

BURR ALERT

The Intersection of Bankruptcy and Health Savings Accounts:

Are HSA Accounts Exempt From Bankruptcy Estate?

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In 2003, Congress passed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the "Act").¹ The Act authorized states to create health savings accounts ("HSAs") with tax-preferred treatment to encourage individuals with high-deductible health insurance plans to save for their healthcare expenses.² Recent data suggests that the popularity of HSA accounts is growing, with one study estimating that the number of HSA accounts rose to 13.8 million in 2014, which is a twenty-nine percent (29%) increase from 2013.

Unsurprisingly, individuals who have taken advantage of the tax-preferred treatment of HSA accounts, who also seek to take advantage of the protections of the Bankruptcy Code, desire to withhold the funds they have deposited into these tax-preferred HSA accounts from distribution to creditors. In response, numerous states have passed legislation to exempt deposits into HSA accounts from property of a debtor's bankruptcy estate, thereby allowing the debtor to retain the funds therein to the exclusion of their creditors. Within Burr & Forman's footprint, Florida,³ Mississippi,⁴ and Tennessee⁵ have passed statutes exempting HSA contributions from a debtor's bankruptcy estate.

To date, the State of Georgia has not passed a similar law that expressly exempts contributions to a HSA account from a debtor's bankruptcy estate. The absence of such legislation led to the Eleventh Circuit case of *In re Mooney*, --- F.3d --- (11th Cir. 2016), in which an individual chapter 7 debtor is currently arguing that Georgia's bankruptcy exemption statute—O.C.G.A. § 44-13-100(a)—exempts from property of her bankruptcy estate the contributions she made to her HSA account. More specifically, debtor is arguing that Section 44-13-100(a)(2)(C) (which exempts from the bankruptcy estate any "disability, illness, or unemployment benefit") and Section 44-13-100(a)(2)(E) (which exempts from the bankruptcy estate any "payment under a pension, annuity, or similar plan or contract on account of illness [or] disability") serve to exempt her HSA account contributions from her bankruptcy estate. In response, the Chapter 7 Trustee is arguing that HSA contributions are not

¹ See Publ. L. 108-173, § 1201, 117 Stat. 2066, 2469-79 (2003).

² See 26 U.S.C. § 223.

³ See Fla. Stat. § 222.22(2).

⁴ See Miss. Code Ann. § 85-3-1(g).

⁵ See Tenn. Code Ann. § 26-2-105(b).

exempt under Section 44-13-100(a)(2)(C) because they are not a benefit received from an employer, insurance, or a public program such as social security. The Trustee is also arguing that HSA contributions are not exempt from the bankruptcy estate pursuant to Section 44-13-100(a)(2)(E), as they are not a pension or an annuity, nor do they constitute a "plan or contract" with characteristics similar to a pension or an annuity.

The United States Bankruptcy Court for the Middle District of Georgia agreed with the Trustee, and the United States District Court for the Middle District affirmed the Bankruptcy Court's decision. The matter has now been appealed to the Eleventh Circuit Court of Appeals. After reviewing the aforementioned statutes, the Eleventh Circuit Court of Appeals concluded that it could not rule on the matter since "there is substantial doubt about the correct answer to a dispositive question of state law." Consequently, on February 11, 2016, the Eleventh Circuit certified the following three (3) questions to the Supreme Court of Georgia:

- 1) Does a debtor's health savings account constitute a right to receive a "disability, illness, or unemployment benefit" for the purposes of O.C.G.A. § 44-13-100(a)(2)(C)?
- 2) Does a debtor's health savings account constitute a right to receive a "payment under a pension, annuity, or similar plan or contract" for the purposes of O.C.G.A. § 44-13-100(a)(2)(E)?
- 3) Is a debtor's right to receive a payment from a health savings account "on account of illness [or] disability" for the purposes of O.C.G.A. § 44-13-100(a)(2)(E)?

It will be interesting to see how the Supreme Court of Georgia responds to these questions. If the Court concludes that the foregoing statutes operate to exempt HSA contributions from a debtor's bankruptcy estate, then debtors from other states under similar circumstances will most likely seize on the Court's decision and attempt to apply it to their bankruptcy cases. On the other hand, if the Court concludes that the foregoing statutes do not operate to exempt HSA contributions from a debtor's bankruptcy estate, will the Georgia legislature respond by passing a law that expressly exempts these contributions from a debtor's bankruptcy estate similar to the Florida, Mississippi, and Tennessee statutes identified above? Time will tell, and we will be sure to notify you of any further developments in these areas.

If you would like more information, please contact:

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