



Entered on Docket  
May 13, 2011

Hon. Linda B. Riegler  
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

\* \* \* \* \*

In re: <b>RONALD ANDRE and SANDRA V. ANDRE</b>	)	BK-S-09-10361-LBR
	)	Chapter 7
	)	
	)	
Debtor(s)	)	DATE: March 14, 2011
	)	TIME: 9:30 a.m.
	)	
	)	

**MEMORANDUM DECISION**

The issue before the court is whether individual Nevada bankruptcy debtors can exempt qualified retirement accounts under 11 U.S.C. § 522(b)(3)(C) given that Nevada has opted out of the federal exemption scheme in section 522(d). This court holds that they can.

The debtors in this case, Mr. and Mrs. Andre, have exempted two retirement accounts with a combined value of \$540,019.63 – one with Morgan Stanley in the amount of \$384,859.67, and the other with Provident Group for \$155,159.96. Exemptions in the retirement accounts are claimed on the debtors’ amended Schedule C<sup>1</sup> under 11 U.S.C. § 522(b)(3)(C), or in the alternative, under N.R.S. § 21.090(1)(r).

First, Mr. Andre claims both accounts exempt under 11 U.S.C. § 522(b)(3)(C). This section exempts “retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue

<sup>1</sup>Docket #55.

1 Code of 1986.”

2 In the alternative, both Mr. and Mrs. Andre claim exemptions in the retirement accounts  
3 under N.R.S. § 21.090(1)(r). The Nevada law exempts:

4 Money, not to exceed \$500,000 in present value, held in . . . [a]n  
5 individual retirement arrangement which conforms with the  
6 applicable limitations and requirements of section 408 or 408A of  
7 the Internal Revenue Code, 26 U.S.C. §§ 408 and 408(A).

8 Under this alternative basis in their Schedule C the debtors split each retirement account  
9 with Mr. Andre claiming \$313,591.95 of the Morgan Stanley account as exempt under N.R.S.  
10 § 21.090(1)(r) and Mrs. Andre exempting the \$71,267.72 remainder. Similarly, the Provident  
11 Group retirement account is split. Mr. Andre claims as exempt \$126,427.68 under state law and  
12 Mrs. Andre exempts the remainder of \$28,732.28.

13 The trustee’s counsel has objected to both bases for the claimed exemptions. Counsel  
14 argued at trial that only the Nevada state law applies and thus the total exemption is limited to  
15 \$500,000. He characterized whether 11 U.S.C. § 522(n) applies to opt-out states as a “debate,” but  
16 argued that even if section 522(n) does apply to opt-out states the “shall not exceed” language in  
17 section 522(n) does not grant an exemption in the amount listed in the statute or enlarge Nevada’s  
18 statute, but merely defines the “outer edge” of the exemption amount that is allowed by state law.  
19 Counsel further argued that the retirement accounts belong only to Mr. Andre and cannot be split  
20 between the debtors to circumvent the \$500,000 Nevada state-law cap found in N.R.S.  
21 § 21.090(1)(r).

22 This court rejects the notion that section 522(b)(3)(C) does not apply in opt-out states. The  
23 trustee’s position is not supported by the plain language of the Bankruptcy Code.

24 ***Section 522***

25 Section 522 of the Bankruptcy Code allows individual debtors to exempt certain  
26 property from the bankruptcy estate. Specifically, an individual debtor is entitled to exempt  
property under either section 522(b)(2), which refers to the property listed in section 522(d), or  
section 522(b)(3). The Code provides, in pertinent part:

/ / /

/ / /

1 § 522 Exemptions

2 - - - -

3 (b)(1) Notwithstanding section 541 of this title, *an individual debtor*  
4 *may exempt from property of the estate the property listed in either*  
5 *paragraph (2) or, in the alternative, paragraph (3) of this*  
6 *subsection.* In joint cases filed under section 302 of this title and  
7 individual cases filed under section 301 or 303 of this title by or  
8 against debtors who are husband and wife, and whose estates are  
9 ordered to be jointly administered under Rule 1015(b) of the Federal  
Rules of Bankruptcy Procedure, one debtor may not elect to exempt  
property listed in paragraph (2) and the other debtor elect to exempt  
property listed in paragraph (3) of this subsection. If the parties  
cannot agree on the alternative to be elected, they shall be deemed to  
elect paragraph (2), where such election is permitted under the law  
of the jurisdiction where the case is filed.

10 (2) Property listed in this paragraph is property that is specified  
11 under subsection (d), *unless the State law that is applicable to the*  
*debtor under paragraph (3)(A) specifically does not so authorize.*

12 (3) Property listed in this paragraph is--  
13 (A) subject to subsections (o) and (p), any property that is  
14 exempt under Federal law, other than subsection (d) of this section,  
15 or State or local law that is applicable on the date of the filing of the  
16 petition to the place in which the debtor's domicile has been located  
17 for the 730 days immediately preceding the date of the filing of the  
petition or if the debtor's domicile has not been located in a single  
State for such 730-day period, the place in which the debtor's  
domicile was located for 180 days immediately preceding the 730-  
day period or for a longer portion of such 180-day period than in any  
other place;

18 (B) any interest in property in which the debtor had, immediately  
19 before the commencement of the case, an interest as a tenant by the  
entirety or joint tenant to the extent that such interest as a tenant by  
the entirety or joint tenant is exempt from process under applicable  
nonbankruptcy law; and

20 (C) *retirement funds to the extent that those funds are in a*  
21 *fund or account that is exempt from taxation under section 401,*  
*403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code*  
22 *of 1986.* (Emphasis supplied.)

23 The bottom line is that under the opt-out provision in section 522(b)(2) the Bankruptcy  
24 Code allows states to opt in or opt out of the federal list of exemptions in section 522(d). If a state  
25 opts in, section 522(b)(2) applies. If a state opts out, section 522(b)(3) applies. Nevada has elected

1 to opt out<sup>2</sup> and as a result, by the plain terms of 11 U.S.C. § 522, individual Nevada bankruptcy  
2 debtors have the exemptions listed in section 522(b)(3). As quoted above, pursuant to section  
3 522(b)(3)(C), this includes tax-qualified retirement funds.

4 Section 522(b)(3)(C) and the identical 522(d)(12)<sup>3</sup> were enacted as part of the Bankruptcy  
5 Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119  
6 Stat. 23 (2005). Both sections have clarified and expanded the exemption status of retirement  
7 funds.<sup>4</sup> Before BAPCPA debtors in opt-out states had to look solely to state law for retirement  
8 fund exemptions. Now these two sections - § 522(b)(3)(C) and § 522(d)(12) - provide equal  
9 treatment to retirement funds whether a state has opted in or opted out of the section 522(d)  
10 exemptions. According to the legislative history, section 522(b)(3)(C) was added:

11 [T]o expand the protection for tax-favored retirement plans or  
12 arrangements that may not be already protected under Bankruptcy  
13 Code section 541(c)(2) pursuant to *Patterson v. Shumate*, or other  
14 state or Federal law . . . ***[T]his provision ensures that the specified  
retirement funds are exempt under state as well as Federal law.***  
(Emphasis supplied.)

15 H. Rep. No. 109-31(I), 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 63-64 (2005), reprinted in 2005 WL 832198.

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18 <sup>2</sup>N.R.S. § 21.090(3). *See also, In re Greene*, 583 F.3d 614, 618 n.1 (9<sup>th</sup> Cir. 2009).

19 <sup>3</sup>Section 522(d)(12) exempts “[r]etirement funds to the extent that those funds are in a fund  
20 or account that is exempt from taxation under section 401, 403, 408, 408(A), 414, 457, or 501(a)  
21 of the Internal Revenue Code of 1986.”

22 <sup>4</sup>Debtors choosing the federal exemptions can exempt payments from certain benefit plans  
23 and contracts under 11 U.S.C. § 522(d)(10)(E) “to the extent reasonably necessary” for the support  
24 of the debtor and any dependents. Before BAPCPA, courts were split as to whether this provision  
25 included IRAs. In April 2005, the United States Supreme Court resolved that split in *Rousey v.*  
26 *Jacoway*, 544 U.S. 320 (2005) by holding that IRAs are covered under § 522(d)(10)(E). Congress  
enacted BAPCPA in the same year, which added sections 522(b)(3)(C) and (d)(12).

1 **Section 522(n)**

2 A companion statute, 11 U.S.C. § 522(n),<sup>5</sup> imposes a cap in excess of \$1 million dollars<sup>6</sup>  
3 on the aggregate value of exempted assets in qualified retirement accounts. It provides that:

4 For assets in individual retirement accounts described in section 408  
5 or 408A of the Internal Revenue Code of 1986, other than a  
6 simplified employee pension under section 408(k) of such Code or a  
7 simple retirement account under section 408(p) of such Code, the  
8 aggregate value of such assets exempted under this section, without  
9 regard to amounts attributable to rollover contributions under section  
10 402(c), 402(e)(6), 403(a)(4), 403(a)(5), and 403(b)(8) of the Internal  
11 Revenue Code of 1986, and earnings thereon, shall not exceed  
12 [\$1,171,650] in a case filed by a debtor who is an individual, except  
13 that such amount may be increased if the interests of justice so require.

14 11 U.S.C. § 522(n). Together sections 522(b)(3)(C) and 522(n) entitle an individual debtor to  
15 exempt qualified retirement funds under federal bankruptcy law regardless of a state law  
16 limitation. *See In re Thiem*, 443 B.R. 832 (Bankr. D. Ariz. 2011)(section 522(b)(3)(C) retirement  
17 fund exemption may be exercised even if debtor’s state has opted out of the federal exemption  
18 scheme).

19 The total value of the two accounts (\$540,019.63) is well below the \$1-million-plus figure  
20 in 11 U.S.C. § 522(n). And there is no dispute between the parties that the retirement accounts at  
21 least qualify for the exemption. The trustee agreed at trial that the accounts have a qualified status.  
22 This means Mr. Andre alone is entitled to exempt both retirement accounts under 11 U.S.C.

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25 <sup>5</sup>Subsection 522(n) was also enacted as a part of BAPCPA in 2005.

26 <sup>6</sup>The dollar figure in section 522(n) is subject to periodic adjustment pursuant to 11 U.S.C. § 104. For cases commenced before April 1, 2010 the amount is \$1,095,000. This case was filed in January 2009.

1 § 522(b)(3)(C) as he has done on the Schedule C.<sup>7</sup>

2 The trustee’s objection is denied.

3 **IT IS SO ORDERED.**

4 Copies noticed through ECF to:  
Bart K. Larsen  
5 Timothy S Cory  
Michael F Thomson  
6 U.S. Trustee-LV-7

7 Copies noticed through mail to:  
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<sup>7</sup>It is unnecessary for this court to decide whether or not the debtors can split their claim of exemptions, or whether Mrs. Andre has a community property interest in the accounts, given that Mr. Andre alone can exempt both accounts. Neither does this memorandum decision specifically address whether the amount listed in section 522(n) is a cap on the exemption for retirement funds exempted under state law, or whether it creates a uniform minimum for retirement fund exemptions in all bankruptcy cases regardless of any state law limitation. The facts in this case do not bring this issue into focus given that the aggregate value of these retirement accounts is below the \$1 million plus figure in section 522(n).