

DEBTOR/CREDITOR

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Pension Rules Prevent Setoff

If John Smith owes Jane Doe \$100, and Jane owes John \$50, Jane can set off the \$50 debt and pay John nothing. This legal principle that allows parties to set off mutual debts may not operate where one of the parties is a pension fund governed by the Employee Retirement Income Security Act (ERISA).

Barry Radcliffe was one of two owners of a corporation which contributed to a multi-employer pension fund. Mr. Radcliffe personally guaranteed the obligations of the corporation to the pension fund. Additionally, Mr. Radcliffe was an employee of the company and entitled to pension benefits from the fund. When the corporation went out of business leaving unpaid pension fund contributions, Mr. Radcliffe filed a petition for bankruptcy relief in order to discharge the debts that he had guaranteed.

The pension fund sought permission from the bankruptcy court to set off the pension benefits which it owed to Mr. Radcliffe against the unpaid contributions that he guaranteed to the pension fund. The bankruptcy court denied the request, concluding that the provisions of ERISA required the pension fund to pay Mr. Radcliffe's benefits, unless he breached a fiduciary duty to the pension fund which caused a loss. The court determined that mere inability to pay the guaranteed amount was not a breach of fiduciary duty.

Radcliffe v. International Painters Pension Fund (In re Radcliffe), 372 B.R. 401 (Bankr. N.D. Ind. 2007).

Tenancy by the Entirety Protection Lost

Where a husband and wife own their home jointly as tenants by the entirety, creditors of one spouse only cannot force a sale of the house to pay that spouse's debt. This protection of the non-debtor spouse may be lost through ill-advised asset protection plans.

A husband transferred his one half interest in their home to his wife without receiving payment. In his subsequent bankruptcy, the trustee sued his wife to undo the transfer. The wife argued that the house should return to the tenancy by the entirety that it was prior to transfer, leaving it exempt from claims of the husband's creditors. The court held that the bankruptcy statute prevented this result and allowed the trustee to sell the house and pay creditors from the husband's one half interest in the proceeds.

If the husband had not transferred his interest to his wife, the house would have been protected from claims of his creditors, and the trustee would not have been able to sell it in the bankruptcy case.

Maxwell v. Barounis (In re Swiontek), 376 B.R. 851 (Bankr. N.D. Ill. 2007).

Bankruptcy Claim Waives Arbitration

Commercial agreements frequently contain provisions requiring the parties to arbitrate any dispute between them. Congress has enacted legislation requiring courts to enforce valid arbitration clauses in agreements. However, if one party to an agreement files a petition for bankruptcy relief and the other party files and litigates a claim in the bankruptcy case, the party filing the claim may lose its right to compel arbitration of any lawsuit that the bankrupt subsequently files to enforce the agreement.

Lewallen v. Green Tree Servicing, LLC, 487 F.3d 1085 (8th Cir. 2007).



This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.

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