

**DEBTOR/CREDITOR RIGHTS COMMITTEE**  
**REPORT PREPARED FOR THE JUNE 2, 2016 COUNCIL MEETING**

**1. Next Scheduled Meeting of the Committee.**

The next scheduled meeting of the Committee will be on Wednesday, August 17, 2016, at the offices of Jaffe Raitt, Heuer & Weiss, P.C., 27777 Franklin Road, Suite 2500, Southfield, MI. Dinner will be served at 6:00 p.m. and the meeting will begin at 6:30 p.m.

**2. Council Approval.**

None at this time.

**3. Membership.**

The Committee communicates regularly with its membership through its list serve, with announcements of Committee events, case law alerts, and announcements of events of interest to bankruptcy and insolvency law practitioners. This increases the Committee's profile. In addition, holding regular meetings and educational events increases the interest of the bar in becoming members. We regularly receive inquiries from bar members about joining the Committee and respond immediately to reach out to the individuals.

We had 33 reserved for our May 11, 2016 joint meeting with the Bankruptcy Subcommittee of the Real Property Law Section of the State Bar of Michigan.

**4. Accomplishments Toward Committee Objectives.**

The Committee has already held two meetings this year, one with an educational component on receiverships; and have planned a third meeting. The Committee presented a seminar on January 13, 2016 with the Bench of the Eastern District of Michigan Bankruptcy Court on recent amendments to the Federal Rules of Bankruptcy Procedure and on Local Bankruptcy Rules.

The Committee is also, with Council authority, working on amendments to M.C.L. 600.6023 (see Section 8 below).

**5. Meetings and Programs.**

Our May 11, 2016 joint meeting featured a presentation by Kay Kress on the Uniform Commercial Real Estate Receivership Act by the National Conference of Commissioners on Uniform State Laws, by Michael Leib on the recently adopted SCAO forms for receivership cases, and Michelle C. Harrell on the issues presented in her article with Scot Garrison, entitled *The Reports Runneth Over: A Practical Approach for the Bench and Bar to Address an*

*Overflow of Receivership Reports*, Michigan Bar Journal, Vol. 95, at 34 (March 2016).

Our August 17, 2016 meeting will include discussions of the changes to the Federal Rules of Bankruptcy Procedure which will become effective December 1, 2016 and the 2015-2016 term Supreme Court opinions on bankruptcy-related issues.

## **6. Publications.**

An article by Judy B. Calton on the recently adopted SCAO forms for receiverships cases was published in the Spring of 2016 issue of the Michigan Business Bar Journal. The SCAO forms were prepared by and submitted to SCAO by the Receivership Forms Committee, organized by the Committee.

## **7. Methods of Monitoring Legislative/Judicial/Administrative Developments and Recommended Action**

The Committee discusses legislative developments and case law at its meetings. Vice-Co-Chair Paul Hage writes case notes for the American Bankruptcy Institute monthly magazine, and will also keep us advised on new case law.

## **8. Miscellaneous.**

The Committee was authorized to file amicus curiae papers in support of the appeal from a trial court's refusal to make the findings required by MCR 2.622, the new receivership rule, when the judge refused to appoint the nominated receiver and appointed the judge's selection instead. Robert Mollhagen of Varnum wrote an amicus in support of leave to appeal. The Court of Appeals granted that leave on August 11, 2015. The appeal itself was argued on May 10, 2016.

A Subcommittee consisting of Kal Goren, Seth Drucker and Tom Morris is spearheading the Committee's work on amending MCL 600.6023 exemptions to correct defects in the statute's intended protection from creditors of IRAs, other retirement accounts, education savings accounts and plans. The Subcommittee has already obtained the support of the plans from the Oakland County Bar Association's Employee Benefits Committee. The Subcommittee is working to obtain the support of the General Counsel for the UAW, the State Bar's Probate Council, the Oakland County Bar Associations Debtor/Creditor Committee and Legislative Committee. If the Oakland County Bar Association Board supports the amendments, it will engage its professional lobbyist to assist in gaining passage. Minor changes in the proposal have been made in this process. The current draft is attached.

Dated: May 26, 2016

Judy B. Calton, Co-Chair

Judith Greenstone Miller, Co-Chair

Seth Drucker, Vice Co-Chair

Paul Hage, Vice Co-Chair

600.6023(1) (j)

(j) All individual retirement accounts or individual retirement annuities as now or hereafter defined in section 408 or 408A of the internal revenue code of 1986, 26 USC 408 and 408a, and the payments or distributions from the account or annuity to the initial owner and his dependents as that term is defined in section 152 of the internal revenue code of 1986, 26 USC 152. As used herein, the reference to "all individual retirement accounts shall include, but not be limited to: so-called traditional individual retirement accounts, Roth individual retirement accounts, "inherited individual retirement accounts", rollover individual retirement accounts as defined in section 402(c) of the internal revenue code of 1986, 26 USC 402(c), "simple retirement accounts" as defined in section 408(p) of the internal revenue code of 1986, 26 USC 408(p) and "simplified employee pension plans" as defined in section 408(k) of the internal revenue code of 1986, 26 USC 408(k). This exemption applies to the operation of the federal bankruptcy code as permitted by section 522(b)(2) of the bankruptcy code, 11 USC 522. This exemption does not apply to i) any amount contributed to the individual retirement account or individual retirement annuity within 120 days before the debtor files for bankruptcy; or ii) contributions to the individual retirement account or premiums on the individual retirement annuity, and the earnings or benefits from those contributions or premiums, if those contributions or premiums exceed, in the tax year made or paid, the deductible amount allowed under section 408 of the internal revenue code of 1986, 26 USC 408. This limitation on contributions does not apply to a rollover of a pension, profit-sharing, stock bonus, or other plan that is qualified under section 401 of the internal revenue code of 1986, 26 USC 401, or an annuity contract under section 403(b) of the internal revenue code of 1986, 26 USC 403.

This exemption does not apply to exempt an individual retirement account or individual retirement annuity from the following:

(i) An order of a court pursuant to a judgment of divorce or separate maintenance,

(ii) An order of a court concerning child support,

(i)

**Comment [A1]:** How does a debtor establish which IRA is intended to be protected? Who chooses? What does the 2<sup>nd</sup> creditor do?

**Comment [A2]:** To coordinate with 600.5451 + to why should a debtor be at a disadvantage if he has split his IRAs into multiple IRAs for different investment alternatives or classes? If only 1 IRA is protected, how does the creditor or debtor determine which is protected?

**Comment [A3]:** Proper title for Roth IRA

**Comment [A4]:** This includes a "qualifying child" i.e. lives in same home, is under age 19 or 24 if a student and where the parent provides over ½ of the support; could include minor brother, sister, stepchild or grandchild, the key being a dependent for Federal Income tax purposes

**Comment [A5]:** An SEP-IRA is now included and will overrule the 6<sup>th</sup> Circuit's opinion in *Lampkins v. Golden*, 2002 U.S. LEXIS 900, 28 Fed Appx 409, 27 EBC 1587, 2002 WL 74449 (6<sup>th</sup> Cir. 2002).

**Comment [A6]:** Is this intended to mean that the IRA is reachable by a creditor if payments are being made to an ex-spouse pursuant to a QDRO so that the creditor could "trump" the payments being made to the ex-spouse?

**Comment [A7]:** Same comment

(k) The right or interest of a person in ~~all~~ pension, profit-sharing, stock bonus, defined benefit, money purchase, employee stock ownership, deferred compensation plans of state and local government and tax-exempt employers for the benefit of their employees or other plans that are intended to qualify under section 401 of the internal revenue code of 1986, 26 USC 401, or an annuity contract intended to comply with section 403(b) of the internal revenue code of 1986, 26 USC 403, unless the Internal Revenue Service has revoked a favorable determination letter issued to the plan sponsor where it was not within the job responsibility of the person asserting this statute as an affirmative defense to maintain the tax qualified status of the plan or retirement vehicle in question. ~~This~~ exemption applies to the operation of the federal bankruptcy code, as permitted by section 522(b)(2) of the bankruptcy code, 11 USC 522. This exemption does not apply to any amount contributed to a pension, profit-sharing, stock bonus, or other plan intended to qualify for current income tax exemption under section 401(a) of the internal revenue code of 1986, 26 USC 401 or a 403(b) annuity or annuity contract issued with the intent to qualify for current income tax exemption under section 403(b) of the internal revenue code of 1986, 26 USC 401 if the contribution occurs within 120 days before a petition in bankruptcy is filed by or against the debtor. This exemption does not apply to the right or interest of a person in a pension, profit-sharing, stock bonus, or other plan intended to qualify for current income tax exemption under section 401(a) of the internal revenue code of 1986, 26 USC 401 or 403(b) of the internal revenue code of 1986, 26 USC 403b to the extent that the right or interest in the plan or annuity is subject to either of the following:

- (i) An order of a court pursuant to a judgment of divorce or separate maintenance or
- (ii) An order of a court concerning child support.

(l) Any interest in the following as to contributions made more than 120 days before a petition in bankruptcy is filed by or against the debtor for an annual amount that is limited to the annual gift tax of a present interest tax exclusion of section 2503(b) of the internal revenue code of 1986, 26 USC 2503(b):

- (i) A trust, fund, or advance tuition payment contract established under the Michigan education trust act, 1986 PA 316, MCL 390.1421 to 390.1442.

**Comment [A8]:** Why limit the number of plans the person participates in? Which plan is entitled to the "exemption"? How would that be determined or proved?

**Comment [A9]:** Imposes a duty on the debtor if they have the responsibility to maintain tax qualified status as to an employer plan and to not engage in a prohibited transaction as to an IRA.

**Comment [A10]:** Deleted reference to 403(b) plan being subject to ERISA in order to include non-ERISA 403(b) plans maintained by 501(c)(3) organizations and public schools as well as to avoid any published or unpublished determination by the US Department of Labor as to whether the level of involvement by an employer rises to the level of becoming subject to ERISA.

**Comment [A11]:** Why exempt contributions made within 120 days of filing in an involuntary filing?

**Comment [A12]:** This is the current \$14,000 annual gift tax exclusion.

(ii) An account established under the Michigan education savings program act, 2000 PA 161, MCL 390.1471 to 390.1486.

(iii) An account in a qualified tuition program or educational savings trust under section 529, §29A or 530 of the internal revenue code of 1986, 26 USC 529 and 530.

(2) The exemptions provided in this section do not extend to any lien on the exempt property that is excluded from exemption by law.

(3) If the owner of a homestead dies, leaving a surviving spouse but no children, the homestead is exempt, and the rents and profits of the homestead shall accrue to the benefit of the surviving spouse before his or her remarriage, unless the surviving spouse is the owner of a homestead in his or her own right.

**Comment [A13]:** 529A is ABLE accounts enacted by Federal legislation on 2/13/2013 with the Michigan counterpart having been enacted on 10/28/15 by PA 161 of 2015-tax-advantaged savings account if disabled before age 26.

**Formatted:** Line spacing: 1.5 lines