



Written By:  
Dustin I. Nichols  
Partner



Heather Kocer  
Attorney

### *The Retirement Planning Roller Coaster - Customizing Your Retirement Plan*

In order to qualify for the exemption protection of the Cal. C.C.P. § 704.115(b), a Private Retirement Plan ("Plan") must be principally or primarily *designed* and *used* for retirement purposes. Subjective intent alone is not sufficient, which means that a person cannot just designate assets as retirement assets and enjoy the statutory exemption protection when creditors strike. Rather, the creation of a Plan that satisfies the criteria of being *designed* and *used* for retirement purposes requires knowledge of the statute as well as proficiency with related case law. Creating a Plan without the proper know-how would be like riding a roller coaster in the dark grasping onto your retirement assets while not knowing if the next drop will leave you empty-handed.

Fortunately, an experienced exemption planning attorney can assist with safeguarding your retirement assets by customizing a retirement track based on your individual needs with built in protections intended to prevent you from taking a wrong turn into non-retirement purposes. Courts have found non-retirement purposes if a Plan is partly designed and used to shield assets from creditors, when the creation of a Plan coincides with judgments or bankruptcy, when a Plan Participant maintains a high degree of control over the Plan or the retirement assets, when the Plan Participant does not comply with the IRS rules (if applicable) or the Plan's rules, and when the Plan Participant uses funds for a non-retirement purpose. In some instances, such events in isolation negate the retirement purpose of a Plan and in other instances a non-retirement purpose was found based on a combination of such events.

To avoid the inference of a non-retirement purpose, the Plan agreement and the Private Retirement Trust ("PRT") which holds the Plan assets, must be skillfully crafted. In assessing whether a Plan is valid, courts are to look at the "totality of the circumstances." (*O'Brien v. AMBS Diagnostics, LLC*, 38 Cal.App.5th 553, 561(2019).) For example, the degree of control over the Plan and PRT by a Plan Participant is a highly litigated issue. "The kind of control which would show a non-retirement purpose would be substantially all control over contributions, management, administration, and use of funds [...]" (*Schwartzman v. Wilshinsky*, 50 Cal.App.4th 619, 629 (1996).) Thus, it is critical that the Plan agreement and the PRT limit the control possessed by a Plan Participant, which can be a tricky task if the sponsor company of the Plan is wholly owned by the Plan Participant.

In such circumstances, it is critical that the Plan Participant is not the trustee of the PRT. That factor alone greatly reduces the degree of control that can be exercised by the Plan Participant, but that alone is not enough. Since the Plan Participant owns the sponsor company which controls the Plan agreement, the Plan agreement must also restrict the powers that can be exercised by the Plan Participant by detailing exactly what the Plan Participant can and cannot do instead of granting unlimited powers. For example, with respect to distributions, the Plan agreement must explicitly state the projected retirement age of the Plan Participant and that distributions can only be taken after the retirement

age or upon an unforeseen emergency, disability or death and the amount of the distributions allowed. This will prevent the Plan Participant from unintentionally destroying the retirement purpose of the Plan by wrongfully taking distributions. With respect to loans from the PRT to the Plan Participant, the Plan agreement should specify the maximum loan amount that can be taken in relation to the total amount of retirement assets, that adequate interest is required, the terms of repayment, that the loan must benefit the Plan's retirement purpose by preserving and enhancing the retirement assets, and require that the terms of the loan are substantially similar to commercially available loans. Detailing such will allow the Plan Participant to reap the benefits of the Plan while steering clear of exercising a high degree of control over the funds.

The provisions and requirements of the Plan and PRT may differ significantly from one individual to the next as such are customized for each individual's particular needs depending on their financial status and retirement goals. Thus, each Plan agreement and PRT require the drafting of numerous customized provisions including but not limited to participation requirements, contributions and funding guidelines, recharacterizations of assets, investments, beneficiary designations, and Plan administration.

Don't live your life riding the retirement exemption roller coaster on an unfinished track where any unanticipated twist or turn will throw you to the mercy of creditors. Contact an experienced exemption planning attorney today and take action now to preserve and protect your retirement assets by utilizing the potent statutory exemption protection of CCP § 704.115(b).