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Alienability of Pension Benefits - Employee Retirement Income Security Act

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Recent Decisions

ALIENABILITY OF PENSION BENEFITS—EMPLOYEE RETRIEMENT INCOME SECURITY ACT—The United States Supreme Court held that a court may not imply an exception to ERISA's anti-alienability provision in cases where an employee has committed criminal acts against his employer.

Guidry v Sheet Metal Workers National Pension Fund, ___ US ___, 110 S Ct 680 (1990).

In 1982, Curtis Guidry was charged with, and pleaded guilty to, embezzling over $377,000 from the Sheet Metal Workers International Association, Local No. 9 (the "Union").[1] Guidry's acts were committed while he was serving as the chief executive officer of the Union and trustee of the Sheet Metal Workers Local No. 9 Pension Fund and the acts were in violation of section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").[2] As a Union official, Guidry had become a participant in three pension plans affiliated with the Union.[3] While serving a prison sentence for the embezzlement of the Union funds, Guidry sought to collect pension benefits pursuant to early retirement provisions under the terms of the plans.[4] Two of the plans[5]

1. *Guidry v Sheet Metal Workers National Pension Fund*, 110 S Ct 680, 683 (1990).

2. Id. 29 USC § 501(c) provides: "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

3. *Guidry v National Sheet Metal Workers' National Pension Fund*, 641 F Supp 360, 361 (D Colo 1986). Guidry was a participant in the Sheet Metal Workers Local Unions and Councils Pension Fund, the Sheet Metal Workers National Pension Fund, and the Sheet Metal Workers Local No. 9 Pension Fund. *Guidry*, 110 S Ct 683, n. 2.

4. Guidry had applied for and began receiving benefits from the Local No. 9 Pension Fund in 1985. *Guidry*, 641 F Supp at 361.

5. The Sheet Metal Workers Local Unions and Councils Pension Fund and the Sheet Metal Workers National Pension Fund. Id.

refused to pay benefits, citing Guidry's wrongful appropriation of Union funds.[6] Guidry subsequently brought an action in April of 1984 to recover pension benefits from the two plans.[7] The action was brought in the United States District Court for the District of Colorado pursuant to section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA").[8] The Union intervened and joined as a party the Local No. 9 Pension Fund.[9] The parties then stipulated to a $275,000 judgment against Guidry with respect to five of the six claims for relief asserted by the Union.[10]

In response to Guidry's claim that he was entitled to pension benefits, the two pension plans averred that by his criminal deeds, Guidry had forfeited his pension benefits.[11] The Union contended that a constructive trust in favor of the Union should be imposed on the benefits.[12]

At the outset of its decision, the district court held that the ERISA prohibition on forfeiture of vested pension benefits precluded Guidry's benefits from being forfeited.[13] However, the court decided that a constructive trust[14] was not barred in spite of the ERISA ban on the *alienation* of pension benefits.[15] The district

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6. *Guidry*, 110 S Ct at 683.

7. *Guidry*, 110 S Ct at 683. Guidry and the Sheet Metal Workers No. 9 Pension Fund had previously negotiated a settlement, id, and Guidry began receiving benefits from that plan in 1985 during the pendency of his claim against the other plans. *Guidry*, 641 F Supp at 1458.

8. *Guidry*, 110 S Ct at 683. ERISA provisions are found at 29 USC sections 1001-1461. Section 502(a) of ERISA states in pertinent part: "[a] civil action may be brought by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan. . . ." 29 USC § 1132(a)(1).

9. *Guidry*, 110 S Ct at 683.

10. Id. The parties stipulated to five claims, one concerning a breach, by Guidry, of his fiduciary duty to the Union which was in violation of section 501(a) of LMRDA, and four others concerning fraud, conversion, equitable restitution and negligence. The sixth claim was for the Union and pension funds to withhold Guidry's pension benefits. Id, n.5.

11. *Guidry*, 110 S Ct at 683.

12. Id.

13. Id at 684. Section 203(a) of ERISA provides that " '[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable' if the employee meets certain age and years of service requirements found in that section." *Guidry*, 641 F Supp at 360 (quoting 29 USC § 1053(a)).

14. "A constructive trust . . . is a trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means. . .either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice." 76 Am Jur 2d, Trusts § 221 (1975).

15. *Guidry*, 110 S Ct at 684. Section 206(d)(1) of ERISA provides: "[e]ach pension plan shall provide that benefits under the plan may not be assigned or alienated." 29 USC §

court based its decision in large part on its perception that "ERISA must be read in pari materia with other important federal labor legislation," most notably, LMRDA and the Labor Management Relations Act of 1947 which have as their underlying policy "to combat corruption on the part of union officials and to protect the interests of the membership."[16] The district court stated, "[i]n circumstances where the viability of a union and the members' pension plans was [sic] damaged by the knavery of a union official, a narrow exception to ERISA's anti-alienation provision is appropriate,"[17] and in so finding imposed a constructive trust on Guidry's benefits from all three pension plans.[18]

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the district court decision, agreeing that the imposition of a constructive trust was an appropriate form of relief.[19] However, the appeals court based its decision to except a constructive trust from the ERISA anti-alienability provision, in part, on relief afforded under ERISA section 409 concerning a pension plan fiduciary's breach of duty that results in injury to the plan's participants.[20]

The United States Supreme Court granted certiorari because of the multifarious interpretations and applications of the ERISA anti-alienability provision ascribed to the provision by various courts of appeals.[21]

1056(d)(1).

16. *Guidry*, 110 S Ct at 684 (quoting *Guidry*, 641 F Supp at 362).

17. Id (quoting *Guidry*, 641 F Supp at 363).

18. Id.

19. Id.

20. Id. The court of appeals relied upon, inter alia, decisions from courts of appeals in other circuits, e.g., *Crawford v La Boucherie Bernard, Ltd.*, 815 F 2d 117 (D C Cir 1987), and *St. Paul Fire and Marine Ins. Co. v Cox*, 752 F2d 550 (11th Cir 1985), and the principles of trust law. Id at 684.

The Union alleged that Guidry had breached his fiduciary duty *to the Union* in violation of section 501(a) of LMRDA which provides: "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person . . . to hold its money and property solely for the benefit of the organization and its members. . . ." 29 USC § 501(a).

The appeals court, however, invoked relief provided by ERISA section 409(a) (29 USC § 1109(a)) concerning breaches by pension plan fiduciaries which injure *the plan and its participants*, reasoning that such an interpretation comports with "[a] major purpose of ERISA . . . [which is] to safeguard 'the continued well-being and security of millions of employees and their dependents . . . [by establishing] minimum standards . . . assuring the equitable character of [pension fund] plans and their financial soundness.' 29 USC § 1001(a)." *Guidry*, 856 F2d at 1460. See also, note 34.

21. *Guidry*, 110 S Ct at 684. The Supreme Court cited several cases from courts of

A unanimous United States Supreme Court[22] reversed, finding error in both the district and appeals court decisions on the grounds that, first, the question of whether ERISA permits alienation of benefits under the circumstances of the present case had already been decided, albeit in dictum.[23] Second, the appeals court had based its decision on a pension plan fiduciary having committed wrongful acts against the plan when in fact there had been no finding that Guidry had breached any duty to the plan on which he served as trustee.[24] Third, the district court correctly recognized that LMRDA and ERISA must be read in pari materia; however, to apply the district court's interpretation would render the anti-alienation provision a nullity.[25] Finally, any previously announced and currently existing exceptions to the ERISA anti-alienability provision are few in number and all fall within the underlying policy of the statute; any exceptions and modifications to the pronounced policy are to be made by the legislature.[26]

The Supreme Court, in an opinion written by Justice Blackmun, echoed the view expressed by both the district and appeals courts that section 206(d)(1) of ERISA (the anti-alienability provision) does indeed preclude the *garnishment*[27] of a pension plan participant's vested benefits notwithstanding any criminal acts that he may have committed against his employer who maintains the plan

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appeals of various circuits illustrating the apparent inconsistency in application of the anti-alienability provision. The cases cited by the Court, most of which are detailed below, are as follows: *Ellis National Bank of Jacksonville v Irving Trust Co.*, 786 F2d 466 (2nd Cir 1986) (imposition of constructive trust rejected where employee of company maintaining a pension plan defrauded customers and company became liable to customers for the fraud), *United Metal Products v National Bank of Detroit*, 811 F2d 297 (6th Cir 1987) (garnishment of pension benefits rejected where employee embezzled funds from company, thereby injuring co-workers), *St. Paul Fire and Marine Ins. Co. v Cox*, 752 F2d 550 (11th Cir 1985) (garnishment of pension benefits of an employee who injured employer through criminal conduct was upheld), *Crawford v La Boucherie Bernard Ltd.*, 815 F2d 117 (D C Cir 1987), and *Goldstein v Crawford*, 484 US 943 (1987) (trustee of employer's pension plan had his pension benefits offset against a civil judgment for breaching his fiduciary duty to the plan). Id, n. 9.

22. All justices concurred in the opinion with the exception of Justice Marshall, who concurred in all of the opinion except Part II-C in which the Court expressed the view that exceptions to ERISA's anti-alienability provision are to be made by Congress and not the courts. Id at 682.

23. Id at 685.

24. Id.

25. Id at 686.

26. Id at 687.

27. "The term 'garnishment' denotes a proceeding by a creditor to obtain satisfaction of the indebtedness out of property or credits of the debtor in the possession of, or owing by, a third person." 6 Am Jur 2d, Attachment and Garnishment § 2 (1963).

or against his coworkers.[28] This finding has ample support in "and is consistent with applicable administrative regulations,[29] with the relevant legislative history,[30] and with the views of other federal courts[31]."[32]

Having found such clear judicial and legislative determinations that pension benefits not be subject to garnishment, the Court concluded that the constructive trust as a judicial remedy is of no significant difference and that it is precluded by the anti-alienability provision for the same reasons that garnishment is precluded "unless some exception to the general statutory ban is applicable."[33]

The Supreme Court, continuing its analysis, next addressed and rebutted the specific rationales for the district and appeals courts' decisions. The United States Court of Appeals for the Tenth Circuit based its holding that a constructive trust did not violate the

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28. *Guidry*, 110 S Ct at 685. The Court had expressed this same view in dictum of a 1988 decision, *Mackey v Lanier Collections Agency & Service, Inc.*, 486 US 825 (1988). There, the Court held that the ERISA bar to alienability only applied to the garnishment of pension benefits and did not apply to the garnishment of *welfare benefits*. A judgment creditor of individuals who were participants in a welfare benefit plan maintained by their employer sought to garnish the funds in the plan from which the participants could draw vacation and holiday pay. *Mackey*, 486 US at 827. "Welfare benefit plans [as defined by ERISA - 29 USC § 1002 (1)] provide health, legal, vacation, or training benefits." *Mackey*, 486 US at 827, n.1. The Supreme Court held that section 206(d)(1) of ERISA is a specific bar on alienation of pension benefits and although welfare benefits are governed by ERISA, and although garnishment of pension benefits would be prohibited by section 206(d)(1), the fact that the proscription is directed expressly at pension benefits makes it unlikely that Congress intended such a ban on alienation of welfare benefits. *Mackey*, 486 US at 836.

29. Regulations to the Internal Revenue Code state: "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." 26 CFR 1.401(a)-13(b)(1) (1989) (emphasis added).

30. One of the expressed exceptions to the ERISA anti-alienability provision is that a plan participant may make "any voluntary and revocable assignment of not to exceed 10% of any benefit payment." 29 USC § 1056(d)(2). "The [House of Representatives] Conference Report [on ERISA] states: '[f]or purposes of this rule, a *garnishment* or levy is not to be considered a voluntary assignment.' " 110 S Ct 685, n.11 (quoting HR Conf Rep No 93-1280, p 280 (1974)). (Emphasis added.)

31. Although some courts of appeals have determined that equitable remedies may be invoked in spite of the ERISA anti-alienability provision, those same courts have also stated that "as a general matter" garnishment is not one of the limited equitable exceptions. See, *Cox* and *Crawford*, both cited in note 20. 110 S Ct 685, n.12.

In *Cox*, where the Court of Appeals for the Eleventh Circuit upheld the garnishment of an employee's pension benefits, the court admitted that " '[t]he federal cases have construed ERISA's provision against assignment or alienation as prohibiting garnishment generally,' *General Motors Corp. v Buha*, 623 F2d 455 (6th Cir 1980)." *Cox*, 752 F2d at 551.

32. *Guidry*, 110 S Ct at 685.

33. Id.

anti-alienability provision on section 409(a) of ERISA which provides that a pension plan fiduciary may be *personally* liable for any losses experienced by the plan due to the breach of his fiduciary duty to the plan and that such losses may be restored by equitable or remedial relief which a court deems appropriate.[34]

Although Guidry had been a fiduciary of one of the pension plans, the Supreme Court, without deciding the applicability of section 206(d)(1) of ERISA (the anti-alienability provision) to section 409(a), determined that application of section 409(a) was wholly inappropriate to the facts of the instant case because there had been no finding that Guidry had stolen any money from the pension plans.[35] Guidry admitted to stealing money from the Union and although such acts may constitute a breach of a fiduciary's duty to the Union in violation of LMRDA section 501(a), there had been no alleged theft from the Union's pension plan, nor was the actual embezzlement of Union funds done by Guidry in his capacity as a trustee of the pension plan.[36] Moreover, the $275,000 judgment stipulated to by the parties was held by the Union and not the plans.[37] The Court conceded that it would not be uncommon for one to associate the Union with the pension funds that it maintains, however, "the funds here and the Union are distinct legal entities."[38] Therefore, the Court stated that Guidry could not be held to have breached his fiduciary duty to the pension plan when he had been found only to have embezzled money from the Union.[39]

The Court, in evaluating the district court's rationale of imposing a constructive trust and its reliance on the expressed underlying policy[40] and the "remedial provision"[41] of LMRDA assumed,

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34. Id at 685. Section 409(a) of ERISA states in part: "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall personally be liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . ." 29 USC § 1109(a).

Among the obligations that a plan fiduciary is charged with owing to the plan is to discharge his duties "with the care, skill, prudence, and diligence" of an ordinary prudent person. 29 USC § 1104(a)(1)(B).

35. *Guidry*, 110 S Ct at 685.

36. Id.

37. Id at 686.

38. Id.

39. Id.

40. See note 20.

41. Section 501(b) of LMRDA provides: "[w]hen any officer, agent, shop steward, or

without deciding that a constructive trust may be anticipated by the statute's "other appropriate relief" language in certain situations; however, the Court criticized the district court's determination that the ERISA anti-alienability provision did not preclude such measures in this case.[42]

While the district court made its determination on the basis of reading LMRDA section 501(b) and section 206(d)(1) of ERISA in pari materia, the Supreme Court said that "[s]uch an approach would eviscerate the protections of section 206(d). . . ."[43] In reaching its conclusion, the district court had ignored a polestar of statutory construction, that where there is no indication of how two seemingly conflicting statutes should be applied with respect to each other, the general shall yield to the specific.[44] The Court suggested that a more plausible reading of the two statutes would be "that the LMRDA determines what sort of *judgment* the aggrieved party may obtain, while ERISA governs the narrow question whether that judgment may be collected through a particular means - a constructive trust placed *on the pension.*"[45]

Finally, the Supreme Court invoked the clear legislative policy behind ERISA's anti-alienability mandate - that the pension benefits of employees be protected for the employees' dependents as well as for the employees themselves.[46] Where an employee has committed criminal acts that have resulted in injury to his employer, it is likely that his dependents had no part in the wrongdoing and, therefore, should not be punished for the employee's malfeasance.[47] The Court said that the ERISA anti-alienability provision is a deliberate decision on the part of Congress to execute the foundational policy of ERISA and that "[a] restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes prece-

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representative of any labor organization is alleged to have violated the duties declared in subsection [501](a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or *other appropriate relief* within a reasonable period of time after being requested to do so by any member of the labor organization, such member may sue such [person] . . . to recover damages or secure an accounting *or other appropriate relief* for the benefit of the labor organization." 29 USC § 501(b) (emphasis added).

42. *Guidry*, 110 S Ct at 686.

43. Id at 687.

44. Id.

45. Id (emphasis in original).

46. Id at 687.

47. Id at 688.

dence over the desire to do equity between particular parties."[48] The Court declared that in the absence of legislative guidance, the task of the judiciary attempting to create exceptions to the ERISA anti-alienability provision without undermining the ERISA policy itself is daunting and is one best left for Congress, particularly if it means modifying the policy.[49]

Congress enacted ERISA, in relevant part, for the expressed purpose of "protect[ing] interstate commerce, and the interests of participants in employee benefit plans and their beneficiaries."[50] This purpose was based on a congressional finding that substantial assets were contained in these plans; and

> that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of such plans; . . . [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits. . . ."[51]

ERISA's anti-alienability provision[52] originally contained only one exception. It allowed a plan participant to *voluntarily and revocably* assign up to 10% of any benefit payment to which he was entitled.[53]

As cases developed in which parties urged courts to adopt implied exceptions to the anti-alienability provision, the paucity of legislative history concerning the provision required the courts to look elsewhere to infer legislative intent.[54]

One of the first serious challenges to the view that the anti-alienability provision is to be strictly construed and that the voluntary

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48. Id at 687 (emphasis in original).

49. Id.

50. 29 USC § 1001(b).

51. 29 USC § 1001(a).

52. 29 USC § 1056(d)(1).

53. 29 USC § 1056(d)(2). "For the purposes of paragraph (1) of this subsection [section 1056(d)], there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act [enacted Sept. 2, 1974]. Id.

54. See *Ellis National Bank of Jacksonville v Irving Trust Co.*, 786 F2d 466 (2nd Cir 1986) ("Because the legislative history on section 1056 is sparse, we are compelled to consider other indicia of legislative intent."). Id at 470.

assignment is the only exception to the mandate came in the area of alienation of benefits for failure of a plan participant to fulfill court-ordered family support obligations. Two district court decisions from 1978 marked an implied exception to 29 USC section 1056(d) and, in so doing, foreshadowed what would eventually become an expressed exception prescribed by Congress.[55]

In *Stone v Stone*,[56] the United States District Court for the Northern District of California held that ERISA section 206(d) did not preclude the efficacy of California's community property laws with respect to a husband's pension benefits. Noel Stone obtained a divorce decree form the California district court which provided that the pension benefits of her husband were community property and as such, 40% represented her interest in that property.[57] The husband subsequently failed to turn over any of the pension assets, whereupon Noel brought an action against the pension plan to recover the portion of her ex-husband's benefit awarded her in the divorce decree.[58]

In determining that ERISA section 206(d) does not pre-empt California's community property laws, the district court undertook to read the statute and legislative intent with the view that Congress recognizes that regulation in the area of family support is one controlled by the states and that there is a *presumption* that Congress, in its enactments, does not intend to interfere with states' control in that field unless such intent is clearly expressed.[59]

The district court determined that Congress could not have intended community property laws to be pre-empted since ERISA was intended to protect those same individuals who were among the intended beneficiaries of the community property laws - dependents of the participant.[60] The court stated, "It would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce."[61]

The United States District Court for the Eastern District of New York reached a similar result with respect to a state court spousal

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55. 29 USC § 1056(d)(3).
56. 450 F Supp 919 (N D Cal 1978).
57. Id at 920.
58. Id.
59. Id at 924.
60. Id at 926.
61. Id.

support order in *Cody v Riecker*.[62] In that case, the Family Court of the State of New York levied the pension benefits of a pension plan participant for his failure to pay support to his former wife in contravention of a court order.[63] The trustees of the husband's pension plan brought an action against the Family Court and the sheriff to enjoin the levy, invoking ERISA section 206(d).[64]

The district court cited *Stone* in implying a family support exception to ERISA's proscription on alienation of benefits. However, the court relied predominantly on other statutory areas which have had implied in them, with respect to family support obligations, exceptions to statutorily created benefits safeguards against alienation.[65] The *Cody* court pointed to the District of Columbia Life Insurance Act which expressly precluded disability benefits from being attached or garnished or taken "by *any* legal or equitable process to pay any debt of liability of such insured person."[66] The court cited the reasoning of the appeals court for the District of Columbia in *Schlaefer v Schlaefer*,[67] that to withhold disability benefits from dependents would defeat the intent of the statute in that the dependents of disability payment recipients were to be the beneficiaries of the ban on alienation of the disability payments.[68] Similarly, the court reasoned, protecting pension benefits of a pension plan participant who refuses to abide by a court-ordered support obligation would contravene the intent behind ERISA, which is to protect employees *and their dependents*.[69]

The district court holdings in *Cody* and *Stone* were followed when the issue of an implied exception for family support reached a United States court of appeals for the first time in *American Telephone & Telegraph Co. v Merry*.[70] The Court of Appeals for the Second Circuit found the holdings and rationales of *Cody* and *Stone* persuasive in holding that an implied exception to the ERISA anti-alienability provision exists when family support obli-

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62. 454 F Supp 22 (E D NY 1978).
63. Id at 23.
64. Id.
65. Id at 24.
66. Id at 24-25 (emphasis added).
67. 112 F2d 177 (D C Cir 1940).
68. *Cody*, 454 F Supp at 25.
69. Id.
70. 592 F2d 118 (1979). Appeals for both *Cody* and *Stone* were taken to the courts of appeals for the Second and Ninth Circuits, respectively and were pending at the time the Court of Appeals for the Second Circuit ruled on the *Merry* case. Id at 121, 122. The courts of appeals affirmed both district court decisions. See 594 F2d 314 (2nd Cir 1979) and 632 F2d 740 (9th Cir 1980).

gations of an employee are at stake.[71]

Addison Merry, an employee of defendant, AT&T, and Ann Merry, the plaintiff, were divorced and obtained a divorce decree from the Connecticut Superior Court.[72] The decree provided that alimony and child support were to total one-half of Mr. Merry's retirement benefits from AT&T's pension plan.[73] When Mr. Merry failed to make support payments, the Connecticut Superior Court issued a contempt order and subsequently a garnishment order attaching $22,422.34 of Mr. Merry's pension benefits.[74] Upon receiving the garnishment order, AT&T brought an action in the Federal District Court for declaratory judgment.[75] AT&T invoked section 206(d) of ERISA, contending that the garnishment order should not be enforced.[76]

The court cited, in addition to the *Cody* and *Stone* decisions, other federal statutes containing anti-alienability type provisions which had been subject to judicial determinations that those provisions were not intended to result in the individual protected by the ban evading child support and alimony payments. The court reasoned that by analogy, the ERISA proscription could not have been intended by Congress, to defeat family support obligations.[77] For example, before the Bankruptcy Act[78] was amended such that support obligations would not be discharged by bankruptcy,[79] the United States Supreme Court held that a husband's discharged debts should not include alimony and child support, for if they did, the general policy of law to enforce support obligations would be defeated.[80] Similarly, the United States Court of Appeals for the District of Columbia had held that support obligations should not be treated as ordinary debts in implying an exception to the anti-garnishment provision of the Life Insurance Act for the Dis-

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71. *Merry*, 592 F2d at 122.

72. Id at 119.

73. Id.

74. Id.

75. Id at 120.

76. Id at 122.

77. Id at 123.

78. 11 USC §§ 1-1080. The Bankruptcy Act was recodified with the 1978 Bankruptcy Code (11 USC §§ 101-1330)

79. *Merry* was decided before enactment of the 1978 Bankruptcy Act. The former Act at 11 USC § 35 provided in part: "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (7) are for alimony due or to become due, or for maintenance or support of wife or child. . . ." 11 USC § 35(a)(7). These exceptions are now codified at 11 USC § 523(a).

80. *Wetmore v Markoe*, 196 US 68 (1904).

trict of Columbia.[81]

Congress formally recognized this judicially created exception by adding section 206(d)(3)[82] to ERISA's anti-alienability provision in 1984.[83] This subsection expressly exempts from the anti-alienability clause, "qualified domestic relations orders."[84]

Some of the early, albeit unsuccessful, attempts at creating an implied exception to the anti-alienability provision in cases where an employee had committed fraud or theft against his employer came in New York state and federal courts. In the 1980 case *Helmsley-Spear, Inc. v Winter*,[85] the New York State Supreme Court, Appellate Division refused to imply an exception to section 206(d) of ERISA where an employee had been convicted of grand larceny in stealing checks from his employer.[86]

The New York Supreme Court had previously issued an order attaching the employee's benefits in a profit sharing plan maintained by the plaintiff employer.[87] The employee contested the order on the ground that ERISA section 206(d) prohibited such an attachment.[88] The plaintiff posited that an exception to the anti-alienability provision should be made for tort creditors who maintain pension or profit sharing plans which end up benefitting the tortfeasor.[89] The court refused to do so, stating simply, "We see nothing in the statutes carving out such an exception. And we note

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81. *Merry*, 592 F2d at 124 (referring to *Schlaefer v Schlaefer*, 112 F2d 177 (D C Cir 1940)). See notes 65-69 and accompanying text.

82. 29 USC § 1056(d)(3)(A).

83. Id.

84. Id. A qualified domestic relations order is, by definition, a domestic relations order -

> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
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> (II) with respect to which the requirements of subparagraphs [1056(d)(3)(C) and (D)] are met. . . .

29 USC § 1056(d)(3)(B)(i).

29. USC § 1056(d)(3)(B)(ii) defines "domestic relations order" as

> any judgment, decree, or order (including approval of a property settlement agreement) in which-
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> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
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> (II) is made pursuant to a State domestic relations law (including a community property law).

85. 74 AD2d 195, 426 NYS2d 778 (1980).

86. Id at 779.

87. Id.

88. Id.

89. Id at 781.

'strong public policy against forfeiture of employee benefits manifested by [ERISA].' "[90]

The rather terse rationale in *Helmsley-Spear, Inc.* was amplified in 1982 by the United States District Court for the Southern District of New York in *Vink v SHV North America Holding Corp.*[91] There, the defendant employer (SHV) urged the court to imply a "fraud" exception to the ERISA bans on forfeiture and alienability of pension benefits.[92] The defendant's employee, plaintiff therein (Vink), was convicted of receiving a bribe from one of the employer's customers and for making representations on a bank application that SHV's board of directors had agreed to guarantee payment on a personal loan to Vink.[93]

SHV refused to pay Vink any of his vested pension benefits, whereupon Vink brought the principal action to recover such benefits.[94] SHV, relying on *American Telephone & Telegraph Co. v Merry*, [95] based its argument that an exception should be implied, in large part, on the rationale for the family support obligation exception; that just as public policy will not tolerate an individual being relieved of his support obligations under the guise of a statute intended to protect his income, it should not accept an unfaithful employee who has committed criminal fraud against his employer collecting retirement benefits provided by that employer.[96] The court dismissed this analogy however, saying that the reasons for implying a support exception do not exist in cases where the employee has committed fraud against the employer.[97] In laying out its rationale, the court focused specifically on the successful arguments in *Merry*.

First, according to the court, unlike with family maintenance, no

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90. Id (quoting *Post v Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 48 NY2d 84, 88, 421 NYS2d 847, 849, 397 NE2d 358, 360 (1979)).

91. 549 F Supp 268 (S D NY 1982).

92. Id at 271.

93. Id at 269. In addition, SHV alleged that Vink had received thousands of dollars in kickbacks from SHV customers and "diverted more than three million dollars of SHV business to dummy corporations that he had set up with his wife as sole shareholder." Id.

94. Id. The district court was unsure as to whether the basis of SHV's refusal to disburse Vink's pension benefits was a forfeiture or a mode of "involuntary assignment." The court addressed both mechanisms, however. The court did not draw a clear distinction in its discussion between the two, phrasing its reasoning in such a manner as would apply to both forfeiture and alienation equally. (The discussion in the main text of this Note is couched in terms that apply to alienation and assignment only). Id at 270.

95. *Merry*, 592 F2d at 118.

96. *Vink*, 549 F Supp at 271.

97. Id.

historically entrenched presumption exists that, absent an intent clearly expressed otherwise by Congress, the area of employee fraud against employers is to be controlled by the states.[98] In fact, the court contended that Congress intended the anti-alienability provision to eliminate "bad boy" clauses[99] in retirement plans which closely approximate the implied exception that the employer was urging the court to adopt in the present case.[100]

Second, the family support exception directly effectuates the intent that Congress had in enacting ERISA, i.e., to benefit *dependents* of employees as well as the employees themselves.[101] A fraud exception, according to the court, would certainly not benefit employees' dependents; rather it would, in fact, be inimical to their well-being since the alienated assets would go to the employer and not the dependents.[102]

Third, in cases antedating the instant case which involved the family support exception,[103] the United States Departments of Labor and Treasury, the executive branch agencies charged with enforcing the provisions of ERISA, filed amicus briefs in support of an implied family support obligation exception.[104] Such had never been the case with a case involving an implied exception for employee fraud.[105] In fact, in a previous employee fraud case, the Department of Labor sued an employer on behalf of an employee in an Eighth Circuit district court, urging the court *not* to imply an exception for employee misconduct.[106]

Finally, the district court noted the abundance of case law in which the family support exception was recognized (most notably, the aforementioned *Merry*,[107] *Cody*,[108] and *Stone*[109]cases) as compared with the dearth of cases adopting an employee fraud

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98. Id.

99. Id. "Bad boy" clauses are provisions in a pension plan which "generally provide that employees who were dishonest, engaged in acts of misconduct, or competed with his former company after leaving it would forfeit their pension benefits." Id at 270.

100. Id.

101. Id at 271. "[O]ne of Congress' key objectives in enacting ERISA, [was] 'the continued well-being and security of employees *and their dependents*.' 29 USC § 1001(a) (emphasis added)." *Vink*, 549 F Supp at 271.

102. Id.

103. See for example, *Merry*, 592 F2d at 125.

104. *Vink*, 549 F Supp at 271.

105. Id.

106. Id. *Winer v Edison Brothers Stores Pension Plan*, 593 F2d 307 (8th Cir 1979).

107. *Merry*, 592 F2d 118.

108. *Cody*, 454 F Supp 22.

109. *Stone*, 450 F Supp 919.

exception.[110]

In 1985, the Court of Appeals for the Eleventh Circuit[111] found that an implied exception to the anti-alienability provision exists for criminal acts committed by an employee against his employer.[112] The court, however, did not attack or refute the holding and rationale in *Vink*. The defendant, Cox, was the president of the Alabama City Bank of Gadsden.[113] He was charged and "convicted of willfully and knowingly misapplying bank funds, with the intent to injure and defraud the bank in violation of 18 U.S.C. § 656."[114] The bank's insurer, the plaintiff in the case, after paying the bank the $152,000 claim and having been assigned the bank's rights against Cox, obtained a judgment against Cox in the amount of the insurance proceeds and subsequently brought an action to garnish the vested pension and profit sharing benefits that Cox had earned while employed by the bank, such plans having been maintained by the bank.[115]

The district court held that the ERISA anti-alienability provision was not intended by Congress to defeat the maxim of equity, that a wrongdoer should not benefit by his own wrongs, and, consequently, issued an order garnishing Cox's benefits.[116]

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision, basing its decision ostensibly on the rationale which evolved into the implied exception for family support obligations, i.e., "the congressional objectives behind ERISA, and the effect of the proposed [implied] exceptions on those goals."[117] The appeals court seized on the expressed congressional purpose that ERISA was "to protect 'the continued well-being and security of millions of employees and their dependents' by providing 'minimum standards . . . assuring the equitable character of [pension fund] plans and their financial soundness.' "[118] However, rather than focusing on the congressional intent with re-

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110. *Vink*, 549 F Supp at 272.

111. In *St. Paul Fire and Marine Insurance Co. v Cox*, 752 F2d 550 (11th Cir 1985).

112. Id at 551.

113. Id.

114. Id. 18 USC section 656 provides in relevant part: "[w]hoever, being an officer, director, agent or employee of, or connected in any capacity with any . . . national bank . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . ." 18 USC § 656.

115. *Cox*, 752 F2d at 551.

116. Id.

117. Id at 552.

118. Id (quoting 29 USC § 1001(a)).

spect to *dependents* of employees, the court found in the passage which it quoted from ERISA the purpose of ERISA to be "to protect the employee against mismanagement or the provision of misinformation by the employer."[119]

Not finding any indication that ERISA was intended to protect the employee from his own criminal misdeeds, the court held that the anti-alienability provision did not apply to garnishment in the instant case and that the articulated purpose of ERISA would be effectuated by such measures since "the financial stability of the employer and, indirectly, the employer's financial plan," would best be served.[120]

In 1987, the Court of Appeals for the District of Columbia Circuit, in *Crawford v La Boucherie Bernard Ltd.*,[121] cited, inter alia, the holding and rationale in *Cox* in holding that the pension benefits of a trustee of a pension plan could be off-set by a judgment against the trustee for breach of his fiduciary duty to the plan, notwithstanding the ERISA proscription on alienability of pension benefits.[122]

Bernard Goldstein, defendant in the district court, was the chief executive officer of La Boucherie Bernard Ltd. and was the trustee of its profit sharing plan.[123] He was alleged to have breached his fiduciary duty to the plan by transferring money from the plan to La Boucherie Bernard Ltd. and its affiliated partnership, BRIL Associates, to satisfy obligations of those entities.[124] Fifteen participants of the La Boucherie profit sharing plan brought an action against Goldstein in federal district court alleging breach of fiduciary duty and violation of certain prohibited transaction provisions under ERISA.[125]

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119. *Cox*, 752 F2d at 552.

120. Id.

121. 815 F2d 117 (D C Cir 1987).

122. Id.

123. Id at 118.

124. Id.

125. Id. Among the provisions of ERISA which Goldstein was accused of violating were:

(1) as a plan fiduciary, failing to discharge his duties-

(a) "for the exclusive purpose of providing benefits to [plan] participants and their beneficiaries" (29 USC § 1104(a)(1)(A));

(b) "with the care, skill, prudence, and diligence" of an ordinary prudent person (29 USC § 1104(a)(1)(B));

(c) by failing to diversify plan investments in order to minimize the risk of financial loss (29 USC § 1104(a)(1)(C)); and

(d) in accordance with the instruction of the plan language (29 USC § 1104(a)(1)(D));

(2) engaging in a transaction constituting a "transfer to, or use by or for the benefit of

The district court granted summary judgment in favor of the plaintiffs and entered a judgment in the amount of $976,822.38.[126] When Goldstein failed to satisfy the judgment, the plaintiffs sought and were granted an order from the district court offsetting the judgment against Goldstein's profit sharing benefits.[127] Goldstein appealed, saying that such action was barred by section 206(d) of ERISA (the anti-alienability clause).[128]

In refuting the petitioner's argument, the court of appeals agreed with the Eleventh Circuit holding in *Cox* that section 206(d) should not apply where the employee would benefit from his own tortious acts.[129] The court also stated that where the application of section 206(d) would undermine the ERISA policy of protecting the security of employees and their dependents by threatening the security of the plan, it should not be applied.[130]

Due to the factual difference from *Cox* — that in the instant case the employee was a *trustee* of the plan and that his malfeasance harmed that plan directly — the court buttressed its holding with the language of section 409 of ERISA which states that "a person who breaches his fiduciary duties to a pension plan 'shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate.' "[131]

Finally, in *Ellis National Bank of Jacksonville v Irving Trust Co.*,[132] the United States Court of Appeals for the Second Circuit refused to apply a constructive trust on the pension benefits of an employee who had committed fraud against customers of his employer and in doing so, left the employer liable to the customers for over $3 million.[133] The employee was a participant in the employer's Employee Savings Plan and had pleaded *nolo contendere*

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a party in interest, of any assets of the plan (29 USC § 1106(a)(1)(D); and
(3) dealing with plan assets-
(a) for the fiduciary's own interests (29 USC § 1106(b)(1)); and
(b) on behalf of a party whose interests are adverse to those of the plan or plan participants (29 USC § 1106(b)(2)).

Crawford, 815 F2d at 118.

126. Id at 119.
127. Id.
128. Id at 121.
129. Id.
130. Id.
131. Id at 119 (quoting 29 USC § 1109(a)).
132. 786 F2d 466 (2nd Cir 1986).
133. Id at 468.

to eight counts of grand theft and securities fraud in connection with unauthorized transactions in the employer's customers' accounts.[134]

The employer urged the court to imply an exception to the anti-alienability provision where the employee beneficiary of a pension plan maintained by his employer has engaged in criminal activity which ultimately involves the employer and where the funds (or a portion thereof) which represent the employee's pension benefits are directly linked to the criminal acts.[135]

Citing the successful adoption of an implied exception for family support obligations articulated in *Merry*, the court applied the four-part *Vink* analysis and, as in *Vink*, concluded that an exception to ERISA section 206(d) should not be implied in cases of employees injuring their employer through fraudulent misconduct.[136] First, regulation of employee relations are not deeply rooted in state authority, unlike domestic support obligations.[137] Second, an implied theft and fraud exception would not further the ERISA mandate of providing security for employees *and their dependents*.[138] Third, the Departments of Labor and Treasury had not supported such an exception, while they had supported a family support exception as evidenced by their filing amicus briefs urging adoption of that exception.[139] Fourth, there have been few courts which have recognized an implied fraud exception, whereas, by comparison, numerous courts have recognized the family support exception.[140]

The court expressly rejected the holding in *Cox*, stating that such an exception ignores the congressional directive manifested in ERISA, that the anti-alienability provision was to provide security to employees and their dependents.[141] The court added, that if such an exception is to be made, it should only be made by

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134. Id at 467. The employee (Kalil) was a commissioned stock broker with the brokerage firm of Bache & Company and subsequently an officer with its successor, Prudential Bache. Id.

135. Id at 469. Certain commissions received by Kalil as a result of the fraudulent transactions with customers' accounts were deposited directly by Prudential Bache into Kalil's pension account. Id at 467.

136. Id at 470-71.

137. Id at 470.

138. Id at 470-71.

139. Id at 471. See *Merry*, 592 F2d at 118 and *Cartledge v Miller*, 457 F Supp 1146 (S D NY 1978).

140. *Ellis*, 786 F2d at 471.

141. Id.

Congress.[142]

In the *Guidry* decision, the Supreme Court settled the issue of whether a court may imply a criminal fraud exception to ERISA section 206(d)(1). A simplification, indeed an oversimplification of the *Guidry* holding would be that a criminal fraud exception to the anti-alienability provision is for Congress and not the courts to make. A number of courts had previously passed on the question of whether they should imply the exception and reached varying results in doing so. For this reason, *Guidry's* value is not limited to its seemingly basic holding; but rather its importance lies in the Supreme Court's analysis of the arguments presented in the case and those which preceded it.

The Supreme Court's purpose in deciding the dispute presented in *Guidry* was whether it was the *intent of Congress* to exempt from the anti-alienability protection of ERISA, employee participants in an employer-sponsored pension plan who have committed wrongs against their employer. This is a far different question than *whether* the anti-alienability protection *should* apply to an employee participant in an employer-sponsored plan who has committed wrongs against his employer.

While the United States Court of Appeals for the Eleventh Circuit in *Cox* and both the district and circuit courts in *Guidry* ostensibly based their finding of an implied exception to ERISA section 206(d)(1) on their interpretations of congressional intent, arguably, one could infer from reading those courts' opinions that the courts started their analyses with a desired conclusion that the faithless employee should not be given a reprieve from equitable sanctions by the ERISA anti-alienability clause. While the conclusion is laudable, the Supreme Court's analysis in *Guidry* demonstrates that it is also untenable; support for such a result is soundly outweighed by traditional indicia of legislative intent and principles of statutory construction.

In analyzing factors which militate against the creation of a judicially implied exception to the anti-alienability clause, one need only look at the language of the statute: "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[143]

A tenet of statutory construction is that the starting point in

142. Id.
143. 29 USC § 1056(d)(1).

construing a statute is to examine its plain meaning.[144] ERISA section 206(d)(1) is an unambiguous prohibition on alienation. In the statute's language there are no qualifiers intimating that Congress anticipated certain exceptions to the statute's command. The few exceptions that *have* been made are narrow in scope and have been formally recognized by Congress.[145]

Other, less direct indications of the congressional intention that the anti-alienability protection is to be absolute can be found: (1) in the preamble to ERISA where Congress expressed the underlying policy of the law by stating that one of Congress' purposes in enacting ERISA was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries;[146] (2) in administrative regulations promulgated by executive branch agencies charged with the enforcement of ERISA and its provisions;[147] and (3) in previous judicial interpretations of congressional intent.[148]

The factors which have been cited in support of a judicially created exception to the anti-alienability provision in cases of employees' wrongful acts against their employers can be considered an indirect expression of congressional intent at best. These factors tend to invoke the absence of expressed legislative intent as a license to imply such an exception.

For example, in *Cox*, the court noted the purpose of ERISA to be "to protect 'the continued well-being and security of millions of employees and their dependents' by providing 'minimum stan-

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144. *Ernst & Ernst v Hochfelder*, 425 US 185, 197 (1976).

145. The voluntary assignment exception, 29 USC § 1056(d)(2) (see note 30) and the exception for qualified domestic relations orders, 29 USC § 1056(d)(3) (see notes 82-84 and accompanying text) are the only statutory exceptions and the only exceptions recognized by *all* federal and state courts.

146. 29 USC § 1001(b) (see notes 50 and 51 and accompanying text).

147. The Treasury Department issued regulations requiring that in order for a pension plan to acquire "qualified" status, it must provide that pension benefits "may not be anticipated, assigned, . . . alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 CFR 1.401(a)-13(b)(1) (1989).

148. Although there has not been complete unanimity among the circuit courts in deciding the appropriateness of a judicially implied exception (*Guidry*, 110 S Ct at 684), the clear majority of the circuits have refused to imply such an exception (see note 21). In fact, of the circuits which have found an employee criminal fraud exception to ERISA's anti-alienability provision, only *Cox*, from the eleventh circuit (see notes 111-120 and accompanying text) stated so unequivocally. In *Crawford v La Boucherie Ltd.*, 815 F2d 117 (D C Cir 1987), (see notes 121-131 and accompanying text), although the court cited and affirmed the *Cox* holding, the alleged wrongdoer was a trustee of a pension plan and his alleged wrongs represented breaches of his fiduciary duty to the plan. As such, the court invoked ERISA section 409(a) (29 USC § 1109(a)) concerning personal liability for breaches of a plan trustee's fiduciary duty to the plan (see note 34).

dards . . . assuring the equitable character of [pension fund] plans and their financial soundness.' "[149] However, the court observed that "[t]he legislation provides *no indication whatsoever* that it is intended to protect the employee against the consequences of his own misdeeds."[150]

Similarly, in the appeals court decision of *Guidry*, the court inferred an intent of Congress from there being "*no indication or legislative history* that an unscrupulous trustee should be shielded from the consequences of his misdeed."[151]

The flaw in the reasoning of these courts is that one would *not* expect to find a specific set of circumstances specified in law where the general language of a statute appears to encompass those circumstances. To follow the reasoning of the *Cox* court and the court of appeals in *Guidry*, one must inquire into the type of debt owed and the conduct on the part of the pension plan beneficiary in determining whether his pension benefits are subject to the anti-alienability clause. It is indeed difficult to glean that Congress intended this sort of exercise from a plain reading of ERISA section 206(d)(1).

Therefore, while the specter of a disloyal employee retaining his employer-provided pension benefits due to the ERISA proscription on alienation of benefits may be intuitively unpalatable, there appears to exist little persuasive authority to impute to Congress an intention to the contrary. Although the equity-based notion that a wrongdoer should not benefit by his own wrongs is well founded, it must be assumed that Congress was aware of this maxim when it enacted ERISA and that Congress determined that its policy of protecting the pension benefits for the security of employees and their dependents outweighed the occasional instance of an unfaithful employee benefitting by wrongful acts committed against his employer.

The Supreme Court's decision in *Guidry* represents more than the last word on whether or not a judicially implied exception to ERISA section 206(d)(1) should be made in cases of employees' criminally fraudulent acts against their employers.

Not only did the respondents (the Union) in *Guidry* urge the Court to adopt a judicially created exception to ERISA section 206(d)(1), the Union also based its argument that a constructive

149. *Cox*, 752 F2d at 552 (quoting 29 USC § 1001(a)).

150. *Cox*, 752 F2d at 552 (emphasis added).

151. *Guidry*, 856 F2d at 1457 (emphasis added).

trust should be imposed on Curtis Guidry's pension benefits on existing law and in doing so urged the recognition of a *statutorily* created exception to the anti-alienability provision.

The Union invoked ERISA section 409(a)[152] since Guidry, in addition to serving as a Union official, was also a trustee of Sheet Metal Workers Local No. 9 Pension Fund.[153]

The Court did not rule on the Union's suggestion that ERISA section 409(a)'s provision for "other equitable or remedial relief as the court may deem appropriate" where a plan fiduciary has breached his duty imposed by *ERISA*[154] represented an express exception to the anti-alienability provision.[155] The Court instead ruled that section 409(a) was inapplicable to the facts of the instant case because there had been no showing that Guidry breached his duty to the Union's pension plans.[156]

While the Union pointed to the fact that the series of transactions which constituted Guidry's embezzlement included the pension plan of which Guidry was a trustee,[157] the Union conceded "it is hard to define precisely from which entity much of the money was stolen."[158]

In determining whether a breach of fiduciary duty to the pension plans occurred, the Court looked to the actual facts of the case. The initial criminal action was brought pursuant to section 501(c) of LMRDA (rather than ERISA section 409(a)) which addresses monies or assets stolen from *a labor organization by one of its officers.*[159] As the Supreme Court noted, a labor union and the pension plan that it sponsors "are distinct legal entities."[160] Although those members of the Union who are injured by Guidry's criminal conduct may be indirectly injured in their capacity as participants of the Union's pension plans, unless there is a threshold showing of a breach of Guidry's fiduciary duty *to the plans*, the relief afforded injured plan participants, even if it happens to include alienation

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152. 29 USC § 1109(a). See note 34.

153. *Guidry*, 110 S Ct at 683, 685.

154. 29 USC § 1109(a).

155. Respondent's Brief at 32, *Guidry v Sheet Metal Workers National Pension Fund*, ___ US ___, 110 S Ct 680 (1990) (No. 88-1105).

156. *Guidry*, 110 S Ct at 685.

157. Respondent's Brief at 32, *Guidry v Sheet Metal Workers National Pension Fund*, 110 S Ct 680 (1990) (No. 88-1105).

158. Id.

159. *Guidry*, 110 S Ct at 683. 29 USC § 501(c). See note 2.

160. *Guidry*, 110 S Ct at 686.

of the wrongdoer's pension benefits, is inapplicable.[161]

The fact that no breach of fiduciary duty to the plans occurred is supported by the fact that the *Union* and not the pension fund or the pension fund *and* the Union held the $275,000 judgment to which the parties stipulated and which was entered against Guidry.[162] Again, the critical distinction between the Union and the pension funds must be made.

It should be noted that until the Supreme Court decision in *Guidry*, *Crawford v La Boucherie Ltd.*[163] had been cited along with *Cox*[164] in support of a judicially created exception to ERISA's anti-alienability provision in cases of faithless employees. While the *Guidry* decision was a final pronouncement that such an exception should not be implied by the courts, the refusal of the Supreme Court to make a definitive ruling on whether such an exception could exist in cases where a plan fiduciary had breached his duty to the plan in violation of ERISA section 409(a)[165] has left the door open for a *statutorily* created exception and therefore, at this juncture, *Crawford*, unlike *Cox*, should remain good law.

The Union's "other" attempt at urging upon the Court a statutory exception to ERISA section 206(d)(1), by invoking the provisions of LMRDA, represents the most unique aspect of this case in comparison to the line of preceding cases involving a criminal fraud exception to the anti-alienability provision.

Since Guidry pleaded guilty to violating LMRDA section 501(c)[166] and stipulated to the entry of judgment on the charge that he violated LMRDA section 501(a),[167] that statute clearly has relevance to the instant case. The remedial provision of LMRDA[168] provides for a private cause of action against violators of LMRDA section 501(a).[169] The relief provided in the statute includes the recovery of damages, the securing of an accounting, "*or other appropriate relief.*"[170] The Union made a deliberate and thorough argument that as evidenced through the legislative history of LMRDA, Congress intended the imposition of traditional trust law

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161. Id.
162. Id.
163. See notes 121-131 and accompanying text.
164. See notes 111-120 and accompanying text.
165. *Guidry*, 110 S Ct at 685.
166. Id at 681. See note 2.
167. Id at 683, n.5. See note 10.
168. 29 USC § 501(b). See note 41.
169. *Guidry*, 110 S Ct at 686.
170. 29 USC § 501(b) (emphasis added).

remedies, including a constructive trust, against violators of LMRDA.[171]

The Union, after attempting to establish that a constructive trust was contemplated by Congress in its enacting LMRDA section 501(b), next invoked the saving clause of ERISA[172] which 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."[173]

The Union argued that for ERISA section 206(d)(1) to prevent the imposition of a constructive trust on Guidry's pension benefits, LMRDA section 501(b) would be "altered" or "modified" in violation of ERISA § 514(d).[174] While the Union's argument has intrinsic appeal, the Supreme Court noted that it ignores certain very basic precepts of statutory construction.

Initially, the Supreme Court assumed *arguendo* that LMRDA authorized the imposition of a constructive trust.[175] That being the case, the imposition of a constructive trust on Guidry's pension benefits is clearly an alienation of those benefits and therefore, LMRDA section 501(b) and ERISA section 206(d)(1) are in irreconcilable conflict.

In such a case, the specific prohibition on alienation must control over the general indirect provision for a constructive trust.[176] Furthermore, another guide in statutory construction not men-

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171. Respondent's Brief at 13, *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S Ct 680 (1990) (No. 88-1105). Much of the legislative discussion preceding the passage of LMRDA centered on the fiduciary nature of labor union officials and the need for adequate remedies for breaches of that fiduciary duty. Sen Rep No 187 on S 1555, at 72, reprinted at *I Legislative History of the Labor Management Reporting and Disclosure Act of 1959* (Leg Hist) at 468. In contemplating federal regulation of labor unions, the Senate recognized that while many of the acts prohibited by the prospective statute were already deemed violations under the laws of most states, the Senate was concerned about providing adequate relief to unions and union members so that violators of LMRDA could not elude personal liability. Included in the discussion leading up to a vote on the legislation, certain Senators likened a union official's position to that of an officer of a corporation and mentioned that faithless officers are subject to having *constructive trusts* imposed on any illgotten gains obtained by means of breaches in their fiduciary duty to the corporation. 105 Cong Rec S 5859 (Daily ed April 23, 1959), reprinted in *II Leg Hist* at 1133. The Senate's concern was eventually expressed as the "other appropriate relief" language in the statute. 105 Cong Rec S 5854-5861 (Daily ed April 23, 1959), reprinted at *II Leg Hist*, at 1128-1135.

172. 29 USC § 1144(d).

173. *Guidry*, 110 S Ct at 686.

174. Id.

175. Id at 686, n.16.

176. Id at 687.

tioned by the Court is that the statute enacted later in time implicitly repeals a former statute to the extent that there is conflict between the two.[177] Therefore, for purposes of the facts of the instant case, since the statutes cannot be harmonized to effectuate the expressed intention of each, ERISA, which was enacted in 1974 and is clear and narrow on the point of alienation, should repeal the more general LMRDA provision which was enacted in 1959.

To most individuals, there is an inherent injustice in an employee retaining a benefit bestowed upon him through the graciousness of his employer when he has betrayed the employer by his criminal acts. This situation falls squarely within the canon of equity that a wrongdoer should not benefit from his own wrongs. However, in the area of statutory law, seemingly unjust or unpopular results cannot be ameliorated solely by the invocation of equity. A statute is a mandate by the legislature, and indirectly, its electorate. The intent of the statute's makers is supreme and if in conflict with equitable principles, the latter must yield.

In the *Guidry* case, the Supreme Court decidedly favored the specificity of Congress' expressed intent, the lack of equally specific expressed intent otherwise, and the importance that Congress placed on pension plan participants *and their dependents* retaining their vested pension benefits over less direct, less compelling indicia of legislative intent and perhaps the visceral urge to prevent an intuitive injustice.

The Supreme Court makes it clear that if an exception to ERISA's anti-alienability provision is to be made in cases such as *Guidry*, such an exception must be made by Congress.[178]

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177. *Posodas v National City Bank*, 296 US 497 (1936).
178. *Guidry*, 110 S Ct at 687.