

What claims has a creditor on a debtor's pension? The answer depends largely whether the debtor is bankrupt.

bankrupt

The general rule is that the bankrupt's estate vests automatically in his trustee in bankruptcy under s306 of the Insolvency Act 1986 (IA 1986). "Estate" is defined as all property belonging to the bankrupt at the commencement of the bankruptcy, except for items for his personal use in his employment and items for the basic domestic needs of the bankrupt and his family (IA 1986, s283).

bankruptcy before 29 May 2000

Re Landau [1998] Ch 223 established that the trustee in bankruptcy (TIB) was entitled to claim the bankrupt's entire pension benefits and not just his pension in payment. All the bankrupt's rights under the scheme (excluding protected rights) vested in the TIB and continued to be vested in him even after the bankrupt was discharged, until all debts were discharged or the fund exhausted.

Welfare Reform and Pensions Act 1999 (WRPA 1999)

Where the bankruptcy order was made on or after 29 May 2000, s11 applies to prevent rights under a registered (then approved) pension scheme from vesting in the TIB on his appointment. This does not mean that the bankrupt member's benefits under the scheme are entirely free from the claims of the TIB, who is able to claim money paid to the bankrupt under an income payments order (IPO).

"unapproved pension arrangements"

Corresponding protection for the bankrupt's pension rights under an unapproved pension arrangement can be provided by an exclusion order by the court or a qualifying agreement between the bankrupt and the TIB under s12 of the WRPA 1999 and the Occupational and Personal Pension Schemes (Bankruptcy) (No. 2) Regulations 2002/836. The latter (as amended by SI 2006/744) defines these arrangements to include de-registered pension schemes and employer-financed retirement benefits schemes (EFRBSs) as defined in Income Tax (Earnings & Pensions) Act 2003. s393A.

income payment order (IPO)

When a pension becomes payable the TIB may, between the date of bankruptcy and the date of discharge, apply for an IPO under IA 1986, s310, of which sub-s(7) states that such an order may be made in respect of every payment in the nature of income including any payment under a pension scheme apart from guaranteed minimum pensions and protected rights. "Any payment" includes lump sums arising on a member's death in service and from the commutation of pension as well as the pension itself.

As an alternative to an income payment order, from 1 April 2002 the IA 1986, s310A (inserted by the Enterprise Act 2001, s260) provides for an "income payment agreement" to be made between the bankrupt and the TIB.

the Raithatha decision overruled

The main finding in Raithatha v Williamson [2012] EWHC 909 (Ch) was that an IPO could be made against benefits, to which the bankrupt is entitled but has not exercised his right to draw from the scheme, including both pension payments for the duration of the IPO and the tax-free lump sum of up to 25% of the value of the bankrupt's pension fund. The Court of Appeal reversed this decision in Horton v Henry [2016] EWCA Civ 989, with the effect now that only pensions in payment at the start

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of the bankruptcy or that the bankrupt voluntarily draws down are available to the creditors.

not bankrupt

The creditor is in a much more favourable position, if his debtor is not bankrupt than if he is. In *Blight v Brewster* [2012] EWHC 165 (Ch) the defendant debtor was a member of a pension scheme, under which he could elect to draw down 25% of his pension fund. The creditor obtained a third-party debt order in relation to the debtor's right. There is no debt until the election is exercised. The court used its injunctive power under the Senior Courts Act 1981 s37 to order the defendant to delegate to the claimant his power to elect to take his tax free 25% lump sum up to the amount needed to pay the balance of the judgment debt.

other issues

flexible drawdown

The Taxation of Pensions Act 2014 enabled registered money purchase pension schemes, whether occupational or personal, to allow members aged 55 and over to draw down the whole of their pension funds from 6 April 2015. The first 25% of amounts drawn down is (as previously) tax free and the balance is taxed as income. The ability to draw down the whole of a member's fund would, if *Raithatha* had not been overruled, have had profound repercussions on bankrupt members of money purchase pension schemes, and can be expected to have such repercussions on debtors who are not bankrupt. So far as registered money purchase schemes are concerned, bankruptcy is now an even greater privilege than it was previously.

access to pension scheme assets

The creditor's entitlement is in respect of the debtor's rights as a pension scheme member and not in respect of the assets that the scheme holds to fund the benefits provided by the pension scheme. See *Granada Group Limited v The Law Debenture Pension Trust Corporation plc* [2015] EWHC 1499 Ch at 53 to 55: in which 55 ends with the following. "... the employee received a present right to a future benefit. That does not mean that he has a proprietary interest in the assets of the trust. He did not."

forfeiture and alienation of benefits

All clauses for forfeiture on bankruptcy of pension rights in a registered pension scheme are ineffective (WRPA 1999, s 14). By s91(1) of the Pension Act, assignments, commutations, surrenders, charges, liens and set-offs of a member's rights are ineffective and agreements for them are unenforceable, and, by s92(2) may result forfeiture, following which, by sub-s(3) the trustees may pay the benefits to all or any of the member and his dependants. The only orders over a member's rights that a court may make in favour of a creditor are an attachment of earnings order and an IPO: the injunctive relief in *Blight v Brewster* above is not an act made ineffective by s91(1). There are no "s91" restrictions on personal pension schemes and EFRBSs.

excessive contributions

IA 1986, sections 342A to 342C, inserted by inserted by WRPA 1999, s15. On the TIB's request for an excessive pension contributions order, the court must consider, whether any pension contributions by or for the bankrupt were made for the purpose of putting assets beyond the reach of his creditors and whether the total amount of any contributions is excessive in view of his circumstances when paid. The court may make an order to restore the position to what it would have been had the excessive contributions not been made.

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