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## ERISA Preemption of Community Property Law—*Francis v. United Technologies Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978)

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ERISA PREEMPTION OF COMMUNITY PROPERTY LAW—*Francis v. United Technologies Corp.*, 458 F. SUPP. 84 (N.D. CAL. 1978).

Plaintiff, Sharon Francis, sued for divorce in the Superior Court of Santa Clara, California. Seeking her alleged community property interest in her husband's retirement plan, she joined as defendants her husband's employer and both the administrator and the trustee of the employer's retirement plan. After removing the case to the Federal District Court for the Northern District of California, defendants moved for summary judgment. They asserted that the federal Employee Retirement Income Security Act<sup>1</sup> (ERISA) preempted state law purporting to award a community property interest in a private pension plan to the non-employee spouse at dissolution. Granting summary judgment, the court in *Francis v. United Technologies Corp.*<sup>2</sup> held that ERISA preempts state community property law insofar as it recognizes a property interest of the non-employee spouse in the pension.

Courts in both California and Washington recognize a community property interest in pension plans at dissolution.<sup>3</sup> Consequently, under the *Francis* interpretation, ERISA would have preemptive effects in Washington similar to those in California. The California court by statute must distribute half the community property to each spouse,<sup>4</sup> while the Washington court need only effectuate a "just and equitable" distribution of all property.<sup>5</sup> Despite the broader power of the Washington courts, the other property may be insufficient to compensate for the lost community interest in the pension and, following the *Francis* rationale, a court might even be required to disregard the pension entirely, precluding any offsetting award of property.<sup>6</sup>

The theory of modern domestic relations law—marriage as partnership<sup>7</sup>—requires recognition of the non-employee spouse's ownership in-

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1. 29 U.S.C. §§ 1001–1381 (1976). For a full presentation of ERISA's evolution, see SENATE SUBCOMMITTEE ON LABOR, 94TH CONG., 2D. SESS. (1976), LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, reprinted in [1976] CONGRESSIONAL INFORMATION SERVICE at S 542–13–14–15.

2. 458 F. Supp. 84 (N.D. Cal. 1978) (Poole, J.).

3. *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976); *Payne v. Payne*, 82 Wn. 2d 573, 512 P.2d 736 (1973); *DeRevere v. DeRevere*, 5 Wn. App. 741, 491 P.2d 249 (1971).

4. CAL. CIV. CODE § 4800 (West 1970).

5. WASH. REV. CODE § 26.09.080 (1979).

6. See note 71 *infra*.

7. See note 10 *infra*.

terest in the pension. This note challenges the *Francis* court's finding that recognition of the non-employee spouse's ownership interest was preempted by ERISA,<sup>8</sup> concluding that Congress did not intend to bring about the regression in domestic relations law that *Francis* threatens.

## I. BACKGROUND

### A. *State Community Property Characterization of Pension Benefits*

Traditionally, federal courts have treated state domestic relations law with great deference, and have viewed interests in family property as a concern of local law.<sup>9</sup> Thus a state is free to choose a system of community property ownership which resembles a partnership. Community property law generally presumes that each spouse's contribution to the community is equal and, therefore, each spouse possesses an equal right to succeed to all property acquired during the marriage by the labor of either.<sup>10</sup> Thus pension benefits earned by the labor of one spouse during marriage would be treated as community property under accepted community property principles.

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8. Though *Francis* raises both issues, this note examines preemption of property interests, rather than of awards of alimony or support. There has been comparatively little difficulty with the latter. Most courts have found that ERISA does not preempt state domestic relations law providing for child support or maintenance; thus, private pension benefits are generally alienable for these limited purposes. See note 72 *infra*.

Constitutional issues will be identified, but are not the focus of this note. See note 56 *infra*.

9. See, e.g., *Stone v. Stone*, 450 F. Supp. 919, 924-25 (N.D. Cal.), appeal docketed, No. 78-2313 (9th Cir. June 21, 1978) (noting the "heavy presumption that Congress does not interfere with the workings of state domestic relations law"). See also Reppy, *Community and Separate Interests in Pensions and Social Security Benefits after Marriage of Brown and ERISA*, 25 U.C.L.A. L. Rev. 417, 483 (1978) [hereinafter cited as Reppy, *Community and Separate Interests*]; text accompanying note 45 *infra* (discussion of *Wissner v. Wissner*, 338 U.S. 655 (1950)) and note 47 *infra* (discussion of *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)).

10. "[T]he marital property relationship in the community property system may be regarded as a type of partnership . . . [where] each spouse is regarded as contributing equally to and sharing equally in the economic well-being of the marital enterprise." Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 733-34 (1974).

Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that all wealth acquired by the joint efforts of the husband and wife shall be common property; the theory of the law being that, with respect to marital property acquisitions, the marriage is a community of which [each] spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution.

*Id.* at 734 n. 8.

Similarly, in common law property states, the more modern view of marriage recognizes the institution as a partnership between co-equals where each is equally entitled to the property accumulated during the marriage. Foster & Freed, *Marital Property and the Chancellor's Foot*, 10 FAM. L. Q. 55, 57 (1976). Indeed, most states allow an equitable distribution of marital and separate property. See

*B. Purpose of ERISA*

Congress enacted ERISA to provide uniform national regulation of employee benefit plans because of the great increase over the past 30 years in pension plans, which often “were inadequate, mismanaged and promised benefits that proved to be illusory.”<sup>11</sup> The Act seeks to protect employees and their “dependents” and “beneficiaries,” although it uses the latter two terms rather indiscriminately.<sup>12</sup>

Uniform regulation of plans provided the means of ensuring retirement security.<sup>13</sup> To guarantee proper administration and management of benefit plans, ERISA provides national standards for vesting, funding, reinsurance, portability, fiduciary responsibility, and disclosure.<sup>14</sup> The early drafts of ERISA indicate that state law was intended to be superseded only to the extent that it interfered with this elaborate scheme of federal regulation.<sup>15</sup> Thus the House proposal would have expressly preempted a

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note 57 *infra*. “It is fair, to conclude that criteria for property distribution, and to a lesser extent alimony, has been ‘non-fault’ oriented, and the current emphasis is upon economic factors and the trend is toward an approach analogous to the dissolution of a partnership.” Freed & Foster, *Economic Effects of Divorce*, 7 FAM. L. Q. 275, 277 (1973).

11. *In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362, 366 (1979), *appeal dismissed*, 40 S. Ct. BULL. (CCH) at B411 (Jan. 14, 1980).

12. The Congress finds . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001 (1976) (“Congressional findings and declaration of policy”).

13. *See e.g.*, *Stone v. Stone*, 450 F. Supp. 919, 926 (N.D. Cal) *appeal docketed*. No. 78-2313 (9th Cir. June 21, 1978); *In re Marriage of Johnston*, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798, 802 (1978), *cert. denied sub nom.* *Southern Cal. Pension Plan v. Johnston*, 40 S. Ct. BULL. (CCH) B417 (Jan. 14, 1980).

The House Committee on Education and Labor in endorsing its own comprehensive private pension reform program stated: “Its most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society.” H.R. REP. No. 533, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4646.

The Senate Committee on Labor and Public Welfare framed the basic issue as follows: “[W]hether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives.” S. REP. No. 127, 93d Cong., 2d Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4838, 4838.

14. 29 U.S.C. §§ 1001-1114 (1976).

15. The House version of ERISA specified that the scope of preemption included laws of the

field consisting of reporting, disclosure and fiduciary responsibilities, forfeitability, financing, portability, and insurance<sup>16</sup>; the Senate proposal would have preempted the "subject matters regulated by this Act"<sup>17</sup> which upon examination of committee reports were similar in scope to the explicit list in the House proposal.<sup>18</sup> Concern in both houses thus focused on uniformity in regulation of "administration, organization and structure"<sup>19</sup> of employee benefit plans. The final wording of the Act's preemption provision reads: "[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."<sup>20</sup>

## II. THE *FRANCIS* DECISION

The *Francis* court relied upon the literal wording of the Act's preemption provision for its finding that ERISA preempts community property characterization of ERISA benefits.<sup>21</sup> Citing other decisions which pro-

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states relating "to the reporting and disclosure responsibilities and fiduciary responsibilities" and "to the nonforfeitability of participant's benefits . . . , the adequacy of financing . . . , portability requirements . . . , or the insurance of pension benefits." H.R. 2, 93d Cong., 2d Sess., 120 CONG. REC. 4742 (1974).

The final Senate proposal ambiguously stated the intent to expressly preempt state laws that "relate to the subject matters regulated by this Act." *Id.* at 5002. An examination of the committee reports and early drafts, however, indicates that the Senate version was intended to parallel that of the House.

The Report of the Senate Committee on Labor and Public Welfare stated that "[t]he purpose of [Senate Bill 4] is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems," listing such remedies as "standards of vesting, funding, reinsurance, disclosure and fiduciary standards, and a voluntary program of portability of vested pension credits." S. REP. NO. 127, 93d Cong., 2d Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4838. The Committee noted that the

problems in the private pension field . . . are so interrelated that they cannot be resolved without a comprehensive legislative program, dealing not only with malfeasance and maladministration in the plans, or the consequences of lack of adequate vesting, but also with the broad spectrum of questions such as adequacy of funding, plant shut-downs and plan terminations, transferability of vested credits, adequate communication to participants, and, in short, the establishment of certain minimum standards to which all private pension plans must conform if the private pension promise is to become a reality rather than an illusion.

*Id.* at 4851.

The Committee report explained that the Senate bill provided "that this Act supersedes state laws covering *the same matters*." *Id.* at 4883 (emphasis added). The Senate's intent therefore was in harmony with the more explicit language used by the House.

16. See note 15 *supra*.

17. *Id.*

18. *Id.*

19. Comment, *Preemption of California Community Property Law by ERISA: Congressional Intent and Judicial Interpretation*, 10 PAC. L.J. 881, 885-86 (1979).

20. 29 U.S.C. § 1144 (1976).

21. 458 F. Supp. at 85-86.

claimed ERISA's broad preemption of the employee benefit field,<sup>22</sup> the court concluded: "This language was intended to effect the broadest possible preemption of state law. The inclusion of all state laws which 'relate to' any ERISA plan was an attempt to make this preemption cover laws which were not specifically directed at this subject area, but which still affected it."<sup>23</sup>

The *Francis* court then found that an award to the wife of a community interest in the benefits would constitute an impermissible alienation under ERISA's spendthrift provision which prohibits assignment or alienation of benefits.<sup>24</sup> The court claimed support from the Supreme Court's decision in *Wissner v. Wissner*,<sup>25</sup> which held that provisions for beneficiary designation in the National Service Life Insurance Act<sup>26</sup> preempted a spousal community property interest in insurance benefits under that Act.

### III. ERISA'S GENERAL PREEMPTION PROVISION

Clearly, ERISA preempted a broad field in the areas of administration, organization, and structure of employee benefit plans,<sup>27</sup> and any state law within that field is therefore precluded by the supremacy clause.<sup>28</sup> The pertinent issue, then, is the scope of the field occupied by ERISA, which in turn depends on Congress' purpose in enacting it.

ERISA's general preemption provision mandates that ERISA supersedes any state law "relat[ing] to" any employee benefit plan.<sup>29</sup> Although the *Francis* court applied this provision in a literal sense, numerous attempts to determine the scope of the language "relate to" have resulted in little consensus.<sup>30</sup> One commentator suggested that only

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22. See notes 43-44 *infra*.

23. 458 F. Supp. at 86 (emphasis added).

24. *Id.*

25. 338 U.S. 655 (1950). See note 46 and text accompanying notes 45-46, and 65-67 *infra*.

26. 38 U.S.C. §§ 701-729 (1976).

27. See notes 14-20 and accompanying text *supra*. See also Comment, *ERISA and the Preemption of State Law*, 6 FORDHAM URB. L.J. 599 (1978).

28. U.S. CONST. art. VI, § 2. "Occupation of the field" occurs wherever Congress expresses the intent to do so in the exercise of its constitutional powers. In this situation all state law in the field is invalid, regardless of its compatibility with the federal regulator. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25 at 384-85 (1978). Preemption also occurs where the state law conflicts with the express terms of the federal enactment or frustrates congressional objectives. *Id.* § 6-24 at 377-84. See Part IV *infra*. See generally, Morris, *Constitutional Preemption of State Laws Against Massive Oil Spills*, 1 U. PUGET SOUND L. REV. 73, 83-97 (1977).

29. The general preemptive clause is quoted in text accompanying note 20 *supra*. "The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both . . ." 29 U.S.C. § 1002(3) (1976).

30. Comment, *supra* note 27, at 599; H.R. REP. 1785, 94th Cong., 2d Sess. 38, 47 (1977) [hereinafter cited as Task Force Report].

state laws that relate to the “terms and conditions” of employee benefit plans are preempted.<sup>31</sup> The Joint Pension Task Force,<sup>32</sup> however, rejected such an interpretation as too narrow.<sup>33</sup>

There are inherent practical limitations on the scope of ERISA’s preemption. A literal reading of the preemption clause would invalidate substantial areas of state law with which Congress displayed no apparent intention of tampering. Reading the preemption clause to invalidate state law which only tangentially affects or relates to an ERISA-covered plan would lead to incongruous consequences.<sup>34</sup> Recognizing such dangers, courts have determined that ERISA does not preempt state fair employment laws.<sup>35</sup> Furthermore, if all related state law were precluded, the fed-

31. Reppy, *Community and Separate Interests*, *supra* note 9, at 515–16.

32. The Joint Pension Task Force was established pursuant to ERISA, 29 U.S.C. § 1221 (1976). The Act required the Task Force to “make a full study and review of . . . (4) the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans” by September 2, 1976. 29 U.S.C. § 1222 (1976). Though it followed the enactment of ERISA, this report is strong evidence of legislative intent. *See Sioux Tribe v. United States*, 316 U.S. 317, 329–30 (1942) (Congressional statements explaining or interpreting a statute which follows the statute’s enactment may nevertheless be “virtually conclusive” on legislative intent).

33. The Task Force Report concluded: “[T]he legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the field preempted. Similarly it is our belief that the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded.” Task Force Report, *supra* note 30, at 47.

34. As one commentator notes:

Huge chunks of state law would be displaced, resulting in the creation of a vacuum which would have to be filled by the tedious and unending task of fashioning a federal common law rule to answer all questions “relat[ing],” however remotely, to employee benefit plans. For example, if it were contended that an employee was insane or otherwise lacked capacity to contract when he signed up as a participant in the plan or made elections under it for certain optional benefits, state laws on insanity and capacity to contract would, if utilized to solve the question, “relate to” the plan.

An employer’s discharging a participant employee for cause would most certainly “relate to” the plan by causing discontinuance of the employee’s participation (except as to already vested rights). The very broad reading of “relate[s] to” could preempt almost the entire California Labor Code, requiring a federal common law to be created to replace it. Does Congress intend the federal courts to write a new federal common law of employment contracts and labor law for ERISA covered employees?

Reppy, *Community and Separate Interests*, *supra* note 9, at 514–15.

35. A Wisconsin court, in *Time Ins. Co. v. Department of Indus., Labor & Human Relations*, 46 U.S.L.W. 2369 (Wis. Cir. Ct. 1978), found that the Wisconsin fair employment law, which prohibits employment practices that discriminate on the basis of sex, barred an employer’s disability plan that pays benefits to employees who are temporarily unable to work due to medical disabilities unless the disability was due to pregnancy. The court noted:

There is more merit to the claim of federal preemption by reason of ERISA. . . . The Wisconsin law, however, is not a state law dealing with some particular aspect of private employee benefit plans, but is a statute broad in scope grounded on the state’s police power to prevent employers from engaging in employment practices that discriminate because of sex. This statute in no way impinges on federal regulation of employee benefit and pension plans. The sex discrimination prohibitions are merely a peripheral concern of ERISA.

*Id.* at 2370.

## ERISA: Community Property Law

eral courts would need to create a substantial body of federal common law, which might often amount to adopting the preempted state law.<sup>36</sup>

The latest legislative interpretation of the general preemption provision emerged in the Task Force Report.<sup>37</sup> While emphasizing ERISA's broad preemptive effect, the Task Force Report, without directing itself specifically to the question of community property law, provides a standard that would exclude community property law from ERISA's sweep. That standard includes in the field preempted only state law "which relates to employee benefit plans, qua benefit plans,"<sup>38</sup> or, phrased differently, state law "undertaken to regulate employee benefit plans as such."<sup>39</sup> The test thus is whether the state intended to regulate plans covered by ERISA or whether the purposes of the state regulation were similar to those of ERISA. Applying this test, state community property law, which does not purport to regulate employee benefit plans as such, should be exempt.

The general tenor of the Task Force Report reinforces the conclusion that community property law lies outside the field preempted. Neither the Report nor any of ERISA's legislative history indicates that Congress intended community property to be within that field.<sup>40</sup> Rather, the Task Force Report focused on state law which intentionally and manifestly regulates ERISA plans.<sup>41</sup>

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An Oregon court of appeals held that ERISA did not supersede a similar Oregon fair employment law which defined sex discrimination to include employee benefit plans that discriminate against those with pregnancy-based disabilities. *Gast v. Oregon*, 5 FAM. L. REP. (BNA) 2010 (Ore. Ct. App. 1978). That court explained:

The full import of this argument is that the states are precluded from regulating any matters that relate to employer or employee organizations' provision of medical, disability, or death benefits, vacation benefits, apprenticeship or training programs, day-care centers, scholarship funds, prepaid legal insurance, retirement income, or deferred income. . . . The Statutory purposes are to require disclosure and reporting to beneficiaries, to insure that employee pension benefit programs are adequately funded, to improve the equities of pension plans, and to establish minimum standards assuring financial soundness of such plans. With respect to employee welfare benefit plans . . . Congress confined federal regulation to establishing minimum standards for disclosure and fiduciary responsibility.

. . . Significantly, there is no indication in any of the legislative history of an intent to preempt areas of state regulation that are not addressed by ERISA, nor an intent that such areas be left wholly unregulated.

*Id.* at 2010-11.

36. For example in *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 426 F. Supp. 316 (N.D. Ind. 1977), the court held that ERISA preempted state law which provided that health coverage of an employee's disabled dependent could not end at a certain age. Consequently the employee's quadriplegic son obtained no relief under state law. Nevertheless, the court went on to fashion a federal common law remedy, adopting the essentials of the preempted state law.

37. See note 32 *supra*.

38. Task Force Report, *supra* note 30, at 48.

39. *Id.* at 46.

40. See [1976] CONGRESSIONAL INFORMATION SERVICE, *supra* note 1, *passim*.

41. A number of states had undertaken to regulate employee benefit plans as such; others had



*Francis* inappropriately cited cases unrelated to community property law to support its finding of preemption.<sup>42</sup> For example, *Hewlett-Packard Co. v. Barnes*<sup>43</sup> concluded that ERISA preempted the California Knox-Keene Health Care Service Plan Act of 1975 because the state act attempted to regulate matters of administration of health care programs which were clearly within the field occupied by ERISA.<sup>44</sup> The community property law preempted in *Francis*, however, is not the type of state regulatory action which will hinder Congress' goal of uniform national regulation over private employee benefit plans. *Francis* also cited *Wissner v. Wissner*,<sup>45</sup> which involved the National Service Life Insurance Act, as another case where the operation of state community property law was found to frustrate Congress' purpose of ensuring uniform regulation. *Wissner*, however, is distinguishable from *Francis* because the *Wissner* court found that Congress had spoken with "force and clarity" in specifying the preemptive effect of the National Service Life Insurance Act;<sup>46</sup> similarly clear language cannot be found in ERISA.

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already made, or appeared ready to declare, these plans subject to state control as insurers, trust companies, or investment companies. From a drafting standpoint the difficulty arose in attempting to extricate these plans from the framework of state insurance, trust and securities regulation even though their activities might very well bring them within the sphere of conduct historically subject to such regulation. On the one hand it was clear that the plans subject to ERISA needed to be freed of the possibility of state regulation; on the other, it was important to limit the effects of preemption, in order to avoid disrupting state efforts to regulate the conduct of other financial entities not subject to the federal Act.

Task Force Report, *supra* note 30, at 46.

42. 458 F. Supp. at 86.

43. 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd mem.*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 572 (1979).

44. In *Hewlett-Packard Co.*, the corporate plaintiffs managed employee health benefit plans which the defendant, Commissioner of Corporations of the State of California, admitted were within the regulatory scope of ERISA as well as the California Knox-Keene Health Care Service Plan Act of 1975, CAL. HEALTH & SAFETY CODE §§ 1340-1395.5 (West Supp. 1977). Plaintiffs sought to enjoin defendant from requiring compliance with the Knox-Keene Act which regulated such areas as funding, disclosure and licensing of health care programs. Defendant denied that ERISA preempted the state Act, because there was insufficient evidence of congressional intent to preempt state regulation of health plans. Granting judgment for plaintiffs, the court concluded, in language later adopted by *Francis*, "that Congress both comprehended the change and intended the statute to occupy the entire field of employee benefit plan regulation." 425 F. Supp. at 1299. Thus, in *Hewlett-Packard Co.*, state law intentionally and manifestly competed with ERISA.

*Francis* also cited *Bell v. Employee Security Benefit Ass'n*, 437 F. Supp. 382 (D. Kan. 1977). Although the *Bell* court concluded that the defendant association was not within the scope of ERISA because its major medical and death benefit plans were essentially those of an ordinary insurance company and were not established by "employers" or "employee organizations," the court, in dicta, adhered to the broad preemption doctrine that ERISA had occupied the field of employee benefit plan regulation. 437 F. Supp. at 86.

45. 338 U.S. 655 (1950).

46. 338 U.S. at 658. In *Wissner*, the deceased had purchased life insurance as a serviceman under the National Service Life Insurance Act, designating his mother as sole beneficiary. After his

The United States Supreme Court held in *Hisquierdo v. Hisquierdo*<sup>47</sup> that the Railroad Retirement Act<sup>48</sup> preempted any recognition of a spouse's community property interest in pension benefits created by that Act, but emphasized the deference typically accorded state domestic relations law. Reiterating preemption guidelines found in prior cases,<sup>49</sup> the Court stated that preemption will be found only if Congress "has 'positively required by direct enactment' that state law be preempted. . . . A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests"<sup>50</sup> before preemption will be found. The standard used by the Court was "whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."<sup>51</sup>

Although there are major differences between the Railroad Retirement Act and ERISA,<sup>52</sup> the *Hisquierdo* standard is applicable wherever federal

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death, the widow sued to collect her alleged one-half interest in the policy because the premiums had been paid with community funds (his army pay). The Court held for the mother, stating that the Act specified that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance (within a designated class), . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries. . . ." 38 U.S.C. § 802(g). Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.*

47. 439 U.S. 572 (1979). The Court in a seven-to-two decision, held that retirement benefits under the Railroad Retirement Act of 1974 could not be considered community property in a California divorce action. The *Hisquierdo* ruling is likely to influence future decisions concerning ERISA's preemptive effect on community property law.

48. 45 U.S.C. § 231-231t (1976).

49. The most recent case cited by the Court was *United States v. Yazell*, 382 U.S. 341 (1966), in which the defendant and her husband had defaulted on a federal loan from the Small Business Administration (SBA). The SBA sued to recover out of defendant's separate property. Under Texas coverture law, however, the wife had no capacity to bind herself by contract unless she obtained a court decree removing the disability. Since she had not done so, the contract could not be enforced unless the federal interest required preemption of state law. The Court decided it did not and found for the defendant. The Court held that family property law "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interest, will suffer major damage if the state law is applied." *Id.* at 352.

*Hisquierdo* cited several cases demonstrating the federal interests necessary to override community property law: *Free v. Bland*, 369 U.S. 663 (1962) (rights of survivorship in U.S. savings bonds purchased with community property to supersede Texas community property law because the recognition of such rights was viewed as an integral feature of marketing the bonds in the exercise of federal power to borrow money); *Wissner v. Wissner*, 338 U.S. 665 (1950); *McCune v. Essig*, 199 U.S. 382 (1905) (lands owned by federal government were deemed to pass under the federal homestead law rather than by state law of descent and distribution).

50. 439 U.S. at 581 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904) and *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

51. *Id.* at 583.

52. In a footnote, the *Hisquierdo* Court acknowledged differences between the two federal statutory schemes and specified that a decision of preemption in that case had no implications for any

regulatory schemes confront state community property law.<sup>53</sup> Under this standard it is doubtful that ERISA reflects preemptive intent sufficient to overcome the presumption of validity of state community property law. First, the express terms of ERISA do not conflict with the non-employee spouse's claim. Second, recognition of this claim would not in any way harm the objectives of ERISA. Congress' purpose was to ensure worker retirement security,<sup>54</sup> but Congress has shown no intent to ensure the worker's security to the exclusion of the spouse's.<sup>55</sup> Its concern was whether the retirement benefits would be available for personal use and not whether the user would be the husband or wife. The finding of preemption in *Francis* not only deprives the plaintiff individually of a property interest in a manner raising serious constitutional issues,<sup>56</sup> but

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future decision regarding the effect of ERISA on state community property law, 439 U.S. at 590 n.24.

The *Hisquierdo* Court found that the Railroad Retirement Act benefits were essentially a federal entitlement: "Congress may alter, and even eliminate, them at any time." *Id.* at 575. "Railroad Retirement Act benefits from their very inception have federal overtones. Compulsory federal taxes finance them and not just the taxes that fall on the employee." *Id.* at 582. ERISA, on the other hand, regulates the management and administration of private pension plans to ensure future security for employees and their dependents. Private pensions are contractual. The federal interest in the two types of pensions is considerably different.

In enacting the Railroad Retirement Act, Congress expressly dealt with a number of competing interests and possible beneficiaries. Congress modified the Railroad Retirement Act in 1975, specifically exempting child support and alimony obligations from the spendthrift clause, *id.* at 575-76; 42 U.S.C. § 659 (1978), and again in 1977, dictating that divisions of property between spouses were not within this exemption. 42 U.S.C. § 662(c) (1978). Moreover, the Railroad Retirement Act specifically anticipated the possibility of divorce: "The entitlement of a spouse of an individual to an annuity . . . shall end on the last day of the month preceding the month in which . . . the spouse and the individual are absolutely divorced. . . ." 45 U.S.C. § 231d(c)(3) (Supp. 1979). The *Hisquierdo* court concluded that a finding of preemption was required because Congress had made express decision regarding the allocation of the finite funds. 439 U.S. at 585. ERISA, by contrast, is silent on all of the above points.

53. See note 49 and accompanying text *supra*.

54. See note 13 and accompanying text *supra*.

55. See note 12 and accompanying text *supra*.

56. Some commentators have suggested that depriving the non-employee spouse of a property interest by the preemptive effect of ERISA, as in *Francis*, may violate due process. See, e.g., Reppy, *Community and Separate Interests*, *supra* note 9, at 513, 524-26.

Two major Supreme Court cases interpreting broad national regulatory schemes provide support for the preemption of community property and domestic relations law. *Wissner v. Wissner*, 338 U.S. 655 (1950) (see text accompanying notes 45-46 *supra*); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (see text accompanying notes 47-52 *supra*).

The *Wissner* court noted that the National Service Life Insurance Act: (a) involved the war powers of Congress, 338 U.S. at 660; (b) provided for very low premiums, with administration costs borne by the federal government and liabilities discharged out of congressional appropriations, *id.* at 658; and (c) specified both that the insured shall have the right to designate the beneficiary and that no person shall have a vested right to the proceeds. *Id.* at 661. For these reasons, the Court concluded no constitutional question of due process was presented.

The *Hisquierdo* Court decided that the annuity provided for by the Railroad Retirement Act more

also threatens a regression in domestic relations and community property law generally.<sup>57</sup>

#### IV. THE SPENDTHRIFT PROVISION

The spendthrift provision of ERISA requires that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.”<sup>58</sup> This provision should not be construed as presenting a conflict between state community property law and federal law<sup>59</sup> because it is too narrowly drawn to prevent a non-employee spouse from becoming an owner of a community property interest in the benefits. The fundamental

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closely resembled social security benefits than private pension benefits; hence the annuity is not contractual but only a federal entitlement. *Id.* at 575. The constitutional issue was never raised. One commentator argues strongly that the *Hisquierdo* result is unconstitutional. See Reppy, *Learning to Live with Hisquierdo*, 6 COMMUNITY PROP. J. 5, 14–16 (1979)[hereinafter cited as Reppy, *Hisquierdo*].

57. See note 10 *supra*. State courts and legislatures have sought to recognize the contribution of the non-employee spouse to the marital assets in community property states and in an increasing number of common law property states. “[S]ome 37 common-law property states by statute or decision permit an equitable distribution of marital and separate property upon divorce.” Foster & Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187, 191 n. 17 (1978). An increasing number of these states recognize a spousal claim to retirement benefits. *Id.* Divestment by the courts of the non-employee spouse’s interest in a pension plan defeats this approach.

The argument that maintenance obligations are an adequate substitute for the community property interest of the non-employee spouse is faulty. First, the modern purpose of maintenance is to support the former spouse only until he or she can become economically self-sustaining. Courts view maintenance as a transitional arrangement, not a permanent one. For example, in Washington a primary factor considered by the court in fashioning an order of maintenance is “[t]he time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances.” WASH. REV. CODE § 26.09.090(1)(b) (1979). Furthermore, an award of maintenance cannot be transmitted by will or intestacy. Lastly, maintenance obligations may be difficult to collect; arrearages are often reduced or ignored. See Foster & Freed, *supra*, at 189; Glendon, *Is There a Future for Separate Property?*, 8 FAM. L.Q. 315, 316 (1974).

In addition, in Washington maintenance awards are subject to modification upon a showing of a substantial change of circumstances, while any property disposition pursuant to a divorce decree may be changed only upon a showing of circumstances such as fraud, which would justify the reopening of a judgment in any other case. WASH. REV. CODE § 26.09.170 (1979).

The policies underlying no-fault divorce also militate against denying the non-employee spouse’s interest in retirement income. Only Illinois, Pennsylvania, and South Dakota still require some showing of fault to grant divorce. Note, *Are Fault Requirements in Divorce Actions Unconstitutional?*, 16 J. FAM. L. 265 (1978). The basic premise of no-fault dissolution is that the marital partners should be able to separate without the need of determining blameworthiness. A decision to end a marriage should be made free from the pressure created by the undue economic dependence of one spouse. Certainly a perceived federal inconvenience in administering ERISA should not control domestic relations policy by creating such economic inequality.

58. 29 U.S.C. § 1056(d)(1) (1975).

59. See note 23 *supra* regarding the two bases of preemption: supersession by conflict and supersession by preclusion (occupation of the field). The latter is discussed with regard to ERISA’s general preemption provision in text accompanying note 28 *supra*.

legal premise of community property is that each spouse acquires an equal interest in all property acquired during the marriage by the labor of either one; thus, the non-employee spouse acquires ownership rights in the same fashion as does the employee.<sup>60</sup> Since the non-employee spouse acquires ownership directly, there is no alienation or assignment between the spouses. Under this reasoning, ERISA's prohibition of assignment or alienation is irrelevant to the non-employee spouse's ownership interest.

This conclusion is supported by *Stone v. Stone*,<sup>61</sup> where a judge of the same federal court that decided *Francis* had earlier ruled that recognition of the spouse's interest was not prohibited by ERISA's spendthrift provision.<sup>62</sup> Nevertheless, the *Francis* court disagreed and found the "transfer" of pension benefits under the operation of state community property law to be the kind of transfer expressly prohibited by the spendthrift clause. Another court concluded that the ERISA prohibition could apply only where the transferee was a creditor, and noted that the non-employee spouse was, in fact, an owner.<sup>63</sup> The distinction between owner and creditor is one which *Francis* ignored.<sup>64</sup>

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60. See note 10 *supra*.

61. 450 F. Supp. 919 (N.D. Cal. 1978).

62. See *id.* at 926 (Renfrew, J.). ERISA's spendthrift provision "does not explicitly prohibit the transfer of pension benefits under state community property laws, and the plain meaning of the terms assignment or alienation does not include such a transfer." *Id.*

It should be noted that Judge Renfrew, who wrote the *Stone* decision, also wrote *Hewlett-Packard*, so heavily relied upon in Judge Poole's finding of preemption in *Francis*. See notes 43-44 and accompanying text *supra*.

63. In *Johns v. Retirement Fund*, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *cert. denied*, 40 S. Ct. BULL. (CCH) B411 (Jan. 14, 1980), the California Court of Appeals, Fourth District, held that ERISA "does not preempt California law as applied here in matrimonial matters. . . . The spendthrift features of ERISA are not applicable because [the wife] is an owner, not a creditor." *Id.* at 513, 149 Cal. Rptr. at 551-52 (citations omitted). See Thiede, *The Community Property Interest of Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F.L. REV. 635, 650 (1975).

64. Only if the non-employee spouse is characterized as a creditor and not as an owner will the spousal claim constitute an assignment or alienation. No reported case has held that following a property settlement the former spouse has a claim for the pension benefits *as creditor*. The courts in *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), and *Johns v. Retirement Fund*, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *cert. denied*, 40 S. Ct. BULL. (CCH) B411 (Jan. 14, 1980), however, did hold that the non-employee spouse holds a valid claim as an *owner* of a community property interest. *Accord*, *In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1978), *appeal dismissed*, 40 S. Ct. BULL. (CCH) B411 (Jan. 14, 1980); *In re Marriage of Johnston*, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978), *cert. denied sub. nom.* *Southern Cal. Pension Plan v. Johnston*, 40 S. Ct. BULL. (CCH) B417 (Jan. 14, 1980).

Nonetheless, *Francis* cited *Kerbow v. Kerbow*, 421 F. Supp. 1253 (N.D. Tex. 1976), deciding companion cases in which a woman sought to enforce a claim against her former husband's pension plan. The prior divorce decree in *Kerbow*, as part of the property settlement, had awarded the wife \$1,400 cash in the form of debt in lieu of pension benefits due to the husband. In *Richardson v. Richardson*, the companion case, the prior divorce decree had awarded the wife a 40% interest in the husband's retirement pension. The *Francis* court cited *Kerbow*, which presented a creditor situation,

Only on rare occasions has the Supreme Court found that a spendthrift provision in a broad national statutory scheme requires preemption of state community property and domestic relations law. In *Wissner*,<sup>65</sup> the Supreme Court found that the spendthrift provision in the National Service Life Insurance Act demonstrated the requisite congressional intent to preempt California community property law.<sup>66</sup> The preemption clause in that Act, however, was far broader than ERISA's preemption clause.<sup>67</sup> In *Hisquierdo*,<sup>68</sup> a spendthrift provision in the Railroad Retirement Act essentially prohibited assignment, garnishment, attachment, or other legal process, or anticipation of an annuity.<sup>69</sup> Over a strong dissent,<sup>70</sup> the *Hisquierdo* Court found the prohibition of attachment and anticipation<sup>71</sup> to be determinative of intent to preempt recognition of the spouse's community

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as authority for the preemption of an ownership interest under community property law. *Francis*, 458 F. Supp. at 87.

65. 338 U.S. at 655. See note 46 *supra*.

66. The National Service Life Insurance Act then provided that payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . ." *Wissner*, 338 U.S. at 659 (quoting 38 U.S.C. § 816).

67. ERISA's preemption clause prohibits only assignment and alienation. See text accompanying note 58 *supra*.

68. 439 U.S. at 572.

69. The Railroad Retirement Act spendthrift clause states:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . ."

45 U.S.C. § 231m (Supp. 1979).

70. Justice Stewart, joined by Justice Rehnquist, argued that the spendthrift clause (see note 69 *supra*) was irrelevant because the prohibition against garnishment and attachment relates to remedies, not to the ownership interests asserted by the wife under community property law. Justice Stewart stated that recognition of a community property interest does not constitute an assignment but only a recognition of equal ownership between spouses. Finally, because no definition of anticipation is found in the Act, the dissent concluded that the common law meaning of anticipation—trustees making lump-sum payments inconsistent with specific periodic benefits—was intended. Thus the dissent concluded that a prohibition against anticipation should not supersede community property law. *Hisquierdo*, 439 U.S. at 599–602.

71. Recent Treasury Department regulations have created a similar "no-anticipation" rule under ERISA despite the fact that ERISA prohibits only assignment and alienation: "[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 . . . ." 26 C.F.R. § 1.401(a)–13(b) (1978). Some commentators have merely assumed the regulation is valid. See, e.g., Comment, *Preemption of California Community Property Law by ERISA: Congressional Intent and Judicial Interpretation*, 10 PAC. L.J. 881, 887 (1979). If the regulation is upheld its effect would be similar to that of the "no-anticipation" clause in *Hisquierdo*. Professor Reppy believes that the effect of this regulation in Washington, one of the "fair and equitable" distribution states, see text accompanying note 5 *supra*, would be to preclude the court effecting a property distribution at divorce from even considering the existence of the pension. Reppy, *Hisquierdo*, *supra* note 56, at 10–11. Any indication that the divorce court had reached a particular distribution of property contemplating those benefits would be grounds for appeal.

property interest, thereby implying that a prohibition against mere assignment has no preemptive effect on community property law.

Moreover, prohibitions against alienation or assignment have not prevented the courts from invading pension benefits for either maintenance or support obligations arising out of dissolution.<sup>72</sup>

## V. THE IMPLIED EXCEPTION THEORY

Most cases<sup>73</sup> and legal commentators<sup>74</sup> have rejected the *Francis* result. The proper legal theory for doing so, however, remains a compelling question. The Department of Labor has argued that the *Francis* rationale of preemption is correct, but that the result is nonetheless inappropriate because there should be "an implied exception to the anti-assignment provisions of ERISA" for recognition of community property interests.<sup>75</sup>

The implied exception theory first surfaced in cases dealing with family support obligations. When the issue arose whether ERISA pension funds could be reached to pay family support obligations, courts consistently held that the preemption provisions did not apply.<sup>76</sup> The strong public interest in having funds available for family support led to the judicially-created "implied exception" to ERISA's preemption provisions.<sup>77</sup>

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72. In *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979), the court held that garnishment orders that enforce state-court-created family support obligations are impliedly excepted from ERISA's anti-alienation provision and thus are not subject to preemption by ERISA. The obligations involved included both alimony and child support. However, it is not clear to what extent this implied exception rests upon lack of intent to preempt or upon public policy concepts unique to family support obligations. See text accompanying notes 73-95 and 65-85 *infra*.

Indeed, the argument is much stronger that pensions should be exempt from child support and maintenance obligations than that they should be exempt from community property interests. An award for child support or maintenance is clearly an alienation, albeit an involuntary one; one strand of the argument against preemption (expressed, for example, in *Merry*) is that even if such alienation has occurred it is not intended to come within the "no-alienation" clause. A division of community property, however, is simply not an alienation in the first place; the retiree never held an ownership interest in the benefits which the non-employee claims.

73. See, e.g., *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal.), *appeal docketed*, No. 78-2313 (9th Cir. June 21, 1978); *In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 40 S. CT. BULL. (CCH) B411 (Jan. 14, 1980); *In re Marriage of Johnston*, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978) *cert. denied sub nom.* *Southern Cal. Pension Plan v. Johnston*, 40 S. CT. BULL. (CCH) B417 (Jan. 14, 1980); *Johns v. Retirement Fund*, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *cert. denied*, 40 S. CT. BULL. 4 (CCH) B411 (Jan. 14, 1980).

74. See, e.g., Reppy, *Community and Separate Interests*, *supra* note 9, at 527; Comment, *supra* note 19, at 890-93.

75. Brief of the Secretary of Labor, *Amicus Curiae*, at 20, *Stone v. Stone*, 450 F. Supp. 919, (N.D. Cal), *appeal docketed*, No. 78-2313 (9th Cir. June 21, 1978). The Department of the Treasury concurred in this assertion. *Id.* at 20 n.16.

76. *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979); *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Cartledge v. Miller*, 457 F. Supp. 1146 (S.D.N.Y. 1978).

77. See *American Tel. & Tel. Co.*, 592 F.2d at 121-24.

The Department of Labor would extend this exception to the *Francis* situation under the assertion that policy considerations involved in divisions of community property are comparable to those in the family support cases.<sup>78</sup>

Cases involving family support obligations, however, are not an entirely appropriate source for policy governing property interests. The former is based on *need*; the latter derives from property *rights*. While the courts strongly favor family obligations based on need, they generally rely on legislative direction when adjudicating property rights.<sup>79</sup>

Proponents of extending the implied exception theory to community property interests cite *Wissner* for support,<sup>80</sup> but the Supreme Court there only emphasized the greater judicial solicitude given to legislative ordering of property rights than is accorded to family support obligations.<sup>81</sup> *Hisquierdo* also purported to follow a specific Congressional mandate in finding preemption of property rights.<sup>82</sup> Thus the Court has implicitly refused to adopt an equitable balancing approach in the context of property rights. A court may adjudicate property rights in specific cases, but the creation of the property rights themselves is the province of the legislature.<sup>83</sup> If *Francis* was correct in finding preemption of community property law because the operation of state law would cause, under the *Hisquierdo* standard, “major damage to clear and substantial federal interests,”<sup>84</sup> courts will be loathe to find an implied exception for property rights.

*Stone v. Stone*<sup>85</sup> is the only case which has been cited as direct support for the implied exception approach to the preemption of community property law.<sup>86</sup> The *Stone* court did not expressly adopt an implied exception theory; it found that neither the “plain meaning” of the spendthrift provision<sup>87</sup> nor the general preemption provision<sup>88</sup> preempted community

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78. Brief of the Secretary of Labor, *supra* note 75, at 22–26.

79. See note 83 and accompanying text *infra*.

80. See Brief of the Secretary of Labor, *supra* note 75, at 26; Comment, *supra* note 19, at 898–900.

81. 338 U.S. at 660 (1950).

82. See note 52 *supra*.

83. Refusing to alter what it considered legislative mandate, the *Hisquierdo* Court noted that “[t]he judicial construction on which respondent relies is a child of equity, not of law.” 439 U.S. at 586. “It is not the province of state courts to strike a balance different from the one Congress has struck.” *Id.* at 590.

84. *Hisquierdo*, 439 U.S. at 581.

85. 450 F. Supp. 919 (N.D. Cal.), *appeal docketed*, No. 78–2313 (9th Cir. June 21, 1978).

86. See Brief of the Secretary of Labor, *supra* note 75, at 25; Comment, *supra* note 19, at 898.

87. 450 F. Supp. at 926.

88. *Id.* at 932.



property law. However, the court may have impliedly adopted the approach, in response to practical considerations of fair distribution of marital estates. The *Stone* court found that a non-employee spouse in a community property state had an ownership interest in the employee spouse's ERISA plan benefits.<sup>89</sup>

The court recognized that unless there were an implied exception for awards of pension benefits pursuant to a division of property in a common law state, a non-employee spouse in a common law state would be placed in a disadvantaged position relative to a community property spouse.<sup>90</sup> However, Congress probably never contemplated the variable of community versus common law property states in drafting the preemption provision.<sup>91</sup> Such neglect is not unknown.<sup>92</sup>

Whatever inadequacies the implied exception approach may have in legal theory, in practical terms it offers an attractive alternative. Not only would it rectify the *Francis* result in a community property state, but it would allow a common law property state to award a non-employee spouse an interest in the pension under a "fair and equitable distribution" statute.<sup>93</sup> The implied exception theory is also appealing to community property states with quasi-community property,<sup>94</sup> where the employee spouse's pension would become a community property asset. In these circumstances, the implied exception theory would support an award to the non-employee spouse.

## VI. CONCLUSION

Courts in cases subsequent to *Francis* have refused to adopt the *Francis* approach. ERISA's general preemption clause should not supersede state community property law because there is little reason to think that

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89. *Id.* at 925.

90. *Id.* at 925-26. "If the characterization under state property law were dispositive, a spouse entitled to a fair and equitable share of marital property in a non-community property state . . . could not collect benefits if the law of that state did not recognize a pre-existing ownership interest as California law does." *Id.*

91. Certain tax sections of ERISA mention community property states, 26 U.S.C. §§ 219, 402(e), 408 (1978), but there is nothing in the history of the spendthrift provision which mentions community property law. See [1976] CONGRESSIONAL INFORMATION SERVICE, *supra* note 1, *passim*.

92. For example, because the original federal estate tax provisions made no distinction between decedents of community property states and common law property states, the former were treated more favorably. This inequity was remedied in 1948 by the adoption of the marital deduction. See generally, R. STEPHENS, G. MAXFIELD & S. LIND, FEDERAL ESTATE AND GIFT TAXATION ¶ 5.06 [1] (4th ed. 1978).

93. See note 57 *supra*.

94. See Comment, *supra* note 71, at 896.

Quasi-community property exists only in California and Idaho, and consists of that property which

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Congress intended to preempt it, and because ERISA's purpose of ensuring the viability of employee benefit plans is not impaired by the operation of state community property rules. The Task Force Report indicates ERISA preempts only state regulation of retirement plans qua plans. Thus state law intended to regulate subject matter other than employee benefit plans is outside the field even if it incidentally touches a plan.

Similarly, the spendthrift provision of ERISA should not be a basis for a finding of preemption. The non-employee spouse takes possession of a pre-existing ownership interest; no alienation or assignment is involved. While the implied exception theory presents an attractive alternative to the *Francis* decision in several practical ways, its doctrinal underpinnings are weak.

Divestment of the non-employee spouse's ownership interest is also indefensible in light of the conditions of modern society. A realistic appraisal of the increased divorce rate requires recognition of each spouse both as part of a marital community and as an individual who may again be faced with the difficulties of economic independence.<sup>95</sup> In terms of an enlightened public policy there is simply no equitable rationale to permit the denial of one spouse's property interest in favor of the other.

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is acquired in another state as separate property and would have been community property if acquired in California or Idaho. CAL. CIV. CODE §§ 4800(a), 4803 (West Supp. 1978); IDAHO CODE §§ 15-2-201 to 15-2-209 (1979).

Arizona law embodies the concept of quasi-community property, labeling it simply community property; ARIZ. REV. STAT. ANN. § 25-318 (West Supp. 1979-1980).

95. "For example inadequate attention has been given to the plight of elderly women, fifty percent of whom have incomes under \$1800 a year." Foster & Freed, *supra* note 57, at 190. Moreover, it should be noted that "the divorce rate for the elderly has at least doubled during the recent divorce epidemic." *Id.* at 190 n.12 (figures for 1974).