ERISA Retirement Plans in Individual Bankruptcy

John Minton Newell
Latham & Watkins

ERISA RETIREMENT PLANS IN INDIVIDUAL BANKRUPTCY

John Minton Newell*

* Associate, Latham & Watkins; A.B., 1982, Stanford University; J.D., 1985, University of Michigan. The author would like to thank Professor James J. White of the University of Michigan Law School for his assistance in preparing this Article.

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA),[1] which established comprehensive federal regulation of private employee benefit plans. ERISA amended the provisions of the Internal Revenue Code, adding a number of new requirements that must be met if an employee benefit plan is to qualify for favorable tax treatment.[2] In addition, ERISA established substantially identical substantive civil law requirements that must be met by plans created by employers and employee organizations that operate in interstate commerce.[3] For purposes of this Article, the term "ERISA" is used

1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 5, 18, 26, 29, 31 & 42 U.S.C.).

2. *See* ERISA, Pub. L. No. 93-406, Title II, 88 Stat. 829, 898 (1974) (codified as amended in scattered sections of 26 U.S.C.). A general discussion of the favorable tax consequences of qualified retirement plans may be found in M. CANAN, QUALIFIED RETIREMENT PLANS § 3.1 (1977).

3. *See* ERISA, Pub. L. No. 93-406, Title I, 88 Stat. 829, 832 (1974) (codified as

to refer both to the tax-qualification provisions of the Internal Revenue Code and the substantive civil law provisions found in Title 29 of the United States Code.[4]

Following the enactment of ERISA, many employers adopted various types of ERISA retirement plans that cover millions of employees and hold hundreds of billions of dollars in assets.[5] For purposes of this Article, the term "ERISA retirement plan" refers to those employee benefit plans that provide that plan benefits may not be "assigned or alienated,"[6] either because such a provision is required as a matter of substantive law[7] or as a prerequisite to favorable tax treatment.[8] The term therefore includes many types of pension, profit-sharing, and stock bonus plans, and employee annuities, established by corporations,[9] as

---

amended at 29 U.S.C. §§ 1001-1145); *see also* ERISA § 4, 29 U.S.C. § 1003 (1982) (limiting scope of substantive law provisions to entities operating in interstate commerce).

4. The tax qualification and substantive law provisions are identical in all respects relevant to this Article, except as noted.

5. *See generally* Erlenborn, *Was ERISA Worth the Effort?*, PENSION WORLD, Sept. 1984, at 36.

6. In the absence of such a plan provision, the conflict between ERISA and the Bankruptcy Code examined in this Article would not arise.

7. *See* ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1982) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."); *see also infra* note 8. Although ERISA's substantive law provisions only require "pension plans" to include the restrictions on assignment and alienation, this term is defined broadly enough to include stock bonus, pension or profit-sharing plans, and employee annuities. *See* ERISA § 3(2), 29 U.S.C. § 1002(2) (1982) (definition of "pension plan"); Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510, 514-16 (N.D. Tex. 1981) (profit-sharing plan is within "pension plan" definition).

8. *See* 26 U.S.C.A. § 401(a)(13)(A) (West Supp. 1985) ("A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."); *see also* Treas. Reg. § 1.401(a)-13(b) (1978) ("Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.").

Some courts and commentators have erroneously concluded that Treas. Reg. § 1.401(a)-13(b), interpreting 26 U.S.C.A. § 401(a)(13)(A) (West Supp. 1985), is also a binding interpretation of the substantive law assignment and alienation provision of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1982), described *supra* note 7. *See* General Motors Corp. v. Buha, 623 F.2d 455, 462 (6th Cir. 1980); Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510, 519-20 (N.D. Tex. 1981); Note, *Exemption of ERISA Benefits Under Section 522(b)(2)(A) of the Bankruptcy Code*, 83 MICH. L. REV. 214, 229 n.83 (1984).

The error arises from a misapplication of ERISA § 3002(c), 29 U.S.C. § 1202(c) (1982). Section 3002(c) provides that Treasury regulations issued under 26 U.S.C.A. §§ 410(a), 411, 412 (West 1978 & Supp. 1985) also apply to analogous substantive law provisions in Title I of ERISA. Treas. Reg. § 1.401(a)-13(b), however, is an interpretation of 26 U.S.C.A. § 401 (West 1978 & Supp. 1985), not 26 U.S.C.A. §§ 410(a), 411 or 412 (West 1978 & Supp. 1985)). Therefore, the regulation is not a binding interpretation of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1982).

9. As a matter of substantive law, the assignment or alienation restriction must be

well as "Keogh" plans for self-employed individuals.[10] The term does not include Individual Retirement Accounts.[11]

When an employee covered by an ERISA retirement plan files a petition in bankruptcy, the court is presented with a number of complex issues regarding the relationship among ERISA, the Bankruptcy Code (Code),[12] and the state law of creditors' rights. Three issues have emerged in these cases, and the courts have divided on the proper resolution of each of these issues. First, is the debtor's interest in an ERISA retirement plan "property of the estate,"[13] and thus available for distribution to creditors? Second, if the debtor's interest is property of the estate, and the debtor uses the state exemption scheme, is his interest nevertheless exempt in bankruptcy because it is "exempt under Federal [nonbankruptcy] law?"[14] Third, if the debtor chooses the federal bankruptcy exemption scheme, is his interest in the retirement plan exempt under the section exempting his "right to receive a payment" under a retirement plan, "to the extent reasonably necessary for the support of the debtor?"[15]

Although this Article explores each of these issues in turn, it is not possible to develop a logical and consistent approach to the treatment of ERISA retirement plan benefits in bankruptcy without considering each issue in light of the other two, and in light of the rights of creditors in the nonbankruptcy context.

---

included in any plan established or maintained by an employer or employee organization that provides "retirement income" to employees. *See* ERISA §§ 3(2), 206(d)(1), 29 U.S.C. §§ 1002(2), 1056(d)(1) (1982); *see also supra* note 7.

To qualify for favorable tax treatment, the following types of plans must include the assignment and alienation restriction: stock bonus, pension and profit-sharing plans, tax credit employee stock ownership plans, and employee annuities. *See* 26 U.S.C.A. § 401(a) (West 1978 & Supp. 1985) (stock bonus, pension or profit-sharing plans); 26 U.S.C.A. § 409 (West. Supp. 1985) (tax credit employee stock ownership plans); 26 U.S.C.A. §§ 403(a), 404(a) (West 1978 & Supp. 1985) (employee annuities).

10. The term "ERISA retirement plan" includes retirement plans established by corporations and self-employed individuals. Plans for self-employed individuals are referred to as "Keogh plans" or "H.R. 10 plans." *See* 26 U.S.C. § 401(c) (1982). All Keogh plans must contain the assignment and alienation restrictions to qualify for favorable tax status. As a matter of substantive law, however, only those Keogh plans that cover the common law employees of the self-employed individual must restrict assignment and alienation. *See* 29 C.F.R. § 2510.3-3(b) (1984).

11. ERISA regulates a number of benefit and pension plans that are not required to include the assignment and alienation provisions. *See, e.g.*, 26 U.S.C.A. §§ 408(a) (Individual Retirement Accounts (IRAs)), 408(b) (Individual Retirement Annuities (IRANs)) (West 1978 & Supp. 1985). The status of these plans in bankruptcy is not explicitly considered in this Article, although they may in some cases be analogous to certain ERISA retirement plans.

12. 11 U.S.C. §§ 101 to 151326 (1982).

13. 11 U.S.C.A. § 541 (West. Supp. 1985); *see infra* Part I.

14. 11 U.S.C.A. § 522(b)(2)(A) (West Supp. 1985); *see infra* Part II(A).

15. 11 U.S.C. § 522(d)(10)(E) (1982); *see infra* Part II(B).

I. ERISA RETIREMENT PLAN BENEFITS AS "PROPERTY OF THE ESTATE"

The filing of a petition in bankruptcy creates an "estate," which is comprised of "all legal or equitable interests of the debtor in property" as of the date of the petition.[16] Congress intended that this broad definition of "property and the estate" would encompass anything the debtor has that is of value.[17] The debtor's right to receive retirement benefits, whether contingent or vested, is clearly a "legal or equitable interest" of the debtor.[18]

An interest of the debtor becomes property of the estate "notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law . . . that restricts or conditions transfer of such interest by the debtor . . . ."[19] Thus, although ERISA requires, both as a matter of substantive law and as a condition to qualification for favorable tax treatment, that all ERISA retirement plans provide that the benefits may

---

16. 11 U.S.C. § 541(a)(1) (1982). Whether or not a debtor has a "legal or equitable interest" in property is governed by state nonbankruptcy law. If such an interest exists, however, § 541(a)(1) requires that it become property of the estate. *See* 4 L. KING, COLLIER ON BANKRUPTCY ¶ 541.01[1], at 541-13 (15th ed. 1984).

17. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 (1983); S. REP. NO. 989, 95th Cong., 2d Sess. 82 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 5787, 5868 [hereinafter cited as S. REP. No. 989, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS]; H.R. REP. No. 595, 95th Cong., 1st Sess. 176, 367-68 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6136, 6322-24 [hereinafter cited as H.R. REP. No. 595, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS].

18. *See* Gray v. Ingles Markets, Inc. Employees' Stock Bonus Plan and Trust (*In re* DeWeese), 47 Bankr. 251, 254-55 (Bankr. W.D.N.C. 1985); Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 Bankr. 67, 72-73 (Bankr. E.D. Va. 1985). The question of whether a debtor's interest in a retirement plan is a "legal or equitable interest" is rarely disputed. Section 541(a)(1) clearly encompasses the debtor's contingent, future interests in property. *See, e.g.*, Regan v. Ross, 691 F.2d 81, 83-84 (2d Cir. 1982); Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916, 918 (Bankr. N.D. Ill. 1983). *See generally In re* Ryerson, 3 BANKR. L. REP. (CCH) ¶ 69,956 at 85,516 to 85,517 (9th Cir. Mar. 16, 1984) ("By including all legal interests without exception, Congress indicated its intention to include all legally recognizable interests although they may be contingent and not subject to possession until some future time."). *But see In re* Sheridan, 38 Bankr. 52, 55 (Bankr. D. Vt. 1983) (applying Vermont law) ("A right to future payments that are non-transferable, non-assignable and non-attachable, is of no value to the estate, for the reason that the entitlement may not be prematurely liquidated into a lump sum or other current distribution."); *In re* Haynes, 9 Bankr. 418, 420 (Bankr. N.D. Ind. 1981) (Navy retirement benefits) ("The right to future payment is of no value to the debtor's estate due to the fact that the Navy will not make a lump sum distribution or any distribution in advance.").

19. 11 U.S.C.A. § 541(c)(1)(A) (West Supp. 1985); *see also* S. REP. No. 989, *supra* note 17, at 83, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 5869.

not be "assigned or alienated" by the beneficiary,[20] these provisions would not prevent the debtor's interest in a plan from becoming property of the estate.[21]

The Code provides one exception to the general rule that restrictions on the transfer of an interest by the debtor do not prevent the interest from becoming property of the estate. Section 541(c)(2) states: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."[22] The conflict over ERISA retirement plans in Chapter 7 and Chapter 13 bankruptcy[23] has focused primarily on this section. If the debtor's interest in an ERISA plan falls within section 541(c)(2), the interest is excluded from the property of the estate. In contrast, if the debtor's interest is not within section 541(c)(2), it will be included in the estate. The debtor's rights in the retirement plan will then be distributed to the creditors, unless the debtor claims an exemption.[24]

Courts that have considered whether ERISA retirement plans should be included in the property of the estate have disagreed over the interpretation of section 541(c)(2). The majority of courts have held that Congress intended that section to apply to only spendthrift trusts enforceable under state law.[25] Therefore,

---

20. *See supra* notes 7-8 and accompanying text.

21. 11 U.S.C.A. § 541(c)(11)(A) (West Supp. 1985) expressly invalidates such restrictions on transfers of interest. *See, e.g.*, Samore v. Graham (*In re* Graham), 24 Bankr. 305, 309 (Bankr. N.D. Iowa 1982), *aff'd*, 726 F.2d 1268 (8th Cir. 1984); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434, 437 (Bankr. D. Kan. 1982), *rev'd on other grounds*, 24 Bankr. 927 (D. Kan. 1982); *cf.* Regan v. Ross, 6691 F.2d 81, 83 (2d Cir. 1982) (state law prohibition against assignment of state pension benefits to creditors does not prevent pension benefits from becoming property of estate). *But cf. In re* Sheridan, 38 Bankr. 52, 55 (Bankr. D. Vt. 1983) (debtor's entitlement to future payments under Vermont Employees' Retirement System held not property of the estate because "[a] right to future payments that are non-transferable, non-assignable and non-attachable, is of no value to the estate").

22. 11 U.S.C.A. § 541(c)(2) (West Supp. 1985).

23. *See infra* Part I(C).

24. *See infra* Part II.

25. *See generally infra* note 80 and accompanying text (spendthrift trusts defined). In the following cases, the courts applied the state law of spendthrift trusts to determine whether the debtor's interest in an ERISA retirement plan was excluded under § 541(c)(2): Daniel v. Security Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1358-61 (9th Cir. 1985) (qualified pension and profit-sharing plan; professional corporation); McLean v. Central States, Southeast and Southwest Areas Pension Fund (*In re* McLean), 762 F.2d 1204, 1206-07 (4th Cir. 1985) (qualified pension plan; employee organization), *rev'g on other grounds*, 41 Bankr. 893 (D.S.C. 1984); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985) (qualified pension plans; professional association); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1271 (8th Cir. 1984) (qualified profit-sharing plan; professional corporation), *aff'g* 24 Bankr. 305 (Bankr. N.D. Iowa 1982); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 580 (5th Cir. 1983) (qualified Ke-

an ERISA retirement plan will only be excluded from the property of the estate if it is such a spendthrift trust.

For example, in *Firestone v. Metropolitan Life Insurance Co. (In re Di Piazza),*[26] the Chapter 7 debtor sought to exclude from the property of the estate his interests in his former employer's pension and profit-sharing plans. The plans, which were tax-qualified, together held over $7,000 in benefits.[27] The bankruptcy court, after examining the legislative history of section 541(c)(2), concluded that the section excludes from the property of an estate only those retirement plans that are spendthrift trusts under Illinois law.[28] Because the debtor had a right to

---

ogh plan); Rodgers v. Norman (*In re* Crenshaw), 51 Bankr. 554, 556 (N.D. Ala. 1985) (qualified profit-sharing plan; corporation plan); Miller v. Jones (*In re* Jones), 43 Bankr. 1002, 1006 (N.D. Ind. 1984) (qualified pension plan; corporate plan); Miller v. Lincoln Nat'l Bank and Trust Co. (*In re* Cook), 43 Bankr. 996, 1000 (N.D. Ind. 1984) (qualified savings and profit-sharing plan; corporate plan); Bakst v. Guernsey (*In re* Guernsey), 54 Bankr. 68, 69 (Bankr. S.D. Fla. 1985) (employee stock ownership plan; corporate plan); Gray v. Ingles Markets, Inc. Employees' Stock Bonus Plan and Trust (*In re* DeWeese), 47 Bankr. 251, 255 (Bankr. W.D.N.C. 1985) (qualified stock bonus plan; corporate plan); *In re* Elsea, 47 Bankr. 142, 147-49 (Bankr. E.D. Tenn. 1985) (qualified retirement plans; corporate plans); Nachman v. Diaz (*In re* Diaz), 50 Bankr. 22, 23 (Bankr. E.D. Va. 1985) (qualified Keogh plan); Parkinson v. Bradford Trust Co. of Boston (*In re* O'Brien), 50 Bankr. 67, 74 (Bankr. E.D. Va. 1985) (qualified Keogh plan); *In re* Gillett, 46 Bankr. 642, 644-45 (Bankr. S.D. Fla. 1985) (qualified pension and profit-sharing plans; corporate plan); *In re* Ridenour, 45 Bankr. 72, 78 (Bankr. E.D. Tenn. 1984) (qualified Keogh pension plan; partnership plan); Nixon v. P.J. Pedone & Co. (*In re* Nichols), 42 Bankr. 772, 776 (Bankr. M.D. Fla. 1984) (qualified profit-sharing and trust plan; corporate plan); *In re* Berndt, 34 Bankr. 515, 517 (Bankr. N.D. Ind. 1983) (qualified savings and profit-sharing fund; corporate plan); Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916, 918 (Bankr. N.D. Ill. 1983) (qualified pension and profit-sharing plan; corporate plan); *In re* Strasma, 26 Bankr. 449, 450 (Bankr. W.D. Wis. 1983) (Keogh plan); *In re* Richard Clark, 18 Bankr. 824, 830 (Bankr. E.D. Tenn. 1982) (Keogh profit-sharing plan); *In re* Watson, 13 Bankr. 391, 392 (Bankr. M.D. Fla. 1981) (qualified cooperative investment plan); Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412, 417 n.6 (Bankr. E.D.N.Y. 1981) (dictum) (Keogh plan).

In several other cases, the debtor had an interest in a non-qualified retirement plan, but the plans contained restrictions on assignment and alienation that were similar to those of ERISA plans. In these cases, the courts applied state spendthrift trust law as the standard under § 541(c)(2). *See* Reagan v. Austin Mun. Fed. Credit Union, 741 F.2d 95, 97 (5th Cir. 1984) (per curiam) (municipal retirement fund); Johnson v. Fenslage (*In re* Johnson), 724 F.2d 1138, 1140 (5th Cir. 1984) (group variable annuity); American Nat'l Bank v. Huff (*In re* Huff), 42 Bankr. 553, 556 (Bankr. N.D. Ill. 1984) (state employees deferred compensation plan); SSA Baltimore Fed. Credit Union v. Bizon, 42 Bankr. 338, 341 (D. Md. 1984) (civil service retirement benefits); *In re* Werner, 31 Bankr. 418, 420-21 (Bankr. D. Minn. 1983) (teachers retirement association fund). These cases do not directly support the proposition that § 541(c)(2) excludes only spendthrift trusts from the property of the estate. This is because the argument that § 541(c)(2) also excludes all ERISA plans is based on ERISA's preemption of state law, not the specific language of any particular retirement plan. *See* text at *infra* notes 31-33; *infra* Part I(D).

26. 29 Bankr. 916 (Bankr. N.D. Ill. 1983).

27. *Id.* at 917.

28. *Id.* at 918.

withdraw the funds at any time, although early withdrawal would result in the forfeiture of a portion of the benefits contributed by the employer, the court held that the plans were not spendthrift trusts under Illinois law.[29] As a result, the debtor's interests in the plans were included in the property of the estate and would be distributed to his creditors unless he could claim an appropriate exemption.[30]

A significant minority of courts has held that section 541(c)(2) excludes from the property of the estate not only those trusts that are enforceable against creditors under *state* spendthrift trust law, but also trusts enforceable against creditors under *federal* nonbankruptcy law, such as ERISA.[31] In the nonbankruptcy context, the courts have uniformly held that the general creditors of an ERISA-plan participant may not reach his interest in the plan because ERISA creates a per se federal exemption from creditors' claims.[32] Because the creditors of the debtor cannot attach his interest in an ERISA retirement plan prior to the petition, the minority view is that this restriction is carried over into bankruptcy by means of section 541(c)(2).[33]

In *Liscinski v. Mosley (In re Mosley)*,[34] for example, the Chapter 7 debtor attempted to exclude from the property of the estate his interests in an employee annuity plan, a stock ownership plan, and a savings plan. The three benefit plans were established by the debtor's employer and were tax-qualified. To-

29. *Id.* at 921-22.

30. *Id.* at 923. The court delayed ruling on the exemption issue until a later date.

31. Liscinski v. Mosley (*In re* Mosley), 42 Bankr. 181, 189 (Bankr. D.N.J. 1984) (qualified annuity, stock, and savings plans; corporate plan); Warren v. G.M. Scott & Sons (*In re* Phillips), 34 Bankr. 543, 544 (Bankr. S.D. Ohio 1983) (qualified profit-sharing pension plan; corporate plan); Shults v. Rose's Stores, Inc. (*In re* Holt), 32 Bankr. 767, 772 (Bankr. E.D. Tenn. 1983) (qualified profit-sharing plan; corporate plan); *In re* Pruitt, 30 Bankr. 330, 331 (Bankr. D. Colo. 1983) (qualified pension plan; corporate plan); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 24 Bankr. 927, 929 (D. Kan. 1982) (qualified pension plan; corporate plan), *rev'g* 20 Bankr. 434 (Bankr. D. Kan. 1982); *In re* Rogers, 24 Bankr. 181, 183 (Bankr. D. Ariz. 1982) (qualified profit-sharing plan; corporate plan); Pulles, *ERISA Plans in Bankruptcy,* HENNEPIN LAW., Sept.-Oct. 1984, at 19, 24; Comment, *The Fate of ERISA-Qualified Pension Plans Under the Federal Bankruptcy Code,* 11 WM. MITCHELL L. REV. 1045, 1066-70 (1985); *cf.* Note, *Corporate Pension Plans as Property of the Bankruptcy Estate,* 69 MINN. L. REV. 1113, 1131-32 (1985) (advocating a general exclusion of ERISA plans, except cases in which "debtor's conduct is designed to defraud creditors").

32. *See infra* Part I(D).

33. Recently, a handful of courts has adopted another minority interpretation of § 541(c)(2). These courts have held that § 541(c)(2) can never be used to exclude ERISA plans from the property of the estate, even if they are enforceable as spendthrift trusts under state law. *See infra* note 77. The courts have failed to articulate a persuasive basis for their holdings. *See id.*

34. 42 Bankr. 181 (Bankr. D.N.J. 1984).

gether the plans held approximately $40,000 in present value benefits.[35] The bankruptcy court analyzed the spendthrift trust law of New Jersey, and concluded that the plans would only be partially exempt from creditors under state law.[36] The court, however, also found that ERISA itself created a complete exemption from creditors, so section 541(c)(2) would exclude the entire interest from the property of the estate in bankruptcy.[37] Thus, none of the debtor's interests in the ERISA retirement plans were distributed to his creditors.

The following subsections develop a legal standard to govern the applicability of section 541(c)(2), and apply that standard to a number of typical ERISA retirement plans.

A. *"Applicable Nonbankruptcy Law" as State Spendthrift Trust Law*

The legislative history of the Bankruptcy Code, and the structure of and policies behind the Code, compel the conclusion that section 541(c)(2) was intended to apply only to spendthrift trusts enforceable under state law.

1. *The statutory language*— Section 541(c)(2) excludes from the property of the estate property that is subject to "restriction[s] on the transfer of a beneficial interest of the debtor in a trust" that are "enforceable under applicable nonbankruptcy law."[38] There is some ambiguity as to whether the "applicable nonbankruptcy law" is state law, federal law, or both.[39] It is therefore useful to examine other indices of congressional intent.[40]

---

35. *Id.* at 183.

36. *Id.* at 188.

37. *Id.* at 191.

38. 11 U.S.C.A. § 541(c)(2) (West Supp. 1985).

39. Although § 541(c)(2) appears to refer to all law, both federal and state, outside of Title 11, this is not necessarily the case. In other sections of the Code, references to "applicable nonbankruptcy law" have been held to refer to only state law. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 586 n.33 (5th Cir. 1983) (reference to "applicable nonbankruptcy law" in 11 U.S.C. § 522(b)(2)(B) refers to state law of joint tenancy). In addition, Congress has elsewhere in the Code made explicit reference to "federal" nonbankruptcy law. *See* 11 U.S.C.A. § 522(b)(2)(A) (West Supp. 1985).

40. *See generally* Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976); United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' ") (footnotes omitted). *But see In re* Pruitt, 30 Bankr. 330, 331 (Bankr. D. Colo. 1983) (§ 541(c)(2) is "clear on its face," so "there is no need to resort to legislative history").

2. *The legislative history of section 541(c)(2)*— Under the old Bankruptcy Act (Act),[41] the extent of the property of the estate was defined in terms of the transferability or leviability of the bankrupt's interest.[42] Property that was exempt from judicial process under state law therefore did not pass to the trustee in bankruptcy.[43]

The transferability-leviability standard, when applied to the bankrupt's beneficial interest in a spendthrift trust, meant that the interest was not part of the estate if it could not be transferred or levied under state law.[44] To the extent that a state recognized the validity of a spendthrift trust provision, the trustee in bankruptcy had no right to the trust fund.[45]

The new Bankruptcy Code departed significantly from the Act's definition of property of the estate. All exempt property, even that necessary for a "fresh start,"[46] is initially included in the estate, and then the debtor is permitted to claim specifically delineated exemptions under section 522.[47] Thus, Congress eliminated the Act's transferability-leviability standard. In its place, it required that "all legal or equitable interests of the debtor in property" become property of the estate.[48]

---

41. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979).

42. *See* Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1271 (8th Cir. 1984). Section 70(a)(5) of the Bankruptcy Act provided:

> (a) The trustee of the estate of a bankrupt . . . shall . . . be vested by the operation of law with the title of the bankrupt as of the date of the filing of the petition [to] . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise, seized, impounded or sequestered.

11 U.S.C. § 110(a)(5) (repealed 1979).

43. *See* Lockwood v. Exchange Bank, 190 U.S. 294, 299 (1903).

44. *See* Eaton v. Boston Safe Deposit & Trust Co., 240 U.S. 427 (1916); Stebbins v. Crocker Citizens Nat'l (*In re* Ahlswede), 516 F.2d 784, 786 (9th Cir.), *cert. denied,* 423 U.S. 913 (1975); *In re* McLoughlin, 507 F.2d 177, 181 (5th Cir. 1975); Danning v. Lederer, 232 F.2d 610 (7th Cir. 1956).

45. *See* Judson v. Witlin (*In re* Witlin), 640 F.2d 661 (5th Cir. 1981); First Northwestern Trust Co. v. I.R.S., 622 F.2d 387 (8th Cir. 1980); Erickson v. Bank of Cal., 28 Wash. App. 337, 623 P.2d 721, 724-25 (1981), *modified on other grounds,* 97 Wash. 2d 246, 643 P.2d 670 (1982); REPORT OF THE COMMISSION ON BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 139, 93d Cong., 1st Sess., pt. I, at 197 (1973) [hereinafter cited as BANKRUPTCY COMM'N REPORT], *reprinted in* 2 L. KING, *supra* note 16, at (Appendix) I-1, 197; E. GRISWOLD, SPENDTHRIFT TRUSTS § 356 (2d ed. 1947).

46. *See* Lines v. Frederick, 400 U.S. 18 (1970) (per curiam) (property that bankrupt needed to make a "fresh start" after discharge was excluded from the estate under the Bankruptcy Act of 1898).

47. *See* H.R. REP. No. 595, *supra* note 17, at 368, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6324; S. REP. No. 989, *supra* note 17, at 82, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 5868.

48. *See* Miller v. Lincoln Nat'l Bank and Trust Co. (*In re* Cook), 43 Bankr. 996, 999

Under the Code's broad new definition of property of the estate, a debtor's beneficial interest in a spendthrift trust would come into the estate.[49] Congress therefore added section 541(c)(2), which it intended would preserve the exclusion that spendthrift trusts enjoyed under the old Act.[50] The House committee report on the proposed bankruptcy code states: *"The bill . . . continues over [from the Act] 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."*[51] The Senate committee report similarly states that section 541(c)(2) "*preserves* restrictions on a transfer of *a spendthrift trust* . . . enforceable [under] nonbankruptcy law."[52] Although neither the statute nor the legislative history expressly limits the section 541(c)(2) exclusion to enforceable spendthrift trusts, the compelling inference from the legislative history is that Congress merely intended that the section would preserve the traditional exclusion that had been granted to enforceable spendthrift trusts under the old Bankruptcy Act.

Despite this language in the legislative history, several courts

---

(N.D. Ind. 1984); 4 L. KING, *supra* note 16, at ¶ 541.02(1); Rendleman, *Liquidation Bankruptcy Under the '78 Code,* 21 WM. & MARY L. REV. 575, 594-95 (1980); *supra* notes 16-17 and accompanying text.

49. Restrictions on attachment and alienation that typically accompany spendthrift trusts are invalidated in bankruptcy under 11 U.S.C.A. § 541(c)(1)(A) (West Supp. 1985). *See supra* text accompanying note 19.

50. *See* cases cited *supra* note 25.

51. H.R. REP. NO. 595, *supra* note 17, at 175-76, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6136 (emphasis added) (stating further that "[t]he bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust"). There is a similar statement in the section-by-section analysis of the House report: "Paragraph (2) of subsection (c) [of § 541] *preserves* restrictions on transfer of a *spendthrift trust* to the extent the restriction is enforceable under applicable nonbankruptcy law." *Id.* at 369, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6325 (emphasis added).

52. S. REP. NO. 989, *supra* note 17, at 83, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 5869 (emphasis added); *see also* 124 CONG. REC. 33,999 (1978) (statement of Sen. DeConcini).

The Senate bankruptcy bill originally only excluded § 541(c)(2) property to the extent "reasonably necessary for the support of the debtor and his dependents." *See* S. REP. NO. 989, *supra* note 17, at 83, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 5869. This limitation appears to reflect the Bankruptcy Commission's belief that there was no reason why spendthrift trust property should generally be excluded from the estate. *See* BANKRUPTCY COMM'N REPORT, *supra* note 45, at 193, 197 (recommending that "spendthrift trust provisions be enforceable only to the extent . . . reasonably necessary for . . . support" because "[t]here is no sound justification for permitting a debtor to take advantage of the Bankruptcy Act and, at the same time, to shield from his creditors assets because local law does not allow creditors to reach his interest"). The Senate's limitation on the exclusion of spendthrift trust property was rejected by Congress in the enacted legislation. *See* 11 U.S.C.A. § 541(c)(2) (West Supp. 1985).

have held that section 541(c)(2) refers not only to spendthrift trusts enforceable under state law, but to *all* restrictions on the transfer of a beneficial interest in a trust that are enforceable under *any* nonbankruptcy law, including federal law. With respect to ERISA retirement plans, these courts note that ERISA prohibits creditors from attaching a debtor's interest in a plan prior to bankruptcy because ERISA creates a per se federal exemption from creditors' process for all ERISA retirement plans.[53] Therefore, under the minority interpretation, which includes federal nonbankruptcy laws within the section 541(c)(2) exclusion, *all* ERISA retirement plans would be excluded from the property of the estate, not just those that are enforceable under state spendthrift trust law.[54] As the next two subsections demonstrate, however, the structure of and policies behind the Bankruptcy Code preclude a finding that section 541(c)(2) was intended to encompass all ERISA retirement plans.[55]

3. *Structure of the Bankruptcy Code*— Two aspects of the structure of the Code demonstrate that Congress did not intend to grant a blanket exclusion for all ERISA retirement plans pursuant to section 541(c)(2). First, the language in the alternative bankruptcy-nonbankruptcy exemption scheme[56] suggests that Congress intended that ERISA retirement plans be exempted from the property of the estate, rather than excluded under section 541(c)(2).

Even if the debtor's interest in property is included in the property of the estate, the debtor may nevertheless claim an ex-

---

53. Not all commentators and courts agree that ERISA creates a per se federal exemption from creditors' process in the nonbankruptcy context. Some have argued that ERISA preempts the state law of creditors' rights and that federal common law should govern the enforceability of ERISA plan restrictions on assignment and alienation. *See infra* notes 167 & 171 and accompanying text. Under this minority view, some ERISA plans would be exempt from creditor process outside of bankruptcy, and others would not.

Part I(D) argues that the better view is that ERISA creates a per se exemption. This view has been adopted by virtually all courts, and it appears to be required by the recent congressional amendments to ERISA. *See infra* Part I(D).

54. *See* cases cited *supra* note 31.

55. A number of the objections to the minority interpretation of § 541(c)(2) presume that ERISA creates a per se federal exemption from creditor process for all ERISA plans. *See infra* text at notes 67 & 72; text following *infra* note 71. These arguments turn on the conclusion in Part I(D) that ERISA creates a per se federal exemption and does not authorize the creation of federal common law to govern the enforceability of ERISA plan restrictions on assignment and alienation. If the courts ultimately conclude that there is no per se exemption, these arguments would lose much of their force. If the federal common law interpretation were adopted, some, rather than all, ERISA plans would be exempt from creditor process outside of bankruptcy. *See supra* note 53.

56. *See infra* notes 190-94 and accompanying text.

emption for the property, thereby shielding it from his creditors' claims. Under the Code, the debtor is generally able to elect[57] either a set of federal Code exemptions[58] or a set of state and federal non-Code exemptions.[59] If the debtor chooses the state and federal non-Code exemptions, he may exempt, among other things, "any property that is exempt under *Federal [nonbankruptcy] law* . . . or State or local law."[60] If the debtor instead chooses the federal Code exemptions, he may exempt, among other things, his right to receive "a payment under a *stock bonus, pension, profit-sharing, annuity, or similar plan,*" including ERISA plans.[61]

In light of the language of these exemptions, it is difficult to believe that Congress's use of the term "applicable nonbankruptcy law" in section 541(c)(2) was intended to include federal law, such as ERISA, rather than just the state law of spendthrift trusts. The explicit references to "federal nonbankruptcy law" and "pension plans" in the exemptions demonstrate that Congress knew how to include federal laws within the scope of section 541(c)(2). The fact that Congress did not use these terms in section 541(c)(2), but instead used the ambiguous term "applicable nonbankruptcy law," suggests that Congress intended that ERISA plans should be dealt with by way of exemption, not exclusion.[62] Moreover, as will be demonstrated in Part II, Congress

---

57. The Code permits states to opt out of the federal exemption system. If a state opts out, the debtor may only claim the state and federal non-Code exemptions. 11 U.S.C.A. § 522(b)(1) (West Supp. 1985). Thirty-four states have chosen to opt out of the federal exemption scheme. 3 L. KING, *supra* note 16, at § 522.02.

58. 11 U.S.C.A. § 522(b)(1),(d) (West Supp. 1985).

59. 11 U.S.C.A. § 522(b)(2) (West Supp. 1985).

60. 11 U.S.C.A. § 522(b)(2)(A) (West Supp. 1985) (emphasis added).

61. 11 U.S.C. § 522(d)(10)(E) (1982) (emphasis added).

62. *See* Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1272 (8th Cir. 1984) ("We . . . see a coherent scheme regarding a debtor's pension rights under the Code consistent with the Code's general policy. The question of pension rights is dealt with as a matter of exemption."); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 586 (5th Cir. 1983) ("Congress made reference to federal law and pension benefits when such a characterization was intended; yet it did not do so in Section 541(c)(2)."). There is some authority in the legislative history to support the view that Congress intended to deal with ERISA retirement plans by way of exemption, rather than exclusion. In the hearings held prior to the passage of the Code, Senator Quentin Burdick questioned the interplay between ERISA and the Code's exemption provision:

> Senator BURDICK. What provision would you recommend to reconcile the provisions of the Employee Retirement Income Security Act of 1974 with Section 4-503(c)(6) of the commission's bill and 4-503(e)(5) of the judge's 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 Bankruptcy Act to the effect that not-

intended that a debtor's interest in an ERISA retirement plan not be exempt under the state and federal non-Code exemption for "property that is exempt under Federal [nonbankruptcy] law." It would frustrate Congress's intent to hold that the phrase "applicable nonbankruptcy law" in section 541(c)(2) refers to ERISA, after Congress had concluded that the phrase "Federal [nonbankruptcy] law" does not refer to ERISA.[63]

The second aspect of the Code's structure that demonstrates Congress did not intend section 541(c)(2) to exclude all ERISA retirement plans from the estate pertains to the federal Code exemption granted to retirement plans. Under section 522(d)(10)(E),[64] the debtor's right to receive a payment under a retirement plan is exempt to the extent reasonably necessary for the support of the debtor. This exemption is not available, however, if the plan (i) was established by an "insider,"[65] (ii) the payment is on account of age or length of service, and (iii) *the plan is not tax-qualified under the Internal Revenue Code.*[66]

If section 541(c)(2) is read as excluding all ERISA retirement plans from the property of the estate, section 522(d)(10)(E)(iii) would be rendered surplusage.[67] If Congress intended that no tax-qualified plans would become property of the estate, there would be no reason to require, as a prerequisite for disqualification from the exemption, that the plan is not qualified. Presumably, *every* retirement plan that a debtor claims as exempt under section 522(d)(10)(E) would not be tax-qualified.[68] Section

---

withstanding the provision in ERISA or otherwise, the trustee will be able to get to the excess.

The Bankruptcy Reform Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 678 (1975) (emphasis added).

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

64. 11 U.S.C. § 522(d)(10)(E) (1982); *see infra* Part II(B).

65. The term "insider" is defined in 11 U.S.C.A. § 101(28) (West Supp. 1985).

66. *See infra* note 220 for the complete text of § 522(d)(10)(E).

67. *See* Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1272 (8th Cir. 1984), *aff'g* 24 Bankr. 305, 311 n.5 (Bankr. N.D. Iowa 1982); *In re* Elsea, 47 Bankr. 142, 147 (Bankr. E.D. Tenn. 1985); Central States, Southeast and Southwest Areas Health and Welfare Pension Fund v. Stephenson (*In re* McLean), 41 Bankr. 893, 899 (D.S.C. 1984), *rev'd on other grounds,* 762 F.2d 1204 (4th Cir. 1985); *In re* Kelley, 31 Bankr. 786, 788 (Bankr. N.D. Ohio 1983); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434, 437 (Bankr. D. Kan. 1982), *rev'd,* 24 Bankr. 927 (D. Kan. 1982).

68. A modified version of this argument has been presented in a number of cases. It is considerably weaker than the argument presented in the text, and several courts have justifiably balked at the use of this modified version of the argument. The argument is that, because § 522(d)(10)(E) creates an exemption for ERISA retirement plans, Congress intended that *no* retirement plans would be excluded from the estate under § 541(c)(2). *See, e.g.,* Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916, 922 (Bankr. N.D. Ill. 1983) ("[O]ne can inferentially conclude that since Congress

541(c)(2) must therefore be construed so that it does not exclude all ERISA plans from the property of the estate, so that the detailed requirements of section 522(d)(10)(E)(iii) are not rendered wholly superfluous.[69]

4. *Policies of the Bankruptcy Code*— Two strong policies reflected in the Code would be frustrated if all ERISA retirement plans were excluded from the property of the estate. First, the Code was intended to broaden the "property of the estate" available to creditors.[70] Under the old Bankruptcy Act, certain ERISA plans were routinely held to be property of the estate.[71] If all ERISA plans were excluded from the estate under section 541(c)(2), Congress's intent to broaden the property of the estate, and to force the debtor to claim specifically delineated exemptions, would be defeated.

Second, a broad exclusion for all ERISA retirement plans would defeat the Bankruptcy Code's policy of transferring the debtor's assets to his creditors in satisfaction of their claims.[72]

---

created a separate exemption, for pension plans under Section 522(d)(10)(E), Congress did not intend that the Section 541(c)(2) exception be extended to ERISA plans."). This argument is clearly wrong because it is not inconsistent for Congress to provide for some ERISA plans to be excluded under § 541(c)(2), while others are exempted under § 522(d)(10)(E). *See* McLean v. Central States, Southeast and Southwest Areas Pension Fund (*In re* McLean), 762 F.2d 1204, 1207-08 (4th Cir. 1985); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 587 (5th Cir. 1983); *In re* Pruitt, 30 Bankr. 330, 331-32 (Bankr. D. Colo. 1983); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 24 Bankr. 927, 930 (D. Kan. 1982).

69. *See generally* Duke v. University of Tex., 663 F.2d 522, 526 (5th Cir. 1981) ("It is well established that a statute should be construed so that each of its provisions is given its full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided.") (citing Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633 (1973)), *cert. denied*, 105 S. Ct. 386 (1984).

70. *See supra* notes 16-17 and accompanying text; H.R. REP. NO. 595, *supra* note 17, at 175, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6136 ("[The Act was] a complicated melange of references to State law, and [did] little to further the bankruptcy policy of distribution of the debtor's property to his creditors in satisfaction of his debts."); Rendleman, *supra* note 48, at 594-95.

71. Judson v. Witlin (*In re* Witlin), 640 F.2d 661 (5th Cir. 1981) (Keogh plan); Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412 (Bankr. E.D.N.Y. 1981) (Keogh plan); *In re* Mendenhall, 4 BANKR. CT. DEC. (CRR) 127 (Bankr. D. Ore. 1980) (Keogh plan); *In re* Jenkins, 2 BANKR. CT. DEC. (CRR) 1697 (W.D. Pa. 1977) (employer-created ERISA pension plan).

Several cases did hold, under § 70(a) of the old Bankruptcy Act, that ERISA retirement plan funds were not property of the estate. *See, e.g.*, Turpin v. Wente (*In re* Turpin), 644 F.2d 472 (5th Cir. 1981) (per curiam); Mason v. Eastman Kodak Co. (*In re* Parker), 473 F. Supp. 746 (W.D.N.Y. 1979). Because the Code broadened the general definition of property of the estate, these cases are presumably no longer good law. *See* Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916, 921 (Bankr. N.D. Ill. 1983).

72. *See* Burlingham v. Crouse, 228 U.S. 459, 473 (1913) (the two-fold purposes of bankruptcy are to convert the debtor's estate into cash for distributing to listed creditors

There is a strong public policy interest against allowing individuals to create their own ERISA trust (such as a Keogh plan), contribute a large amount of money, and then claim it as immune from creditors.[73] It is highly unlikely that Congress intended to overturn this established policy without explicitly indicating its intention to do so. In addition, this would frustrate Congress's intent in enacting section 522(d)(10)(E), which exempts ERISA retirement plans, but only to the extent "reasonably necessary for the support of the debtor."[74] Section 541(c)(2) contains no such limitation on the amount that can be excluded.[75]

If section 541(c)(2) is read to include only those ERISA retirement plans that are spendthrift trusts under state law, these policies of the Code would be furthered. A narrow reading of section 541(c)(2) would give effect to the broad definition of property of the estate in section 541(a)(1). In addition, the restrictions on the voluntary and involuntary transfer of the beneficiaries' interests that are contained in valid spendthrift trusts assure that creditors will not be unjustly denied the assets of the debtor.

In summary, therefore, the legislative history, structure, and policies of the Bankruptcy Code support the conclusion that section 541(c)(2) excludes from the property of the bankruptcy estate only those ERISA retirement plans that are enforceable spendthrift trusts under state law.[76] The position taken by the

---

and to provide an unencumbered fresh start to the debtor).

73. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 588 (5th Cir. 1983); *In re* Elsea, 47 Bankr. 142, 148 (Bankr. E.D. Tenn. 1985); *In re* Ridenour, 45 Bankr. 72, 78-79 (Bankr. E.D. Tenn. 1984); Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916, 922 (Bankr. N.D. Ill. 1983); *infra* notes 90-91 and accompanying text (self-settled spendthrift trusts against public policy); *cf.* Johnson v. Fenslage (*In re* Johnson), 724 F.2d 1138, 1141 (5th Cir. 1984) (employee-funded annuity); Judson v. Witlin (*In re* Witlin), 640 F.2d 661, 663 (5th Cir. 1981) (Keogh plan under Bankruptcy Act); Bass v. Shackelford (*In re* Shackelford), 27 Bankr. 372, 373 (Bankr. W.D. Va. 1983) (IRA); National Bank of N. Am. v. International Bhd. of Elec. Workers Local No. 3, Pension & Vacation Funds, 69 A.D.2d 679, 419 N.Y.S.2d 127, 132 (1979) (nonbankruptcy case).

74. *See infra* Part II(B).

75. *See supra* note 52.

76. If the debtor's interest in an ERISA plan is included in the property of the estate, the question arises as to the tax consequences when the retirement plan trustee complies with the bankruptcy trustee's turnover order. ERISA requires that plans must provide that plan benefits may not be assigned or alienated. *See supra* notes 7-8 and accompanying text. It is possible that an *entire* ERISA retirement fund and each of the company's covered employees would lose the tax advantages granted by ERISA whenever a trustee of the fund complies with a bankruptcy court's order to turn over *one* employee's interest in the fund. *See* I.R.S. Private Letter Ruling No. 8131020 (May 5, 1981). To avoid this anomalous result, several courts have held that the passage of the Bankruptcy Code in 1978 impliedly repealed, for purposes of bankruptcy proceedings, ERISA's prohibition

minority of courts, that section 541(c)(2) excludes all ERISA plans because creditors outside of bankruptcy cannot reach plan benefits, is inconsistent with congressional intent.[77]

---

on assignment and alienation. *See* Regan v. Ross, 691 F.2d 81, 87 (2d Cir. 1982); Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916, 922-23 (Bankr. N.D. Ill. 1983); *In re* Wood, 23 Bankr. 552, 559-61 (Bankr. E.D. Tenn. 1982); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434, 439 (Bankr. D. Kan. 1982), *rev'd*, 24 Bankr. 927 (D. Kan. 1982).

The Supreme Court has repeatedly held that the presumption against repeals by implication is a strong one and may only be overcome by either an affirmative showing of congressional intent to repeal or a showing that the two acts are completely irreconcilable. *See* United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1974); Regional Rail Reorg. Act Cases, 419 U.S. 102, 134 (1974); Morton v. Mancari, 417 U.S. 535, 550 (1974). Because there is nothing in the legislative history of the Bankruptcy Code that clearly demonstrates Congress's intent to repeal ERISA's prohibitions on assignment and alienation in the bankruptcy context, the two statutes must be completely irreconcilable before a repeal will be implied.

ERISA can be construed in a way that eliminates the conflict with the Code, and thus avoids the necessity of implying a partial repeal of ERISA by the Code. ERISA does not, by its terms, prohibit the assignment and alienation of retirement plan benefits; rather, ERISA merely requires that all retirement plans contain a provision stating that benefits may not be assigned or alienated. *See supra* notes 7-8. Under this reading of the statute, there is no conflict with the Bankruptcy Code. ERISA requires the provision, and the Code invalidates the effect of that provision in bankruptcy when the plan does not constitute an enforceable spendthrift trust. *See* 11 U.S.C.A. § 541(c)(1)(A) (West Supp. 1985); *supra* notes 19-21 and accompanying text. The ERISA provision would still have effect outside the bankruptcy context. *See infra* Part I(D). This interpretation of the relationship between ERISA and the Code is confirmed by the text of ERISA, which provides that it was not intended to supersede any other federal law. *See infra* note 188.

It is possible, therefore, to read § 541(c)(2) as only applying to ERISA retirement plans that are enforceable under state spendthrift trust law, without also finding that the Code impliedly repealed a portion of ERISA. Given the strong presumption against repeals by implication, this is the preferred interpretation.

77. The majority and minority positions discussed in the text have been adopted by virtually all courts. There is an additional minority position that deserves comment.

A few courts have taken the position that § 541(c)(2) can never be used to exclude ERISA retirement plan benefits from the property of the estate. In contrast, the majority view would exclude retirement plans if they are enforceable as spendthrift trusts under state law.

There are four reasons advanced by courts subscribing to the alternative minority view. None of these reasons are, however, persuasive. First, these courts have argued that ERISA plans are distinguishable from "traditional" spendthrift trusts. This argument is explained and criticized in the text accompanying *infra* notes 83-89.

Second, these courts have argued that because § 522(d)(10)(E) exempts ERISA retirement plans from the property of the estate, the implication is that Congress did not intend the plans to be excluded under § 541(c)(2). *See* Nelson v. White (*In re* White), 47 Bankr. 410, 412 (W.D. Wash. 1985); *see also supra* note 68. This argument ignores the fact that exclusion of some plans under § 541(c)(2) is not inconsistent with exemption of all other plans not excluded. *See supra* note 68.

Third, courts accepting the alternative minority position argue that the restriction on exemption under § 522(d)(10)(E) to amounts "reasonably necessary for support" would be undermined if some plans were completely excluded under § 541(c)(2). *See Nelson*, 47 Bankr. at 412-13. It is possible, however, that Congress concluded that a few ERISA retirement plans so completely restricted access to the funds that it would be superfluous to restrict the amount that could be excluded. Therefore, the exclusion of some ERISA

B. *Application of State Spendthrift Trust Law to ERISA Retirement Plans*

Under the legal standard developed in Part I(A), the debtor's interest in an ERISA retirement plan will be excluded from the property of the estate only if the plan is enforceable as a spendthrift trust under the laws of the state in which the bankruptcy court sits or in which the retirement fund is located.[78] Because the law of spendthrift trusts varies widely from state to state, the following is meant only to be a general overview of the considerations involved when bankruptcy courts apply this law to ERISA retirement plans.[79]

Spendthrift trusts are, generally, trusts that prohibit the voluntary and involuntary alienation of the principal and income of a trust.[80] In most states, spendthrift provisions are enforceable, either without qualification or to a limited extent, against claims by the creditors of the beneficiary.[81] The recent trend, however, has been to permit certain classes of claimants (such as those claiming alimony or child support) to reach a beneficiary's interest in a trust, regardless of the spendthrift clauses.[82]

---

plans under § 541(c)(2) is not inconsistent with the "reasonably necessary for support" limitation in § 522(d)(10)(E).

Fourth, one court has argued that "an ERISA plan cannot be a spendthrift trust under state law" because "ERISA supersedes all state laws with respect to ERISA plans. [ERISA § 514(a),] 29 U.S.C. § 1144(a)." *Nelson*, 47 Bankr. at 413. The court's reasoning is unclear. ERISA's preemption of state laws is typically an argument in favor of *excluding* all ERISA plans from the property of the estate, rather than including all plans. *See supra* notes 31-32 and accompanying text.

One recent court of appeals decision appears to support the position that ERISA retirement plans may never be excluded from the property of the estate under § 541(c)(2). *See* Daniel v. Security Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1360 (9th Cir. 1985). Although the court did fail to explicitly compare the terms of debtor's pension and profit-sharing plan against the applicable state spendthrift trust law, it is clear that the plan, established by the debtor's own professional corporation, would be an invalid self-settled spendthrift trust under the law of any state. *See infra* Part I (B)(2)(b).

78. *See, e.g.*, Samore v. Graham (*In re* Graham), 24 Bankr. 305, 310 n.4 (Bankr. N.D. Iowa 1982) (law of the state in which the court sits), *aff'd*, 726 F.2d 1268 (8th Cir. 1984); SSA Baltimore Fed. Credit Union v. Bizon, 42 Bankr. 338, 344 (D. Md. 1984) (law of the state in which the fund is located).

79. *See generally* G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 222, at 408 n.94 (rev. 2d ed. 1979) (state-by-state description of spendthrift trust statutes and case law); 2 A. SCOTT, THE LAW OF TRUSTS § 152.1 (3d ed. 1967).

80. *See* RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959); G. BOGERT & G. BOGERT, *supra* note 79, § 222 at 383; 2 A. SCOTT, *supra* note 79, at § 151.

81. *See* RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959); G. BOGERT & G. BOGERT, *supra* note 79, § 222 at 406; 2 A. SCOTT, *supra* note 79, at § 152.

82. *See* RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); G. BOGERT & G. BOGERT, *supra* note 79, § 222 at 383; 2 A. SCOTT, *supra* note 79, at § 157.

Before determining whether a particular ERISA retirement plan is an enforceable spendthrift trust under state law, a court must determine whether any type of ERISA retirement plan can be a "spendthrift trust."

1. *Retirement plans as "spendthrift trusts"*— A minority of courts has held that ERISA retirement plan benefits may never be excluded from the property of the estate under section 541(c)(2) because ERISA plans are not "spendthrift trusts."[83] The legislative history of section 541(c)(2) refers only to the exclusion of spendthrift trusts,[84] and these courts have apparently concluded that the characteristics of ERISA plans are sufficiently different to distinguish them from "traditional" spendthrift trusts.[85]

The better view, held by a majority of courts,[86] is that the spendthrift restrictions included in ERISA retirement plans[87] are indistinguishable from spendthrift restrictions traditionally enforceable under state law.[88] Because the legislative history does not limit the application of section 541(c)(2) to "traditional" spendthrift trusts, an ERISA retirement plan that is otherwise a spendthrift trust under state law should not be denied spendthrift trust status under section 541(c)(2) merely because it was established under ERISA.[89]

Assuming that all ERISA retirement plans may potentially be characterized as spendthrift trusts for purposes of section 541(c)(2), the courts are faced with the complex question of

---

83. *See* Nelson v. White (*In re* White), 47 Bankr. 410, 412-13 (W.D. Wash. 1985); *In re* Kelley, 31 Bankr. 786, 788 (Bankr. N.D. Ohio 1983); *cf.* American Nat'l Bank v. Huff (*In re* Huff), 42 Bankr. 553, 556 (Bankr. N.D. Ill. 1984) (court states, without analysis, that because § 541(c)(2) applies to state spendthrift trusts, it does not apply to the Illinois Employee Deferred Compensation Plan).

84. *See supra* notes 51-52 and accompanying text.

85. *See* Nelson v. White (*In re* White), 47 Bankr. 410, 412 (W.D. Wash. 1985) ("It does not appear anywhere in the legislative history that Congress contemplated application of Section 541(c)(2) to ERISA plans."); *In re* Kelley, 31 Bankr. 786, 788 (Bankr. N.D. Ohio 1983) ("[I]t appears from the legislative history that section 541(c)(2) is limited in its application to true spendthrift trusts, as distinguished from ERISA-type trusts.").

86. The conclusion that ERISA retirement plans can be included within the term "spendthrift trust" is impliedly accepted by all those courts that have held ERISA plans to be enforceable spendthrift trusts in bankruptcy. *See infra* note 143.

87. *See supra* notes 7-8 and accompanying text.

88. *See supra* text accompanying note 80.

89. McLean v. Central States, Southeast and Southwest Areas Pension Fund (*In re* McLean), 762 F.2d at 1204, 1207 n.1 (4th Cir. 1985) ("[Section] 541(c)(2) should [not] be confined in its recognition of enforceable transfer restrictions to those found in 'traditional' spendthrift trusts. The language of § 541(c)(2) does not suggest such a limitation, and the legislative history reveals only that the provision has the unambiguous purpose of preserving enforceable transfer restrictions in spendthrift trusts.").

whether a particular retirement plan is an enforceable spendthrift trust. States that recognize the enforceability of spendthrift trusts typically draw a distinction between self-settled trusts and other trusts. This distinction is examined below in light of the characteristics of ERISA retirement plans.

2. *Self-settled spendthrift trusts*— Virtually all states provide that when a person creates a spendthrift trust consisting of his own property and naming himself as beneficiary, the spendthrift provisions are invalid against the claims of his creditors.[90] The "self-settled" spendthrift trust is invalid because creditors have a right that the debtor pay their claims before he makes a provision for his own comfort.[91] If an ERISA retirement plan can be characterized as a self-settled spendthrift trust, it will generally be included in the property of the estate.

Whether an ERISA retirement plan is characterized as self-settled under state law may be a difficult question. There are at least two possible legal standards. First, a trust may be self-settled when the beneficiary *funds* the trust, directly or indirectly. The typical method of creating a self-settled trust is by transferring property to a trust for one's own benefit. A trust may be self-settled even when the corpus is contributed by another, if the circumstances indicate that, in reality, the beneficiary is the true settlor. When an ERISA retirement plan is funded, in whole or in part, by the contributions or efforts of the beneficiary, the plan must be considered self-settled, but only to the extent of his contributions.[92] Courts occasionally fail to observe the *pro tanto* principle, incorrectly holding that an entire retirement plan is self-settled if any portion was contributed by the beneficiary.[93]

---

90. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(1) (1959); G. BOGERT & G. BOGERT, *supra* note 79, § 223 at 438-39; E. GRISWOLD, *supra* note 45, at § 474; 2 A. SCOTT, *supra* note 79, at § 156.

91. *See* G. BOGERT & G. BOGERT, *supra* note 79, at § 223; 2 A. SCOTT, *supra* note 79, at § 156.

92. *See* 6 AMERICAN LAW OF PROPERTY § 26.124 (1952) ("The question is, whose property was actually used for the establishment of the trust?"); G. BOGERT & G. BOGERT, *supra* note 79, at § 223; 2 A. SCOTT, *supra* note 79, at § 156.3.

The notion that a spendthrift trust may be considered self-settled to the extent of the beneficiary's contributions is well established in spendthrift trust law. For example, when the beneficiary of a trust pays off an encumbrance on the trust property out of his own assets, he is *pro tanto* the creator of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 156 comment f (1959); E. GRISWOLD, *supra* note 45, at § 488; 2 A. SCOTT, *supra* note 79, at § 156.3. The result is the same when the beneficiary expends his own funds in making improvements on the trust property. *See* State *ex rel.* v. Nashville Trust Co., 28 Tenn. App. 388, 190 S.W.2d 785 (1944); 2 A. SCOTT, *supra* note 79, at § 156.3.

93. *See In re* Werner, 31 Bankr. 418 (Bankr. D. Minn. 1983) (although employer matched debtor-employee's contributions to Teacher Retirement Account, the entire

Some states may define "self-settled" trusts in a second and much narrower way. Even a trust that is funded by the beneficiary might not be an enforceable self-settled trust if the trust instrument imposes significant restrictions on the beneficiary's *access* to the trust funds.[94] It is unclear whether this is the law of any state, but such a definition would do little to further the general public policy against self-settled trusts. Such trusts are generally unenforceable against creditors because creditors have a right to be paid before the debtor may provide for himself. If a debtor could shield his property from his creditors by placing it in a trust and providing for significant restrictions on his right to reach the trust corpus, then this public policy is thwarted.

The better view, therefore, appears to be that a trust should be characterized as a self-settled trust if it is funded by the beneficiary, regardless of the extent of the settlor-beneficiary's access to or control of the trust funds. Should any jurisdiction adopt the view that a trust is not self-settled if it significantly restricts the beneficiary's access to the corpus, even if funded by the beneficiary, then the access issues discussed in Parts I(B)(3) and (4) must also be considered.

Assuming, therefore, that the appropriate test to determine whether a spendthrift trust is "self-settled" is the extent to which the trust is funded by the beneficiary, there are a number of types of ERISA retirement plans that will often be considered self-settled, and therefore included in the property of the bankruptcy estate.

a. Keogh plans— Self-employed individuals conducting an unincorporated trade or business are permitted to adopt a tax-qualified retirement plan for themselves and their employees.[95] When the owner or partner covered by such a Keogh plan files for bankruptcy, the plan is uniformly held to be a self-settled spendthrift trust.[96]

---

fund was not a spendthrift trust because the debtor "created his own trust"); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434 (Bankr. D. Kan. 1982) (applying Kansas law), *rev'd on other grounds*, 24 Bankr. 927 (D. Kan. 1982) (although debtor employee had contributed $13,000 to ERISA savings plan and employer had provided matching funds of over $8,000, the court held that the entire fund was not a "traditional spendthrift trust" because, among other things, "it is the funds of the beneficiary that are being placed in trust").

94. *Cf.* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 589 n.42 (5th Cir. 1983) (court leaves open the question of "whether an appropriate case might be presented in which the restrictions upon a settlor-beneficiary's control and withdrawal of funds in a self-settled trust would ever render effective a spendthrift clause" under Texas law).

95. 26 U.S.C.A. § 401(c) (West 1978 & Supp. 1985); *supra* note 10.

96. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 587-88 (5th Cir. 1983) (owner, Texas law); *In re* Richard Clark, 18 Bankr. 824, 830 (Bankr. E.D. Tenn. 1982) (owner,

The case of *In re Ridenour*[97] provides a good illustration of this principle. The debtor was a partner in a small law firm, and the partnership had created and funded a Keogh plan for the partners.[98] The debtor claimed his interest in the plan was excluded from the property of the estate under section 541(c)(2), but the bankruptcy court held that, under Tennessee law, the plan was an unenforceable self-settled spendthrift trust.[99] The debtor had contended that the pension plan was funded not by him but by a separate entity, the partnership.[100] The court rejected this argument, stating flatly: "[T]he act of the partnership in establishing and contributing to the pension plan was essentially the act of each of the partners. The partnership was the agent of the debtor in establishing a pension plan for his benefit."[101] Although the *Ridenour* court's analysis is valid in the context of a small law partnership,[102] it is unclear whether the creation of a Keogh plan by a partnership composed of sev-

---

Tennessee law); Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 Bankr. 67, 77 (Bankr. E.D. Va. 1985) (owner, Virginia law); *In re* Ridenour, 45 Bankr. 72, 79 (Bankr. E.D. Tenn. 1984) (partner, Tennessee law); *cf.* Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412, 417 n.6 (Bankr. E.D.N.Y. 1981) (dictum) (owner, New York law); Judson v. Witlin (*In re* Witlin), 640 F.2d 661, 662-63 (5th Cir. 1981) (Bankruptcy Act case, Texas law); Sheehan v. Sheehan, 90 Misc. 2d 673, 395 N.Y.S.2d 596 (N.Y. App. Div. 1977) (nonbankruptcy case, New York law), *aff'd,* 102 Misc. 2d 235, 425 N.Y.S.2d 908 (N.Y. Sup. Ct. 1979); Plymouth Rock Fuel Corp. v. Bank of N.Y., 91 Misc. 2d. 837, 398 N.Y.S.2d 814 (N.Y. Civ. Ct. 1977) (nonbankruptcy case, New York law), *aff'd,* 102 Misc. 2d 235, 425 N.Y.S.2d 908 (N.Y. Sup. Ct. 1979). *But see In re* Diaz, 50 Bankr. 22, 23 (Bankr. E.D. Va. 1985) (Keogh plan not an invalid self-settled spendthrift trust because "public policy favors making provision for one's old age").

Even if the interest of the owner or partner of the business is deemed to be self-settled, that does not necessarily mean that the interests of the employees of the business or partnership should be deemed to be self-settled. *See* E. GRISWOLD, *supra* note 45, at § 282.1 ("Where a person creates a trust with spendthrift provisions, with himself and others as beneficiaries, the invalidity of the restraint extends only to his own interest. The spendthrift clause is valid as to the non-settlor beneficiaries.").

Individual retirement funds are also uniformly considered to be self-settled trusts because, like Keogh plans, they are funded with the debtor's own property. *See In re* Howerton, 21 Bankr. 621, 622 n.1 (Bankr. N.D. Tex. 1982) (Individual Retirement Annuity held not to create a spendthrift "trust"; if a trust were created, it would be an invalid self-settled trust under Texas law). Individual retirement funds will also only rarely be classified as spendthrift trusts because ERISA does not require that the accounts restrict assignment or alienation. *See supra* note 11.

97. 45 Bankr. 72 (Bankr. E.D. Tenn. 1984).

98. *Id.* at 74, 79.

99. *Id.* at 78-79.

100. *Id.* at 79.

101. *Id.* (stating further: "The contributions were based on a percentage of his earnings and were made from partnership funds in which he plainly had a pro rata share of ownership. In short, the debtor was both the settlor and the beneficiary of his pension plan.").

102. It appears that the *Ridenour* partnership had only three partners. *See id.* at 74 n.1.

eral hundred partners should realistically be attributed to each partner as his own act. This more difficult case could not be resolved merely by references to hornbook partnership law, but would require a close examination of the factual situation.

b. Professional corporations and sole-shareholder corporations— The second type of ERISA retirement plans that will often be deemed to be invalid as self-settled spendthrift trusts are plans adopted by professional corporations and sole-shareholder corporations. Although the settlor is in form the corporation, the courts have no difficulty finding that the settlor and the beneficiary are in reality one and the same entity.[103] As in the case of Keogh plans, however, the courts have not yet been faced with difficult fact situations. If the debtor's interest in the retirement plan was created by a corporation of which he is a shareholder, how much of the corporation's shares must he own before the creation and funding of the plan will be attributed to him as his own act? This question will raise complicated factual problems for the courts.

c. Employee contributions— Even if the debtor is covered by an ERISA retirement plan established by his employer, a large corporation, his interest in the plan may nevertheless be characterized as self-settled in certain circumstances. Some plans do not permit employee contributions, but others require such contributions as a precondition to receiving employer contributions. Some plans also permit voluntary employee contributions, without employer matching.[104] To the extent that the debtor's interest in the plan consists of his own contributions,

---

103. *See* Daniel v. Security Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352 (9th Cir. 1985) (apparently California law); *In re* La Fata, 41 Bankr. 842 (Bankr. E.D. Mich. 1984) (Michigan law) (professional corporation); Samore v. Graham (*In re* Graham), 24 Bankr. 305, 310 (Bankr. N.D. Iowa 1982) (Iowa law) ("Even though, in form, the settlor is the [Professional] Corporation, [the debtor's] earnings from his medical practice furnished the corpus of the trust. [The debtor] is therefore both the settlor and the beneficiary of the Fund."), *aff'd*, 726 F.2d 1268 (8th Cir. 1984); Avery Fed. Savings & Loan Ass'n v. Klayer (*In re* Klayer), 20 Bankr. 270, 274 (Bankr. W.D. Ky. 1981) (Kentucky law) (close corporation); *cf.* United States v. Southwestern Life Ins. Co., 526 F. Supp. 62 ((N.D. Tex. 1981) (Texas law, nonbankruptcy case) (professional corporation).

As in the case of Keogh plans, however, the interests of the corporation's employees would probably not automatically be deemed self-settled. *See supra* note 96.

104. *See* M. CANAN, *supra* note 2, at § 14.

The Internal Revenue Code also permits qualified profit-sharing and stock bonus plans to include a "qualified cash or deferred compensation arrangement" in which the employee is allowed to elect to receive either cash or an employer contribution to the plan. *See* I.R.C. § 401(k) (1982). To the extent that plan benefits are a result of such an arrangement, the benefits should be treated as if they were the result of voluntary employee contributions.

the interest should be deemed to be self-settled.[105] This is true regardless of whether the employee's contributions are voluntary or mandatory.[106]

d. All retirement plans as self-settled— As described above, the courts have developed nice distinctions to determine whether the debtor's interest in an ERISA retirement plan is self-settled under state law and therefore available to creditors in bankruptcy. An alternative interpretation is that all retirement plans are self-settled, regardless of who contributes, because retirement benefits are in essence compensation to employees.

An employer may have many motives for contributing to an employee retirement plan, including encouraging employees to retire at a certain age, and preventing the impression that the company "does not take care of its own" after employees retire. One suspects, however, that the primary motive is compensation to employees. Indeed, the Internal Revenue Code treats retirement benefits not as gratuitous transfers, but as compensation; the tax is merely deferred until the benefits are distributed. The contributions by the employer to the retirement plan represent, in large part, lost salary by the employee. The employee has in effect paid the employer to set up the retirement plan on the employee's behalf. Under this interpretation of the nature of retirement benefits, all plans would be treated as self-settled, regardless of who in fact contributes the plan funds.[107]

---

105. *See* Johnson v. Fenslage (*In re* Johnson), 724 F.2d 1138 (5th Cir. 1984) (Texas law) (group variable annuity established by employer is self-settled by employee where the employee made all the contributions to the trust); *supra* note 92 and accompanying text. *But see* Avenue Motor Co. v. Emro, 1 Pa. D. & C.3d 157 (1976). Courts occasionally fail to apply the *pro tanto* rule, holding the entire fund is self-settled when any portion consists of employee contributions. *See supra* note 93 and accompanying text.

106. The mere fact that employee contributions are a precondition to matching employer contributions should not prevent the employee's contributions from being characterized as self-settled *pro tanto*. In an analogous situation, a beneficiary who pays off an encumbrance on the trust property is deemed to be the settlor to the extent of the payment. *See supra* note 92.

One court has objected that if the employee's mandatory contributions were characterized as self-settled, the public policy in favor of encouraging retirement plans would be frustrated. *See* Miller v. Lincoln Nat'l Bank and Trust Co. (*In re* Cook), 43 Bankr. 996, 1001 (N.D. Ind. 1984) (Indiana law); *see also* Miller v. Jones (*In re* Jones), 43 Bankr. 1002, 1006-07 (N.D. Ind. 1984) (same). The court does not, however, address the fact that spendthrift trust law has a strong policy against allowing a debtor to shield his assets from his creditors. *See supra* note 91 and accompanying text.

107. *Cf.* Electrical Workers, Local 1 Credit Union v. IBEW-NECA Holiday Trust Fund, 583 S.W.2d 154 (Mo. 1979) (en banc) (Texas law) (employer contributions to employee vacation trust fund held to be self-settled spendthrift trust by employees); Boyd v. Curran, 166 F. Supp. 193 (S.D.N.Y. 1958) (California law) (pension benefits are not a gratuity; they arise directly from the employment relationship and therefore should be

Most courts have not, however, accepted the view that all retirement plans are in essence self-settled.[108] In many states an ERISA retirement plan will be considered self-settled to the extent that it consists of contributions by the beneficiary, or by an entity controlled by the beneficiary.[109] Thus, although the better view is that all retirement plans, whether funded by the employer or the employee, should be deemed to be self-settled, the courts have not agreed.

If the debtor's interest in an ERISA retirement plan cannot be characterized as an invalid self-settled spendthrift trust under state law, it might nevertheless be an invalid spendthrift trust for a number of other reasons. The states strongly disagree over the validity of spendthrift trusts that are not self-settled, so the following is only intended as a broad overview of the considerations involved when a court attempts to apply state law to ERISA retirement plans.

3. Present unrestricted right to withdraw plan benefits— The first factor to consider in determining the validity of a spendthrift trust that is not self-settled is whether the debtor, on the date of the bankruptcy petition, had an unrestricted right to withdraw the principal from the retirement plan. The general rule is that if the principal of a spendthrift trust is payable immediately to the beneficiary or at any time he may demand it, then the beneficiary's creditors may reach it.[110] Some cases, how-

---

treated as earnings); Annot., 88 A.L.R.2d 493 (1963) (welfare plans can have the same legal effect of wages).

It is generally agreed that a spendthrift trust is self-settled when one party pays a second party consideration to set up a spendthrift trust for the first party. *See* RESTATEMENT (SECOND) OF TRUSTS § 156 comment f (1959); E. GRISWOLD, *supra* note 45, at 487; G. BOGERT & G. BOGERT, *supra* note 79, at § 223; 2 A. SCOTT, *supra* note 79, at § 156.3.

108. *See, e.g.*, Miller v. Lincoln Nat'l Bank and Trust Co. (*In re* Cook), 43 Bankr. 996, 1001 (N.D. Ind. 1984) ("Where an ERISA-qualified plan set up by an employer requires an employee to make contributions to the plan as part of the employee's participation, the employee cannot be considered a settlor as that term is traditionally used in the area of spendthrift trusts."); Thomas v. Thomas, 192 Cal. App. 2d 771, 13 Cal. Rptr. 872 (1961) (California law) (employer-created and funded pension plan is not self-settled by the employee); Avenue Motor Co. v. Emro, 1 Pa. D. & C.3d 157 (1976) (Pennsylvania law) (employee covered by employer's tax-qualified pension plan is not the settlor of the plan to the extent of his contributions); Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App. 1958) (applying Texas law) (where an employer created a profit-sharing trust for employees, the trust is not self-settled by the employee merely because he enters the employ or helps create the profits).

109. *See supra* note 92 and accompanying text.

110. *See* 2 A. SCOTT, *supra* note 79, at § 153; RESTATEMENT (SECOND) OF TRUSTS § 153(2) (1959).

An obvious corollary to this rule is that if the debtor, at some time prior to the petition, had an unrestricted right to withdraw the funds but he elected annuity distribution, then the annuity should be unenforceable against the creditors as a self-settled trust. *See* ever, hold that the creditor may not reach the principal until the beneficiary has actually received it.[111]

If the applicable state has adopted the general rule, the debtor's interest in an ERISA retirement plan may be an invalid spendthrift trust under the following circumstances: the debtor has passed the designated retirement age as of the date of the petition;[112] the debtor has terminated his employment with the employer prior to the date of the petition;[113] the debtor has become disabled prior to the date of the petition and the plan provides for disability distributions;[114] or if the plan provides that benefits may be distributed for "hardship."[115] If under the terms of the particular retirement plan the participant has the right to a lump-sum distribution of benefits under these circumstances,[116] then under the majority rule the occurrence of these events prior to the filing of the petition for bankruptcy would invalidate the spendthrift provisions.

For example, in *Miller v. Lincoln National Bank and Trust Co. (In re Cook),*[117] the debtor's employer had established a savings and profit-sharing plan for the employees. The plan permitted participants to request distribution of plan benefits before retirement or termination of employment if the participant

---

supra Part I(B)(2).

111. *See* 2 A. SCOTT, *supra* note 79, at § 153; RESTATEMENT (SECOND) OF TRUSTS § 153 comment c (1959).

112. *See* Plymouth Rock Fuel Corp. v. Bank of N.Y., 91 Misc. 2d 837, 398 N.Y.S.2d 814 (N.Y. Civ. Ct. 1977) (nonbankruptcy case, New York law) (owner of Keogh plan had passed age 59½, so plan funds are available for his own use at any time), *aff'd,* 102 Misc. 2d 235, 425 N.Y.S.2d 908 (N.Y. Sup. Ct. 1979).

113. *Cf.* SSA Baltimore Fed. Credit Union v. Bizon, 42 Bankr. 338, 345-46 (D. Md. 1984) (Maryland law) (because Maryland enforces partial spendthrift trusts, the fact that the debtor is entitled to receive a lump-sum distribution upon demand because of his termination of employment does not invalidate spendthrift provisions). *See generally* 26 U.S.C. § 401(a)(14) (1982) (tax-qualified trusts may pay benefits under the plan within 60 days of the close of the plan year in which the participant terminates his service with the employer). A significant number of employers offer employees a lump-sum distribution of benefits upon termination of employment. *See* Salisbury, *What Impact Has ERISA Had on Different Types of Pension Plans,* in STAFF OF SENATE SPECIAL COMM. ON AGING, 98TH CONG., 2D SESS., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 107, 123-24 (Comm. Print 1984).

114. Tax-qualified retirement plans may provide that benefits be distributed upon the participants' disability. *See* Treas. Reg. § 1.401(a)-1(b)(1) (1980).

115. Unlike pension plans, tax-qualified profit-sharing plans may permit participants to withdraw benefits upon a showing of financial "hardship." *See* M. CANAN, *supra* note 2, at § 3.58; *see also infra* notes 117-20 and accompanying text.

116. If the occurrence of these circumstances merely entitles the beneficiary to an annuity rather than a lump-sum distribution, then only that portion of the annuity due the participant should be attachable by the creditors.

117. 43 Bankr. 996 (N.D. Ind. 1984).

could demonstrate "hardship or dire need."[118] Under the plan, hardship or dire need included "illness or death in the participant's family, education of the participant's children, or purchase of a residence."[119] The court held that, under Indiana law, the debtor's interest in the plan was not an enforceable spendthrift trust because the debtor has "present access" to the trust principal. The very fact that the debtor had filed a petition for bankruptcy demonstrated that the debtor qualified for early withdrawal due to financial hardship.[120] The debtor's interest in the plan was therefore included in the property of the estate.

4. *Restricted right to withdraw plan benefits: the partial spendthrift trust issue*— Although the states generally agree that a present, unrestricted right to withdraw the principal of a spendthrift trust invalidates the spendthrift provisions as to the beneficiary's creditors, in some instances the circumstances that give rise to the withdrawal rights may not have yet occurred. A retirement plan may, for example, grant complete withdrawal rights to the participant only upon retirement, disability, or termination of employment. If none of these events have occurred prior to the date of the bankruptcy petition, the debtor's right to withdraw is solely prospective.

In some states, an ERISA plan participant's *future* right to withdraw the plan benefits may invalidate the plan's spendthrift provisions. The participant's future right to withdraw makes the retirement plan analogous to a "partial spendthrift trust" which may be invalid against the participant's creditors.

The traditional spendthrift trust provides both that the beneficiary cannot alienate his right to future payments of income or principal and that creditors may not reach his interest in the

---

118. *Id.* at 999.

119. *Id.*

120. *See id.* at 1001; *see also* Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434, 438 (Bankr. D. Kan. 1982) (Kansas law) (the debtor's right to withdraw trust funds at any time and use them for a number of specified purposes, i.e., layoff, illness, disability, purchase of a house, tuition expenses, funeral expenses, and other financial hardship, even though certain withdrawals would suspend the debtor's right to contribute to the fund for up to 12 months, was a factor in finding no spendthrift trust), *rev'd on other grounds*, 24 Bankr. 927 (D. Kan. 1982); *cf. In re* Kenneth Miller, 33 Bankr. 549, 551 (Bankr. D. Minn. 1983) (Minnesota law) (profit-sharing plan permitting withdrawal for financial hardship "is available for current use of the debtor"). *But see* Rodgers v. Norman (*In re* Crenshaw), 51 Bankr. 554, 559-60 (N.D. Ala. 1985) (Illinois law) (debtor could withdraw plan benefits if he demonstrated "financial need"; held that the requisite employer consent to withdrawal, although guided by standards in the plan, was a sufficient impediment to withdrawal and that the plan constituted a spendthrift trust).

trust.[121] When the trust restricts involuntary but not voluntary alienation, or vice versa, a "partial spendthrift trust"[122] is created. The states appear to be split on the question of whether partial spendthrift trusts are enforceable against the beneficiaries' creditors.[123]

ERISA retirement plans are analogous to partial spendthrift trusts that restrict creditors' rights but only partially restrict beneficiaries' rights. ERISA requires that plans provide that "benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process."[124] Voluntary access to benefits by the participant is not as severely restricted. Participants may receive a lump-sum distribution of benefits upon termination of employment.[125] ERISA plans may permit loans to be made from the plan to the participant, with the loan secured by the participant's interest in the plan.[126] ERISA plans may permit participants in pay status[127] to assign their rights to future benefits.[128] A plan participant may also have such control over the plan that he has the power to

---

121. *See, e.g.*, Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1271 (8th Cir. 1984); RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959); 76 AM. JUR. 2d *Trusts* § 148.

122. Courts do not always use the term "partial spendthrift trust." Occasionally they state that a spendthrift trust is invalid if the beneficiary has sufficient dominion or control over the trust, or access to the trust funds. *See, e.g.*, Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985).

123. *See* Eaton v. Boston Safe Deposit and Trust Co., 240 U.S. 427, 428 (1916) ("[T]here would be difficulty admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts."); 2 A. SCOTT, *supra* note 79, at § 152.3 (a partial spendthrift trust restraining only the creditor's rights is unenforceable as against public policy); Williams, *Partial Spendthrift Trusts*, 50 DICK. L. REV. 79, 85 (1946) (spendthrift restrictions on involuntary, but not voluntary, alienation are invalid in Pennsylvania). *But see* SSA Baltimore Fed. Credit Union v. Bizon, 42 Bankr. 338, 345-46 (D. Md. 1984) (partial spendthrift trusts valid under Maryland law); G. BOGERT & G. BOGERT, *supra* note 79, § 222 at 401-02 ("There is no requirement that the restraint must affect both alienees and creditors."); E. GRISWOLD, *supra* note 45, at §§ 267, 360.

124. *See supra* notes 7-8.

125. *See supra* note 113 and accompanying text.

126. *See* 26 U.S.C.A. § 401(a)(13)(A) (West Supp. 1985); ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2) (1982); Treas. Reg. § 1.401(a)-13(d)(2) (1978); *see also* Alden, *Employee Loans Are Respectable—At Last!*, PENSION WORLD, July 1984, at 46.

127. "Pay status" occurs when the plan participant begins receiving plan benefits.

128. A participant in pay status may voluntarily assign up to 10% of any future benefit payment, if the plan so provides. 26 U.S.C.A. § 401(a)(13)(A) (West Supp. 1985); ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2) (1982); Treas. Reg. § 1.401(a)-13(d)(2)(1978). If the plan so provides, a participant in pay status may also make a voluntary revocable assignment of all future benefit payments. Treas. Reg. § 1.401(a)-13(e) (1) (1978). Finally, a beneficiary may deduct and pay union dues from plan benefits. Rev. Rul. 68-159, 1968-1 C.B. 153.

terminate the plan and force distribution of benefits.[129]

In a jurisdiction that recognizes the validity of partial spendthrift trusts, an ERISA retirement plan provision that permits withdrawal of plan benefits and voluntary alienation by participants should not render the spendthrift restrictions on creditors' rights unenforceable. If a jurisdiction holds partial spendthrift trusts invalid, on the other hand, the courts must examine the particular retirement plan to determine whether the participant's right to withdraw, alienate, or assign the benefits is so great that the plan must be characterized as a partial, and therefore invalid, spendthrift trust.[130]

a. Termination of employment— ERISA plans may begin paying benefits after the participant terminates his employment, and some plans permit a lump-sum distribution of benefits upon termination.[131] One court has held that a participant's ability to compel distribution merely by quitting his job meant that the retirement plan was an invalid partial spendthrift trust.[132] The court failed to acknowledge, however, that in some circumstances a requirement that the debtor must terminate his employment to reach his retirement plan benefits may be a significant restriction on his access to the funds.[133] If the debtor is an aging auto worker in Michigan who has no income assets, it is inadequate to argue that he may withdraw his benefits simply by quitting his job. On the other hand, if the debtor is a young doctor who can terminate his employment with his own corporation and begin work again under a new corporate form, termination of employment may be an illusory barrier to distribution. The courts should look to the facts of the individual case to de-

---

129. *See* ERISA § 4041, 29 U.S.C. § 1341 (1982); 29 C.F.R. § 2617.1 (1985).

130. *But see* Gray v. Ingles Markets, Inc. Employees' Stock Bonus Plan & Trust (*In re* DeWeese), 47 Bankr. 251, 255 (Bankr. W.D.N.C. 1985) (ERISA's provision permitting various forms of voluntary alienation and assignment means the stock bonus plan is not a valid spendthrift trust, without regard to whether the plan in question actually permitted the objectionable practices); Central States, Southeast and Southwest Areas Health and Welfare Pension Fund v. Stephenson (*In re* McLean), 41 Bankr. 893, 897 (D.S.C. 1984) (same), *rev'd*, 762 F..2d 1204 (4th Cir. 1985).

131. *See supra* note 113 and accompanying text.

132. *In re* Werner, 31 Bankr. 418, 421 (Bankr. D. Minn. 1983) (Minnesota law) (non-ERISA retirement plan); *see also* Nixon v. P.J. Pedone & Co. (*In re* Nichols), 42 Bankr. 772, 776 (Bankr. M.D. Fla. 1984) (debtor can compel distribution of benefits by terminating employment).

133. *See In re* Sheridan, 38 Bankr. 52, 56-57 (Bankr. D. Vt. 1983) ("It hardly needs pointing out that it would be foolhardy and self-defeating for the debtor, at age 46, and without income assets, to voluntarily terminate his employment with the state, thereby cutting himself off from the means with which to support himself and his dependents."); *see also* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 589 (5th Cir. 1983) (employment termination may be a significant restriction on withdrawal of funds).

termine whether termination of employment is a significant restriction on the debtor's access to the plan funds.[134]

b. Plan loans— ERISA plans may also make loans to plan participants for any reason, with the loan secured by the participant's interest in the plan.[135] In a jurisdiction that invalidates partial spendthrift trusts, the inclusion of a plan provision permitting such loans will be fatal to the debtor's spendthrift trust claim.[136] There is little difference between receiving a distribution and a loan secured by plan benefits.[137]

c. Voluntary revocable assignment of benefits— ERISA also permits participants in retirement plans to make a revocable assignment of their right to future plan benefits once the participant enters pay status.[138] Although some courts have suggested that a plan provision authorizing voluntary revocable assignment of future plan benefits destroys the enforceability of the spendthrift clauses,[139] that result is contrary to established spendthrift trust law. When a spendthrift trust limits the beneficiary's ability to alienate his right to receive future income payments, and the beneficiary nevertheless alienates his right, the

---

134. Few cases have held that a participant's right to benefits upon termination of employment alone creates a partial spendthrift trust. *See cases cited supra* note 132. In fact, valid spendthrift trusts have been found in a number of cases in which termination of employment would trigger distribution. *See, e.g.*, Rodgers v. Norman (*In re* Crenshaw), 51 Bankr. 554 (N.D. Ala. 1985) (Illinois law); Bezanson v. Maine Nat'l Bank (*In re* Kwaak), 42 Bankr. 599 (Bankr. D. Me. 1985) (Maine law); *In re* Berndt, 34 Bankr. 515 (Bankr. N.D. Ind. 1983) (Indiana law).

135. *See supra* note 126 and accompanying text.

136. In a number of cases, the presence of a plan provision permitting the debtor to borrow from the fund, secured by his interest in the plan, has been held to be a factor in destroying spendthrift trust status. *See* Nixon v. P.J. Pedone & Co. (*In re* Nichols), 42 Bankr. 772, 776 (Bankr. M.D. Fla. 1984) (applying Florida law); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434, 438 (Bankr. D. Kan. 1982) (applying Kansas law), *rev'd on other grounds*, 24 Bankr. 927 (D. Kan. 1982); *cf.* Central States, Southeast and Southwest Areas Health and Welfare Pension Fund v. Stephenson (*In re* McLean), 41 Bankr. 893, 897 (D.S.C. 1984) (apparently South Carolina law) (ERISA "allowed" loans from the plan secured by the debtor's interest; without a showing that the plan in question actually authorized loans, that was a factor in denying spendthrift trust status), *rev'd*, 762 F.2d 1204 (4th Cir. 1985).

If a particular plan does not permit such loans, that is additional evidence that the plan is not a partial spendthrift trust. *See* Bezanson v. Maine Nat'l Bank (*In re* Kwaak), 42 Bankr. 599, 602 (Bankr. D. Me. 1984) (Maine law).

137. There are certain restrictions on the amount and term of plan loans if the loan is not to be treated as a taxable distribution. *See* 26 U.S.C.A. § 72(p) (West 1984 & Supp. 1985). These restrictions have no effect on the right to make plan loans.

138. *See supra* note 128 and accompanying text.

139. Reagan v. Austin Municipal Credit Union (*In re* Reagan), 741 F.2d 95, 97 (5th Cir. 1984) (per curiam); Central States, Southeast and Southwest Areas Health and Welfare Pension Fund v. Stephenson (*In re* McLean), 41 Bankr. 893, 897 (D.S.C. 1984), *rev'd*, 762 F.2d 1204 (4th Cir. 1985).

courts regularly hold that the assignment is valid but revocable at will by the beneficiary.[140] There is no reason why an ERISA plan's restrictions should be invalidated merely because its provisions expressly authorize that which the law already authorizes. Therefore, the inclusion of a plan provision allowing voluntary revocable assignments of future plan benefits should not destroy the spendthrift character of the retirement plan.

d. Plan termination— Finally, if a plan participant has such control over a retirement plan that he could terminate it at will and force distribution of benefits, the plan is likely to be characterized as a partial spendthrift trust.[141] In most cases in which the participant has such control, however, the plan may also be characterized as self-settled.[142]

5. Summary of ERISA plans enforceable as spendthrift trusts— It is dangerous to generalize about spendthrift trust law, given the wide disagreement among the courts and the states. However, in the few cases in which a debtor's interest in an ERISA retirement plan was found to be a valid and enforceable spendthrift trust, certain common circumstances existed. In each of these cases, the plan was created and funded by the employer, and thus by an entity legally and realistically distinct from the employee; the employee could only withdraw plan benefits upon death, termination of employment, disability, retirement, or plan termination; and none of the facts authorizing withdrawal had occurred as of the date of the bankruptcy petition.[143]

---

140. *See* RESTATEMENT (SECOND) OF TRUSTS § 152 comment i (1959); 2 A. SCOTT, *supra* note 79, at § 152.3; G. BOGERT & G. BOGERT, *supra* note 79, at 404; 90 C.J.S. *Trusts* § 194 (1955).

141. *See* Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985) (Florida law) (beneficiary of professional corporation retirement plan had sole authority to amend or terminate the plan); Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 Bankr. 67, 76-77 (Bankr. E.D. Va. 1985) (Virginia law) (Keogh plan); *In re* Gillett, 46 Bankr. 642 (Bankr. S.D. Fla. 1985) (Florida law) (close corporation); Bass v. Shackelford (*In re* Shackelford), 27 Bankr. 372 (Bankr. W.D. Va. 1983) (IRA); Sheehan v. Sheehan, 90 Misc. 2d 673, 395 N.Y.S.2d 596 (N.Y. App. Div. 1977) (New York law) (Keogh plan).

142. *See supra* Part I(B)(2).

143. *See* McLean v. Central States, Southeast and Southwest Areas Pension Fund (*In re* McLean), 762 F.2d 1204, 1207 (4th Cir. 1985); Rodgers v. Norman (*In re* Crenshaw), 51 Bankr. 554 (N.D. Ala. 1985); *In re* Elsea, 47 Bankr. 142, 149 (Bankr. E.D. Tenn. 1985) (Tennessee law); Miller v. Jones (*In re* Jones), 43 Bankr. 1002, 1007 (N.D. Ind. 1984) (Indiana law); Miller v. Lincoln Nat'l Bank and Trust Co. (*In re* Cook), 43 Bankr. 996, 1001 (N.D. Ind. 1984) (dictum) (Indiana law); Bezanson v. Maine Nat'l Bank (*In re* Kwaak), 42 Bank. 599 (Bankr. D. Me. 1984) (Maine law); Warren v. G.M. Scott & Sons (*In re* Phillips), 34 Bankr. 543, 546 (Bankr. S.D. Ohio 1983) (dictum) (Ohio law); *In re* Berndt, 34 Bankr. 515 (Bankr. N.D. Ind. 1983) (Indiana law) (pension portion of savings and profit-sharing plan); *cf.* Bakst v. Guernsey (*In re* Guernsey), 54 Bankr. 68, 69

One such case is *Miller v. Jones (In re Jones)*.[144] The debtor in *Jones* was employed by General Electric, which had created an ERISA pension plan for its employees. General Electric required employees who participated in the plan to contribute a fixed percentage of their salaries to it. These employee contributions were then matched by employer contributions. Plan benefits were payable only upon termination of employment, retirement, death, or disability. None of these events had occurred as of the date of the petition.[145]

The debtor claimed her interest in the pension plan was excluded from the property of the estate under section 541(c)(2) because it was an enforceable spendthrift trust under Indiana law. The district court agreed.[146] The court noted first that Indiana generally recognizes the enforceability of spendthrift trusts.[147] Second, the pension fund was not self-settled by the debtor because her plan contributions were required as a prerequisite to receiving the employer's matching funds.[148] Finally, the pension plan was not a partial spendthrift trust because it placed significant restrictions on the debtor's access to the plan funds. Because "the debtor ha[d] no access to the trust corpus at this time" and the funds were "not available to this debtor for current use," the court held that the pension plan constituted a valid spendthrift trust and was therefore excluded from the property of the estate.[149]

In general, the states have set high standards to govern whether spendthrift trust property may be kept beyond the reach of the beneficiary's creditors. Although these standards mean that many ERISA retirement plans will be included in the property of the bankruptcy estate, the debtor may nevertheless claim the property as exempt under state and federal law.[150]

(Bankr. S.D. Fla. 1985) (Florida law) (employee terminated employment, entitling him to distribution, but the approval of a committee had neither been requested nor obtained).

144. 43 Bankr. 1002 (N.D. Ind. 1984).

145. *Id.* at 1004, 1007.

146. *Id.* at 1007.

147. *Id.* at 1006.

148. *Id.* This aspect of the court's opinion is criticized at *supra* notes 105-06 and accompanying text.

149. *In re* Jones, 43 Bankr. at 1007 ("The only way a participant in this plan may gain access to any portion of the plan is to retire, be terminated, become disabled, or die.").

150. The exemptions are discussed *infra* Part II.

C. *The Legal Standard in Chapter 13 Cases*

Most of the litigation over whether a debtor's interest in an ERISA retirement plan is property of the estate has occurred in the Chapter 7 liquidation contest, in which the property of the estate is defined by section 541 of the Code. In a consumer plan case under Chapter 13, the definition of the property of the estate is broader. It includes not only the property specified in section 541, but also any additional property of the same kind that the debtor acquires after filing the petition, but before the case is closed.[151]

Under the legal standard developed in Part I(A), certain ERISA retirement plans will be excluded from the property of the estate if they are enforceable as spendthrift trusts under state law. Although debtors generally prefer that their property be excluded from the estate, some debtors may want their retirement benefits included in the property of the Chapter 13 estate.[152] Chapter 13 offers debtors a number of advantages over Chapter 7 liquidation,[153] but Chapter 13 is available only to individuals with a "regular income."[154]

Congress intended that Chapter 13 bankruptcy would be available to those whose sole source of income was retirement benefits.[155] If a debtor's retirement benefits are not included in the property of the estate, however, the debtor may not meet Chapter 13's "regular income" requirement. A number of courts have therefore held that the property of the estate in a Chapter 13 case includes property, such as retirement benefits, that

---

151. 11 U.S.C. § 1306(a) (1982). Section 1306(a) provides:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title—
>
> (1) all property of a kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title, whichever occurs first; and
>
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title, whichever occurs first.

See In re Wood, 23 Bankr. 552, 554-55 (Bankr. E.D. Tenn. 1982).

152. *See infra* text accompanying notes 153-55.

153. *See generally* J. WHITE, BANKRUPTCY AND CREDITORS' RIGHTS 417-18 (1985).

154. 11 U.S.C. § 109(e) (1982). There are a number of other restrictions on the availability of Chapter 13 relief.

155. *See* H.R. REP. No. 595, *supra* note 17, at 311-12, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6268-69 (under the "regular income" standard, "individuals on welfare, social security, fixed pension incomes, or who live on investment incomes" can take advantage of Chapter 13); Regan v. Ross, 691 F.2d 81, 85 (2d Cir. 1982); *In re* Wood, 23 Bankr. 552, 556 (Bankr. E.D. Tenn. 1982).

would otherwise be excluded under section 541.[156] This result is, however, clearly at odds with the statutory language. The definition of property of the Chapter 13 estate is limited to property under section 541, and the property of the *same kind* acquired after the filing of the petition.[157]

It is possible to be true to the statutory language and, at the same time, fulfill Congress's intent that Chapter 13 be available to those living on retirement benefits. To take advantage of Chapter 13, the debtor must have a "regular income,"[158] which is defined as income that is "sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13."[159] An individual receiving retirement benefits has a stable and regular income; that the income may be derived from property that is excluded from the property of the estate does not prevent the debtor from using Chapter 13. If the debtor wishes to use his retirement benefits to fund a Chapter 13 plan, and he has no other income, he may "donate" his retirement benefits to the trustee each month.[160] If he has other stable sources of income, he may choose not to use the retirement benefits to fund the Chapter 13 plan.

There is no reason, therefore, why the legal standard governing the property of the estate should be different in Chapter 7 and Chapter 13 cases. A willing debtor who wants to take advantage of Chapter 13 may do so, regardless of whether or not his income from retirement benefits is excluded from the property of the estate.

D. *Conflict Between the Bankruptcy Code and the Law of Creditors' Rights Outside of Bankruptcy*

Under the legal standard adopted in Part I(A), ERISA retirement plans would be excluded from the property of the bankruptcy estate only if they are spendthrift trusts under state law.

156. *See* Regan v. Ross, 691 F.2d 81 (2d Cir. 1982); *In re* Wood, 23 Bankr. 552 (Bankr. E.D. Tenn. 1982); *see also* Note, *ERISA Plans as Property of Individuals' Bankruptcy Estates,* 5 CARDOZO L. REV. 685 (1984).

157. *See supra* note 151.

158. *See supra* text accompanying note 154.

159. 11 U.S.C.A. § 101(27) (West Supp. 1985).

160. *See* McLean v. Central States, Southeast and Southwest Areas Pension Fund (*In re* McLean), 762 F.2d 1204, 1208 (4th Cir. 1985); *cf.* Hildebrand v. Social Sec. Admin. (*In re* Buren), 725 F.2d 1080, 1086 (6th Cir. 1984) (social security benefits), *cert. denied,* 1055 S. Ct. 87 (1984). A debtor may, of course, voluntarily contribute property to the Chapter 13 estate. *See* 5 L. KING, *supra* note 16, at § 1300.90.

As a result, this standard would permit creditors to reach many different types of retirement plan benefits in bankruptcy. Outside of bankruptcy, however, creditors are rarely permitted to claim ERISA retirement plan benefits.

1. Creditors' rights outside of bankruptcy— ERISA requires, both as a matter of substantive law and as a qualification for favorable tax status, that all retirement plans require that plan benefits may not be assigned or alienated by plan participants.[161] In addition, ERISA provides that all state laws that "relate to any employee benefit plan" are preempted by the Act.[162]

The question of whether a creditor has a right, outside of bankruptcy, to garnish a debtor's interest in an ERISA retirement plan has plagued the courts for years. Given ERISA's restrictions on assignment and alienation, and the preemption of state law, the courts could reach three results. First, ERISA could have no effect on the state law of creditors' rights. Second, ERISA could preempt the state law of creditors' rights, and federal common law could govern the validity of creditors' claims. Third, ERISA could create a per se federal exemption from creditor process for all retirement plans. This final interpretation is the only one that has been generally accepted by the courts, and appears to be required by Congress's recent amendments to ERISA.[163]

The first position, that ERISA has no effect on the state law of creditors' rights, rests on the fact that ERISA does not prohibit assignment and alienation. ERISA merely requires that plans include the assignment and alienation clause. Congress may have intended to leave the question of the enforceability of those provisions to state law. Moreover, the state law of creditors' rights has such a tangential effect on retirement plans that it cannot be said to "relate to" the plans. The state law therefore is not preempted by ERISA. This position has never garnered much support. The one court that expounded this view[164] created questionable precedent in its own jurisdiction,[165] and al-

161. *See supra* notes 7-8.

162. ERISA § 514(a), 29 U.S.C. § 1144(a) (1982).

163. *See infra* note 177 and accompanying text.

164. National Bank of N. Am. v. International Bhd. of Elec. Workers Local 3, 69 A.D.2d 679, 419 N.Y.S.2d 127, *appeal dismissed,* 48 N.Y.2d 752, 422 N.Y.S.2d 666 (1979); *see also* Local 212 v. Local 212 IBEW Credit Union, 549 F. Supp. 1299, 1302 (S.D. Ohio 1982) (dictum), *aff'd per curiam,* 735 F.2d 1010 (6th Cir. 1984).

165. A subsequent appellate court decision questioned the holding of *National Bank of N. Am.*, and was affirmed by the New York Court of Appeals. Helmsley-Spear, Inc. v. Winter, 74 A.D.2d 195, 426 N.Y.S.2d 778, 780-81 (1980), *aff'd,* 52 N.Y.2d 984, 438

most certainly has been overruled by the 1984 ERISA amendments.[166]

The second position is that Congress intended that ERISA preempt the state law of creditors' rights, and that the courts develop federal common law, similar to state spendthrift trust law, to govern whether and in what circumstances the restrictions on assignment and alienation would be enforceable against creditors. Although several commentators have advocated this position, no court has yet adopted it.[167] It too appears not to be a viable interpretation in light of the recent ERISA amendments.

The final position, that ERISA creates a per se federal exemption from creditor process outside of bankruptcy, has received the support of a majority of courts.[168] Although many courts have also recognized an implied exception to the per se exemption in the case of family support claims,[169] this conclusion is reached as a matter of statutory interpretation[170] and is not evidence of federal common law in this area.[171]

According to the majority of courts, therefore, ERISA's restriction on assignment and alienation of plan benefits, in conjunction with its sweeping preemption of state law, demonstrates that Congress intended that creditors could never reach a plan participant's interest, unless the creditor is seeking to sat-

---

N.Y.S.2d 79 (1981).

166. *See infra* notes 177-81 and accompanying text.

167. The best example of the broad potential reach of the federal common law position is illustrated in Sherman, *Spendthrift Trusts and Employee Pensions: The Problem of Creditors' Rights,* 55 IND. L.J. 247 (1980). Professor Sherman argues that Congress intended the courts to create federal common law, along the lines of state spendthrift trust law, to govern the enforceability of plan restrictions on assignment and alienation.

168. *See, e.g.,* Tenneco Inc. v. First Va. Bank, 698 F.2d 688 (4th Cir. 1983) (qualified thrift and stock ownership plan); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982) (vacation trust fund), *vacated,* 463 U.S. 1 (1983); General Motors Corp. v. Buha, 623 F.2d 455 (6th Cir. 1980); Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510 (N.D. Tex. 1981) (qualified pension and profit-sharing plans).

169. *See, e.g.,* Operating Engineers' Local 428 Pension Trust Fund v. Zamborsky, 650 F.2d 196 (9th Cir. 1981); Carpenters Pension Trust v. Kronschnabel, 632 F.2d 745 (9th Cir. 1980), *cert. denied,* 453 U.S. 922 (1981); Cody v. Riecker, 594 F.2d 314 (2d Cir. 1979); American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979). *But see* General Motors Corp. v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976).

With the enactment of the Retirement Equity Act of 1984, Pub. L. No. 98-379, 98 Stat. 1426, Congress codified and preempted this judicially created exception. *See infra* notes 177-81 and accompanying text.

170. *See, e.g.,* cases cited *supra* note 169.

171. *But see* Liscinski v. Mosley (*In re* Mosley), 42 Bankr. 181, 189-90 (Bankr. D.N.J. 1984) (exception for family support claims suggests that "the federal courts are developing a federal common law to govern" the exemption from creditors).

isfy a family support obligation. A typical example of this principle is found in *Commercial Mortgage Insurance, Inc. v. Citizens National Bank of Dallas*,[172] in which a judgment creditor sought to garnish a doctor's interest in tax-qualified pension and profit-sharing plans. The plans had been established by the doctor's professional association, of which he was the sole director and sole shareholder at the time of the garnishment action. The doctor had an eighty percent interest in the $127,000 held in the two plans.[173] Although the plans were unenforceable self-settled trusts under Texas law, the district court held that the creditor could not garnish any of the plan assets.[174] The court concluded that ERISA created a per se federal exemption for all ERISA retirement plans, and the court refused to create federal common law to govern the enforceability of the plan restrictions.[175] The *Commercial Mortgage Insurance* case has been widely followed by state and federal courts.[176]

The conclusion that ERISA created a per se federal exemption outside of bankruptcy is bolstered by the recent enactment of the Retirement Equity Act of 1984 (REA).[177] REA creates a single, express exception to the general rule that plan benefits may not be assigned or alienated: if the court order to pay plan benefits to a participant's creditor is a "qualified domestic relations order," then the order will not violate the general spendthrift restrictions.[178] In addition, Congress amended the ERISA provision preempting state law to permit courts to issue qualified domestic relations orders.[179]

The explicit exception for qualified domestic relations orders suggests that Congress intended that ERISA would preempt all other orders, such as garnishment and attachment orders. The Senate report states: "[The] conforming changes to the ERISA preemption provision are necessary to ensure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA."[180] In addition, Congress's purpose in en-

172. 526 F. Supp. 510 (N.D. Tex. 1981).

173. *Id.* at 513-14.

174. *Id.* at 523.

175. *Id.* at 516.

176. *See, e.g.*, Tenneco, Inc. v. First Va. Bank of Tidewater, 678 F.2d 688, 689-90 (4th Cir. 1983); Citizens Bank of Ashburn v. Shingler, 173 Ga. App. 511, 511, 326 S.E.2d 861, 862 (1985).

177. Pub. L. No. 98-397, 98 Stat. 1426 (1984).

178. 26 U.S.C.A. §§ 401(a)(13)(B), 414(p) (West Supp. 1985); ERISA § 206(d)(2), 29 U.S.C.A. § 1056(d)(3) (West Supp. 1985).

179. ERISA § 514(b)(7), 29 U.S.C.A. § 1144(b)(7) (West Supp. 1985).

180. S. REP. No. 575, 98th Cong., 2d Sess. 19 (1984), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2547, 2565.

acting the elaborate provisions defining qualified domestic relations orders would be undermined if "unqualified" orders were not preempted.[181]

The inescapable conclusion is that Congress intended that ERISA preempt the state law of creditors' rights and that there be a per se exemption for ERISA retirement plans. There is no evidence that Congress supported the creation of federal common law to govern creditors' rights in the nonbankruptcy context.

2. *Conflict with the treatment of ERISA retirement plans in bankruptcy*— Under the legal standard recommended in Part I(A), ERISA retirement plans would only be excluded from the property of the estate if they are enforceable as spendthrift trusts under applicable state law. This legal standard creates an inconsistency between the treatment of ERISA plans in and outside of bankruptcy. In *Commercial Mortgage Insurance,*[182] the doctor was granted a per se exemption from garnishment in a nonbankruptcy proceeding, even though he owed a $250,000 judgment and held almost $100,000 in his plans.[183] In the bankruptcy context, however, the same plans would certainly be characterized as self-settled spendthrift trusts, and the entire fund would be included in the property of the estate and distributed to the creditors.[184]

There is no statement in either the legislative history of ERISA or the Bankruptcy Code that suggests Congress intended that creditors' rights to ERISA retirement plans should turn on the filing of a bankruptcy petition. Because bankruptcy is in some sense simply another creditors' remedy,[185] the inconsistency between the treatment of ERISA plans in bankruptcy and nonbankruptcy is troubling.[186] This inconsistency is not, how-

181. *See* 26 U.S.C.A. § 414(p) (West Supp. 1985); ERISA § 206(d)(3), 29 U.S.C.A. § 1056(d)(3) (West Supp. 1985).

182. *See supra* text accompanying notes 172-75.

183. *Commercial Mortgage Insurance,* 526 F. Supp. at 512-14.

184. *See supra* Part I(B)(2).

185. Three creditors can force a debtor into bankruptcy. *See* 11 U.S.C.A. § 303(b)(1) (West Supp. 1985).

186. *See* J. WHITE, *supra* note 153, at 508-09.

It has also been argued that different treatment in bankruptcy and nonbankruptcy would frustrate Congress's intent to establish uniform regulation of employee benefit plans. *See* Liscinski v. Mosley (*In re* Mosley), 42 Bankr. 181, 191 (Bankr. D.N.J. 1984) (Some courts have concluded that "although Congress had created a general federal exemption for pensions and eliminated the effect of state attachment and exemption statutes on pensions in 1974, Congress chose in the Bankruptcy Code of 1978 to revive the effect of state attachment and exemption statutes on pensions. This court finds this very unlikely in view of the great importance which the legislature had seen in relieving penever, so absurd[187] as to require a different result in either situation.[188]

It is unfortunate that there is not a rational explanation for the inconsistent treatment of ERISA plans. One suspects that Congress has never focused its attention on the problem, and that the bankruptcy and nonbankruptcy rules were developed in isolation from each other. If Congress were presented, for example, with *Commercial Mortgage Insurance*, the inequities of a per se exemption outside of bankruptcy would be readily appar-

---

sion plans from state regulation."); Note, *supra* note 156, at 706 (reliance on state spendthrift trust law to determine the property of the estate "contravenes, at least in spirit, ERISA's intended preemption of state law."). Congress's general intent to preempt all state law relating to pension plans should not, however, override Congress's specific intent to limit the exclusion of ERISA retirement plans in bankruptcy. *See supra* Part I(A).

187. Statutes should be construed so as to avoid "absurd" results. *See, e.g.* United States v. Turkette, 452 U.S. 576, 580 (1981); United States v. Brown, 333 U.S. 18, 27 (1948).

188. There are two possible explanations for the inconsistency between bankruptcy and nonbankruptcy treatment of ERISA retirement plans. First, both ERISA and bankruptcy are congressionally created rights, and each right is subject to certain restrictions. As one bankruptcy court has noted, "[i]t is neither illogical nor inequitable that Congress may require an otherwise nonassignable or nontransferable Congressionally created right to become an asset of the debtor's estate in order for the holder of that right to take advantage of another Congressionally created right—bankruptcy." Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434, 437 (Bankr. D. Kan. 1982), *rev'd*, 24 Bankr. 927 (D. Kan. 1982); *cf.* Kokoszka v. Belford, 417 U.S. 642 (1974) (not illogical that Consumer Credit Protection Act limits wage garnishment in the nonbankruptcy, but not bankruptcy, setting); *In re* Ridenour, 45 Bankr. 72, 78 (Bankr. E.D. Tenn. 1984); BANKRUPTCY COMM'N REPORT, *supra* note 45, at 197 (recommending that spendthrift trust provisions be enforceable in bankruptcy only to the extent reasonably necessary for support because "[t]here is no sound justification for permitting a debtor to take advantage of the Bankruptcy Act and, at the same time, to shield from his creditors assets because local law does not allow creditors to reach his interest.").

Second, ERISA itself resolves the conflict between its provisions and those of the Bankruptcy Code. Section 514(d) states: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1982). In light of the strong congressional policy of excluding from the property of the estate only those trusts that are enforceable spendthrift trusts, ERISA's assignment and alienation restrictions cannot be used to exclude from the property of the estate that which would otherwise be included. ERISA's exemption of plans from creditor process in the nonbankruptcy context should have no effect on the status of those plans in bankruptcy. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 588 n.38 (5th Cir. 1983); *In re* Ridenour, 45 Bankr. 72, 77-78 (Bankr. E.D. Tenn. 1984); Clotfelter v. Ciba-Geigy Corp. (*In re* Threewitt), 20 Bankr. 434, 437 (Bankr. D. Kan. 1982), *rev'd*, 24 Bankr. 927 (D. Kan. 1982); *In re* Berndt, 34 Bankr. 515, 518 (Bankr. N.D. Ind. 1983); Samore v. Graham (*In re* Graham), 24 Bankr. 305, 309 (Bankr. N.D. Iowa 1982), *aff'd*, 726 F.2d 1268, 1273 (8th Cir. 1984); Eisenberg v. Baviello (*In re* Baviello), 12 Bankr. 412, 417 (Bankr. E.D.N.Y. 1981) (Bankruptcy Act case); *cf.* National Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing and Sheet Metal, 655 F.2d 1218 (D.C. Cir. 1981) (Labor-Management Relations Act); Bonin v. American Airlines, 621 F.2d 635 (5th Cir. 1980) (Railway Labor Act).

ent.[189] Congress should act to remove the inconsistency between bankruptcy and nonbankruptcy treatment of ERISA retirement plans.

II. ERISA RETIREMENT PLANS AS EXEMPT FROM THE BANKRUPTCY ESTATE

If the debtor's interest in an ERISA retirement plan is included in the property of the bankruptcy estate, the debtor may nevertheless claim it as exempt. Under section 522, an individual debtor in a bankruptcy case is offered a choice between exemption systems. The debtor may choose the federal Code exemptions, which are specified in section 522(d)),[190] or he may choose the state and federal non-Code exemptions, which are a combination of state exemptions and federal exemptions outside of bankruptcy.[191] The federal non-Code exemptions are unavailable to a debtor who chooses the federal Code exemption scheme.[192] Also, the federal Code exemption scheme is unavailable to a debtor whose state has opted out of the federal scheme.[193] The debtor may, of course, claim the federal non-Code exemptions even in those states that have opted out.[194]

The applicability of the federal Code exemptions to ERISA retirement plans is discussed in Part II(B). Part II(A) discusses whether such plans are exempt under the federal non-Code exemptions, and it is concluded that they are not exempt. A debtor who seeks to exempt an interest in an ERISA retirement

189. *See, e.g., supra* notes 90-91 and accompanying text.

190. 11 U.C.S.A. § 522(b)(1), (d) (West Supp. 1985).

191. 11 U.S.C.A. § 522(b)(2) (West Supp. 1985).

192. *See In re* Kochell, 732 F.2d 564, 566 (7th Cir. 1984); S. REP. No. 989, *supra* note 17, at 75, *reprinted in* 1978 CODE CONG. & AD. NEWS, at 5861; H.R. REP. No. 595, *supra* note 17, at 360, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6316; 11 U.S.C.A. § 522(b) (West Supp. 1985) (debtor may claim exemptions under subsection (d), or "in the alternative," exemptions under state and federal non-Code law). *But see* Goff v. Taylor (*In re* Goff), 706 F.2d 547, 582 n.22 (5th Cir. 1983) (dictum) ("both federal and state electors are granted the exemption benefits of these [federal non-Code] laws").

193. 11 U.S.C.A.. § 522(b)(1) (West Supp. 1985); 3 L. KING, *supra* note 16, at § 522.02.

194. 11 U.S.C.A. § 522(b)(2)(A) (West Supp. 1985) (in states that have opted out of the federal exemption scheme, debtors may exempt "any property that is exempt under Federal law, other than subsection (d) of this section, *or* State *or* local law . . .") (emphasis added); 3 L. KING, *supra* note 16, at § 522.21; Goff v. Taylor (*In re* Goff), 706 F.2d 574, 579 n.12 (5th Cir. 1983). *But see* Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916, 923 (Bankr. N.D. Ill. 1983) (implying that because Illinois has opted out of the federal scheme, the federal non-Code exemptions are not available to the debtor).

plan under the state and federal non-Code exemption system must employ a state law exemption.[195]

A. *ERISA Retirement Plans As Exempt Under "Federal [Nonbankruptcy] Law"*

Under section 522(b)(2)(A), the debtor who chooses the state and federal non-Code exemptions may exempt from the property of the estate "any property that is exempt under Federal law, other than subsection (d) of this section [(the federal Code exemptions)], or State or local law that is applicable . . . ."[196] If ERISA is a "Federal [nonbankruptcy] law" within the meaning of section 522(b)(2)(A), then all ERISA retirement plans would presumably be exempt from the bankruptcy estate. The majority of the few courts that have considered whether ERISA is such a federal nonbankruptcy law have concluded that it is not.[197] This result is consistent with the legislative history and policies of the Code.

1. The statutory language— The language of section 522(b)(2)(A) is cryptic. It allows a debtor to exempt from the bankruptcy estate property that is "exempt" under federal nonbankruptcy law. The obvious question is, "Exempt from what?" The section could be referring to federal laws that exempt property from the claims of: both the trustee in bankruptcy and the creditors outside of bankruptcy; just the trustee; just the creditors; or either the trustee or the creditors.[198] If the

195. Several states exempt private retirement plans. *See, e.g.* CAL. CIV. PROC. CODE § 704.115 (West Supp. 1985); ILL. ANN. STAT., ch. 110, § 12-1001 (Smith-Hurd Supp. 1985); N.Y. DEBT. & CRED. LAW § 282 (McKinney Supp. 1984-1985); 42 PA. CONS. STAT. ANN. § 8124 (Purdon Supp. 1985); *see generally* 7 L. KING, *supra* note 16.

196. 11 U.S.C.A. § 522(b)(2)(A) (West Supp. 1985).

197. *See* Daniel v. Security Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352 (9th Cir. 1985); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488 (11th Cir. 1985); Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983); Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 Bankr. 67 (Bankr. E.D. Va. 1985); *In re* Gillett, 46 Bankr. 642 (Bankr. S.D. Fla. 1985); Rodgers v. Norman (*In re* Crenshaw), 44 Bankr. 30 (Bankr. N.D. Ala. 1984), *rev'd on other grounds*, 51 Bankr. 554 (N.D. Ala. 1985); Nixon v. P.J. Pedone & Co. (*In re* Nichols), 42 Bankr. 772 (Bankr. M.D. Fla. 1984); *In re* La Fata, 41 Bankr. 842 (Bankr. E.D. Mich. 1984); Samore v. Graham (*In re* Graham), 24 Bankr. 305 (Bankr. N.D. Iowa 1982), *aff'd*, 726 F.2d 1268 (8th Cir. 1984); Note, *supra* note 31, at 1129-31. *Contra* Barr v. Hinshaw (*In re* Hinshaw), 23 Bankr. 233 (Bankr. D. Kan. 1982); Note, *supra* note 8; Comment, *supra* note 31, at 1070-71.

198. The legislative history implies that the last interpretation was intended. The House and Senate committee reports list a number of illustrative federal statutes thought to fall within § 522(b)(2)(A). *See infra* notes 202, 208. These statutes typically provide that certain property shall not be subject to execution, levy, attachment, gar-

section refers to only those federal nonbankruptcy statutes that specifically state that the funds may not be reached by the trustee in bankruptcy, the section would not apply to ERISA. ERISA's assignment and alienation restrictions make no mention of bankruptcy or insolvency law.[199]

Apart from the ambiguities of the Bankruptcy Code, there are indications in the text of ERISA itself that suggest that it was not intended to create an exemption under section 522(b)(2)(A). ERISA provides that it should not be construed to "alter, amend, modify, invalidate, impair or supersede" any other federal law.[200] If ERISA is construed to be a federal nonbankruptcy law within the meaning of section 522(b)(2)(A), it would have the effect of modifying the set of exemptions already established by the Bankruptcy Code. By ERISA's own terms, this construction must be avoided.

Although the statutory language of the Code and ERISA support the conclusion that ERISA is not a federal nonbankruptcy law under section 522(b)(2)(A), there is sufficient ambiguity about this issue that it is appropriate to examine the legislative history of section 522(b)(2)(A).[201]

2. *The legislative history of section 522(b)(2)(A)*— The legislative history of section 522(b)(2)(A) reveals that Congress intended that ERISA not create a federal nonbankruptcy law exemption. ERISA is noticeably absent from a list of illustrative statutes contained in the legislative history. In addition, ERISA is substantively very different from the narrow class of statutes included in the list. Congress appears to have made a conscious decision to exclude ERISA from section 522(b)(2)(A).

a. *The failure to list ERISA as an illustrative statute*— The House and Senate reports list a number of federal statutes that Congress intended to include within section 522(b)(2)(A).[202]

---

nishment, or other legal process. *See, e.g.*, 22 U.S.C. § 4060 (1982) (Foreign Service Retirement and Disability Benefits). Two of these statutes, however, explicitly exempt property from, among other things, "the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407 (1982) (social security payments); 42 U.S.C. § 1717 (1982) (injury or death compensation from war risk hazards). *See In re* Stewart, 32 Bankr. 132, 138 (Bankr. D. Utah 1983).

199. *See supra* notes 7-8.

200. ERISA § 514(d), 29 U.S.C. § 1144(d) (1982); *see supra* note 188.

201. *See supra* note 40 and accompanying text.

202. According to the House report:

[S]ome of the items that may be exempted under other Federal laws include:
— Foreign Service Retirement and Disability payments, 22 U.S.C. § 1104;
— Social security payments, 42 U.S.C. § 407;
— Illness or death compensation payments from war risk hazards, 42 U.S.C. § 1717;

ERISA is absent from these lists. Although the lists were not intended to be exclusive,[203] there are a number of reasons to believe that Congress's failure to include ERISA demonstrates its intent that ERISA was not within the federal non-Code exemptions.

ERISA was enacted in 1974. It imposed comprehensive regulation on private employee benefit plans and was subject to a great deal of congressional and public debate.[204] The new Bankruptcy Code, including section 522(b)(2)(A), was enacted only four years later. Congress was undoubtedly aware of ERISA and its provisions because, in another subsection of section 522 of the Code, Congress specifically referred to ERISA.[205]

Congress could not have simply forgotten to mention ERISA in the illustrative list of statutes.[206] As one court has indicated, "Given the extensive and general reach of ERISA-qualified plans, it is highly improbable that Congress intended their inclusion without mention in the section 522(b)(2)(A) exemption in the midst of a listing of significantly less well-known statutes."[207]

— Wages of fishermen, seamen, and apprentices, 46 U.S.C. § 601;
— Civil Service retirement benefits, 5 U.S.C. §§ 729, 2265;
— Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. § 916;
— Railroad Retirement Act annuities and pensions, 45 U.S.C. § 228(L);
— Veterans benefits, 45 U.S.C.. § 352(E) [38 U.S.C. § 770(b)];
— Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. § 3101; and
— Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. § 1755.

H.R. REP. No. 595, *supra* note 17, at 360, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6316; *see* S. REP. No. 989, *supra* note 17, at 75, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 5861.

203. *See* H.R. REP. No. 595, *supra* note 17, at 360, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6316 ("*some* of the items that may be exempted . . . include") (emphasis added).

204. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981); Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1983).

205. *See* 11 U.S.C. § 522(d)(10)(E) (iii) (1982) (cited *infra* note 220); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Goff v. Taylor (*In re* Goff), 706 F.2d at 574, 585 (5th Cir. 1983); *see also* H.R. REP. No. 595, *supra* note 17, at 455, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6411.

206. One commentator has pointed to citation errors in the illustrative list of statutes as evidence that "the list was not painstakingly drafted," and that "Congress overlooked [ERISA]." Note, *supra* note 8, at 223. The citation errors are minor, however, and do not adequately explain the complete absence of a statute as important as ERISA. *See infra* note 207 and accompanying text.

207. Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1983); *see also* Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Rodgers v.

b. Dissimilarity between ERISA and the listed statutes— Further evidence that Congress did not intend that ERISA be included within the "federal [nonbankruptcy] law[s]" specified in section 522(b)(2)(A) is the dissimilarity between ERISA and the statutes listed in the legislative history. Specifically, ERISA differs from the listed statutes in the type of property exempted from the creditor process.[208] Although the statutes all refer to

---

Norman (*In re* Crenshaw), 44 Bankr. 30, 33 (Bankr. N.D. Ala. 1984), *rev'd on other grounds*, 51 Bankr. 554 (N.D. Ala. 1985); Samore v. Graham (*In re* Graham), 24 Bankr. 305, 311-12 (Bankr. N.D. Iowa 1982), *aff'd*, 726 F.2d 1268, 1274 (8th Cir. 1984). In one bankruptcy court case, *In re* La Fata, 41 Bankr. 842 (Bankr. E.D. Mich. 1984), the court remarked that *Goff* and *Graham* "have relied heavily upon Congress' failure to specify ERISA plans as falling within property exempt under federal law. Too much reliance has been placed upon that congressional silence." *Id.* at 843. The court ultimately ruled, however, that ERISA is not a federal nonbankruptcy exemption statute within the meaning of § 522(b)(2)(A). The court felt constrained by the two court of appeals decisions. *See id.* at 843.

208. Courts and litigants have suggested four other ways in which ERISA is different from the listed statutes, but none is particularly persuasive. First, one court has argued that ERISA only requires that plans include the alienation and assignment restrictions in ERISA retirement plans. The listed statutes, in contrast, directly preclude assignment and alienation as a matter of federal law. *See* Samore v. Graham (*In re* Graham), 24 Bankr. 305, 312 (Bankr. N.D. Iowa 1982), *aff'd*, 726 F.2d 1268 (8th Cir. 1984); *see also supra* Part I(D). The relevant language from each of the statutes listed in the legislative history is as follows: 22 U.S.C. § 1104 (now codified at 22 U.S.C. § 4060 (1982)) ("None of the moneys . . . shall be assignable . . . or subject to execution, levy, attachment, garnishment, or other legal process . . ."); 42 U.S.C. § 407 (1982) ("The right . . . to any future payment . . . shall not be transferable or assignable . . . and none of the moneys . . . shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."); 42 U.S.C. § 1717 (1982) (same wording); 46 U.S.C. § 601 ("No wages . . . shall be subject to attachment . . ."); 5 U.S.C. §§ 729, 2265 (now codified at 5 U.S.C. § 8346 (1982)) ("The money [covered herein] is not assignable . . . or subject to execution, levy, attachment, garnishment, or other legal process . . ."); 33 U.S.C. § 916 (1982) ("No assignment, release, or commutation of compensation or benefits . . . shall be valid, and such compensation or benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt . . ."); 45 U.S.C. § 228(*l*) (now codified at 45 U.S.C. § 231m (1982)) ("Notwithstanding any other [federal or state law], no annuity or pension payment shall be assignable or be subject to . . . garnishment, attachment, or other legal process under any circumstances whatsoever . . ."); 45 U.S.C. § 352(e) (1982) (same wording); 38 U.S.C. § 3101 (1982) ("Payment of benefits . . . shall not be assignable . . . and . . . shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever . . . ."); 43 U.S.C. § 175 (repealed 1976) ("No [homestead] lands . . . shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of a patent therefor.").

The argument advanced by the *Graham* bankruptcy court fails to recognize the ERISA provisions are intended to preempt the state law of creditors' rights applicable to employee benefit plans. *See supra* Part I(D). ERISA, therefore, has *the effect* of directly precluding assignment and alienation and is indistinguishable from the listed statutes in that regard. *See* Liscinski v. Mosley (*In re* Mosley), 42 Bankr. 181, 189 (Bankr. D.N.J. 1984).

Second, some litigants have apparently suggested that ERISA differs from the listed pensions, wages, and benefits, ERISA alone relates to *private* pension benefits. The listed statutes, in contrast, deal with publicly funded or created pension and welfare systems, and a few industries the federal government traditionally protects.[209] This suggests that Congress did not intend to exempt private pension plan benefits, such as ERISA benefits, from the creditors in bankruptcy.

Congress's intent to exempt only publicly funded or created pension and welfare systems, as revealed by the illustrative list of statutes, is consistent with the practice of the majority of the states. Roughly thirty states have enacted statutes that exempt public employee retirement systems from the claims of the beneficiary's creditors, without also enacting statutes exempting private retirement benefits.[210] The rationale for this distinction is that future pension payments from a public retirement system "are not vested contractual rights but mere bounties conferred out of gratitude by a benevolent government, subject to reduc-

---

statutes in the explicitness with which they prohibit creditor process. ERISA, although less explicit than some of the listed statutes, is more explicit than others. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 n.28 (5th Cir. 1983); Barr v. Hinshaw (*In re* Hinshaw), 23 Bankr. 233, 235 (Bankr. D. Kan. 1982). *Compare* ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1982) ("Each [ERISA] pension plan shall provide that benefits provided under the plan may not be assigned or alienated.") *with* 46 U.S.C. § 601 (1982) ("No wages [of fishermen, seamen or apprentices] . . . shall be subject to attachment . . . .").

Third, it has been suggested that ERISA merely "encourages" the inclusion of the "no assignment or alienation" clauses, while the listed statutes directly preclude assignment and alienation. *See* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1983). This is factually incorrect, however, because ERISA requires that all employers and employee organizations operating in interstate commerce must include these clauses in their employee pension plans, unless the plan is established by a self-employed individual who has no employees. *See supra* notes 6-10 and accompanying text.

Finally, one court has argued that the listed statutes exempt only *present* periodic payments and that ERISA differs because it exempts *future* payments. *See* Parkinson v. Bradford Trust Co. (*In re* O'Brien), 50 Bankr. 67, 79 (Bankr. E.D. Va. 1985). The court's distinction is invalid because one of the listed statutes expressly exempts both present and future payments. *See* 42 U.S.C. § 407 (1982):

> The right of any person to any future payment [of social security benefits] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

209. *See* Lichstrahl v. Bankers (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1274 (8th Cir. 1984); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 586 & nn.31-32.

210. *See* 7 L. KING, *supra* note 16, *passim* (Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Kansas, Kentucky, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming).

tion or abolition by subsequent legislation."[211] As a result, creditors have no right to complain if the state or Congress chooses to exempt the benefits from the creditors' claims in bankruptcy. In contrast, "[p]rivate pension plans for employees more often have a contractual base."[212] Congress and the majority of states have decided that, unlike the case of public employee pensions, it would be unfair to deny the creditors a share of the private pension benefits, because the benefits are more clearly a vested property interest of the debtor.[213]

Although the language and legislative history of section 522(b)(2)(A) demonstrate that Congress did not intend to include ERISA as an exempting statute, this conclusion is strengthened by an examination of the policies of the Bankruptcy Code.

3. *The policies of the Bankruptcy Code*— The debtor who chooses the federal exemption scheme discussed in Part II(B) can only exempt his interest in a retirement plan to the extent "reasonably necessary for the support of the debtor."[214] Congress included this limitation "because of the well-known fact that a corporate officer or a member of a professional corporation may be entitled to vested pension benefits aggregating hundreds of thousands of dollars."[215]

If section 522(b)(2)(A) is construed to include ERISA, a debtor who chooses the state and federal non-Code exemption scheme would be able to exempt all the funds in any ERISA retirement plan, without limitation.[216] It is illogical to suppose that Congress, after making a deliberate policy choice to limit the exemption of private retirement benefits under the federal exemption scheme, would simultaneously grant an unlimited exemption under the state and federal non-Code exemption scheme.[217] It is more likely that Congress intended that the

---

211. Plumb, *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 VA. L. REV. 1, 54-55 (1975); *see also* 4A J. MOORE, COLLIER ON BANKRUPTCY § 70.22[2] (14th ed. 1978).

212. Plumb, *supra* note 211, at 55.

213. *But see* Note, *supra* note 8, at 231-33; Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS 678, 740 (1960) (discussing § 6 of the Bankruptcy Act, which is similar too § 522(bb)(2)(A) of the new Code).

214. 11 U.S.C. § 522(d)(10)(E) (1982); *see infra* note 220.

215. Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1272 (8th Cir. 1984); *see* Plumb, *supra* note 211, at 59.

216. *Cf. In re* La Fata, 41 Bankr. 842, 844 (Bankr. E.D. Mich. 1984) (implying that there is presently no "reasonably necessary for support limitation" on § 522(b)(2)(A) elections).

217. One may argue that the unlimited exemption of benefits under other federal laws besides ERISA, *see supra* note 202, is equally inconsistent with Congress's intent to

states would provide an exemption to the extent they thought appropriate.[218]

In summary, Congress did not intend that a debtor who chooses the state and federal non-Code exemption system should be able to exempt his interest in an ERISA retirement plan under the federal nonbankruptcy law exemption. He should only be permitted to exempt his interest to the extent that it is exempt under applicable state or local law.[219]

B. *ERISA Retirement Plans as Exempt to the Extent Reasonably Necessary for the Support of the Debtor*

If the debtor chooses the federal Code exemption scheme, he may exempt his "right to receive . . . 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" under section 522(d)(10)(E).[220] Three issues are presented when a debtor seeks

---

limit benefits to the extent reasonably necessary for support. There is no reason to believe, however, that the federal welfare and pension benefits provided under the statutes listed in the legislative history are in any way excessive. These benefits would surely never reach "hundreds of thousands of dollars."

218. An unlimited exemption for ERISA retirement plan benefits under § 522(b)(2)(A) would also be inconsistent with the general purpose of the bankruptcy exemptions. The exemptions are designed to leave the debtor with just enough assets to make a fresh start, so that he is not left destitute after bankruptcy. *See, e.g., In re* Richard Clark, 18 Bankr. 824, 828 (Bankr. E.D. Tenn. 1982); Warren v. Taff (*In re* Taff), 10 Bankr. 101, 106 (Bankr. D. Conn. 1981). In light of these purposes, it is difficult to believe that Congress intended to grant an automatic exemption for retirement plans that could hold several hundred thousand dollars.

219. *See supra* note 195.

220. 11 U.S.C. § 522(d)(10)(E) (1982). This section reads in relevant part:

> (d) The following property may be exempted under subsection (b)(1) of this section:
>
> . . . .
>
> (10) The debtor's right to receive—
>
> . . . .
>
> (E) 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—
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
> (ii) such payment is on account of age or length of service; and
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1954 (26 U.S.C.

to apply this exemption to his interest in an ERISA retirement plan. First, if the debtor is not presently receiving payments from the plan on the date of the bankruptcy petition, some courts have contended that he has no "right to receive a payment" and therefore may not exempt any part of his interest. Second, if the debtor has a right to receive a payment, the court must determine whether the payment is "under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service." Third, the court must undertake the difficult task of determining what is "reasonably necessary for the support" of the debtor and his dependents.

1. The debtor's right to receive a payment— If a benefit is currently in pay status under an ERISA retirement plan, or the debtor has received plan benefits prior to the filing of the petition, then he clearly has a "right to receive a payment." The courts have agreed that the debtor may exempt both the present payment stream[221] and any prior disbursement,[222] subject only to the "reasonably necessary for support" limitation.

When a benefit is not in pay status and the debtor is not seeking an exemption for a prior disbursement, several courts have held that the debtor's future right to receive payments from a retirement plan is not exempt under section 522(d)(10)(E), even

§§ 401(a), 403(b), 408, or 409).

221. *See In re* Bari, 43 Bankr. 253 (Bankr. D. Minn. 1985) (disability income; Minnesota exemptions analogous to § 522(d)(10)(E)); Warren v. Taff (*In re* Taff), 10 Bankr. 101 (Bankr. D. Conn. 1981) (retiree's pension payments are exempt, but only to the extent reasonably necessary for support); *cf.* Clark v. O'Neill (*In re* Robert Clark), 711 F.2d 21, 23 (3d Cir. 1983) (dictum) ("The exemption of present Keogh payments, to the extent they are necessary for the support of the debtor, is consistent with [Congress's goal of giving debtors a fresh start].").

222. *See In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981). A retired debtor received a lump-sum distribution from a pension fund three weeks before filing bankruptcy petition. Although the debtor no longer had a "right to receive a payment," the court held that "[t]he identifiable sum . . . is a tangible reflection of 'the debtor's right to receive . . . a payment' " within the language and spirit of § 522(d)(10)(E). *Id.* at 680. No court has addressed the *Donaghy* holding, but it would appear to be inconsistent with Congress's exemption, in another subsection of § 522(d), of "the debtor's right to receive, *or property that is traceable to*" various other payments. 11 U.S.C. § 522(d)(11) (1982) (emphasis added). Congress's failure to use this phrase in § 522(d)(10)(E) suggests that traceable retirement benefits already paid to the debtor could not be exempted. *See* Plumb, *supra* note 211, at 558 (exemption for "rights . . . under a . . . plan," rather than "benefits" suggests that it "will not exempt any pension payments or lump sum distributions already in the hands of the debtor"); Vukowich, *Debtor's Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C.L. REV. 769, 778 (1980) (same). *But see* Dunham, *Tracing the Proceeds of Exempt Assets in Bankruptcy and Nonbankruptcy Cases*, 1978 S. ILL. U.L.J. 317, 343.

though it may be reasonably necessary for his support.[223] These courts have offered two arguments to justify this result, but neither is persuasive.

First, the courts have relied on the "literal" language of section 522(d)(10)(E). Because the debtor does not, on the date of the petition, have an unrestricted right[224] to receive payments from the plan, he cannot claim an exemption for a "right to receive payments," which is interpreted by these courts as encompassing only present rights to payment.[225] The statutory language, however, is broad enough to cover both present and future interests. The debtor's right to receive payment in the future, whether vested or contingent, is a right that has a present existence. The enjoyment of the right is merely postponed.[226] Therefore, a debtor has a "right to receive a payment" within the literal terms of section 522(d)(10)(E) even though the benefit is not in pay status.

---

223. A number of courts have held that a debtor who does not have an *unrestricted* right to compel payment under an ERISA retirement plan on the date of the petition may not claim an exemption for his interest under § 522(d)(10)(E). *See* Clark v. O'Neill (*In re* Robert Clark), 711 F.2d 21 (3d Cir. 1983) (Keogh plan, 10% penalty tax for premature distributions); *In re* Richard Clark, 18 Bankr. 824 (Bankr. E.D. Tenn. 1982) (same); *cf.* Hovis v. Lowe (*In re* Lowe), 25 Bankr. 86 (Bankr. D.S.C. 1982) (IRA fund, 10% penalty tax for premature distributions) (interpreting South Carolina exemption similar to § 522(d)(10)(E)).

The majority of courts have, however, ignored the issue. These courts have examined plans in light of the "reasonably necessary for support" limitation, even though the benefit was not in pay status. *See In re* Kochell, 732 F.2d 564 (7th Cir. 1984); *In re* Grant, 40 Bankr. 612 (Bankr. N.D. Tex. 1984); *In re* Sheridan, 38 Bankr. 52 (Bankr. D. Vt. 1983); *In re* Johnson, 36 Bankr. 54 (Bankr. D.N.M. 1984); *In re* Kenneth Miller, 33 Bankr. 549 (Bankr. D. Minn. 1983).

224. Two courts have held that a 10% tax penalty for a withdrawal of funds prior to retirement supports a finding that the debtor does not have a "right to receive a payment" from the plan. *See* Clark v. O'Neill (*In re* Robert Clark), 711 F.2d 21 (3d Cir. 1983) (Keogh plan); Hovis v. Lowe (*In re* Lowe), 25 Bankr. 86, 88 (Bankr. D.S.C. 1982) (interpreting South Carolina exemption similar to § 522(d)(10)(E)). *But see* Comment, *Bankruptcy—Section 522(d)(10)(E),* 29 VILL. L. REV. 831, 852 (1984) (financial penalty does not affect right to receive payment).

225. *See* Clark v. O'Neill (*In re* Robert Clark), 711 F.2d 21, 22 (3d Cir. 1983) (bankruptcy court below held that because the debtor does not have a present right to receive payments from his Keogh plan, "his exemption claim did not fall within the literal terms of section 522(d)(10)(E)"); *In re* Richard Clark, 18 Bankr. 824, 829 (Bankr. E.D. Tenn. 1982) ("At the present time [the debtor] is receiving no payments under the plan. Thus, the court is not required to determine whether payments are 'necessary for the support of the debtor.' "); *cf.* Hovis v. Lowe (*In re* Lowe), 25 Bankr. 86, 88 (Bankr. D.S.C. 1982) (intepreting South Carolina exemption similar to § 522(d)(10)(E)) ("As [the debtor] was due no payment from the I.R.A. as of the moment of filing his petition for relief, he is provided no exemption . . . in the funds in the account."). There is some support in the legislative history for this literal reading of § 522(d)(10)(E). *See Clark v. O'Neill,* 711 F.2d at 24 (Beccker, J., concurring).

226. *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 65 (2d ed. 1956).

Second, the courts have argued that the policies of section 522(d)(10)(E) would be frustrated if it exempted future benefit payments to a debtor whose benefits are not presently in pay status. The purpose of section 522(d) is said to provide the debtor with a "fresh start," and to alleviate present rather than long-term need.[227] If the benefit is not in pay status, one court has held, "the exemption of *future* payments . . . demonstrates a concern for the debtor's long-term security which is absent from the statute."[228]

Assuming, arguendo, that Congress was concerned only with the debtor's present needs, the bright-line "pay status" test adopted by these courts could frustrate that purpose. If a debtor, not in pay status, filed a bankruptcy petition a few days before his benefit was to enter pay status, the debtor's "future" right to payment may be absolutely necessary to provide for what are in essence "present needs" and a fresh start. The approach that would best implement Congress's intent would be to allow the debtor to exempt his interest in an ERISA retirement plan, whether the benefit is in pay status or not. Then if the benefit is not in pay status, that could be used as a factor in determining whether the benefits are "reasonably necessary for his support."[229]

The courts should therefore adopt the rule that a debtor may exempt his "right to receive a payment" under his retirement plan, whether the benefit is in pay status or not. The issue is then what exactly the debtor may exempt. Section 522(d)(10)(E) refers to a "payment." There is some authority for the proposition that the debtor may exempt *only* the payment stream, and not the principal.[230] The better view is that both periodic pay-

227. *See* Clark v. O'Neill (*In re* Robert Clark), 711 F.2d 21, 23 (3d Cir. 1983); *In re* Richard Clark, 18 Bankr. 824, 828-29 (Bankr. E.D. Tenn. 1982).

228. Clark v. O'Neill (*In re* Robert Clark), 711 F.2d 21, 23 (3d Cir. 1983) (emphasis in original).

229. *See supra* note 226 and accompanying text.

230. *Cf. In re* Kitson, 3 BANKR. L. REP. (CCH) § 70,120 at 86,084 (Bankr. C.D. Ill. Oct. 5, 1984) (interpreting an Illinois exemption for the debtor's right to receive "a payment under any pension plans") ("[T]he 'payment' is what can be exempt, not the asset itself . . . . There is no provision in the Illinois law . . . for the exemption of the entire asset [an IRA]."). *Kitson* is questionable authority, however. The debtor was not due to receive a disbursement from his IRA, so the case is identical to the "pay status" cases criticized *supra* notes 223-29 and accompanying text. In addition, the *Kitson* court cited Hovis v. Lowe (*In re* Lowe), 25 Bankr. 86 (Bankr. D.S.C. 1982), *see* 3 BANKR. L. REP. (CCH) at 86,084, which was clearly decided under the "pay status" rationale. *See supra* note 223. It is possible, therefore, that the court believed the IRA was not exempt because the debtor had no "right to receive" a payment, rather than because the debtor was requesting exemption of an "asset," not a "payment."

ments and principal are exempt to the extent reasonably necessary for support. The principal of the retirement plan will eventually be distributed in the form of "payments," either periodically or in a lump sum, during the plan participant's retirement. Therefore, the entire asset must be exempt in order to exempt the "payments."

2. *The nature of the retirement plan*— To qualify for the exemption under section 522(d)(10)(E), the debtor's right to receive a payment must be "under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service."[231] The legislative history of section 522(d)(10)(E) refers to "benefits akin to the future earnings of the debtor."[232] One court has held that the exemption does not apply to a retirement plan that does not have stringent restrictions on withdrawal before retirement.[233] Because there was no guarantee that the funds would be used solely for retirement purposes, the court denied the exemption because the funds were not "akin to future earnings."

A rule that denies a debtor the section 522(d)(10)(E) exemption for retirement plans from which he has a present right to withdraw funds would mean that Individual Retirement Accounts (IRAs)[234] would never be exempt in bankruptcy under the federal Code exemptions.[235] This result is, however, difficult to square with the statutory language. Section 522(d)(10)(E) provides that the retirement plan exemption will not apply when, among other things, the plan does not meet the require-

---

231. 11 U.S.C. § 522(d)(10)(E) (1982).

232. H.R. REP. No. 595, *supra* note 17, at 362, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6318.

233. *See In re* Pauquette, 38 Bankr. 170, 174 (Bankr. D. Vt. 1984) (Individual Retirement Annuities) ("[W]here account funds may be withdrawn at any time by the contract holder, even if any early assessment is an incident of the early withdrawal, the courts have unanimously rejected a claim of exemption under § 522(d)(10)(E)."). Of the seven cases cited for this "unanimous" proposition, five did not even involve § 522(d)(10)(E). *See In re* Berndt, 34 Bankr. 515 (Bankr. N.D. Ind. 1983); *In re* Howerton, 21 Bankr. 621 (Bankr. N.D. Tex. 1982); *In re* Talbert, 15 Bankr. 536 (Bankr. W.D. La. 1981); *In re* Macee, 4 BANKR. CT. DEC. (CRR) 94 (Bankr. D. Ore. 1978); *In re* Brown, 2 BANKR. CT. DEC. (CRR) 1661 (Bankr. S.D. Ohio 1976). In the other two cases, Clark v. O'Neill (*In re* Robert Clark), 711 F.2d 21 (3d Cir. 1983), and Hovis v. Lowe (*In re* Lowe), 25 Bankr. 86 (Bankr. D.S.C. 1982), the courts held § 522(d)(10)(E) to be inapplicable to the retirement plan because the debtors had *insignificant*, rather than *excessive*, control over the plan funds. *See supra* note 223 and accompanying text.

234. *See supra* note 11. The textual discussion of IRAs is equally applicable to Individual Retirement Annuities (IRANs).

235. IRAs permit withdrawal of funds prior to age 59½ for any reason, subject only to a 10% tax penalty. *See* 26 U.S.C. § 408(f) (1982).

ments of an IRA.[236] If Congress had intended that IRAs would never be exempt, it would be superfluous to require, as a condition for disqualification from the exemption, that the plan not be an IRA.[237]

As in the case of the pay status test, this "access and control" test adopted by the court draws an inappropriately bright line for application of the section 522(d)(10)(E) exemption. A debtor may file a bankruptcy petition a few days before retirement, and his only retirement funds may be his IRA and social security. Although he may "withdraw funds at any time before retirement" and "there is no guarantee these funds will actually be available for retirement purposes," that line of reasoning ignores the reality of the situation. The better view is that if the debtor has an interest in a retirement plan, that interest should be exempt to the extent reasonably necessary for support.[238] If the retirement plan permits withdrawals before retirement and there is little likelihood that the funds will actually be used for the debtor's support, the court should consider these facts in determining whether the funds are reasonably necessary for support.

3. *Benefits reasonably necessary for the support of the debtor*— Section 522(d)(10)(E) limits the exemption for payments under a retirement plan to the extent "reasonably necessary for the support of the debtor and any dependent of the debtor."[239] Neither the Code nor the legislative history[240] defines this phrase;[241] the courts have defined it on a case-by-case

---

236. *See supra* note 220. The reference to I.R.C. § 408 is the authorization for IRAs and IRANs.

237. *Cf. supra* text accompanying notes 64-69.

238. *See In re* Worthington, 28 Bankr. 736, 739 (Bankr. W.D. Ky. 1983) (interpreting a Kentucky exemption analogous to § 522(d)(10)(E)).

239. 11 U.S.C. § 522(d)(10)(E) (1982).

240. The legislative history gives a general description of the purpose of the Code's exemptions:

> The historical purpose of . . . exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. [This] purpose has not changed . . . .

H.R. REP. No. 595, *supra* note 17, at 126, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 5963, 6087; *see also supra* note 218.

The "reasonably necessary for support" limitation in § 522(d)(10)(E) was apparently included because corporate executives and those in professional corporations might accrue huge pension benefits, amounting to several hundred thousand dollars. *See* Plumb, *supra* note 211, at 59.

241. The exemptions listed in § 522(d) were derived in large part from the Uniform Exemptions Act. *See* H.R. REP. No. 595, *supra* note 17, at 361, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, at 6317. Section 6(b) of the Uniform Exemptions Act defined the phrase "property to the extent reasonably necessary for the support of [the debtor]

basis.[242]

The courts have generally agreed that they must consider both the needs of the debtor at the time of the filing of the petition and his anticipated future needs.[243] It is not, however, appropriate to consider all possible future contingencies that might befall the debtor.[244]

A number of factors affect whether a retirement plan is reasonably necessary for the support of the debtor.[245] These include: the debtor's age, health, other sources of income, ability to reestablish a retirement fund, and whether the debtor is presently receiving disbursements from the plan.[246]

---

and his dependents" to mean: "property required to meet the present and anticipated needs of the individual and his dependents as determined by the court after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual including that which is exempt." Uniform Exemptions Act § 6(b), 13 U.L.A. 365, 382 (1980). The Comment to section 6(b) states:

> [T]he definition requires the court to direct its attention to the individual's needs and responsibilities, including particularly those that may be attributable to the disability, illness, or injury on the basis of which benefits became payable, foreseeable responsibilities for dependents, and the need for providing subsistence for an individual who has reached a mandatory retirement age.

Id. at 384.

242. *See, e.g.*, Warren v. Taff (*In re* Taff), 10 Bankr. 101, 106 (Bankr. D. Conn. 1981).

243. *See In re* Kochell, 732 F.2d 564, 566 (7th Cir. 1984); *In re* Rosen, 52 Bankr. 96, 98 (Bankr. D. Minn. 1985) (interpreting Minnesota provision identical to § 522(d)(10)(E)); *In re* Grant, 40 Bankr. 612, 613 (Bankr. N.D. Tex. 1984); *In re* Sheridan, 38 Bankr. 52, 57 (Bankr. D. Vt. 1983); *In re* Kenneth Miller, 33 Bankr. 549, 552 (Bankr. D. Minn. 1983); *supra* note 241.

244. *See In re* Kochell, 26 Bankr. 86, 87 (Bankr. W.D. Wis. 1982) (court rejecting argument by 44-year-old debtor in good health that in the event of his death or disability he would be unable to provide for his children's education without his retirement fund), *aff'd*, 31 Bankr. 139 (W.D. Wis. 1983), *aff'd*, 732 F.2d 564 (7th Cir. 1984).

245. In Warren v. Taff (*In re* Taff), 10 Bankr. 101 (Bankr. D. Conn. 1981), the court stated the standard that has received general acceptance by the bankruptcy courts:

> [T]he reasonably necessary standard requires that the court take into account other income and exempt property of the debtor, present and anticipated, . . . and that the appropriate amount to be set aside for the debtor ought to be sufficient to sustain basic needs, not related to his former status in society or the lifestyle to which he is accustomed but taking into account the special needs that a retired and elderly debtor may claim.

Id. at 107.

246. The decision on whether a retirement benefit is reasonably necessary for support is highly fact-specific. In the following cases, the courts mentioned certain important factors: *In re* Kochell, 26 Bankr. 86 (Bankr. W.D. Wis. 1982), *aff'd*, 31 Bankr. 139 (W.D. Wis. 1983), *aff'd*, 732 F.2d 564 (7th Cir. 1984) (relatively young debtor, age 44; good health; income exceeds expenses; retirement fund could easily be reestablished within a few years; debtor is not presently receiving disbursements from the fund; held that none of the $127,400 in retirement fund is reasonably necessary for support); *In re* Rosen, 52 Bankr. 96 (Bankr. D. Minn. 1985) (elderly debtor, age 69; unemployed; poor physical health; held that $25,000 in Keogh account is reasonably necessary for support under Minnesota statute identical to § 522(d)(10)(E)); *In re* Bari, 43 Bankr. 253 (Bankr. D. Minn. 1984) (middle-aged debtor, age 50; disabled; future-earning capacity is uncertain;

CONCLUSION

The status of a debtor's interest in an ERISA retirement plan when the debtor files a petition for individual bankruptcy has caused a great deal of confusion among the courts. This confusion is caused in part by the complex relationship among the Bankruptcy Code, ERISA, and the state law of creditors' rights. It is compounded by the myriad variations of ERISA plans.

This Article has developed a framework for examining the exclusion and exemption of ERISA retirement plans. ERISA plans should be excluded from the property of the estate only to the extent that they are enforceable against creditors under state spendthrift trust law. Whether a plan may be characterized as an enforceable spendthrift trust will depend upon state law and the type of plan and plan provisions involved.

If the debtor's interest in an ERISA retirement plan is included in the property of the estate, it may nevertheless be exempt. The state and federal non-Code exemption scheme permits a debtor to exempt from the property of the estate, among other things, property exempt under "federal nonbankruptcy law." Congress, by the use of the term "federal nonbankruptcy law," did not intend to include ERISA. A debtor claiming under the state and federal non-Code exemptions must therefore use the state law exemptions for ERISA retirement plans.

The federal Code exemption scheme permits a debtor to ex-

---

held that only $2600 of his $3100 a month disability payment is reasonably necessary for support); *In re* Grant, 40 Bankr. 612 (Bankr. N.D. Tex. 1984) (one-income family; held that all $6000 in retirement and profit-sharing plans is reasonably necessary for support); *In re* Sheridan, 38 Bankr. 52 (Bankr. D. Vt. 1983) (middle-aged debtor; other sources of income are modest; held that all $18,000 in retirement fund are reasonably necessary for support); *In re* Robert Miller, 36 Bankr. 420 (Bankr. D.N.M. 1984) (interpreting analogous § 522(d)(11)(E)) (debtor is disabled; only assets are homestead, van, and vacant lot; only source of income (social security disability) pays $100 a month less than expenses; held that vacant lot valued at $27,000 is reasonably necessary for support); *In re* Johnson, 36 Bankr. 54 (Bankr. D.N.M. 1984) (middle-aged debtor, age 47; unemployed; travel expenses to look for new employment; held that all of $12,000 in stock bonus plan is reasonably necessary for support); *In re* Kenneth Miller, 33 Bankr. 549 (Bankr. D. Minn. 1983) (relatively young debtor, age 54; held that $353 a month in future retirement benefits is reasonably necessary for support); *In re* Werner, 31 Bankr. 418 (Bankr. D. Minn. 1983) (relatively young debtor, age 48; good health; other sources of income sufficient; not presently receiving disbursements; held that none of $23,700 in retirement fund is reasonably necessary for support); *In re* Donaghy, 11 Bankr. 677 (Bankr. S.D.N.Y. 1981) (elderly debtors, ages 62 and 64; both debtors in very poor health; large medical expenses; held that all of $22,000 lump-sum pension disbursement is reasonably necessary for support); Warren v. Taff (*In re* Taff), 10 Bankr. 101 (Bankr. D. Conn. 1981) (total annual income of $37,000; exempt assets worth $8,000; held that half of debtor's $14,000 a year pension payment is not reasonably necessary for support).

empt from the property of the estate, among other things, his right to receive a payment from an ERISA retirement plan, to the extent reasonably necessary for support. Interpretations of this exemption that would allow a debtor to claim the exemption only if his benefit is in pay status, or if he has no right to withdraw plan funds prior to retirement, are unnecessarily strict. The flexible "reasonable necessary for support" limitation permits courts to grant the exemption when the circumstances require.