

So This Isn't Work?—

When a Wage Isn't Protected

Florida Bankruptcy Court Decisions Erode Earnings Exemption for Professional Practice and Business Owners

by Craig R. Hersch and Michael B. Hill

The Florida Statutes provide creditor protection from garnishment of "earnings." Over the course of the last several years, however, a number of troubling decisions have emerged from the bankruptcy courts in decisions that circumvent the clear intent of the earnings exemption statute. In short, the bankruptcy courts have denied small office professional practice and small business owners the earnings exemption due to the fact that such individuals do not take a "wage," but rather take "discretionary draws" from the business. It is the authors' opinion that the bankruptcy court for the Southern District of Florida has legislated judicial requirements not found in the Florida Statutes or in the leading case law.

The Florida Statute

F.S. §222.11 provides the exemption at issue. Specifically, earnings of a head of family that are less than or equal to \$500 a week are absolutely exempt from garnishment.¹ Further, disposable earnings greater than \$500 per week are exempt unless the individual agrees otherwise in writing.²

These earnings may be invested in other types of exempt assets (including, e.g., homestead, certain annuities, and life insurance) without the transfer being considered fraudulent under the Fraudulent Conveyance Act.³ Exempt earnings deposited into a bank account are exempt for six months after deposit, as long as the funds are traced and properly identified as earnings.⁴

Thus, if Mr. Jones earns \$500 weekly and has creditor issues, theoretically he could use the earnings to support himself and his family, and he could take any ex-

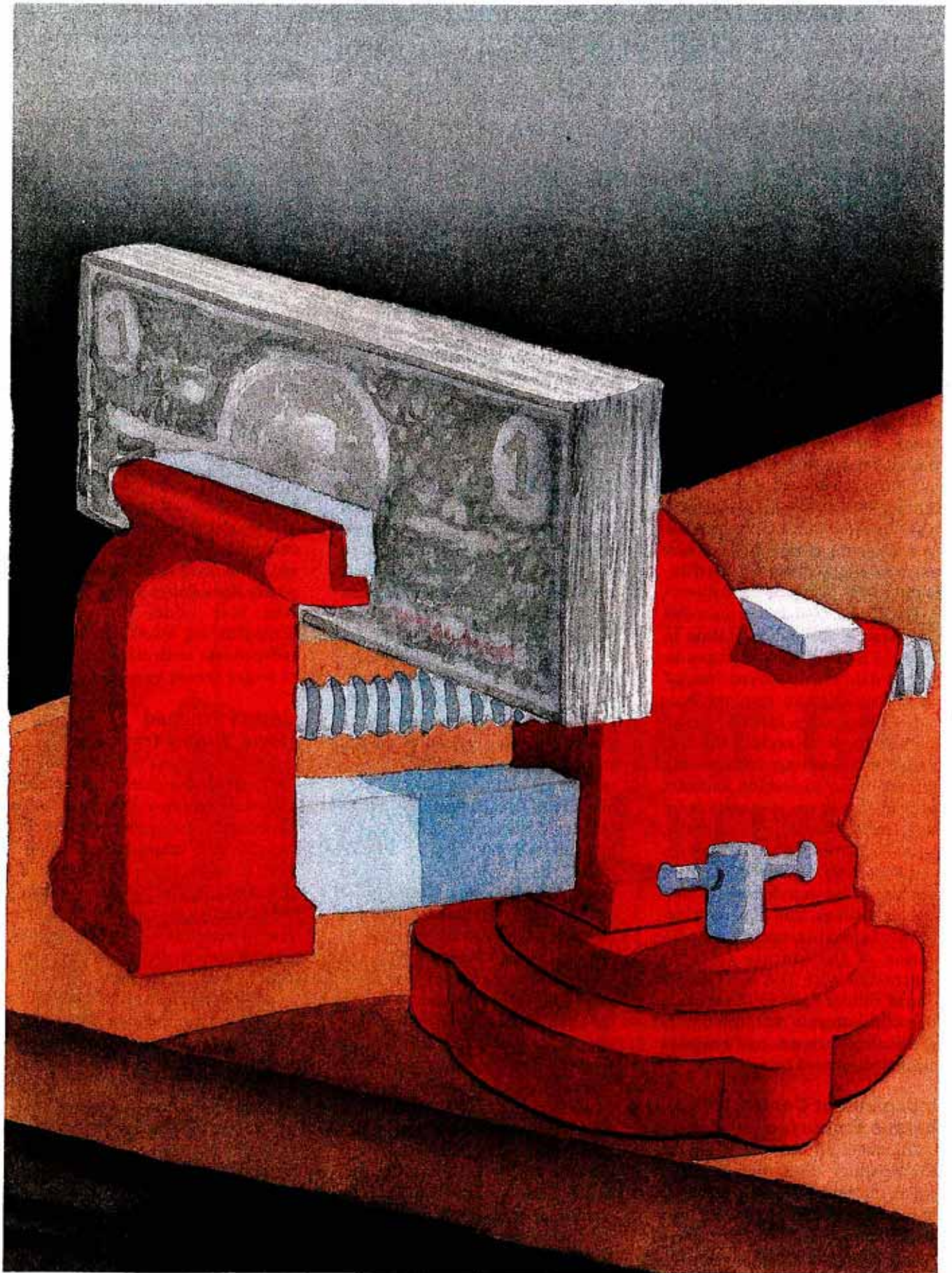
cess and pay down his mortgage on his Florida homestead (another exempt asset) without fear that creditors will garnish the extra earnings. Earnings over \$500 per week would also be creditor-exempt if Mr. Jones had not otherwise agreed in writing.

Requirements for Exemption

The debtor has the initial burden of proving entitlement to the earnings exemption.⁵ The debtor must establish that he or she is a head of family and that the amounts in dispute constitute earnings as defined in the statute.

"Head of family" includes any natural person who is providing more than one half of the support for a child or other dependent.⁶ Generally, this issue has not been contested in the court opinions. However, a handful of cases have involved the meanings of "dependent" and "child." "Dependent" is not defined under the statute, and could include a child, aunt, uncle, parent, or former spouse who does not necessarily reside in Florida. An unmarried father may qualify as a head of family when he acknowledges a child as his own and voluntarily provides financial support.⁷ Further, a former husband may qualify when he provides alimony payments to a former wife.⁸

A moral obligation to support another person may be sufficient to satisfy the head of family requirement. However, the courts often require that nonrelated individuals reside in the same residence.⁹ "Child" generally means any son or daughter, regardless of age.¹⁰ Therefore, a debtor supporting an adult child away at college may still qualify as a head of family.¹¹



A number of courts have denied the earnings exemption in cases where the debtor was determined to be an independent contractor and not an employee.

Earnings as Personal Services or Labor

The most common area of dispute and the focus of this article centers on the statutory and case law definition of "earnings." "Earnings" under the statute include compensation paid or payable, in money of a sum certain, for personal services or labor whether denominated as wages, salary, commission, or bonus.¹² "Disposable earnings" means that part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required by law to be withheld.¹³

The Florida Legislature amended the earnings exemption statute in 1993.¹⁴ The significant changes involved deleting the word "wage," which connotes an employer/employee relationship. Instead, the legislature chose to replace the language with "earnings," broadening the definition to include amounts paid in money or sum certain for wages, salary, commission, or bonus, items arguably found not only in employer/employee relationships, but also found in independent contractor settings. The apparent legislative intent to broaden the application of the statute is to be contrasted with the bankruptcy courts' rulings limiting the application of the statute with relation to professional practice and business owners, discussed below.

Independent Contractor Versus Employee

A number of courts have denied the earnings exemption in cases where the debtor was determined to be an independent contractor and not an employee. These courts have relied mainly on a 1931 Florida Supreme Court case, *Patten Package*

Co. v. Houser, 136 So. 353 (Fla. 1931). In *Patten*, the debtor, Mr. Houser, worked for Gulf Refining Company. Mr. Houser delivered various petroleum products to customers, utilized the services of his son, and often fronted expenses related to the operation of his delivery truck, for which Gulf Refining would later reimburse.

The dispute centered on whether amounts Gulf Refining owed Mr. Houser were creditor-exempt. Mr. Houser argued that the earnings exemption applied to the amounts as earnings for his personal labor and services. The court's issue was whether the money due Mr. Houser from Gulf Refining was due for "personal labor or services rendered by him."¹⁵ (Emphasis added) The court determined an "indeterminable part" of the money due was for the expense account related to the operation of his truck and for the services of the adult son, as well as for his services rendered. Mr. Houser could not account for the exact makeup of the amounts due. Accordingly, the court held that the amounts owed to Mr. Houser were not exempt as earnings within the meaning of the statute.

In reaching its conclusion, the court did note that Mr. Houser acted more like an independent contractor than an employee.¹⁶ It merely stated this fact and moved on to the above analysis. However, this observation was not apparently determinative in arriving at a decision. The court seemed more concerned that Mr. Houser commingled the funds than the source of those funds. Subsequent case law, however, picked up on this innocuous distinction, resulting in rulings that for earnings to be exempt, they must be employment earnings as opposed to earn-

ings of an independent contractor.¹⁷

Intent of Exemption

The Florida Supreme Court's clear intent in *Patten* arguably stands for the proposition that an independent contractor may be entitled to the exemption for that portion of his or her earnings related to personal services, even under the old statute. The court expressly stated that the purpose of the earnings exemption is to

prevent the unfortunate citizen from being deprived of the necessities of life and to preserve for him and his family certain things reasonably necessary to enable him to earn a livelihood, and, where his livelihood is produced by his personal labor and services, to so protect him and his family that such earnings may not be taken from them and they be left destitute and a charge upon charity.¹⁸

Moreover, the court states that the exemption should be "liberally construed in favor of the debtor."¹⁹ Nowhere does *Patten* draw a bright-line test under the statute distinguishing wages earned by an independent contractor as opposed to wages earned by an employee.

Courts Proceed Down Wrong Track

A series of cases then evolved on the misinterpretation of *Patten* that the court requires an actual "employment" relationship in order to benefit from the earnings exemption. In *In re: Moriarty*, 27 B.R. 73 (Bankr. M.D. Fla. 1983), the debtor was a real estate agent working on commission basis. The real estate agency exercised very little control over him and, therefore, the bankruptcy court found an independent contractor relationship. The court then denied the exemption based not on whether his personal services resulted in the wages, but simply due to the fact that the debtor had an independent contractor relationship with the real estate agency as opposed to an employer/employee relationship.²⁰

Since *Moriarty*, a number of cases have relied on the same or similar rules denying the wage exemption to independent contractors.²¹ Most

of the cases following this line of reasoning proceed into an analysis of the factors determining whether the debtor is an employee or independent contractor. If the court determines the debtor more closely resembles an employee, the exemption is granted. If the determination is independent contractor, the exemption is denied.

In a 1993 decision, the U.S. 11th Circuit Court of Appeals followed this track. *In re: Schlein*, 8 F.3d 745 (11th Cir. 1993), involved a physician debtor trying to exempt monies distributed to him from his practice.²² The lower bankruptcy court for the Middle District of Florida held that since the debtor was an independent contractor, the exemption was not available.²³ The debtor argued that there is no such requirement in the statute.²⁴ Further, the debtor argued that *Patten's* language regarding independent contractors was merely dictum.²⁵ When the 11th Circuit analyzed this issue,

it stated, "In order to determine the meaning of a state statute, we look to the decisions of the state's courts."²⁶ The court looked at recent Florida state cases interpreting the *Patten* language²⁷ to determine that independent contractors do not benefit from the exemption. Since the debtor conceded that he was an independent contractor, the court denied the exemption.²⁸

Middle District Disregards Employee/Independent Contractor Issue

The bankruptcy court for the Middle District of Florida realized that the employee-independent contractor distinction was irrelevant in a 1991 ruling. In *Matter of Glickman*, 126 B.R. 124 (Bankr. M.D. 1991), the plaintiff obtained a judgment against the defendant and sought to garnish amounts due to the defendant. The plaintiff argued the exemption should not apply since the defendant was an indepen-

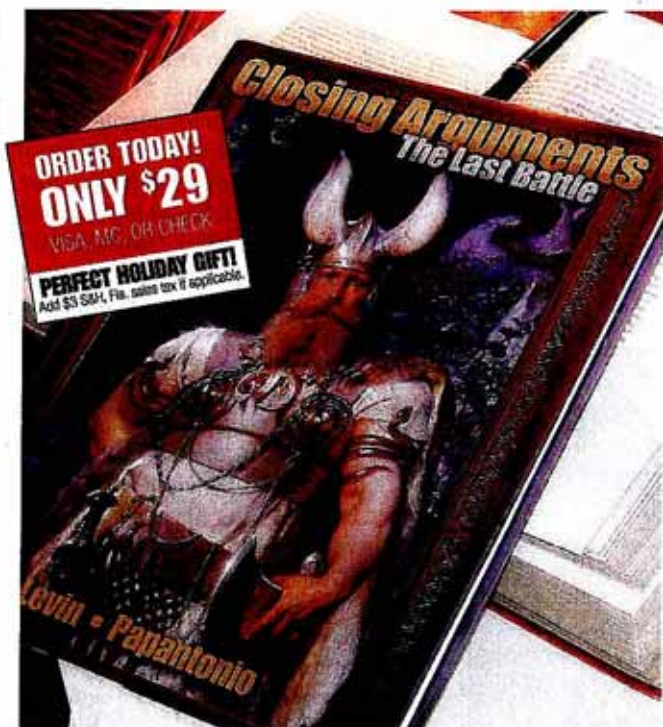
dent contractor. The bankruptcy court for the Middle District of Florida did not follow its own earlier *Moriarty* reasoning:

The Court finds the issue in F.S. §222.11 is not whether the defendant is an independent contractor or an employee but rather whether the work performed was in the nature of personal labor or services rendered by the defendant The Statute also does not limit the term "person" to an employee as opposed to an independent contractor.²⁹

The court cited *Patten* and determined that it must accept the law as it is written and had no right by judicial fiat to add any qualifying words to it. This prohibition against judicially legislating additional requirements fell on deaf ears with its sister court, the bankruptcy court for the Southern District of Florida.

Problems for Business Owners/Professionals Who Own Their Own Practices

The bankruptcy court for the Southern District of Florida has con-



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sistently applied tougher and stricter standards limiting the application of the earnings exemptions statute as it applies to professional practice and business owners. A troubling line of cases has held that owners of businesses and professional practices exhibit too much control over their own wage arrangements, and therefore cannot, under most circumstances, benefit from the earnings exemption.

In *In re: Manning*, 163 B.R. 380 (Bankr. S.D. Fla. 1994), Mrs. Manning owned a contracting company. Her spouse was president and responsible for day-to-day operations; however, he did not own the business. There was no employment contract between Mr. Manning and the business. Mr. Manning set his own salary, commissions, and bonuses. However, if the business did not have enough cash, he would forgo his paycheck. This is not uncommon practice for business owners and their spouses who work the business.

Upon filing bankruptcy, Mr. Manning claimed amounts in his bank account as exempt under the earnings exemption. The trustee argued that the earnings exemption did not apply because the amounts were earned as an independent contractor and not as an employee. The Southern District apparently disregarded *Glickman* in determining that the earnings exemption applies only to the earnings of an employee, not an independent contractor, citing instead to *Moriarty* and its progeny. Therefore, the court concluded that the wage exemption did not apply to the bank account.

However, the court did not stop there. The Southern District applied new criteria to qualify for the wage exemption:

In sum, a debtor that owns or controls a business cannot exempt the funds he distributes to himself from the business simply by calling the money "wages." For the exemption to apply, the debtor must not only perform personal services to the business, he must also receive regular compensation dictated by the terms of an arms-length employment agreement.³⁰ (Emphasis added)

The court went on to state that

the compensation Mr. Manning received was merely discretionary distributions from a family-owned business, citing the irregular distribution of sums to the debtor.³¹ Apparently, the corporation's cash flow problems that resulted in these irregular distributions were either not factually believed by the court or they were simply ignored.

Running a Business Not Working a Job

In *In re: Zamora*, 187 B.R. 783 (Bankr. S.D. Fla. 1995), the debtor, Mr. Zamora, was a sole practitioner attorney and the owner of a marina business. There was no employment contract in place. He controlled his income and the terms of his employment in both businesses.

In the bankruptcy proceedings, Mr. Zamora attempted to exempt certain bank accounts that held money he earned from his businesses. In citing *Manning*, the bankruptcy court for the Southern District of Florida again stated that money he chose to distribute to himself is not exempt as wages.³² The court stated that because Mr. Zamora had complete control over both businesses, he could not avail himself of the exemptions by declaring the amounts held in the accounts as wages.³³

Between the time of the *Manning* and *Zamora* cases, the earnings exemption statute was amended, effective October 1, 1993. As stated above, the revised statute replaced the language "money or other thing due to any person . . . for the personal labor or service of such person" with the term "earnings." The 1993 statutory change further defined "earnings" as including compensation paid or payable, in money or a sum certain, for personal services or labor whether denominated as wages, salary, commission, or bonus. The statute no longer limited "earnings" to be defined solely as "wages."

The debtor argued that *Manning* did not apply due to the broadened language found in the amended statute. The court held that the statutory definition did not preclude

application of *Manning*.

Whether under the statute before or after the 1993 amendments, this Court finds that earnings from a business controlled by a debtor are not exempt. Although many of the cases focus on whether the label "independent contractor" applies to the debtor's services, this Court finds that the relevant inquiry is whether the debtor's activities were essentially a job or whether they were in the nature of running a business.³⁴

The court justified the limitation of the earnings exemption to business owners by stating that the legislature did not intend to exempt all funds a person chooses to "draw" from a business where the individual has full discretion over what expenses to pay or not pay in order to fund the draw.³⁵ However, it is the opinion of the authors that if the legislature wished to impose such a limitation on business owners, it could easily have done so.

Employment Agreement Apparently Not Enough

In 1997, the Southern District took *Zamora* one step further in denying earnings exemptions to a dentist who had an employment agreement in a practice with more than one shareholder. In *re: Harrison*, 216 B.R. 451 (Bankr. S.D. Fla. 1997), involved payments to a debtor pursuant to a deferred wage agreement. Mr. Harrison was a dentist, running his dental practice with another shareholder. He argued that he was an employee of the practice and that the payments represented payments for personal dentistry services performed by him. The court held the earnings were not exempt because he was running a business and was not really an employee, relying on *Zamora* and *Manning*.

However, in this case Mr. Harrison did have an employment agreement. The court simply looked past the agreement or found it lacking. The court noted that since there existed only two shareholders, they could, in essence, agree to whatever wage they wanted.³⁶ The court reasoned that the employment agreement at issue was not an arms-length agreement solely because it was between the debtor, as the employee, and the debtor and the other shareholder, on

behalf of the employer. The court did not state what elements an employment agreement should have, if any, to allow the exemption in this type of setting.

A debtor that owns or controls a business cannot exempt the funds he distributes to himself from the business simply by calling the distributions wages. For the exemption to apply, the debtor must not only perform personal services for the business, he must also receive regular compensation dictated by the terms of an *arms length employment agreement*. *In re Manning* 163 B.R. at 382. Although the Debtor in the case at bar has indeed executed an Employment Agreement with the Professional Association, it is, in substance, an agreement between himself and the only other shareholder and is accordingly enforceable only by themselves. Moreover, the Employment Agreement does not provide for or follow a schedule of regular compensation. Furthermore, although the Debtor is paid directly for providing personal dentistry labor or services, he is not akin to an employee of the Professional Association because, as his testimony established, he and the other shareholder control the business including the controlling and timing and the amount of their compensation.³⁷ [Emphasis in original]

Apparently, the court did not like the fact that there were only two shareholders involved in the practice. How many other shareholders would it take to make an arms-length agreement that would be recognized as a valid employment relationship for purposes of the earnings exemption? What if there were three shareholders? Five? Ten? The bankruptcy court for the Southern District of Florida also stated the following in support of their exemption denial:

As indicated above, the Debtor testified that he and his partner would forego payment if there was not sufficient cash at the time of compensation, or conversely, they would supplement their regular paychecks if additional cash flow was available. Stated simply, even with the employment agreement in existence, the Debtor and his partner ran the business of the Professional Association while also performing dentistry services. They made all decisions about when they got paid and how much they received; the payment of their wages was purely discretionary. Therefore, this Court finds that the Debtor was, in addition to performing dentistry services, running the business of a Professional Association.³⁸

The court found that these

anomalies in pay worked factually against the debtor when attempting to apply the earnings exemption statute. Such anomalies might be considered normal when a business owner must, for example, forgo his own pay before paying the other bills of the business. Further, the court acted as if the earnings produced by the professional association had little to do with the dentists rendering dental services, but instead were a result of their running the administrative aspects of their professional practice.

The court then revived the employee/independent contractor analysis, indicating that it was pertinent and analogous to the case at hand:

The Debtor argues that he is an employee within this framework. However, this Court does not agree. The Court finds that the Debtor is more similarly situated to an independent contractor than an employee because an employee in the sense of a standard employer/employee relationship envisioned by the Florida legislature in drafting Fla. Stat. §222.11 are not afforded such latitude

or luxury as the Debtor has.³⁹

However, using another branch of the federal government's employee/independent contractor rules, *Harrison* would have been decided for the debtor, given the requirements imposed by the IRS on professional practice and business owners in classifying distributions either as wages (earnings) or dividends.

Comparison to Tax Laws

The tax courts and the IRS often impose taxes, penalties and interest against business owners who attempt to classify earnings from the business as dividends.⁴⁰ The main difference being, of course, that when a business owner takes a wage he or she must then pay self-employment taxes. Currently, both the employer and employee portion of the employment taxes (FICA and Medicare) exceed 15 percent of the wage itself up to the FICA earnings limits.⁴¹ If the business owner instead classifies a distribution as divi-



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The IRS has tightened its definition of "independent contractor" as opposed to "employee" in order to ensure that business owners do not misclassify individual workers.

dends, then the self-employment taxes do not apply.⁴² Consequently, the IRS is vigilant about reclassifying distributions as wages to business owners rather than dividends when the business owner is not claiming enough income as a "reasonable wage."⁴³

Further, the IRS has tightened its definition of "independent contractor" as opposed to "employee" in order to ensure that business owners do not misclassify individual workers.⁴⁴ A business owner has incentive to classify its workers as independent contractors in order to avoid paying employment taxes on amounts paid to those individuals or avoid including those same individuals in benefit plans that can not be discriminatory in favor of the owners, such as health insurance and ERISA retirement plans.

The method under which the tax laws determine if amounts distributed constitute wages or dividends could easily be incorporated into the courts' decisions relating to whether the earnings exemption would be available.

The 9th Circuit Gets It Right

In *Carter v. Anderson*, 182 F.3d 1027 (9th Cir. 1999), the U.S. Ninth Circuit Court of Appeals interpreted the California earnings exemption statute in a case involving actress Nell Carter. California's exemption statute⁴⁵ is very similar to Florida's in that it exempts compensation for personal services. One difference is that the exemption specifically applies only to employees,⁴⁶ theoretically making it more difficult for a business owner to fall within the exemption.

In *Carter*, the debtor, a professional entertainer, was the sole shareholder, director and officer of

her subchapter S corporation. The corporation entered into business contracts and Carter performed on behalf of the corporation. The corporation then paid Carter the net profits of the corporation for services rendered.

The court held that, even though she was the sole shareholder, Carter was an employee of the corporation, not an independent contractor.⁴⁷ The corporation was the independent contractor when dealing with other businesses, not the debtor.⁴⁸

The court then considered whether the payments to Carter constituted earnings subject to California's exemption. At issue was a sum of \$43,260.58, which constituted the corporation's entire net profits (gross income less expenses). The trustee argued that net profits cannot be earnings. The court disagreed.

The Ninth Circuit looked to the federal income tax laws for guidance as to whether the amounts qualified as wages under their statute. The court found that for federal income tax purposes, "compensation to sole shareholder/employees of close and subchapter S corporations may be paid out of net profits in the form of earnings . . . '[N]et profits' is often used to refer to money paid out as earnings."⁴⁹ The court then remanded the case to the lower court for further evidence on this point. It appears that at least some portion of the amount in question will qualify as earnings and be exempt from garnishment.

The *Carter* court therefore disregarded extraneous and irrelevant employee versus independent contractor status when applying a wage exemption statute similar to the one found under Florida law. This result appears to be more evenhanded and

consistent with *Patten* as the *Carter* court's decision did not discriminate against professional practice and small business owners. Instead, the court treats the corporate earnings as wages, and consistently applies the logic found not only in *Patten*, but also in parallel laws, such as the federal tax laws.

This result is not necessarily preempted by the *Schlein* opinion from the 11th Circuit. In *Schlein*, the debtor conceded in the lower bankruptcy court that he was an independent contractor of the business.⁵⁰ The court did not rule whether a significant shareholder may still be classified as an employee, rather than as an independent contractor, thereby availing himself of the exemption.

California is not the only state in which business owners can be classified as employees for earnings exemption purposes.⁵¹

Conclusion

A court properly applying the Florida earnings exemption statute, its intent as expressed in *Patten*, and employee/independent contractor law could instead decide that the earnings exemption would be available if the amounts were compensation for personal services rendered to the business—regardless of affiliation, and so long as the earnings were "reasonable" in relation to the services, total net profits of the business and similarity of the arrangement to other like-businesses. This test would parallel federal tax law. Such a test should serve to weed out those business owners who overreach, while not denying the exemption to small business owners.

It is unclear whether other bankruptcy or appellate courts applying Florida law will follow the bankruptcy court for the Southern District of Florida's denial of the earnings exemption.⁵² Until these matters are decided, business owners and professionals who own their own practices in Florida are cautioned that they may not avail themselves of the earnings exemption. Prudence dictates creation of

an arms-length employment agreement, coupled with independent analysis that the salary agreed upon is consistent with similar businesses or practices. The agreement should be strictly followed, and amended with corporate formalities.

Consideration should be given to the creation of a nonqualified deferred compensation agreement as well, to ensure that any excess amounts the business or practice earns over the employment agreement can be classified as deferred wages or compensation that could theoretically be subject to the exemption.

Neither strategy would ensure the exemption, given the current precedent in the bankruptcy court for the Southern District of Florida. One could only hope that the bankruptcy courts in Florida realize the judicially legislated discrimination that has been aimed at those who face the odds and risk of running their own business. It is improper to categorize all amounts distributed to professional practice and business owners as "discretionary distributions," as if the money from such businesses grew on trees, with the owners indiscriminately plucking the cash from its leaves, while not claiming any of said cash as earnings for federal tax purposes. □

¹ FLA. STAT. §222.11(2)(a).

² *Id.* at §222.11(2)(b).

³ *Havoco v. Hill*, 790 So. 2d 1018 (Fla. 2001).

⁴ FLA. STAT. §222.11(3).

⁵ *In re: Parker*, 147 B.R. 810 (Bankr. M.D. Fla. 1992).

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⁶ FLA. STAT. §222.11(1)(c).

⁷ *Flannery v. Green*, 482 So. 2d 400 (Fla. 2d D.C.A. 1986).

⁸ *Killian v. Lawson*, 387 So. 2d 960 (Fla. 1980).

⁹ *Moorehead v. Yonqu*, 183 So. 804 (Fla. 1938).

¹⁰ *Mazzella v. Boinis*, 617 So. 2d 1156 (Fla. 4th D.C.A. 1993).

¹¹ *Id.*

¹² FLA. STAT. §222.11(1)(a).

¹³ FLA. STAT. §222.11(1)(b).

¹⁴ 1993 Fla. Laws ch. 256, §2.

¹⁵ *See Patten* 136 So. at 355.

¹⁶ *Id.* at 356.

¹⁷ *See infra* pp. 20-21.

¹⁸ *See Patten*, 136 So. at 355.

¹⁹ *See id.*

²⁰ *In re: Moriarty*, 27 B.R. 73 (Bankr. M.D. Fla. 1983).

²¹ *Refco, Inc. v. Sarmiento*, 487 So. 2d 75 (Fla. 3d D.C.A. 1986); *In re: Schlein*, 8 F.3d 745 (11th Cir. 1993); *In re Branscum*, 229 B.R. 32 (Bankr. M.D. Fla. 1999); *In re: Braddy*, 226 B.R. 479 (Bankr. N.D. 1998).

²² *Schlein*, 8 F.3d 745.

²³ *Id.* at 754.

²⁴ *Id.*

²⁵ *Id.* at 755.

²⁶ *See id.* at 754.

²⁷ *Sarmiento*, 487 So. 2d 75; *In re: Moriarty*, 27 B.R. 73.

²⁸ *Schlein*, 8 F.3d at 756.

²⁹ *See Glickman*, 126 B.R. at 126.

³⁰ *See Manning*, 163 B.R. at 382.

³¹ *Id.*

³² *Zamora*, 187 B.R. at 784.

³³ *Id.*

³⁴ *See id.* at 785.

³⁵ *Id.*

³⁶ *Harrison*, 216 B.R. at 454.

³⁷ *See id.*

³⁸ *See id.*

³⁹ *See id.* at 455.

⁴⁰ 26 U.S.C. §§6651 and 6656.

⁴¹ 26 U.S.C. §§3301(a), (b) and 3111(a), (b).

⁴² Rev. Rul. 59-221, 1959-1 C.B. 225.

⁴³ Rev. Rul. 74-44, 1974-1 C.B. 277; *Joseph Radtke v. U.S.*, 712 F. Supp. 143 (E.D. Wisc. 1989).

⁴⁴ Employment Tax Handbook 104.6, §5.8.1 (04/21/1999) (IRS Handbook); Independent Contractor or Employee? Training Materials, IRS Training Course 3320-102, TPDS 842381 (Oct. 30, 1996) (IRS Training Course).

⁴⁵ CAL. CIV. PROC. CODE §706.010 *et seq.*

⁴⁶ *Id.*

⁴⁷ *Carter*, 182 F.3d at 1031.

⁴⁸ *Id.* at 1032.

⁴⁹ *Id.* at 1033.


⁵⁰ *Schlein*, 8 F.3d at 756.

⁵¹ *See Idaho Ambucare Center, Inc. v. U.S.*, 57 F. 3d 752, 755 (9th Cir. 1995); *Spicer Accounting, Inc. v. U.S.*, 918 F. 2d 90, 93 (9th Cir. 1990).

⁵² *Brock v. Westport Recovery Corporation*, 832 So. 2d 209 (Fla. 4th D.C.A. 2002) (following *Manning* and *Zamora*).

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