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ERISA: Anti-Alienation Superiority in Bankruptcy

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ERISA: ANTI-ALIENATION SUPERIORITY IN BANKRUPTCY

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I. INTRODUCTION

The recent increase in bankruptcy litigation over the proper treatment of a debtor-participant's interest in a pension plan indicates that few bankruptcy trustees understand the plan administrator's problem when confronted with a turnover demand. Whether a court excludes such interests from the bankrupt's estate is at the heart of the efficacy of the Employee Retirement Income Security Act of 1974 (ERISA).[1] This decision determines whether the policy fostering private retirement funds for retirement succeeds or fails. Unless the courts adopt the analysis set forth in this Article, ERISA will encompass a hodge-podge of state laws rather than the uniform federal law mandated by Congress to protect retirement funds and to expand the private pension system.

This Article begins by explaining the problem currently facing plan administrators. Second, it examines the relevant ERISA provisions, especially those dealing with alienation of benefits and compatibility with federal law.[2] Third, the Article discusses the policy objectives of ERISA, and the relevant Bankruptcy Code[3] provisions, especially those dealing with exclusions from, and exemptions for, the debtor-participant's estate.[4] Fourth, the Article explains the policy objectives of the Bankruptcy Code. Fifth, it discusses the current lack of uniformity in the treatment of plan interests by the various circuit, district, and bankruptcy courts that have dealt with the situation. Many courts have perceived a conflict between these provisions of ERISA and the Bankruptcy Code. This Article then performs the reasoning that the courts should adopt to resolve the

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1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).
2. 29 U.S.C. §§ 1056(d)(1), 1144(d) (1988).
3. Pub. L. No. 95-598, 92 Stat. 2651 (1978) (codified as amended in 11 U.S.C. §§ 101-1330 (1988)).
4. 11 U.S.C. §§ 522, 541 (1988).

erroneously perceived conflict between ERISA and the Bankruptcy Code. Finally, it concludes that both ERISA and the Bankruptcy Code mandate that courts exclude employee plan interests subject to the anti-alienation provision from the debtor-participant's estate. This approach will insure the uniform law of employee benefit plans, encourage their growth, and provide that fresh start intended for debtor-participants in the Bankruptcy Code.

II. THE DILEMMA

When a bankruptcy filing by a debtor-participant for liquidation under Chapter 7[5] or rehabilitation under Chapter 13[6] occurs, the plan administrator receives a turnover demand for the debtor-participant's interest in the plan from the debtor-participant's bankruptcy trustee.[7] Chapter 7 provides the debtor-participant future

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5. 11 U.S.C. §§ 701-66 (1988). For a liquidation under Chapter 7, the bankrupt's estate is created immediately at the time of filing and does not increase subsequently for property acquired later by the bankrupt. *Id.* § 541. A Chapter 7 filing may be made voluntarily by the bankrupt or involuntarily by his creditors. *Id.* §§ 301, 303.

6. 11 U.S.C. §§ 1301-30 (1988). For a rehabilitation under Chapter 13, the bankrupt's estate is kept open so that it can increase subsequent to the time of filing by the acquisition of after-acquired property by the bankrupt. *Id.* § 1306(a)(1). A Chapter 13 filing may only be made voluntarily by the bankrupt. *Id.* §§ 301, 303. A debtor may not use Chapter 13 unless he has regular income with less than $100,000 in unsecured debts and $350,000 in secured debts. *Id.* § 109(e). This requirement can eliminate professionals if they permit entry of a malpractice judgment against them before filing for bankruptcy.

Chapters 1, 3, & 5 of the Bankruptcy Code, dealing with general provisions, case administration, creditors, debtors, and the estate, apply equally to both Chapter 7 liquidations and Chapter 13 rehabilitations. *Id.* § 103. Thus the exclusions and exemptions should apply to a Chapter 7 liquidation and a Chapter 13 rehabilitation similarly.

A study conducted in 1983 indicated that the reasons given for declaring bankruptcy in both Chapter 7 and Chapter 13 proceedings were increases in cost of living (67% of Chapter 7 respondents and 72% of Chapter 13 respondents), unemployment (36% of Chapter 7 respondents and 34% of Chapter 13 respondents), and unusual medical bills (36% of Chapter 7 and Chapter 13 respondents). COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY, BANKRUPTCY REFORM ACT OF 1978—A BEFORE AND AFTER LOOK 15-16 (1983).

7. The bankruptcy trustee ascertains the role of the plan administrator from the debtor-participant's list of creditors and schedule of assets. The Bankruptcy Code requires this filing. 11 U.S.C. § 521(1) (1988). Schedules are required for this filing, under the Bankruptcy Code. *Id.* app. Rule 1007. The Schedules provide for a listing with addresses of priority creditors on Schedule A-1, secured creditors on Schedule A-2, and unsecured creditors on Schedule A-3. *Id.* app. Form 6. The debtor-participant also lists his realty on Schedule B-1, his personalty on Schedule B-2, his property held by third parties with addresses on Schedule B-3, and the property that he claims as exempt under section 522 of the Bankruptcy Code on Schedule B-4. *Id.* He should list interests in an employee benefit plan, since they are held by a third party, on Schedule B-3. From this schedule, the bankruptcy

income protection, along with protection of exempt assets, by discharging some of his existing debts in exchange for a liquidation of some of his assets.[8] Chapter 13 provides the debtor-participant asset protection along with partial income protection by discharging more of his existing debts than in a Chapter 7 liquidation. In exchange for this protection under Chapter 13, the debtor-participant pledges a portion of his disposable income over a time-period of several years pursuant to a rehabilitation plan.[9]

For a certain class of employee benefit plans, compliance with this turnover demand results in several undesirable consequences: (1) the administrative and accounting costs of the plan increase; (2) the plan administrator faces liability for breach of fiduciary duty; and (3) the plan risks losing its favorable taxation treatment. Non-compliance with the turnover demand forces the debtor-participant to face a determination of his plan rights in a non-jury trial by an

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trustee obtains the plan administrator's address for making the turnover demand.

If the debtor-participant believes that the plan interests are excluded from the bankruptcy estate, he might omit them from the Schedules. When a creditor later discovers this property, he may make a motion to reopen the case so the new bankruptcy trustee may make the turnover demand of the plan administrator. *Id.* §§ 350(b), app. Rule 5010. This is a risky procedure for the debtor-participant in a Chapter 7 liquidation. This debtor- participant might have his discharge revoked for fraudulently obtaining the discharge, provided the action is brought within one year of the discharge. *Id.* § 727(d)-(e).

If the debtor-participant has claimed the plan interests as exempt property, the property is automatically exempt unless a creditor or the bankruptcy trustee objects. *Id.* §§ 522(l) (granting the privilege to parties in interest), 1109 (defining parties in interest to include creditors and the bankruptcy trustee). The bankruptcy court determines the matter of the objections to the exemption in a non-adversarial proceeding without regard to the rules of evidence. *Id.* app. Rule 4003.

The plan administrator may also be a secured creditor of the debtor-participant entitled to notice of the bankruptcy sent to all creditors listed on Schedule A by the clerk of the bankruptcy court. *Id.* app. Rule 2002. A plan may make a loan to a participant provided the loan is adequately secured. *See infra* notes 143-45 and accompanying text.

8. 11 U.S.C. § 727 (1988).

9. *Id.* § 1328 (1988 & Supp. I 1989). The normal length of a rehabilitation plan is three years. *Id.* § 1322(c). However, a court may extend it to five years. *Id.* § 1329(c).

The court will not approve a debtor-participant's rehabilitation plan unless the amount proposed to be paid to unsecured claimants is not less than what they would be paid in a Chapter 7 liquidation. *Id.* § 1325(a). Even though payments made to creditors may be the same under the two Chapters, a debtor-participant might desire to file, or convert to, Chapter 13, because the discharge is greater under Chapter 13. So two issues relating to pension plans surface in a Chapter 13 rehabilitation: (1) whether the bankruptcy trustee can use the debtor-participant's right to receive a payment from the pension plan to satisfy claims under the Chapter 13 rehabilitation plan, and (2) whether the bankruptcy trustee can use the debtor-participant's interest in the pension plan to satisfy claims under a Chapter 7 liquidation.

interested judge and to risk his interests in the plan that are reachable in no other action.

A. *The Affected Plans*

ERISA defines two types of employee benefit plans to which the turnover demand might apply: the welfare plan, which provides benefits in the nature of medical, disability, death, severance, vacation, or education benefits; and the pension plan, which provides retirement income or deferred income.[10] There are two types of pension plans: (1) the defined contribution plan, such as a profit-sharing plan, a money purchase pension plan, or a thrift plan; and (2) the defined benefit plan.[11] The turnover demand only affects the plan administrator of a pension plan. The plan administrator of a welfare plan can safely comply with the turnover demand under ERISA.

The plan administrator of a pension plan, not well versed in the Bankruptcy Code but knowledgeable in ERISA, will refuse the turnover demand. ERISA specifically provides that the plan administrator, as a fiduciary of the plan,[12] must comply with the plan's terms,[13] else he breaches his fiduciary duty for which he could be monetarily liable.[14] One of those plan terms is the anti-alienation provision required of certain pension plans by ERISA.[15] This provision prohibits the assignment or alienation of plan interests. Similarly, the ERISA portion of the Internal Revenue Code requires the same provision[16] for plan qualification to obtain favorable tax treatment. The employee pays income tax only upon actual receipt of his benefit, typically years after receipt by the plan.[17] The employer then gets a deduction for contributions, when made to the plan,[18]

10. 29 U.S.C. § 1002(1)-(3) (1988).
11. *Id.*
12. *Id.* §§ 1002(16), 1102.
13. *Id.* § 1104(a)(1)(D).
14. *Id.* § 1109(a).
15. *Id.* § 1056(d)(1).
16. 26 U.S.C. § 401(a)(13) (1988).
17. *Id.* § 402(a) (income tax on receipt); 29 U.S.C. § 1056(a) (1988 & Supp. I 1989) (receipt may be on latter of separation or retirement).
18. 26 U.S.C. § 404(a) (1988).

and the plan pays no tax on the contribution or on any income it makes on the contribution.[19]

This anti-alienation provision does not apply to all pension plans. ERISA specifically exempts the following from this requirement: unfunded, deferred compensation plans for highly-compensated employees; plans maintained by fraternal societies; plans maintained by voluntary employee benefit associations; certain pre-1959 plans funded by employees; labor organization plans without employer contributions; plans for payments to retired or deceased partners; individual retirement accounts; individual retirement annuities; excess benefit plans; and certain pre-1974 plans that replace terminated plans.[20] ERISA itself does not cover governmental plans, church plans that have not opted into ERISA, workers' compensation plans, plans for nonresident aliens, and unfunded excess benefit plans.[21]

B. *The Undesirable Consequences Under ERISA*

The anti-alienation provision should preclude the plan administrator's compliance with the bankruptcy trustee's turnover demand. The courts have confirmed this interpretation of the anti-alienation provision when a creditor in a nonbankruptcy situation makes the analogous turnover demand.[22]

The real problem deals with payment of the benefit. The debtor-participant does not receive his benefit until the latter of severance

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19. *Id.* § 501(a).

20. 29 U.S.C. § 1051 (1988 & Supp. I 1989).

Litigants have suggested the same principle that applies to ERISA-qualified plans with respect to anti-alienation should also apply to individual retirement accounts (IRAs), but have generally lost since the law does not require IRAs to have anti-alienation provisions. *E.g.*, Smith v. Winter Park Software, Inc., 504 So. 2d 523, 524 (Fla. Dist. Ct. App. 1987); Halliburton Co. v. Mor, 555 A.2d 55, 56 (N.J. Super. Ct. Law Div. 1988); Long Island Jewish Hillside v. Pendergast, 509 N.Y.S.2d 697, 699 (N.Y. Sup. Ct. 1986); Rowland v. Strickland, 362 S.E.2d 892, 893 (S.C. Ct. App. 1987). *But see* Citizens Bank of Ashburn v. Shingler, 326 S.E.2d 861, 861-62 (Ga. App. 1985) (court erroneouly concludes ERISA anti-alienation provision applies to IRAs); Mallory v. Mallory, 432 A.2d 950, 952 (N.Y. Super. Ct. Ch. Div. 1981) (dicta); Edwards v. Edwards, 713 S.W.2d 642, 647-48 (Tenn. 1986) (same; but then permits a domestic relations order exception), *appeal dismissed and cert. denied* 479 U.S. 1024 (1987). *See also* Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1225 (8th Cir. 1987) (IRA has no spendthrift provision (bankruptcy case)); Bartlett Co-op. Ass'n v. Patton, 722 P.2d 551, 556 (Kan. 1986) (not exempt from state garnishment laws). *See generally* Lohwater, *Who Can Attack Your IRA*, NAT'L L.J., Apr. 19, 1982, 22.

21. 29 U.S.C. § 1003 (1988 & Supp. I 1989).

22. *See infra* notes 73-74 and accompanying text.

or retirement.[23] If bankruptcy occurs before this event, some courts hold that the bankruptcy trustee has no greater rights than the debtor-participant.[24] In such a case, the bankruptcy trustee would obtain only funds presently available to the debtor-participant from the pension plan, such as possibly a hardship withdrawal or a plan loan.[25] If bankruptcy occurs after this event, if the bankruptcy estate remains open until it occurs,[26] or if the bankruptcy court treats the interest as an asset assignable to one or more of the creditors,[27] then how should courts determine the division of the interest and its payment? Courts are incapable of solving this problem alone since it depends on the specific plan's provisions including vesting schedules.[28]

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23. 29 U.S.C. § 1056(a) (1988 & Supp. I 1989).

24. *E.g.*, American Nat'l Bank v. Huff (*In re* Huff), 61 B.R. 678, 684-85 (N.D. Ill. 1986) (bankruptcy trustee cannot compel turnover of pension assets if debtor cannot); Schechter v. Balay (*In re* Balay), 113 B.R. 429, 443-46 (Bankr. N.D. Ill. 1990) (same); Christison v. Slane (*In re* Silldorff), 96 B.R. 859, 866 (C.D. Ill. 1989) (same); Halverson v. Micro, Inc. (*In re* Loe), 83 B.R. 641, 646 (Bankr. D. Minn. 1988) (same); Gray v. Ingles Markets, Inc. Employees' Stock Bonus Plan & Trust (*In re* DeWeese), 47 B.R. 251, 256 (Bankr. W.D.N.C. 1985) (same); *see also In re* Brooks, 60 B.R. 155, 160 (Bankr. N.D. Tex. 1986) (suggesting bankruptcy trustee cannot reach segregated account in pension plan by a turnover order), *aff'd sub nom.* Brooks v. Interfirst Bank, 844 F.2d 258 (5th Cir. 1988). *Contra* Humphrey v. Buckley (*In re* Swanson), 873 F.2d 1121, 1125 (8th Cir. 1989) (affirming turnover order without addressing issue of availability); Watson v. Kincaid (*In re* Kincaid), 96 B.R. 1014, 1021 (Bankr. 9th Cir. 1989) (same), *rev'd*, 917 F.2d 1162 (9th Cir. 1990); Magill v. Lyons (*In re* Lyons), 114 B.R. 572, 578 (Bankr. C.D. Ill. 1990) (to avoid keeping the case open), *rev'd*, 118 B.R. 634 (C.D. Ill. 1990); Morrison v. Rouleton (*In re* Smith), 103 B.R. 882, 883 (Bankr. N.D. Ohio 1989).

25. *See infra* notes 141-45 and accompanying text. *See also* Parkinson v. Bradford Trust Co. of Boston (*In re* O'Brien), 50 B.R. 67, 79 (E.D. Va. 1985) (ordering a Keogh plan terminated and moneys withdrawn per plan provisions).

26. *See* Magill v. Lyons (*In re* Lyons), 114 B.R. 572, 578 (Bankr. C.D. Ill. 1990) (in Chapter 7 case for state retirement system, court ordered turnover of pension-plan moneys to avoid payment to creditors 30 years hence); *In re* Miller, 33 B.R. 549, 553 n.11 (Bankr. D. Minn. 1983) (in Chapter 7 case, court speculated if pension-plan interests were not exempt, trustee would have to keep case open indefinitely).

27. *See* Halverson v. Micro, Inc. (*In re* Loe), 83 B.R. 641, 646 (Bankr. D. Minn. 1988) (ordering turnover of pension-plan moneys only as they become available to the debtor); Gray v. Ingles Markets, Inc. Employees Stock Bonus Plan & Trust (*In re* DeWeese), 47 B.R. 251, 256 (Bankr. W.D.N.C. 1985) (directing the trustee to abandon or liquidate the nominal present value of an interest in a pension plan).

28. *See* Clark v. O'Neill (*In re* Clark), 711 F.2d 21, 23 n.2 (3d Cir. 1983) (dicta; include only the vested portion); Samore v. Independent Pension Services, Inc. (*In re* McKenna), 58 B.R. 221, 223-24 (Bankr. N.D. Iowa 1985) (include only the vested portion); Parkinson v. Bradford Trust Co. of Boston (*In re* O'Brien), 50 B.R. 67, 79-80 (Bankr. E.D. Va. 1985) (self-employed debtor's post-petition contributions to a Keogh plan, plus earnings thereon, not included in Chapter 7 estate but

Defined contribution plans might require separate accounting to insure subsequent employer contributions and earnings do not inure to the creditors. Most such plans do not have provisions authorizing separate accounting since ERISA does not generally require them. Defined benefit plans might require formulae for dividing the accrued benefit. Such formulae would depend on how the plan accrues benefits.

Congress solved this problem for divorce courts through the qualified domestic relations order (QDRO).[29] ERISA now requires pension plans to have provisions authorizing procedures for handling and reviewing QDROs and requiring plan administrator approval before they can become effective. This insures the order does not require payments of more than the participant's portion of his accrued benefit in improper payment forms and times.[30] However, Congress deemed the added cost of the plan administrator's review of a QDRO (typically requiring an attorney), and the additional accounting, worthwhile for a previous plan beneficiary (a spouse or dependent).[31] Congress may not conclude similarly for numerous improvident, but otherwise wealthy, undeserving creditors.

Since compliance with the bankruptcy trustee's turnover demand violates ERISA's anti-alienation provision, a complying plan ad-

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earnings on prepetition contributions are included). *See generally*, Donna Litman Seiden, *The Bankruptcy Code and ERISA: Do They Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can Be Used to Satisfy Claims and Expenses?*, 3 BANKR. DEV. J. 1, 85-92 (1986) (hereinafter Seiden, *The Bankruptcy Code*), *reprinted in*, Seiden, *Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can Be Used to Pay Claims?* (pts. 1 & 2), 61 AM. BANKR. L.J. 219 (1987), 61 AM. BANKR. L.J. 301, 326-32 (1987) (hereinafter Seiden, *Chapter 7 cases*).

29. 29 U.S.C. § 1056(d)(3) (1988 & Supp. I 1989).

30. *Id.* § 1056(d)(3)(D), (G).

31. *See, e.g.*, S. REP. No. 575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547 [hereinafter S. REP. No. 575] ("[t]o provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home. . . ."); *see also* 29 U.S.C. § 1001(a) (1988 & Supp. I 1989) (purpose of ERISA is to provide security for both the participant and his dependents, conspicously leaving out creditors); Craig Westbrook, *Retirement Plan Assets in Arkansas Bankruptcy*, 43 ARK. L. REV. 253, 288-89 (1990) (calling for an amendment to ERISA's anti-alienation provision for a Qualified Bankruptcy Order); Charles G. Huber, Jr., Note, *ERISA, Employees, and Creditors Rights: A Search for a Consistent Theme*, 67 WASH. U. L.Q. 461, 486-87 (1989) (same).

ministrator would be liable to make the plan whole again.[32] Any participant, beneficiary, fiduciary, or the Secretary of Labor, may bring such an action.[33] The plan administrator would then repay an amount equal to the amount transferred to the bankruptcy trustee.[34] This merely shifts the payment to the creditors from the debtor-participant to the plan administrator.

However, a far greater danger for the plan exists. Compliance with the turnover demand could jeopardize the plan's tax qualified status, thereby adversely affecting all participants. The Internal Revenue Service enforces rules against violation of those plan terms required for qualification under the ERISA portion of the Internal Revenue Code;[35] ERISA's anti-alienation provision is one such requirement.[36] Disqualification of a plan results in taxation of the plan assets, once as a trust[37] and again in the hands of all participants.[38] The Internal Revenue Service has stated it would bring such an action if a plan administrator violated the anti-alienation provision through compliance with a turnover demand.[39] This could jeopardize the further existence of all plans. Employers would become extremely reluctant to establish or continue plans whose benefits could vanish for circumstances beyond the sponsor's control. Such circumstances could create potentially large tax liabilities for the highly-compensated management employees unable to reach plan funds to pay the tax due to other plan provisions.[40]

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32. 29 U.S.C. § 1109 (1988).

33. *Id.* § 1132(a)(3), (5).

34. *See, e.g.*, Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985) (plan can recover as a whole under § 409(a), not the beneficiary); Call v. Sumitomo Bank of Cal., 881 F.2d 626, 632-33 (9th Cir. 1989) (cause of action exists for plan for loss on unsecured real estate investment); Kim v. Fujikawa, 871 F.2d 1427, 1429-31 (9th Cir. 1989) (prohibited transaction payments made to administrator reimbursed to plan); Lowen v. Tower Asset Mangement, Inc., 829 F.2d 1209, 1221 (2d Cir. 1987) (investment manager liable to reimburse fees to plan for prohibited transaction).

35. 26 U.S.C. §§ 402(b), 404(a)(5) (1988).

36. *Id.* § 401(a)(13); 26 C.F.R. § 1.401(a)-13 (1990).

37. Rev. Rul. 74-299, 1974-1 C.B. 154 (disqualified trust taxed as general trust and must maintain separate accounts to allocate beneficiaries' share in net trust assets and income).

38. 26 U.S.C. § 402(b) (1988) (contributions made to a previously qualified plan, but now a disqualified plan, are included in the employee's gross income for the year in which his rights to the contributions become substantially vested). The employer may lose partially its current deduction. *Id.* § 404(a)(5) (employer's deduction for contributions made to a disqualified plan occurs when employee includes the contribution in his gross income).

39. *See infra* note 76 and accompanying text.

40. *E.g.*, 29 U.S.C. § 1056(a) (1988 & Supp. I 1989) (permitting plan prohibition of payment

Moreover, plan administrators regard turnover demands as bothersome. Under ERISA, their duties flow to all the plan beneficiaries, not to some third party requiring an explanation of ERISA. Depending on the federal circuit,[41] the response to these demands may require detailed knowledge of state law. Rather than have the plan attorney investigate the appropriate state law, however, many plan administrators merely respond with a form letter prepared by the plan's attorney, stating that the plan interest is excluded from the bankrupt's estate and citing a few favorable cases. At any rate, the response letter serves only to drive up the cost of administering the plan with no added benefit to all plan participants.

C. *The Effect on the Debtor-Participant*

The plan administrator of the ERISA-qualified pension plan will then receive notice for an adversarial proceeding concerning the turnover of the debtor-participant's plan interest in the custodianship of the plan administrator.[42] The bankruptcy trustee brings this action — effectively one to clarify rights to future benefits under the plan — in bankruptcy court[43] and not in state or federal district court as required by ERISA.[44] The significance of this difference lies with

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until the latter of separation or retirement).

The possibility of employers terminating plans is significant. A survey made in 1990 by the National Institute of Pension Administrators indicates that 46% of small businesses terminated their plans the three preceding years due to the lowered contribution caps caused by amendments made in 1986. New York Times Service, *Paranoia in Pensions: High Cost of Employee Plans Scaring Off Many Small Companies*, SAN ANTONIO EXPRESS NEWS, June 3, 1991, at 1-C. Consequently, the Bush Administration has proposed the Pension Opportunities for Workers' Expanded Retirement Program to provide small businesses with simplified preapproved pension plans calling for employer contributions of 2% of compensation, employee contribution up to $4200, and matching employer contributions up to 50% of employee contributions. *Id.*

41. *See infra* notes 247-82 and accompanying text.

42. *See* 11 U.S.C. § 543 (1988). The adversarial proceeding is conducted as a formal trial.

43. 28 U.S.C. § 157(b)(2)(E) (1988) (turnover proceeding is a core proceeding and may be heard by the bankruptcy judge); *see* Watson v. Kincaid (*In re* Kincaid), 96 B.R. 1014, 1016-17 (Bankr. 9th Cir. 1989) (holding that Bankruptcy Code's jurisdiction provision overrides ERISA's jurisdictional provision), *rev'd*, 917 F.2d 1162 (9th Cir. 1990).

44. 29 U.S.C. §§ 1132(a)(1)(B), (e)(1) (1988).

Under ERISA the bankruptcy trustee is not one of the parties that may bring suit. *Id.* § 1132(a). However, the trustee might have derivative standing to bring the ERISA suit on behalf of the debtor-participant. *See, e.g.*, Michael Reese Hosp. and Medical Ctr. v. Solo Cup Employee Health Benefit Plan, 899 F.2d 639, 640 (7th Cir. 1990) (plaintiff was an assignee of a beneficiary); Hermann Hosp. v. MEBA Medical & Benefits Plan, 845 F.2d 1286, 1289 (5th Cir. 1988) (an assignee of medical the possibility of jury trial in ERISA actions[45] and the lack of in-

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benefits has standing to sue); Multicare Health Care Servs., Inc. v. General Am. Life Ins. Co., 720 F. Supp. 581, 582 (N.D. Tex. 1989) (assignee of benefit had derivative standing to sue); Kennedy v. Deere & Co., 492 N.E.2d 199, 202 (Ill. App. Ct. 1986) (same), *aff'd* and *remanded on other grounds*, 514 N.E.2d 171 (1987), *cert. denied*, 484 U.S. 1064 (1988). *See generally* David P. Kallus, *ERISA: Do Health Care Providers Have Standing to Bring a Civil Enforcement Action under Section 1132(a)?*, 30 SANTA CLARA L. REV. 173 (1990). Pension plans, unlike the welfare plans described in the above cases, involve ERISA's anti-alienation provision, which would prevent derivative standing as an assignee.

45. *See* George Lee Flint, Jr. *ERISA: Jury Trial Mandated for Benefit Claims*, 25 LOY. L.A. L. REV. 361 (1992). ERISA actions in state court generally permit jury trial under a state constitutional provision despite ERISA preemption of state law. *E.g.*, Overcash v. Blue Cross & Blue Shield, 381 S.E.2d 330, 338 (N.C. Ct. App. 1989). In other state cases, the parties do not question the right. *E.g.*, Herbst v. Humana Health Ins., Inc., 781 P.2d 762, 763 (Nev. 1989); Felts v. Graphic Arts Employee Benefit Trust, 680 S.W.2d 891, 892-93 (Tex. Ct. App. 1984). Other state courts follow the federal district court decisions permitting jury trials. *E.g.*, Walker v. Sperry & Hutchinson Co., 544 N.Y.S.2d 958, 959-60 (Sup. Ct. 1989); Fuller v. INA Life Ins. Co., 533 N.Y.S.2d 215, 217-18 (Sup. Ct. 1988). *Contra* Pfeiffer v. Roux Labs, 547 So. 2d 1271, 1272 (Fla. Dist. Ct. App. 1989).

Federal courts generally find no right to a jury trial for benefit lawsuits under ERISA because the suit is an equitable action or may involve legal questions only. *E.g.*, Cox v. Keystone Carbon Co., 894 F.2d 647, 649-50 (3d Cir. 1990) (equitable), *cert. denied*, 111 S. Ct. 47 (1990); Pane v. RCA Corp., 868 F.2d 631, 636 (3d Cir. 1989) (equitable); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir. 1988) (following equitable precedent), *cert. denied*, 488 U.S. 826 (1988); Nevill v. Shell Oil Co., 835 F.2d 209, 213 (9th Cir. 1987); Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan, 797 F.2d 521, 527 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); Turner v. CF & I Steel Corp., 770 F.2d 43, 47 (3d Cir. 1985) (equitable), *cert. denied*, 474 U.S. 1058 (1986); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985) (not a fact question); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984) (following equitable precedent), *cert. denied*, 474 U.S. 865 (1985); *In re* Vorpahl, 695 F.2d 318, 319-20 (8th Cir. 1982) (equitable); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980) (not a fact question); Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980) (equitable), *cert. denied*, 449 U.S. 1112 (1981).

However some federal district courts have permitted trial by jury in an ERISA action, viewing it as legal in nature. *E.g.*, Puz v. Bessemer Cement Co., 700 F. Supp. 267, 268 (W.D. Pa. 1988) (contractual in nature); Abbarno v. Carborundum Co., 682 F. Supp. 179, 181-82 (W.D.N.Y. 1988) (legal question); Bower v. Bunker Hill Co., 114 F.R.D. 587, 597-98 (E.D. Wash. 1986) (contractual in nature); Paladino v. Taxicab Indus. Pension Fund, 588 F. Supp. 37, 39 (S.D.N.Y. 1984) (legal question); Pollock v. Castrovinci, 476 F. Supp. 606, 609 (S.D.N.Y. 1979) (legal question), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980); Stamps v. Michigan Teamster Joint Council No. 43, 431 F. Supp. 745, 747 (E.D. Mich. 1977) (legal question). *See generally* Comment, *The Right to Jury Trial in Enforcement Actions under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737 (1983) (explaining the two grounds for denial as: (1) viewing the arbitrary and capricious review standard as a legal question and not a fact question, and (2) viewing the matter as an equitable one because it involves a trust).

Bankruptcy courts generally deny jury trials for core proceedings such as turnover actions. *E.g.*, Kaiser Steel Corp. v. Frates (*In re* Kaiser Steel Corp.), 911 F.2d 380, 389-92 (10th Cir. 1990) (in a core adversary proceeding for the turnover of fraudulently transferred assets, the bankruptcy court does not have authority to conduct a jury trial); *In re* United Missouri Bank of Kansas City, 901 F.2d 1449, 1454-57 (8th Cir. 1990) (in a core adversary proceeding to recover a preference, the bankruptcy court has neither express nor implied authority to conduct a jury trial); *see In re* Cinematronics, Inc., 916 F.2d 1444, 1451 (9th Cir. 1990) ("[B]ankruptcy courts cannot conduct jury trials on noncore dependence on the part of bankruptcy judges.[46] The bankruptcy courts have muddled the law since the passage of the Bankruptcy Code in 1978 as to whether they will decide in favor of the plan administrator's adherence to the anti-alienation provision under ERISA or the bankruptcy trustee's turnover demand under the Bankruptcy Code. In some federal circuits, the outcome depends on which state law applies under the law of the state where the bankruptcy is filed.[47] This surprises the plan administrator, since he has become accustomed to the uniformity of pension law as mandated under ERISA.[48] Moreover, most of the courts that have confronted the issue of the compatibility of ERISA and the Bankruptcy Code have permitted alienation of some, if not most, of the debtor-participant's plan benefits[49] — a result not permitted in the absence of the bank-

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matters, where the parties have not consented."); Beard v. Braunstein, 914 F.2d 434, 443 (3d Cir. 1990) ("Accordingly a bankruptcy court cannot conduct a jury trial in a noncore proceeding."). *Contra* Ben Cooper, Inc. v. Insurance Company of the State of Pennsylvania (*In re* Ben Cooper, Inc.), 896 F.2d 1394, 1401-02 (2d Cir.) (sustaining a jury trial in bankruptcy court in a core proceeding), *cert. granted*, 110 S. Ct. 3269, *and vacated and remanded* 111 S. Ct. 425 (1990).

46. Bankruptcy judges, Article I (of the U.S. Constitution) judges, are appointed by the circuit judges, 28 U.S.C. § 152 (1988), and do not receive the benefit of life-tenure and salary protection during their term as do federal district judges, who are Article III judges. *See* U.S. CONST. art. III; 28 U.S.C. §§ 134-35 (1988). *See generally* David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983). Because of this lack of independence, the quality of the bankruptcy judges lags behind that of federal district judges. *See* Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1051-52 (7th Cir. 1984) (Posner, J., dissenting).

47. *See infra* notes 247-82 and accompanying text.

48. *See infra* notes 109-25 and accompanying text.

49. *See infra* notes 229-82 and accompanying text.

The result has engendered many articles. *See, e.g.*, Edward W. Brankey & Frank P. Darr, *Debtor Interests in Pension Plans as Property of the Debtor's Estate*, 28 AM. BUS. L.J. 275, 303-05 (1990) (calling for the courts to retain their present control test for determining spendthrift trusts but to place more weight on ERISA's policies in order to afford relief to participants in pension plans that are not self-settled but permit employee contributions); Darrell Dunham, *Pensions and Other Funds in Individual Bankruptcy Cases*, 4 BANKR. DEV. J. 293, 396 (1987) (approving of state spendthrift trust analysis); John Minton Newell, *ERISA Retirement Plans in Individual Bankruptcy*, 19 U. MICH. J.L. REF. 183, 191-99, 236-37 (1985) (setting forth the case for exclusion on the basis of state spendthrift law); Seiden, *The Bankruptcy Code*, *supra* note 28, at 124, *reprinted in* Seiden, *Chapter 7 Cases*, *supra* note 28, at 339 (calling for a bankruptcy clarifying amendment to exclude pension-plan interests except current rights to withdraw any portion in order to achieve uniformity); Laurence B. Wohl, *Pension and Bankruptcy Laws: A Clash of Social Policies*, 64 N.C. L. REV. 3, 32-36 (1985) (proposing that courts divide the plan interests into two components—the tax deferred investment portion would be includable and the amount needed for reasonable needs upon retirement would be excluded or exempted); James H. Erlinger III, Note, *Creditor's Rights in Bankruptcy to Qualified Retirement Benefits*, 53 UMKC L. REV. 626, 644-45 (1985) (calling for a bankruptcy amendment to permit an exclusion for interests in pension plans reasonably necessary for support); Elynn Lambert, Note, ruptcy action.[50] Thus, a creditor cannot reach a debtor's plan interest unless and until he forces the debtor into bankruptcy — a result encouraging involuntary bankruptcy litigation.[51] The Supreme Court does not favor this result and has mandated keeping the substantive law of bankruptcy the same as debtor-creditor law in general.[52]

III. The Applicable ERISA Provision

The lawyers and judges responsible for muddling the joint interpretation of ERISA and the Bankruptcy Code neglected the basic statutory interpretation standard: effectuate the intent of the leg-

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ERISA Plans as Property of Individuals' Bankruptcy Estates, 5 Cardozo L. Rev. 685, 710-711 (1984) (advocating court bifurcation of plan interests, with inclusion of that portion not truly spendthrift determined under state law); Nancy Roetman Menzel, Note, *Corporate Pension Plans as Property of the Bankruptcy Estate*, 69 Minn. L. Rev. 1113, 1134 (1985) (approving use of state spendthrift law); Alana K. Michelson, Note, *The Individual Debtor's Interest in ERISA Benefits: Is it Property of the Estate? Is it Exempt?*, 2 Bankr. Dev. J. 293, 315-16 (1985) (calling for a bankruptcy amendment to permit an exclusion for interests in pension plans reasonably necessary for support); Daniel Spitzer, Note, *Contra Goff: Of Retirement Trusts and Bankruptcy Code § 541(c)(2)*, 32 UCLA L. Rev. 1266, 1328 (1985) (developing a federal spendthrift trust law to include some pension-plan interests in the estate).

All of these proposals, except that of Seiden, involve uncertain standards (control tests, spendthrift trust tests, or support tests) that are too complex for a plan administrator to handle and which violate ERISA's anti-alienation provision and, in some cases, ERISA's preemption provision, all contrary to the statutory interpretation canon to interpret two statutes harmoniously. Seiden's standard violates ERISA's anti-alienation provision.

50. *See infra* notes 73-74 and accompanying text.

51. *See* Newell, *supra* note 49, at 216-22 (noting the anomaly between different treatment of the same problem under bankruptcy law and nonbankruptcy law).

One of the goals of the Bankruptcy Act was to encourage rehabilitation of debtors under Chapter 13. *E.g.*, Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I, 157-67 (1973) [hereinafter H.R. Doc. No. 137]; S.R. Rep. No. 989, 95th Cong., 2d Sess. 12-13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5798-99 [hereinafter S. Rep. No. 989]. Since Chapter 13 cases are voluntary, the interaction of ERISA and the Bankruptcy Act, as interpreted by these courts, thwarts the purposes of the Bankruptcy Code by increasing involuntary Chapter 7 cases at the expense of possibly a voluntary Chapter 13 filing. The debtor-participant, however, has the right to convert to Chapter 13. 11 U.S.C. § 706(a) (1988).

52. Butner v. United States, 440 U.S. 48, 55 (1979) ("Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"); Lewis v. Manufacturers Nat'l Bank, 364 U.S. 609, 609 (1961) (same).

Debtor-creditor law prohibits garnishment of funds in the hands of the plan trustee regardless of a right to a distribution. *E.g.*, Tenneco v. First Va. Bank, 698 F.2d 688, 690 (4th Cir. 1983); *see infra* note 74 and accompanying text.

islature.[53] Congress passed ERISA with several purposes in mind: (1) to insure that workers received their promised retirement benefits; (2) to preserve the federal law relating to pension plans not included within ERISA; (3) to foster development of a uniform federal law governing the pension system; and (4) to encourage the growth of the private pension system. Most lawyers representing the parties in the bankruptcy-pension dispute have overlooked the overall purposes of ERISA to focus on two ERISA provisions. ERISA attorneys focus on the anti-alienation provision that prohibits transfers from certain pension plans.[54] In contrast, bankruptcy attorneys focus on the compatibility provision that leaves other federal law intact,[55] meaning the superiority of the Bankruptcy Code in the event of a conflict.

A. *Anti-Alienation Provision: To Insure the Availability of Retirement Funds*

The impetus for ERISA's passage was the plight of the retiree who had lost his pension benefits prior to retirement.[56] To prevent such horror stories in the future, Congress developed, through ERISA, a comprehensive scheme to protect those benefits.[57] The first

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53. *E.g.*, United States v. N.E. Rosenblum Truck Lines, 315 U.S. 50, 55 (1942) (the all-important controlling factor in determining the meaning of a statute is legislative intent); United States v. Stone & Downer Co., 274 U.S. 225, 239 (1927) (same); Eber v. Poston, 266 U.S. 548, 554 (1925) (same); Wisconsin Cent. R.R. v. Forsythe, 159 U.S. 46, 55 (1895) (same); Jones v. New York Guar. & Indem. Co., 101 U.S. 622, 626 (1879) (legislative intent is the law); Indianapolis & St. Louis R.R. v. Horst, 93 U.S. 291, 300 (1876) (same); Raymond v. Thomas, 91 U.S. 712, 715 (1875) (same); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 396 (1867) (same); *see also* United States v. Cooper Corp., 312 U.S. 600, 605 (1941) (role of the court is to declare the legislative intent); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1817) (same).

54. *See infra* note 65 and accompanying text.

55. *See infra* note 90 and accompanying text.

56. *E.g.*, S. REP. No. 127, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4841 [hereinafter S. REP. No. 127]; 120 CONG. REC. 29,928 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5177 (statement of Sen. Williams); JOHN LANGBEIN & BRUCE WOLK, PENSION AND EMPLOYEE BENEFIT LAW 53-57 (1990) (describing the Studebaker Incident, a plant closing in 1963, and its impact on the pension reform movement); *see generally* David S. Preminger, et al, *What Do You Get with the Gold Watch? An Analysis of the Employee Retirement Income Security Act of 1974*, 17 ARIZ. L. REV. 426 (1975); G. Waldron Snyder, *Employee Retirement Income Security Act of 1974*, 11 WAKE FOREST L. REV. 219 (1975).

57. ERISA's Congressional declaration of policy provision provides:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . . by espart of that protective scheme was to insure that employers did not deprive employees of their benefits. Hence, ERISA contains provisions for: (1) vesting standards for prohibiting forfeitures to insure that employees receive their benefits once they meet required conditions of employment;[58] (2) defined benefit plan insurance to protect plan benefits should the employer go into bankruptcy;[59] and (3) min-

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> tablishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b) (1988), and

> It is hereby further declared to be the policy of this Chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Id. § 1001(c).

A Congressional Report on ERISA noted:

> Underlying the provisions of this Act is a recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, or the consequences of lack of adequate vesting, but also with the broad spectrum of questions such as adequacy of funding, plant shut downs and plan terminations, adequate communication to participants, and, in short, the establishment of certain minimum standards to which all private pension plans must conform . . . .

H.R. REP. No. 533, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647-48 [hereinafter H.R. REP. No. 533].

58. 29 U.S.C. §§ 1051-61 (1988); H.R. REP. No. 533, *supra* note 57, at 6, 1974 U.S.C.C.A.N. at 4644-45 ("[T]he issue . . . resolves itself into whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits that have been placed for them in a fund for retirement purposes."); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) ("'[I]f a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required . . . he [should] actually receive[] it.'" (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980)).

Forfeitures generally inure to the employer. Pre-ERISA law prohibited forfeitures from increasing the benefits any employee would otherwise receive under the plan and ERISA continued this provision for defined-benefit plans. *Compare* 26 U.S.C. § 401(a)(8) (1973) *with* 26 U.S.C. § 401(a)(8) (1988). Money-purchase pension plans and defined benefit plans generally credit forfeitures against future employer contributions, since they are also credited against the maximum contributions deductible by the employer. *See* 26 U.S.C. §§ 404(a)(1)(A) (1988) (maximum deduction determined by the funding limitation of section 412); *id.* § 412(b)(3)(B)(ii) (1988) (calculation of limit includes experience of plan, namely benefits not required for payout but funded, that are forfeitures).

59. 29 U.S.C. §§ 1301-1461 (1988); H.R. REP. No. 807, 93d Cong., 1st Sess. 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4680 [hereinafter H.R. REP. No. 807] (seeking to prevent loss of benefits upon plan termination as happened in the Studebaker Incident).

Defined benefit plans are those that promise the participant a specified benefit upon reaching retirement age. *See* 29 U.S.C. § 1002(34)-(35) (1988). Consequently, the employer funds the benefit over a number of years, thirty in some cases, placing a portion of the expected benefit in the plan each year. *Id.* § 1082. So it is possible that, in the event of a plan termination, an employer has not completely funded a particular participant's benefit and, without the insurance, the participant could lose much of his benefit.

imum funding standards to insure that employers make contributions.[60]

The second part prevents plan fiduciaries from absconding with plan funds.[61] Consequently, ERISA contains provisions for: (1) fiduciary standards to delineate minimum fiduciary duties;[62] (2) reporting to employees so they may knowledgeably enforce their rights under the plan;[63] and (3) prohibitions against self-dealing and conflict of interest transactions by fiduciaries.[64]

The third part of this protective scheme prevents the participant from using his retirement moneys for current expenditures prior to reaching retirement age when he would most need the moneys. ERISA accomplishes this by an anti-alienation provision, which mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[65] ERISA lawyers and plan administrators assert that the bankruptcy turnover order violates this provision and prevents their compliance with the turnover demand.

Under the statutory interpretation canons, the court considers the statute as a whole.[66] So the entire protective scheme is relevant

60. *Id.* §§ 1081-86; H.R. REP. No. 533, *supra* note 57, at 7, 1974 U.S.C.C.A.N. at 4645 ("Without adequate funding, a promise of a pension may be illusory and empty.").

61. *Id.* at 7, 1974 U.S.C.C.A.N. at 4645 ("Another area of concern . . . has been the course of conduct in fund transactions, the degree of responsibility required of the fiduciaries . . . and the standards of accountability they shall be governed by in the management and disposition of pension funds.").

62. 29 U.S.C. §§ 1101-14 (1988); H.R. REP. No. 533, *supra* note 57, at 57, 1974 U.S.C.C.A.N. at 4649 ("The fiduciary responsiblity section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.").

63. 29 U.S.C. §§ 1021-31 (1988); H.R. REP. No. 533, *supra* note 57, at 11, 1974 U.S.C.C.A.N. at 4649 ("[T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.").

64. 29 U.S.C. §§ 1106-08 (1988); H.R. REP. No. 533, *supra* note 57, at 13, 1974 U.S.C.C.A.N. at 4651 ("There follows a list of proscriptions which represent the most serious type of fiduciary misconduct which in one way or another has occurred in connection with some welfare or pension plans.").

65. 29 U.S.C. § 1056(d)(1) (1988).

66. *E.g.*, Richards v. United States, 369 U.S. 1, 11 (1962); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956); United States v. Boisdore's Heirs, 49 U.S. (8 How.) 113, 122 (1850); 2A JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (Norman J. Singer ed., 4th ed. 1984).

to a determination that Congress intended the anti-alienation provision to prevent loss of benefits through legal process however accomplished. The scheme prevents loss whether by employer misconduct, by fiduciary misconduct, or by employee misconduct.

The anti-alienation provision reappears in the ERISA portion of the Internal Revenue Code.[67] Since Congress gave authority to the Internal Revenue Service to define the anti-alienation provision,[68] courts have tended to follow the Internal Revenue Service's regulation expounding upon what it covers:[69] anticipation; assignment (either at law or in equity); alienation or subjection to attachment; garnishment; levy; execution or other legal or equitable process.[70] Courts, when interpreting a statute, are bound by legislative regulations issued pursuant to the delegated legislative power — unless

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67. 26 U.S.C. § 401(a)(13) (1988). This provision did not appear in the pre-ERISA Internal Revenue Code. *Compare id. with* 26 U.S.C. § 401(a) (1973).

68. H.R. REP. No. 1280, 93d Cong., 2d Sess. 359-60 (1974) *reprinted in* 1974 U.S.C.C.A.N. 5038, 5139 [hereinafter H.R. REP. No. 1280] ("Treasury is to prescribe . . . necessary regulations under the general provisions relating to participation, vesting, and funding . . . ."). The anti-alienation provision is in ERISA's participation and vesting section. *See supra* note 59 and accompanying text. *See also* Reorganization Plan No. 4 of 1978, 3 C.F.R. § 332 (1978), *reprinted in* 5 U.S.C. app. at 1374 (1988), *and in* 92 Stat. 3790 (vesting the Internal Revenue Service with authority to issue regulations with respect to all aspects of the anti-alienation rule and requiring the Department of Labor to follow those rules. *Id.* §§ 101(a), 104.).

69. *E.g.*, General Motors Corp. v. Buha, 623 F.2d 455, 462 (6th Cir. 1980); Northwest Airlines, Inc. v. Roemer, 603 F. Supp. 7, 10 (D. Minn. 1984); Commercial Mortg. Ins. Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510, 520 (N.D. Tex. 1981); *see* Baker v. Otis Elevator Co., 609 F.2d 686, 691 (3d Cir. 1979) (following 26 C.F.R. § 1.401(a)-14(c)(3) (1990) for 29 U.S.C. § 1056(a) (1988)).

Courts generally follow interpretations of the Internal Revenue Service when interpreting those portions of ERISA that correspond to Income Tax Code provisions. *E.g.*, Tulley v. Ethyl Corp., 861 F.2d 120, 125-26 (5th Cir. 1988) (deference: following 26 C.F.R. § 1.401(a)-11(b)(3) (1990) as explaining 29 U.S.C. § 1055(a) (1988)); Blessit v. Retirement Plan for Employees of Dixie Eng'g, 848 F.2d 1164, 1170-71 (11th Cir. 1988) (great deference: following 26 C.F.R. § 1.401-2(b)(1) (1990) as explaining 29 U.S.C. § 1103(c)(1) (1988)); Bance v. Alaska Carpenters Retirement Plan, 829 F.2d 820, 827 (9th Cir. 1987) (great deference: following 26 C.F.R. § 1.411(a)-7(b)(1)(ii) (1990) against a claim it is inconsistent with 29 U.S.C. § 1053(a) (1988)); Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 918 (2d Cir. 1987) (great deference: following Rev. Rul. 57-128, 1957-1 C.B. 311 as defining terms in 29 U.S.C. § 1002(32) (1988)), *cert. denied*, 485 U.S. 936 (1988)).

70. 26 C.F.R. § 1.401(a)-13(b)(1) (1991). The rule also specifies that the term includes payments to the employer of plan benefits and direct and indirect payments, whether revocable or not, of plan benefits to a third party. *Id.* § 1.401(a)-13(c). The term does not include federal tax levies and judgments, federal income tax witholdings with respect to plan benefits, certain plan recoveries of benefit payments or overpayments, plan-to-plan transfers, direct deposits to financial institutions of plan benefits, and the statutory exceptions of (1) up to 10% of benefits in pay status and (2) secured plan loans to participants. *Id.* at § 1.401(a)-13(b) to (d).

arbitrary or capricious[71] — and give great weight to interpretative regulations issued by the administrative agency charged with administration of that statute.[72] For this reason, courts, including the Supreme Court in dictum,[73] have interpreted the anti-alienation provision to include involuntary garnishment actions by third-party judgment creditors, even when the participant may withdraw the funds.[74] Concerning a third party's ability to reach pension-plan in-

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71. *E.g.*, Batterton v. Francis, 432 U.S. 416, 426 (1977) (because it is a legislative regulation and not an interpretive regulation); American Tel. & Tel. Co. v. United States, 299 U.S. 232, 235-37 (1936); *see* United States v. Mersky, 361 U.S. 431, 437-38 (1960); Atchison, T. & S.F. R.R. v. Scarlett, 300 U.S. 471, 474 (1937).

72. *E.g.*, United States v. Clark, 454 U.S. 555, 564-65 (1982); Miller v. Youakim, 440 U.S. 125, 144 (1979); New York Dept. of Social Services v. Dublino, 413 U.S. 405, 421 (1973); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973); Investment Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971); 2A SUTHERLAND, *supra* note 66, § 49.05.

73. Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 836 (1988).

74. *E.g.*, Travelers Ins. Companies v. Fountain City Fed. Credit Union, 889 F.2d 264, 266 (11th Cir. 1989) (even though plan was terminated and the benefits available in lump sum); Smith v. Mirman, 749 F.2d 181, 183-84 (4th Cir. 1984) (same); Tenneco Inc. v. First Va. Bank, 698 F.2d 688, 690-91 (4th Cir. 1983) (even though in pay-status); General Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980); Commercial Mortg. Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510, 513 (N.D. Tex. 1981) (even though sole-owner employee plan); Christ Hospital v. Greenwald, 403 N.E.2d 700, 702 (Ill. App. Ct. 1980) (even though paying pension); Peoples Fin. Co. v. Saffold, 403 N.E.2d 765, 768 (Ill. App. Ct. 1980) (same); Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav., 467 A.2d 758, 769 (Md. 1983) (same); Altimaro v. Bohn, 539 A.2d 431, 434 (Pa. Super. Ct. 1988) (even though had unfettered access to 50% of employer contribution); *see* Retirement Fund Trust of Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1283-86 (9th Cir. 1990) (state tax levy); Northwest Airlines, Inc. v. Roemer, 603 F. Supp. 7, 9-11 (D. Minn. 1984) (same). *See also* H.R. REP. No. 1280, *supra* note 68, at 280, 1974 U.S.C.C.A.N. at 5061 ("[A] plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10% of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment."). *But see* Brosamer v. Mark, 561 N.E.2d 767, 770-71 (Ind. 1990) (can get if already paid to participant without roll over into individual retirement account); Aronsohn & Springstead v. Weissman, 552 A.2d 649, 652 (N.J. Super. Ct. App. Div. 1989) (can get Keogh plan interest on theory it is not subject to ERISA), *cert. denied*, 563 A.2d 808 (N.J. 1989); Abrahams v. New York State Tax Comm'n, 500 N.Y.S.2d 965, 967 (Sup. Ct. 1986) (same).

Some courts, however, based on a literal interpretation of one statutory exception to the anti-alienation provision have held it only prohibits voluntary transfers. *See* National Bank of N. Am. v. International Bhd. of Elec. Workers, 400 N.Y.S.2d 482, 486-87 (Sup. Ct. 1977) (commenting on the exception for voluntary assignments of 10% of benefits in pay status before the Internal Revenue Service issued its regulation), *aff'd per curiam*, 419 N.Y.S.2d 127 (N.Y. App. Div. 1979), *appeal dismissed*, 397 N.E.2d 1333 (N.Y. 1979).

There are three statutory exceptions to ERISA's anti-alienation rule for (1) qualified domestic relations orders, (2) 10% of the amounts in the plan in pay status, and (3) secured plan loans to terests, there should be no difference between a judgment creditor's garnishment order and a bankruptcy trustee's turnover order.[75] The Internal Revenue Service, in private letter rulings, has so indicated.[76]

participants. 29 U.S.C. § 1056(d) (1988).

Courts have allowed several exceptions to this rule. Prior to the 1978 Internal Revenue Service regulation defining garnishment as a voluntary alienation, one court permitted a judgment creditor to garnish. *National Bank*, 400 N.Y.S.2d at 486-87. Courts have created an exception to this rule for the federal government. *E.g.*, Ratzlaff v. Carpenters Pension Trust, 813 F.2d 408 (9th Cir. 1987) (tax levy by IRS); Calhoun v. FDIC, 653 F. Supp. 1288, 1292 (N.D. Tex. 1987) (FDIC); ERISA Op. Letter No. 79-90 (1979) (IRS tax levy); *see also* 26 C.F.R. § 1.401(a)-13(b)(1) (1991) (defining tax levies out of the provision). Courts have also created exceptions for domestic relations orders, fraud on the plan, and bankruptcy. *See infra* notes 80-82 and accompanying text.

75. *See* Butner v. United States, 440 U.S. 48, 55 (1979) (to prevent forum shopping and creditor windfalls, treatment of property should be the same in bankruptcy as under debtor-creditor law); Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 608-09 (1961). *But see* Kokoszka v. Belford, 417 U.S. 642, 650-51 (1974) (making a distinction between a turnover order and a garnishment of wages where prohibition in Consumer Credit Protection Act (now 15 U.S.C. § 1671 (1988)) was intended to prevent bankruptcy). Congress, however, did not intend ERISA's anti-alienation provision to prevent bankruptcy. *See infra* note 79 and accompanying text.

76. *E.g.*, Priv. Ltr. Rul. 90-11-037 (Mar. 16, 1990) (Chapter 7); Priv. Ltr. Rul. 89-51-067 (Dec. 22, 1989) (Chapter 7); Priv. Ltr. Rul. 89-10-035 (Mar. 18, 1989) (Chapter 7); Priv. Ltr. Rul. 88-29-009 (July 30, 1988) (Chapter 13); Priv. Ltr. Rul. 81-31-020 (May 5, 1981) (Chapter 13).

Some bankruptcy courts have slighted this possibility, despite the fact that most courts follow the Internal Revenue Service's interpretation of ERISA's provisions, albeit through regulations rather than the much less authoritative private letter ruling. *See supra* note 69 and accompanying text. These courts have claimed disqualification by the Internal Revenue Service is unlikely, *In re* Gribben, 84 B.R. 494, 498 (S.D. Ohio 1988) (debtor in Chapter 7 claimed exemption), even in the face of a private letter ruling applicable to another bankrupt. *In re* Wood, 23 B.R. 552, 561 (Bankr. E.D. Tenn. 1982) (plan to pay benefits to Chapter 13 trustee), or suggested the Internal Revenue Service would use its discretion not to disqualify the plan. Bishop v. Masters (*In re* Masters), 73 B.R. 796, 799 (Bankr. D. Or. 1987) (turnover order to administrator); *see also* Rev. Rul. 80-27, 1980-1 C.B. 85 (using flexibility not to disqualify plans complying with domestic relations orders under the then judicial exception to the anti-alienation provision, now codified). Some of these courts have decided that the Internal Revenue Service's interpretations in private letter rulings are irrelevant to the problem. Gouveia v. Pulley (*In re* Pulley), 111 B.R. 715, 742-46 (Bankr. N.D. Ind. 1989) (Chapter 7); Federman v. Gallagher (*In re* Gallagher), 101 B.R. 594, 603-04 (Bankr. W.D. Mo. 1989) (same); White v. Babo (*In re* Babo), 97 B.R. 827, 830 (Bankr. W.D. Pa. 1989) (same); Firestone v. Metropolitan Life Ins. Co. (*In re* DiPiazza), 29 B.R. 916, 922-23 (Bankr. N.D. Ill. 1983) (same). Other bankruptcy courts have formed their turnover orders so as not to violate the anti-alienation provision. Berman v. Mead (*In re* Mead), 110 B.R. 434, 440 (Bankr. W.D. Mo. 1990) (plan terminated so benefit payable); *In re* Witte, 92 B.R. 218, 223-24 (Bankr. W.D. Mich. 1988) (debtor in Chapter 7 to formulate plan distribution as a loan); *In re* Swafford, 41 B.R. 845, 845 (Bankr. M.D. Tenn. 1984) (plan to make benefit payable to debtor in Chapter 13); *see also* McLean v. Central States S.E. & S.W. Areas Pension Fund, 762 F.2d 1204, 1210 (4th Cir. 1985) (not contempt for plan to pay beneficiary in Chapter 13, not bankruptcy trustee).

Other courts have concluded that the possibility of plan disqualification by the Internal Revenue Service means that the court must interpret ERISA and the Bankruptcy Act to avoid this result. Forbes v. Lucas (*In re* Lucas), 924 F.2d 597, 603 (6th Cir. 1991) (Chapter 7); Anderson v. Raine (*In re* Moore), 907 F.2d 1476, 1480 (4th Cir. 1990); *see also* John Hancock Mut. Life Ins. Co. v.

Courts generally use committee reports to confirm statutory construction[77] or to determine the meaning of ambiguous language.[78] Congressional committee reports state that Congress specifically enacted the anti-alienation provision to "ensure that the employee's accrued benefits are actually available for retirement purposes."[79] This would insure that the employee would have funds available to him in his unemployable old age so he would not have to rely on public moneys for support. Permitting the funds to vanish in a bankruptcy proceeding violates this express legislative history on Congressional intent.

Some courts, however, have not used the legislative scheme, the Internal Revenue Service regulations, or the legislative history to interpret the anti-alienation provision. Instead they have created three judicial exceptions: (1) domestic relations orders,[80] (2) fraud on the

Watson (*In re* Kincaid), 917 F.2d 1162, 1170 (9th Cir. 1990) (Fletcher, J., concurring) (this approach will have to be madé someday).

77. *E.g.*, Commissioner v. Bilder, 369 U.S. 499, 502 (1962); McLean v. United States, 226 U.S. 374, 380 (1912); Hepburn v. Giswold, 75 U.S. (8 Wall.) 603, 610 (1869), *overruled on other grounds*, The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553 (1870); 2A SUTHERLAND, *supra* note 66, § 48.06.

78. *E.g.*, Wright v. Vinton Mountain Trust Bank, 300 U.S. 440, 459 (1937); United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929); Railroad Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563, 589 (1922); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921).

79. H.R. REP. No. 807, *supra* note 59, at 68, 1974 U.S.C.C.A.N. at 4734.

80. This judicially implied exception was given statutory sanction in a significantly reduced form (decree must specify certain matters and plan approval for compliance must be obtained) through The Retirement Equity Act of 1984 (REA). Pub. L. No. 98-397, § 104, 98 Stat. 1426, 1433-36 (codified at 29 U.S.C. § 1056(d)(3) (1988).

Several courts held that plan benefits could be alienated pursuant to a state court order prior to REA. *E.g.*, Bowen v. Bowen, 715 F.2d 559, 560-61 (11th Cir. 1983) (for alimony payments); Operating Eng'rs Local No. 428 Pension Trust Fund v. Zamborsky, 650 F.2d 196, 199 (9th Cir. 1981) (alimony); Stone v. Stone, 632 F.2d 740, 742 (9th Cir. 1980) (as community property), *cert. denied*, 453 U.S. 922 (1981); Cody v. Rieker, 594 F.2d 314, 315 (2d Cir. 1979) (family support); American Tel. & Tel. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (for family support); Ball v. Revised Retirement Plan for Salaried Employees of Johns-Manville Corp., 522 F. Supp. 718, 721 (D. Colo. 1981) (domestic relations decree); Central States S.E. & S.W. Areas Pension Fund v. Parr, 480 F. Supp. 924, 925 (E.D. Mich. 1979) (alimony); Senco, Inc. v. Clark, 473 F. Supp. 902, 908 (M.D. Fla. 1979) (family support); Cartledge v. Miller, 457 F. Supp. 1146, 1149 (S.D.N.Y. 1978) (family support); Knapp v. Johnson, 301 N.W.2d 548, 549 (Minn. 1980) (child support); Western Elec. Co. v. Traphagen, 400 A.2d 66, 71 (N.J. 1979) (child support); Ward v. Ward, 396 A.2d 365, 369 (N.J. 1978) (support order); M.H. v. J.H. (*In re* M.H.), 403 N.Y.S.2d 411, 415-16 (N.Y. Fam. Ct. 1978) (alimony); Wanamaker v. Wanamaker (*In re* Wanamaker), 401 N.Y.S.2d 702, 706 (N.Y. Fam. Ct. 1978) (alimony); Commonwealth *ex rel.* Magrini v. Magrini, 398 A.2d 179, 183 (Pa. 1979) (family support).

The argument for this judicially implied exception was based on ERISA's purpose clause to continue the "security of millions of employees and their dependents [that] are affected by these plan,[81] and (3) bankruptcy orders.[82] Congress subsequently legitimated only one of these judicial exceptions — the one for some, but not all, domestic relations orders.[83] The Supreme Court struck

plans," 29 U.S.C. § 1001(a) (1988), and the pre-ERISA law that permitted attachment pursuant to divorce decrees despite an anti-alienation provision in the plan (*e.g.*, Weigold v. Weigold, 258 N.Y.S. 348, 350 (1932); Monck v. Monck, 172 N.Y.S. 401, 402 (1918)) or in a statute containing an anti-alienation provision similar to the one in ERISA. *E.g.*, Schlaefer v. Schlaefer, 112 F.2d 177, 184 (D.C. Cir. 1940) (section 16(a) of the Life Insurance Act for District of Columbia, 48 Stat. 1156, 1175 (1934)); *In re* Flanagan, 31 F. Supp. 402, 403 (D.D.C. 1940) (section 3 of the Act of Aug. 12, 1935, ch. 510 49 Stat. 607, 609 (amending the War Veterans Act of 1924), 38 U.S.C. § 454(a), *repealed by* Pub. L. No. 85-56, Title XXII, § 2202, 71 Stat. 83, 168 (1957)); Tully v. Tully, 34 N.E. 79, 79 (Mass. 1893) (section 33 of the Act of Mar. 3, 1873, ch. 234, 17 Stat. 566, 575 (amending veteran's pension laws)); Brown v. Brown, 288 N.E.2d 852, 854 (Ohio 1972) (Social Security Act, 42 U.S.C. § 407 (1988)); Huskey v. Batts, 530 P.2d 1375, 1376 (Okla. Ct. App. 1974) (same).

Congress explained that it passed the REA to clarify the alleged ambiguity between the purpose clause and the anti-alienation provision of ERISA. H.R. REP. No. 655(I), 93d Cong., 2d Sess. 23 (1983) ("[R]emoving any ambiguity in ERISA which might permit a pension plan to refuse to honor a legitimate state domestic relations order issued pursuant to a divorce.").

A few courts held that plan benefits could not be alienated pursuant to a state court order prior to REA. *E.g.*, Francis v. United Technologies Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978) (community property); General Motors Corp. v. Townsend, 468 F. Supp. 466, 469 (E.D. Mich. 1976) (divorce decree).

81. Crawford v. LaBoucherie Bernard, Ltd., 815 F.2d 117, 121-22 (D.C. Cir. 1987) (participant-trustee diverted profit-sharing funds to his real estate partnership so court permitted an offset of benefits to satisfy the plan's judgment), *cert. denied*, 484 U.S. 943 (1987), *reh'g denied*, 484 U.S. 1020 (1988). *Contra* Herberger v. Shanbaum, 897 F.2d 801, 804 (5th Cir. 1990) (anti-alienation provision precludes offset against trustee's benefit for breaches of fiduciary duty to plan), *cert. denied*, 111 S. Ct. 60 (1990). This judicially implied exception arises when (1) a participant embezzles or defrauds plan funds, (2) the other participants seek to recover the loss by obtaining a civil judgment against the wrongdoer, and (3) the wrongdoer or plan administrator attempts to block garnishment of his plan benefits as violative of the anti-alienation provision. *See generally* Michael A. Frazee, Comment, *ERISA—Exceptions to the Anti- Alienation Provision: Strengthening ERISA's Protection Through a Fraud Amendment*, 10 W. NEW ENG. L. REV. 317, 341-42 (1988) (advocating a statutory amendment to the ERISA anti-alienation provision to insure the efficacy of the judicially implied fraud exception).

The anti-alienation provision has no judicially implied exception when the participant embezzles or defrauds the employer who makes contributions to the plan. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680, 685-86 (1990) (union trustee embezzled union funds); United Metal Prod. Corp. v. Nat'l Bank of Detroit, 811 F.2d 297, 298-99 (6th Cir. 1987) (employee embezzled company funds), *cert. dismissed*, 483 U.S. 1019 (1988); Ellis Nat'l Bank v. Irving Trust Co., 786 F.2d 466, 469-71 (2d Cir. 1986) (employee theft and securities fraud against employer); Vink v. SHV North Am. Holding Corp., 549 F. Supp. 268, 271 (S.D.N.Y. 1982) (employee dismissed due to illegal activities); Helmsley-Spear, Inc. v. Winter, 426 N.Y.S.2d 778, 781 (App. Div.) (employee misappropriated checks and took kickbacks from suppliers), *aff'd*, 419 N.E.2d 1078 (N.Y. 1980). *Contra* St. Paul Fire and Marine Ins. Co. v. Cox, 752 F.2d 550, 552 (11th Cir. 1985) (bank president misapplied bank funds); Planned Consumer Marketing, Inc. v. Coats & Clark, Inc., 522 N.E.2d 30, 37-38 (N.Y. 1988) (contribution made to plan to defraud judgment creditor).

82. *See infra* notes 229-82 and accompanying text.

83. The Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 104, 98 Stat. 1426, 1433-36 (codified as amended at 29 U.S.C. § 1056(d)(3) (1988 & Supp. I 1989)).

down the only judicially implied exception to reach it — the one for participant fraud on the employer.[84] This strongly suggests there are no exceptions to the ERISA anti-alienation provision unless Congress specifically expresses one.[85] To date, Congress has not specifically approved any of the judicially-created exceptions to the anti-alienation provision for bankruptcy.

The one time Congress amended the anti-alienation provision (to permit qualified domestic relations orders) it constantly referred to the anti-alienation provision in committee reports as a spendthrift trust provision.[86] Clearly, Congress anticipated that ERISA's anti-alienation provision would operate as a spendthrift trust provision similar to that under traditional trust law. Under that law and the Bankruptcy Code, courts exclude interests in spendthrift trusts from

84. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680, 685-86 (1990) (eliminating the previously judicially implied exception for those committing fraud on the employer); *see also supra* note 81 for the prior cases recognizing the exception.

85. *See Guidry*, 110 S. Ct. at 687 (only Congress to change the anti-alienation provision as it did for the QDRO); Herberger v. Shanbaum, 897 F.2d 801, 804 (5th Cir. 1990) (commenting on *Guidry* and stating "[T]he fact that Congress amended the statute to allow this exception [for domestic relations orders] lends support to the notion that Congress will create exceptions where it sees fit and courts should not do so.").

Rather than create an exception, Congress is currently considering a bill to make clear that the judicially implied exception for bankruptcy orders is barred. S. 1985, 102d Cong., 1st Sess. § 202(c) (1991) (amending the Bankruptcy Code to exclude qualified pension plans from the debtor-participant's bankruptcy estate).

86. S. Rep. No. 575, *supra* note 31, at 1, 1984 U.S.C.C.A.N. at 2547; H.R. Rep. No. 655(II), 98th Cong., 2d Sess. 1 [hereinafter H.R. Rep. No. 655]: "[T]he bill clarifies that [a domestic relations] order does not result in a prohibited assignment or alienation of benefits under the spendthrift provisions of the Code or ERISA." S. Rep. No. 575 *supra* at 3, 1984 U.S.C.C.A.N. at 2549; H.R. Rep. No. 655 *supra* at 3.

> [U]nder present law, benefits . . . are subject to prohibitions against assignment or alienation (spendthrift provisions.) . . . . A plan that does not include these required spendthrift provisions is not a qualified plan under the Code . . . . Several cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations . . . .

S. Rep. No. 575 *supra* at 18, 1984 U.S.C.C.A.N. at 2564; H.R. Rep. No. 655 *supra* at 17.

> The IRS has ruled that the spendthrift provisions are not violated when . . . . The committee believes that the spendthrift rules should be clarified by creating a limited exception [for domestic relations orders] . . . . [T]he committee believes it is necessary to establish guidelines for determining whether the exception to the spendthrift rules applies . . . . [O]nly those orders that are excepted from the spendthrift provisions are not preempted by ERISA . . . . The bill clarifies the spendthrift provisions by . . . .

S. Rep. No. 575 *supra* at 19, 1984 U.S.C.C.A.N. at 2565; H.R. Rep. No. 655 *supra* at 18.

the bankrupt's estate.[87] Although this legislative history concerning that 1984 amendment may not be persuasive in interpreting a statute as a subsequent pronouncement,[88] it serves as a current pronouncement on a recently passed statute: the anti-alienation provision as amended. Courts use such current committee reports to confirm statutory construction or to determine the meaning of ambiguous language.[89] After 1984, therefore, courts should regard the anti-alienation provision in a qualified pension plan as creating a spendthrift trust.

B. *The Compatibility Provision: Preserving Pre-ERISA Federal Law*

The other ERISA provision relevant to the proper relationship between ERISA and the Bankruptcy Code is ERISA's compatibility provision, which states that ERISA does not "alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under such law."[90] The legislative history of that section of ERISA makes no reference to the compatibility provision.[91] However, the Supreme Court has refused to read

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87. The Bankruptcy Code, excludes from the bankrupt's estate interests in spendthrift trusts that are enforcable under "applicable nonbankruptcy law." 11 U.S.C. § 541(c)(2) (1988). The spendthrift trust provision, ERISA's anti-alienation provision, is enforcable under nonbankruptcy law. *See supra* notes 73-74 and accompanying text.

88. Pronouncements of a legislative committee with respect to a previously enacted statute form a hazardous basis for determining a statute's interpretation. *See* Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) (remarks before a committee of one of a bill's sponsors). These statements, although relevant (*see* Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1804)) are less weighty than a subsequent statute. *Consumer Product*, 447 U.S. at 119 n.13. The reason is that memories fade and intentions change. *Id.*; *see also* Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) (using 1892 report of the Morris Senate Comittee on Indian Affairs for the Allotment Act of 1887 as virtually conclusive due to the time proximity, less than five years, and consideration the same committee that reported on the original bill).

89. *See supra* notes 77-78.

90. 29 U.S.C. § 1144(d) (1988). ERISA only repealed the Welfare and Pension Disclosure Act. *Id.* §§ 1031(a)(1), 1144(a).

91. *See* H.R. REP. No. 533, *supra* note 57 at 28, 1974 U.S.C.C.A.N. at 4666; S. REP. No. 127, *supra* note 56, at 47, 1974 U.S.C.C.A.N. at 4883; H.R. REP. No. 1280, *supra* note 68, at 383, 1974 U.S.C.C.A.N. at 5162; 120 Cong. Rec. 29,933 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5188 (Sen. Harrison).

The provision appears in the earlier versions of the bill. *See* H.R. 2, 93d Cong., 1st Sess. 114 (as introduced Jan. 3 1973), *reprinted in* 1 Legislative History of the Employment Income Security the compatibility provision broadly to eviscerate ERISA's anti-alienation provision for judgment creditors relying on a nonbankruptcy federal statute.[92]

Despite such narrowness, bankruptcy lawyers and creditors assert that ERISA is irrelevant to their turnover order issued pursuant to the federal Bankruptcy Code. They seize upon the alleged plain-meaning of this provision of ERISA to claim that ERISA is inferior to the Bankruptcy Code, both in individual bankruptcy cases[93] as well as employer bankruptcy cases.[94] The earliest court to consider

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Act of 1974: Public Law 93-406, 94th Cong., 2d Sess. 50 (1974) [hereinafter *Legislative History*]; S.4, 93d Cong., 1st Sess. § 609 (as introduced Jan. 4, 1973), *reprinted in* 1 Legislative History at 196-88. ADMINISTRATION RECOMMENDATIONS TO THE HOUSE AND SENATE CONFEREES OF H.R. 2 TO PROVIDE FOR PENSION REFORM, 109, *reprinted in* 3 Legislative History at 5174.

92. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680, 686 (1990) "Were we to accept respondent's position, ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute. Such an approach would eviscerate the protections of [ERISA's anti-alienation provision], and we decline to adopt so broad a reading of [ERISA's compatibility provision]." *Id.*

93. The courts that have faced this argument have merely noted ERISA's compatability provision, asserted the Bankruptcy Code's superiority, and cited a few prior cases holding likewise. *E.g.*, Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1273 (8th Cir. 1984) (Chapter 7 case); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 588 n.38 (5th Cir. 1983) (individual bankruptcy); Ottawa Cartage v. Central States (*In re* Ottawa Cartage, Inc.), 55 B.R. 371, 377-78 (N.D. Ill. 1985) (Chapter 7 case to recover contribution to plan made within 90 days of bankruptcy action against the inapplicable ERISA's non-inure provision); Threewitt v. Ciba-Geigy Corp. (*In re* Threewitt), 20 B.R. 434, 437 (Bankr. D. Kan. 1982) (Chapter 7 case for turnover), *rev'd*, 24 B.R. 927 (D. Kan. 1982); *see also* Eisenberg v. Baviello (*In re* Baviello), 12 B.R. 412, 417 (Bankr. E.D.N.Y. 1981) (turnover for a pre-ERISA Keogh plan under pre-Bankruptcy Code law).

94. *E.g.*, Local 144 Hospital Welfare Fund v. Baptist Medical Center of New York, Inc. (*In re* Baptist Medical Ctr. of New York, Inc.), 52 B.R. 417, 423-24 (E.D.N.Y. 1985) (Chapter 11 case to recover unpaid contributions); Central States, S.E. & S.W. Areas Health and Welfare and Pension Funds v. Columbia Motor Express, Inc. (*In re* Columbia Motor Express, Inc.), 33 B.R. 389, 394 (M.D. Tenn. 1983) (Chapter 11 case to recover unpaid contributions and denied injunction for future contributions); Sterling Die Casting Co. v. Local 365 UAW Welfare and Pension Fund (*In re* Sterling Die Casting Co., Inc.), 118 B.R. 205, 208 (Bankr. E.D.N.Y. 1990) (Chapter 11 case to recover employer's contribution to plan against ERISA's non-inure provision, 29 U.S.C. § 1103 (1988)); *In re* U.S. Lines, Inc., 103 B.R. 427, 434 (Bankr. S.D.N.Y. 1989) (Chapter 11 case seeking legal fees for work on plan against ERISA's attorney's fee provision, 29 U.S.C. § 1132(g)(1) (1988)); *In re* Miller Block Co., Inc., 63 B.R. 99, 101-03 (Bankr. W.D. Pa. 1986) (plan claim against bankrupt employer for legal fees against ERISA's attorney's fee provision); Pulaski Highway Express, Inc. v. Central States S.E. and S.W. Health and Welfare Pension (*In re* Pulaski Highway Express, Inc.), 41 B.R. 305, 309-10 (Bankr. M.D. Tenn. 1984) (Chapter 11 case to recover contributions made to plan against ERISA's non-inure provision).

This Article is not concerned about employer bankruptcies and ERISA. Their situation is entirely different from the case of individual bankruptcies because of the absence of the anti-alienation provision's application, the subject of this Article.

this argument concluded that, although the preemption provision eliminates garnishment and levy by state action, it does not affect such action under federal law — such as the Bankruptcy Code — because of the compatibility provision.[95] The leading circuit court opinion, decided before the 1984 amendment to the anti-alienation provision, concluded that ERISA's provisions have no general application in bankruptcy.[96]

Before a court becomes concerned about a statute's superiority, a litigant must show that the two statutes conflict.[97] When Congress passed ERISA, there was no conflict between ERISA's anti-alienation provision and the then current bankruptcy laws. Prior to ERISA's passage, courts excluded from the debtor-participant's estate, interests in pension trusts that were subject to an anti-alienation provision contained in the plan, whether in accordance with federal[98]

95. *Baviello*, 12 B.R. at 417.

96. *Goff*, 706 F.2d at 588 n.38.

97. *See infra* notes 338-40 and accompanying text.

98. The pre-Bankruptcy Code law provided that the bankruptcy trustee did not become vested in the property of the bankrupt that could not be transferred or levied on. 11 U.S.C. § 110(a)(5) (1976).

Several courts, in a bankruptcy setting, have upheld anti-alienation provisions in trusts by plan provision in accordance with federal law. *See, e.g.*, TVA v. Kinzer, 142 F.2d 833, 835, 838 (6th Cir. 1944) (rule contained in plan documentation for TVA's retirement system trust fund that prohibited transfer, assignment, pledge, seizure, or other voluntary or involuntary alienation or encumbrance upheld against bankruptcy trustee); *In re* McManaman, 50 F. Supp. 869, 870 (N.D. Ill. 1941) (rule contained in plan documentation for FRB's retirement system trust fund prohibited benefits before termination upheld against bankruptcy trustee). Since these cases involve trusts with transfer restrictions, they correspond to those excluded trusts under the Bankruptcy Code. 11 U.S.C. § 541(c)(2) (1988).

Other courts, in a bankruptcy setting, have upheld a federal statutory anti-alienation provision. *See, e.g.*, Nunnally v. Nunnally (*In re* Nunnally), 506 F.2d 1024, 1025-26 (5th Cir. 1975) (dicta: veterans benefits subject to statutory anti-alienation provision, now 38 U.S.C. § 5301 (1988)); *In re* Howe, 381 F. Supp. 1025, 1026 (N.D. Fla. 1974) (veterans benefits subject to statutory anti-alienation provision, now 38 U.S.C. § 5301 (1988)); Avant v. United States, 165 F. Supp. 802, 804-05 (E.D. Va. 1958) (civil service retirement under statutory anti-alienation provision, 5 U.S.C. § 2265 (now 5 U.S.C. § 8346 (1988)); *In re* Walker, 94 F. Supp. 49, 50 (N.D. Ohio 1950) (veteran's life insurance under statutory anti-alienation provision, 38 U.S.C. § 454(a), *repealed by* Pub. L. No. 85-56, Title XXII, § 2202, 71 Stat. 83, 168 (1957), and now covered by 38 U.S.C. § 5301 (1988)); *In re* Barry, 52 F. Supp. 492, 493 (E.D.N.Y. 1943) (civil service retirement funds not in bankruptcy estate due to statutory anti-alienation provision, 5 U.S.C. § 729 (now 5 U.S.C. § 8346 (1988)), *aff'd sub nom.* Barry v. Morris Plan Industrial Bank of New York, 141 F.2d 1021 (2d Cir. 1944); *In re* Bean, 100 F. 262, 263 (D. Vt. 1900) (U.S. pension under Rev. Stat. § 4747, Act of March 3, 1873, § 32, 17 Stat. 566, 575 (1873)); Comptroller General's Opinion, Bankr. L. Rep. (CCH) 54,032 (Oct. 8, 1942) (same). Since these cases do not involve trusts, *see infra* notes 181-87 and accompanying text, they or state law.[99] ERISA only required additional plans — namely,

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correspond to the exemption for federally restricted benefits. 11 U.S.C. § 522(b)(2)(A) (1988). Thus, the Bankruptcy Code did expand the limits of the bankrupt's estate by including these benefits in the estate, *see infra* note 241 and accompanying text, necessitating the exemption.

99. *See, e.g.*, Standard Oil Co. v. Blane (*In re* Baxter), 104 F.2d 318, 320 (6th Cir. 1939) (contract with insurance company to provide annuities upon retirement for a large oil company matching thrift plan prohibited anticipation and encumberance of contract benefits upheld against bankruptcy trustee without reference to state law); Mason v. Eastman Kodak Co. (*In re* Parker), 473 F. Supp. 746, 750 (W.D.N.Y. 1979) (Kodak thrift plan under ERISA with an anti-alienation provision); *In re* Hurd, [1977-78] Bankr. L. Rep. (CCH) 66,926 (Bankr. D. Conn. July 12, 1978) (non-contributory profit-sharing plan that had spendthrift clause upheld against bankruptcy trustee); *In re* Byrd, [1970-73] Bankr. L. Rep. (CCH) 64,209 (Bankr. D. Conn. Aug. 23, 1971) (contractual transfer restriction in retirement trust fund upheld against bankruptcy trustee); *In re* Ladas, 52 Am. Bankr. (N.S.) 16 (S.D. Cal. 1942). *See also In re* Taylor's Mobile Home Sales, Inc., [1978-1981] Bankr. L. Rep. (CCH) 67,226 (Bankr. 9th Cir. June 19, 1979) (upholding the employer non-inurement provision in a company profit-sharing plan against bankruptcy trustee); *In re* Philips, [1967-70] Bankr. L. Rep. (CCH) 63,370 (Bankr. D. Ill. Aug. 22, 1969) (not vested in profit-sharing plan so bankruptcy trustee cannot obtain them).

Before ERISA a number of states had statutory provisions that interests of beneficiaries in employee plans would not be subject to the claims of creditors or that the interests may be made nontransferable by assignment. *See, e.g.*, 1955 Fla. Laws ch. 29948; LA. REV. STAT. ANN., § 20:33 (West 1973); MINN. STAT. ANN. § 561B:88 (West 1967), *repealed by* 1969 Minn. Laws § 17:1006; MISS. CODE ANN. § 6995.3 (1942); N.Y. PERS. PROP. LAW § 13-d (McKinney 1967); OKLA. STAT. ANN. tit. 60, §§ 327, 328 (West 1973); WIS. STAT. ANN. § 272.18(31) (West 1955) (renumbered 815.18(31) effective Jan. 1, 1976). *See generally* Note, *Legal Problems of Private Pension Plans*, 70 HARV. L. REV. 490, 498-500 (1957).

These cases and statutes involve plans now encompassed within ERISA and so would be required to have an anti-alienation provision enforcible under federal law, not state law as in the past, due to ERISA's preemption provision. 29 U.S.C. § 1056(d) (1988). So ERISA only changed the law under which the anti-alienation provision in pension plans was enforcable from state law to federal law. This pre-Bankruptcy Code law also excluded from the bankrupt's estate benefits from plans that permitted employee contributions, which many courts under the Bankruptcy Code have refused to do. *See infra* note 274 and accompanying text.

Several courts, in a bankruptcy setting, have upheld anti-alienation provisions pursuant to state statutes in plans that would not now necessarily be subject to ERISA. *See, e.g.*, Negin v. Salomon, 151 F.2d 112, 113 (2d Cir. 1945) (N.Y.C. employees' retirement system under N.Y. INS. LAW § 200(7) (now N.Y. INS. LAW § 4607 (1985)); *In re* Dill, [1977-78] Bankr. L. Rep. (CCH) 66,872 (Bankr. N.D. Ala. June 12, 1978) (teacher retirement under state anti-alienation provision); *In re* Santos, [1973-75] Bankr. L. Rep. (CCH) 65,322 (Bankr. M.D. Fla. July 1, 1974) (municipal retirement under state and municipal law); *In re* Barry, 52 F. Supp. 496, 497-98 (E.D.N.Y. 1943) (city retirement funds not in bankruptcy estate due to statutory anti-alienation provision, N.Y. EDUC. LAW § 1109-o (now N.Y. EDUC. LAW § 524 (1988)), *aff'd sub nom.* Barry v. Morris Plan Industrial Bank of New York, 141 F.2d 1021 (2d Cir. 1944); *see also* Voltz v. Goodwin (*In re* Goodwin), 57 F.2d 31, 32 (6th Cir. 1932) (not vested in fireman's pension under state law). To the extent these cases also involve trusts with transfer restrictions, they correspond to those excluded trusts under the Bankruptcy Code. 11 U.S.C. § 541(c)(2) (1988).

Under the pre-Bankruptcy Code law, only when the plan benefits were in pay-status did the trustee succeed in obtaining title to the benefits. *See, e.g.*, Short v. Grand (*In re* Short), 507 F.2d 425, 427 (8th Cir. 1974) (public school retirement); Dunlavey v. Newnum (*In re* Newnum), 2 B.R. 500, 502 (Bankr. D. Ariz. 1980) (received lump sum 6 months after bankruptcy); *In re* Solomon, those that had not already voluntarily done so — to include an anti-alienation provision, thus expanding the total amount of plan interests that courts would exclude from all debtor-participants' estates. The purpose was to assure that debtor-participants had retirement funds upon retirement and would not become a burden on society.

The question that should have been investigated by the courts accepting the ERISA inferiority argument was whether Congress, through the Bankruptcy Code, expressed an intent to repeal this prior result providing that courts exclude certain pension-plan interests from the debtor-participant's estate. Although the Bankruptcy Code contains no express provision repealing any part of ERISA,[100] courts may imply a repeal[101] based on the legislative intent[102] as determined by the usual legislative-interpretation rules.[103] Courts presume against repeal by implication,[104] however, and a court may

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[1970-73] Bankr. L. Rep. 64,141 (Bankr. D. Ala. Sept. 11, 1970) (profit-sharing plan); *In re* Ashbaugh, [1970-73] Bankr. L. Rep. 63,710 (Bankr. D. Ill. Feb. 13, 1970) (received before bankruptcy); *In re* Page, [1967-70] Bankr. L. Rep. 62,720 (Bankr. D. Va. Apr. 3, 1968) (profit-sharing plan).

Under pre-Bankruptcy Code law, exclusion from the owner-employee's bankruptcy estate of benefits from plans benefiting owner-employees was unsettled. *Compare* Turpin v. Wente (*In re* Turpin) 644 F.2d 472, 474 (5th Cir. Unit A 1981) (spendthrift provision in professional corporation plan valid against bankruptcy trustee) *with* Judson v. Witlin (*In re* Witlin) 640 F.2d 661, 663 (5th Cir. Unit B 1981) (spendthrift provision in Keogh plan void as self-settled trust under state law). *See also* Clark v. O'Neill (*In re* Clark), 711 F.2d 21, 23 n.2 (3d Cir. 1983) (conceded Keogh plan in estate); Ferwerda v. Zevers (*In re* Ferwerda), 424 F.2d 1131, 1134 (7th Cir. 1970) (reserving decision on issue for Keogh plan when turnover order requested); Baviello v. Eisenberg (*In re* Baviello), 12 B.R. 412, 416 (Bankr. E.D.N.Y. 1981) (pre-ERISA Keogh plan in estate as it lacked anti-alienation provision); *In re* Mendenhall, 4 B.R. 127, 129 n.1. (Bankr. D. Or. 1980) (same). This pre-Bankruptcy Code law has been cited for the propositions that the pre-Bankruptcy Code included plans of the self-employed, *see, e.g.*, Goff v. Taylor (*In re* Goff), 706 F.2d 574, 587 (5th Cir. 1983). It has also been cited for excluding plans of the self-employed. *See e.g.*, Barr v. Hinshaw (*In re* Hinshaw), 23 B.R. 233, 234 (Bankr. D. Kan. 1982).

100. *See* Bankruptcy Code, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549, 2682 (1978) (repealing the Bankruptcy Act). The implication is against repeal of a statute not specifically mentioned in the subsequent statute's repealing section. Wood v. United States, 41 U.S. (16 Pet.) 342, 364 (1842). *See also* The Regional Rail Reorganization Act Cases, 419 U.S. 102, 129 (1974) (provision declaring certain statutes inapplicable to present statute's subject matter).

101. *See, e.g.*, United States v. Belt, 319 U.S. 521, 522-23 (1943); United States v. Yuginovich, 256 U.S. 450, 463 (1921); McDonnell v. Jordan, 178 U.S. 229, 238 (1900); Hanrick v. Hanrick, 153 U.S. 192, 197 (1894); District of Columbia v. Hutton, 143 U.S. 18, 26-27 (1892).

102. *See, e.g.*, Posadas v. National City Bank of New York, 296 U.S. 497, 503 (1936); *Yuginovich*, 256 U.S. at 463; United States v. Claflin, 97 U.S. 546, 551 (1878).

103. *See, e.g.*, *Posadas*, 296 U.S. at 503; *Hutton*, 143 U.S. at 27.

104. *See, e.g.*, Graham v. Goodcell, 282 U.S. 409, 425 (1931); Eckloff v. District of Columbia, 135 U.S. 240, 243 (1890).

not repeal by implication if it is possible to harmonize the statutes.[105] Some courts have suggested that the Bankruptcy Code impliedly amended ERISA's anti-alienation provision.[106] In determining whether Congress impliedly amended a statute, courts may consider subsequent legislation.[107] For ERISA, that subsequent legislation, the 1984 amendment, suggests that courts are to regard certain pension plans as spendthrift trusts, the interests of which courts exclude from the bankrupt's estate under the Bankruptcy Code.[108]

C. *The Preemption Provision: Purpose of A Uniform Federal Law*

ERISA's legislative history indicates that Congress designed the entire statutory scheme to accomplish two additional goals that are relevant to the relationship between ERISA and the Bankruptcy Code. First, Congress desired to establish uniform federal rules for employee benefit plans. Consequently, ERISA contains a preemption provision eradicating state laws "insofar as they . . . relate to any employee benefit plan . . . ."[109] This appears both in the committee reports and in statements of committee members. Some bankruptcy courts, in contrast, use state rather than federal law to determine whether plan interests belong in the debtor-participant's estate.[110]

Two committees considered and reported on the effect that the preemption provision was to have. Although most of the committee

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105. *See, e.g.*, United States v. Burroughs, 289 U.S. 159, 164 (1933); Washington v. Miller, 235 U.S. 422, 428 (1914); *Ex parte* United States, 226 U.S. 420, 424 (1913); Petri v. Creelman Lumber Co., 199 U.S. 487, 497 (1905); United States v. Greathouse, 166 U.S. 601, 605 (1897). *See also infra* notes 338-40 and accompanying text.

106. *See, e.g.*, Regan v. Ross, 691 F.2d 81, 87 (2d Cir. 1982); Central States, S.E. & S.W. Areas Health and Welfare and Pension Fund v. Stephenson (*In re* McLean), 41 B.R. 893, 900-02 (Bankr. D.S.C. 1984), *rev'd sub. nom.* McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985); White v. Babo (*In re* Babo), 97 Bankr. 827, 830 (Bankr. W.D. Pa. 1989); Gray v. Ingles Markets, Inc. Employees' Stock Bonus Plan and Trust (*In re* DeWeese), 47 B.R. 251, 256 (Bankr. W.D.N.C. 1985); Firestone v. Metropolitan Life Ins. Co. (*In re* DiPiazza), 29 B.R. 916, 923 (Bankr. N.D. Ill. 1983).

107. *See, e.g.*, Cape Girardeau County Ct. v. Hill, 118 U.S. 68, 72 (1886).

108. *See supra* note 87 and accompanying text.

109. 29 U.S.C. § 1144(a) (1988).

110. *E.g.*, Goff v. Taylor (*In re* Goff), 706 F.2d 574, 582 (5th Cir. 1983) (exclusion from the bankrupt's estate of spendthrift trust under the Bankruptcy Code depends on state law); Judson v. Witlin (*In re* Witlin), 640 F.2d 661, 663 (5th Cir. Unit B 1981) (same under the pre-Bankruptcy Code law).

language made references to state law, even the early drafts of the proposed legislation that became ERISA contained the federal compatibility provision.[111] The report of the Senate Committee on Labor and Public Welfare indicated that Congress intended ERISA preemption to create uniformity in employee benefit law in order to give interstate plan fiduciaries certainty about the legality of their actions without reference to varying state laws.[112] Some courts are thus in error in their determination of whether pension-plan interests are included in the debtor-participant's estate by reference to that very same variable state law. For a pension plan, that state law does not exist by virtue of the preemption provision. The report of the Senate Committee on Education and Labor stated that ERISA alone was "a uniform source of law" for fiduciary standards in the area of vesting,[113] which certainly would include plan administrators' handling of a turnover demand.[114]

Courts often treat the explanations of committee reports made by a committee member or the committee chairman as supplemental

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111. *See supra* note 91.

112. S. REP. No. 127, *supra* note 56, at 29, 35, *reprinted in* 1974 U.S.C.C.A.N. at 4865, 4871.

> Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. . . .
>
> Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.
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> . . . .
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> . . . [S]tate law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.

Id.

113. H.R. REP. No. 533, *supra* note 57, at 17, *reprinted in* 1974 U.S.C.C.A.N. at 4655.

> Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evalutaion of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.

Id.

114. ERISA's anti-alienation provision, 29 U.S.C. § 1056(d) (1988), is in the subtitle on vesting. *See supra* note 58 and accompanying text.

committee reports.[115] Senator Jacob Javits, a co-sponsor of the original draft legislation[116] and senior ranking Republican on the Senate Committee on Labor and Public Welfare,[117] stressed that "the interests of uniformity . . . required that the ERISA preemption provision provide for the displacement of State action in the field of private employee benefit programs."[118] Similar remarks were made by Senator Harrison Williams, Jr. (then Chairman of the Senate Committee on Labor and Public Welfare,[119] the other co-sponsor of the original draft legislation,[120] and floor manager of the bill)[121] and Representative John Dent (the second ranking Democrat on the House Committee on Education and Labor[122] and House sponsor of the original legislation).[123]

The report of the House Committee on Education and Labor — resulting from the Joint Pension Task Force study conducted after ERISA's passage — indicated that Congress intends the ERISA preemption to bring about the uniformity of decision necessary for

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115. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475-77 (1921); *see also* Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, 300 U.S. 440, 459 (1937) (explanations given in Congress make meaning plain); Helvering v. Twin Bell Oil Syndicate, 293 U.S. 312, 322 (1934) (chairman of committee so stated); United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929) (statements by those in charge); Railroad Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563, 589 (1922) (explanatory statements of members in charge); United States v. St. Paul, M. & M. Ry. Co., 247 U.S. 310, 318 (1918) (remarks in nature of supplementary report); United States v. Coca Cola Co., 241 U.S. 265, 281 (1916) (chairman explaining the provision); 2A SUTHERLAND, *supra* note 66, at §§ 48.14, 48.15.

116. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985); Theodore Paul Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 TEMP. L.Q. 51, 61 (1979).

117. 1974 U.S.C.C.A.N. XCII.

118. 120 CONG. REC. 29,942 (1974).

119. 1974 U.S.C.C.A.N. XCII. Sen. Williams stated that ERISA preemption is to eliminate "the threat of conflicting or unconsistent state and local regulation of employee benefit plans." 120 CONG. REC. 29,933 (1974).

120. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985); Manno, *supra* note 116, at 61.

121. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 113 (1985).

122. 1974 U.S.C.C.A.N. CVIII. Rep. Dent stated that ERISA preemption is to reserve "to Federal authority the sole power to regulate the field of employee benefit plans." 120 CONG. REC. 29,197 (1974).

123. Robert L. Aldisert, Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After* Pilot Life Insurance Co. v. Dedeaux, 21 LOY. L.A. L. REV. 1343, 1355 (1988).

plan fiduciaries to determine their actions without reference to state laws.[124]

This legislative history demonstrates an intent to make the rules governing employee benefit plans nationally uniform. This uniformity simplifies legal matters for plan administrators of interstate plans and thereby reduces the cost of operating plans. Plan administrators only need to consult the uniform federal law and not additional and potentially different state law. Some bankruptcy courts clearly defeat Congressional efforts to create that national uniformity by requiring interstate plan fiduciaries to determine a debtor-participant's interest in a pension plan by reference to non-uniform state law.[125] One interstate plan, for example, could have several different results for different debtor-participants depending on which state they reside in. The gain provided by such action serves only to relieve creditors from their own foolishness, at the expense of the public who is consequently unable to shift the cost of retirement benefits equal to that gain to the private sector.

D. *Purpose of Fostering Plan Growth*

Second, Congress intended ERISA to foster the growth of the private pension system so that further burdens would not accrue to the social security system. A House committee report on one of the predecessor bills to ERISA noted that "the objective is to increase the number of individuals participating in employer-financed plans . . . [and to] continue the approach in present law of encouraging the establishment of retirement plans which contain socially desirable

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124. HOUSE COMM. ON EDUC. & LABOR, ACTIVITY REPORT, H.R. REP. No. 1785, 94th Cong., 2d Sess. 46-47 (1977).

> Based on our examination of the effects of section 514, it is our judgment that the legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the field preempted. Similary it is our finding that the Federal interest and the need for national uniformity are so great that the enforcement of a state regulation should be precluded . . . . Accordingly, any activity by a state or political subdivision thereof, which relates to employee benefit plans . . . is preempted by section 514(a).

Id.

125. *See* Liscinski v. Mosley (*In re* Mosley), 42 B.R. 181, 191 (Bankr. D.N.J. 1984), criticizing Goff v. Taylor (*In re* Goff, 706 F.2d 574 (5th Cir. 1983), for its unlikely theory that Congress revived state regulation through the Bankruptcy Code: unlikely because of the strong policy for national uniformity in pension law).

provisions . . . ."[126] The Senate report urging the passage of ERISA noted that ERISA "will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension-plan coverage and to improve benefits for workers."[127] Senator Williams noted that ERISA was "designed to improve and encourage the expansion of private pension plans."[128] The ranking majority member of the House Ways and Means Committee, Representative Al Ullman, made similar remarks on the introduction of the conference committee report that led to ERISA's passage. He stated that ERISA's requirements were "carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans."[129] Thus, Congress balanced two interests: (1) lowly-compensated employees would receive some benefits with security while (2) highly-compensated employees, in control of the employer, would get incentives to establish plans.

The primary encouragement for these pension plans was the favorable tax consequences to the employer[130] and the skewing of ben-

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126. H.R. REP. No. 779, 93d Cong., 2d Sess. 8 (1974).

127. S. REP. No. 127, *supra* note 56, at 13, 1974 U.S.C.C.A.N. at 4849.

128. 120 CONG. REC. S29,928 (1974).

129. 120 CONG. REC. H29,198 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5166. "This legislation provides urgently needed reform in the pension area. But, at the same time, it continues the basic governmental policy of encouraging the growth and development of voluntary private pension plans." *Id.*

ERISA has succeeded in this goal. Estimates indicate that private pension plans have grown from 500,000 in 1974 to over 900,000 by 1988. 60A AM. JUR. 2D *Pensions and Retirement Funds* § 1 (1988). Private pension-plan assets exceed one trillion dollars. Chuck Paustian, *$1 Trillion Milestone: Top 100 Soared With Bull Market*, PENSION & INVESTMENT AGE, Jan. 25, 1988, at 1. They cover over fifty million American workers and provide 37% of United States retirement income. Hage & Oslund, *Pension Funds: Secure Futures or Big Risks?*, MINN. STAR & TRIB., Jan. 20, 1985, at 1D.

130. H.R. REP. No. 807, *supra* note 59, at 9, 1974 U.S.C.C.A.N. at 4677.

> The tax advantages associated with qualification under the Internal Revenue Code are substantial. Employers, within certain limits, are permitted to deduct contributions made to such plans on behalf of covered employees, whether or not the interests of covered employees are vested; [and] earnings on the plan's assets are exempt from tax . . . .

Id.

> [I]f a retirement plan is to qualify for the favorable tax treatment, it will be required to comply with specified new requirements which are designed to improve the retirement sys-

efits towards the highly-compensated management employees. Employers normally get a deduction for payments made to unqualified plans in the year the plan pays the funds to the employee.[131] But for those funds paid to an ERISA-qualified plan on behalf of an employee, the employer gets a current deduction.[132] Since qualified trusts are not taxed,[133] the moneys in the plan increase without reduction for income taxes on the earnings.

The individuals that benefit most from the tax-free compounding of these pension moneys are the ones with the largest interests in the plans.[134] These are the highly-compensated, typically, management individuals, since allocations to defined contribution plans, as well as benefits payable from defined benefit plans are generally based on compensation.[135] But ERISA contains authorization for integration with social security,[136] that is, not making a contribution with respect to a specified amount of the participant's compensation. That amount corresponds in some loose manner with the employer's social security tax paid to the government on behalf of the participant. Integration has the tendency to reduce the proportion of the contribution going to those with total annual compensation below the social security wage base. Providing the highly-compensated with most of the contribution is offset by requiring broad participation of the lowly-compensated[137] and, in some cases, after the Tax Equity and Fiscal Responsibility Act,[138] minimum contributions for the lowly-

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> tem. Since the favorable tax treatment is quite substantial, presently involving a revenue loss of over $4 billion a year, it is anticipated that plans will have a strong inducement to comply with the new qualification rules and thereby become more effective in fulfilling their objective of providing retirement income.

Id.

131. 26 U.S.C. § 404(a)(5) (1988); 26 C.F.R. § 1.404(a)-12 (1991).

132. 26 U.S.C. § 404(a)(1), (3) (1988).

133. *Id.* § 501(a).

134. Clearly the tax-free increase in defined contribution plans directly inures to the participants since the trust's income is added to their accounts. For defined benefit plans, the increase inures to the participants indirectly. The increase normally reduces the employer's future contributions, which may enable the employer to expand the plan or increase wages.

135. 26 U.S.C. § 401(a)(5) (1988); 26 C.F.R. § 1.401-1(b)(1)(i)-(ii) (1991).

136. 26 U.S.C. § 401(a)(5)(D), 401(l) (1988).

137. 29 U.S.C. § 1052 (1988); 26 U.S.C. § 410 (1988).

138. Pub. L. No. 97-248, § 240, 96 Stat. 324, 515 (1982) (amending only the ERISA portion of the Internal Revenue Code).

compensated.[139] The idea clearly was that the lowly-compensated employees would get some benefits, even if Congress had to redesign the rules.[140]

Another encouragement was the liberal rules for getting money out of the plans, used primarily by the highly-compensated. These rules permit the participant to expend some of his benefits on current consumption. Profit-sharing plans, for example, may allow members to withdraw all employer contributions after a specified time[141] or for hardship.[142] All pension plans, on the other hand, may provide for loans from the plan provided they are adequately secured.[143] There are limits, however, to the amount of the loan. Since the participant may use as security only fifty percent of the present value of the vested accrued benefit,[144] the plan can only loan something less than that amount unless the participant provides other security. Loans in excess of the lesser of $50,000 or the greater of fifty percent of the present value of the vested accrued benefit or $10,000 are subject to inclusion in taxable income and an additional early distribution penalty.[145]

Thus, the complexity of ERISA arises from the desire to balance the interests of the highly-compensated and the lowly-compensated employees. Congress gave the highly-compensated employees several limited advantages so that they would establish plans that minimally benefited the lowly-compensated. The latter then would not become

139. 26 U.S.C. § 416(c) (1988).

140. *See supra* notes 322-24 and accompanying text.

141. Rev. Rul. 68-24, 1968-1 C.B. 150 (after five years' participation); Rev. Rul. 54-231, 1954-1 C.B. 150 (withdrawal two years after contribution).

Distributions from plans are taxable if the participant has not previously paid the income tax on them; 26 U.S.C. § 402(a) (1988). They are also subject to an additional 10% penalty tax if distributed before age 59 1/2, *id.* § 72(t), and not rolled over into another plan or IRA. *Id.* § 408(d)(3).

142. Rev. Rul. 71-224, 1971-1 C.B. 124.

143. 26 U.S.C. § 401(a)(13) (1988); 29 U.S.C. §§ 1056(d), 1108(b) (1988); 29 C.F.R. § 2550.408b-1(b) (1991); *see also* 26 U.S.C. §§ 72(p), 4975(d)(1) (1988).

144. 29 C.F.R. § 1550.408b-1 (1991); 26 U.S.C. § 72(p)(2)(A)(ii) (1988). Use of the plan interest as security carries risks for the debtor-participant and his creditors. Upon default, typically defined in loan documents as filing bankruptcy, the plan forecloses on the security, typically by offset as provided in the loan documents. 29 C.F.R. § 2550.408b-1(f)(2) (1991). This creates a current distribution from the plan without any additional cash, a taxable event, 26 U.S.C. § 402(a) (1988), subject to the early distribution penalty if the debtor-participant is under age 59 1/2. *Id.* § 72(t).

145. *Id.* § 72(p), (t).

wards of the state. When bankruptcy courts threaten pension plans with disqualification and ignore ERISA's interplay, they seriously undermine that delicate balance that Congress itself has reworked several times. Under the guise of the bankruptcy laws, some courts now desire to thwart this ERISA goal by subjecting plans to bankruptcy transfers out of employee benefit plans.

IV. The Applicable Bankruptcy Code Provisions

In the absence of ERISA, ERISA lawyers and debtor-participants fall back on the Bankruptcy Code's exclusion provision or try to fit the plan interest under an exemption. Bankruptcy lawyers and creditors dealing with the relationship between ERISA and the Bankruptcy Code have focused primarily on these two Bankruptcy Code sections and their legislative history and have ignored entirely the statutory interpretive canons to look for the purpose behind the Bankruptcy Code: to permit the debtor-participant a fresh start in life. Instead, their interpretation of the relationship between ERISA and the Bankruptcy Code thwart this purpose of the Bankruptcy Code.

A. Exclusion Provision: To Preserve Prior Anti-Alienation Decisions

The pre-Bankruptcy Code law excluded from the bankrupt's estate assets that he could not transfer.[146] Under this rule, courts excluded from the debtor-participant's estate interests in pension plans that had anti-alienation clauses in accordance with federal or state law.[147] Some, but not all, of these cases turned on whether the anti-alienation clause was enforceable under federal law.[148]

Before adopting any change to this rule, Congress selected a committee to examine the bankruptcy laws and make recommen-

146. 11 U.S.C. § 110(a)(5) (1976).

147. *See supra* notes 98-99.

148. *E.g.*, TVA v. Kinzer, 142 F.2d 833, 835, 838 (6th Cir. 1944) (federal law; TVA's retirement system trust rule); *In re* McManaman, 50 F. Supp. 869, 870 (N.D. Ill. 1941) (federal law; FRB's retirement system trust rule); *see also* Judson v. Witlin (*In re* Witlin), 640 F.2d 661, 663 (5th Cir. 1981) (state law; trust document); *In re* Barry, 52 F. Supp. 496, 497-98 (E.D.N.Y. 1943) (state law; education statutory rule), *aff'd*, 141 F.2d 1021 (2d Cir. 1944); Standard Oil Co. v. Blane (*In re* Baxter), 104 F.2d 318, 320 (6th Cir. 1939) (state law; insurance contract).

dations.[149] This committee recommended that the rules for determining the limits of the bankrupt's estate abandon the use of state law in order to achieve uniformity. The committee also recommended that Congress eliminate the exclusion of interests in spendthrift trusts (including pension plans with an anti-alienation provision) with the exception of the extent needed for support of the bankrupt and his dependents.[150] However, Congress did not adopt these recommendations.[151] Therefore, the Bankruptcy Code includes an exclusion for "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law . . . ."[152] Since courts presume that Congress did not intend to adopt rejected limitations[153] — such as the rejected inclusion in the debtor-bankrupt's estate of interests in pension plans with anti-alienation provisions — they must conclude that interests in such pension plans are excluded from the debtor-participant's estate.

The issue under this provision that the courts have focused on, however, is whether "applicable nonbankruptcy law" includes ERISA.[154] Clearly, the anti-alienation provision is a restriction on transfer contained in a trust.[155] Those courts affirmatively deciding this issue need not consider bankruptcy exemptions.

The committee reports for this provision are inconclusive.[156] The Senate report does not indicate whether it encompasses state or state

149. H.R. Doc. No. 137, *supra* note 51, pt. I, at v.

150. *Id.* at 17, 197.

151. *See* S. 2266, 95th Cong., 1st Sess. § 541(c) (1977) (retaining the exclusion to the extent necessary for support); H.R. 8200, 95th Cong., 1st Sess. § 541(c) (1977) (retaining the exclusion regardless of support requirements).

152. 11 U.S.C. § 541(c)(2) (1988).

153. *E.g.*, Russello v. United States, 464 U.S. 16, 23-24 (1983); Arizona v. California, 373 U.S. 546, 580-81 (1963); Carey v. Donohue, 240 U.S. 430, 437 (1916); *see* United States v. St. Paul, M. & M.R.R., 247 U.S. 310, 318 (1918) (can be of use if provision ambiguous); Pennsylvania R.R. v. International Coal Mining Co., 230 U.S. 184 (1913) (most persuasive); 2A SUTHERLAND, *supra* note 66, § 48.18.

154. *Compare* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 581-87 (5th Cir. 1983) *with* Forbes v. Lucas (*In re* Lucas), 924 F.2d 597, 600-02 (6th Cir. 1991).

155. *See supra* notes 73-74 and accompanying text.

156. *See Lucas*, 924 F.2d at 602; Anderson v. Raine (*In re* Moore), 907 F.2d 1476, 1478 (4th Cir. 1990). *Contra* Daniel v. Sec. Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1360 (9th Cir. 1985); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985); *Goff*, 706 F.2d at 581-82.

and federal law. However, the report does state that the provision "preserves restrictions on a transfer of a spendthrift trust [provided] that the restriction is enforceable under nonbankruptcy law . . . ."[157] The House report indicates that the provision covers two types of trusts, spendthrift trusts and support trusts, and "continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable state law."[158] These reports do agree that the provision preserved the pre-Bankruptcy Code practice.

Courts presume that Congress is familiar with prior judicial decisions when passing a statute, and so they interpret that statute in accordance with those prior judicial decisions.[159] Those decisions excluded from the debtor-participant's estate an interest in a pension plan with an anti-alienation provision created under federal law.[160] Thus, "applicable nonbankruptcy law" includes trust anti-alienation provisions created in accordance with federal law such as ERISA.

Courts also presume that the same phrase in a statute has the same meaning throughout the statute.[161] "Applicable nonbankruptcy

157. S. REP. No. 989, *supra* note 51, at 83, 1978 U.S.C.C.A.N. at 5869; H.R. REP. No. 595, 95th Cong., 1st Sess. 176 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6325 [hereinafter H.R. REP. No. 595] (same).

158. *Id.* at 176, 1978 U.S.C.C.A.N. at 6136 (citing a citation that refers to 1 RESTATEMENT (SECOND) OF TRUSTS §§ 153-54 (1959), relating generally to trust provisions for anti-alienation and support).

The citation to the *Restatement* indicates that the House envisioned at least two types of trusts within this exclusion, namely spendthrift trusts and support trusts. *See* H.R. DOC. No. 137, *supra* note 51, pt. II, at 147-48 & 151 (committee recommendation for an exemption for "a restriction on the transfer of a beneficial interest under applicable nonbankruptcy law" explained as creating an exception for "spendthrift and support trusts"). So Congress did not intend to limit the exclusion to spendthrift trusts only. Moreover, ERISA trusts are created for support during retirement. *But see id.* at 129 (federal exemption for ERISA plans with support limit so that their treatment would be the same as spendthrift trusts under the exclusion).

159. *E.g.*, Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986); District of Columbia v. Murphy, 314 U.S. 441, 453-54 (1941); Blake v. McKim, 103 U.S. 336, 339 (1880); 2A SUTHERLAND, *supra* note 66, at § 50.01; *see* Communications Workers of Am. v. Beck, 487 U.S. 735, 759-60 (1988) (Congress presumed to know about labor union practices when passing labor laws).

160. *See supra* note 98.

161. *E.g.*, Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 633 (1983); United States v. Cooper Corp., 312 U.S. 600, 606 (1941); Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932). 2A SUTHERLAND, *supra* note 66, § 46.06.

law" appears a number of times in the Bankruptcy Code.[162] Congressional reports for some of these other sections indicate that they include federal law.[163] Courts have held that some of these sections include federal law.[164] So the exclusion provision for nontransferability must include those provisions established under federal law such as ERISA.

When Congress uses different language in various parts of a statute, courts presume a different meaning.[165] When Congress desired to limit the applicable law to only state law, it clearly so stated in the Bankruptcy Code.[166] Thus, nonbankruptcy law means something different than merely state law.

A court should conclude from an examination of the Bankruptcy Code's exclusion provision that Congress intended to exclude interests in ERISA-qualified pension plans from the debtor-participant's estate. Congress made changes during the legislative process to exclude from the debtor-participant's estate interests in spendthrift trusts which includes interests in most qualified pension trusts. The Congressional committee reports expressed a desire to preserve

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162. *E.g.*, 11 U.S.C. §§ 101(51)(F), 108(a), 363(f)(1), 365 *passim*, 510(a), 522(b)(2)(B), 524(c), 541(c)(1) & (2), 552(b), 927, 943(b)(6), 1123(a), 1125(d), 1126(b)(1), 1142(a) (1988).

163. S. REP. No. 989, *supra* note 51, at 30, 121, 1978 U.S.C.C.A.N. at 5816 (applicable nonbankruptcy law in § 11 U.S.C. § 108(a) (1988) is derived from 11 U.S.C. § 29(e) (1977), § 11(e) of the old Bankruptcy Act, which stated "Federal or state law"), 5907 (applicable nonbankruptcy law under 11 U.S.C. § 1125(d) (1988) relieves court of the need to follow federal or state law); H.R. REP. No. 595, *supra* note 157, at 318, 409, 410, 1978 U.S.C.C.A.N. at 6275 (applicable nonbankruptcy law in 11 U.S.C. § 108(a) (1988) is derived from 11 U.S.C. § 29(e) (1977), § 11(e) of the old Bankruptcy Act, which stated "Federal or state law"), 6365 (applicable nonbankruptcy law under 11 U.S.C. § 1125(d) (1988) includes the Securities Act and the Exchange Act), 6366 (applicable nonbankruptcy law in 11 U.S.C. § 1126(b)(1) (1988) includes the Exchange Act).

164. *See* Eisenberg v. Feiner (*In re* Ahead By a Length, Inc.), 100 B.R. 157, 162-63 (Bankr. S.D.N.Y. 1989) (applicable nonbankruptcy law in 11 U.S.C. § 108(a) (1988) includes RICO); *In re* Stanley Hotel, Inc., 13 B.R. 926, 931 (Bankr. D. Colo. 1981) (applicable nonbankruptcy law in 11 U.S.C. § 1125(d) (1988) includes the federal securities laws). *See also* Bavely v. United States (*In re* Terwilliger's Catering Plus, Inc.), 911 F.2d 1168, 1176 (6th Cir. 1990) (priority of "statutory liens" under 11 U.S.C. § 724(d) (1988) determined by federal law); *In re* Laymon, 117 B.R. 856, 864 (Bankr. W.D. Tex. 1990) (allowable post-petition "interest" under 11 U.S.C. § 506(b) (1988) determined by federal judgment rate); *In re* Wedtech Corp., 87 B.R. 279, 288 (Bankr. S.D.N.Y. 1988) ("unenforceable" claim under 11 U.S.C. § 502(b) (1988) includes those under RICO and the federal securities laws).

165. *E.g.*, Guarantee Title & Trust Co. v. Title Guarantee & Surety Co., 224 U.S. 152, 158-60 (1912); United States v. Atchison, T. & S.F.R.R., 220 U.S. 37, 44 (1911).

166. *E.g.*, 11 U.S.C. §§ 109(c)(2), 362(b)(12), 522(b)(1), 523(a)(5), 903(1), 1145(a) (1988).

prior law that excluded interests in most qualified pension trusts from the debtor-participant's estate. The legislative history for the same language, as used in the exclusion provision located elsewhere in the Bankruptcy Code, indicates that the language covers both federal and state law. And Congress failed to limit expressly the exclusion provision to only state law as done elsewhere in the Bankruptcy Code.

B. *Exemption Provision: To Conserve Some Debtor Assets*

Failing to have the pension-plan benefits excluded from the debtor-participant's estate, the debtor-participant and the plan administrator next try to fit these benefits under one of the exemptions from liquidation under Chapter 7 or disposable income under Chapter 13. To provide a fresh start for the bankrupt, the Bankruptcy Code lists a number of exemptions for the debtor-participant's estate that are unavailable for distribution to the creditors. Unlike ERISA, the Bankruptcy Code failed to mandate uniformity amongst the states through a unitary exemption system.[167] Consequently, the exemptions provided the debtor-participant by the Bankruptcy Code depend on his state of residence. This fact explains the readiness of bankruptcy judges to delve into state law with respect to employee plans, much to the amazement of plan administrators accustomed to the uniformity provided by ERISA.

The Bankruptcy Code sets up three different exemption schemes: (1) the federal scheme, (2) the voluntary state scheme, and (3) the involuntary state scheme.[168] Normally a debtor-participant has a choice of selecting either the federal exemption scheme or the voluntary state scheme; however, a state may opt out of the federal

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167. *Compare* H.R. Doc. No. 137, *supra* note 51, at 171 (recommending uniform federal law for exemptions) *with* 11 U.S.C. § 522(b) (1988) (providing for the triple system of exemptions).

168. 11 U.S.C. § 522 (1988).

The Treasury Department has recently recommended elimination of state exemption schemes to obtain nationally uniform exemptions, a thinly disguised attempt to eliminate liberal California and Texas exemptions to protect the Federal Deposit Insurance Corporation. DEPARTMENT OF TREASURY, MODERNIZING THE FINANCIAL SYSTEM: RECOMMENDATIONS FOR SAFER, MORE COMPETITIVE BANKS, XX-6 (1990); *see also* S. 713, 102d Cong., 1st Sess. (1991) *reprinted in* 137 CONG. REC. S3739-3779 (daily ed. Mar. 21, 1991).

scheme by statute, in which case the debtor-participant may only use the required involuntary state scheme.[169]

The federal scheme only permits a limited exemption for certain non-contractual, non-trusteed federal benefits such as social security and veterans benefits and for:

> a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless . . . such plan . . . does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code.[170]

The failure to exclude ERISA pension plan interests under the exclusion provision results, under the federal scheme, in only a partial protection of these interests.

This federal-scheme-exemption provision is a holdover from the Bankruptcy committee's recommendation to prohibit the exclusion from bankrupts' estates of interests in spendthrift trusts — including certain qualified pension plans — and to permit their exemption to the extent necessary for the support of the debtor-participant.[171] The Senate bill did not have this provision and so the Senate report omits

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169. 11 U.S.C. § 522(b) (1988). Most states have opted out. *E.g.*, ALA. CODE § 6-10-11 (Supp. 1980); ALASKA STAT. § 9.38.055 (1983); ARIZ. REV. STAT. ANN. § 33-1133(B) (1987); ARK. CODE ANN. § 36- 210, 211 (Michie 1987); CALIF. CIV. PROC. CODE § 703.130(a) (Deering 1983); COLO. REV. STAT. § 13-54-107 (1987); DEL. CODE. ANN. tit. 10, § 4914 (Supp. 1990); FLA. STAT. ch. 222.20 (1988); GA. CODE ANN. § 44-13-100(b) (Michie 1982); IDAHO CODE § 11-609 (1990); ILL. ANN. STAT. ch. 81, 1505 (Smith-Hurd 1987); IND. CODE § 34-2-28-0.5 (1986); IOWA CODE § 627.10 (Supp. 1991); KAN. STAT. ANN. § 60-2312 (1983); KY. REV. STAT. ANN. § 427.170 (Michie/Bobbs-Merrill Supp. 1990); LA. REV. STAT. ANN. § 13:3881(B) (West Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 4426 (West Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. § 11-504(g) (1989); MISS. CODE ANN. § 85-3-1 (Supp. 1990); MO. REV. STAT. § 513.427 (Supp. 1991); MONT. CODE ANN. § 31-2-106 (1989); NEB. REV. STAT. § 25-15,105 (1989); NEV. REV. STAT. § 21.090(3) (1987); N.H. REV. STAT. ANN. § 511: 2-a (1983); N.Y. DEBT. & CRED. LAW § 284 (McKinney 1990); N.C. GEN. STAT. § 1C-1601(f) (Supp. 1989); N.D. CENT. CODE § 28-22-17 (Supp. 1990); OHIO REV. CODE ANN. § 2329.662(16) (Baldwin 1989); OKLA. STAT. tit. 31, § 1(B) (1991); OR. REV. STAT. § 23.305 (1987); S.C. CODE ANN. § 15-41-30 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 43- 31-30 (1983); TENN. CODE ANN. § 26-2-112 (1980); UTAH CODE ANN. § 78-23-15 (1987); VA. CODE ANN. § 34-3.1 (Michie 1990); W. VA. CODE § 38-10-4 (1985); WYO. STAT. § 1-20-109 (1988).

170. 11 U.S.C. § 522(d)(10)(A), (B), (E) (1988).

171. *See supra* note 150 and accompanying text.

it.[172] The House bill did not have the support limitation.[173] Thus, the provision arose from a compromise between the Senate and the House, with the House probably yielding on the support limitation to obtain the provision.[174]

The federal-scheme-exemption provision also contains a Bankruptcy Code reference to ERISA's provisions.[175] The federal-scheme exemption provides an exemption for certain retirement benefits provided they derive from: (1) qualified pension plans under section 401(a) of the ERISA portion of the Income Tax Code; (2) qualified annuity plans under section 403(a); (3) tax-sheltered annuities under section 403(b); (4) individual retirement accounts under section 408; and (5) retirement bonds under section 409.[176] One court suggested that this reference means that all benefits derived from ERISA-qualified pension plans are included in the debtor-participant's estate else this provision is surplusage.[177] However, this view overlooks the intricacies of ERISA. Not all qualified pension plans, qualified annuity plans, or tax-sheltered annuities are subject to the anti-alienation provision.[178] Individual retirement accounts and retirement

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172. S. 2266, 95th Cong., 1st Sess. § 522 (1977); S. REP. No. 989, *supra* note 51, at 75, 1978 U.S.C.C.A.N. at 5861.

173. H.R. 8200, 95th Cong., 1st Sess. § 522 (1977); H.R. REP. No. 595, *supra* note 157, at 361-62, 1978 U.S.C.C.A.N. at 6317-18 (indicating the provision came from the Uniform Exemptions Act of 1976). The Uniform Exemptions Act, however, does have the support limitation. UNIF. EXEMPTIONS ACT § 6(b), 13 U.L.A. 224 (1986).

174. *See* S. REP. No. 989, *supra* note 51, at 6, 1978 U.S.C.C.A.N. at 5792 (critizing the House bill's exemption provision as creating instant affluence for the debtor). Assumptions about a Congressional compromise, however, are too speculative to provide a basis for interpretation. *See* Fox v. Standard Oil Co., 294 U.S. 87, 96 (1925) (eliminated words during passage not conclusive); Andrews v. Hovey, 124 U.S. 694, 716 (1888) (arguments based on assumed phases in its passage are very unreliable).

175. 11 U.S.C. § 522(d)(10)(E)(iii) (1988).

176. 26 U.S.C. §§ 401(a), 403(a), 403(b), 408 (1988 & Supp. I 1989); 26 U.S.C. § 409 (Supp. II 1978). The Bankruptcy Code still refers to I.R.C. § 409 (Supp. II 1978) (dealing with retirement bonds), which was repealed in 1982 by the Tax Reform Act of 1984, Pub. L. No. 98-369 §§ 491(b), (e), 98 Stat. 494, 848, 852 (1984), so that old I.R.C. § 409A (dealing with additional requirements for employee stock ownership plans) became I.R.C. § 409. Congress has apparently yet to make this technical correction.

This exemption also applies to social security and veterans benefits, 11 U.S.C. § 522(d)(10)(A), (B) (1988), that are the subject of the federal exemption under the state scheme. *See infra* note 183.

177. Regan v. Ross, 691 F.2d 81, 82 (2d Cir. 1982); *see also* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1983).

178. The Internal Revenue Code's anti-alienation provision (26 U.S.C. § 401(a)(13) (1988); *see*

bonds are not subject to an anti-alienation provision.[179] So several classes of qualified pension plans are not subject to ERISA's anti-alienation provision, and, therefore, courts cannot exclude their interests from the debtor-participant's estate as interests in a trust with a transfer restriction. These included interests, then, are the ones subject to the federal-scheme exemption, not those containing ERISA's anti-alienation provision.

The federal-scheme exemption works to protect retirement benefits in two ways. First, the exclusion provision excludes qualified pension trusts with anti-alienation provisions. Second, the federal-scheme exemption exempts the remaining retirement benefits: those non-contractual, non-trusteed federal benefits, such as social security and veterans benefits and qualified pension plans not subject to the anti-alienation provision, albeit with a support limitation. This was the best the House could obtain from the Senate for these latter

29 U.S.C. § 1056(d) (1988 & Supp. I 1989)) does not apply to (1) government plans, (2) church plans, and (3) plans which have not received employer contributions since 1974. 26 C.F.R. § 1.401(a)-13(a) (1991); *see* 29 U.S.C. § 1003(b), 1031 (1988 & Supp. I 1989). The non-employer contribution plans would include the plans of fraternal societies organized under 26 U.S.C. § 501(c)(8) (1988), voluntary employee benefit associations organized under 26 U.S.C. § 501(c)(9) (1988), and certain pre-1959 plans funded by employee labor organizations without employer contributions as provided under 26 U.S.C. § 501(c)(5) (1988). *See* 26 U.S.C. § 411(e) (1988). Each of these plans can have a pension plan qualified under 26 U.S.C. § 401(a) (1988 & Supp. I 1989), provided that they satisfy the requirements of pre-ERISA 26 U.S.C. § 401(a)(7) (Supp. IV 1974). *See* 26 U.S.C. § 412(h) (1988). Thus these plans are qualified under section 26 U.S.C. § 401(a) (1988 & Supp. I 1989) but are not subject to the anti-alienation provision. So their interests are not excluded from the bankrupt's estate as interests in a spendthrift trust. 11 U.S.C. § 541(c)(2) (1988).

These same government and church plans have an employer eligible to purchase annuity contracts from qualified annuity plans under 26 U.S.C. § 403(a) (1988). Qualified annuity plans are required to satisfy the requirements of 26 U.S.C. § 401(a) (1988 & Supp. I 1989). 26 U.S.C. §§ 403(a), 404(a)(2) (1988). But government and church plans satisfy 26 U.S.C. § 401(a) (1988 & Supp. I 1989) without satisfying the anti-alienation provision. Thus there is a class of qualified annuity plans under 26 U.S.C. § 403(a) (1988) that are not subject to the anti-alienation provision. So their interests are not excluded from the bankrupt's estate as interests in a spendthrift trust. 11 U.S.C. § 541(c)(2) (1988).

Similarly, church employers are eligible to purchase tax-sheltered annuities under 26 U.S.C. § 403(b) (1988). Tax-sheltered annuities must have an anti-alienation provision unless the holder is qualified under 26 U.S.C. § 401(a) (1988 & Supp. I 1989). 26 U.S.C. § 401(g) (1988). But church plans are not required to contain the anti-alienation provision. Again there is a class of tax-sheltered annuity plans under 26 U.S.C. § 403(b) (1988) that are not subject to the anti-alienation provision. So their interests are not excluded from the bankrupt's estate as interests in a spendthrift trust. 11 U.S.C. § 541(c)(2) (1988).

179. 26 C.F.R. § 1.408-4(a)(2) (1991) (alienation of an individual retirement account amounts to a distribution subject to a penalty tax of 10%); 26 C.F.R. § 346.7, 346.8 (1982) (retirement bonds are not transferable unless redeemable, but they are redeemable early for a 10% penalty tax).

interests. Failure to exclude qualified pension trusts with anti-alienation provisions only creates an anomaly between different types of retirement programs with respect to their availability for distribution to creditors. Federal benefits would not be subject to a support limitation but private benefits would.

Under the state scheme, voluntary or involuntary, the debtor-participant may exclude "property that is exempt under federal law, other than" bankruptcy law.[180] The committee reports contain a nonexclusive list of items this exemption covers, omitting ERISA.[181] So courts have concluded the state scheme's federal exemption does not include ERISA.[182] The listed items are generally employee benefits provided (1) from federal funds under federal law, or (2) in industries protected by the federal government.[183] These employee benefits are also subject to a federal statutory anti-alienation provision and not a federal requirement for an anti-alienation provision in the plan as with ERISA.[184]

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180. 11 U.S.C. § 522(b)(2)(A) (1988).

181. S. REP. No. 989, *supra* note 51, at 75, 1978 U.S.C.C.A.N. at 5861; H.R. REP. No. 595, *supra* note 157, at 360, 1978 U.S.C.C.A.N. at 6316. *But see* Note, *Exemption of ERISA Benefits Under Section 522(b)(2)(A) of the Bankruptcy Code*, 83 MICH. L. REV. 214 (1984) (arguing that exemption under 11 U.S.C. § 522(b)(2)(A) (1988) includes ERISA qualified pension plans).

182. *E.g.*, Goff v. Taylor (*In re* Goff) 706 F.2d 574, 585 (5th Cir. 1983).

The fact that ERISA is omitted from the list has led some to conclude "Federal [nonbankruptcy] law" does not include ERISA, and hence ERISA cannot be "applicable nonbankrutpcy law" of the exclusion. Newell, *supra* note 49, at 196. But the reason the legislative list omits ERISA is that interests subject to its provisions are excluded by the trust exclusion or exempted by another exemption and so do not need required listing.

183. S. REP. No. 989, *supra* note 51, at 75, 1978 U.S.C.C.A.N. at 5861. The list specifies Foreign Service Retirement and Disability payments; social security payments; injury or death compensation payments for war risk hazards; wages of fishermen, seamen, and apprentices; civil service retirement benefits; Longshoremen's and Harbor Workers' Compensation Act death and disability benefits; Railroad Retirement Act annuities and pensions; railroad unemployment insurance (mislabeled "veterans benefits"); veterans benefits (mislabeled "special pensions paid to winners of the Congressional Medal of Honor"); and federal homestead lands.

184. The list specifies the following statutory anti-alienation provisions: (1) Foreign Service Retirement and Disability payments, 22 U.S.C. § 1104 (1978) (not "assignable . . . or subject to execution, levy, attachment, garnishment or other legal process . . . ."), *repealed by* Pub. L. No. 96-465, § 2205(1), 94 Stat. 2071, 2159 (1980) (codified at 22 U.S.C. § 4042 (1988)); (2) social security payments, 42 U.S.C. § 407 (1988) (not "transferrable or assignable . . . [or] subject to execution, levy, attachment or other legal process"); (3) injury or death compensation payments from war risk hazards, 42 U.S.C. § 1717 (1990) (not "transferrable or assignable . . . [nor] subject to execution, levy, attachment or other legal process"); (4) wages of fishermen, seamen, and apprentices, 46 U.S.C. § 601 (1978) (current version at 46 U.S.C. § 11109 (1988) ("not subject to attachment . . . . payment

This list led one court to assert that the state scheme's federal exemption for trusts with a transfer restriction means that the exclusion provision does not exclude from the bankrupt's estate benefits subject to a federally required anti-alienation provision, such as ERISA's.[185] Otherwise, the exemption for federal statutory anti-alienation provisions would be superfluous. This view, however, overlooks the difference between benefits created under pension plans set up by private companies subject to federal requirements and benefits created and specified solely by federal statute. Private benefits are contractual in nature,[186] but public benefits are subject to divestment by statutory amendment at any time.[187] Unlike benefits

of wages . . . is valid, not withstanding any . . . assignment;") (5) civil service retirement benefits, 5 U.S.C. §§ 729, 2265 (1978), *repealed by* Pub. L. No. 89-554, § 7, 80 Stat. 378, 631 (1966) (codified at 5 U.S.C. § 8346 (1988)) ("not assignable . . . or subject to execution, levy, attachment, garnishment, or other legal process . . . ."); (6) Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. § 916 (1988) ("no assignment . . . [and] exempt from . . . levy, execution, and attachment"); (7) Railroad Retirement Act annuities and pensions, 45 U.S.C. § 228(L) (1978), *repealed by* Pub. L. No. 93-445, § 14, 88 Stat. 1305, 1345 (1974) (codified at 45 U.S.C. § 231m (1988)) (not "assignable . . . [or] subject . . . to garnishment, attachment or other legal process"); (8) railroad unemployment insurance (mislabeled "veterans benefits"), 45 U.S.C. § 352 (1988) (not "assignable . . . [or] subject to . . . garnishment, attachment or other legal process"); (9) veterans benefits (mislabeled "special pensions paid to winners of the Congressional Medal of Honor"), 38 U.S.C. § 5301 (1988) (not "assignable . . . [or] liable to attachment, levy, or seizure by . . . legal . . . process"); and (10) federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. § 175 (1975) (not liable to satisfy debt), *repealed by* Pub. L. No. 94-579, 90 Stat. 2987 (1976). H.R. REP. No. 595, *supra* note 157, at 360, 1978 U.S.C.C.A.N. at 6316.

Of these ten types of benefits, six involve a fund that might be a trust. *See* 22 U.S.C. § 4042 (1988) (Foreign Service Retirement Disability Fund); 42 U.S.C. § 401 (1988 & Supp. I 1989) (Federal Old-Age and Survivors Insurance Trust Fund); *id.* § 1701 (war risk hazards uses the Employees' Compensation Fund); 5 U.S.C. § 8348 (1988 & Supp. I 1989) (Civil Service Retirement and Disability Fund); 45 U.S.C. § 231n (1988 & Supp. I 1989) (Railroad Retirement Account); 45 U.S.C. § 360 (1988) (Railroad unemployment insurance account). Only these six types of benefits might be subject to the Bankruptcy Code's spendthrift-trust exclusion. *See* 11 U.S.C. § 541(c)(2) (1988).

The other four types of benefits do not involve trusts. Seamen's current wages and homestead land clearly do not. Longshoremen's benefits are secured by insurance, not trusts, 33 U.S.C. § 932 (1988), and veterans benefits are payable from the Treasury, not a trust. 38 U.S.C. § 3020 (1988).

185. Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1983).

186. *See* George Lee Flint, *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U. L. REV. 133, 160-62 (1989) (explaining that after World War I the two methods of handling private pension rights were the contractual approach and the trust-law approach).

187. With respect to those benefits that have special funds that might be a trust for purposes of the bankruptcy exclusion, see *supra* note 185, courts have refused to give effect to government-fostered expectations that in the private sector form the basis of contractual rights or an estoppel for (1) social security benefits (*e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 646 (1975); Richardson v. Belcher, 404 U.S. 78, 80 (1971); Flemming v. Nestor, 363 U.S. 603, 609-10 (1960), (2) civil service retirement benefits (*e.g.*, Zucker v. United States, 758 F.2d 637, 638 (Fed. Cir. 1985) (no claim to

from ERISA-qualified plans, these non-contractual, non-trusteed, federally-specified benefits are not encompassed within the exclusion provision for trusts with a transfer restriction and would, therefore, require an exemption.

Under the state scheme, the debtor may also avail himself of the many state statutes that exempt interests in pension plans.[188] Those states that did not already have such an exemption started passing these exemptions for pension plans after the courts refused to rule interests in pension plans excluded under the exclusion provision.[189]

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benefits that are subject to lawful change), *cert. denied,* 474 U.S. 842 (1985); American Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 554 (D.C. Cir. 1983) (same), *cert. denied,* 465 U.S. 1100 (1984); Stouper v. Jones, 284 F.2d 240, 242 (D.C. Cir. 1960) (same)), and (3) railroad retirement annuities and pensions. *E.g.,* Freeman v. Railroad Retirement Bd., 192 F.2d 51, 52 (5th Cir. 1951) (same), *cert. denied,* 343 U.S. 909 (1952). The courts should find similarly for foreign service retirement and disability benefits, war risk hazard payments, and railroad disability insurance benefits.

Benefits from qualified pension plans, in contrast, cannot be divested once they have vested. 29 U.S.C. § 1053(c) (1988); 26 U.S.C. § 411(a)(10) (1988).

188. *E.g.,* ALASKA STAT. § 09.38.017(a)(1) (Supp. 1990); ARIZ. REV. STAT. ANN. § 33-1126(B) (1990); ARK. CODE STAT. ANN. § 16-66-220 (Michie Supp. 1991); CALIF. CIV. PROC. CODE § 704.115 (Deering 1983); COLO. REV. STAT. § 13-54-104(1.1) (Supp. 1990); CONN. GEN. STAT. ANN. § 52-352b(m) (West Supp. 1991) (limited by support); FLA. STAT. ANN. § 222.21 (West 1989); GA. CODE ANN. § 18-4-22 (Michie 1991); HAW. REV. STAT. § 651-124 (Supp. 1990); IDAHO CODE § 55-1011 (Supp. 1991); ILL. ANN. STAT. ch. 110, 12-1006 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 34-28-1(a)(6) (Burns Supp. 1991); IOWA CODE ANN. § 627.6(8)(e) (West Supp. 1991) (limited by support); KAN. STAT. ANN. § 60-2313(a)(1) (Supp. 1990); KY. REV. STAT. ANN. § 427.150(2)(f) (Michie/Bobbs-Merrill Supp. 1990); LA. REV. STAT. ANN. § 20:33 (West Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 4422(13)(B)(E) (West Supp. 1990) (limited by support); MD. CTS. & JUD. PROC. CODE ANN. § 11-504(h) (1989); MINN. STAT. ANN. § 550.37-24 (West Supp. 1991) (limited by support); MISS. CODE ANN. § 85-3-1(1)(b)(iii) (Supp. 1990); MO. ANN. STAT. § 513.430(10)(e) (Vernon Supp. 1991) (limited by support); MONT. CODE ANN. § 31-2-06 (1991) (reference to federal exemption with support limitation); NEB. REV. STAT. § 25-1563.01 (1989) (limited by support); N.Y. DEBT. & CRED. LAW § 282(iii)(2)(e) (McKinney 1990); N.D. CENT. CODE § 2 8-22-03.1(3) (Supp. 1990) (limited by dollar amount); OHIO REV. CODE ANN. § 2329.66(A)(4)(b) (Anderson 1991) (limited by support); OKLA. STAT. ANN. tit. 31, § 1(A)(20) (West 1991); OR. REV. STAT. § 23.170(2) (1989); PA. STAT. ANN. tit. 42, § 8124(b)(1)(vii) (1991); R.I. GEN. LAWS § 9-26-4(12) (Supp. 1990); S.C. CODE ANN. § 15-41-30(10) (Law. Co-op. 1989); TENN. CODE ANN. § 26-2-104(b) (Supp. 1991); TEX. PROP. CODE ANN. § 42.0021 (West Supp. 1991); UTAH CODE ANN. § 78-23-5(1)(j) (Supp. 1991); VT. STAT. ANN. tit. 12, § 2740(19)(J) (Supp. 1991); VA. CODE ANN. § 34-34 (Michie 1990) (limited by dollar amount); WASH. REV. CODE ANN. § 6.15.020(3) (West Supp. 1991); W. VA. CODE § 38-10-4(j)(5) (1985) (limited by support); WIS. STAT. ANN. § 815.18(3)(j) (West Supp. 1991); WYO. STAT. § 1-20-110 (Supp. 1991).

189. *See In re* Volpe, 100 B.R. 840, 848 (Bankr. W.D. Tex. 1989) (explaining the Texas exemption, TEX. PROP. CODE ANN. § 42.0021 (West Supp. 1991), as the response to Goff v. Taylor (*In re* Goff) 706 F.2d 574 (5th Cir. 1983)), *aff'd sub nom.* NCNB Texas Nat'l Bank v. Volpe, 120 B.R. 843 (Bankr. W.D. Tex. 1990); Jonathan T. Baer, Note, *ERISA Preemption of State Exemption Laws: The Effects in Bankruptcy,* 7 BANKR. DEV. J. 615, 617-18 (1990).

The Bankruptcy Code authorizes these state exemptions.[190] The issue for the courts regarding these exemptions is whether — since ERISA preempts any state law relating to an employee plan — courts regard these exemptions as federal law and hence valid, or state law and hence invalid. Some courts have decided the latter and have struck down these state exemptions as violative of ERISA's preemption provision that forbids the application of state law to pension plans.[191]

The state-scheme exemption works to protect retirement benefits as follows. As under the federal scheme, the exclusion provision excludes interests in qualified pension trusts with anti-alienation provisions. The state-scheme exemption for federal benefits exempts those non-contractual, non-trusteed federal benefits such as social security and veterans benefits, albeit in a more expansive list than under the federal scheme. A court might also exempt the remaining retirement benefits — those not subject to the anti-alienation provision — provided the state legislature has adopted such an exemption. So both the federal and state schemes, although in differing and incomplete fashion, attempt to protect all retirement benefits from creditors.

But due to court decisions, plan administrators generally do not obtain the result they expected from ERISA and the Bankruptcy Code. The exemptions do not provide the required protection — whether the federal one limited by a support requirement, or the state one emasculated by either the legislative history on other federal nonbankruptcy exemptions or ERISA's preemption provision. The reason for the exemption failure is obvious. Congress did not anticipate courts would have to apply them to interests in qualified pension plans with an anti-alienation provision since the exclusion for trusts with a transfer restriction should have protected these interests.[192]

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190. 11 U.S.C. § 522(b) (1988); H.R. REP. No. 595, *supra* note 157, at 363, 1978 U.S.C.C.A.N. at 6319 (debtor's choice to use federal scheme or state scheme); 124 CONG. REC. H11,089 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6453 (statement of Rep. Don Edwards) (states may bar the federal scheme); 124 CONG. REC. S17,406 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6521 (statement of Sen. Dennis DeConcini) (same).

191. *See infra* note 304.

192. *See The Bankruptcy Reform Act: Hearings on S.235 and S.236, Before the Subcomm. on*

C. *Purpose of a Fresh Start*

When interpreting the Bankruptcy Code, the Supreme Court generally follows the plain-meaning rule confirmed by an examination of the Bankruptcy Code's object and policy.[193] So the policy behind the Bankruptcy Code has significance for interpretation.

The Bankruptcy Code serves two main purposes: equality of distribution among creditors and a fresh start for debtors.[194] With re-

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Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 664, 679 (1975) [hereinafter *Hearings*]. Congressional hearings on an earlier bill recorded the following response by John J. Creedon, American Life Insurance Association, to a written question:

> Question 2. Why do you believe that it is more equitable to include in the proposed exemptions all pension plans qualifying under section 401, 403, 408 or 409 . . .?
> Answer. Retirement benefits can be provided in different ways . . . . Each of the tax qualified retirement plans has been recognized by Congress as a means of encouraging retirement planning . . . . If any exemption for retirement benefits is warranted it would seem that benefits pursuant to any tax qualified plan should be recognized — although different plans require different kinds of exemptions.

Id. So Congress did not expect one exemption scheme to cover all plans, but several exemptions (and exclusion) to protect interests in all pension plans.

193. *See infra* note 337 and accompanying text.

194. H.R. Doc. No. 137, *supra* note 51, pt. I, at 75; *see* Perez v. Campbell, 402 U.S. 637, 648 (1971) (basic purpose of the bankruptcy laws is to give certain debtors a fresh start); S. Rep. No. 989, *supra* note 51, at 6, 1978 U.S.C.C.A.N. at 5792 ("The committee feels that the policy of the bankruptcy law is to provide a fresh start . . . .").

Creditors have often suggested that one purpose of the bankruptcy laws is to assist in debt collection. *See* David T. Stanley & Marjorie Girth, Bankruptcy: Problems, Process and Reform 20-21 (1971) (describing one of the purposes as debt-collection and creditor-distribution); Wohl, *supra* note 49, at 5 (to permit creditors to recoup as much owed them as possible); *see also* S. Rep. No. 989, *supra* note 51, at 5, 1978 U.S.C.C.A.N. at 5791 ("to include all of the property of the debtor in the bankruptcy case . . . . As a result of these changes the amounts that will be returned to all creditors can be greater.").

However, this is an erroneous view. The creditor rights laws of the various states serve this purpose. Bankruptcy law, in contrast, uniquely provides discharge and only assists in debt collection to the extent state law does not extend beyond its state borders. H.R. Doc. No. 137, *supra* note 51, at 63-64; *see* Segal v. Rochelle, 382 U.S. 375, 380 (1966) (to convert the estate of the bankrupt to cash and distribute it and give the bankrupt a fresh start); Burlingham v. Crouse, 228 U.S. 459, 473 (1913) (same).

The erroneous view reflects nineteenth century bankruptcy law. There have been five federal bankruptcy statutes, namely, (1) the Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 [hereinafter the 1800 Act], *repealed by* the Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; (2) the Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, [hereinafter the 1841 Act] *repealed by* the Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; (3) Act of Mar. 2, 1867, ch. 176, 14 Stat. 517; [hereinafter the 1867 Act], *repealed by* the Act of June 7, 1878, ch. 160, 20 Stat. 99; (4) the Act of July 1, 1898, ch. 541, 30 Stat. 544 [hereinafter the Bankruptcy Act] *repealed by* the Bankruptcy Code, Pub. L. No. 95-598, tit. IV, § 401(a), 92 Stat. 2651, 2682 (1978); and (5) the Bankruptcy Code. *Id.* (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). Except during the brief time of the 1867 Act, prior to 1898, the bankruptcy laws favored spect to liquidations under Chapter 7 and rehabilitations under Chapter 13, the creditor-favoring purpose is of little import.[195] An individual debtor in bankruptcy has a choice to protect (1) all his future income by exposing some of his assets — namely those not exempt — to liquidation under Chapter 7, or (2) all his assets by exposing some of his future income — namely his disposable income for several years — to distribution, in accordance with a rehabilitation plan under Chapter 13.[196] The debtor surrenders his claims to either (1) certain non-exempt assets in a Chapter 7 liquidation, or (2) disposable income for several years in a Chapter 13 rehabilitation in exchange for a discharge[197] of some of his existing debts.[198] Discharge relieves the debtor from the burdens of existing debt and places him in the marketplace again to earn, consume, and borrow,[199] by freeing all or a portion of his future income potential from his past financial obligations.[200]

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the creditor. *Compare* Reed v. McIntyre, 98 U.S. 507, 512 (1878) (stating that the Court has "often declared that the *pro rata* distribution of the property of the bankrupt was the main purpose of the bankrupt statute [the 1867 Act].") *with* Stellwagen v. Clum, 245 U.S. 605, 617 (1918):

> [T]he federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the [Bankruptcy Act], intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors.

Id.

The main favoring device was the requirement of creditor approval for relief. Section 36 of the 1800 Act, 2 Stat. 31 (two-thirds); Section 4 of the 1841 Act, 5 Stat. 443 (majority). *But see* Section 29 of the 1867 Act, 14 Stat. 531-32 (without creditor consent, before it was amended). *See generally* Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515 (1991).

195. *See* STANLEY & GIRTH, *supra* note 194, at 20-21 (showing historically from 1946 to 1969 over 70% of Chapter 7 cases involved no assets); TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 216, 339 (1989) (showing that two-thirds of the debtors in Chapter 13 could not make their payments to creditors from disposable income).

196. *See supra* notes 5-9 and accompanying text. *See also* H.R. REP. No. 595, *supra* note 157, at 118, 1978 U.S.C.C.A.N. at 6079 (explaining that the advantage of Chapter 13 to the debtor is his ability to protect his assets).

197. 11 U.S.C. §§ 727, 1328 (1988). Discharge is denied for certain norms specified in the Bankruptcy Code. *Id.* §§ 523(a), 727(a), 1328(a). Discharge under Chapter 13 is viewed as more generous, since fewer debts are non-dischargeable under Chapter 13. *Compare id.* § 1328(a) *with id.* § 727(b).

198. *See* Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretative Theory*, 21 U. RICH. L. REV. 49, 51 (1986) (discharge "is, rather, the principal (if not the sole) point of the exercise."); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) ("The principal advantage bankruptcy offers an individual lies in the benefits associated with discharge.").

199. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("[o]ne of the primary purposes of the

In furtherance of this policy, the Bankruptcy Code contains several provisions to foster the fresh start not contained in earlier bankruptcy statutes. One set of provisions encourages the use of rehabilitations under Chapter 13 to obtain the broader discharge for the fresh start.[201] The Bankruptcy Code made two major changes to encourage consumer bankruptcies that would provide that broader discharge: Congress (1) broadened the definition of the debtor who could use Chapter 13 to include small businessmen and investors[202] and (2) broadened the discharge of existing debts to include all debts except family support orders.[203] Another set of provisions insures

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bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (quoting Williams v. U.S. Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915)); H.R. Doc. No. 137, *supra* note 51, pt. I, at 71 ("to rehabilitate debtors for continued and more value-productive participation, *i.e.*, to provide a meaningful 'fresh start.'").

200. 11 U.S.C. §§ 541(a)(6), 704 (all future earnings freed in Chapter 7), 1322(c), 1325(b) (1988) (a portion of future earnings freed in Chapter 13, with disposable income dedicated to plan payments for three years).

201. S. REP. No. 989, *supra* note 51, at 13,140 1978 U.S.C.C.A.N. at 5799 ("The new Chapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment . . . .") ("Increased access to the simpler, speedier, and less expensive debtor relief provisions of Chapter 13 is accomplished by . . . ."); H.R. REP. No. 595, *supra* note 157, at 4,117, 1978 U.S.C.C.A.N. at 5966 ("The second major problem under current bankruptcy law is the inadequacy of relief that the Bankruptcy Act provides for consumer debtors . . . . This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor . . . . In the consumer area, proposed Chapter 13 encourages more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge."), 6077-78 ("[consumer debtors] opt for straight bankruptcy only because present Chapter XIII simply cannot meet their needs . . . . This bill attempts to cure these inadequacies in the Bankruptcy Act and to prevent the frequent problems confronting consumer debtors . . . . First, the bill simplifies, expands, and makes more flexible wage earner plans . . . .").

202. *Compare* 11 U.S.C. § 109(e) (1988) (individual with regular income and owing unsecured debts of less than $100,000 and secured debts of less than $350,000) *with* 11 U.S.C. § 1006(8) (1976) (wage earner whose principal income is derived from wages, salary, or commissions). *See also* H.R. REP. No. 595, *supra* note 157, at 119, 1978 U.S.C.C.A.N. at 6079-80 (explaining that the reason for the change was to make Chapter 13 asset protection available to the small businessman (who is a self-employed sole propietor, since the difference between him and the employee is slight) and to small investors, even those on social security).

203. *Compare* 11 U.S.C. § 1328(a) (1982) (before the 1990 amendments adding education loans and motor vehicle judgments as nondischargeable) *with* 11 U.S.C. §§ 35, 1060 (1976) (listing taxes, certain torts, debts of breaching fiduciaries, certain wages, moneys to secure performance, family support orders, willful and malicious injuries, and federally insured loans as nondischargeable). *See also* S. REP. No. 989, *supra* note 51, at 142, 1978 U.S.C.C.A.N. at 5928-29 (describing a less limited discharge in the Senate bill); H.R. REP. No. 595, *supra* note 157, at 430. 1978 U.S.C.C.A.N. at 6386 (discharge of all debts except family support orders).

the availability of a fresh start by increasing the exemptions.[204] Congress provided two provisions to expand exemptions: (1) a federal scheme of exemptions for the debtor as an alternative to the puny exemption schemes in some states,[205] and (2) double exemptions for married couples in a joint bankruptcy.[206] Congress, by passing the Bankruptcy Code, intended to insure that the debtor preserved sufficient assets and future income so he could proceed with his fresh start without ending up as a ward of the state.

Subsequent attempts by creditors to have Congress alter the Bankruptcy Code confirms that its policy was asset and income protection for the debtor's fresh start. The consumer credit industry in the throws of the early 1980s recession placed the blame for increased bankruptcies on the Bankruptcy Code which, according to them, had liberalized exemptions, expanded the discharge provisions, and diminished Chapter 13 entry-level requirements.[207] Their major complaints were that (1) debtors with no non-exempt assets used Chapter 7 to discharge debts that they could have paid under a Chapter 13 rehabilitation plan, and (2) rehabilitation plans allowed debtors to pay less than they were capable of to get discharged from

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204. H.R. REP. No. 595, *supra* note 157, at 118, 126, U.S.C.C.A.N. at 6078 ("the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start . . . . The premises of the bill with respect to consumer bankruptcy are that use of bankruptcy law should be a last resort; that if it is used, debtors should attempt repayment under Chapter 13 . . .; and finally . . . bankruptcy relief should be effective, and should provide the debtor with a fresh start."), 6087 ("there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start.").

205. 11 U.S.C. § 522 (1988); *see* H.R. REP. No. 595, *supra* note 157, at 126, 360 U.S.C.C.A.N. at 6087 ("Under current law, what property is exempt is determined under State law . . . . The historical purpose of these exemption laws . . . [was so] the debtor will not be left destitute and a public charge. The purpose has not changed, but neither have the level of exemptions in many States. Thus, the purpose has largely been defeated."), 6316 ("section [522], is a significant departure from present law. It permits an individual debtor in a bankruptcy case a choice between exemptions systems.").

206. 11 U.S.C. § 522(m) (1982) (before the 1984 amendment to eliminate the double exemption feature); *In re* Ancira, [1978-1981] Bankr. L. Rep. (CCH) ¶ 67,580 (Bankr. N.D. Cal. Aug. 20, 1980) (permitting double exemptions). *Contra In re* Skipworth, [1978-1981] Bankr. L. Rep. (CCH) ¶ 67,885 (Bankr. S.D. Cal. Mar. 3, 1981) (denying double exemptions); *see also* Baldwin v. Marshack (*In re* Baldwin), 70 B.R. 612 (Bankr. 9th Cir. 1987) (denying aggregating of exemptions as thwarted by opt-out statute); *In re* Riebow, 114 B.R. 656 (Bankr. E.D. Mo. 1990) (same).

207. *Bankruptcy Reform: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 452, 488-89 (1983) (hereinafter *Bankruptcy Reform Hearing*). *See generally* Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59 (1986).

debts that were non-dischargeable in a Chapter 7 liquidation.[208] The consumer credit industry proposed two major changes: (1) an "ability to pay" test[209] for a Chapter 13 rehabilitation plan rather than just "good faith,"[210] and (2) a requirement for a Chapter 7 liquidation filing that the debtor cannot repay his debts out of a reasonable portion of future income.[211] Both of these proposals would have insured greater recovery by creditors but fewer assets and less income for the debtor's fresh start. Congress rejected both of these efforts to undo the protection of the fresh start guaranteed by the Bankruptcy Code.[212] The fact that Congress rejected this major effort to thwart the fresh start suggests that courts should interpret the Bankruptcy Code to preserve that fresh start, unless Congress specifically acts to undo it.[213]

Achievement of a fresh start depends on insuring the ability of the debtor-participant to produce income in the future.[214] Individuals in today's society produce income by two methods. First, income is earned by rendering services for compensation during their productive lives before they are required to quit working either by law[215] or inability to render further services.[216] Second, income is earned

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208. *Bankruptcy Reform Hearing*, *supra* note 207, at 487.

209. *E.g.*, S. 863, 97th Cong., 1st Sess. § 128(b) (1981) (bona-fide-effort test); S. 658, 96th Cong., 2d Sess. § 128(b) (1980) (good-faith-effort test); S. Rep. No. 150, 97th Cong., 1st Sess. 18-19 (1981) (ability to pay test).

210. 11 U.S.C. § 1325(a)(3) (1988).

211. *E.g.*, S. Rep. No. 65, 98th Cong., 1st Sess. 90 (1983) (comments of Senators Kennedy and Metzenbaum concerning "future income test" contained in an earlier version of S. 445, 98th Cong., 1st Sess. (1983)).

212. Congress gave the consumer credit industry three minor changes: (1) access to Chapter 7 can be eliminated if the court determines such a filing would be a "substantial abuse," 11 U.S.C. § 707(b) (1988); (2) if a creditor objects to a Chapter 13 plan, a bankruptcy court should not confirm the plan unless the debtor uses all his disposable income over the next three years to make payments under the plan, *id.* at § 1325(b); and (3) an unsecured creditor may seek an increase in an individual debtor's payments under a Chapter 13 plan, *id.* at § 1329(a). *See* Gross, *supra* note 207, at 65-66.

213. *See* Carey v. Donohue, 240 U.S. 430, 437 (1916) (court cannot supply construction clearly rejected by Congress); Pennsylvania R.R. v. International Coal Mining Co., 230 U.S. 184, 198-99 (1913) (same). *See also supra* note 153 and accompanying text.

214. H.R. Rep. No. 595, *supra* note 157, at 126, 1978 U.S.C.C.A.N. at 6087 (the purpose of the exemptions is so "the debtor will not be left destitute and a public charge.").

215. *E.g.*, 29 U.S.C. § 631(c)(1)-(d) (1988) (age 65 for management executives; age 70 for tenured faculty).

216. George E. Rejda, Social Insurance and Economic Security 7 (2d ed. 1984) (old age); *see also* American Honda Fin. Corp. v. Cilek (*In re* Cilek), 115 B.R. 974, 990 (Bankr. W.D. Wis.

by a return of capital and income from retirement savings after having reached that terminable working age.[217] Failure to exclude[218] pension-plan interests from the debtor-participant's estate constitutes a serious threat to achieving the desired result of a fresh start. The amount of pension interest a debtor-participant has depends generally on the amount of time the debtor-participant has available to collect them.[219] Younger debtors would have at least a chance of redeveloping retirement savings since they have the most years remaining in their lives to garner savings. Older debtors not only would not have much time left to garner savings,[220] but would also be the most exposed, since they generally have larger pre-bankruptcy retirement savings.

Therefore, the failure to exclude retirement benefits from the debtor-participant's bankruptcy estate falls the hardest on those debtors closest to the time when they will be unable to support themselves. A fresh start means protecting these interests; Congress recognized this. The Bankruptcy Code expanded the property included in the bankrupt's estate and available for distribution to the

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1990) (permitting an exemption for car dealership owner since he had only a few remaining working years); *In re* Woodford, 73 B.R. 675, 681 (Bankr. N.D.N.Y. 1987) (permitting a partial exemption because the lawyer-debtor had only a few remaining working years).

217. REJDA, *supra* note 216, at 4; *see* Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680, 687 (1990) (purpose of ERISA's anti-alienation provision is to safeguard a stream of income for pensioners); *see also* Turpin v. Wente (*In re* Turpin), 644 F.2d 472, 475 (5th Cir. 1981) (under pre-Bankruptcy Code law, fresh start means protection for future wages and pension benefits are a substitute for future wages).

218. Even if applicable, exemptions will not work for this purpose since under the federal scheme and several state schemes, they would be limited by the amount needed for current support. *See* 11 U.S.C. § 522(d)(10)(E) (1988); CONN. GEN. STAT. § 52-352b(m) (Supp. 1991); IOWA CODE ANN. § 627.6(8)(e) (West Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 4422(13)(E) (West Supp. 1990); MINN. STAT. ANN. § 550.37-24 (West 1988); MO. REV. STAT. § 513.430(10)(e) (Supp. 1991); MONT. CODE ANN. § 31-2-106 (1991) (reference to federal exemption with support limitation); NEB. REV. STAT. § 25-1563.01 (1989); OHIO REV. CODE ANN. § 2329.66(A)(6) (Anderson 1991); W. VA. CODE § 38-10-4(j)(5) (1985). These limitations, for a current worker, could be nil.

219. *See* 26 C.F.R. § 1.401-1(b)(1)(i) (requiring pension plans to have determinable benefits based generally on years of service and compensation), -(ii) (1991) (requiring a definite predetermined formula for allocating contributions and trust earnings annually for profit-sharing plans generally based on compensation). When defined benefit pensions are excepted from the anti-alienation provision, the debtor participant only receives a fraction of the benefit he otherwise would have received. *See* 29 U.S.C. § 1056(d)(3) (1988) (providing for the split in the case of domestic relations orders).

220. *See In re* LaFata, 41 B.R. 842, 844 (Bankr. E.D. Mich. 1984) (refusing to include owner-doctor's plan interest in the estate due to his age of 62).

creditors under a Chapter 7 liquidation or under a Chapter 13 rehabilitation.[221] Nevertheless, the Bankruptcy Code retained the exclusion from the bankrupt's estate available under the prior statute for interests in certain trusts. Those trusts had restrictions on transfers made by the beneficiary that courts enforced under applicable nonbankruptcy law.[222] Such interests include most pension-plan interests. For those retirement interests not encompassed by this exclusion, Congress created new exemptions. Those debtor-participants selecting the federal exemptions may use the federal exemption for (1) those interests from qualified pension plans and retirement accounts not subject to ERISA's anti-alienation provision, albeit with a support limitation,[223] and (2) those non-contractual, non-trust interests subject to a federal statutory anti-alienation provision.[224] Those debtor-participants voluntarily or involuntarily choosing the state exemptions generally receive the same exemptions.[225]

V. The Incompatible Interpretation of ERISA and the Bankruptcy Code Prevalent in the Courts

When interpreting the interrelationship between ERISA and the Bankruptcy Code, the courts have shown a sympathetic concern for those creditors confronted with debtors using ERISA's anti-alienation provision to shield some of their pension interests in accordance with Congressional intent. Rather than using the traditional statutory interpretation methods, these courts have allowed this concern to create a conflict between ERISA and the Bankruptcy Code and have ruled that the Bankruptcy Code is superior. These courts

221. H.R. Rep. No. 595, *supra* note 157, at 175-76, 1978 U.S.C.C.A.N. at 6136 ("The bill makes significant changes in what constitutes property of the estate . . . . These changes will bring anything of value that the debtors have into the estate."); S. Rep. No. 989, *supra* note 51, at 5, 1978 U.S.C.C.A.N. at 5791, ("Chapter 5 reflects the policy of the revision of the Bankruptcy Act to include all of the property of the debtor in the bankruptcy case . . . . As a result of these changes the amounts that will be returned to all creditors can be greater.").

222. H.R. Rep. No. 595, *supra* note 157, at 176, 1978 U.S.C.C.A.N. at 6136 ("The bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust . . . ."); S. Rep. No. 989, *supra* note 51, at 83, 1978 U.S.C.C.A.N. at 5869 (the bill "preserves restrictions on a transfer of a spendthrift trust" as an exclusion).

223. 11 U.S.C. § 522(d)(10)(E) (1988).

224. *Id.* § 522(b)(2)(A).

225. *See supra* notes 180-91 and accompanying text.

have focused on the two Bankruptcy Code provisions relating to exclusions and exemptions.

A. *The Exclusion Issue*

The key issue in resolving whether ERISA's anti-alienation provision prevails in bankruptcy is whether a court excludes pension-plan interests from the debtor-participant's estate. On this issue, the circuit courts have taken three incompatible positions, two of which are obviously incorrect. Those courts have ruled these interests (1) included,[226] (2) potentially included,[227] or (3) excluded.[228]

1. Inclusion in the Estate

The earliest view adopts the position urged by the improvident creditors: pension-plan trusts are not spendthrift trusts to which the exclusion applies. This view prevails in the Second[229] and Eighth Circuits.[230] These courts base their position on four propositions. First, ERISA's compatibility provision means that the Bankruptcy Code is superior.[231] So ERISA's provisions, including the anti-alienation provision, are irrelevant to an interpretation of the provisions of the Bankruptcy Code.[232] This is the key point: it permits the court to ignore any policy furthered by ERISA. This proposition, however, overlooks the statutory interpretative principle that courts interpret statutes harmoniously if possible.[233]

Second, since the legislative history of the Bankruptcy Code refers only to spendthrift trusts, the exclusion applies only to *traditional* spendthrift trusts.[234] Traditional spendthrift trusts protect the

226. *See infra* notes 229-46 and accompanying text.

227. *See infra* notes 247-82 and accompanying text.

228. *See infra* notes 283-90 and accompanying text.

229. Regan v. Ross, 691 F.2d 81, 85-86 (2d Cir. 1982) (state employee retirement system opted into ERISA and so was subject to ERISA's anti-alienation provision).

230. Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1270-73 (8th Cir. 1984); *see* Humphrey v. Buckley (*In re* Swanson), 873 F.2d 1121 (8th Cir. 1989) (dicta as teacher retirement system not subject to ERISA's anti-alienation provision).

231. *Graham*, 726 F.2d at 1273; Gouveia v. Pulley (*In re* Pulley), 111 B.R. 715, 732, 747, 752 (Bankr. N.D. Ind. 1989); *In re* Bartlett, 67 B.R. 455, 456 (Bankr. W.D. Mo. 1986).

232. *See Graham*, 726 F.2d at 1273 (no discussion of ERISA's policy or legislative history).

233. *See supra* notes 338-40 and accompanying text.

234. *Graham*, 726 F.2d at 1271-72; Regan v. Ross, 691 F.2d 81, 85-86 (2d Cir. 1982)

beneficiary from his own profligacy. Since pension trusts provide deferred compensation, they are not spendthrift trusts and hence not encompassed within the exclusion.[235] This proposition misreads the legislative history and fails to properly define "spendthrift trust." Congress created the exclusion for two types of trusts, namely, spendthrift trusts and support trusts.[236] Moreover, Congress, when using the term, clearly understood it to include certain qualified pension plans.[237]

Third, the existence of the federal-scheme exemption for retirement benefits[238] means that the exclusion provision does not exclude any retirement benefits, including those from qualified pension plans.[239] This proposition fails to note that not all qualified pension plans are subject to ERISA's anti-alienation provision.[240]

Fourth, since legislative history indicates the Bankruptcy Code enlarged the bankrupt's estate, courts must interpret the exclusion narrowly not to encompass pension-plan benefits.[241] This proposition

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235. *E.g.*, Halverson v. Mico, Inc. (*In re* Loe), 83 B.R. 641, 645-46 (Bankr. D. Minn. 1988) (deferred compensation plans cannot be spendthrift trusts); Central States, S.E. & S.W. Areas Health and Wealth Pension Fund v. Stephenson (*In re* McLean), 41 B.R. 893, 897 (D.S.C. 1984) (ERISA plan permits alienation in certain circumstances), *rev'd sub nom.* McLean v. Cent. States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985).

Both *Regan*, 691 F.2d at 85-86, and *Graham*, 726 F.2d at 1271-72, conclude that pension trusts are not spendthrift trusts, despite the anti-alienation provision. *Regan* notes that the anti-alienation provision has a divorce exception and so is not spendthrift in nature. *Graham* notes the inconclusive legislative history for the exclusion, calling for determination by state law, not federal law.

236. *See supra* note 158.

237. *See supra* notes 86-89 and accompanying text.

238. 11 U.S.C. § 522(d)(10)(E) (1988).

239. *E.g.*, Humphrey v. Buckley (*In re* Swanson), 873 F.2d 1121, 1124 (8th Cir. 1989) (surplusage otherwise); Samone v. Graham (*In re* Graham), 726 F.2d 1268, 1272 (8th Cir. 1984) (citing pre-Bankruptcy Code legislative history, a suspect practice since the goal then was to abolish the spendthrift-trust exclusion); Regan v. Ross, 691 F.2d 81, 86 (2d Cir. 1982) (surplusage otherwise); (*In re* Nadler, 122 B.R. 162, 166 (Bankr. D. Mass. 1990) (surplusage otherwise); Nelson v. White (*In re* White), 47 B.R. 410, 412 (W.D. Wash. 1985); *In re* Elsea, 47 B.R. 142, 147 (Bankr. E.D. Tenn. 1985) (same); Central States, S.E. & S.W. Areas Health and Welfare Pension Fund v. Stephenson (*In re* McLean), 41 B.R. 893, 899-90 (D.S.C. 1984), *rev'd sub nom.* McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985); *In re* Kelley, 31 B.R. 786, 788 (Bankr. N.D. Ohio 1983) (same).

240. *See supra* note 178; *see also* Chrysler-UAW Pension Plan v. Watkins (*In re* Watkins), 95 B.R. 483, 487 (W.D. Mich. 1988) (rejecting *Graham*, 726 F.2d 1268, since it's improper to conclude some pension benefits cannot be excluded because some are subject to the exemption).

241. *Regan*, 691 F.2d at 85 (discussing Chapter 13's expansion); *Graham*, 726 F.2d at 1270.

overlooks Congressional intent to preserve the prior law's exclusion for retirement benefits in a trust, subject to a transfer restriction under federal law.[242]

Several lower courts have followed this reasoning.[243] The debtor-participant's only hope for a fresh start in these circuits is an ex-

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Chapter 13 permits pensioners to have rehabilitation plans. H.R. REP. No. 595, *supra* note 157, at 312, 1978 U.S.C.C.A.N. at 6269 (individuals "on welfare, social security, fixed pension incomes, or who live on investment incomes, will be able to work out repayment plans with their creditors rather than being forced into straight bankruptcy."). However, permitting an individual to obtain the broader discharge from existing debts than permitted under Chapter 7 liquidation, *see supra* note 197, does not mean that all his pension income is disposable income for distribution to the creditors under the rehabilitation plan. *See Regan*, 691 F.2d at 85 (suggesting so). Some will be exempted, *e.g.*, social security, depending on the exemption scheme chosen. *See supra* notes 180-84 and accompanying text. Hence, other pension income, such as from a qualified plan, may be excluded because of ERISA's anti-alienation provision.

The Bankruptcy Code intended to expand the limits of the bankrupt's estate. S. REP. No. 989, *supra* note 51, at 82, 1978 U.S.C.C.A.N. at 5868 ("The scope of [Section 541] is broad . . . . [I]t includes as property of the estate all property of the debtor, even that needed for a fresh start."); H.R. REP. No. 595, *supra* note 157, at 366-68, 1978 U.S.C.C.A.N. at 6322-24; *see* United States v. Whiting Pools, 462 U.S. 198, 205 (1983). *See also supra* note 98 (For one class of benefits now included in the bankrupt's estate). However, this does not mean that there are no exclusions. Congress intended to exclude interests in trusts with transfer restrictions. *See supra* notes 146-66 and accompanying text.

242. *Id.*

243. *E.g.*, Nelson v. White (*In re* White), 47 B.R. 410, 413 (W.D. Wash. 1985) (highly-compensated); Central States, S.E. & S.W. Areas Health and Welfare Pension Fund v. Stephenson (*In re* McLean), 41 B.R. 893, 902-03 (D.S.C. 1984), *rev'd sub nom.* McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985) (lowly-compensated); *In re* Nadler, 122 B.R. 162, 166 (Bankr. D. Mass. 1990); *In re* Bryant, 106 B.R. 727, 729 (Bankr. M.D. Fla. 1989) (same); *In re* Sheppard, 106 B.R. 724, 726 (Bankr. M.D. Fla. 1989) (lowly-compensated); Halverson v. Micro, Inc. (*In re* Loe), 83 B.R. 641, 645 (Bankr. D. Minn. 1988) (lowly-compensated); B.K. Medical Systems, Inc. Pension Plan v. Roberts (*In re* Roberts), 81 B.R. 354, 362 (Bankr. W.D. Pa. 1987) (highly-compensated); *In re* Bowen, 80 B.R. 1012, 1017 (Bankr. D.S.D. 1987) (lowly-compensated); *In re* Bartlett, 67 B.R. 455, 456 (Bankr. W.D. Mo. 1986) (same); *In re* Goldberg, 59 B.R. 201, 205 (Bankr. N.D. Okla. 1986) (highly-compensated); *In re* Flygstad, 56 B.R. 884, 887 (Bankr. N.D. Iowa 1986) (lowly-compensated); Samore v. Independent Pension Services, Inc. (*In re* McKenna), 58 B.R. 221, 223 (Bankr. N.D. Iowa 1985) (lowly-compensated); Gray v. Ingles Markets, Inc. Employees' Stock Bonus Plan & Trust (*In re* DeWeese), 47 B.R. 251, 255 (Bankr. W.D.N.C. 1985) (same); Rodgers v. Norman (*In re* Crenshaw), 44 B.R. 30, 33 (Bankr. N.D. Ala. 1984) (same), *rev'd*, 51 B.R. 554 (N.D. Ala. 1985); *In re* Kelley, 31 B.R. 786, 788 (Bankr. N.D. Ohio 1983) (same); Threewitt v. Ciba-Geigy Corp. (*In re* Threewitt), 20 B.R. 434, 438 (Bankr. D. Kan.) (same), *rev'd*, 24 B.R. 927 (D. Kan. 1982); *accord In re* Kochell, 26 B.R. 86, 87 (Bankr. W.D. Wis. 1982) (assumed), *aff'd*, 31 B.R. 139 (W.D. Wis. 1983); Barr v. Hinshaw (*In re* Hinshaw), 23 B.R. 233, 234 (Bankr. D. Kan. 1982) (same); *In re* Watson, 13 B.R. 391, 392 (Bankr. M.D. Fla. 1981) (on the basis of pre-Bankruptcy Code law); *In re* Donaghy, 11 B.R. 677, 679 (Bankr. S.D.N.Y. 1981) (assumed); Joelson v. Tiffin Savings Bank (*In re* Everhart), 11 B.R. 770, 772 (Bankr. N.D. Ohio 1981) (same).

This rule includes within the debtor-participant's estate interests in pension plans regardless of whether the employee is lowly-compensated.

emption for pension-plan interests.[244] The position of the circuits treats the Bankruptcy Act as impliedly amending ERISA to eliminate ERISA's anti-alienation provision in bankruptcy without any basis in any legislative history[245] or any attempt to show a court cannot achieve harmony between the two statutes.[246]

2. Potential Inclusion in the Estate

The majority view of the courts is a compromise of sorts: the courts will recognize ERISA's anti-alienation provision as excluding the debtor-participant's pension-plan interests in certain circumstances. This is the prevalent view of the Fifth,[247] Ninth,[248] and Eleventh[249] Circuit Courts of Appeal. These courts interpret the exclusion, on the basis of the inconclusive legislative history, as referring only to state spendthrift trust law.[250] This view neglects the pre-Bankruptcy Code decisions recognizing federal spendthrift law.[251]

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244. *See supra* notes 167-92 and accompanying text.

245. *See* Central States, S.E. & S.W. Areas Health and Welfare and Pension Fund v. Stephenson (*In re* McLean), 41 B.R. 893, 900-02 (D.S.C. 1984) (on the basis of pre-Bankruptcy Code legislative history), *rev'd sub nom.* McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985).

Congressional Hearings on an earlier bill recorded the following exchange between Senator Burdick and John J. Creedon, Chairman of the Committee of the American Life Insurance Association:

> Senator Burdick. What provision would you recommend to reconcile the provisions of [ERISA and the proposed bankruptcy bill]?
>
> Mr. Creedon. This I guess has to do with the fact that ERISA provides that a pension benefit is not assignable and the Commission's bill would allow an exemption only with respect to that portion of the pension plan that is necessary for the bankrupt's maintenance.
>
> I guess something could be put in the Bankrutpcy Act to the effect that not withstanding the provision in ERISA or otherwise, the trustee will be able to get the excess.

Hearings, *supra* note 192, at 678.

This legislative history is irrelevant, since the Committee's bill was to abolish the spendthrift-trust exclusion, H.R. Doc. No. 137, *supra* note 51, at 17, 197, and since the recommended provision concerning ERISA was never included.

246. *See infra* notes 338-40 and accompanying text.

247. Goff v. Taylor (*In re* Goff), 706 F.2d 574, 582-86 (5th Cir. 1983). *See also* Brooks v. Interfirst Bank (*In re* Brooks), 844 F.2d 258, 260 (5th Cir. 1988); Reagan v. Austin Mun. Fed. Credit Union (*In re* Reagan), 741 F.2d 95, 97 (5th Cir. 1984); Johnson v. Fenslage (*In re* Johnson), 724 F.2d 1138, 1140-41 (5th Cir. 1984).

248. Daniel v. Sec. Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *see also* Watson v. Kincaid (*In re* Kincaid), 917 F.2d 1162, 1166 (9th Cir. 1990).

249. Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985).

250. *Daniel*, 771 F.2d at 1360; *Lichstrahl*, 750 F.2d at 1490; *Goff*, 706 F.2d at 581-82.

251. *See supra* note 98.

These courts also use the first and third propositions of the decisions including pension benefits to confirm their interpretation.[252]

These courts then proceed to examine the pension plan in accordance with the choice-of-law rules of the state where the debtor-participant filed the bankruptcy action.[253] The choice-of-law rules vary from state to state. The initial problem is to determine the essence of the employee pension plan. Some states contend that the trust document governs, so the situs of the trust determines which state's law governs.[254] Other states claim that the plan document governs, so the law specified in the plan governs.[255] Still other states

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252. Goff v. Taylor (*In re* Goff), 706 F.2d 584, 582-87, (5th Cir. 1983).

253. *E.g.*, McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204, 1206 (4th Cir. 1985) (fund uses Illinois law, not South Carolina law); Donald H. Hartwig, Inc. v. Kellas (*In re* Kellas), 113 B.R. 673, 677 (D. Or. 1990) (plan provides for Colorado law; Oregon choice-of-law rule gives clause effect unless no substantial relationship to Colorado); Morter v. Farm Credit Services, 110 B.R. 390, 393 (N.D. Ind. 1990) (plan provides for New York law); Stilson v. Gulf States Paper Corp. (*In re* Pilkington), 89 B.R. 911, 918 (N.D. Ala. 1987) (using the relationship between an Alabama employee and employer to use Alabama trust law, rather than New York trust law as provided in the trust agreement); Rodgers v. Norman (*In re* Crenshaw), 51 B.R. 554, 556 (N.D. Ala. 1985) (plan and employer located in Illinois; plan provides for Illinois law); Tyler v. Putnam (*In re* Putnam), 110 B.R. 783, 792-98 (Bankr. E.D. Va. 1990) (plan provides for New York law, trust for Massachusetts law; Virginia choice-of-law rule uses contracts for plans, so use New York law); Walker v. Guy F. Atkinson Co. of California (*In re* Sanders), 89 B.R. 266, 269 (Bankr. S.D. Ga. 1988) (using a California trustee with California funds to use California trust law as called for in the trust agreement, rather than Georgia law); Govaert v. Strehlow (*In re* Strehlow), 84 B.R. 241, 244 (Bankr. S.D. Fla. 1988) (plan provides for Illinois law); *In re* Hohl, 81 B.R. 450, 453 (Bankr. N.D. Ill. 1987) (plan provides for New York law); *In re* Rodriguez, 82 B.R. 74, 75-76 (Bankr. W.D. Ark. 1987) (plan executives are in Pennsylvania, so use Pennsylvania law); Simon v. Braden (*In re* Braden), 69 B.R. 93, 94 (Bankr. E.D. Mich. 1987) (plan documents provide for New York law). *See also* Watson v. Kincaid (*In re* Kincaid), 96 B.R. 1014, 1017 (Bankr. 9th Cir. 1989) (refusing to choose between plan in Oregon and plan document specification of Massachusetts law since both are the same), *rev'd*, 917 F.2d 1162 (9th Cir. 1990); Currell v. Taylor (*In re* Taylor), 119 B.R. 170, 173 (Bankr. N.D. Iowa 1990) (stipulated Minnesota law); Howison v. W.W. Grainger, Inc. (*In re* Peterson), 88 B.R. 5, 7 (Bankr. D. Me. 1988) (conceded Illinois law); Bakst v. Guernsey (*In re* Guernsey), 54 B.R. 68, 69 (Bankr. S.D. Fla. 1985) (stipulated Michigan law).

254. *E.g.*, McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204, 1206 (4th Cir. 1985) (fund uses Illinois law); Walker v. Guy F. Atkinson Co. of California (*In re* Sanders), 89 B.R. 266, 269 (Bankr. S.D. Ga. 1988) (California trustee with California funds, so use California trust law).

The *Second Restatement* provides that a trust document choice-of-law clause, if any, governs, and in its absence the situs of the trust for administrative matters controls. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 268 (1971).

255. *E.g.*, Donald H. Hartwig, Inc. v. Kellas (*In re* Kellas), 113 B.R. 673, 677 (D. Or. 1990) (plan provides for Colorado law); Govaert v. Strehlow (*In re* Strehlow), 84 B.R. 241, 244 (Bankr.

use a significant contacts test and use the law of the situs of the employment contract to govern.[256] Thus, it is a complex matter for the plan administrator to determine which law to apply for an interstate plan.[257]

But Congress fashioned ERISA's preemption provision to avoid these conflicting state rules.[258] Congress directed the courts to establish a federal common law[259] using the practice under the Labor Management Relations Act (LMRA).[260] Under LMRA, the courts

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S.D. Fla. 1988) (plan provides for Illinois law); *In re* Hohl, 81 B.R. 450, 453 (Bankr. N.D. Ill. 1987) (plan provides for New York law); Simon v. Braden (*In re* Braden), 69 B.R. 93, 94 (Bankr. E.D. Mich. 1987) (plan documents provide for New York law); *see also In re* Rodriguez, 82 B.R. 74, 76 (Bankr. W.D. Ark. 1987) (plan executed in Pennsylvania so use Pennsylvania law); Rodgers v. Norman (*In re* Crenshaw), 51 B.R. 554, 556 (N.D. Ala. 1985) (plan and employer located in Illinois; plan provides for Illinois law).

The *Second Restatement* provides that a choice-of-law clause in a contract, such as the plan, governs, unless there is no substantial relation with the forum state or its law is contrary to the forum state's policy. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

256. *E.g.*, Stilson v. Gulf States Paper Corp. (*In re* Pilkington), 89 B.R. 911, 918 (N.D. Ala. 1987) (using the relationship between an Alabama employee and employer to use Alabama trust law); Rodgers v. Norman (*In re* Crenshaw), 51 B.R. 554, 556 (N.D. Ala. 1985) (plan and employer located in Illinois).

The *Second Restatement's* main thrust is the significant contacts test, the employment relationship contract being the most significant for the debtor-participant. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1977).

257. *See, e.g.*, Watson v. Kincaid (*In re* Kincaid), 96 B.R. 1014, 1018 (Bankr. 9th Cir. 1989) (refusing to choose between plan in Oregon and plan document specification of Massachusetts law), *rev'd*, 917 F.2d 1162 (9th Cir. 1990).

258. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams) ("eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans").

259. 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits) ("[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) (The courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans."); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55-57 (1987) (same); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983) (adopting Sen. Javits' statement).

260. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-87 (1990)). *See* H.R. REP. No. 1280, *supra* note 68, at 327, 1974 U.S.C.C.A.N. at 5107 ("All such actions . . . are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Labor Relations Act of 1947."); 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams) (same). The Supreme Court used this legislative history in applying the preemption removal rules of LMRA practice to ERISA cases. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-67 (1987) (benefits-due lawsuits). This legislative history applies only to actions brought under ERISA, but a turnover demand is surely a derivative action for a claim for benefits under ERISA, even though brought under the Bankruptcy Code.

create a uniform federal common law[261] in which state law is merely a source of potentially compatible rules.[262] Under this principle, the courts have determined that the applicable contract construction rules for collective bargaining agreements are the federal rules, not the state rules,[263] even if the contract specifies a particular state's law.[264] The end result is only one choice of law for a pension plan, namely federal law.

Having failed to resolve the choice-of-law issue properly, these bankruptcy courts next determine whether the selected state's law would recognize the employee trust as a spendthrift trust. Again the various states vary widely concerning the extent to which they recognize spendthrift trusts.[265] In some states the matter is unsettled.[266] Even if the state does enforce spendthrift trusts, the main problem for the plan administrator would then be whether a qualified pension trust would satisfy that state's rules. The real issue is whether to follow the approach that merely inquires whether the anti-alienation provision is enforceable.[267] The alternative "traditional" spendthrift

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261. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

262. *Id.*; John Wiley & Sons v. Livingston, 376 U.S. 543, 548 (1964).

263. *E.g.*, Smith v. Evening News Ass'n, 371 U.S. 195, 199-201 (1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962) ("The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements .... The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling."); Clark v. Kraftco Corp., 510 F.2d 500, 506 (2d Cir. 1975); Teamsters, Local Union No. 688 v. Crown Cork & Seal Co., 488 F.2d 738, 740 (8th Cir. 1973); Zdanok v. Glidden Co., 327 F.2d 944, 950 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

264. International Union of Elec., Radio & Mach. Workers v. General Elec. Co., 174 A.2d 298, 303 (Conn. 1961).

265. 4 GEORGE G. BOGERT & GEORGE T. BOGERT, TRUSTS AND TRUSTEES § 222 (2d ed. rev. 1979). Three states deny them (New Hampshire, Ohio, and Rhode Island), four states have no case law or statutes concerning them (Alaska, Idaho, New Mexico, and Wyoming), some have comprehensive statutes (Delaware, Lousiana, Nevada, and Oklahoma), some make a principal-income distinction (*e.g.*, New York and California), and many recognize support and tax exceptions by statute or case law. *Id.*

266. *See, e.g.*, Stilson v. Gulf States Paper Corp. (*In re* Pilkington), 89 B.R. 911, 920 (N.D. Ala. 1987) (Alabama law unsettled with respect to retirement plans with anti-alienation provisions, so include); Rodgers v. Norman (*In re* Crenshaw), 51 B.R. 554, 556-57 (N.D. Ala. 1985) (Illinois law unsettled, so guess); *In re* Wiggins, 60 B.R. 89, 93 (Bankr. N.D. Ohio 1986) (Ohio law unsettled, so include); *see also In re* Craddock, 62 B.R. 583, 585 (Bankr. N.D. Ga. 1986) (Georgia law only if incompetent), *rev'd*, Craddock v. Anderson, No. C86-1815 A (N.D. Ga. Dec. 31, 1986).

267. McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204, 1207 n.1 (4th Cir. 1985).

approach demands that the ERISA pension plan must have the characteristics of a spendthrift trust for a profligate.[268]

This introduces another element quite at variance with the national uniformity ERISA was to foster. Generally, under the enforceable approach, if the debtor-participant is a lowly-compensated employee of a large corporation, the court excludes the plan interests from the debtor-participant's estate.[269] In contrast, the traditional approach concerns itself with the self-settled trust, which is disqualified as a spendthrift trust[270] if the settlor is the beneficiary[271]

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268. Goff v. Taylor (*In re* Goff), 706 F.2d 574, 582 (5th Cir. 1983).

269. *See, e.g.*, *McLean*, 762 F.2d at 1206 (union plan); Donald H. Hartwig, Inc. v. Kellas (*In re* Kellas), 113 B.R. 673, 677 (D. Or. 1990) (US West plan); Morter v. Farm Credit Serv., 110 B.R. 390, 393 (N.D. Ind. 1990) (TIAA-CREF plan); Chrysler-UAW Plan v. Watkins (*In re* Watkins), 95 B.R. 483, 490 (W.D. Mich. 1988) (Chrysler plan spendthrift trust in Chapter 13); Cornell v. Taylor (*In re* Taylor), 119 B.R. 170, 178 (Bankr. N.D. Iowa 1990) (Northwest Airlines plan); *In re* Bartlett, 116 B.R. 1015, 1020 (Bankr. S.D. Iowa 1990) (grocery store plan); Tyler v. Putnam (*In re* Putnam), 110 B.R. 783, 791 (Bankr. E.D. Va. 1990) (Xerox plan); *In re* Hysick, 90 B.R. 770, 777 (Bankr. E.D. Pa. 1988) (small employer adopting bank master plan); *In re* Zabelski, 81 B.R. 89, 90 (Bankr. N.D. Fla. 1988) (Centel plan); *In re* Hohl, 81 B.R. 450, 453 (Bankr. N.D. Ill. 1987) (Eastern Airlines plan); *In re* Vogel, 78 B.R. 192, 194 (Bankr. N.D. Ill. 1987) (G.D. Searle plan); *In re* Richardson, 75 B.R. 601, 605 (Bankr. C.D. Ill. 1987) (Catepillar plan); Simon v. Braden (*In re* Braden), 69 Bankr. 93, 94 (Bankr. E.D. Mich. 1987) (TIAA-CREF plan); Tamboy Trustee, Inc. v. Florida Progress Corp. (*In re* Lawson), 67 B.R. 94, 97 (Bankr. M.D. Fla. 1986) (FP & L plan); Blackwell v. Wallace (*In re* Wallace), 66 B.R. 834, 841 (Bankr. E.D. Mo. 1986) (utility company plan); *In re* West, 64 B.R. 738, 743-44 (Bankr. D. Or. 1986) (Intel plan), *aff'd*, 81 B.R. 22 (Bankr. 9th Cir. 1987); *In re* Matteson, 58 B.R. 909, 911 (Bankr. D. Colo. 1986) (insurance company plan); *In re* Elsea, 47 B.R. 142, 147 (Bankr. E.D. Tenn. 1985) (insurance company plan); Bezanson v. Maine Nat'l Bank (*In re* Kwaak), 42 B.R. 599, 601-02 (Bankr. D. Me. 1984) (bank plan).

270. *See* 4 BOGERT & BOGERT, *supra* note 265 § 223.

271. *E.g.*, Daniel v. Sec. Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1360 (9th Cir. 1985) (doctor corporate plan under California law), *cert. denied*, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985) (same under Florida law); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 587 (5th Cir. 1983) (doctor Keogh plan under Texas law); NCNB Texas Nat'l Bank v. Volpe (*In re* Volpe), 120 B.R. 843, 846 (W.D. Tex. 1990) (doctor Keogh plan under Texas law); Siegel v. Swaine (*In re* Siegel), 105 B.R. 556, 560 (D. Ariz. 1989) (doctor corporate plan under Arizona law); Wear v. O'Brien (*In re* O'Brien), 94 B.R. 583, 588 (W.D. Mo. 1988) (doctor plan under Missouri law); *In re* Felts, 114 B.R. 131, 133 (Bankr. W.D. Tex. 1990) (lawyer corporate plan under Texas law); Heitkamp v. Dyke (*In re* Dyke), 99 B.R. 343, 344-46 (Bankr. S.D. Tex. 1989) (doctor corporate plan under Texas law), *rev'd*, 119 B.R. 536 (S.D. Tex. 1990), *aff'd*, 943 F.2d 1435 (5th Cir. 1991); B.K. Medical Systems, Inc., Pension Plan v. Roberts (*In re* Roberts), 81 B.R. 354, 374 (Bankr. W.D. Pa. 1987) (doctor corporate plan); *In re* Kerr, 65 B.R. 739, 745 (Bankr. D. Utah 1986) (dentist partnership plan under Utah law); Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 B.R. 67, 74 (Bankr. E.D. Va. 1985) (Keogh plan under Virginia law); *In re* Ridenour, 45 B.R. 72, 78-79 (Bankr. E.D. Tenn. 1984) (owner-employee plan under Tennessee law).

or exercises control over the trust assets.[272] This means that the self-employed never have their interests excluded.[273] The traditional approach, however, often defeats the expectations of even the lowly-compensated employees for minor infractions permitted by the plan under ERISA, such as augmenting retirement savings through employee contributions[274] or having the option to make withdrawals

272. *E.g.*, Shuman v. McDonald (*In re* Shuman), 78 B.R. 254, 256 (Bankr. 9th Cir. 1987) (sole shareholder-employee plan under Nevada law); Kaplan v. Primerit Bank (*In re* Kaplan), 97 B.R. 572, 576 (Bankr. 9th Cir. 1989) (radiology corporation plan under Arizona law); Creasy v. Coleman Furniture Corp., 83 B.R. 404, 410 (W.D. Va. 1988) (owner-employee plan under Virginia law); *In re* Ullman, 116 B.R. 228, 230 (Bankr. D. Mont. 1990) (doctor corporate plan under Montana law); Berman v. Mead (*In re* Mead), 110 B.R. 434, 437 (Bankr. W.D. Mo. 1990) (owner-employee plan under Missouri law); *In re* Velis, 109 B.R. 64, 70 (Bankr. D.N.J. 1989) (Keogh plan under New Jersey law); *In re* Walker, 108 B.R. 769, 773 (Bankr. N.D. Okla. 1989) (oilfield services Keogh plan under Oklahoma law); *In re* Alagna, 107 B.R. 301, 307 (Bankr. D. Colo. 1989) (owner-employee plan under Colorado law); Foglen v. Flindall (*In re* Flindall), 105 B.R. 32, 39 (Bankr. D. Ariz. 1989) (doctor-owner plan under Arizona law); *In re* Toner, 105 B.R. 978, 980 (Bankr. D. Colo. 1989) (owner-employee plan under Colorado law); *In re* Gifford, 93 B.R. 636, 639-40 (Bankr. N.D. Ind. 1988) (doctor corporate plan under Indiana law); Govaert v. Strehlow (*In re* Strehlow), 84 B.R. 241, 244 (Bankr. S.D. Fla. 1988) (owner-employee plan under Illinois law); Hunter v. Ohio Citizens Bank (*In re* Hotchkiss), 75 B.R. 115, 117-18 (Bankr. N.D. Ohio 1987) (doctor-owner plan under Ohio law); *In re* Slezak, 63 B.R. 625, 628 (Bankr. W.D. Ky. 1986) (doctor plan under Kentucky law); *In re* Gillett, 46 B.R. 642, 644 (Bankr. S.D. Fla. 1985) (owner-employee plumber plan under Florida law); *see also*, Boron v. Moorman Mfg. Co. (*In re* Coldsen), 105 B.R. 500, 501 (N.D. Iowa 1988) (lowly compensated employee has no control under Iowa law); Chrysler-UAW Pension Plan v. Watkins (*In re* Watkins), 95 B.R. 483, 490 (W.D. Mich. 1988) (same under Michigan law); *In re* Bartlett, 116 B.R. 1015, 1020 (Bankr. S.D. Iowa 1990) (same under Iowa law); Thimmig v. Elmore (*In re* Elmore), 108 Bankr. 612, 614 (Bankr. N.D. Ohio 1989) (same under Ohio law); *In re* Hysick, 90 B.R. 772, 777 (Bankr. E.D. Pa. 1988) (same under Pennsylvania law); *In re* West, 64 B.R. 738, 743-44 (Bankr. D. Or. 1986) (same under Oregon law); Bakst v. Guernsey (*In re* Guernsey), 54 B.R. 68, 69 (Bankr. S.D. Fla. 1985) (same under Michigan law).

273. *See In re* LaFata, 41 B.R. 842, 843-44 (Bankr. E.D. Mich. 1984) (refusing to use the spendthrift rule in a doctor case because it places a physician in worse shape than an assembly worker, solely because the physician lacks an independent trustee).

The self-employed's retirement plan, a Keogh plan, is established pursuant to the Keogh-Smathers Act, Pub. L. No. 87- 792, 76 Stat. 809 (1962) (codified in scattered sections of the Internal Revenue Code, 26 U.S.C.), and is usually controlled and administered by the self-employed individual.

274. *E.g.*, Reagan v. Austin Mun. Fed. Credit Union (*In re* Reagan), 741 F.2d 95, 97 (5th Cir. 1984) (nurse self-settlor due to own contributions under Texas law); Watson v. Kincaid (*In re* Kincaid), 96 B.R. 1014, 1017 (Bankr. 9th Cir. 1989) (lowly-compensated employee in salary-reduction plan under both Oregon and Massachusetts law), *rev'd*, 917 F.2d 1162 (9th Cir. 1990); Verwer v. Fullmer (*In re* Martin), 115 B.R. 311, 316 (Bankr. D. Utah 1990) (lowly-compensated employee in salary-reduction plan under Utah law); Schechter v. Balay (*In re* Balay), 113 B.R. 429, 436 (Bankr. N.D. Ill. 1990) (lowly-compensated employee is self-settlor due to employee contributions under Illinois law); *In re* Tisdale, 112 B.R. 61, 64-65 (Bankr. D. Conn. 1990) (lowly-compensated employee in salary-reduction plan under Connecticut law); *In re* Conroy, 110 B.R. 492, 498-99 (Bankr. D. Mont. 1990) (lowly-compensated self-settlor due to employee contributions under Montana law); *In re* Weeks, 106 B.R. 257, 261 (Bankr. E.D. Okla. 1989) (lowly-compensated employee self-settlor due to own contributions

for hardship,[275] loans,[276] or upon termination of service.[277] To avoid

to thrift plan under Oklahoma law); Federman v. Gallagher (*In re* Gallagher), 101 B.R. 594, 600 (Bankr. W.D. Mo. 1989) (clerk in airline plan is self-settlor due to matching contributions under Missouri law); Walken v. Guy F. Atkinson Co. (*In re* Sanders), 89 B.R. 266, 269 (Bankr. S.D. Ga. 1988) (lowly-compensated employee in plan is self-settlor due to employee contributions under California law); Miner v. Boon (*In re* Boon), 90 B.R. 988, 992 (Bankr. W.D. Mo. 1987) (clerk in bank plan is self-settlor since the money is "deferred income" under Missouri law), *rev'd*, 108 B.R. 697, 706 (W.D. Mo. 1989); Iannacone v. Trustees of Pillsbury Co. (*In re* Hansen), 84 B.R. 598, 601 (Bankr. D. Minn. 1987) (self-settled as making employee contributions under Minnesota law). *But see* Miller v. Lincoln Nat'l Bank (*In re* Cook), 43 B.R. 996, 1000-01 (N.D. Ind. 1984) (employee contributions do not make a self-settled trust under Indiana law); Miller v. Jones (*In re* Jones), 43 B.R. 1002, 1006-07 (N.D. Ind. 1984) (same).

Pension plans may include provisions permitting voluntary employee contributions, *see* Rev. Rul. 80-350, 1980-2 C.B. 133 (up to 10% of compensation), salary reduction contributions, *see* 26 U.S.C. § 401(k) (1988), and requiring involuntary employee contributions. *See* Rev. Rul. 80-307, 1980-2 C.B. 136 (up to 6% of compensation).

The distinction made by the bankruptcy courts between employee contributions and employer contributions to a plan is a meaningless distinction. Employee contributions are treated for tax purposes similar to employer contributions. Employee contributions are generally tax deductible. *See* 26 U.S.C. § 219 (providing a deduction for very small limits), § 401(k) (providing a deduction for salary reduction contributions) (1988). The maximum limits to annual plan contributions include employee contributions. *See infra* notes 310-14 and accompanying text. Employee contributions are really a mechanism for an employee to contribute himself to the plan when the employer is laggard in contributing employer contributions. The bankruptcy court's different treatment of employee contributions only serves to condemn those trying to avoid becoming wards of the state in their old age and to reward profligates seeking current consumption who make no employee contributions.

275. *E.g.*, Miller v. Lincoln Nat'l Bank (*In re* Cook), 43 Bankr. 996, 1000-01 (N.D. Ind. 1984) (hardship moneys under Indiana law); Miller v. Jones (*In re* Jones), 43 B.R. 1002, 1006-07 (N.D. Ind. 1984) (same); Tabor v. Employee Benefits Comm. (*In re* Cress), 121 B.R. 1006, 1011 (Bankr. S.D. Ind. 1990) (hardship moneys under Indiana law); *In re* Williams, 118 B.R. 812, 814 (Bankr. N.D. Fla. 1990) (hardship moneys under Florida law); Gouveia v. Pulley (*In re* Pulley), 111 B.R. 715, 738 (Bankr. N.D. Ind. 1989) (hardship moneys under Indiana law); White v. Babo (*In re* Babo), 81 B.R. 389, 391 (Bankr. W.D. Pa. 1988) (funds for house under Pennsylvania law); Iannacone v. Trustees of Pillsbury Co. (*In re* Hansen), 84 B.R. 598, 601 (Bankr. D. Minn. 1987) (alienation for qualified domestic relations order and ability to get hardship funds under Minnesota law); *see also In re* Berndt, 34 B.R. 515, 519 (N.D. Ind. 1983) (Sears plan: can withdraw contributions under Indiana law); *In re* Goshe, 85 B.R. 157, 159 (Bankr. M.D. Fla. 1988) (can obtain early withdrawal on request under Florida law); *In re* Rodriguez, 82 B.R. 74, 76 (Bankr. W.D. Ark. 1987) (can withdraw moneys under Pennsylvania law); *In re* Pettit, 61 B.R. 341, 345-46 (Bankr. W.D. Wash. 1986) (withdraw two year-old contributions per plan provision under Washington law); Firestone v. Metropolitan Life Ins. Co. (*In re* DiPiazza), 29 B.R. 916, 921 (Bankr. N.D. Ill. 1983) (NL Industries plan: can withdraw contributions under Illinois law).

Plans may provide for withdrawal of funds in certain circumstances. *See, e.g.*, *supra* notes 141-42 and accompanying text.

276. *See* Brooks v. Interfirst Bank (*In re* Brooks), 844 F.2d 258, 261 (5th Cir. 1988) (1 of 23 doctors in plan to get loan funds, hardship funds and lump sum by quitting under Texas law); *In re* Martin, 119 B.R. 297, 299 (Bankr. M.D. Fla. 1990) (to borrow money under Florida law); Howison v. W.W. Grainger, Inc. (*In re* Peterson), 88 B.R. 5, 7 (Bankr. D. Me. 1988) (to borrow money under Maine law); Nixon v. P.J. Pedone & Co. (*In re* Nichols), 42 B.R. 772, 776 (Bankr. M.D. Fla. 1984)

these disasters, the plan would have to exclude many of the provisions Congress intended to foster the growth of pension plans.[278]

The application of state law to the plan trust shocks plan administrators. The plan sponsor wrote the trust with ERISA in mind, which specifically preempted that same state law to the extent it relates to an employee pension plan.[279] So plan sponsors gave no thought to whether the trust would satisfy the spendthrift laws of a particular state.[280] Moreover, the inconsistent results for different states destroys the uniform federal common law of trusts that Congress intended ERISA to develop[281] and makes it difficult for a plan sponsor of an interstate plan to design a plan to avoid these disasters. The result also conflicts with the legislative history of the Bankruptcy Code to preserve the spendthrift-trust exclusion: decisions under the pre-Bankruptcy Code law recognized the spendthrift-trust exclusion for retirement plans created under the authority of

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(to borrow money under Florida law).

Plans may provide for borrowing of funds with certain limits. *See, supra* notes 143-45 and accompanying text.

277. *See* Christison v. Slane (*In re* Silldorff), 96 B.R. 859, 862 (C.D. Ill. 1989) (to quit and get lump sum under Illinois law); *In re* Morrow, 122 B.R. 151, 153 (Bankr. M.D. Fla. 1990) (to quit and get moneys under Florida law); *In re* Spears, 121 B.R. 896, 900 (Bankr. M.D. Fla. 1990) (same); *In re* Nuttleman, 117 B.R. 975, 979 (Bankr. D. Neb. 1990) (to quit and receive lump sum under Nebraska law); *In re* Hartman, 115 B.R. 171, 173 (Bankr. W.D. Ark. 1990) (to quit and receive lump sum under Arkansas law); Forbes v. Lucas (*In re* Lucas), 100 B.R. 969, 970 (Bankr. M.D. Tenn. 1989) (can get moneys if you quit under Tennessee law), *rev'd*, 924 F.2d 507 (6th Cir. 1991); *In re* Leimbach, 99 B.R. 796, 799 (Bankr. S.D. Ohio 1989) (quit and get moneys under Ohio law); *In re* Sundeen, 62 B.R. 619, 620 (Bankr. C.D. Ill. 1986) (quit and get moneys under Illinois law); *see also* Johnson v. Fenslage (*In re* Johnson), 724 F.2d 1138, 1140-41 (5th Cir. 1984) (revokable trust funded by own earnings under Texas law); *In re* Gribben, 84 B.R. 494, 496 (S.D. Ohio 1988) (owner-employee; ability to get funds under Ohio law).

Plans may provide for a distribution upon termination of service, even if before the retirement age. 29 U.S.C. § 1056(a) (1990).

278. *See supra* notes 141-45 and accompanying text.

279. *See supra* note 109 and accompanying text.

280. Many of the provisions that destroy the spendthrift nature of pension plans under state laws are the very provisions permitted under ERISA. *See supra* notes 141-45 and accompanying text.

281. *See supra* notes 109-25 and accompanying text. *See also In re* Majul, 119 B.R. 118, 121 (Bankr. W.D. Tex. 1990) (ERISA preempts state spendthrift law to the extent it applies to pension plans); Nelson v. White (*In re* White), 47 B.R. 410, 413 (Bankr. W.D. Wash. 1985) (same); Shults v. Rose's Stores, Inc. (*In re* Holt), 32 B.R. 767, 770 (Bankr. E.D. Tenn. 1983) (same); S. REP. No. 575, *supra* note 31, at 18, 1984 U.S.C.C.A.N. at 2564 ("A plan that does not include these required spendthrift provisions is not qualified under the Code, and State law permitting such an assignment or alienation is generally preempted by ERISA.").

federal statutes without reference to state law.[282] This position impliedly amends ERISA twice to eliminate partially ERISA's anti-alienation provision and to eliminate ERISA's preemption provision in a bankruptcy proceeding.

3. Exclusion from the Estate

The correct view takes the position of the plan administrator: ERISA itself is the applicable nonbankruptcy law referred to in the Bankruptcy Code exclusion, and it does contain a restriction on transfer. This is the recently prevailing view in the Fourth[283] and Sixth[284] Circuits. This interpretation is based on three propositions. First, legislative history is irrelevant unless the statute is ambiguous, and there is no ambiguity in the Bankruptcy Code's exclusion for trusts with transfer restrictions.[285] Therefore, the alleged analysis of the other circuits is wasted effort.

Second, a court must interpret the same language in a statute in the same fashion throughout the statute, and "applicable nonbankruptcy law" elsewhere in the Bankruptcy Code means federal and state law.[286] The "applicable nonbankruptcy law," then, cannot be limited to only "state spendthrift law."

Third, the legislative history of the Bankruptcy Code exclusion is inconclusive; it means merely that state spendthrift law is one of the applicable nonbankruptcy laws, but not the only one.[287] So ERISA's anti-alienation provision is one of the "applicable nonbank-

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282. *See supra* note 98 and accompanying text.

283. Anderson v. Raine (*In re* Moore), 907 F.2d 1476, 1477-79 (4th Cir. 1990) (likely overruling McLean v. Central States, S.E. & S.W. Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985)). The Fourth Circuit *claims* that it has consistently applied a broad interpretation of what constitutes "applicable nonbankruptcy law." *Id.* at 1478.

284. Forbes v. Lucas (*In re* Lucas), 924 F.2d 597, 600-02 (6th Cir. 1991).

285. *Lucas*, 924 F.2d at 600; *Moore*, 907 F.2d at 1479; *In re* Majul, 119 B.R. 118, 122-23 (Bankr. W.D. Tex. 1990); *see* Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 808 n.3 (1989); Burlington N. R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987); Rubin v. United States, 449 U.S. 424, 430 (1981).

286. *Lucas*, 924 F.2d at 601; *Moore*, 907 F.2d at 1478.

287. *Lucas*, 924 F.2d at 602; *Moore*, 907 F.2d at 1479.

ruptcy laws."[288] Several lower courts have followed this position.[289] This decision treats ERISA and the Bankruptcy Code as compatible statutes;[290] preserving benefits from retirement trusts with transfer restrictions (as required by both ERISA and the Bankruptcy Code) under a uniform federal common law (as required by ERISA) to preserve a fresh start (as required by the Bankruptcy Code).

B. The Exemption Issue

The exemptions apply to qualified pension plans with anti-alienation provisions only in those jurisdictions failing to recognize the exclusion for (1) employee plans (primarily the Second and Eighth Circuits), and (2) the self-settled, controlled plans (primarily the Fifth, Ninth, and Eleventh Circuits). The exemptions — an issue the courts never should have reached — frequently fail to preserve the debtor-participant's retirement benefits and hence his fresh start.

The exemption for pension-plan benefits under the federal scheme applies only to the extent needed for support.[291] Consequently, this exemption is of interest only for Chapter 7 liquidations.[292] Courts frequently deem benefits not in pay-status unnecessary for support, because they are not available for support presently.[293] However,

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288. *Lucas*, 924 F.2d at 602-03; *Moore*, 907 F.2d at 1479-81.

289. *E.g.*, Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 24 B.R. 927, 929 (D. Kan. 1982); *In re* Majul, 119 B.R. 118, 122 (Bankr. W.D. Tex. 1990); *In re* Ralstin, 61 B.R. 502, 503-04 (Bankr. D. Kan. 1986); Liscinski v. Mosley (*In re* Mosley), 42 B.R. 181, 191 (Bankr. D.N.J. 1984); *In re* LaFata, 41 B.R. 842, 843 (Bankr. E.D. Mich. 1984); Warren v. G.M. Scott & Sons (*In re* Warren), 34 B.R. 543, 544 (Bankr. S.D. Ohio 1983); *In re* Pruitt, 30 B.R. 330, 331 (Bankr. D. Colo. 1983); *In re* Rogers, 24 B.R. 181, 182-83 (Bankr. D. Ariz. 1982); *cf. In re* Leamon, 121 B.R. 974, 979 (Bankr. E.D. Tenn. 1990) (for government plan subject to 26 U.S.C. § 401(a)(13) but not ERISA).

290. *See infra* notes 338-40 and accompanying text.

291. 11 U.S.C. § 522(d)(10)(E) (1988).

292. Chapter 13 rehabilitations exclude amounts needed for support from the definition of disposable income that goes to creditors. 11 U.S.C. § 1325(b)(2)(A) (1988).

293. Some courts conclude that, since the exemption literally only applies to "payments" from pension plans, it cannot include rights not yet in pay status. *E.g.*, Clark v. O'Neill (*In re* Clark), 711 F.2d 21, 23 (3d Cir. 1983) (43-year-old family therapist); *In re* Tisdale, 112 B.R. 61, 66 (Bankr. D. Conn. 1990) (41-year-old sales manager); *In re* Velis, 109 B.R. 64, 68 (Bankr. D.N.J. 1989) (63-year-old doctor); Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 B.R. 67, 77 (Bankr. E.D. Va. 1985) (young doctor); *In re* Clark, 18 B.R. 824, 829 (Bankr. E.D. Tenn. 1982) (37-year-old doctor). Other courts, concerned about the ability of the debtor-participant to reestablish his pension benefits, consider the future ability of the debtor-participant to support himself. These courts deny the exemption for healthy workers and the young. *E.g.*, *In re* Kochell, 732 F.2d 564, 565-66 (7th Cir. 1984);

courts also deem benefits in pay-status unnecessary for support unless the debtor-participant is destitute.[294]

The federal nonbankruptcy exemption for the few remaining non-opt-out states under the state-exemption scheme[295] also frequently fails. Since the legislative history list excludes ERISA[296] and primarily mentions payments that are federal in nature,[297] many courts deem this exemption inapplicable to pension plans.[298] Other courts — since

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cf. In re Montavon, 52 B.R. 99, 102 (Bankr. D. Minn. 1985) (same rule for IRA). These same courts grant the exemption for the ill and the old. *E.g., In re* Bari, 43 B.R. 253, 256 (Bankr. D. Minn. 1984) (50-year-old heart-attack victim on disability leave); *In re* Grant, 40 B.R. 612, 614 (Bankr. N.D. Tex. 1984) (one-wage-earner family with spouse in school); *In re* Johnson, 36 B.R. 54, 56 (Bankr. D.N.M. 1984) (47-year-old unemployed engineer); *In re* Miller, 33 B.R. 549, 553 (Bankr. D. Minn. 1983) (54-year-old insurance company employee); *cf.* American Honda Fin. Corp. v. Cilek (*In re* Cilek), 115 B.R. 974, 984 (Bankr. W.D. Wis. 1990) (IRA using same rule for 54-year-old).

294. The factors to determine the amounts needed for support are age, health, future earnings capacity, and necessary expenditures. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 580 n.15 (5th Cir. 1983); *In re* Kochell, 26 B.R. 86 (Bankr. W.D. Wis. 1982), *aff'd,* 31 B.R. 139 (W.D. Wis. 1983), *aff'd,* 732 F.2d 564 (7th Cir. 1984). In practice only the destitute are permitted to reserve some benefits for support. *E.g., In re* Fill, 84 B.R. 332, 339 (Bankr. S.D.N.Y. 1988) (64-year-old doctor, a victim of heart attack and stroke, got support from Keogh and IRA); *In re* Rosen, 52 B.R. 96 (Bankr. D. Minn. 1985) (69-year-old metal buyer with cardiac condition and dependent on Keogh income got support since trustee provided no evidence to the contrary); *In re* Donaghy, 11 B.R. 677 (Bankr. S.D.N.Y. 1981) (62-year-old unemployed with emphysema and wife with cancer and large medical bills got support due in lump sum from plan); Warren v. Taff (*In re* Taff), 10 B.R. 101, 107 (Bankr. D. Conn. 1981) (retired corporate executive living from spouse's investments got 50% of plan benefits for support despite no evidence of special needs).

295. 11 U.S.C. § 522(b)(2)(A) (1988). See *supra* note 169 for a listing of the opt-out states.

296. *See supra* notes 180-87 and accompanying text.

297. *See* Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1274 (8th Cir. 1984); *In re* Gribben, 84 B.R. 494, 497 (S.D. Ohio 1988); Creasy v. Coleman Furniture Corp., 83 B.R. 404, 410 (W.D. Va. 1988); *In re* Bowen, 80 B.R. 1012, 1015 (Bankr. D.S.D. 1987); Rodgers v. Norman (*In re* Crenshaw), 44 B.R. 30, 34 (Bankr. N.D. Ala. 1984), *rev'd,* 51 B.R. 554 (N.D. Ala. 1985).

298. *E.g.,* Daniel v. Sec. Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1359 (9th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); *Graham,* 726 F.2d at 1268; *Gribben,* 84 B.R. at 497; *In re* Lingle, 119 B.R. 672 (Bankr. S.D. Iowa 1990); *In re* Martin, 115 B.R. 311, 323 (Bankr. D. Utah 1990); *In re* Conroy, 110 B.R. 492, 498-99 (Bankr. D. Mont. 1990); *In re* Alagna, 107 B.R. 301, 314-15 (Bankr. D. Colo. 1989); *In re* Toner, 105 B.R. 978, 981-83 (Bankr. D. Colo. 1989); Heitkamp v. Dyke (*In re* Dyke), 99 B.R. 343, 346-47 (Bankr. S.D. Tex. 1989), *rev'd,* 119 B.R. 536 (S.D. Tex. 1990), *aff'd,* 943 F.2d 1438 (5th Cir. 1991); Helverson v. Mico, Inc. (*In re* Loe), 83 B.R. 641, 646 (Bankr. D. Minn. 1988); *Bowen,* 80 B.R. at 1015; *In re* Shuman, 68 B.R. 290, 295 (Bankr. D. Nev. 1986); *In re* Kerr, 65 B.R. 739 (Bankr. D. Utah 1986); *In re* Slezak, 63 B.R. 625, 629 (Bankr. W.D. Ky. 1986); *In re* Goldberg, 59 B.R. 201, 205 (Bankr. N.D. Okla. 1986); *In re* Flygstad, 56 B.R. 884, 888 (Bankr. N.D. Iowa 1986); Samore v. Indep. Pension Serv. (*In re* McKenna), 58 B.R. 221 (Bankr. N.D. Iowa 1985); Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 B.R. 67, 78 (Bankr. E.D. Va. 1985); *In re* Gillett, 46 B.R. 642, 645 (Bankr. S.D. Fla. 1985); *Crenshaw,* 44 B.R. at 34; Nixon v. P.J. Pedone & Co. (*In re* Nichols), 42 B.R. 772, 777 (Bankr. M.D. Fla. 1984); *see also* Goff v. Taylor (*In re*

the legislative history list contains mistakes,[299] and other legislative history indicates the list was not exclusive[300] — conclude that the exemption does encompass interests in pension plans.[301]

The debtor-participant faces the same problems under the state exemptions whether for opt-out states or non-opt-out states. Unfortunately, many state exemptions are patterned after the federal-scheme exemption and so contain the support limitation.[302] Courts in these jurisdictions follow the decisions concerning the corresponding federal-scheme exemption.[303] Another danger to the state

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Goff), 706 F.2d 574, 585 (5th Cir. 1983) (dicta); Gilbert v. Osburn (*In re* Osburn), 56 B.R. 867, 874 (Bankr. S.D. Ohio 1986) (same for state government plan).

299. The list contains two statutory provisions that were repealed before 1978 when the Bankruptcy Code was passed, namely, civil service benefits (changed in 1966) and foreign service benefits (changed in 1974). Secondly, the list misnames veterans benefits as Congressional Medal of Honor benefits. *See In re* Burns, 108 B.R. 308, 315 n.7. (Bankr. W.D. Okla. 1989).

300. H.R. REP. No. 595, *supra* note 157, at 360, 1978 U.S.C.C.A.N. at 6316 ("If the debtor chooses [sec. 522(b)], some of the items that may be exempted under other Federal laws include . . . ."); S. REP. No. 989, *supra* note 51, at 75, 1978 U.S.C.C.A.N. at 5861 ("Some of the items that may be exempted under Federal laws other than title 11 include . . . .").

301. *E.g.*, *In re* Majul, 119 B.R. 118, 124 (W.D. Tex. 1990); *In re* Starkey, 116 B.R. 259, 264 (Bankr. D. Colo. 1990); *In re* Messing, 114 B.R. 541, 547-50 (Bankr. E.D. Tenn. 1990); *In re* Felts, 114 B.R. 131, 133-34 (Bankr. W.D. Tex. 1990); *In re* Burns, 108 B.R. 308, 308 (Bankr. W.D. Okla. 1989); *In re* Komet, 104 B.R. 799, 805-16 (Bankr. W.D. Tex. 1989); Barr v. Hinshaw (*In re* Hinshaw), 23 B.R. 233, 234 (Bankr. D. Kan. 1982).

This position makes little sense. Congress intended to overcome puny state exemptions by adding the option of federal exemptions. *See supra* note 205 and accompanying text. Yet, according to this position, the state scheme has exempted pension-plan benefits while the federal scheme exempts only pension-plan benefits to the extent needed for support.

302. *See supra* note 218 for a listing of the states with a support requirement.

303. For benefits not in pay status, some courts conclude the exemption inapplicable since there are no "payments." *E.g.*, *In re* Craddock, 62 B.R. 583, 586 (Bankr. N.D. Ga. 1986) (young bank employee under Georgia law), *rev'd*, Craddock v. Anderson, No. C86-1815 A (N.D. Ga. Dec. 31, 1986). Other courts engage in a future support analysis and deny the exemption for the young and healthy. *E.g.*, *In re* Herzog, 118 B.R. 529, 532 (Bankr. N.D. Ohio 1990) (59-year old healthy lawyer under Ohio law); *In re* Syrtveit, 105 B.R. 599, 606 (Bankr. D. Mont. 1989) (income exceeds expenses under Montana law); *In re* Bartlett, 67 B.R. 455, 457 (Bankr. W.D. Mo. 1986) (41-year-old salesman under Missouri law); *see also In re* Sederstrom, 52 B.R. 448, 451 (Bankr. D. Minn. 1985) (57-year-old teacher under Minnesota law for school annuities); *cf. In re* Bell, 119 B.R. 783, 785 (Bankr. D. Mont. 1988) (45-year-old military retiree with IRA under similar state exemption). Similarly, these courts grant the exemption for the old and infirm. *E.g.*, *In re* Hunsucker, 106 B.R. 220, 222 (Bankr. D. Mont. 1988) (57-year-old teacher's aide for teacher retirement under Montana law); *In re* Weaver, 98 B.R. 497, 499 (Bankr. D. Neb. 1988) (under Nebraska law, creditor failed to show absence of need by 28-year-old); *In re* Woodford, 73 B.R. 675, 680 (Bankr. N.D.N.Y. 1987) (under New York law, 58-year-old lawyer had few working years remaining); *In re* Schlee, 60 B.R. 524, 527 (Bankr. D. Minn. 1986) (under Minnesota law, unemployed with degenerative back, unemployed wife, and asthmatic son with large medical bills); *In re* Lawrence, 57 B.R. 727, 729 (Bankr. N.D. Iowa 1986) (under Iowa law, 48-year-old unemployed farmer with disabled wife); *In re* Flygstad, 56 B.R. 884,

exemption is the courts' decision that ERISA preempts the exemption since it relates to an employee benefit plan.[304] Not only does the exemption's effectiveness for a pension plan depend on state law — not federal law, as mandated by ERISA — but it varies between bankruptcy courts within a state.[305]

C. *The Fallacious Reasoning of the Judicial Exception to ERISA's Anti-Alienation Provision*

The main reason given by some courts for their tortured interpretation of ERISA and the Bankruptcy Code is to prevent an oth-

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889 (Bankr. N.D. Iowa 1986) (54-year-old healthy manufacturing employee under Iowa law); *In re* Pettit, 57 B.R. 362, 363 (S.D. Iowa 1985) (under Iowa law, 48-year-old unemployed with disabled spouse).

304. Courts have stricken down statutes in Arizona, Colorado, Florida, Mississippi, Missouri, Montana, Oklahoma, Tennessee, and Texas. *E.g.*, *In re* Schlein, 114 B.R. 780, 783 (M.D. Fla. 1990) (exemption refers specifically to ERISA, so preempted); Siegel v. Swaine (*In re* Siegel), 105 B.R. 556, 564 (D. Ariz. 1989) (same); *In re* Lee, 119 B.R. 833, 834 (Bankr. M.D. Fla. 1990) (same); *In re* Gardner, 118 B.R. 860, 863 (Bankr. M.D. Fla. 1990) (same); *In re* Starkey, 116 B.R. 259, 263-64 (Bankr. D. Colo. 1990) (same); *In re* Messing, 114 B.R. 541, 543-45 (Bankr. E.D. Tenn. 1990) (same); *In re* Conroy, 110 B.R. 492, 496 (Bankr. D. Mont. 1990) (same); *In re* Burns, 108 B.R. 308, 311 (Bankr. W.D. Okla. 1989) (same); *In re* Sheppard, 106 B.R. 724, 727 (Bankr. M.D. Fla. 1989) (same); *In re* Alagna, 107 B.R. 301, 317 (Bankr. D. Colo. 1989) (same); *In re* Sellers, 107 B.R. 152, 155 (Bankr. E.D. Tenn. 1989) (same); *In re* Bryant, 106 B.R. 727, 730 (Bankr. M.D. Fla. 1989) (same); *In re* Weeks, 106 B.R. 257, 262 (Bankr. E.D. Okla. 1989) (same); *In re* Gaines, 106 B.R. 1008, 1016 (Bankr. W.D. Mo. 1989) (same), *rev'd*, 121 B.R. 1015 (W.D. Mo. 1990); Fogler v. Flindell (*In re* Flindall), 105 B.R. 32 (Bankr. D. Ariz. 1989) (same); Deposit Guar. Nat'l Bank v. McLeod (*In re* McLeod), 102 B.R. 60, 63 (Bankr. S.D. Miss. 1989) (same); *In re* Brown, 95 B.R. 216 (Bankr. N.D. Okla. 1989) (same); Penick v. Hirsch (*In re* Hirsch), 98 B.R. 1, 2 (Bankr. D. Ariz. 1988) (same), *aff'd*, 105 B.R. 556 (D. Ariz. 1989) (same); *In re* Komet, 93 B.R. 498, 500 (Bankr. W.D. Tex. 1988) (same), *aff'd on reh'g*, 104 B.R. 799, 801 (1989).

Courts have upheld statutes in Florida, Missouri, Nebraska, and Texas. *E.g.*, *In re* Dyke, 119 B.R. 536, 539 (S.D. Tex. 1990) (exception does not interfere with plan operation under ERISA), *aff'd*, 943 F.2d 1435 (5th Cir. 1991); *In re* Williams, 118 B.R. 812, 815-16 (Bankr. N.D. Fla. 1990) (same); *In re* Nuttleman, 117 B.R. 975, 979-82 (Bankr. D. Neb. 1990) (ERISA compatability provision makes it inferior to Bankruptcy Code); *In re* Vickers, 116 B.R. 149, 153-54 (Bankr. W.D. Mo.) (same), *aff'd*, 126 Bankr. 348 (W.D. Mo. 1990); *In re* Martinez, 107 B.R. 378, 380 (Bankr. S.D. Fla. 1989) (exemption doesn't interfere with plan operation under ERISA); *In re* Selkop, 107 B.R. 776, 778 (Bankr. S.D. Fla. 1989) (same); *In re* Bryan, 106 B.R. 749, 751 (Bankr. S.D. Fla. 1989) (same); *In re* Volpe, 100 B.R. 840, 848-55 (Bankr. W.D. Tex. 1989) (same), *aff'd*, 120 B.R. 843 (W.D. Tex. 1990). Since some of these states are the same ones where other courts have stricken the statute, this area of the law is unsettled.

See generally Charles Sterbach et al, *Pre-Bankruptcy Planning for Professionals and ERISA Qualified Pension Plans: Are State Created Statutory Exemptions D.O.A. in Bankruptcy Proceedings?*, 94 COM. L.J. 229 (1989).

305. *Compare In re* Schlein, 114 B.R. 780, 783 (M.D. Fla. 1990) (Florida exemption preempted) *and In re* Komet, 93 B.R. 498, 500 (Bankr. W.D. Tex. 1988) (Texas exemption preempted), *aff'd on reh'g*, 104 B.R. 799, 801 (1989) *with In re* Williams, 118 B.R. 812, 815-16 (Bankr. N.D. Fla. 1990) (Florida exemption not preempted) *and In re* Volpe, 100 B.R. 840, 848-55 (Bankr. W.D. Tex. 1989) (Texas exemption not preempted), *aff'd*, 120 B.R. 843 (W.D. Tex. 1990).

erwise wealthy debtor from placing the bulk of his assets into excluded property — namely the pension benefit plan — immediately prior to the filing of bankruptcy.[306] The concern then is whether the bankrupt has defrauded his creditors by sheltering his assets in accordance with federal law.

The Bankruptcy Code has a provision to prevent any such fraud.[307] Moreover, the Bankruptcy Code allows the conversion of non-exempt property into exempt property, even on the eve of bankruptcy, without the debtor losing the exemption.[308] The remedy for these

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306. Daniel v. Sec. Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1358 (9th Cir. 1985) (doctor with $98,000 in plan used plan loans for current needs and converted $39,000 nonexempt property into plan on eve of bankruptcy), *cert. denied*, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985) (strong public policy against placing property in a revocable trust for own benefit at expense of creditors); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1272 (8th Cir. 1984) (doctor with $150,000; purpose of the support limitation on the federal exemption was to eliminate corporate officers and professionals from shielding hundreds of thousands of dollars in pension plans at expense of creditors); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 588 (5th Cir. 1983) (to create a revocable trust for their own benefit); *In re* Burns, 108 B.R. 308, 314 (Bankr. W.D. Okla. 1989) (so stating for *Goff*, *Daniel*, *Graham*, and *Lichstrahl*); Christison v. Slane, (*In re* Silldorff), 96 B.R. 859, 863 (C.D. Ill. 1989) (too much room for a participant anticipating bankruptcy to shield assets).

307. 11 U.S.C. § 547(b) (1988) (dealing with preferential conveyances within 90 days of the bankruptcy filing); *id.* § 548(a) (dealing with fraudulent conveyances within 1 year of the bankruptcy filing). The bankruptcy trustee may not recover the assets from a good faith transferee for value. *Id.* § 550.

Some courts have suggested that trustees may recover from pension-plans contributions made as fraudulent transfers, *e.g.*, *In re* LaFata, 41 B.R. 842, 844 (Bankr. E.D. Mich. 1984) (contributions made after notice of malpractice claim against self-insured doctor), or as preferential conveyances. *E.g.*, Sterling Die Casting Co., Inc. v. Local 365 UAW Welfare and Pension Fund (*In re* Sterling Die Casting Co., Inc.), 118 B.R. 205, 208 (Bankr. E.D.N.Y. 1990) (eve-of-bankruptcy payment on judgment for arrearages to multi-employer pension plan); Pulaski Highway Express, Inc. v. Central States S.E. & S.W. Areas Health and Welfare and Pension Funds (*In re* Pulaski Highway Express, Inc.), 41 B.R. 305, 308 (Bankr. M.D. Tenn. 1984) (same).

ERISA generally prohibits contributions to pension plans from inuring to the benefit of the employer; however, an employer may recover contributions within 1 year of when made, if made in accordance with a mistake of fact, 29 U.S.C. § 1103(c)(2)(A)(i) (1988), or, for multi-employer plans, made within 6 months, if made in accordance with a mistake of fact or law. *Id.* § 1103(C)(2)(A)(ii). However, the cases ordinarily arise after the allowed periods and so involve the superiority of the Bankruptcy Code over ERISA's non-inure provision.

308. *E.g.*, Norwest Bank Nebraska v. Tveten, 848 F.2d 871, 874 (8th Cir. 1988) (doctor converted, among other things, pension- plan benefits into life insurance exempt under Minnesota law); Hanson v. First Nat'l Bank in Brookings, 848 F.2d 866, 868 (8th Cir. 1988) (farmer prepaid homestead mortgage); Ford v. Poston, 773 F.2d 52, 54 (4th Cir. 1985) (converted inherited land to tenants by the entirety); Armstrong v. Lindberg (*In re* Lindberg), 735 F.2d 1087, 1091 (8th Cir.), *cert. denied*, 469 U.S. 1073 (1984) (between conversion from Chapter 13 to Chapter 7 sold house for farm); First Texas Sav. Assoc. v. Reed (*In re* Reed), 700 F.2d 986, 990 (5th Cir. 1983) (sold collections to prepay

situations, when done on the eve of the bankruptcy, is not to deny the exemption but rather the discharge, provided there is other evidence of fraudulent intent.[309] The same remedy should apply to

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mortgage on family residence). *See* H.R. REP. No. 595, *supra* note 157, at 361, 1978 U.S.C.C.A.N. at 6317.

> As under current law, the debtor will be permitted to convert nonexempt property before filing a bankruptcy petition . . . . The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.

Id.; S. REP. No. 989, *supra* note 51, at 76, 1978 U.S.C.C.A.N. at 5862.

Pre-Bankruptcy Code law permitted the conversion. *E.g.*, Grover v. Jackson (*In re* Jackson), 472 F.2d 589, 590 (9th Cir. 1973) (converted business receipts to $1000 exempt savings account); Wudrich v. Clements, 451 F.2d 988, 990 (9th Cir. 1971) (on advice of counsel, refinanced car loans to obtain $1000 exempt savings account); Love v. Menick, 341 F.2d 680, 682-83 (9th Cir. 1965) (on advice of counsel, converted life insurance to $1000 exempt savings account); Schwartz v. Seldon, 153 F.2d 334, 335 (2d Cir. 1946) (paid off whole life insurance policy loan); Doethlaff v. Penn Mut. Life Ins. Co., 117 F.2d 582, 584 (6th Cir. 1941) (paid insurance premiums while insolvent); Forsberg v. Security State Bank of Canovà, 15 F.2d 499, 501 (8th Cir. 1926) (converted livestock to exempt personalty); Crawford v. Sternberg, 220 F. 73 (8th Cir. 1915) (withdrew partnership funds to partners who bought exempt personalty when there was no action against them); *In re* Wilson, 123 F. 20, 22 (9th Cir. 1903) (sale of grocery business to pay off existing homestead mortgage); *In re* Irvin, 120 F. 733, 734 (8th Cir. 1903) (converted storehouse to homestead by moving from rented house); Huenergardt v. John S. Brittain Dry Goods Co., 116 F. 31, 33 (8th Cir. 1902) (converted town homestead to country farm homestead).

309. *E.g.*, *Tveten*, 848 F.2d at 876 (17 transactions on the eve was evidence of fraud); *Ford*, 773 F.2d at 55 (converted one day after judgment, allegedly to correct mistake, constituted fraud); *Reed*, 700 F.2d at 991 (numerous transactions on eve was evidence of fraud). Otherwise, the conversion is ignored. *E.g.*, *Hanson*, at 848 F.2d at 869 (converted to reduce living expenses); *Lindberg*, 735 F.2d at 1091 (converted to change occupation from oil industry to farming).

The discharge is denied for Chapter 7 cases under 11 U.S.C. § 727(a)(2) (1988). The effect of denying the discharge is that the debtor-participant retains his exempted property and remains liable for his debts. The trustee may have satisfied some of his debts before the discharge denial since on the filing he has title to the bankrupt's estate. 11 U.S.C. § 544 (1988).

The corresponding tactic for Chapter 13 is failure to approve the rehabilitation plan as not proposed in good faith. 11 U.S.C. § 1325(a)(3) (1988). However, the problem should be of little consequence in Chapter 13, since only disposable income is distributable to creditors, and conversion of assets from non-exempt property to exempt property should have little effect on disposable income. The bankrupt can always dismiss a Chapter 13 case, *id.* § 1307(b), and so would only loose a few payments made to the trustee, *id.* § 1326(a)(1) (within 30 days of filing the proposed plan), before dismissal.

So, the effect of this remedy is to permit the debtor-participant to retain interest in his fraudulently conveyed pension moneys and remain liable on his outstanding debts.

Pre-Bankrutpcy Code law, if the court found fraudulent intent beyond the mere conversion, denied the exemption rather than deny the discharge. *E.g.*, Lyon v. Arnold, 46 F.2d 451, 452 (5th Cir. 1931) (land sold before bankruptcy disallowed by state as a fraudulent conveyance, claimed as a homestead); Levinson v. Greene, 296 F. 598, 600-01 (9th Cir. 1924) (paid insurance premiums in advance for five years); Kangas v. Robie, 264 F. 92, 94 (8th Cir. 1920) (converted business receipts to homestead while not paying trade obligations); Peyton v. Farmers Nat'l Bank, 261 F. 326, 328 (5th Cir. 1919) (bought homestead on eve with six-month renter in house); McGahan v. Anderson, 113 F. 115, 119 (4th Cir. 1902) (sold unpaid-for-goods to build homestead on wife's land conveyed exclusions. The Bankruptcy Code, therefore, already provides a remedy for creditors faced with a defrauding debtor-participant. They do not require an additional judicially-created remedy.

The sheltering primarily affects professionals who have established owner-employee plans for themselves and minimal number employees: a secretary, a professional assistant, such as a nurse or legal assistant, and a receptionist. Trying to punish the professional debtor by forfeiting his plan interests overlooks the very extensive ERISA provisions aimed at the same problem.

First, ERISA limits the amount of assets such persons can shelter. For all defined contribution plans of the employer, the limit of the annual contribution for a participant, including employee contributions, is the lesser of twenty-five percent of the employee's annual compensation or $30,000.[310] For all defined benefit plans of the employer, the limit is the lesser of the amount to fund the employee's benefit computed on an average compensation[311] over three years or set at $108,963.[312] If the employer has more than one type of plan, there is a method to combine these limits.[313] The net effect is a maximum contribution to one plan type plus a little more in the second type. Unless the plan has extensive coverage for numerous employees, however, the top-heavy plan rules reduce these combined limits.[314] These lesser benefits mean that the employer generally can make the maximum contribution only to one plan type. The result is that the highly-compensated debtor-participant can only shelter a

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to debtor).

Since the prior law did not make a distinction between exclusions and exemptions, *see, e.g.*, Judson v. Witlin (*In re* Witlin), 640 F.2d 661, 663 (5th Cir. 1981) (referring to the spendthrift-trust exclusion as an exemption under pre-Bankruptcy Code law); *Levinson*, 296 F. at 600 (referring to the spendthrift-trust provision as an exemption), the result of discharge denial should be applicable to the spendthrift-trust exclusion as well as to exemptions.

310. 26 U.S.C. § 415(c) (1988); 26 C.F.R. § 1.415-6 (1990). The dollar limitation is subject to cost-of-living adjustment. 26 U.S.C. § 415(d) (1988).

311. The maximum compensation considered for these purposes for owner-employees is $222,220. 26 U.S.C. § 401(a)(17) (1988) (specifying $200,000); I.R.S. News Release IR-91-12 (Jan. 17, 1991) (cost-of-living adjustment).

312. 26 U.S.C. § 415(b) (1988) (specifying $90,000); 26 C.F.R. § 1.415-3 (1990); I.R.S. News Release IR-91-12 (Jan. 17, 1991) (cost-of-living adjustment).

313. 26 U.S.C. § 415(e) (1988); 26 C.F.R. § 1.415-7 (1990).

314. 26 U.S.C. § 416(h) (1988). A top-heavy plan is one for which more than 60 percent of the contribution goes to key employees. *Id.* § 416(g).

certain amount of funds each year. This amount was the trade-off Congress devised to encourage these higher compensated individuals to establish plans to provide benefits to their lower-compensated employees.

Second, ERISA also limits the ability of the debtor to immediately establish the plan and then to terminate it after bankruptcy a short time afterward. Employers can only establish a qualified pension plan as part of a long-term program.[315] Premature termination or cessation of contributions to a qualified pension plan without a legitimate business reason results in disqualification of the plan, possibly retroactive to its inception.[316] Collection of past and current taxes on a disqualified plan could be prohibitive.[317] Regulations limit the amount of funds that a terminated, defined benefit plan — for which the shelter limits generally are greater — can distribute to a highly-compensated employee unless the plan exists for ten years.[318] Moreover, such action of prematurely terminating a qualified pension plan, if done shortly after discharge in bankruptcy, may constitute the necessary fraud for revocation of the discharge under the Bankruptcy Code.[319] Thus, the fear of the courts, the revocable trust,[320] doesn't work the way they imagined.

Third, ERISA similarly restricts the ability of the debtor to establish a plan solely for himself, thereby not shifting any of his assets to his employees. A qualified pension plan must include as participants sufficient lowly-compensated employees that they number (or their benefits amount to) at least seventy percent of the number of highly-compensated employees (or their benefits).[321]

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315. 26 C.F.R. § 1.401-1(b)(2) (1990).

316. Rev. Rul. 69-25, 1969-1 C.B. 113 (a plan is presumed permanent initially; however, termination or discontinuance after a few years for other than a business cause reverses the presumption ab initio).

317. *See supra* notes 37-38 and accompanying text.

318. 26 C.F.R. § 1.401-4(c)(2)(iii) (1990) (the greater of $20,000 or 20 percent of the first $50,000 compensation multiplied by the number of years the plan existed). This limit applies to the 25 highest compensated employees. *Id.* § 1.401-4(c)(2)(i).

319. 11 U.S.C. § 727(d), (e) (1988) (if brought within one year).

320. Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 588 (5th Cir. 1983).

321. 26 U.S.C. § 410(b) (1988); 26 C.F.R. § 1.410(b)-1 (1990). Employees include common law employees, self-employed persons, and leased employees. Prop. Treas. Reg. § 1.410(b)-9(a)(1) (1991) *reprinted in* [1991] CCH FED. TAX RPTR. 2665TL.

Moreover, ERISA contains numerous provisions to prevent the typical owner-employee from shifting employees so as to have a plan that covers only himself. The qualification rules require pension plans to treat all employees in a controlled group[322] or an affiliated service group[323] and leased employees[324] as if a single employer employed them all. Thus, if the professional establishes a plan to shelter his assets from bankruptcy, significant amounts will go to employees.

VI. STATUTORY CONSTRUCTION

To achieve justice, courts use different principles determined by the circumstances before the court.[325] Two techniques exist for statutory construction: (1) the analytical or plain-meaning method (acting on the literal meaning of the words in the statute); and (2) the teleological method (acting on the intended legislative remedy).[326]

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322. 26 U.S.C. §§ 414(b)-(c), 1563(a)(2) (1988) (controlled groups have 50 percent common ownership in five persons). *See* H.R. REP. No. 807, *supra* note 59, at 50, 1974 U.S.C.C.A.N. at 4716 (commenting on Pub. L. No. 93-406, § 1015, 88 Stat. 829, 926 (1974)):

> [T]his provision . . . make[s] it clear that the coverage and antidiscrimination provisions cannot be avoided by operating separate corporations instead of separate branches of one corporation. For example, if managerial functions were performed through one corporation employing highly-compensated personel, which has a generous pension plan, and assembly-line functions were performed through one or more other corporations employing lower-paid employees, which have less generous plans or no plans at all, this would generally constitute an impermissible discrimination.

Id.

323. 26 U.S.C. § 414(m) (1988) (affiliated service groups have one member providing service for another that historically was done by employees). *See* H.R. REP. No. 1278, 96th Cong., 2d Sess. 34-35 (1980) (commenting on Pub. L. No. 96-605, § 201, 94 Stat. 3521, 3526-27 (1980)):

> [This provision prevents avoidance of the controlled group rules by] establishing individual corporations which form a partnership of corporations. The partnership employs the rank and file employees. Because none of the corporations have more than a 50 percent interests in the partnership, the partnership is not a member of a group of commonly controlled trades or businesses.

Id. See also Garland v. Commissioner, 73 T.C. 5 (1979) (successfully using the described scheme).

324. 26 U.S.C. § 414(n) (1988) (added by Pub. L. No. 97-248, § 248, 96 Stat. 324, 526 (1982)). This scheme involved the transfer of the employees to an entirely unrelated entity and then leasing back the employees. LANGBEIN & WOLK, *supra* note 56, at 179. Consequently, there is a safe-harbor from the leased employee rules if the unrelated entity contributes an amount equal to ten percent of the compensation of the lowly-compensated employees to a pension plan for these leased employees. 26 U.S.C. § 414(n)(5) (1988).

325. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960). *See generally* ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 60-85 (1983) (discussing principles and counterprinciples in contract law, such as the freedom to contract and fairness).

326. 2A SUTHERLAND, *supra* note 66, § 46.07; STANLEY A. DESMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 86 (2d ed. 1968). The key difference between the two methods is the use of legislative history to interpret statutes.

A. *Statutory Interpretation Techniques*

The analytical method limits courts to consideration only of the statute itself and intrinsic aids such as section headings, preambles, titles, punctuation, context, grammar, and word choice.[327] Under the analytical method, the court determines a statute's meaning through its exact language using intrinsic aids only if necessary.[328] A court must enforce the statute as written, even if the literal construction leads to unjust results.[329] Courts frequently weaken this method by combining it with the teleological method. They create an ambiguous language exception to the plain-meaning rule under which the court considers extrinsic aids in addition to intrinsic aids.[330]

The teleological method permits courts to consider external aids, such as other statutes, prior judicial and administrative decisions, historical context, and legislative history.[331] In contrast to the analytical method, a court examines the problem that the legislature set out to solve and the remedy it developed and then construes the statute in light of achieving those ends.[332] Some courts treat this method as an additional exception to the analytical method to prevent unjust or absurd results.[333]

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327. *See generally* 2A SUTHERLAND, *supra* note 66, §§ 47.01-.38.

328. *See* Burlington Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987); Caminetti v. United States, 242 U.S. 470, 485 (1917); *see also* Pennsylvania Dep't of Pub. Welfare v. Davenport, 110 S. Ct. 2126, 2131 (1990) (applying the plain-meaning rule to definitions in the Bankruptcy Code); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-42, 247-48 (1989) (applying the plain-meaning rule to section 506 of the Bankruptcy Code, 11 U.S.C. § 506 (1988), since there is no ambiguity). *See generally* Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975) (analyzing cases in which the Supreme Court only appeared to give weight to the rule and other cases where federal courts followed *Caminetti*, 242 U.S. 470, in its full rigor); 2A SUTHERLAND, *supra* note 66, §§ 47.01-.38.

For criticism of the plain-meaning rule, *see* Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 442 (The rule is unnecessary; competent judges do not need grammar handbooks; incompetent judges are unable to apply them). *See generally* Michael R. Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 U. DAYTON L. REV. 31 (1979).

329. *See, e.g.*, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 521 (1981) (concerning ERISA preemption, "[o]ur judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales.").

330. 2A SUTHERLAND, *supra* note 66, § 46.01.

331. *Id.* §§ 48.01-56.05.

332. *Id.* §§ 56.01-.02. The teleological method derives from Heydon's Case, 76 Eng. Rep. 637, 638 (1584) (Sir Edward Coke, reporter).

333. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

The United States Supreme Court has used both methods.[334] With respect to the key provisions of ERISA, the Supreme Court has adhered to the analytical method for both the anti-alienation provision[335] and the preemption provision.[336] With respect to the Bankruptcy Code, the Supreme Court also has adhered to the analytical method.[337]

The interpretation of the relationship of ERISA to the Bankruptcy Code, however, involves an additional element. Courts presume that when Congress passes subsequent legislation relating to the subject matter of an earlier statute that it had the earlier statute

334. *Compare* Chung Fook v. White, 264 U.S. 443, 446 (1924) (if the language is plain and an injustice arises, the remedy lies with Congress and not the courts) *and* Caminetti v. United States, 242 U.S. 470, 485 (1917) (if the language is plain and unambiguous, the duty of interpretation does not arise and the court need not discuss the aids for resolving ambiguity) *with* Holy Trinity Church v. United States, 143 U.S. at 459 (statutes should be sensibly construed so that the reason of the law prevails over its letter if an injustice or absurdity would result) *and* Pierson v. Ray, 386 U.S. 547, 560 (1967) (teleological method, suggesting the rule in Heydon's Case, 76 Eng. Rep. at 638).

335. *See* Mackey v. Lanier Collections Agency & Service Inc., 486 U.S. 825, 836 (1988).

> Where Congress intended . . . [to] extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute. Specifically ERISA § 206(d)(1) bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA pension benefit plans . . . . Congress did not enact any similar provision applicable to ERISA welfare benefit plans . . . .

Id.

But see Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 371-72 (1990) (applying the anti-alienation provision to garnishments since this interpretation is consistent with Treasury regulations, Congressional conference reports, and other similar federal statutes).

336. *See, e.g.*, Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482-83 (1990) (applying the plain-meaning rule to the ERISA preemption provision); FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990) (same); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987) (same); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741 (1985) (applying the plain-meaning rule to the savings clause of the ERISA preemption provison); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) (same).

337. *See, e.g.*, Farrey v. Sanderfoot, 111 S. Ct. 1825, 1828-30 (1991) (confirming plain-meaning interpretation for exemption contained in 11 U.S.C. § 522(f) (1988) with reference to legislative history on the purpose of the section); Pennsylvania Dep't of Pub. Welfare v. Davenport, 110 S. Ct. 2126, 2130-31 (1990) (uses plain meaning for 11 U.S.C. § 101(11) (1988) and refuses to entertain idea of drafter's intention to vary the strict language); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 243 (1989) (same for 11 U.S.C. § 506 (1988)); Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (interpreting 11 U.S.C. § 554 (1988)) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."), *reh'g denied*, 475 U.S. 1090 (1986). *But see Davenport*, 110 S. Ct. at 2134 (although the Court generally uses the plain-meaning rule, it does not follow a literal interpretation for the Bankruptcy Code) (Blackmun, J., dissenting); Kelly v. Robinson, 479 U.S. 36, 43-44 (1986) (to interpret the Bankruptcy Code, the Court looks to its object and policy, not only the plain-meaning rule).

in mind. Courts then construe the two statutes together as if they were one.[338] If reasonably possible, courts construe them harmoniously even when in apparent conflict.[339] Only when there is an irreconcilable conflict will the newer provision control the earlier provision as the most recent expression of Congress.[340] The validity of the interpretation of the majority of the bankruptcy courts rests, therefore, on a showing that ERISA and the Bankruptcy Code cannot be harmonized.

Most courts considering ERISA and the Bankruptcy Code have used ERISA's compatibility provision to ignore ERISA and consider only the Bankruptcy Code rather than attempting to interpret them consistently and compatibly. It is only the use of the compatibility provision before finding a conflict that enables these courts to create a conflict between ERISA and the Bankruptcy Code. Their resulting interpretation effectively destroys both ERISA's anti-alienation pro-

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338. *E.g.*, Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (in light of each other); Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 541 (1954) (to read the later one without reference to the earlier one is to read it out of context); United States v. Stewart, 311 U.S. 60, 64 (1940) (as one statute); Sanford v. Commissioner, 308 U.S. 39, 42 (1939) (read a statute in light of closely related provisions in another statute); British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 166 (1936) (same); Maul v. United States, 274 U.S. 501, 508 (1927) (as a system); Commissioner of Immigration v. Gottlieb, 265 U.S. 310, 312 (1294) (same); 2A SUTHERLAND, *supra* note 66, § 51.02.

339. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680, 687 (1990); Watt v. Alaska, 451 U.S. 259, 266-67 (1981); Morton v. Moncari, 417 U.S. 535, 551 (1974); 2A SUTHERLAND, *supra* note 66, § 51.02.

340. *E.g.*, United States v. Arizona, 295 U.S. 174, 191 (1935) (unless a different purpose is clear); United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 396 (1934) (same); Maul v. United States, 274 U.S. 501, 508 (1927) (same); Panama R.R. v. Johnson, 264 U.S. 375, 384 (1924) (same); United States v. Sweet, 245 U.S. 563, 572 (1918) (same); United States v. Barnes, 222 U.S. 513, 520 (1912) (same); 2A SUTHERLAND, *supra* note 66, § 51.03.

Critics have alleged various irreconcilable conflicts between ERISA and the Bankruptcy Code. *See, e.g.*, Goff v. Taylor (*In re* Goff), 706 F.2d 574, 586-87 (5th Cir. 1983) (ERISA's anti-alienation provision versus the Bankruptcy Code's intent to broaden the property of the estate distributable to bankruptcy creditors); D. Bruce Hendrick, *Federal Nonbankruptcy Law Includes ERISA*, 53 TEX. B.J. 854 (1990) (ERISA's policy favoring accummulated retirement benefits versus the Bankruptcy Code's policy of a "fresh start," but not a "head start"); Wohl, *supra* note 49, at 5 (ERISA's protection of benefits at retirement time versus the dual policy of rehabilitating debtors and reimbursing creditors to the greatest extent possible). These conflicts involve various misunderstandings of the purposes behind the Bankrutpcy Code.

If ERISA and the Bankruptcy Act conflict, the most recent statute would be ERISA's anti-alienation provision under REA, clearly denoted as a spendthrift trust provision eligible for the bankruptcy exclusion. *See supra* notes 86-89 and accompanying text.

vision (by ordering transfers of plan interests reachable in no other action)[341] and ERISA's preemption provision (by making bankruptcy exclusions and exemptions depend on varying state law).[342] This procedure is improper statutory interpretation.[343]

B. The Proper Solution

Under the interpretation principles, courts must interpret the Bankruptcy Code to protect ERISA's anti-alienation provision and its uniformity of federal common law if at all possible. This means that the distinction between creditors in and outside bankruptcy and the use of state law to determine bankruptcy exclusions and exemptions is erroneous.

The first step in interpreting the two statutes is to determine whether there is any ambiguity in the statutes. In the absence of that ambiguity,[344] the plain-meaning rule governs. Under the plain-meaning rule, the exclusion provision requires examination of trust law as the "applicable nonbankruptcy law" enforcing a restriction on transfers in trusts.[345] ERISA's preemption provision[346] mandates the use of federal trust law rather than the state trust law used by most courts. Fortunately, federal trust law exists — namely the federal common law of trusts developed under ERISA[347] and ERISA itself, the embodiment of much trust law.[348] This federal trust law both requires a restriction on transfers and enforces it.[349] Thus, courts must exclude the interest of a debtor-participant in a qualified pension plan with an anti-alienation provision from the debtor-participant's estate.

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341. *See supra* notes 49-50 and accompanying text.

342. *See supra* notes 247-82, 302-05 and accompanying text.

343. *See* Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1271 (8th Cir. 1984) (explaining the basis of the interpretation as legislative history of the Bankruptcy Code without any finding of ambiguity or any conflict with ERISA); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 581 (5th Cir. 1984) (same).

344. *See* Forbes v. Lucas (*In re* Lucas), 924 F.2d 597, 600-02 (6th Cir. 1991) (explaining that the key language of the Bankruptcy Code is not ambiguous).

345. *See* 11 U.S.C. § 541(c)(2) (1988).

346. *See supra* note 109 and accompanying text.

347. *See supra* note 259.

348. *See supra* note 62.

349. *See supra* notes 73-74 and accompanying text.

The next step in interpretation is to determine whether this plain-meaning result is harmonious with the rest of ERISA and the Bankruptcy Code and their respective legislative histories. This interpretation preserves the language and policies of ERISA. The anti-alienation requirement preserves retirement moneys for retirement to prevent the participant from becoming a public charge.[350] This preservation will not occur unless courts exclude interests in pension plans from the debtor-participant's estate. The Supreme Court indicated that ERISA's anti-alienation requirement has no exceptions unless Congress specifically acts to legislate one.[351] Congress has not legislated one for bankruptcy. Congress labelled ERISA's anti-alienation requirement a spendthrift-trust provision.[352] Congress similarly described the trusts with transfer restrictions subject to the bankruptcy exclusion.[353] ERISA contains a federal compatibility provision. The Supreme Court stated that a court cannot interpret the compatibility provision to eviscerate ERISA's anti-alienation provision whenever a creditor relies on other federal law.[354] The Bankruptcy Code is one such other federal law. Bankruptcy courts, therefore, must honor ERISA's alienation restriction and exclude interests in pension plans with anti-alienation provisions from bankruptcy estates.

ERISA also seeks uniformity in pension-plan administration. ERISA's preemption provision eradicates state law relating to pension plans to foster that uniform federal common law. Under the Congressional directive, for ERISA to pattern that uniform federal law similar to that developed for collective-bargaining agreements, various state trust and contract interpretation rules are irrelevant.[355] Consequently, federal law determines the effectiveness of ERISA's anti-alienation requirement, not the state law used by many bankruptcy courts.[356] Under that federal law, courts protect interests in

350. *See supra* notes 56-79 and accompanying text.
351. *See supra* note 85 and accompanying text.
352. *See supra* notes 86-89.
353. *See supra* notes 157-58 and accompanying text.
354. *See supra* note 92 and accompanying text.
355. *See supra* notes 258-64 and accompanying text.
356. *See supra* notes 247-82, 302-05 and accompanying text.

pension plans with anti-alienation provisions from creditors.[357] Moreover, ERISA aims to encourage the growth of private pension plans. Congress accomplished this through a complex, delicate balance of incentives (namely tax-free compounding, certain plan withdrawals, and integration with social security)[358] for the highly-compensated employees with participation (namely vesting, coverage, and minimum contributions)[359] for the lowly-compensated. Only the above interpretation preserves these goals.

The exclusion from the debtor-participant's estate of interests in pension plans with anti-alienation provisions avoids several problems that otherwise would arise under ERISA. The pension plan would not risk potential disqualification by the Internal Revenue Service for not abiding by ERISA's anti-alienation requirement.[360] The disqualification would result in adverse tax consequences for management employees unable to reach funds in the pension plan with which to pay their individual tax. Employers would then become reluctant to continue retirement programs, thwarting one goal of ERISA. The courts also would not need to resolve the jurisdictional forum for determining pension-plan rights. ERISA mandates state or federal district court.[361] The Bankruptcy Code specifies the bankruptcy court. Moreover, the need for Congressional action over how to enforce the bankruptcy turnover order would cease. The bankruptcy estate only receives the same title that the debtor-participant had. For most of these interests in pension plans, the participant has no current right to receive anything.[362] Should the bankruptcy estate remain open until the bankrupt's rights are in pay status, or should they order a direct transfer subject to third-party rights? Do these third party rights include those of the plan? There presently is no qualified bankruptcy order analogous to a qualified domestic relations order to properly account for a split in pension benefits between participant and creditors.[363] Furthermore, whether a court

357. *See supra* notes 73-74 and accompanying text.
358. *See supra* notes 130-45 and accompanying text.
359. *See supra* notes 137-40, 321-24 and accompanying text.
360. *See supra* notes 35-40, 76 and accompanying text.
361. *See supra* notes 43-46 and accompanying text.
362. *See supra* notes 23-28 and accompanying text.
363. *See supra* notes 23-31.

preempted state-scheme exemptions for pension plans under ERISA's preemption provision[364] would become irrelevant. States no longer would attempt to circumvent the preemption by either making no reference to ERISA in their exemption statutes or defining spendthrift trusts to include pension plans.[365] Interpreting the Bankruptcy Code as compatible with ERISA avoids all of these problems.

But more importantly, this interpretation also complies with the provisions and policies of the Bankruptcy Code. Congress intended "available nonbankruptcy law" in the Bankruptcy Code's exclusion to preserve prior law regarding the bankrupt's interest in spendthrift trusts.[366] That prior law excluded interests in pension plans with anti-alienation provisions under federal law.[367] Elsewhere in the Bankruptcy Code, "applicable nonbankruptcy law" includes both state and federal law.[368] The Bankruptcy Code uses a different phrase to limit the applicable law to only state law.[369] So ERISA is included within the "applicable nonbankruptcy law" of the exclusion. During the Bankruptcy Code's passage, Congress resisted attempts to abolish the exclusion for trusts with transfer restrictions.[370] Afterwards, Congress rejected attempts to restrict the availability of bankruptcy discharge for consumers.[371] Thus, Congress did not intend the courts to accomplish what it refused to do — include within the debtor-participant's estate interests in pension plans with anti-alienation provisions.

The exclusion of interests in qualified pension trusts meshes with the exemption schemes designed to protect those other retirement benefits not included within the exclusion.[372] The federal-scheme exemption applies to both federal benefits that are divestible, and to which trust law does not apply, and to those retirement benefits to

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364. *See supra* notes 304-05.

365. *E.g.*, KAN. STAT. ANN. § 60-2308(b) (1990) ("Any [ERISA] plan shall be conclusively presumed to be a spendthrift trust under these [exemptions] statutes and the common law of the state.").

366. *See supra* notes 157-58 and accompanying text.

367. *See supra* note 98 and accompanying text.

368. *See supra* notes 162-64 and accompmaying text.

369. *See supra* note 166 and accompanying text.

370. *See supra* notes 149-53 and accompanying text.

371. *See supra* notes 207-13 and accompanying text.

372. *See supra* notes 175-91 and accompanying text.

which ERISA's anti-alienation provision does not apply. The state scheme has only an exemption for those federal benefits that are divestible and to which trust law does not apply, since many states have exemptions for those retirement benefits to which ERISA's anti-alienation provision does not apply. So Congress intended the Bankruptcy Code's exclusion to provide similar protection for interests in pension trusts subject to ERISA's anti-alienation provision.

Congress passed the Bankruptcy Code to provide the debtor with a fresh start so that he could avoid becoming a public charge. To carry out that policy demands the preservation of his retirement moneys. The destruction of these retirement funds in a bankruptcy proceeding only insures that the debtor has a significant probability of becoming a public charge. The Bankruptcy Code has a number of provisions to insure this result: the trust exclusion for pension plans subject to ERISA's anti-alienation provision, a federal exemption under both the federal- and state-exemption schemes for federal benefits not provided by enforceable trusts, and a federal exemption under the federal-exemption scheme (copied in many state exemption schemes) for those pension-plan benefits not subject to ERISA's anti-alienation provision. Preservation of retirement benefits through exclusion and exemptions is vital to that fresh start.[373]

This interpretation also avoids several problems that otherwise would arise under the Bankruptcy Code. No longer would creditors reach through a bankruptcy proceeding interests in pension trusts with anti-alienation provisions that they cannot reach in a non-bankruptcy proceeding.[374] No longer would courts need to imply a repeal of ERISA's anti-alienation and preemption provision without evidence of any conflict between the two statutes and contrary to the Bankruptcy Code's repealer.[375]

Instead, since the two statutes are compatible, the courts and the creditor can use the Bankruptcy Code as Congress intended. Their concern is improper shielding of assets through use of ERISA.

373. *See supra* notes 214-25 and accompanying text.
374. *See supra* notes 50, 73-74 and accompanying text.
375. *See supra* notes 100-08 and accompanying text.

Under the Bankruptcy Code, the remedy is not elimination of the exclusion, which destroys the debtor-participant's fresh start, but to deny the discharge.[376] Thus, the proper interpretation of ERISA and the Bankruptcy Code requires excluding interest in certain pension plans from the debtor-participant's estate.

VII. Conclusion

Both ERISA and the Bankruptcy Code mandate that courts exclude from the debtor-participant's bankruptcy estate his interest in a pension plan that contains an anti-alienation provision. ERISA requires certain pension trusts to include an anti-alienation provision. The Bankruptcy Code excludes from the bankrupt's estate interests in trusts with a restriction on transfer enforceable under "applicable nonbankruptcy law."

Courts interpreting these two statutes must do so harmoniously. The circuit courts presently have three approaches. One approach uses the plain meaning of the statutes and concludes that the Bankruptcy Code requires exclusion of all interests in pension plans with ERISA's anti-alienation provision from the debtor-participant's bankruptcy estate. These courts have no further problems since this interpretation complies with the exact language and policy of both statutes. Regarding such policy, ERISA's preservation of retirement moneys and the Bankruptcy Code's preservation of the fresh start are both designed to prevent the debtor-participant from becoming a public charge. The other two approaches, however, engender conflicts. One approach makes interests in pension plans with anti-alienation provisions available for distribution to creditors, a result that courts disallow in the nonbankruptcy setting. This approach eviscerates ERISA's anti-alienation provision. The other approach uses state spendthrift law to determine whether the court includes interests in certain pension plans in the debtor-participant's estate. This procedure creates a horribly complex web of conflicting state rules with which plan administrators must cope. This approach eviscerates both ERISA's anti-alienation provision and preemption-of-state-law provision.

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376. *See supra* notes 307-09 and accompanying text.

Exclusion of all interests in pension plans that contain an anti-alienation provision pursuant to ERISA from the debtor-participant's bankruptcy estate, even those capable of various withdrawals, is the only interpretation of the Bankruptcy Code and ERISA that comports with the Bankruptcy Code's fresh start policy and ERISA's encouragement of the private pension system. It is also the only interpretation that does not do violence to other provisions in the Bankruptcy Code (the exemption scheme) and in ERISA (the anti-alienation and preemption provision).