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GET IT RIGHT THE FIRST TIME: The Case for Opposing or Denying Motions to Amend

By Edward L. Kainen, Esq.

When asked about the standard for obtaining leave to amend, most practitioners are quickly able to recall the phrase ". . . leave shall be freely given when justice so requires . . . " The result of such a cursory review does not consider the significant impact related to untimely changes in litigation, such as increased costs, delays and increasing the level of the litigation's complexity. After all, if Courts are supposed to follow the liberal policy to "freely grant" leave to amend, then why must permission be requested and obtained?

In litigation today, both courts and counsel seem to pay little attention to NRCP 15(a). As a result of general unfamiliarity with the actual requirements to amend a pleading, an important legal protection and litigation tool is often simply forfeited, to the detriment of our clients. Most practitioners are surprised to discover that the Rule, and the case law regarding the same, are not nearly as permissive as they might appear.

Motions to amend pleadings are governed by NRCP 15(a), which states, in pertinent part, as follows:

> (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a

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First Time cont.

> party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . .

In actuality there is a substantial body of case law regarding such requests to amend pleadings. Perhaps the simplest way to explain the law, as it relates to a request to amend a pleading under NRCP 15(a), is as follows:

> ...leave to amend shall be freely given when justice so requires. This does not, however, mean that a trial judge may not, in a proper case, deny a motion to amend. If that were the intent, leave of court would not be required. A motion for leave to amend is addressed to the sound discretion of the trial court, and its action in denying the motion should not be held to be error unless that discretion has been abused.

Stephens v. So. Nevada Music Co., 89 Nev. 104, at 105, 507 P.2d 138 (1973); *Leggett v. Montgomery Ward & Co.*, 178 F.2d 436, 439 (10 Cir. 1949); *Nelson v. Sierra Construction Corp.*, 77 Nev. 334, 343, 364 P.2d 402, 406 (1961); *Cf*: *Nevada Bank of Commerce v. Edgewater, Inc.*, 84 Nev. 651, 653, 446 P.2d 990, 991 (1968).

Reasons which could, or should, cause a Motion to Amend to be *properly* denied include, but are not limited to, (1) undue delay; (2) bad faith; (3) dilatory motive; (4) repeated failure to cure deficiencies by amendments previously allowed; (5) undue prejudice to the opposing party by virtue of allowance of the amendment; or (6) the futility of the amendment. The above is a nonexclusive list of reasons for proper denial of leave to amend which originated from the U.S. Supreme Court case of *Foman v. Davis*, 371 US 178, 9 L Ed 2d 222, 83 S Ct 227 (1962). For purposes of this article, the list will hereinafter be referred to as the "*Foman* factors."

The Court in *Foman* concluded that the granting or denial of an amendment is "within the discretion of the court." The case concluded that an abuse of discretion only occurs when leave to amend is denied "without any justifying reason appearing for the denial." In other words, so long as there is a basis or justification for the denial, then the question of granting or denying a Motion to Amend is within the sound discretion of the Trial Court.

THE NEVADA SUPREME COURT HAS FULLY ADOPTED FOMAN

In considering the *Foman* factors, and the comments of U.S. Supreme Court Justice Arthur Goldberg regarding those factors, the Nevada Supreme Court stated, "[w]e subscribe completely to this interpretation of the intent and purpose of NRCP 15(a)." *Adamson v. Bowker*, supra, 85 Nev. 115, 121, 450 P.2d 796, 801-2 (1969).

In *Adamson*, an analysis of *Foman* was undertaken and the Nevada Supreme Court quoted directly from Justice Goldberg's Opinion in *Foman*, as follows:

> If the underlying facts or circumstances relied upon by a Plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on its merits. In the

> absence of an apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'. Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Adamson, at 121.

The significance of such language is that amendments should be freely allowed "in the absence of an apparent or declared reason" for the denial of leave to amend. *Foman*, at 9 L. Ed. 2d 222, 226.

THE NEVADA SUPREME COURT HAS CONSISTENTLY UPHELD DENIALS OF MOTIONS TO AMEND WHERE REASON FOR DENIAL EXISTS

In contrast to those situations where leave to amend is granted, leave to amend is properly denied when there is an appropriate reason for the denial. In fact, the vast majority of Nevada case law on this point involves cases in which the District Court's denial of leave to amend was upheld. *Ennes v. Mori*, 80 Nev. 237, 391 P.2d 737 (1964), *Stephens v. So. Nevada Music Co.*, 89 Nev. 104, at 105, 507 P.2d 138 (1973); *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 634 P.2d 673 (1981). As stated, if it was improper for leave to amend to be denied by the Court, permission to amend would not be required.

In *Ennes v. Mori*, 80 Nev. 237, 391 P.2d 737 (1964), there was a lawsuit between business partners, and the appellant sought leave to amend his Answer so as to plead "fraud and fraudulent representations as an affirmative defense." The District Court denied a request for leave to amend, and established certain facts as part of the record. The primary element, which supported the denial, appeared to be that the party seeking the amendment had nearly six months in which to pursue the amendment and did not seek such an amendment during that time. The Nevada Supreme Court approved the decision of the District Court which denied leave to amend.

In *Stephens v. So. Nevada Music Co.*, 89 Nev. 104, 507 P.2d 138 (1973), injuries were sustained from a slip-and-fall accident. The Plaintiff alleged she fell when she slipped on a cigarette butt. During jury selection of the case, a mistrial was declared. Immediately thereafter, the Plaintiff moved to amend her Complaint to assert she did not fall based on the cigarette butt, but fell because of an accumulation of floor wax. The Court denied the Motion to Amend, and the denial was upheld by the Nevada Supreme Court. The Nevada Supreme Court specifically found that the conduct of Plaintiff's counsel in waiting until trial to make the request for leave to amend constituted a dilatory action. On that basis, the denial of the Motion to Amend was affirmed by the Nevada Supreme Court. This case focused heavily on the broad exceptions to the language that "leave to amend shall be freely given."

In *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 634 P.2d 673 (1981), a lawsuit resulted from an automobile collision. On the eve of trial, Plaintiff sought to amend her Complaint to include a theory of negligent entrustment. The Trial Court denied her request to amend based on the late date of the requested amendment. The Nevada Supreme Court upheld the denial of the amendment, and pointed out that,

> A motion for leave to amend pursuant to NRCP 15(a) is addressed to the sound discretion of the trial court, and its action in denying such a motion will not be held to be error in the absence of a showing of abuse of discretion.

Connell, at 439.

The Nevada Supreme Court concluded that, "[i]n light of appellant's dilatory conduct in waiting until the eve of trial to seek an amendment, we find no such abuse." *supra*. Clearly, the Nevada Supreme Court has held, on more than one occasion, that waiting until the eve of trial constitutes "dilatory conduct."

It is clear that, when appropriate reasons for denial exist, Courts properly deny Motions for leave to amend regularly. Such motions may be properly denied based upon the presence of any of the following reasons:

(1) Lack of diligence of the party seeking to amend; *Ennes v. Mori*, 80 Nev. 237, 391 P.2d 737 (1964), *Stephens v. So. Nevada*

Music Co., 89 Nev. 104, at 105, 507 P.2d 138 (1973); *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 634 P.2d 673 (1981).

(2) Neglect; *Stephens v. So. Nevada Music Co.*, 89 Nev. 104, at 105, 507 P.2d 138 (1973); *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 634 P.2d 673 (1981).

(3) Prior approval of the pleaded issues in a Pretrial Conference; *Schick v. Finch*, (D.C., S.D.N.Y.), 8 F.R.D. 639 (1944); *Ennes v. Mori*, 80 Nev. 237, 391 P.2d 737 (1964).

(4) Making such requests on the eve of trial; *Stephens v. So. Nevada Music Co.*, 89 Nev. 104, at 105, 507 P.2d 138 (1973); *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 634 P.2d 673 (1981).

(5) Making requests without adequate cause for modification: *Schick v. Finch*,(D.C., S.D.N.Y.), 8 F.R.D. 639 (1944).

(6) Futility of the requested modification; *Foman*,371 US 178, 9 L Ed 2d 222, 83 S Ct 227 (1962).

(7) Attempts to amend matters that are related to the merits of the controversy which have already been admitted; Cf: *Good v. District Court*, 71 Nev. 38, 279 P.2d 407 (1955); *Tehansky v. Wilson*, 83 Nev. 263, 428 P.2d 375 (1967); *Weiler v. Ross*, 80 Nev. 380, 395 P.2d 323 (1964); and,

(8) As discussed in detail above, the *Foman* factors, which include:(a) Undue delay; (b) Bad faith; (c)Dilatory motive; (d)Repeated failure to cure deficiencies by amendments previously allowed; (e) Undue prejudice to the opposing party; and (f)Futility of the amendment.

The Burden of Proof

The case of *Ennes v. Mori*, 80 Nev. 237, 391 P.2d 737 (1964), also created a distinct change in the analysis of lower court denials of requests to amend with respect to the burden of proof. Historically, there was a suggestion that, since *"leave to amend should be freely granted,"* it was incumbent upon the party seeking to prevent the amendment to show prejudice. The Nevada Supreme Court rejected such an interpretation. In fact, the Supreme Court cited the case of *Schick v. Finch*, (D.C., S.D.N.Y.), 8 F.R.D. 639 (1944), as being on point. In interpreting *Schick*, the Nevada Supreme Court stated,

> The court goes on to say that **the liberal policy provided in Rule 15(a) 'does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted.** The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters, which, if true, must have been within the defendant's knowledge when the controversy arose.' The Honorable Simon H. Rifkind, District Judge, denied the motion for leave to amend.

[Emphasis added]. *Ennes*, at 243.

The Nevada Supreme Court chose to reject the concept that the party seeking to defeat the amendment should be required to show prejudice in order to successfully defeat the amendment. Relying upon *Schick v. Finch*, (D.C., S.D.N.Y.), 8 F.R.D. 639 (1944) and *Anderson v. National Produce Co.*, 253 F.2d 834 (1958), the Nevada Supreme Court concluded,

> We prefer to follow the reasoning of these two cases. Otherwise, we should be approving a rule under which, despite an entire lack of diligence on the part of the defendant, in spite of long-lasting neglect without excuse, in spite of a defendant's approval of the pleaded issues in a pre-trial conference, he is entitled to an amendment and may throw the entire burden of showing resulting prejudice upon the opposing party.
>
> We prefer to follow the logic of Judge Rifkind's opinion as approved by the Court of Appeals for the Second Circuit, and to hold that there was no abuse of discretion in the trial court's denial of appellant's motion for leave to amend his answer.

Ennes, at 243, 244.

In this regard, it is **not** the burden of the party opposing the amendment to demonstrate that prejudice will result from allowing the amendment. Rather, such prejudice is a "factor" (just like the other *Foman* factors) which the Court may rely upon as a basis for denying a Motion to Amend.

WHEN LEAVE TO AMEND SHOULD BE FREELY GRANTED

It is true that leave of court *should* be freely given when no prejudice would result to either party and none of the reasons listed in *Foman* are present. For example, in *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 864 P.2d 796 (1993), summary judgment was granted in the case midway through discovery. Accordingly, the case was dismissed and an appeal ensued.

The Supreme Court reinstated the case, and also allowed the amended pleading to be filed. The Supreme Court reasoned that, based on the reinstatement of the case and the reset trial date, ". . . any perceived prejudice . . . is *de minimis*." *Doud*, at 1107.

The Nevada Supreme Court has also overruled the District Court's denial of a Motion to Amend, and permitted an amendment, when:

(1) a corporate plaintiff was being substituted for a named individual plaintiff. *Good v. District Court*, 71 Nev. 38, 279 P.2d 407 (1955);

(2) correcting a failure to acknowledge a prior pleading. *Tehansky v. Wilson*, 83 Nev. 263, 428 P.2d 375 (1967);

(3) amending the complaint which designated a "special administrator" of the estate when, in fact, the proper title was "general administrator." *Weiler v. Ross*, 80 Nev. 380, 395 P.2d 323 (1964).

In such cases, it is certainly appropriate for the Court to permit the amendment. In fact, the denial of such minor amendments would constitute an abuse of discretion. In characterizing the sort of minor amendment to which they were referring, the Nevada Supreme Court, in *Weiler v. Ross*, 80 Nev. 380, 395 P.2d 323 (1964), noted that the failure to properly identify the "special administrator" as a "general administrator,"

> . . . was an inadvertence totally unrelated to the merits of the controversy . . . and without prejudice to the rights of either.

Weiler, at 382.

Simply put, these are minor changes, oversights and inadvertent errors, for which leave of court to amend *should* be freely given. In such cases the amendments do not relate to the merits of the pending case. Further, these are situations where the *Foman* factors are not present. In *Tehansky v. Wilson*, 83 Nev. 263, 428 P.2d 375 (1967), the Court adopted the same rationale as in *Weiler*. In that regard, amendments should be freely allowed when there is ". . . an inadvertence totally unrelated to the merits of the controversy . . ." *Tehansky*, at 264.

CONCLUSION

The bottom line is that amending a pleading is not an action which one should rely upon as being easily accomplished. The careful practitioner should take the time to get it right the first time. Further, if you find yourself defending a case where an opponent is belatedly attempting to drastically change the litigation by amending a pleading, your efforts may be able to save your client significant increases in litigation time and costs. In this regard, knowledge is the most meaningful litigation tool.

HOW TO BE AN EXPERT WITNESS

By Todd L. Torvinen, Esq.

As many know, my law practice involves divorce litigation. I am also fortunate enough to have been engaged as an expert witness several times. I have been deposed, and I have given courtroom testimony.

GENERAL ADVICE

I bring this up because I believe that I have gained a unique perspective. I have worn both hats. I have worn the advocate hat, and I have worn the expert hat.

The role as an expert requires an entirely different thought process then that of an advocate. In order to be an effective expert, the expert must not be an advocate for a party. The expert can and should be an advocate for his position and opinion. To be an effective expert and advocate for an opinion, the expert, in general, should be conservative, and not take positions that are "far out" of the mainstream. In addition, an expert can and should always admit weaknesses in his opinion. Such admissions only add to credibility.

Because of my experience, I suggest the following to the divorce bar when considering the engagement and testimony of an expert witness (usually a CPA).

UNDERSTANDING THE CASE

Most Common Cases. It is important for the expert CPA to understand the nature of the case. Typically, in a divorce case, most common issues involve business valuation, professional practice valuation, preparation of a marital balance sheet, and income normalization calculations for purposes of alimony and child support.

Understanding the Case. It is important to read the relevant court pleadings and discovery which would include: the complaint, answer, affidavits of financial condition, and any interrogatories and production of documents. However the expert's primary source of information for understanding the case is the attorney. The attorney should spend a block of time with the CPA at the beginning of the case, and explain his or her view of the most important aspects of the case and the issues likely to be litigated. The CPA should also spend a block of time with a party for whom he or she is engaged as an expert.

Understanding the Attorney. The attorney should never indicate to the expert that he expects a certain outcome. If the attorney does this, perhaps the CPA should consider declining the engagement. Such expectation could compromise the CPA's ability to be an advocate for his or her opinion.

Attorney Understanding CPA's Opinions. The CPA should spend sufficient time so that the attorney understands the CPA's opinions and the underlying facts supporting them. The CPA should also inform the attorney of any weaknesses in his or her opinions. The last thing an attorney wants at trial is to be surprised by his own expert. Many times attorneys do not understand the financial issues upon which the CPA relies. If the attorney understands the CPA's opinions, then he or she will be better able to present and direct CPA testimony. The attorney will also be better able to cross-examine his or her adversary's expert.

PREPARATION OF WRITTEN OPINIONS AND REPORTS

Easy to Understand Report. In most cases, the CPA is called upon to prepare a written report. The report should be easy for the judge, the attorneys, and the parties to understand. If there is a great deal of information in the report, perhaps consider preparing a summary page of the report which "boils down" the information and the opinions of the expert. Such a summary will also provide a good point for the beginning or the end of direct testimony. For example, if a complex professional practice valuation report is prepared, consider summarizing the opinion as to value, and the main important underlying factors contributing to value on one page. The judge is human, and will be more likely to adopt an expert's opinion which is easily understood.

Triple Check the Report. It does not happen often, but sometimes I have reviewed reports from CPA's which contain errors. The errors include: (1) picking up the wrong facts, (2)

carrying incorrect numbers which are necessary for later calculation, and sometimes adopting methodologies which just plain do not fit the case. Check and recheck the report.

Discuss the Report with the Attorney and the Party. The CPA should discuss any report and its opinions with the attorney and the party. Both the attorney and the party should understand the report to the fullest extent possible. That way, any surprises are avoided, and no false expectations are created.

EFFECTIVELY DELIVERING EXPERT WITNESS TESTIMONY

Clear and Concise Communication. The bottom line is that you communicate your opinion and its underlying support clearly and concisely. Judges usually love pictures with color graphs and charts. They are easily understood.

Communicating and Testifying at Various Stages.

The expert may testify at a deposition, and at trial. Usually, deposition testimony is given to the opposing party's lawyer. Trial testimony is usually given to the attorney who engaged the expert. Trial testimony also usually includes cross-examination by the opposing party's attorney.

Attire. The expert should always dress appropriately. For deposition and for trial the appropriate professional attire would include a suit. The dress of the expert contributes to or detracts from credibility.

Direct Testimony. As stated above, the direct testimony should be clear and concise. Avoid using words that only CPA's know. Avoid rambling answers. Speak in short, understandable sentences. You should let the attorney ask questions which will allow information to be presented in digestible blocks.

Knowing the Courtroom. Every courtroom is different. Courtrooms have different acoustics. The CPA, if unfamiliar with the courtroom, should visit first. Usually, court staff is helpful with access. The attorney may also be helpful in this regard. The CPA should test the courtroom to ensure that his or her testimony can be clearly heard and understood by the judge, the parties, and the attorneys. In addition, if the CPA plans on preparing a PowerPoint presentation, the CPA should determine the best place for the screen so that the attorneys and the judge can easily see the information presented.

Credible Testimony. All you have is your reputation. Therefore, never, ever, lie. 9 times out of 10, the opposing attorney will expose it. As a result, your credibility with the court in that particular case will be destroyed. Probably, your credibility with that judge will also be forever destroyed. It is not worth it. If you do not know the answer, admit it. Do not guess. If you guess, and your guess is exposed for what it is, your credibility will be damaged. If your opinion testimony has a weakness, it should be brought out on direct examination. This adds to your credibility. If it is not brought out on direct testimony, it will probably be brought out on cross-examination. Immediately admit any weaknesses in the opinion testimony.

Do Not Memorize. Do not memorize. You should know your opinion and its underlying facts and assumptions cold. If you try to memorize, it comes out mechanically and is not persuasive. Further, memorization is a trap. The opposing counsel on cross-examination will hone in on rigid memorized answers to try to throw you off your testimony.

Practice. Practice delivering your testimony. The attorney should prepare you for testimony by asking you to present your opinion, and also by asking the most likely cross-examination questions.

Active Listening. The CPA should closely listen to any questions asked. If you do not understand the question, ask that it be repeated. If the question is unclear, ask the attorney or opposing counsel "what do you mean?". Let the attorney finish asking the question before you answer. Do not banter with the attorney. 9 times out of 10, if an opposing attorney tries to banter with you, he or she is simply trying to get you to "take your eyes off the ball" and make a mistake. Do not fall for this old trick.

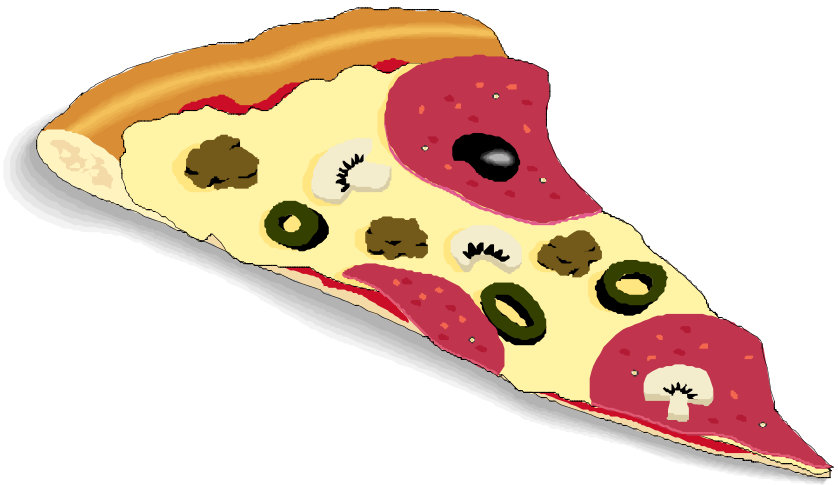
Behavior on the Witness Stand. Do not roll your eyes at opposing counsel. Do not make inappropriate gestures such as shrugging your shoulders, or pointing at opposing counsel.

CONCLUSION

Be yourself. If you deliver straightforward, clear, and concise testimony that is easily understandable, you will enjoy yourself, and provide valuable information to the court.

The Scheme of Exempt Property for Nevadans, or, You Get a Combo Pizza No Matter What You Ordered

by Bob Butler, Reno, Nevada



Lawyers and litigants often give thought to protecting assets from creditors claims. The bookstores are full of books on how to hide assets, whether it be by taking the assets offshore, burying them in the backyard or squirreling them away in the family trust.

Prudent planning, or the proverbial "prior planning prevents poor performance," on the eve of an adverse jury verdict, divorce complaint, TPO excluding a party from the home, or even bankruptcy might include converting non-exempt assets into exempt assets. In the divorce scenario, perhaps it means taking greater exempt assets, e.g. houses which can be homesteaded or protected pension assets, and not the assets which could be seized by creditors.

A variety of laws govern exemption of property from execution, attachment or other legal process. It is the same concept in keeping property out of the hands of the bankruptcy trustee.

Congress has acted to protect Social Security benefits, longshoreman's benefits and veterans benefits, as well as federal civil service retirements, etc. These are exempt from legal process. This is "nonbankruptcy" law because it is not a part of the U.S. Bankruptcy Code, found in Title 11 of the United States Code.

There are additional federal bankruptcy exemptions applying only in bankruptcy which are found in the bankruptcy code at 11 U.S.C. § 522.

The Bankruptcy Reform Act of 1978 brought us our current bankruptcy code which permitted the states to opt either for the bankruptcy code exemptions or the state law exemptions.

The four areas of law or ingredients which make up the total picture are:

1) federal non-bankruptcy law, e.g., protecting Social Security, Veterans, etc.

2) federal bankruptcy law, in the BK Code at 11 U.S.C. 522(d)

3) state law exemptions (contained in our execution statute, NRS Chapter 21)

4) state law exemptions not found in the execution statute

Congress did not preclude the fifty states from using their laws regarding property protected from creditors or the trustee in bankruptcy. It created an option to use the federal bankruptcy exemptions in 11 U.S.C. §522(d) or not. Specifically, the election is between the bankruptcy list,

or

> ... any property that is exempt under Federal law, other than Subsection (d) of this section, or state or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of filing of the petition...

11 U.S.C. §522(b)(2)(A)

In Re Richards, 57 B.R. 662 (Bankr. D. Nev. 1986), and NRS 21.090(3) established that we are an opt-out state and thus the quoted rule above applies to us. The Nevada scheme covers any proceeding in the state. It consists of federal nonbankruptcy exemptions and Nevada law.

The author's motivation for the article is the fact that no known source has properly indexed the exemptions available. One twenty-year-old handbook accompanying a CLE debt collection seminar found in some libraries is both outdated and wrong.

Choice of law considerations are being purposely ignored because of a line of authority that holds:

> ... exemption laws pertain merely to the remedy and have no extraterritorial effect and exemption laws of the forum apply (cites omitted), *In Re Marriage of DeLotel*, 140 Cal. Rptr. 553, 100 ALR 3d 1231 (1977)

Judge Riegle, who sits in Las Vegas, held in I*n re Weed* 221 B.R. 256 (Bankr. D Nev. 1998) that exempt property is defined by the state law that is applicable at the time the bankruptcy petition is filed. *Weed* is consistent with *Watson* where Judge Goldwater was presented with a debtor who wanted Nevada law to govern certain exempt property, but a more favorable Utah Law to cover his pension plan:

> Debtor claims his domicile is Nevada and signed schedules that he had lived in Nevada for 180 days. He thus falls squarely under the provision of §522(b)(2)(A). Debtor may only use Nevada exemptions; he cannot use Nevada for some things and Utah for his pension plan.

In Re Watson, 192 B.R. 238, 244 (Bankr. D Nev. 1996)

Nevada is quite friendly to judgment debtors and bankrupts because of a scheme of exemptions which has liberalized constantly in the last twenty years by raising homesteads to $125,000, IRAs to $500,000 and cars to $4,500.

The protection available to the downtrodden (but not necessarily the broke) is as benign as it has ever been in our history. Let's look at some of these exemptions:

These do apply in Nevada:

Alimony (all), 21.090

Annuities $350 per month, NRS 687B.290 (more if hardship shown, NRS 687B.290(1)(c)

All property in Nevada where judgment creditor is a foreign state whose judgment is for tax on pension NRS 21.090 (n)

Cemetery Trust, NRS 689.700

Child Support all, NRS 21.090

Civil Service disability and death benefits (all), 5 U.S.C. §8130

Civil Service Retirement (all), 5 U.S.C. §8346

Courthouses, schools, public property of cities and towns NRS 21.090

Dwelling if creditor has judgment for medical bill, NRS 21.095

Earnings disposable (25% or more by formula, with restrictions inapplicable in case of "...order for support...state or federal tax..." 15 U.S.C. §1673

Escrow funds of escrow agents, NRS 645A.170

Family pictures and keepsakes, NRS 21.090

Farm truck, equipment $4,500, NRS 21.090

Federal judges, widows, children annuities, (Judicial Survivors Annuities Fund) 28 U.S.C. §376(n)

Fire engines, apparatus and furniture of fire departments, NRS 21.090

Foreign Service retirement and disability system, 22 U.S.C. §4060(c)

Fraternal benefit societies money, whether before or after payment by the society, NRS 695A.220

Funeral and burial service plan trust funds, NRS 689.700

Guns, one per debtor, NRS 21.090

Homestead, state law equity up to $125,000, NRS 21.090; federal lands or debts contracted before patent, 43 U.S.C. §175

Household goods (necessary), yard equipment, $3,000, NRS 21.090, limited by CFR

Housing Authority property, NRS 315.992, real property NRS 315.310

Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717

Insurance (Health or Disability which are supplemental to life or annuity contracts, NRS 687B.270

Insurance (Life), where premium does not exceed $1,000 per year, NRS 21.090

IRA, $500,000, NRS 21.090

Libraries, private $1,500, professional $4,500, NRS 21.090

Life Insurance, NRS 687B.280 (all) and NRS 21.090 (part) "Serviceman's, or "Veteran's"

"...exempt from claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever whether before or after receipt by the beneficiary." 38 U.S.C. §1970(g)

Longshoreman and harbor worker's benefits (all), 33 U.S.C. §916

Military Survivor benefit plan (all) 10 U.S.C. §1450

Mineral collections, art curiosities and paleontological remains, NRS 21.090

Miner's stuff, $4,500, NRS 21.090

Money on deposit in US Serviceman's savings institutions while on permanent station abroad, 10 U.S.C. §1035(a)

Mortgage Company money in an impound trust account, NRS 645B.180

Motor vehicles, $4,500 per debtor (but all of the specially equipped vehicle for disabled), NRS 21.090

Partnership property, NRS 87.250 (2)(c)

Pension/Profit Sharing, ERISA qualified plans/IRA, $500,000, NRS 21.090

Pensions paid to winners of Congressional Medal of Honor, 38 U.S.C. 3101

Pet Cemetery Trust Funds, NRS 452.700

Public Employees Retirement, NRS 286.670

Prosthesis, NRS 21.090

Public Assistance, NRS 422.291

Railroad retirement, 45 U.S.C. §231(m)

Railroad Unemployment Insurance, 45 U.S.C. § 288(e)

Social Security (all), 42 U.S.C. §407

Spendthrift Trust, NRS 21.080

Tools $4,500, NRS 21.090

Unemployment Compensation, NRS 612.710

Veteran's Benefits, 38 U.S.C. §5301 and 38 U.S.C. §3101

Vehicle for disabled, NRS 21.090

Vocational rehabilitative maintenance (all), NRS 615.270

Wages due seaman, fishermen, masters and apprentices, 46 U.S.C. §601

Workmen's Compensation, "...before issuance and delivery of the check..." NRS 616C.205

Before we end, it should be clear that a careful reading of the exemption language could save you or your client thousands. For example, many pensioners can have their benefits assigned for awards of child support and support of a spouse. Railroad and veterans benefits have tiers where some are exempted and some are not under a family Court award. Federal Civil Service has an assignment exception for sexual molestation and abuse victims. A letter to the editor of the NTLA Advocate by a lawyer from southern Nevada suggested about five years ago there was such an exception for railroad benefits. There is not!

There is a consistent line of thought that reoccurs all through the exemption statutes. Some pensioners can claim the exemption even *after* the money or benefits are paid to them: Social Security, servicemans and veterans insurance, fraternal benefit society payments. Most of the litigation concerning the continuing nature of the exempt status has concerned Social Security.

Bennett v. Arkansas, 485 US 395, 108 S.Ct. 1204, 99 L.Ed.2d 455 (1988) refused to allow the state to seize its prisoner's Social Security benefits for the costs of their confinement. A certificate of deposit was protected in *Fayette County Hospital v. Reavis*, 523 NE.2d 693 (Ill. App. 1988). Funds from Social Security held in a bank account are supposed to be protected. They were in *Household Finance Corp. v. Chase Manhattan Bank, NA*, 397 NYS.2d 564 (1977); *Harris v. Bailey*, 574 F.Supp 966 (WDVa 1983); and *Brosamer v. Mark*, 540 N.E.2d 652 (Ind. App. 1989).

One notable exception occurred in the Eleventh Circuit, where the recipient had $63,000 in the bank and corporate control over another 10 million. *Citronelle Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180 (C.A. 11th Ala 1991).

When there are other owners of the account or where there is evidence of commingling, the burden of proof shifts to the recipient. Commingling itself is not fatal to the exemption claim but does shift the burden of proof. *NCNB Financial Services v. Shumate*, 829 F.Supp 178 (W.D.Va 1993).

Failing to assert the exemption is a waiver. *Matavich v. Budak*, 447 NE.2d 1311 (Ohio App 1982). Our state allows such a claim of exemption to be made should a creditor go after exempt property. At execution, the notice prescribed in NRS 21.075 is mailed to the debtor. Within eight days, the affidavit of exemption must be filed with the clerk of the Court issuing the execution, and served on the creditor and the sheriff. See NRS 21.112.

Exempt property in our state has authority in both state and federal statutes, but not the §522(d) list in the bankruptcy code. When you serve up the law of exemption, it should look like a combo pizza, or you are not using the right recipe.

THE MILITARY DISABILITY WAIVER

By Marvin Snyder

When a military pension is marital property to be divided in a divorce the provisions of the Uniformed Services Former Spouses' Protection Act (USFSPA) must be followed. In order to prevent double dipping a military retiree cannot receive retirement benefits under the Armed Forces Retirement System at the same time that disability benefits are received from the Veteran's Administration program. It is more favorable for the person to receive veteran's disability benefits, if possible, because they are tax free. It is to the advantage of the military retiree to waive a portion of military retirement pay to receive a like amount of veteran's disability pension.

This potential, or actual, waiver poses a problem in a desired distribution of the military pension as marital property in a divorce. The USFSPA authorizes state courts to treat military retirement benefits as marital property and the Armed Forces Retirement System honors valid court orders (similar to a qualified domestic relations order ("QDRO"). The maximum amount of a military pension that is allowed to be awarded to a former spouse as property in divorce is fifty percent of disposable retired pay. The definition of disposable retired pay specifically excludes any amount waived so the retiree may receive a veteran's disability pension.

An otherwise carefully crafted and designed divorce property settlement can be thwarted if and when such a waiver is executed by a military retiree because then the amount supposed to be received by the former spouse could be diminished.

For example, if the former spouse is awarded fifty percent

EXAMPLES*

1.The marital coverture fraction community portion is 100%

Spouse %	Award	Marital Fraction	Sp.Portion	Monthly Benefit	Amt. Waived	Net Ben.Sp.	Ben.Retiree Pays to Sp.
50%	100%	50%	1,000	0	1,000	500	0
50%	100%	50%	1,000	250	750	375	125
50%	100%	50%	1,000	500	500	250	250
50%	100%	50%	1,000	750	250	125	375
50%	100%	50%	1,000	1,000	0	0	500

2.The marital coverture fraction community portion is 75%.

Spouse %	Award	Marital Fraction	Sp.Portion	Monthly Benefit	Amt. Waived	Net Ben.Sp.	Ben.Retiree Pays to Sp.
50%	75%	37.5%	1,000	0	1,000	375	0
50%	75%	37.5%	1,000	250	750	281	94
50%	75%	37.5%	1,000	500	500	188	187
50%	75%	37.5%	1,000	750	250	94	281
50%	75%	37.5%	1,000	1,000	0	0	375

3.The marital coverture fraction community portion is 50%.

Spouse %	Award	Marital Fraction	Sp.Portion	Monthly Benefit	Amt. Waived	Net Ben.Sp.	Ben.Retiree Pays to Sp.
50%	50%	25%	1,000	0	1,000	250	0
50%	50%	25%	1,000	250	750	188	62
50%	50%	25%	1,000	500	500	125	125
50%	50%	25%	1,000	750	250	63	187
50%	50%	25%	1,000	1,000	0	0	250

Note: Titles are Spouse, Award, Marital Fraction, Spouse Portion, Monthly Benefit, Amount Waived, Net Benefit Spouse, Benefit Retiree Pays to Spouse.

of the military pension, and such pension is $1,000 per month, the former spouse expects to receive $500 per month. But, if the retiree is eligible for a partial disability award of $250 per month, that much is waived so the retiree receives $750 from the military system and $250 from the Veteran's Administration. The former spouse's award of fifty percent translates into dollars as only $375 (50% of $750), not the expected $500 per month. A state court cannot change this.

However, a state court may have the power to order the military retiree to make up any deficiency in the award to the former spouse by paying the required portion of any waived amounts directly to the former spouse. The Supreme Court of South Dakota ruled on this subject in 1996 in the case of *Marilyn Hisgen v. Richard M. Hisgen*, 554 N.W.2d 494 (S.D. 1996). The military retiree can be made responsible by the state court for any amounts not paid by the military retirement system which were contemplated to be paid to the former spouse under the terms of the divorce action. It is advisable for appropriate language to be included in the divorce decree or property settlement agreement to impose such a requirement whenever there is a military pension involved.

Set forth below are sets of examples to illustrate how the allocation of benefits could work when there may be a disability waiver in a divorce of a military member.

It should be clear that in every case where there is a military pension, provision should be made in advance for the possibility of a disability waiver.

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