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ERISA AND THE BANKRUPTCY CODE: STEPPING INTO QUICKSAND OR SOMETHING ELSE, POST *MACKEY*[*]

Maria A. Di Pippo and Gerald P. Wolf[**]

INTRODUCTION

It is most ironic that the Employee Retirement Income Security Act of 1974, as amended (ERISA),[1] the primary purpose of which is to safeguard the pension rights of employees and their beneficiaries,[2] is being used in the bankruptcy context[3] as an in-

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[*] The title of this Article is derived from the lower court decision in *In re* Volpe, 100 B.R. 840 (Bankr. W.D. Tex. 1989), *order aff'd*, 120 B.R. 843 (W.D. Tex. 1990), *judgment aff'd*, 943 F.2d 1451 (5th Cir. 1991), where Chief Judge Kelly stated "[a]s stated by one court, '[t]he ERISA quicksand is fast swallowing up everything that steps into it or near it.' After finishing its work on this case, this Court is not sure that quicksand is all that it has stepped into." 100 B.R. at 842 (footnote omitted) (quoting Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822, 827 (N.D. Ala. 1988)).

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1. Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)).

2. *See* 29 U.S.C. § 1001 (1988). The legislative history of ERISA provides that ERISA's "most important purpose" is 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." S. REP. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4849. One of the provisions enacted under ERISA to "further ensure that the employee's [pension] benefits are actually available for retirement . . ." was ERISA § 206(d)(1) -- the anti-alienation provision. H.R. REP. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N.

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strument to strip such persons of their retirement security. This ironic twist has been unfolding since the United States Supreme Court decided *Mackey v. Lanier Collection Agency & Service,*

4734. *See infra* notes 18, 21 and accompanying text.

3. The majority of courts hold that benefits under an ERISA-covered pension or tax qualified plan are not subject to enforcement proceedings by a nonbankruptcy creditor due to the anti-alienation provisions set forth in ERISA § 206(d)(1) and § 401(a)(13) of the Internal Revenue Code (IRC), as applicable. *See infra* notes 18, 21 and accompanying text; United Metal Products Corp. v. National Bank of Detroit, 811 F.2d 297, 300 (6th Cir. 1987) (no fraud exemption to anti-alienation provisions of ERISA due to employee's fraudulent or criminal conduct directed against employer), *cert. dismissed*, 485 U.S. 1017 (1988); Tenneco Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688, 689-90 (4th Cir. 1983) (by virtue of the ERISA statute and IRC regulations, an employee's accrued benefits under such a qualified plan may not be reached by judicial process in aid of a third-party creditor); General Motors Corp. v. Buha, 623 F.2d 455, 463 (6th Cir. 1980) (benefits under plan which was covered by ERISA were not subject to garnishment by a creditor of a plan beneficiary); Commercial Mortgage Co. v. Citizens Nat'l Bank of Dallas, 526 F. Supp. 510, 516 (N.D. Tex. 1981) (ERISA's assignment and alienation prohibition creates a general federal exemption of pension benefits from commercial creditor's claims and preempts otherwise relevant state law); Helmsley-Spear, Inc. v. Winter, 74 A.D.2d 195, 197, 426 N.Y.S.2d 778, 780 (1st Dep't 1980) (employee's interest in profit sharing plan and trust established by employer was exempt under ERISA from claims of employer even though employee committed fraud against employer), *aff'd*, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981); *cf.* Planned Consumer Marketing, Inc. v. Coats and Clark, Inc., 71 N.Y.2d 442, 454-55, 522 N.E.2d 30, 38, 527 N.Y.S.2d 185, 193 (1988) (ERISA's anti-alienation provision does not preclude judgment creditor from reaching pension benefits pursuant to state laws prohibiting fraudulent conveyances, where very creation and enhancement of pension trust was allegedly fraudulent); *see also* Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 373-74 (1990) (Court found that imposition of a constructive trust in favor of union against ERISA-covered pension benefits of former official who embezzled union funds violated ERISA's anti-alienation provision).

In addition, the United States Supreme Court in Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988), stated "[ERISA] Section 206(d)(1) bars the assignment or alienation of pension plan benefits and thus prohibits the use of state enforcement mechanisms only insofar [sic] as they prevent those benefits from being paid to plan participants." *Id.* at 836 (dictum) (emphasis removed).

Inc.[4] *Mackey's* progeny are using ERISA's broad preemptive reach[5] to invalidate the pension protection legislation recently enacted by many states, including New York.[6]

This Article discusses the general manner in which the courts treat ERISA-covered pension benefits[7] under the Bankruptcy

4. 486 U.S. 825 (1988).

5. *See infra* notes 117-43 and accompanying text.

6. *See infra* notes 76-79, 94-106 and accompanying text.

7. For purposes of this Article and unless otherwise indicated, the phrase "ERISA-covered pension benefits" or "pension benefits" refers to benefits under an employee pension benefit plan, such as a pension or profit sharing plan, covered by Title I of ERISA. Title I of ERISA, which sets forth certain requirements relating to reporting and disclosure, vesting and participation, plan funding, fiduciary responsibility, administration and enforcement, and ERISA's anti-alienation and preemption provisions (*see infra* notes 17-23, 118-21), generally applies to:

> any employee benefit plan if it is established or maintained --
>
> (1) by an employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by an employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.

29 U.S.C. § 1003(a) (1988).

The term "employee benefit plan" includes an employee pension benefit plan. *See* 29 U.S.C. § 1002(3) (1988). The term "employee pension benefit plan" generally means:

> any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A) (1988).

ERISA specifically excludes certain plans from coverage under Title I, including but not limited to, church and governmental plans. *See* 29 U.S.C. § 1003(b) (1988). Regulations issued by the United States Department of Labor also elaborate on other plans excluded from coverage under Title I. *See* 29 C.F.R. § 2510.3-3 (1991). Thus, an individual retirement account (IRA)

Code,[8] recent amendments to New York's civil practice, trust and debtor-creditor laws aimed at protecting the pension benefits of debtors in bankruptcy, and the potential utilization of *Mackey* and its progeny by bankruptcy courts within New York's jurisdiction to circumvent the New York legislation. This Article concludes by proffering a number of arguments to support the position that notwithstanding the broad preemptive reach of ERISA espoused by the *Mackey* Court, ERISA does not preempt state legislation that attempts to protect pension benefits within the bankruptcy context.

I. TREATMENT OF ERISA-COVERED PENSION BENEFITS UNDER THE BANKRUPTCY CODE

A. The Bankruptcy Estate

The commencement of a bankruptcy proceeding[9] under the Bankruptcy Code[10] creates an estate generally consisting of "all

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established by an individual taxpayer is not covered under Title I of ERISA. *See* 29 C.F.R. § 2510.3-2(d) (1991). A Keogh plan, *i.e.*, a retirement plan established and maintained by a sole proprietor or partnership, which does not cover common law employees (other than the spouse of the sole proprietor or partner), is not covered by Title I of ERISA. *See* 29 C.F.R. § 2510-3.3(a)-(c) (1991). A corporate-sponsored plan which only covers the sole corporate shareholder (and his or her spouse) is not covered under Title I of ERISA. *Id.*

8. 11 U.S.C. §§ 101-1330 (1988).

9. A bankruptcy proceeding commences with the filing of a petition with the bankruptcy court. *See* 11 U.S.C. §§ 301-302 (1988). There are generally three types of bankruptcy proceedings: Chapter 7, Chapter 11 and Chapter 13. Chapter 7 proceedings involve liquidation of the debtor's assets. *See* 11 U.S.C. § 301 (1988). Chapter 11 and Chapter 13 proceedings generally involve rehabilitation of the debtor, *i.e.*, the debtor generally retains his or her assets and pays creditors from future earnings pursuant to a court-approved plan. *See* 11 U.S.C. § 303 (1988).

Bankruptcy proceedings under Chapters 7 and 11 may be initiated by the debtor or by a creditor. *See* 11 U.S.C. §§ 301, 303 (1988). Bankruptcy proceedings under Chapter 13 may only be initiated by the debtor. *See* 11 U.S.C. § 303(a) (1988). This Article will only deal with debtors in bankruptcy under Chapter 7 or Chapter 11.

10. 11 U.S.C. §§ 101-1330 (1988).

legal or equitable interests of the debtor in property as of the commencement of the case."[11] This broad provision brings a debtor's[12] ERISA-covered pension benefits into the bankruptcy estate, unless all or a part of such benefits are either excluded from the estate under section 541(c)(2)[13] of the Bankruptcy Code (section 541(c)(2)) or are exempt from the estate under section 522(b)[14] of the Bankruptcy Code (section 522(b)).

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11. 11 U.S.C. § 541(a)(1) (1988). This section states:

> (a) the commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1) (1988).

The Report of the Senate Committee on the Judiciary on the Bankruptcy Reform Act of 1978 describes § 541(a)(1) as follows:

> This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interests of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad.

S. REP. No. 989, 95th Cong., 2d Sess. 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5785, 5868.

12. Bankruptcy Code § 101(13) defines debtor as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13) (1988). Bankruptcy Code § 101(41) defines "person" as including an "individual, partnership, and corporation . . . ." 11 U.S.C. § 101(41) (1988). This Article will only deal with the pension benefits of an individual debtor in bankruptcy. All references to "debtor" mean an individual debtor in bankruptcy.

13. *See* "except as" clause in 11 U.S.C. § 541(a)(1) (1988) *supra* at note 11.

14. The first sentence of Bankruptcy Code § 522(b) states: "Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection." 11 U.S.C. § 522(b) (1988).

B. Section 541(c)(2) -- The Spendthrift Trust Exclusion

Section 541(c)(2) provides that spendthrift trusts[15] will be excluded from a debtor's bankruptcy estate. This section states that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable non-bankruptcy law* is enforceable in a case under [the Bankruptcy Code]."[16] The Bankruptcy Code does not define "applicable nonbankruptcy law."

1. ERISA's Anti-Alienation Provision As Applicable Nonbankruptcy Law Under Bankruptcy Code Section 541(c)(2)

ERISA section 206(d)(1)[17] requires an ERISA-covered pension plan to expressly prohibit the assignment or alienation of benefits under the plan.[18] The legislative history of this section indicates

15. Generally, a spendthrift trust is a trust created to provide a fund for the maintenance of a beneficiary, and at the same time secure it against his improvidence or incapacity. It provides a fund for the benefit of a person other than the settlor, secures it against the beneficiary's own improvidence, and places it beyond his creditors' reach. BLACK'S LAW DICTIONARY 1400 (6th ed. 1990).

16. 11 U.S.C. § 541(c)(2) (1988) (emphasis added).

17. 29 U.S.C. § 1056(d)(1) (1988).

18. ERISA § 206(d)(1) states: "Each pension plan shall provide that benefits under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1988). The term "pension plan" is defined in the same manner as "employee pension benefit plan" under ERISA. *See* 29 U.S.C. § 1002(2)(A) (1988); *see supra* note 7 and accompanying text.

ERISA provides three exceptions to the anti-alienation requirement: (a) the voluntary and revocable assignment of up to ten percent of benefits in pay status; (b) loans to plan participants which are adequately secured and are not prohibited transactions under § 4975 of the Internal Revenue Code; and (c) payments pursuant to a qualified domestic relations order. *See* 29 U.S.C. § 1056(d)(2) and (3)(A) (1988).

ERISA's anti-alienation provision does not apply to an employee welfare benefit plan. *See* 29 U.S.C. § 1051(1) (1988); Mackey v. Lanier Collection Agency & Serv., Inc., 488 U.S. 825, 830 (1988).

In addition, a retirement plan sponsored by a sole proprietor, partnership or corporation under which only the sole proprietor, partner(s) and sole

that its purpose was "[t]o further insure that [an] employee's accrued benefits are actually available for retirement purposes . . . ."[19] An anti-alienation provision is also required by the Internal Revenue Code[20] in order for a retirement plan and the trust created thereunder to "qualify" for favorable federal income tax treatment.[21] Anti-alienation applies not only to voluntary

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shareholder (and their spouses) participate respectively, is not covered by ERISA's anti-alienation provision because the plan is not an "employee benefit plan" within the meaning of ERISA § 3(3). *See supra* note 7 and accompanying text. However, such plans must contain the comparable anti-alienation provision required by the IRC in order to qualify for certain tax advantages. *See infra* note 21 and accompanying text.

An IRA is not covered under ERISA's anti-alienation provision. *See* 29 U.S.C. § 1051(6) (1988); *see also supra* note 7 and accompanying text.

19. H.R. REP. No. 807, 93rd Cong. (1974), 2d Sess. 68, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4734; *see also supra* note 2 and accompanying text.

20. I.R.C. §§ 1-9602 (1991). Title II of ERISA amended the IRC of 1954. *See* 29 U.S.C. § 1001 (1990). All references are to the IRC in effect as of January 1, 1991, unless otherwise indicated.

21. In order for a trust created under a pension or profit sharing plan to qualify for certain tax advantages, the plan and trust must satisfy the applicable provisions of IRC § 401. *See* I.R.C. § 401(a),(b),(c),(d),(f),(g),(i),(k),(l),(m),(n) (1991). If a plan and trust satisfy IRC § 401, the employer sponsoring the plan can take deductions for contributions thereto within certain limitations. *See* I.R.C. § 404 (1991). In addition, the trust will generally be exempt from taxation, *i.e.*, earnings on the contributions held thereunder accumulate tax free. *See* I.R.C. § 501(a) (1991). Finally, a participant in a qualified retirement plan will not have taxable income with respect to his or her benefits under the plan until such benefits are distributed to the participant. *See* I.R.C. § 402 (1991).

Generally, if a pension or profit sharing trust fails to satisfy the applicable qualification provisions of IRC § 401, employer deductions are disallowed (to the extent participants in the plan are not vested in their benefits), trust earnings are subject to taxation, and participants realize gross income to the extent they are vested in employer contributions made for the period of disqualification. *See* I.R.C. § 404(a)(5) (1991); I.R.C. § 501(a) (1991); I.R.C. § 402(b) (1991); I.R.C. § 83 (1991).

The anti-alienation provision of the IRC is found in the first sentence of IRC § 401(a)(13)(a), which states: "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides the benefits provided under the plan may not be assigned or alienated." The exceptions to anti-alienation provided under ERISA are also found in the IRC.

transfers of benefits by a plan participant but also to involuntary transfers of benefits through judicial process by such enforcement mechanisms as garnishment, levy and attachment.[22] Failure to comply with the anti-alienation requirement may result in plan disqualification.[23]

See I.R.C. § 401(a)(13)(a) and (b) (1991); TREAS. REG. § 1.401(a)-(13)(d) and (g) (codified as amended in 1988); *supra* note 18, 21 and accompanying text. Treasury Regulations provide additional anti-alienation exceptions under IRC § 401(a)(13) with respect to certain federal tax liens and judgments, and certain revocable third party arrangements. *See* TREAS. REG. § 1.401(a)-13(b)(2) and (e) (codified as amended in 1988).

22. Treasury Regulation § 1.401(a)-13(b)(1) provides:

> Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits 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*.

TREAS. REG. § 1.401(a)-13(b)(1) (codified as amended in 1988) (emphasis added).

"Assignment" and "alienation" include "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is or may become payable to the participant or beneficiary." TREAS. REG. § 1.401(a)-13(c)(ii) (codified as amended in 1988).

23. The Internal Revenue Service (IRS) takes the position that compliance with a bankruptcy court order to turn over qualified plan benefits to a bankruptcy trustee violates the anti-alienation provision of IRC § 401(a)(13) and results in plan disqualification. *See* Priv. Ltr. Rul. 88-29-009 (Apr. 6, 1988); *see also* Priv. Ltr. Rul. 81-31-020 (May 5, 1981) (honoring pension payment deduction order of bankruptcy court in a chapter 13 proceeding violates IRC § 401(a)(13)). Thus, if a qualified plan administrator/trustee receives a bankruptcy court order, he or she may be faced with the task of choosing between contempt of court sanctions and plan disqualification. If the administrator/trustee honors the order and the plan is disqualified, the administrator/trustee may be personally liable for breach of fiduciary duties under ERISA, which generally requires a plan fiduciary to carry out plan duties "solely in the interest" of plan participants and beneficiaries, and in a prudent manner. *See* 29 U.S.C. § 1104(a)(1) (1988); 29 U.S.C. § 1109 (1988); 29 U.S.C. § 1132(a)(2), (3) and (4) (1988); *see, e.g.*, Wright v. Nimmons, 641 F. Supp. 1391, 1403 (S.D. Tex. 1986) (plan fiduciaries failure to respond to IRS requests and bring plan into compliance with ERISA, which resulted in plan's disqualification, was violation of ERISA's prudent man

The issue of whether ERISA's anti-alienation provision constitutes "applicable nonbankruptcy law" under section 541(c)(2) has been addressed by the courts with a split emerging between the circuit courts.

The view, adopted by the United States Courts of Appeals for the Fifth, Eighth, Ninth, and Eleventh Circuits, is that ERISA's anti-alienation provision does not constitute an "applicable nonbankruptcy law" under section 541(c)(2).[24] Generally, these courts reach this conclusion by examining the legislative history of section 541(c)(2) in order to determine the meaning of "applicable" and finding that Congress intended only to carry forward the state spendthrift trust exclusion that existed under the prior Bankruptcy Code.[25] In addition, some of these courts rely

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fiduciary standard).

24. *See In re* Dyke, 943 F.2d 1435, 1444 (5th Cir. 1991) (ERISA anti-alienation provision is not "applicable nonbankruptcy law" which would preclude creditors from reaching the assets in a qualified plan); *In re* Goff, 706 F.2d 574, 580 (5th Cir. 1983) ("Congress did not evidence an intent, by reference to 'applicable nonbankruptcy law' to include an ERISA plan exemption."); *In re* Graham, 726 F.2d 1268, 1271 (8th Cir. 1984) (Congress did not intend "applicable nonbankruptcy law" to include ERISA); *In re* Daniel, 771 F.2d 1352, 1360 (9th Cir. 1985) (qualifying pension plans containing anti-alienation provisions are excluded only if they are enforceable under state spendthrift trust law), *cert. denied*, 475 U.S. 1016 (1986); *In re* Lichstral, 750 F.2d 1490 (11th Cir. 1985) (because pension plans are not spendthrift trusts, they are not excluded under § 541 (c)(2)).

25. *See Dyke*, 943 F.2d at 1441 n.16 (in which the court referred to legislative history analysis in *Goff* finding that if Congress intended to include federal statutes as "applicable nonbankruptcy law," it would have expressly referred to federal law); *Goff*, 706 F.2d at 586 (see above); *Graham*, 726 F.2d at 1271 ("[C]ongress only intended by § 541(c)(2) to preserve the status traditional spendthrift trusts, as recognized by state law, enjoyed under the old Bankruptcy Act."); *Daniel*, 771 F.2d at 1360 ("'applicable non-bankruptcy law' was intended to be a narrow reference to *state* 'spendthrift trust' law and not a broad reference to *all* other laws"); *Lichstral*, 750 F.2d at 1490 (agreeing with other courts' interpretations based on legislative history of 'applicable nonbankruptcy law' as applying only to state law). The House Report accompanying the proposed Bankruptcy Code of 1978 states that the new Code "continues over [from the old Bankruptcy Code] the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable state law." H.R. REP. No. 595, 95th Cong., 2d Sess. 175-76, *reprinted in* 1978 U.S.C.C.A.N.

on the existence of the federal bankruptcy exemption under section 522(b)(1) for certain tax-qualified pension benefits[26] as further support for finding that Congress did not intend to provide a blanket exemption for ERISA-covered pension benefits under section 541(c)(2).[27]

The view adopted by the United States Courts of Appeals for the Third, Fourth, Sixth and Tenth Circuits is that ERISA's anti-alienation provision constitutes "applicable nonbankruptcy law" under section 541(c)(2).[28] Generally, these courts find that *all* state and federal laws under which a transfer restriction is enforceable constitute "applicable nonbankruptcy law" based on the plain language of section 541(c)(2),[29] and that reliance on legislative history to restrict "applicable nonbankruptcy law" to state spendthrift trust law is unwarranted.[30] The rationales used

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5787, 6136.

26. *See infra* notes 47-53 and accompanying text.

27. *See, e.g., Goff*, 706 F.2d at 586.

28. *See* Velis v. Kardonis, 949 F.2d 78, 82 (3d Cir. 1991) (Bankruptcy Code's exclusion of property from estate, to the extent that restriction on transfer is enforceable under "applicable nonbankruptcy law," included federal law as well as state spendthrift trust law); *In re* Moore, 907 F.2d 1476, 1477 (4th Cir. 1990) (debtors' interests in profit-sharing and pension plan are not the property of their bankruptcy estates due to broad language of § 541(c)(2)); *In re* Lucas, 924 F.2d 597, 601 (6th Cir. 1991) (debtor's interest in ERISA-qualified pension plan was not property of the estate due to Bankruptcy Code provision's unambiguous application to both state and federal bankrupcty law), *cert. denied sub. nom.* Forbes v. Holiday Corp. Sav. & Retirement Plan, 111 S. Ct. 2275 (1991); *In re* Harline, 950 F.2d 669, 674 (10th Cir. 1991) (Chapter 7 debtor's interest in profit sharing trust was excludable from his bankruptcy estate to extent it was a qualified ERISA plan, even if plan did not qualify as a state spendthrift trust).

29. *See Velis*, 949 F.2d at 81 ("statutory interpretation properly begins with the language of the statute itself"); *Moore*, 907 F.2d at 1477 ("'[a]pplicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable"); *Lucas*, 924 F.2d at 601 ("language of § 541(c)(2) is clear and unambiguous"); *Harline*, 950 F.2d at 674 ("[w]e do not perceive an ambiguity in the phrase 'applicable nonbankruptcy law' that would permit us to differentiate state from federal law").

30. *See Velis*, 949 F.2d at 81 ("There is no need to resort to legislative history unless the statutory language is ambiguous."); *Moore*, 907 F.2d at

by these courts in refusing to rely on legislative history are as follows: first, the phrase "applicable nonbankruptcy law" in other sections of the Bankruptcy Code refers to federal and state law;[31] second, where Congress chose to limit sections of the Bankruptcy Code to state law it did so expressly;[32] third, the legislative history relied upon by proponents of the non-applicability of ERISA indicates that Congress merely intended to *continue* a state spendthrift trust law exclusion, but not to the exclusion of federal law.[33] Finally, these courts hold that ERISA's anti-alienation provision is an enforceable transfer restriction under section 541(c)(2) because it is enforceable against general creditors.[34]

Moreover, those courts that find ERISA to be applicable nonbankruptcy law note that their conclusion, in contrast to the opposite view, "harmonizes" ERISA and the Bankruptcy Code, prevents a qualified plan from being disqualified, and guarantees the uniform treatment of plan benefits.[35]

1478 ("An appeal to legislative history is inappropriate here because the language of § 541(c)(2) is clear."); *Lucas*, 924 F.2d at 600 ("It is an axiom of statutory construction that resort to legislative history is improper when a statute is unambiguous."); *Harline*, 950 F.2d at 674 ("Finding no ambiguity in the language of § 541(c)(2), resort to legislative history is inappropriate.").

31. *See Velis*, 949 F.2d at 81; *Moore*, 907 F.2d at 1477-78; *Lucas*, 924 F.2d at 601; *Harline*, 950 F.2d at 674.

32. *See, e.g.*, *Lucas*, 924 F.2d at 601-02 & n.8 (relying on *Moore*, 907 F.2d at 1478).

33. *See, e.g.*, *Lucas*, 924 F.2d at 602; *Moore*, 907 F.2d. at 1479; *In re* Ralstin, 61 B.R. 502, 503 (Bankr. D. Kan. 1986); *In re* Threewitt, 24 B.R. 927, 929 (Bankr. D. Kan. 1982).

34. *See, e.g.*, *Lucas*, 924 F.2d at 602-03; *Moore*, 907 F.2d at 1479-80; Shumate v. Patterson, 943 F.2d 362, 364 (4th Cir. 1991), *cert. granted*, No. 91-913, 1992 U.S. LEXIS 387 (Jan. 21, 1992); *In re* Leamon, 121 B.R. 974, 982 (Bankr. E.D. Tenn. 1990); *Ralstin*, 61 B.R. at 504-05; Warren v. G.M. Scott & Sons, 34 B.R. 543, 544-45 (Bankr. S.D. Ohio W.D. 1983); *In re* Rogers, 24 B.R. 181, 182-83 (Bankr. D. Ariz. 1982); *Threewitt*, 24 B.R. at 929.

35. *See, e.g.*, *Shumate*, 943 F.2d at 365 (relying on *Moore*, 907 F.2d 1476 (4th Cir. 1990)); *Lucas*, 924 F.2d at 603; *Moore*, 907 F.2d at 1480-81; *In re* Majul, 119 B.R. 118, 123-24 (W.D. Tex. 1990) (relying on *Moore*).

2. State Spendthrift Trust Law As Applicable Non-Bankruptcy Law

The jurisdictions that have rejected ERISA as applicable nonbankruptcy law exclude a debtor's ERISA-covered pension benefits from the bankruptcy estate only if the particular plan holding such benefits constitutes a spendthrift trust under applicable state law.[36] Under this state spendthrift trust analysis, the courts usually examine the terms and provisions of the plan document and the surrounding facts and circumstances to determine the degree of control the debtor may have over his or her pension benefits.[37]

The following have been found to constitute a sufficient degree of control by a debtor over ERISA-covered pension benefits to taint the spendthrift nature of the trust and bring the debtor's pension benefits into the bankruptcy estate: the debtor's ability to control plan investments as trustee;[38] the debtor's ability to direct investments with respect to his or her plan benefits;[39] the

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36. *See supra* note 25 and accompanying text; *see also In re* Lingle, 119 B.R. 672, 674 (Bankr. S.D. Iowa 1990).

37. *See In re* Kincaid, 917 F.2d 1162, 1167 (9th Cir. 1990) (court focused on the amount of dominion and control exercised by the debtor, even if plan is not self-settled); *In re* Kaplan, 97 B.R. 572, 577 (Bankr. 9th Cir. 1989) (primary consideration to determine whether a trust is spendthrift is debtor's degree of control over his trust); *In re* Balay, 113 B.R. 429, 438 (Bankr. N.D. Ill. 1990) (no bright line test to determine the point at which a beneficiary's control over a trust renders it non-spendthrift); *In re* Spears, 121 B.R. 896, 900 (Bankr. M.D. Fla. 1990) ("[U]ltimate question is whether the debtor's ability to reach their interest in the plans rises to the level of asserting a sufficient degree of dominion and control over their funds in the plans, thus to negate the spendthrift character of these plans."); *see also In re* Lichstrahl, 750 F.2d 1488, 1490 (11th Cir. 1985); *In re* Creasy, 83 B.R. 404, 407 (Bankr. W.D. Va. 1988), *rev'd sub. nom.* Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991), *cert. granted*, No. 91-913, 1992 U.S. LEXIS 387 (Jan. 21, 1992); *In re* Martin, 119 B.R. 297, 300 (Bankr. M.D. Fla. 1990); *In re* Morrow, 122 B.R. 151, 154 (Bankr. M.D. Fla. 1990); *In re* Rosenquist, 122 B.R. 775, 780 (Bankr. M.D. Fla. 1990); *In re* Alagna, 107 B.R. 301, 308 (Bankr. D. Colo. 1989).

38. *See In re* Brooks, 844 F.2d 258, 263 (5th Cir. 1988); *Kaplan*, 97 B.R. at 578; *see also Alagna*, 107 B.R. at 309-10.

39. *See In re* Smith, 124 B.R. 787, 790 (Bankr. W.D. Mo. 1991); *In re*

debtor's ability as officer or director of the plan sponsor to terminate and/or amend the plan;[40] the debtor's ability to borrow from the plan;[41] the debtor's ability to compel distributions from the plan at termination of employment;[42] the debtor's ability to

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Carver, 128 B.R. 239, 242 (Bankr. W.D. Mo. 1990); *In re* Starkey, 116 B.R. 259, 262 (Bankr. D. Colo. 1990); *In re* Mumm, 52 B.R. 140, 141 (Bankr. S.D. Fla. 1985).

40. *In re* O'Brien, 94 B.R. 583, 587 (Bankr. W.D. Mo. 1988) (corporation, which was controlled by debtor, reserved the right to amend or terminate the trust, thus defeating spendthrift nature); *Creasy*, 83 B.R. at 408; (someone who holds power of revocation is deemed to be the settlor as a matter of law); *Alagna*, 107 B.R. at 309 (plan was controlled by the debtor who reserved the right to alter, amend or terminate).

41. *See In re* Brooks, 844 F.2d 258, 263 (5th Cir. 1988) (ability to borrow for any undefined hardship); *In re* Morrow, 122 B.R. 151, 154 (Bankr. M.D. Fla. 1990) (ability to borrow from the plan in event of hardship is inconsistent with character of classical spendthrift trust); *In re* Rosenquist, 122 B.R. 775, 781 (Bankr. M.D. Fla. 1990) (ability to borrow for specified purposes); *In re* Balay, 113 B.R. 429, 439 (Bankr. N.D. Ill. 1990) (liberal loan provision alone would be sufficient to vitiate spendthrift nature of the plan); *In re* Martin, 119 B.R. 297, 300 (Bankr. M.D. Fla. 1990) (ability to borrow funds that may be used for purchase of a residence or education of dependents); *cf. In re* Kincaid, 917 F.2d 1162, 1168 (9th Cir. 1990) (where administrator has sole discretion of trust corpus and any loan made must be repaid with interest did not defeat spendthrift character); *see also In re* Knowles, 123 B.R. 428, 432 (Bankr. M.D. Fla. 1991) (no ability to borrow against interest in plan).

42. *See Brooks*, 844 F.2d at 263 (beneficiary could access funds by terminating membership in association and then rejoining association one week later); *In re* Davis, 125 B.R. 242, 245 (Bankr. W.D. Mo. 1991) (debtor ability to receive lump sum payment upon termination of employment is sufficient dominion and control over assets to defeat spendthrift nature); *Smith*, 124 B.R. at 791 (ability to access funds by terminating employment is sufficient control to render trust reachable by creditors); *Starkey*, 116 B.R. at 262 (debtor could gain access to employer's contributed funds simply by terminating employment); *Balay*, 113 B.R. at 439 (ability to reach plan assets on voluntary termination is alone sufficient to defeat spendthrift nature of the trust); *In re* Leimbach, 99 B.R. 796, 800 (Bankr. S.D. Ohio 1989) (debtor retained a future interest in the plan as evidenced by his right to receive his vested interest upon voluntary termination of employment). *See also Morrow*, 122 B.R. at 154; *Rosenquist*, 122 B.R. at 781; *Spears*, 121 B.R. at 900; *contra Kincaid*, 917 F.2d at 1168 (provision of plan enabling employee to gain access to funds by voluntarily terminating employment was determined a

change, discontinue or resume contributions, and elect a non-spouse beneficiary;[43] and the debtor's ability to request in-service withdrawals.[44] In addition, the spendthrift nature of a pension trust has been deemed tainted if the trust is self-settled, *i.e.*, the employer/sponsor and the debtor/participant are one and the same, or the debtor makes contributions to the plan.[45]

Some courts have held that section 541(c)(2) is simply not applicable to ERISA-covered plans and will not apply a state spendthrift trust analysis with respect to a debtor's pension

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sufficient restriction to prevent abuse).

43. *In re* Fritsvold, 115 B.R. 192, 195 (Bankr. D. Minn. 1990).

44. *See In re* Kaplan, 97 B.R. 572, 578 (Bankr. 9th Cir. 1989) (no restriction on drawing from account invalidates anti-alienation provision of plan); *Davis*, 125 B.R. at 246 (ability to make withdrawals under the plan is deemed dominion and control over trust); *Rosenquist*, 122 B.R. at 780 (feature requiring trust administrator to convey trust property to debtor defeats validity of spendthrift trust); *Morrow*, 122 B.R. at 154 (ability to require trust administrator to convey trust property to debtor is sufficient dominion and control over trust *res* to defeat spendthrift nature); *In re* Martin, 119 B.R. 297, 300 (Bankr. M.D. Fla. 1990) (ability to terminate trust or force conveyance of trust *res* is not in the nature of a spendthrift trust); *In re* Starkey, 116 B.R. 259, 262 (Bankr. D. Colo. 1990) (voluntary contributions debtor had the absolute right to withdraw); *cf. Kincaid*, 917 F.2d at 1168 (administrator not obligated to make distribution, it is solely within his discretion).

45. *See In re* Velis, 123 B.R. 497, 509 (Bankr. D. N.J. 1991) (self-settled spendthrift trust is not protected from creditors), *modified*, Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991); *Brooks*, 844 F.2d at 263-64 (court looked to reality of who really was the settlor and who funded the trust); *In re* Goff, 706 F.2d 574, 587 (5th Cir. 1983) (well established rule that if settlor creates a trust for his own benefit, it is invalid as far as creditors are concerned and can be reached); *In re* Davis, 125 B.R. 242, 246 (Bankr. W.D. Mo. 1991) (if beneficiary makes contributions to the plan it gives the beneficiary the power to be the settlor); *Leimbach*, 99 B.R. at 800 ("if settlor and beneficiary are viewed as substantively the same entity, the trust is self-settled and not a valid spendthrift trust under the law of most jurisdictions, including Ohio); *see also In re* Lichstrahl, 750 F.2d 1488, 1490 (11th Cir. 1985); *In re* Kaplan, 97 B.R. 572, 578 (Bankr. 9th Cir. 1989); *In re* Balay, 113 B.R. 429, 438 (Bankr. N.D. Ill. 1990); *In re* O'Brien, 94 B.R. 583, 587 (Bankr. W.D. Mo. 1988); *contra In re* Kincaid, 917 F.2d 1162, 1166-67 (9th Cir. 1990) (a plan in which an employee voluntarily participates should not *per se* be held to be self-settled).

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benefits.[46]

C. Section 522(b) -- Exemptions From The Bankruptcy Estate

If a debtor's pension benefits are not excluded from the bankruptcy estate pursuant to section 541(c)(2), all or a part of such benefits may nonetheless be exempt from the estate under section 522(b).[47] There are two types of exemptions under this section: (1) the federal bankruptcy exemptions,[48] and (2) the federal nonbankruptcy and state or local law exemptions.[49] A debtor may choose either type of exemption (but not both),[50] unless the debtor's state has "opted out" of the federal bankruptcy exemptions.[51]

46. *See In re* Graham, 726 F.2d 1268, 1271-72 (8th Cir. 1984); *In re* Nadler, 122 B.R. 162, 165-67 (Bankr. D. Mass. 1990); *In re* Loe, 83 B.R. 641, 644-45 (Bankr. D. Minn. 1988); *In re* Bowen, 80 B.R. 1012, 1014-17 (Bankr. D.S.D. 1987); *In re* Flygstad, 56 B.R. 884, 886-87 (Bankr. N.D. Iowa 1986); *In re* McKenna, 58 B.R. 221, 222-23 (Bankr. N.D. Iowa 1985); *In re* White, 47 B.R. 410, 412-13 (Bankr. W.D. Wash. 1985), *on remand* 61 B.R. 388 (Bankr. W.D. Wash. 1986). These courts generally base their conclusion on the relationship between Bankruptcy Code § 541(c)(2) and Bankruptcy Code § 522(b)(1), the latter section providing a limited exemption for tax-qualified plans pursuant to Bankruptcy Code § 522(d)(10)(E). *See Graham*, 726 F.2d at 1271-72; *Nadler*, 122 B.R. at 165; *Loe*, 83 B.R. at 645; *In re* Bowen, 80 B.R. at 1016; *In re* Flygstad, 56 B.R. at 887; *McKenna*, 58 B.R. at 223; *White*, 47 B.R. at 412. These courts find this Bankruptcy Code exemption for pension benefits to be evidence that Congress intended ERISA-covered plans to be part of the bankruptcy estate. *See Graham*, 726 F.2d at 1272; *Flygstad*, 56 B.R. at 887, *McKenna*, 58 B.R. at 223; *White*, 47 B.R. at 412-13. *But see In re* Cheaver, 121 B.R. 665, 665-66 (Bankr. D.D.C. 1990); *In re* Rodriguez, 82 B.R. 74, 76 & n.2 (Bankr. W.D. Ark. 1987).

47. 11 U.S.C. § 522(b) (1988); *see supra* note 14 and accompanying text.

48. 11 U.S.C. § 522(b)(1) (1988); *see infra* note 52 and accompanying text.

49. 11 U.S.C. § 522(b)(2)(A) (1988); *see infra* note 54 and accompanying text.

50. *See supra* note 14 and accompanying text.

51. *See infra* note 52 and accompanying text.

1. The Federal Bankruptcy Exemption For Pension Benefits

If a state has not "opted out" of the federal bankruptcy exemptions,[52] an exemption is available under Bankruptcy Code section 522(d) for certain benefits under plans that are qualified under the Internal Revenue Code, but only to the extent such benefits are "reasonably necessary" for the debtor's support.[53]

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52. The exemption provided under Bankruptcy Code § 522(b)(1) is for "property that is specified under subsection (d) of this section, *unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize*; or, in the alternative, ..." 11 U.S.C. § 522(b)(1) (1988) (emphasis added). *See infra* note 54 and accompanying text defining the "[s]tate law that is applicable to the debtor" under Bankruptcy Code § 522(b)(1).

53. Bankruptcy Code § 522(d)(10)(E) provides an exception with respect to:

The debtor's right to receive --

(E) a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, *to the extent reasonably necessary for the support of the debtor and any dependent of the debtor,* unless --

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under § 401(a), 403(a), 403(b), 408, or 409 of the IRC of 1986 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

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

This exemption applies, *inter alia,* to all plans which are qualified under the IRC, including Keogh plans and IRAs. *See supra* note 21 and accompanying text; *see also supra* note 21 and accompanying text (discussing applicability of ERISA'S anti-alienation provision). This exemption does *not* require that a retirement plan be ERISA-covered. *See supra* note 7 and accompanying text.

In determining whether such payments are reasonably necessary for support under this exemption, the courts apply a facts and circumstances test, taking into consideration the debtor's age, health, and present and future earnings capacity. In applying this facts and circumstances test, the courts generally apply the standard that the "exempt amount" should be sufficient to sustain the basic needs of the debtor, not related to the former status or lifestyle to which the debtor has grown accustomed, but taking into account the special needs the debtor may have. *See In re* Kochell, 732 F.2d 564 (7th Cir. 1984) (forty-four year old physician-debtor's benefits in hospital's pension plans were not

2. The Federal Nonbankruptcy and State Law Exemptions

Section 522(b)(2)(A) permits exemptions for any property that is exempt under federal nonbankruptcy laws, or state or local laws.[54]

(a) *ERISA's Anti-alienation Provision As Federal Nonbankruptcy Law*

As with section 541(c)(2), the issue of whether ERISA's anti-alienation provision[55] constitutes a federal nonbankruptcy exemption for pension benefits under section 522(b)(2)(A) has been addressed by the courts, with two different views evolving.

The majority view, taken by several of the circuit courts and most bankruptcy courts addressing this issue, is that ERISA's anti-alienation provision does not constitute a federal non-

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reasonably necessary for support where debtor's net cash receipts were $1500 per month with high future earnings capacity and debtor was in good health); *In re* Clark, 711 F.2d 21 (3d Cir. 1983) (Keogh assets of debtor, a forty-three year old licensed therapist in good health, were not reasonably necessary for support); *In re* Velis, 123 B.R. 497, 510-14 (Bankr. D.N.J. 1991) (debtor's pension benefits were not reasonably necessary for support where debtor's share of personal expenses could be satisfied from future income of orthopedic practice, $200,000 in equity existed in marital home, and debtor could, in future, accumulate enough pension assets to provide for various needs at retirement), *modified,* Velis v. Kardonis, 949 F.2d 78 (3d Cir. 1991); *In re* Donaghy, 11 B.R. 677 (Bankr. S.D.N.Y. 1981) (lump-sum distribution to debtor, age sixty-two (wife age sixty-four), was reasonably necessary for support where debtor was in poor health and where disability payments were only source of income).

54. The property which is exempt under Bankruptcy Code § 522(b)(2)(A) is:

> [A]ny property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; . . . .

11 U.S.C. § 522(b)(2)(A) (1988).

55. *See supra* note 18 and accompanying text.

bankruptcy exemption under section 522(b)(2)(A).[56] These courts reach this conclusion after examining the legislative history of section 522(b)(2)(A), which lists the type of property Congress intended to fall within that section.[57] This list includes, *inter alia*, social security benefits, civil service benefits and veterans benefits, but, according to the courts, conspicuously omits ERISA-covered pension benefits.[58] The courts reason that since Congress was aware of ERISA during its deliberations over the Bankruptcy Code by virtue of the federal exemption provided for pension benefits in Bankruptcy Code section 522(d),[59] its failure

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56. *See In re* Daniel, 771 F.2d 1352 (9th Cir. 1985); *In re* Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); *In re* Graham, 726 F.2d 1268 (8th Cir. 1984); *In re* Goff, 706 F.2d 574 (5th Cir. 1983); *see also In re* Wimmer, 129 B.R. 563 (C.D. Ill. 1991); *In re* Fullmer, 127 B.R. 55 (D. Utah 1991); *In re* Lingle, 119 B.R. 672 (S.D. Iowa 1990); *In re* McLeod, 102 B.R. 60 (S.D. Miss. 1989); *In re* Loe, 83 B.R. 641 (D. Minn. 1988); *In re* Shuman, 68 B.R. 290 (D. Nev. 1986); *In re* Slezak, 63 B.R. 625 (W.D. Ky. 1986).

57. *See In re* Daniel, 771 F.2d 1352 (9th Cir. 1985); *In re* Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); *In re* Graham, 726 F.2d 1268 (8th Cir. 1984); *In re* Goff, 706 F.2d 574 (5th Cir. 1983); *see also In re* Wimmer, 129 B.R. 563 (C.D. Ill. 1991); *In re* Fullmer 127 B.R. 55 (D. Utah 1991); *In re* Morrow, 122 B.R. 151 (M.D. Fla. 1990); *In re* Bowen, 80 B.R. 1012 (D.S.D. 1987); *In re* Nichols, 42 B.R. 772 (M.D. Fla. 1984).

58. The list is as follows:

Foreign Service Requirement and Disability payments, 22 U.S.C. 1104;
Social Security payments, 42 U.S.C. 407;
Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;
Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601;
Civil service retirement benefits, 5 U.S.C. 729, 2265;
Longshoremen's and Harbor Workers' Compensation Act
death and disability benefits, 33 U.S.C. 916;
Railroad Retirement Act annuities and pensions, 45 U.S.C 228(L);
Veterans benefits, 45 U.S.C. 352(E);
Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101; and
Federal homestead lands on debts contracted before issuance of the patent 43 U.S.C. 175

S. REP. No. 989, 95th Cong., 2d Sess. 75 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5861; H.R. REP. No. 595, 95th Cong., 2d Sess. 360 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6316.

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

to include ERISA-covered pension benefits in the list was intentional.[60] In addition, the courts find further support for their conclusion in that the listed benefits are federally created retirement benefits or relate to industries protected by the federal government, whereas ERISA-covered pension benefits are privately created benefits.[61]

The minority view is that ERISA's anti-alienation provision constitutes federal nonbankruptcy law under section 522(b)(2)(A).[62] Generally, these courts hold that the protection afforded by ERISA's anti-alienation provision in the nonbankruptcy context[63] also extends to a debtor in bankruptcy.[64] These courts have found that the "clear and unambiguous" language of section 522(b)(2)(A) precludes reliance on the legislative history thereto,[65] and that in any event, the legislative list of benefits is merely illustrative[66] because if Congress intended to limit section 522(b)(2)(A) to specific federal laws, it would have expressly done so.[67]

In addition, the courts note that the fact that the federal statutes creating the listed benefits also prohibit the assignment or alienation of benefits supports the conclusion that a federal exemption

60. *See In re* Daniel 771 F.2d 1352 (9th Cir. 1985); *In re* Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); *In re* Graham, 726 F.2d 1268 (8th Cir. 1984); *In re* Goff, 706 F.2d 574 (5th Cir. 1983); *see also In re* Wimmer, 129 B.R. 563 (C.D. Ill. 1991); *In re* Fullmer 127 B.R. 55 (D. Utah 1991); *In re* Morrow, 122 B.R. 151 (M.D. Fla. 1990); *In re* Loe, 83 B.R. 641 (D. Minn. 1988); *In re* McIntosh, 116 B.R. 277 (N.D. Okl. 1990); *In re* Conroy, 110 B.R. 492 (D. Mont. 1990); *In re* O'Brien, 94 B.R. 583 (W.D. Mo. 1988); *In re* Bowen, 80 B.R. 1012 (D.S.D. 1987); *In re* Faulkner, 79 B.R. 362 (E.D. Tenn. 1987).

61. *See supra* note 58.

62. *See, e.g., In re* Komet, 104 B.R. 799, 805 (Bankr. W.D. Tex. 1989) (the anti-alienation language of ERISA § 206(d)(1) qualifies for exemption under § 522(b)(2)(A) of the Federal Bankruptcy Code). *See also In re* Wines, 113 B.R. 787, 789 n.2 (Bankr. S.D. Fla. 1990) (questioning the soundness of the *Lichstrahl* decision in light of *Guidry*) (citations omitted).

63. *See supra* notes 18, 22 and accompanying text.

64. *See In re* Komet, 104 B.R. 799, 805 (Bankr. W.D. Tex. 1989).

65. *See, e.g., id.* at 814.

66. *See, e.g., id.* at 814-15.

67. *See, e.g., id.* at 813-14.

for ERISA-covered pension benefits was intended by Congress.[68] As with the view under section 541(c)(2), which finds that ERISA's anti-alienation provision is applicable nonbankruptcy law,[69] the courts note that this conclusion results in harmonizing ERISA and the Bankruptcy Code.[70]

The most recent minority decisions rely heavily on the United States Supreme Court case of *Guidry v. Sheet Metal Workers National Pension Fund.*[71] In *Guidry*, the Court held that the imposition of a constructive trust on a former union official's pension benefits violated ERISA's anti-alienation provision, even though the official had embezzled union funds.[72] The Court stated:

> [ERISA's anti-alienation provision] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.[73]

The Court also noted that the view that ERISA's anti-alienation

68. *See, e.g., In re* Hinshaw, 23 B.R. 233, 234-36 (Bankr. D. Kan. 1982) (section 522(b)(2)(A) of the Bankruptcy Code, when read in conjunction with 29 U.S.C. § 1056's prohibition of assignment or alienation of pension benefits, mandates the conclusion that Congress intended a federal exemption for tax-qualified ERISA plans).

69. *See supra* text accompanying notes 17-23, 28-35 (discussing ERISA's anti-alienation provision as applicable nonbankruptcy law under Bankruptcy Code § 541(c)(2)).

70. *See In re* Starkey, 116 B.R. 259, 265 (Bankr. D. Colo. 1990); *In re* Burns, 108 B.R. 308, 315 (Bankr. W.D. Okl. 1989).

71. 493 U.S. 365 (1990); *see generally In re* Suarez, 127 B.R. 73, 79 (Bankr. S.D. Fla. 1991) (individual retirement account and Keogh accounts are exempt); *In re* Starkey, 116 B.R. 259, 265 (Bankr. D. Colo. 1990); *In re* Messing, 114 B.R. 541, 547 (Bankr. E.D. Tenn. 1990) (benefits from pension plan are exempt), *aff'd,* No. 91-5087, 1991 U.S. App. LEXIS 19755 (6th Cir. Aug. 22, 1991); *In re* Wines, 113 B.R. 787, 789 n.2 (Bankr. S.D. Fla. 1990) (annuity is exempt); *In re* Komet, 104 B.R. 799, 806 (Bankr. W.D. Tex. 1989) (employee pension plan qualified for exemption).

72. *Guidry*, 493 U.S. 365, 376.

73. *Id.*

provision applies in a garnishment context is consistent with other federally created pension benefits.[74] It is interesting to note that the federally created benefits referred to by the Court are those included in the list enumerated in the legislative history of section 522(b)(2)(A).[75]

(b) *State Law Exemptions*

All or a part of a debtor's ERISA-covered pension benefits may be exempt from the bankruptcy estate under section 522(b)(2)(A) by virtue of an available state exemption.[76] Some states provide exemptions that are virtually identical or similar to the qualified plan exemption under Bankruptcy Code section 522(d).[77] Other states provide exemptions for all pension benefits, or for certain types of pensions.[78] An exemption may also be available under the applicable state spendthrift trust law or state judgment enforcement laws.[79]

II. NEW YORK STATE PROTECTS TAX-QUALIFIED PENSION BENEFITS IN BANKRUPTCY PROCEEDINGS

A. Treatment of ERISA-Covered Pension Benefits Under Bankruptcy Code Prior to New York Amendments

Prior to a recent series of amendments made by the New York

74. *Id.*

75. *Id.; see supra* note 58.

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

77. N.Y. DEBT. & CRED. LAW § 282(iii)(2)(e) (McKinney 1989); *see* Donna Litman Seiden, *Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims? Second Installment*, 61 AM. BANKR. L.J. 301, 311 (1987) [hereinafter *Chapter 7 Cases*].

78. *See Chapter 7 Cases, supra* note 77, at 312.

79. *Id*; *see also* N.Y. DEBT. & CRED. LAW § 282(i) (McKinney 1989) ("personal and real property [may be] exempt from . . . money judgments under sections 5205 and 5206 of the civil practice law and rules").

State Legislature to its Estates Powers and Trust Law (EPTL),[80] Civil Practice Law and Rules (CPLR)[81] and Debtor and Creditor Law (DCL),[82] it was unclear as to how a New York debtor's[83] ERISA-covered pension benefits would fare in a bankruptcy court within the jurisdiction of New York (hereinafter referred to as "New York bankruptcy court").[84]

First, there were, and still are, no New York bankruptcy court decisions directly addressing the issue of whether ERISA's anti-alienation provision constitutes "applicable nonbankruptcy law" under section 541(c)(2).[85] Despite the dearth of New York case

80. N.Y. EST. POWERS & TRUSTS LAW §§ 1-14 (McKinney 1967 & Supp. 1991)

81. N.Y. CIV. PRAC. L. & R. §§ 1-8503 (McKinney 1978 & Supp. 1991).

82. N.Y. DEBT. & CRED. LAW §§ 1-291 (McKinney 1990 & Supp. 1992).

83. For purposes of this Article, the term "New York debtor" means a debtor domiciled in the State of New York. *See infra* note 93 (sets out DCL § 282(iii)(2)(e) prior to amendment).

84. In the nonbankruptcy context, the New York Court of Appeals recognized that ERISA's anti-alienation provision protects a debtor's pension benefits from attachment by third-party creditors in state law enforcement proceedings. *See* Helmsley-Spear, Inc. v. Winter, 74 A.D.2d 195, 199, 426 N.Y.S.2d 778, 781 (1st Dep't 1980), *aff'd*, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981). However, the *Helmsley* case involved benefits under a corporate-sponsored plan. *Id.* Lower court cases decided in New York both before and after *Helmsley* but prior to New York's amendments to its civil practice law (*see infra* notes 102-04) did not give the same protection to a sole proprietor's or partner's benefits under a Keogh plan, *i.e.*, a retirement plan established or maintained by a sole proprietor. *See In re* Abrahams, 131 Misc. 2d 594, 500 N.Y.S.2d 965 (Sup. Ct. Westchester County 1986); Plymouth Rock Fuel Corp. v. Bank of New York, 102 Misc. 2d 235, 425 N.Y.S.2d 908 (App. Term 2d Dep't 1979); Lerner v. Williamsburg Savings Bank, 386 N.Y.S.2d 906 (N.Y. Civ. Ct. 1976). This was because such trusts were considered self-settled under New York CPLR § 5205(c). *See, e.g.*, *Abrahams*, 131 Misc. 2d at 595-96, 500 N.Y.S.2d at 967. Thus, prior to New York's amendments to CPLR § 5205(c) in June of 1987 (described *supra* at note 96), a debtor's pension benefits under a corporate-sponsored plan were afforded greater protection from judgment creditors than a sole proprietor's/partner's benefits under a comparable Keogh plan.

85. In one case, which arose under the old Bankruptcy Act, the debtor attempted to exclude his Keogh plan benefits from the bankruptcy estate. *In re* Baviello, 12 B.R. 412 (Bankr. E.D.N.Y. 1981). One of the arguments offered by the debtor was that ERISA's anti-alienation provision prevented the Keogh

account from passing to the bankruptcy estate. *Id.* at 416. The court rejected this argument on the basis, *inter alia*, that ERISA preempts state law, but does not supersede federal law. *Id.* at 417. In its opinion, the court took note of the § 541(c)(2) exclusion provided under the New Bankruptcy Code stating: "An exception, which is provided for interests in spendthrift trusts [citing legislative history of Bankruptcy Code § 541(c)(2)] would not be applicable to a plan such as this bankrupt's under New York law. See note 4 supra." *Id.* at 417 n.6. Note 4, as referred to by the court, states "[u]nder New York law, it is settled that a disposition in trust for the use of the creator is void as against the existing and subsequent creditors of the creator." *Id.* at 414 n.4. (citing N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney 1967)). Hence, it appears that the *Baviello* court would have held that ERISA is not an applicable nonbankruptcy law under Bankruptcy Code § 541(c)(2) and would have applied a state spendthrift trust analysis under said section if the case had arisen under the Bankruptcy Act of 1978. *Cf. In re* Woodford, 73 B.R. 675 (Bankr. N.D.N.Y. 1987) (a Chapter 7 proceeding where the court, in dictum, found that debtor's Keogh plan interest, for which debtor claimed exemption, was part of the bankruptcy estate without any discussion of ERISA's anti-alienation provision or the legislative history of Bankruptcy Code § 541(c)(2)) (relying on Reagan v. Ross, 691 F.2d 81 (2d Cir. 1982)).

However, the *Woodford* court's reliance on *Reagan* as a resolution of the § 541(c)(2) issue was misplaced because the *Reagan* case involved the ability of retired debtors to use their monthly retirement benefits from a state pension plan not covered by ERISA to fund a Chapter 13 estate. *Reagan*, 691 F.2d at 82. The *Reagan* court did enunciate the state spendthrift trust analysis under § 541(c)(2), but found that a comparison of the legislative history of § 541(c)(2) with the legislative history of Chapter 13 clearly evidenced Congress' intent to include such payments under a Chapter 13 program. *Id.* at 84-85.

Under the old Bankruptcy Act, a debtor's property became part of the bankruptcy estate if it was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start." *Baviello*, 12 B.R. at 415 (citing Segal v. Rochelle, 382 U.S. 375, 385 (1966)). Generally, under this test, if there were limitations on the debtor's control over plan benefits, such as the right to withdraw funds only in the case of hardship, this was an indication that the benefits were a substitute for future wages resulting in an exclusion from the bankruptcy estate. *Id.* at 415. The greater the control a debtor had over plan benefits, the greater the chance such benefits would become part of the estate under the old Bankruptcy Act. In *Baviello*, although an independent trustee held plan assets, the debtor could make unconditional withdrawals of voluntary contributions and direct the management and investment of his accounts. The independent trustee never exercised any control over the plan's management. The court held that such control indicated that the Keogh plan was not functioning as a substitute for

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law, it appeared that bankruptcy courts in certain New York jurisdictions would employ a state spendthrift trust analysis.[86] New York's spendthrift trust law,[87] found in the EPTL, merely provided that a nonself-settled trust[88] was spendthrift, unless the power to alienate was expressly set forth in the trust.[89] Second,

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future wages and was therefore sufficiently rooted in the debtor's pre-bankruptcy past to become part of the bankruptcy estate. *Id.*

86. *See supra* notes 36-46; *see also supra* note 85 and accompanying text.

87. The mere fact that a debtor is domiciled in New York does not mean that New York law will be applied under a spendthrift trust analysis. In determining the proper state law to be applied to a pension trust under the spendthrift trust analysis, the courts generally take into consideration the plan's provision setting forth governing law, the location of the plan sponsor, and the state law pursuant to which the plan document was executed. *See In re* Rodriguez, 82 B.R. 74, 76 (W.D. Ark. 1985) (Pennsylvania law was proper state law to be applied to pension trust holding Arkansas debtor's benefits, where plan sponsor was a Pennsylvania corporation, plan was executed pursuant to Pennsylvania law and provided that Pennsylvania law was to govern all aspects of plan); *In re* Crenshaw, 51 B.R. 554, 557 (N.D. Ala. 1985) (Illinois spendthrift trust law was applicable with respect to pension trust holding Alabama debtor's benefits, where plan was executed in Illinois, plan sponsor's headquarters were in Illinois and plan document provided that it would be construed according to Illinois law); *In re* Strehlow, 84 B.R. 241, 243-44 (S.D. Fla. 1988) (Illinois spendthrift trust law applied with respect to Florida debtor's pension benefits due to express terms of the plan); *In re* Hohl, 81 B.R. 450, 453 (N.D. Ill. 1987) (New York spendthrift trust law applied with respect to Illinois debtor's pension benefits, since plan so provided); *In re* Montgomery, 104 B.R. 112, 115 (Bankr. N.D. Iowa 1989) (New York spendthrift trust law applied with respect to Iowa debtor's pension benefits, since plan so provided); *cf. In re* Kincaid, 917 F.2d 1162 (9th Cir. 1990) (court did not resolve issue of applicable state spendthrift trust law where debtor was resident of Oregon but plan stated Massachusetts law to govern, since plan failed spendthrift trust analysis under law of either state).

88. Under New York law a self-settled trust is one in which the settlor and beneficiary are one and the same. *See infra* note 89 and accompanying text of pre-amended EPTL § 7-3.1; *see supra* note 95 (setting forth amended EPTL § 7-3.1(a)).

89. EPTL § 7-1.5 (a) (1) provides:

> (a) The interest of the beneficiary of any trust may be assigned or otherwise transferred, except that:
>
> (1) The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer

there were, and still are, no New York bankruptcy court decisions addressing the issue of whether ERISA's anti-alienation provision constitutes federal nonbankruptcy law under section 522(b)(2)(A). Third, although New York, which is an "opt-out state,"[90] provides two bankruptcy estate exemptions[91] under DCL that are applicable to a debtor's pension benefits, prior to the New York legislative amendments these exemptions either provided only a general nonself-settled trust exemption[92] or were

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> such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust.

N.Y. EST. POWERS & TRUSTS LAW § 7-1.5(a)(1) (McKinney Supp. 1991).

Prior to the amendment, EPTL § 7-3.1 provided: "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator." N.Y. EST. POWERS & TRUST LAW § 7-3.1 (McKinney 1967).

Under this pre-amended EPTL § 7-3.1, it was clear that a sole proprietor's or partner's benefits under a Keogh plan would not be excluded from the bankruptcy estate under a spendthrift trust analysis. *See supra* note 85. However, what was not clear was how a debtor, who was a corporate shareholder with ERISA-covered pension benefits under a corporate-sponsored plan (e.g., a physician-shareholder of a professional corporation), would fare under EPTL § 7-3.1 before it was amended. In order to find that such a plan was self-settled with respect to the debtor-shareholder's benefits a New York court would have to pierce the corporate veil. Due to the uncertainty of how Bankruptcy Code § 541(c)(2) would be applied to ERISA-covered pension benefits by the New York courts prior to New York's amendments to EPTL, corporate shareholders with ERISA-covered pension benefits under closely-held corporate-sponsored plans may have attempted to further safeguard these benefits in the event a New York bankruptcy court imposed a "control test" under EPTL § 7-3.1, by appointing an independent plan trustee and removing the ability to direct plan investments, to take plan loans and to take in-service withdrawals, if any, from the plan. *See supra* text accompanying notes 36-46.

90. New York DCL § 284 provides: "In accordance with the provisions of [Bankruptcy Code § 522(b)], debtors domiciled in this state are not authorized to exempt from the estate property that is specified under [Bankruptcy Code § 522 (d)]." N.Y. DEBT. & CRED. LAW § 284 (McKinney 1990). This section, as well as article 10-A of DCL, discussed *infra* at note 91, became effective on September 1, 1982 and applies "to petitions filed on or after such date." Act of July 20, 1982, ch. 540, § 2, 1982 N.Y. Laws 1407, 1409 (McKinney).

91. Article 10-A of DCL, enacted in 1982, sets forth the state exemptions available to New York debtors under Bankruptcy Code § 522(b)(2)(A). N.Y. DEBT. & CRED. LAW §§ 282-84 (McKinney Supp. 1990). *See supra* note 90 and accompanying text.

92. DCL § 282(i) provides, in pertinent part: "Under [Bankruptcy Code §

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limited in their application to pension benefits that were reasonably necessary for support.[93]

522(b)], an individual debtor domiciled in this state may exempt from the property of the estate . . . (i) personal and real property exempt from application to the satisfaction of money judgments under [§ 5205 of the CPLR]." N.Y. DEBT. & CRED. LAW § 282(i) (McKinney 1990).

Prior to amendment, CPLR § 5205(c) provided: "Any property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of money judgment." N.Y. CIV. PRAC. L. & R. § 5202(c) (McKinney 1978).

Under this pre-amended section, a New York debtor in bankruptcy could only exempt his ERISA-covered pension benefits from the bankruptcy estate, if the pension plan's trust was not self-settled. This provision paralleled pre-amended EPTL § 7-3.1. *See supra* note 89 and accompanying text. Clearly, as under EPTL § 7-3.1, pension plans maintained by a sole proprietor or partnership would fail to be exempt under CPLR § 5205(c) with respect to the sole proprietor's or partner's plan benefits. What was not clear (as was not clear under EPTL § 7-3.1) was whether a "control" test would be employed by a New York bankruptcy court in determining whether the ERISA-covered pension benefits of a debtor/shareholder under a corporate-sponsored plan would be exempt from the bankruptcy estate under CPLR § 5205(c). *Id.*

Prior to amendment, CPLR § 5205(d)(1) provided:

> The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependent:
>
> 1. ninety percent of the income or other payments from a trust the principal of which is exempt under [CPLR § 5205(c)] . . . .

N.Y. CIV. PRAC. L. & R. § 5205(d)(1) (McKinney 1978 & Supp. 1989).

Under this pre-amended section, a New York debtor could claim a bankruptcy estate exemption for up to ninety percent of payments from a pension trust, but only if the pension trust was not self-settled under CPLR § 5205(c) and payments were necessary for the reasonable requirements of the debtor and the debtor's dependents. The application of the preceding CPLR exemptions to a New York debtor's ERISA-covered pension benefits has not been directly addressed by a New York bankruptcy court.

93. Prior to amendment, DCL § 282(iii)(2)(e) provided, in pertinent part:

> Under [Bankruptcy Code § 522(b)], an individual debtor domiciled in this state may exempt from the property of the state . . . (iii) the following property:
>
> 2. Bankruptcy exemption for right to receive benefits. The debtor's right to receive: . . . (e) a payment under a stock bonus, pension, profit sharing, or similar plan or contract on account of illness,

Di Pippo and Wolf: ERISA

B. New York Amends EPTL, CPLR and DCL

Due to the aggressive manner in which bankruptcy courts of other jurisdictions were finding pension benefits to be part of a debtor's bankruptcy estate,[94] the New York State Legislature

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> disability, death, age, or length of service *to the extent necessary for the support of the debtor and any dependent of the debtor*, unless (i) such plan or contract was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under sections [401(a), 403(a), 403(b), 408, 409 or 457] of the Internal Revenue Code . . . .

N.Y. DEBT. & CRED. LAW § 282(iii)(2)(e) (McKinney Supp. 1989) (emphasis added).

This exemption was virtually identical to the federal bankruptcy exemption set forth in Bankruptcy Code § 522(d)(10)(E) (see text of Bankruptcy Code § 522(d)(10)(E) *supra* at note 53) and was addressed in two New York bankruptcy cases, wherein the debtors were able to obtain full and partial exemptions, respectively, with respect to their pension benefits. *See In re* Fill, 84 B.R. 332 (Bankr. S.D.N.Y. 1988) (sixty four year old debtor's Keogh accounts and IRA were fully exempt under DCL § 282(iii)(2)(e) where debtor was in ill health, former wife had no support obligation to debtor, and debtor's future annual earnings were only $4,000 above his basic annual necessities); *In re* Woodford, 73 B.R. 675 (Bankr. N.D.N.Y. 1987) (30% of sixty year old debtor's interest in qualified retirement plan was reasonably necessary for support and therefore exempt under DCL § 282(iii)(2)(e), where debtor was employed as an attorney, was not subject to any mandatory retirement age, and had a monthly net income of about $3,000).

94. See the Memorandum in Support from Senator Volker and Assemblyman Silver, which states:

> To counter the increasingly callous manner with which bankruptcy courts are including qualified plan interests as assets available to bankruptcy creditors, and to ensure protection of qualified retirement plans from the problems raised by the Internal Revenue Service's entrenched position regarding potential plan disqualification, the CPLR, EPTL, and the Debtor and Creditor Law should be amended to explicitly indicate that qualified retirement plans are to be considered spendthrift trusts for purposes of federal bankruptcy law, and further, that all interests in or payments from such plans are exempt property. These changes remove any opportunity for an aggressive bankruptcy judge to create artificial distinctions in order to include qualified retirement plan interests in a bankruptcy estate, or otherwise limit a

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enacted a series of amendments to the EPTL,[95] CPLR[96] and

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bankruptcy debtor's claimed exemptions.

Until New York adopts a more explicit spendthrift trust statute, and clarifies its bankruptcy exemption provisions, citizens concerned about protecting their retirement benefits have an incentive to relocate in a state that has adopted the more explicit statute. Further, administrators of retirement plans in New York will be conclusively spared the possibility of having to choose between plan disqualification and contempt of court.

Memorandum in Support of A. 6356-A/S. 3909, *reprinted in* 1989 N.Y. LEGIS. ANN. 158.

95. EPTL § 7-3.1 (set forth *supra* at note 89), was amended in June 1987 and July of 1989. The amendments in June of 1987 revised § 7-3.1 to provide that, with certain exceptions, all trusts of tax-qualified plans are protected from judgment creditors. EPTL § 7-3.1, as amended in 1987, provided as follows:

§7-3.1. **Disposition in trust for creator void as against creditors**

(a) A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.

(b)(1) For purposes of paragraph (a) of this section, *a trust*, custodial account, annuity or insurance contract *established as part of either a Keogh (HR-10) plan or a retirement plan established by a corporation, which is qualified under Section 401 of the United States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement plan*; provided, however, that nothing in this section shall impair any rights an individual has under a qualified domestic relations order as that term is defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended.

(2) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney Supp. 1989) (emphasis added).

96. CPLR § 5205(c), set forth *supra* at note 92, was amended in June of 1987, May of 1989 and July of 1989. The amendments made in June of 1987 revised this Section to provide that, with certain exceptions, all trusts of tax-qualified plans were protected from judgment creditors. CPLR § 5205(c), as amended in 1987, provided as follows:

(c) **Trust exemption.** 1. Except as provided in paragraphs three and

four of this subdivision, any property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of the money judgment.

2. For purposes of this subdivision, *any trust*, custodial account, annuity or insurance contract *established as part of either a Keogh (HR-10) plan or a retirement plan established by a corporation, which is qualified under Section 401 of the United States Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement plan.*

3. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended

4. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

N.Y. CIV. PRAC. L. & R. § 5205(c) (McKinney Supp. 1989) (emphasis added).

The purpose of the 1987 amendment was to create a parity of protection from judgment creditors under New York law between corporate-sponsored pension plans and self-settled pension plans, *i.e.*, those sponsored by sole proprietors or partnerships. *See* Memorandum of Assemblyman Silver in Support of A. 3262-B/S. 2391-B, *reprinted in* 1987 N.Y. LEGIS. ANN. 74.

In May of 1989, CPLR § 5205(c)(2) was further amended to extend judgment creditor protection to individual retirement accounts created as a result of rollovers from tax-qualified plans, as follows:

2. For purposes of this subdivision, any trust, custodial account annuity or insurance contract established as part of either a Keogh (HR-10) plan or a retirement plan established by a corporation, which is qualified under Section 401 of the United States Internal Revenue Code of 1986, as amended, *or created as a result of rollovers from such plans pursuant to sections 402(a)(5), 403(a)(4) or 408(d)(3) of the Internal Revenue Code of 1986, as amended*, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh

DCL[97] in order to provide maximum protection for New York debtors' pension benefits (hereinafter referred to as "pension protection statutes").[98]

The pertinent parts of the EPTL, as amended,[99] now provide that the trusts created under tax-qualified plans, and payments therefrom, will not be considered self-settled.[100] The amended EPTL also provides that the trusts created under tax-qualified plans are "conclusively presumed to be spendthrift", *inter alia,* for purposes of "all cases arising under or related to a case arising under [the Bankruptcy Code]."[101] The pertinent parts of the CPLR, as amended,[102] provide the same protection for trusts

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> (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement or other plan.

Act of May 11, 1989, ch. 84, 1989 N.Y. Laws 325, 325-26 (Mckinney) (emphasis added).

97. N.Y. DEBT. & CRED. LAW § 282(iii)(2)(e), as set forth *supra* at note 93, was amended in July of 1989 to provide as set forth *infra* at notes 105-06.

98. *See supra* note 94 and accompanying text.

99. N.Y. EST. POWERS & TRUST LAW § 7-3.1(a), (b)(1) and (2) (McKinney Supp. 1992).

100. **§ 7-3.1 Disposition in trust for creator void as against creditors.**

> (a) A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.
>
> (b)(1) For purposes of paragraph (a) of this section, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement or other plan.
>
> (b)(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph *shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under . . . the United States Bankruptcy Code, as amended.*

Id. § 7-3.1 (emphasis added).

101. *Id.*

102. N.Y. CIV. PRAC. L. & R. §§ 5205(c)(1)-(3) (McKinney Supp. 1991).

created under tax-qualified plans (and payments therefrom) as does the amended EPTL described above.[103] The amended CPLR

103. **§ 5205. Personal property exempt from application to the satisfaction of money judgments.**

. . .

(c) Trust exemption. 1. Except as provided in paragraphs four and five of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402(A)(5), 403(a)(4) or 408(d)(3) of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) a self-employed individual, (ii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iii) a shareholder of the corporation sponsoring the retirement or other plan.

3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision *shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under . . . the United States Bankruptcy Code, as amended.*

Id. (emphasis added).

CPLR § 5205(d)(1) was amended in July of 1989 to provide as follows:

(d) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

(1) ninety percent of the income or other payments from a trust the principal of which is exempt under [CPLR § 5205 (c)]; provided, however, that with respect to any income or payments made from trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interest established as part of a Keogh (HR-10), retirement or other plan described in [CPLR § 5205 (c)(2)], *the exception in this subdivision for such pqrt as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his*

also extends this protection to individual retirement accounts created as a result of rollovers from such plans.[104] The specific exemption for certain pension benefits under the DCL, as amended,[105] no longer limits the exemption to those benefits that are reasonably necessary for support.[106]

> *dependents shall not apply and the ninety percent exclusion of this paragraph shall become a one hundred percent exclusion.*

N.Y. CIV. PRAC. L. & R. § 5205(d)(1) (McKinney Supp. 1992) (emphasis added). This exemption for payments from the trust of a qualified plan is not directly addressed in this Article, which focuses its discussion on alienation of pension benefits while held in a pension trust.

104. N.Y. CIV. PRAC. L & R. § 5205(c)(2) (McKinney Supp. 1992).

105. N.Y. DEBT. & CRED. LAW § 282(iii)(2)(e) (McKinney 1990).

106. **§ 282. Permissible exemptions in bankruptcy.**

> Under [Bankruptcy Code § 522(b)], an individual debtor domiciled in this state may exempt from the property of the estate . . .
>
> (i) personal and real property exempt from application to the satisfaction of money judgments under [CPLR § 5205] and (iii) the following property:
>
> . . .
>
> 2. Bankruptcy exemption for right to receive benefits. The debtor's right to receive or the debtor's interest in . . . (e) all payments under a stock bonus, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service unless (i) such plan or contract, except those qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, was established by the debtor or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under section [401(a), 403(a), 403(b), 408, 409, or 457] of the Internal Revenue Code of [1986], as amended.

Id.; *see In re* Kleist, 114 B. R. 366 (Bankr. N.D.N.Y. 1990). The court held that debtors were not entitled to an exemption under DCL § 282(iii)(2)(e) with respect to their pre-tax and after-tax profit sharing plan benefits. *Id.* at 368. Focusing on debtor's right to withdraw such benefits for any reason and stated purpose of the plan as providing opportunity for personal savings, the court found that the benefits did not qualify as benefits on account of illness, disability, death, age or length of service within the meaning of DCL § 282(iii)(2)(e). *Id.*

C. ERISA-Covered Pension Benefits Under Current New York Law

Subsequent to the legislative changes to the EPTL, CPLR and DCL, it appeared that New York debtors in bankruptcy could be assured that all of their ERISA-covered/tax-qualified pension benefits would be available for their retirement security, and plan administrators would be relieved from the burden of having to choose between plan disqualification and contempt of court sanctions.[107]

For example, assume that a New York debtor who participates in an ERISA-covered/tax-qualified plan files a petition for Chapter 7 relief with the appropriate bankruptcy court in New York. The debtor would have several grounds upon which to claim an exclusion and/or exemption from the bankruptcy estate with respect to his or her pension benefits.

First, the debtor could assert that ERISA's anti-alienation provision is an "applicable nonbankruptcy law" under Bankruptcy Code section 541(c)(2),[108] thereby excluding the pension benefits from the estate. Second, the debtor could assert that such benefits are excluded from the estate pursuant to a state spendthrift trust analysis under Bankruptcy Code section 541(c)(2),[109] since EPTL section 7-3.1(b)(2) and CPLR section 5205(c)(3) provide that tax-qualified pension trusts are conclusively presumed to be spendthrift.[110] Third, the debtor could

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107. *See supra* note 23 and accompanying text.

108. *See supra* notes 17-23, 28-35 and accompanying text.

109. *See supra* notes 36-37 and accompanying text.

110. *See* EST. POWERS & TRUSTS LAW § 7-3.1(b)(2) (McKinney Supp. 1991) and N.Y. CIV. PRAC. LAW § 5205(c)(3) (McKinney Supp. 1992); *see also supra* note 99-100 and accompanying text (discussing exceptions). *In re Kleist*, 114 B.R. 366 (Bankr. N.D.N.Y. 1990), the only bankruptcy decision rendered in New York at the time of this writing dealing with the application of New York's new specific exclusion for pension benefits, held that the debtor's tax-qualified plan benefits were excluded from the debtor's bankruptcy estate under § 541(c)(2) by virtue of CPLR § 5205(c)(3). *Id.* at 368-69. It is important to note that the *Kleist* court was disturbed with its holding. The court stated:

The potential for abuse created by the New York legislature's use of a

aver that ERISA's anti-alienation provision constitutes a federal nonbankruptcy law exemption for the pension benefits under Bankruptcy Code section 522(b)(2)(A).[111] Finally, the debtor could claim that pension benefits come within the New York State law exemptions provided in DCL section 282,[112] *i.e.*, under CPLR section 5205(c)(2), which exempts the trusts of tax qualified plans from creditors,[113] and/or DCL section 282(iii)(2)(e), which also exempts certain benefits under tax-qualified pension plans from the bankruptcy estate.[114]

Notwithstanding the preceding analysis,[115] the putative protection afforded by New York's pension protection statutes may be illusory as a result of the United States Supreme Court decision, *Mackey v. Lanier Collection Agency & Service, Inc.*[116]

> "conclusive presumption" in this context, also a product of the 1989 amendments, is further troubling. It allows debtors to retain the freedom to withdraw their funds, while simultaneously insulating those assets from creditors. The effect of this dichotomous treatment appears, unfortunately, to subvert the policy underlying the state spendthrift trust law, as well as the United States Bankruptcy Code's intent . . . .
>
> It is well-established that non-bankruptcy law will initially determine the debtor's interest in property, yet the question of what constitutes property of the estate is a federal question. Here, Congress has declared, through Code § 541(c)(2), that deference will be accorded to the respective state created boundaries defining spendthrift trusts. New York has exercised its prerogative by "bootstrapping", that is, statutorily placing certain property under the control of the debtor within the protection ordinarily provided only to trusts possessing traditional spendthrift qualities

Id. at 369-70 (citations omitted).

111. *See supra* note 54 (setting forth § 522(b)(2)(a)).

112. N.Y. DEBT. & CRED. LAW §§ 282(i), 282(iii)(2)(e) (McKinney 1990); *see supra* note 92 (setting forth § 282(i)); *see supra* note 93 (setting forth § 282(iii)(2)(e)).

113. *See* N.Y. CIV. PRAC. L. & R. § 5205(c)(2) (McKinney 1987); *see also supra* note 103 and accompanying text (discussing exceptions).

114. N.Y. DEBT. & CRED. LAW 282(iii)(2)(c) (McKinney 1990).

115. *See supra* notes 107-13 and accompanying text.

116. 486 U.S. 825 (1988).

III. *MACKEY v. LANIER COLLECTION AGENCY & SERVICE, INC.* AND ITS POTENTIAL EFFECT ON NEW YORK STATE PENSION PROTECTION STATUTES IN BANKRUPTCY PROCEEDINGS

A. *Mackey v. Lanier Collection Agency & Service, Inc.*[117]

ERISA's preemption provision, found in section 514(a) of the statute,[118] provides, in pertinent part, that "the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by Title I of ERISA]."[119] ERISA's preemption provision generally applies to welfare and pension plans,[120] whereas ERISA's anti-alienation provision only applies to pension plans.[121]

In *Mackey*, decided June 17, 1988, the United States Supreme Court held, *inter alia*, that a state statute that expressly prohibited the garnishment of ERISA welfare plan benefits was preempted by ERISA.[122] The respondent in *Mackey* sought to garnish welfare benefits from an "employee welfare benefit plan" in

117. *Id.*

118. 29 U.S.C. § 1144(a) (1988).

119. *Id.*; *see also supra* note 7 and accompanying text. For purposes of ERISA § 514, the term "State law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1) (1988). The term "State" includes "a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans . . .[covered by Title I of ERISA]." 29 U.S.C. § 1144(c)(2) (1988).

120. ERISA § 514(a) generally applies to state laws which relate to "any employee benefit plan described in [ERISA §] 4(a) . . . ." 29 U.S.C. § 1144(a) (1988). The term employee benefit plan generally means a welfare or pension plan. *See* 29 U.S.C. § 1002(3) (1988); *see also supra* note 7 and accompanying text.

121. *See supra* note 18 and accompanying text.

122. *Mackey*, 486 U.S. at 830.

satisfaction of money judgments obtained against participants.[123] However, a Georgia State garnishment statute provided that "[f]unds or benefits of a pension, retirement, or employee benefit plan or program subject to the provisions of [ERISA] shall not be subject to the process of garnishment . . . ."[124]

The Georgia Supreme Court[125] noted that ERISA's anti-alienation provision[126] prohibited the garnishment of ERISA-covered pension benefits, except for alimony and child support, but did not prohibit the garnishment of ERISA-covered welfare benefits.[127] The court, relying on *Shaw v. Delta Airlines, Inc.*,[128] also noted that Congress' intention in enacting ERISA was to provide a uniform system of federal regulation of ERISA-covered plans.[129] The court rejected the argument that the Georgia anti-garnishment statute should not be preempted because it was "broader than ERISA in protecting benefit plans,"[130] and held that since the state statute "prohibit[ed] that which [ERISA] permit[ted]"[131] the statute was "in conflict with" ERISA and therefore preempted by it.[132]

On appeal, the United States Supreme Court unanimously affirmed that portion of the Georgia Supreme Court's decision.[133]

123. *Id.* at 827-28.

124. GA. CODE ANN. § 18-4-22.1 (Harrison 1982), repealed by Ga. L. 1990, p. 360, § 2, effective July 1, 1990.

125. Lanier Collection Agency & Serv., Inc. v. Mackey, 350 S.E.2d 439, 440-41 (Ga. 1986), *aff'd,* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988).

126. *See supra* note 17 and accompanying text.

127. *Lanier*, 350 S.E.2d at 440-41, *aff'd,* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988); *see supra* note 7 and accompanying text.

128. 463 U.S. 85 (1983) (where employers sought declaratory judgment of preemption of New York's Human Rights Law by ERISA and also sought judgment as to preemption of New York's Disability Benefits Law).

129. *Lanier*, 350 S.E.2d at 441.

130. *Id.* at 442.

131. *Id.*

132. *Id.*

133. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988). The majority opinion, finding preemption, was delivered by Justice White and joined by Chief Justice Rehnquist, Justices Brennan, Marshall and

The Court held that the state anti-garnishment statute, which "single[d] out ERISA employee welfare benefit plans for different treatment under state garnishment procedures"[134] was preempted by ERISA, and that the state statute's "express reference to ERISA plans"[135] was sufficient to bring it within ERISA's "pre-emptive reach."[136] In reaching its holding, the Court stated:

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with *or reference to* such a plan. On several occasions since our decision in *Shaw*, we have reaffirmed this rule, concluding that state laws which make reference to ERISA plans are laws that relate to those plans within the meaning of § 514(a). In fact, we have virtually taken it for granted that state laws which are "specifically designed to affect employee benefit plans" are preempted under § 514(a).[137]

The Court found that the possibility that the state anti-garnishment statute was enacted to perpetuate ERISA's underlying purposes[138] was "not enough to save the state law from preemption."[139] It stated:

> "The pre-emption provision [of § 514(a)] displace[s] all state laws that fall within its sphere, *even including state laws that are consistent with ERISA's substantive requirements*." The decision in Shaw particularly underscore[d] this point. There, we found a New York antidiscrimination statute pre-empted under § 514(a), even though Congress had not expressed any intent in

Stevens. *Id.* at 830. Justice Kennedy filed a dissenting opinion, joined by Justices Blackmun, O'Connor and Scalia, which agreed with the majority's holding on the preemption issue. *Id.* at 841 (Kennedy, J., dissenting). However, the dissent disagreed with the majority by finding that preemption prohibits the garnishment of funds due to participants in ERISA welfare benefit plans. *Id.*; *see also infra* notes 141-43 (discussing majority's holding on use of state garnishment statute to reach ERISA-covered welfare benefits).

134. *Mackey*, 486 U.S. at 830.

135. *Id.*

136. *Id.*

137. *Id.* at 829 (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98 (1988)) (citations omitted).

138. *Id.*

139. *Id.*

> ERISA to approve of the employment practices that the State had banned by its statute. *Legislative "good intentions" do not save a state law within the broad pre-emptive scope of* § *514(a)*.[140]

The *Mackey* Court also held, 5 to 4, that the use of a general state garnishment statute to reach ERISA-covered welfare benefits was *not* preempted by ERISA.[141] The Court found that "Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits."[142] In upholding the state's general garnishment statute, the Court noted:

> It is not incongruous to find that [the Georgia general statute], which provides for garnishment of ERISA welfare benefit plans, escapes pre-emption under ERISA, while striking down [the Georgia anti-garnishment statute] -- an exception to the general state-law provision -- as pre-empted. While we believe that state-law garnishment procedures are not pre-empted by § 514(a), we also conclude that *any* state law which singles out ERISA plans, by *express reference*, for special treatment is preempted. . . . It is this "singling out" that pre-empts the Georgia anti-garnishment exception.[143]

B. Post Mackey Decisions

A number of courts have applied *Mackey* to find preemption of state pension protection statutes, resulting in the inclusion of the debtor's pension benefits within the bankruptcy estate.[144] Other

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140. *Id.* at 829-30 (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (emphasis added)).

141. *Id.* at 831-32, 841.

142. *Id.* at 831-32.

143. *Id.* at 828, 838 n.12 (emphasis added).

144. *See In re* Wimmer, 129 B.R. 563 (C.D. Ill. 1991); *In re* Fullmer, 127 B.R. 55 (D. Utah 1991); *In re* Green, 123 B.R. 327 (W.D. Mo. 1990); *In re* Siegel, 105 B.R. 556 (D. Ariz. 1989); *In re* Spears, 121 B.R. 896 (Bankr. M.D. Fla. 1990); *In re* Knowles, 123 B.R. 428 (Bankr. M.D. Fla. 1991); *In re* Rosenquist, 122 B.R. 775 (Bankr. M.D. Fla. 1990); *In re* Morrow, 122 B.R. 151 (Bankr. M.D. Fla. 1990); *In re* Pruner, 122 B.R. 459 (Bankr. M.D. Fla. 1990); *In re* Carver, 128 B.R. 239 (Bankr. W.D. Mo. 1990); *In re*

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post *Mackey* decisions have not considered the effect of *Mackey* upon such statutes.[145] Some courts have held that *Mackey* is not relevant to and does not affect such state laws.[146]

Martin, 119 B.R. 297 (Bankr. M.D. Fla. 1990); *In re* Gardner, 118 B.R. 860 (Bankr. M.D. Fla. 1990); *In re* Ullman, 116 B.R. 228 (Bankr. D. Mont. 1990); *In re* McIntosh, 116 B.R. 277 (Bankr. N.D. Okla. 1990); *In re* Fritsvold, 115 B.R. 192 (Bankr. D. Minn. 1990); *In re* Conroy, 110 B.R. 492 (Bankr. D. Mont. 1990); *In re* Gaines, 106 B.R. 1008 (Bankr. W.D. Mo. 1989), *rev'd on other grounds*, 121 B.R. 1015 (W.D. Mo. 1990); *In re* Weeks, 106 B.R. 257 (Bankr. E.D. Okla. 1989); *In re* Bryan, 106 B.R. 727 (Bankr. M.D. Fla. 1989); *In re* Sheppard, 106 B.R. 724 (Bankr. M.D. Fla. 1989); *In re* Flindall, 105 B.R. 556 (Bankr. D. Ariz. 1989); *In re* McLeod, 102 B.R. 60 (Bankr. S.D. Miss. 1989); *In re* Brown, 95 B.R. 216 (Bankr. N.D. Okla. 1989). *Cf. In re* Starkey, 116 B.R. 259 (Bankr. D. Colo. 1990); *In re* Messing, 114 B.R. 541 (Bankr. E.D. Tenn. 1990), *aff'd*, No. 91-5087, 1991 U.S. App. LEXIS 19755 (6th Cir. Aug. 22, 1991); *In re* Burns, 108 B.R. 308 (Bankr. W.D. Okla. 1989); *In re* Komet, 104 B.R. 779 (Bankr. W.D. Tex. 1989) (although these courts found the state exemption statute preempted, the courts found that ERISA's anti-alienation provision constituted federal nonbankruptcy law under § 522(b)(2)(A)); *In re* Lee, 119 B.R. 833 (Bankr. M.D. Fla. 1990) (court found state exemption statute preempted relying on *Mackey*, but ordered evidentiary hearing on satisfaction of state spendthrift trust requirements); *In re* Balay, 113 B.R. 429 (Bankr. N.D. Ill. 1990) (court, in dictum, found state exemption statute preempted by ERISA relying on *Mackey*, but found state statute providing that retirement plans are conclusively deemed to be spendthrift as a basis for exclusion under § 541(c)(2)); *see supra* notes 55-75 and accompanying text.

145. *See In re* Smith, 124 B.R. 787 (Bankr. W.D. Mo. 1991); *In re* Kleist, 114 B.R. 366 (Bankr. N.D.N.Y. 1990). *Cf. In re* Gallagher, 101 B.R. 594, 602 (Bankr. W.D. Mo. 1989) (court, finding that debtor's pension benefits were not exempt as reasonably necessary under state exemption statute which was virtually identical to the federal bankruptcy exemption under Bankruptcy Code § 522(d)(10)(E), noted that *Mackey* may bring state exemption statute into question).

146. *See In re* Dyke, 943 F.2d 1435, 1442 (5th Cir. 1991); *In re* Kaplan, 97 B.R. 572, 576 (Bankr. 9th Cir. 1989); *In re* Suarez, 127 B.R. 73, 77-78 (Bankr. S.D. Fla. 1991); *In re* James, 126 B.R. 360, 361 (Bankr. D. Kan. 1991); *In re* Nuttleman, 117 B.R. 975, 981-82 (Bankr. D. Neb. 1990), *modified on other grounds*, 128 B.R. 254 (D. Neb. 1991); *In re* Vickers, 116 B.R. 149, 151 (Bankr. W.D. Mo. 1990), *aff'd*, 126 B.R. 348 (W.D. Mo. 1990), *aff'd*, 1992 U.S. App. LEXIS 827 (8th Cir. Jan. 24, 1992); *In re* Martinez, 107 B.R. 378, 380 (Bankr. S.D. Fla. 1989).

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1. *Mackey* As Basis for Preemption of State Spendthrift Trust Law Under Section 541(c)(2)

One circuit court and a few bankruptcy courts have directly considered the effect of *Mackey* with respect to the application of state spendthrift trust law under section 541(c)(2).[147] In all of these cases, the courts have held that *Mackey* does not support a finding that ERISA preempts state spendthrift trust laws under section 541(c)(2).[148] Generally, these courts dealt with state spendthrift trust laws that contained no express protection for ERISA-covered pension benefits. The courts came to this conclusion by noting that the use of a state spendthrift trust analysis under section 541(c)(2) is by virtue of federal law and that ERISA does not preempt federal law.[149] One court that dealt with a state statute expressly deeming tax-qualified plans be spendthrift, found that *Mackey* did not apply since it did not address the issue of ERISA preemption of state pension protection statutes[150] within the bankruptcy context.

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147. *See In re* Kincaid, 917 F.2d 1162, 1166 (9th Cir. 1990); *see also In re* Kaplan, 97 B.R. 572, 576 (Bankr. 9th Cir. 1989); *In re* James, 126 B.R. 360, 361 (Bankr. D. Kan. 1991).

148. *See supra* note 147.

149. *See, e.g, Kincaid,* 917 F.2d at 1166 (where the court noted that state spendthrift trust requirements were adapted into the Bankruptcy Code for the protection of debtors, and since ERISA did not create a § 541(c)(2) exclusion, ERISA-covered plans must look to state laws for protection); *Kaplan,* 97 B.R. at 576 (where the court held that "*Mackey* has no relevance to the [issue of whether debtor's pension benefits are excluded under § 541(c)(2)]" and "did not redefine traditional spendthrift trusts.").

150. *James,* 126 B.R. at 361. *But cf. In re* Wimmer, 129 B.R. 563, 566 (C.D. Ill. 1991) (court, without addressing preemption, held that state statute providing conclusive spendthrift trust presumption for tax qualified plans was broader than what was intended under § 541(c)(2) and therefore invalid); *In re* Kazi, 125 B.R. 981, 985-86 (Bankr. S.D. Ill. 1991) (court, without considering *Mackey,* held that state statute providing conclusive spendthrift trust presumption for tax qualified plans was invalid under the supremacy clause of the United States Constitution since the statute frustrated the intent of § 541(c)(2) to provide an exclusion only for traditional spendthrift trusts).

2. *Mackey* As Applied to State Exemptions

The overwhelming majority of bankruptcy and district courts that have considered the application of *Mackey* to state exemptions under section 522(b)(2)(A) have held that state pension protection statutes exempting ERISA-covered benefits from the bankruptcy estate are preempted by ERISA.[151] Generally, where the particular state exemption statute specifically refers to benefits under an ERISA-covered plan or a tax-qualified plan under the Internal Revenue Code,[152] the courts broadly apply *Mackey*, finding that the mere reference to such plans is sufficient to bring the statute within ERISA's preemptive reach.[153] Where the state

151. *In re* Green, 123 B.R. 327, 329 (W.D. Mo. 1990); *In re* Siegel, 105 B.R. 556, 560-64 (D. Ariz. 1989); *In re* Wimmer, 129 B.R. 563, 569 (C.D. Ill. 1991); *In re* Fullmer, 127 B.R. 55, 58-59 (D. Utah 1991); *In re* Knowles, 123 B.R. 428, 432 (Bankr. M.D. Fla. 1991); *In re* Rosenquist, 122 B.R. 775, 782 (Bankr. M.D. Fla. 1990); *In re* Morrow, 122 B.R. 151, 154 (Bankr. M.D. Fla. 1990); *In re* Pruner, 122 B.R. 459, 460-61 (Bankr. M.D. Fla. 1990); *In re* Gaines, 121 B.R. 1015, 1021-23 (W.D. Mo. 1990); *In re* Spears, 121 B.R. 897, 901 (Bankr. M.D. Fla. 1990); *In re* Carver, 128 B.R. 239, 241 (Bankr. W.D. Mo. 1990); *In re* Lee, 119 B.R. 833, 834 (Bankr. M.D. Fla. 1990); *In re* Martin, 119 B.R. 297, 300-01 (Bankr. M.D. Fla. 1990); *In re* Gardner, 118 B.R. 860, 863 (Bankr. M.D. Fla. 1990); *In re* Starkey, 116 B.R. 259, 263 (Bankr. D. Colo. 1990); *In re* Ullman, 116 B.R. 228, 230 (Bankr. D. Mont. 1990); *In re* Fritsvold, 115 B.R. 192, 195-97 (Bankr. D. Minn. 1990); *In re* McIntosh, 116 B.R. 277, 279-80 (Bankr. N.D. Okla. 1990); *In re* Messing, 114 B.R. 541, 543-45 (Bankr. E.D. Tenn. 1990), *aff'd*, No. 91-5087, 1991 U.S. App. LEXIS 19755 (6th Cir. Aug. 22, 1991); *In re* Conroy, 110 B.R. 492, 496 (Bankr. D. Mont. 1990); *In re* Burns, 108 B.R. 308, 310-11 (Bankr. W.D. Okla. 1989); *In re* Weeks, 106 B.R. 257, 262 (Bankr. E.D. Okla. 1989); *In re* Bryan, 106 B.R. 727, 729-30 (Bankr. M.D. Fla. 1989); *In re* Sheppard, 106 B.R. 724, 726-27 (Bankr. M.D. Fla. 1989); *In re* Flindall, 106 B.R. 32, 35 (Bankr. D. Ariz. 1989); *In re* Komet, 104 B.R. 799, 801 (Bankr. W.D. Tex. 1989); *In re* McLeod, 102 B.R. 60, 62-63 (Bankr. S.D. Miss. 1989); *In re* Brown, 95 B.R. 216, 218-19 (Bankr. N.D. Okla. 1989). *See also In re* Balay, 113 B.R. 429, 442 (Bankr. N.D. Ill. 1990) (the court, in dictum, noted that state exemption statute may not survive preemption in light of *Mackey* and its progeny).

152. *See supra* note 21 and accompanying text.

153. The subsequent cases followed the decision in *In re* Gardner, 118 B.R. 860 (Bankr. M.D. Fla. 1990): *Siegel*, 105 B.R. at 564; *Wimmer*, 129 B.R. at 569; *Fullmer*, 127 B.R. at 59; *Morrow*, 122 B.R. at 154; *Pruner*, 122 B.R. at

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exemption statute is general in nature and makes no reference to ERISA or the Internal Revenue Code,[154] some courts have found that the particular statute "had a connection"[155] with ERISA and was designed to affect ERISA-covered plans due to ERISA's anti-alienation provision.[156]

One circuit court and a few bankruptcy and district courts considering the application of *Mackey* have held that state pension protection statutes are not preempted by ERISA.[157] Generally, these courts have found that a mere reference to ERISA is not

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461; *Gardner*, 118 B.R. at 863; *Starkey*, 116 B.R. at 263; *Fritsvold*, 115 B.R. at 196, *Messing*, 114 B.R. at 543-45; *Conroy*, 110 B.R. at 496; *Burns*, 108 B.R. at 311; *Bryan*, 106 B.R. at 729-30; *Sheppard*, 106 B.R. at 726-27; *Flindall*, 105 B.R. at 35, 38; *Komet*, 104 B.R. at 801-02; *McLeod*, 102 B.R. at 63-64; *Brown*, 95 B.R. at 218-19. *See also Knowles*, 123 B.R. at 432; *Rosenquist*, 122 B.R. at 782; *Spears*, 121 B.R. at 901; *Lee*, 119 B.R. at 834; *Martin*, 119 B.R. at 300-01. *See also Ullmann*, 116 B.R. at 230 (following *In re* Conroy, 110 B.R. 492 (Bankr. D. Mont. 1990)); *McIntosh*, 116 B.R. at 279-80 (following *In re* Brown, 95 B.R. 216 (Bankr. N.D. Okla. 1989)).

154. For example, a general state statute might provide an exemption for any property exempt from attachment under state or federal law. *See, e.g., In re* Gaines, 121 B.R. 1015, 1019 (W.D. Mo. 1990).

155. *See infra* note 222 and accompanying text.

156. *See Gaines*, 121 B.R. at 1021-23. *See also In re* Green, 123 B.R. 327, 329 (W.D. Mo. 1990); *In re* Carver, 128 B.R. 239, 241 (Bankr. W.D. Mo. 1990) (following *In re* Gaines, 106 B.R. 1008 (W.D. Mo. 1990), *rev'd on other grounds*, 121 B. R. 1015 (W.D. Mo. 1990)). *But see In re* Lingle, 119 B.R. 672, 676 (Bankr. S.D. Iowa 1990); *In re* Bartlett, 116 B.R. 1015, 1023 (Bankr. S.D. Iowa 1990) (statutes were not preempted since state exemption statutes did not make any reference to ERISA or IRC).

157. *See In re* Volpe, 120 B.R. 843, 847 (W.D. Tex. 1990), *judgment aff'd*, 943 F.2d 1451 (5th Cir. 1991); *In re* Dyke, 119 B.R. 536, 538-39 (Bankr. S.D. Tex. 1990), *rev'd on other grounds*, 99 B.R. 343 (S.D. Tex. 1989), *aff'd*, 943 F.2d 1435 (5th Cir. 1991); *In re* Suarez, 127 B.R. 73, 77-78 (Bankr. S.D. Fla. 1991); *In re* Davis, 125 B.R. 242, 246 n.2 (Bankr. W.D. Mo. 1991) (following *In re* Vickers, 116 B.R. 149 (Bankr. W.D. Mo. 1990)), *aff'd*, 126 B.R. 348 (W.D. Mo. 1990), *aff'd*, No. 91-1067, 1992 U.S. App. LEXIS 827 (8th Cir. Jan. 24, 1992); *In re* Nuttleman, 117 B.R. 975, 979-82 (Bankr. D. Neb. 1990), *modified on other grounds*, 128 B.R. 254 (D. Neb. 1991); *In re* Williams, 118 B.R. 812, 815-16 (Bankr. N.D. Fla. 1990); *Vickers*, 116 B.R. at 150; *In re* Seilkop, 107 B.R. 776, 778 (Bankr. S.D. Fla. 1989); *In re* Bryan, 106 B.R. 749, 750-51 (Bankr. S.D. Fla. 1989); *In re* Martinez, 107 B.R. 378, 380 (Bankr. S.D. Fla. 1989).

sufficient to bring such statutes within ERISA's preemptive reach because the statutes do not conflict with ERISA and/or do not attempt to regulate the terms and conditions of an ERISA-covered plan.[158] Some of these courts also note that to find such preemption would impair the Bankruptcy Code and violate ERISA's savings clause.[159]

C. *Impact of Mackey in New York.*

No New York bankruptcy court has directly considered the effect of *Mackey* on ERISA-covered pension benefits in the bankruptcy context.[160] However, in light of the post *Mackey* direction taken by the majority of courts in other jurisdictions,[161] a New York debtor with an interest in an ERISA-covered pension plan could very well find his or her benefits vulnerable to attachment by a trustee in bankruptcy.

For example, assume that a debtor who participates in an ERISA-covered plan that is qualified under the Internal Revenue Code files for Chapter 7 relief under the Bankruptcy Code and does not list pension benefits as part of the bankruptcy estate

158. *See Volpe*, 120 B.R. at 848; *Suarez*, 127 B.R. at 78; *Nuttleman*, 117 B.R. at 981-82; *Williams*, 118 B.R. at 816; *Vickers*, 116 B.R. at 153-54; *Martinez*, 107 B.R. at 380. *See also Seilkop*, 107 B.R. at 778 (following *In re* Martinez, 107 B.R. 378 (Bankr. S.D. Fla. 1989)); *Bryan*, 106 B.R. at 750-51 (following *In re* Volpe, 100 B.R. 840 (Bankr. W.D. Tex. 1989), *aff'd*, 120 B.R. 843 (W.D. Tex. 1990)).

159. *See Nuttleman*, 117 B.R. at 982; *Vickers*, 116 B.R. at 154; *Dyke*, 119 B.R. at 539; *see infra* notes 282-94 and accompanying text (discussing application of ERISA's savings clause).

160. *In re* Mann, No. 889-92426-478, 1991 Bankr. LEXIS 1900 (E.D.N.Y. Dec. 31, 1991), recently considered the effect of *Mackey* where a New York debtor claimed an exemption from the bankruptcy estate pursuant to CPLR § 5205(c)(2) with respect to an IRA that had been created as a result of a rollover from a tax-qualified plan. *Id.* The court held that since the IRA was not subject to ERISA, preemption did not apply. *Id.* The court also held, in dictum, that CPLR § 5205, as it relates to ERISA-covered plans, was not preempted by ERISA due to ERISA's savings clause. *Id.* at *12 (citing *In re* Dyke, 943 F.2d 1435 (5th Cir. 1991)).

161. *See supra* text accompanying notes 148-60.

pursuant to section 541(c)(2)[162] based on EPTL section 7-3.1.[163] The trustee in bankruptcy, relying on *Mackey*, may argue that EPTL section 7-3.1 is preempted by ERISA section 514(a). If a New York bankruptcy court were to agree, EPTL section 7-3.1 would be preempted to the extent it refers to ERISA-covered plans. Thus, EPTL section 7-3.1(b)(1) and (2)[164] would be preempted. The remaining provision of EPTL section 7-3.1 (EPTL section 7.3-1(a))[165] would remain viable.[166] The debtor

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162. *See supra* notes 15-35.

163. N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney Supp. 1991); *see also supra* notes 89, 95 and accompanying text (pertinent parts of EPTL § 7-3.1).

164. N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney Supp. 1991); *see also supra* text accompanying note 95 (pertinent parts of EPTL § 7-3.1).

165. N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney Supp. 1991); *see also supra* note 89 and accompanying text (pertinent parts of EPTL § 7-3.1).

166. New York Statutes § 150d provides as follows:

d. Partial invalidity

> **The court will uphold the valid part of a statute even though part is invalid if they are separable.**
>
> A statute may be unconstitutional in one part and valid in another part and the unconstitutionality of one part does not necessarily invalidate the entire statute. The courts will attempt to save part of the statute, and if valid and invalid provisions are incorporated in the same act the former, if separable, will be upheld though the latter must fall. The invalid part may be severed from the remainder if, after severance, the remaining portions are sufficient to effect the legislative purpose deducible from the entire act.
>
> However, where the valid and invalid portions are so interwoven that neither can stand alone, the entire act is void. Whether they are so interwoven in a given case presents a question of statutory construction and of legislative intent. The resolution of the question depends upon the ultimate result sought by the Legislature, and whether the Legislature, if partial invalidity had been foreseen, would have wished the remainder to be enforced alone. Frequently in such cases the wishes of the lawmakers are positively stated in the act itself by means of a "separability" or "saving" clause, which is simply a declaration that should any part of the act be declared unconstitutional, the remainder shall not be deemed affected thereby. The inclusion of a severability clause in the legislative act raises a presumption that the Legislature intended the act to be divisible.

would be entitled to an exclusion under section 541(c)(2) only if the court were to find that either ERISA constitutes applicable nonbankruptcy law under section 541(c)(2)[167] or, applying a state spendthrift trust analysis,[168] that the pension trust is not self-settled and is indeed spendthrift.[169]

If the court were to find that the debtor's pension benefits were part of the bankruptcy estate,[170] the debtor would claim exemptions for his pension benefits under CPLR section 5205(c)[171] pursuant to DCL section 282(i)[172] and under DCL section 282(iii)(2)(e).[173] The trustee in bankruptcy, relying on *Mackey*, may argue that ERISA preempts these state exemptions.[174] If a New York bankruptcy court were to agree,[175] DCL section 282(iii)(2)(e) would be entirely preempted and CPLR section 5205(c) would be preempted to the extent it refers to ERISA-covered pension plans. Thus, CPLR sections 5205(c)(2) and (3)[176] would be preempted. The debtor would be entitled to an exemption under the remaining viable[177] portion of CPLR section 5205(c) (5205(c)(1)),[178] only if the court were to find that the pension trust was not self-settled.[179]

N.Y. STATUTES § 150d (McKinney 1971 & Supp. 1992).

167. *See supra* text accompanying notes 17-23.

168. *See supra* text accompanying notes 36-46.

169. *Id.*; *see also supra* note 15.

170. *See supra* text accompanying notes 24-27.

171. N.Y. CIV. PRAC. L. & R. § 5205(c) (McKinney Supp. 1992); *see also supra* notes 92, 96 and accompanying text.

172. N.Y. DEBT. & CRED. LAW § 282(i) (McKinney 1990); *see also supra* note 92.

173. N.Y. DEBT. & CRED. LAW § 282(iii)(2)(e) (McKinney 1990); *see also supra* text accompanying notes 93 & 106.

174. *See supra* text accompanying notes 161-80 (discussing application of *Mackey* to state exemptions).

175. *See supra* text accompanying note 174.

176. N.Y. CIV. PRAC. L. & R. § 5205(c)(2) and (3) (McKinney Supp. 1992); *see also supra* text accompanying note 96 (for the pertinent parts of CPLR § 5205(c)(2) and (3)).

177. *See supra* notes 92, 96 and accompanying text.

178. N.Y. CIV. PRAC. L. & R. § 5205(c)(1) (McKinney Supp. 1992); *see also supra* text accompanying note 96 (for the text of CPLR § 5205(c)(1)).

179. *See supra* notes 88, 93 and accompanying text.

IV. ERISA SHOULD NOT PREEMPT NEW YORK STATE PENSION PROTECTION STATUTES

Despite *Mackey*, ERISA should not preempt New York's recently enacted pension protection statutes. First, New York's pension protection statutes were specifically drafted to be woven into the warp and woof of the Bankruptcy Code and are therefore clearly distinguishable from the state statutes reviewed by the *Mackey* Court.[180] *Mackey* is simply inapplicable to New York's pension protection statutes since the interplay between the pension protection statutes and the Bankruptcy Code brings about a specific preemption exception -- ERISA's savings clause. Second, the Georgia anti-garnishment statute reviewed in *Mackey*, which specifically protected ERISA-covered welfare benefit plans from garnishment,[181] conflicted with ERISA which, at best, is neutral as to the issue of the garnishment of welfare benefit plans. In addition, the Georgia statute singled out and protected ERISA welfare plans in a way that was inconsistent with the *Mackey* majority's interpretation of ERISA, to wit, that welfare benefit plans are indeed subject to state enforcement procedures.[182] New York's pension protection statutes do not conflict with, and in fact, further the purpose of ERISA and, therefore, should not be preempted by ERISA.

Furthermore, *Mackey* is merely one of a number of significant United States Supreme Court cases grappling with the ERISA preemption issue. A careful reading of *Mackey's* sister cases leads to the conclusion that *Mackey* should be limited to its facts and that the analyses presented by the Court in *Alessi v. Raybestos-Manhattan, Inc.*,[183] *Shaw v. Delta Airlines, Inc.*,[184]

180. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 828 n.2 (1988) (setting forth the Georgia anti-garnishment law at issue); *see id.* at 830 n.4 (setting forth Georgia's general garnishment procedure).

181. *Id.* at 828.

182. *Id.* at 831-32 (Congress did not intend to forbid the use of state law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits).

183. 451 U.S. 504 (1981).

and *Fort Halifax Packing Co., Inc. v. Coyne,*[185] described below, should be applied in determining whether or not New York's pension protection statutes are subject to ERISA preemption.

A. New York State's Pension Protection Statutes Do Not Relate To ERISA-Covered Plans As That Term Is Used In ERISA Section 514(a)

Generally, a state statute "relates to" ERISA-covered plans and is therefore preempted under ERISA section 514(a)[186] if it "conflicts with"[187] or "purports to directly or indirectly regulate the terms and conditions of"[188] such plans. However, if a state statute affects ERISA-covered plans in a "too tenuous, remote or

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184. 463 U.S. 85 (1983).

185. 482 U.S. 1 (1987).

186. *See supra* text accompanying notes 118-21 (setting forth ERISA § 514(a)).

187. *See, e.g.*, Alessi v. Raybestos-Manhattan, Inc., 45 U.S. 504, 524 (1990) (New Jersey's effort to regulate pension terms found to conflict with federal law because it foreclosed one method of calculating benefits which ERISA permitted); *but see In re* Suarez, 127 B.R. 73, 78 (Bankr. S.D. Fla. 1991) (no conflict between state law providing exemption and ERISA's purpose); *In re* Nuttleman, 117 B.R. 975, 982 (Bankr. D. Neb. 1990) (state pension exemption found entirely consistent with both ERISA and the Bankruptcy Code), *modified on other grounds*, 125 B.R. 254 (D. Neb. 1991); *In re* Vickers, 116 B.R. 149, 154 (Bankr. W.D. Mo. 1990) (state exemption statute was not preempted because it was not related to ERISA), *aff'd,* 126 B.R. 348 (W. D. Mo. 1990), *aff'd,* No. 91-1067, 1992 U.S. App. LEXIS 827 (8th Cir. Jan. 24, 1992); *In re* Martinez, 107 B.R. 378, 380 (Bankr. S.D. Fla. 1989) (state exemption clause allowing exemption of ERISA plans was not preempted because it was not in conflict with federal law); *In re* Volpe, 100 B.R. 840, 855 (Bankr. W.D. Tex. 1989) (state exemption statute was not preempted because it was not related to ERISA), *order aff'd,* 120 B.R. 843 (W.D. Tex. 1990), *judgment aff'd,* 943 F.2d 1451 (5th Cir. 1991).

188. *See, e.g., In re* Suarez, 127 B.R. 73, 78 (Bankr. S.D. Fla. 1991); *In re* Dyke, 119 B.R. 536, 539 (Bankr. S.D. Tex. 1990); *In re* Volpe, 120 B.R. 843, 848 (Bankr. W.D. Tex. 1990), *order aff'd,* 120 B.R. 843 (W.D. Tex. 1990), *judgment aff'd,* 943 F.2d 1451 (5th Cir. 1991); *In re* Williams, 116 B.R. 812, 816 (Bankr. N.D. Fla. 1990); *In re* Martinez, 107 B.R. 378, 380 (Bankr. S.D. Fla. 1989).

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peripheral" manner,[189] preemption will not be found.[190] New York's pension protection statutes do not "relate to" ERISA-covered plans within the meaning of ERISA section 514(a) because they (1) do not conflict with ERISA, (2) do not purport to directly or indirectly regulate the terms and conditions of ERISA-covered plans, and (3) affect ERISA-covered plans in a manner which is "too tenuous, remote or peripheral" to warrant preemption.

1. No Conflict

A conflict with ERISA exists if a state statute prohibits that which ERISA permits.[191] For example, a state statute which prohibits the offset of pension benefits by workers' compensation benefits is preempted by ERISA because it eliminates a method of calculating pension benefits permitted by ERISA.[192] This was the holding of the United States Supreme Court in *Alessi v. Raybestos-Manhattan, Inc.*[193]

In *Alessi*,[194] the New Jersey State Legislature had amended its workers' compensation law to prohibit the offset of workers' compensation benefits against pension benefits.[195] In determining whether the state statute was preempted by ERISA, the Court first noted that preemption "is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'"[196] The Court then turned to ERISA's preemption provision and found that this provision demonstrated

189. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21 (1983) (citing American Tel. and Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979)).

190. *Id.*

191. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524 (1990); *In re* Volpe, 120 B.R. 843, 846 (Bankr. S.D. Tex. 1990).

192. *Alessi*, 451 U.S. at 524.

193. *Id.*

194. *Id.*

195. *Id.* at 521.

196. *Id.* at 522 (citing Chicago & North Western Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981), quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)).

Congress' intent "to establish, [with certain exceptions] pension plan regulation as exclusively a federal concern."[197]

The Court also noted, however, that in order for preemption to be found, the New Jersey statute had to "relate to" ERISA-covered plans.[198] The Court concluded that the New Jersey statute "related to" ERISA-covered plans because it prohibited that which ERISA permitted by purporting to eliminate a method of calculating pension benefits permitted by ERISA.[199]

A conflict with ERISA also exists if a state statute permits that which ERISA specifically prohibits. For example, a state statute which permits the garnishment of ERISA-covered pension benefits is preempted because it permits an alienation of benefits explicitly prohibited by ERISA.[200]

Although the *Mackey* holding took the expression "relate to" to its outer limits by concluding that a statute which makes express reference to an ERISA-covered plan is preempted by ERISA,[201] the Court was influenced by the Georgia Supreme Court, whose identical holding was premised on the conflict between the Georgia anti-garnishment statute and ERISA.[202] Indeed, a number of courts have concluded that the rationale underlying the *Mackey* holding[203] is that because the Georgia anti-garnishment statute[204] conflicted with ERISA's anti-alienation provision,[205] the statute fell within ERISA's preemptive

197. *Alessi,* 451 U.S. at 523.

198. *Id.* at 523.

199. *Id.* at 524.

200. *See supra* note 3 and accompanying text.

201. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 830 (1988) (state statute's express reference to ERISA plan suffices to bring it within the federal law's preemptive reach).

202. Lanier Collection Agency & Serv., Inc. v. Mackey, 35 S.E.2d 439, 442 (Ga. 1986) ("[The Georgia anti-garnishment statute] prohibits that which the federal statute permits and is therefore *in conflict* with it.") (emphasis added), *aff'd,* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 830 (1988) ("The state statute's *express reference* to ERISA plans suffices to bring it within the federal law's preemptive reach.") (emphasis added).

203. *See supra* note 122 and accompanying text.

204. *Id.*

205. *See supra* note 132 and accompanying text.

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reach.[206] Specifically, the state statute struck down by the *Mackey* Court[207] prohibited the garnishment of ERISA welfare benefits.[208] The *Mackey* Court, in discussing Georgia's general garnishment statute, found that Congress only intended to prohibit assignment/garnishment with respect to ERISA-covered pension benefits, not welfare benefits, when it enacted ERISA's anti-alienation provisions.[209] The Court stated:

> Where Congress intended in ERISA to preclude a particular method of state law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute. Specifically, ERISA § 206(d)(1) bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA *pension* benefit plans. 29 U.S.C. § 1056(d)(1). Congress did not enact any similar provision applicable to ERISA *welfare* benefit plans, such as the one at issue in this case.
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> . . .
>
> Ultimately, in examining ERISA §§ 206(d)(1) and 514(a) there is no ignoring the fact that when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and not ERISA welfare benefit plans. In a comprehensive regulatory scheme like ERISA, such omissions are significant ones. Once Congress was sufficiently aware of the prospect that ERISA plan benefits could be attached and or garnished, as evidenced by its adoption of § 206(d)(1) -- Congress' decision to remain silent concerning the attachment or garnishment of ERISA welfare plan benefits "acknowledged and accepted the practice, rather than prohibited it." We therefore conclude that Congress did not intend to preclude state law attachment of ERISA welfare plan benefits.[210]

206. *See supra* note 135.

207. *See supra* notes 138-39.

208. *See supra* note 139 and accompanying text.

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

210. *Id.* at 836-38.

https://digitalcommons.tourolaw.edu/lawreview/vol8/iss2/3

Since the Georgia anti-garnishment statute prohibited that which ERISA permitted, the state law was in conflict with ERISA and therefore preempted. Indeed, the legislative history of ERISA section 514(a) indicates that the purpose of ERISA preemption is to "eliminat[e] the threat of *conflicting* and *inconsistent* State and local regulation."[211]

The oft-quoted statement from *Mackey,* to the effect that if a state statute "makes reference"[212] to an ERISA plan then it "relates to" such plans within the meaning of ERISA section 514(a),[213] has been seized upon by bankruptcy trustees and bankruptcy court judges[214] in an effort to counter states' efforts to protect pension assets in the bankruptcy context. Specifically, the *Mackey* Court stated:

> A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it *has* a connection with or *reference to* such a plan" [citing Shaw].
>
> . . . .
>
> On several occasions since our discussion in *Shaw,* we have reaffirmed this rule, concluding that state laws which *make* "reference" to ERISA plans are laws that "relate to" those plans within the meaning of § 514(a). See, e.g., *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. [41, 47], 107 S. Ct. 1549, [1553], 95 L. Ed. 2d 39, [48] (1987); *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739, 105 S. Ct. 2389, 85 L. Ed. 2d 728 (1985).[215]

We believe that the intent of the *Mackey* Court has been distorted by its bankruptcy progeny and that its "makes reference" language should be applied only if the state statute being analyzed "refers" to ERISA within the meaning of the carefully crafted standards developed in *Shaw v. Delta Airlines, Inc.*,[216] and other Supreme Court cases cited by and relied upon by *Mackey* in ar-

211. 120 CONG. REC. 29,197, 29,933 (1974) (emphasis added).
212. *Mackey,* 486 U.S. at 829.
213. *Id.*
214. *See supra* note 144 and accompanying text.
215. *Mackey,* 486 U.S. at 829 (first and third emphasis added).
216. 463 U.S. 85 (1983).

riving at its conclusion. Otherwise, state statute *A*, which "makes reference" to ERISA (or the Internal Revenue Code) but which is consistent with ERISA's substantive and procedural rules, does not add to or detract from ERISA, does not interfere in any way with the federal government's regulation of benefit plans, and only tangentially or remotely impacts those plans, would be preempted *per se*. In contrast, state statute *B*, which is substantively identical to statute *A* but avoids any specific reference to ERISA (or the Internal Revenue Code), may escape ERISA's preemptive reach.[217]

In *Shaw*, New York's Human Rights Law prohibited, *inter alia*, employment discrimination on the basis of pregnancy.[218] As noted in *Shaw*, New York's Disability Benefits Law required employers to provide the same benefits for pregnancy as for any other disability.[219] ERISA does not require an employer to provide any particular employee benefits nor does it prohibit sex discrimination in the provision of such benefits.[220] Appellees provided their employees with medical and disability benefits through ERISA welfare plans that did not provide pregnancy benefits.[221]

In determining whether the New York statutes were preempted by ERISA, the Court first examined the plain language of ERISA's preemption provision and found that "[a] law 'relates to' an [ERISA-covered] employee benefit plan, in the normal sense of the phrase, if it *has a connection with or reference to* such a plan."[222] Based on this definition, the Court held that New York's Human Rights Law, "which prohibit[ed] employers from structuring their employee benefit plans in a manner that

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217. Indeed, state legislatures whose goal is to protect pension assets might consider redrafting their statutes with a view toward removing the *Mackey* "makes reference to" taint.

218. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 88 n.1 (quoting N.Y. EXEC. LAW § 296.1(a) (McKinney 1982) (referred to as the Human Rights Law)).

219. *Id.* at 90 & n.4.

220. *Id.* at 91.

221. *Id.* at 92.

222. *Id.* at 96-97 (emphasis added).

discriminates on the basis of pregnancy" and New York's Disability Benefits Law, "which required employers to pay employees specific benefits, clearly 'relate[d] to' benefit plans."[223]

The Court then looked to the structure of ERISA section 514 and the legislative history of ERISA section 514(a) in order to determine whether Congress intended "relate to" to have a more restrictive meaning.[224] Noting that ERISA section 514 provides exemptions for certain state laws,[225] the Court held that "relates to" does not mean that ERISA's preemption provision is limited to state laws which specifically deal with ERISA-covered plans.[226] The Court also found, based on the legislative history of ERISA section 514(a), that "relates to" is not limited to state laws that deal with ERISA's subject matter, such as reporting and disclosure, vesting, and fiduciary obligations.[227] The Court noted that Congress had originally considered a preemption provision applicable only to ERISA subject matters but ultimately adopted the broader "relates to" language set forth in section 514(a).[228] The Court referred to the following statements made by two of ERISA's sponsors as further support for its holding:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants *by eliminating the threat of conflicting and inconsistent State and local regulation.*[229]
>
> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, *thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.* This

223. *Id.* at 97.
224. *Id.* at 97-98.
225. *Id.* at 98.
226. *Id.*
227. *Id.*
228. *Id.*
229. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent), quoted in *Shaw*, 463 U.S. at 99 (emphasis added).

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> principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of the law.[230]

The Court held that New York's Human Rights and Disability Laws "related to" ERISA-covered plans within the meaning of ERISA section 514(a) based on the plain meaning of "relates to" under section 514(a), the structure of ERISA section 514 and its legislative history.[231]

As indicated above, the *Mackey* Court cited *Pilot Life*[232] and *Metropolitan Life*[233] as directly supporting its "makes reference to" statement.[234] However, neither of these cases set forth any statements indicating that a state statute which *makes* reference to ERISA plans "relates to" such plans within the meaning of ERISA section 514(a).[235] These cases, in discussing ERISA preemption, merely quoted the rule enunciated in *Shaw*[236] that a state law "relates to" an ERISA-covered plan if it "*has a* connection with or *reference to* such a plan."[237] Furthermore, none of the state statutes or actions before the Court in these cases made any specific references to ERISA-covered plans.[238]

Other statements made by the *Mackey* Court have been misapplied by bankruptcy courts in finding preemption of state pension protection statutes.[239] Specifically, the *Mackey* Court stated

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230. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams), quoted in *Shaw*, 463 U.S. 99 (emphasis added).

231. *Shaw*, 463 U.S. at 100.

232. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829 (1988) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987)).

233. *Id.* (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)).

234. *Id.*

235. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

236. 463 U.S. 85 (1983).

237. *Id.* at 96-97 (emphasis added).

238. *See Pilot Life*, 481 U.S. at 43-44; *Metropolitan Life*, 471 U.S. at 729-30.

239. *See In re* Fullmer, 127 B.R. 55, 59 (D. Utah 1991); *In re* Gardner, 106 B.R. 257, 262 (E.D. Okl. 1989); *In re* Weeks, 118 B.R. 860, 863 (M.D. Fla. 1990) *In re* Rosenquist, 122 B.R. 775, 782 (Bankr. M.D. Fla. 1990). *See*

that the "possibility that [the Georgia anti-garnishment statute] was enacted . . . to help effectuate ERISA's underlying purposes [was] not enough to save the state law from preemption."[240] Citing *Metropolitan Life*,[241] the Court also stated "the preemption provision [of ERISA section 514(a)] displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."[242] The *Mackey* Court finally stated that "legislative good intentions do not save a state law within the broad preemptive scope of [ERISA] Section 514(a)."[243]

These "good intention" statements made by the *Mackey* Court do not, according to some courts, mean that a state statute which is consonant with ERISA is preempted *per se* if the statute contains an express reference to ERISA-covered plans. These statements merely suggest that if state legislation goes beyond what Congress intended to provide in ERISA, as did the Georgia anti-garnishment statute, the statute will be preempted.[244]

The New York State pension protection statutes do not conflict with ERISA. New York did not have to legislate to protect pension assets from third-party creditors, because the New York Court of Appeals had already held that the anti-alienation provisions of ERISA protect pension assets from attachment under state judgment creditor laws.[245] New York's pension protection statutes were necessitated because of the conflict

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also supra notes 144-46 and accompanying text.

240. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829 (1988).

241. *Id.* at 829 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)).

242. *Id.*

243. *Mackey*, 486 U.S. at 830.

244. *See, e.g.*, *In re* Volpe, 100 B.R. 840, 847-48 (Bankr. W.D. Tex. 1989) (a state law that does not conflict with a positive federal law may nevertheless conflict with congressional silence on a subject which is within a field that Congress has retained the sole right to regulate), *order aff'd*, 120 B.R. 843 (W.D. Tex. 1990), *judgment aff'd*, 943 F.2d 1451 (5th Cir. 1991).

245. *See* Helmsley-Spear, Inc. v. Winter, 74 A.D.2d 195, 426 N.Y.S.2d 778 (1st Dep't 1980), *aff'd*, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981).

between ERISA and the Bankruptcy Code. Since ERISA does not preempt other federal law,[246] pension benefits that were protected from third-party creditors under state law actions because of ERISA's anti-alienation rule[247] became vulnerable to those very same creditors in the federal bankruptcy context.[248] Since the Bankruptcy Code gave the states the right to create their own exemptions,[249] many states, including New York have appropriately done so.[250]

Mackey should be limited to its facts. If a state law conflicts with ERISA, ERISA preempts the state law.[251] A specific reference in a non-conflicting state statute to ERISA is certainly an indication that the statute may come within ERISA's preemptive ambit, but should not create a *per se* preemption rule, absent a conflict or any of the criteria discussed below.[252]

2. No Direct or Indirect Regulation of Terms and Conditions of Plan

New York's pension protection statutes do not "relate to" ERISA-covered plans since the statutes do not purport to regulate, directly or indirectly, the terms and conditions of such plans. The underlying purpose of ERISA is to establish national uniformity with respect to the regulation of the terms and conditions of employee benefit plans.[253] Specifically, ERISA section 2(b) provides:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other

246. *See infra* notes 281-84.
247. *See supra* note 18 and accompanying text.
248. *See supra* notes 9-79 and accompanying text.
249. *See supra* notes 52, 54 and accompanying text.
250. *See supra* notes 80-89; *see also supra* notes 94-106.
251. *See supra* note 182.
252. *See supra* note 182 and accompanying text.
253. *See* Fort Halifax Packing Co. Inc. v. Coyne, 482 U.S. 1, 9 (1987); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981); *In re* Martinez, 107 B.R. 378, 379 (Bankr. S.D. Fla. 1989).

> information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal Courts.[254]

This underlying purpose is also found in ERISA section 514(c)(2) which defines "State" for purposes of ERISA's preemption provision[255] as "a state, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of [ERISA-covered plans]."[256]

Therefore, if a state purports, by legislation or otherwise, to directly or indirectly regulate the terms and conditions of an ERISA-covered plan, such action will be preempted by ERISA.

In *Fort Halifax Packing Company, Inc. v. Coyne*,[257] a Maine statute required certain employers to provide a lump-sum severance benefit to certain employees in the event of a plant closing.[258] The United States Supreme Court held that the statute was not preempted by ERISA because it "neither establishe[d], nor require[d] an employer to maintain, an employee welfare benefit 'plan' under [ERISA]."[259] The appellant argued that since the state law pertained to an ERISA-type benefit, it regulated an ERISA-covered plan within the meaning of ERISA section 514(a).[260] The Court rejected this argument based on the plain language of ERISA's preemption provision, the underlying purpose of the provision, and ERISA's overall objectives.[261]

First, the Court noted that ERISA's preemption provision refers to state laws relating to ERISA-covered plans, not to ERISA-covered benefits.[262] Second, the Court, referring to the

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254. 29 U.S.C. § 1001(b) (1988).
255. *See supra* note 119.
256. *Id.*
257. 482 U.S. 1 (1987).
258. *Id.* at 3, 4 n.1.
259. *Id.* at 6.
260. *Id.* at 7.
261. *Id.*
262. *Id.* at 7-8.

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legislative history cited by *Shaw*,[263] noted that preemption of the Maine statute would not further Congress' purpose in enacting ERISA's preemption provision, which was to "afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations."[264] Third, the Court noted that the Maine statute failed to "implicate the regulating concerns of ERISA itself,"[265] which focuses on "the administrative integrity of benefit plans"[266] by requiring that certain disclosures be made to employees,[267] certain "'safeguards be provided with respect to the establishment, operation, and administration of . . . plans,'"[268] and certain fiduciary standards be met in order to prevent abuse with respect to plan funds.[269]

New York's pension protection statutes "relate to" ERISA-covered benefits and do not relate to ERISA-covered plans.[270] These statutes merely define the property rights of its citizens, an area that has traditionally been left to the states to define.[271] New York, in amending the EPTL, CPLR and DCL, did not purport to regulate, directly or indirectly, any matters dealing with ERISA's plan reporting, disclosure, participation, funding, vesting, benefit calculation or fiduciary responsibilities.[272]

263. *Id.* at 8-11 (discussing Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983)).

264. *Id.* at 11.

265. *Id.* at 15.

266. *Id.*

267. *Id.*

268. *Id.* (quoting 29 U.S.C. § 1001(a) (1988)).

269. *Id.* at 15.

270. *See supra* notes 94-106.

271. *See In re* Dyke, 119 B.R. 536, 539 (Bankr. S.D. Tex. 1990), *aff'd*, 943 F.2d 1435 (5th Cir. 1991) (court stated "[t]raditionally, states create and define property interests"). *See also In re* Martinez, 107 B.R. 378, 380 (Bankr. S.D. Fla. 1989) ("area of law traditionally governed by the states and does not interfere with the field of employee pension plans now governed by federal law").

272. *Martinez*, 107 B.R. at 380. The court accepted the opinion in *In re* Volpe, 100 B.R. 840, 848 (Bankr. W.D. Tex. 1989), *order aff'd*, 120 B.R. 843 (W.D. Tex. 1990), *judgment aff'd*, 943 F.2d 1451 (5th Cir. 1991), which held that a state law is not preempted simply because the law mentions ERISA, if it does not conflict with the federal scheme of the statute. *Martinez*, 107

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Therefore, New York's pension protection statutes should not be preempted.

3. Effect of New York's Pension Protection Statutes is Too Tenuous, Remote or Peripheral

New York's pension protection statutes do not "relate to" ERISA-covered plans because the manner in which such statutes affect such plans is "too tenuous, remote or peripheral."[273] Although the United States Supreme Court in *Shaw*[274] stated that "a law 'relates to' an employee benefit plan" within the meaning of ERISA's preemption provision "if it has a connection with or reference to such a plan,"[275] the Supreme Court also noted that "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law relates to the plan."[276]

The standard generally used by the courts in applying the "too tenuous, remote, or peripheral" exception to the preemption rule is whether the state law in question affects the relationship among the principal ERISA entities, *i.e.*, the employer, the plan, the

B.R. at 380; *accord In re* Dyke, 943 F.2d 1435 (5th Cir. 1991); *In re* Suarez, 127 B.R. 73, 78 (Bankr. S.D. Fla. 1991); *In re* Williams, 118 B.R. 812, 816 (Bankr. N.D. Fla. 1990); *contra In re* Komet, 104 B.R. 799, 804 (Bankr. W.D. Tex. 1989).

273. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21 (1983) (citing American Tel. and Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979)); *see also In re* Volpe, 100 B.R. 840, 849-50 (Bankr. W.D. Tex. 1989) (discussing the line drawn between employee benefits that "relate to" and those "too tenuous, remote and peripheral" to be said to "relate to" ERISA and ultimately finding no preemption), *order aff'd*, 120 B.R. 843 (W.D. Tex. 1990), *judgment aff'd*, 943 F.2d 1451 (5th Cir. 1991); *contra In re* Gaines, 106 B.R. 1008, 1015 (Bankr. W.D. Mo. 1989) (statute is invalid to the extent that it relates to or is connected with the provisions of ERISA), *rev'd on other grounds*, 121 B.R. 1015 (W.D. Mo. 1990); *In re* Komet, 104 B.R. 799, 802 (Bankr. W.D. Tex. 1989) (rejected contention that state statute is "too tenuous, remote, or peripheral" to trigger preemption).

274. 463 U.S. 85 (1983).

275. *Id.* at 96-97.

276. *Id.* at 100.

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plan fiduciaries and plan participants.[277] If the state law affects the relationship among the principal ERISA parties, ERISA preemption will be found.[278] Generally, if the state law affects the relationship between an ERISA party and a third party, ERISA preemption will not be found.[279] Under this line of reasoning, the New York statutes should not be preempted because the only parties directly affected in a bankruptcy proceeding by such statutes are the debtor/participant and the trustee in bankruptcy.[280]

B. New York State Pension Protection Statutes Are Exempt From ERISA Preemption Due To ERISA's Savings Clause

Even if *Mackey* can be interpreted to require ERISA preemption whenever an express reference to an ERISA-covered plan is made in a state statute,[281] New York's pension protection statutes should be "saved" from preemption by ERISA's savings clause -- an important exception to ERISA's general preemption provision.[282] Specifically, ERISA section 514(d) provides "*[n]othing* in this title shall be construed to alter, amend, modify, invalidate, impair or supersede *any* law of the United States . . . ."[283]

Although the United States Supreme Court in *Shaw*[284] found that New York's Human Rights Law "related to" ERISA-covered plans within the meaning of ERISA's preemption provision,[285] the Court also found that the enforcement mechanisms

277. *See In re* Volpe, 100 B.R. 840, 853-54 (Bankr. W.D. Tex. 1989), *order aff'd*, 120 B.R. 843 (W.D. Tex. 1990), *judgment aff'd*, 943 F.2d 1451 (5th Cir. 1991). The court discussed the conclusion, reached in the Fifth Circuit, that a common thread in circuit court opinions dealing with ERISA preemption is the relations among the principal ERISA entities. Sommers Drug Stores v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1467-48 (5th Cir. 1986).

278. *See Volpe*, 100 B.R. at 853-54.

279. *Id.*

280. *Id.*

281. *See supra* notes 272-79 and accompanying text.

282. 28 U.S.C. § 1144(d) (1988).

283. *Id.* (emphasis added).

284. Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

285. *Id.* at 96-97.

provided by the state law were not so preempted, because such preemption would impair other federal law in violation of ERISA's savings clause.[286] Specifically, Title VII of the Civil Rights Act of 1964 relies in part on state law enforcement mechanisms to provide a means of federal enforcement.[287] The Court held that if the state Human Rights Law was completely preempted by ERISA, it would result in an impermissible modification and impairment of federal law within the meaning of ERISA's savings clause.[288]

According to the Fifth, Eighth, Ninth and Eleventh Circuits, Congress intended the phrase "applicable non-bankruptcy law" under section 541(c)(2) to require the application of a state spendthrift trust analysis in determining whether such benefits are excluded from the bankruptcy estate.[289] Since preemption of New York's amended spendthrift trust statute would prevent the application of the very law that Congress intended to be applied under section 541(c)(2), such preemption would alter, amend, modify, invalidate and impair the Bankruptcy Code in violation of ERISA's savings clause.[290]

The same analysis should be applied to section 522(b)(2)(A) of the Bankruptcy Code, pursuant to which Congress has expressly given the states the right to provide exemptions for their citizens.[291] In fact, the Bankruptcy Code relies on states to provide their own exemptions where the states have "opted-out" of the federal bankruptcy exemptions.[292] Preemption of New York's exemptions for pension benefits in the bankruptcy context would invalidate federally-permitted state exemptions in violation

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286. *Id.* at 100-01.

287. *Id.* at 101.

288. *Id.* at 100-01.

289. *See supra* notes 24-27.

290. *See In re* Kincaid, 917 F.2d 1162, 1166 (9th Cir. 1990) (ERISA trusts must look to state spendthrift law for protection in a bankruptcy setting); *see also In re* Hysick, 90 B.R. 770, 774 (Bankr. E.D. Pa. 1988) (application of state spendthrift trust law mandated by federal bankruptcy law); *In re* Pettit, 61 B.R. 341, 345 (Bankr. W.D. Wash. 1986) (same).

291. *See supra* notes 52, 54; *see supra notes* 94-98 and accompanying text.

292. *See supra* notes 14, 52 and accompanying text.

of ERISA's savings clause.[293]

CONCLUSION

New York's pension protection statutes for debtors in bankruptcy should not be preempted by ERISA because they are not in conflict with ERISA,[294] do not attempt to regulate the terms and conditions of ERISA-covered plans,[295] and affect ERISA plans in too tenuous, remote and peripheral a manner.[296] Moreover, a finding that ERISA preempts these statutes would constitute an impairment of the Bankruptcy Code and thus violate ERISA's savings clause.[297] Therefore, New York's pension protection legislation should withstand the *Mackey* assault.

Unfortunately, the majority of bankruptcy courts have seized upon *Mackey*'s "makes reference to" language to the detriment of debtors in bankruptcy.[298] New York debtors in bankruptcy do not have any assurance that their pension benefits will be protected notwithstanding the anti-alienation provision of

293. *See In re* Vickers, 116 B.R. 149, 154 (Bankr. W.D. Mo. 1990) (Congress did not intend to prohibit states from enacting exemption laws similar or identical to those contained in the Bankruptcy Code itself), *aff'd,* 126 B.R. 348 (W.D. Mo. 1990), *aff'd,* No. 91-1067, 1992 U.S. App. LEXIS 827 (8th Cir. Jan. 24, 1992); *In re* Nuttleman, 117 B.R. 975, 982 (Bankr. D. Neb. 1990) (Code allows states to opt-out and create their own bankruptcy exemptions, and nothing in ERISA indicates an intent to prohibit state enactment of exemptions identical to those in the Bankruptcy Code), *modified on other grounds,* 125 B.R. 254 (D. Neb. 1991); *contra In re* McLeod, 102 B.R. 60, 63 (Bankr. S.D. Miss. 1989) (state statute specifically exempting ERISA qualified retirement funds from seizure was preempted by federal law); *In re* Flindall, 105 B.R. 32, 37 (Bankr. D. Ariz. 1989) (state exemption statute is not saved from preemption by § 514(d) of ERISA, as preemption does not impair the operation of the Bankruptcy Code); *In re* Siegal, 105 B.R. 556, 562 (Bankr. D. Ariz 1989) (rejection of argument that congressional intent of § 522 of ERISA was to permit states to decide whether to provide exemptions for ERISA plans in view of purpose to establish uniform regulation).

294. *See supra* notes 191-252 and accompanying text.

295. *See supra* notes 253-72 and accompanying text.

296. *See supra* notes 273-80 and accompanying text.

297. *See supra* notes 281-93 and accompanying text.

298. *See supra* notes 151-56, 186-89 and accompanying text.

ERISA[299] and New York's pension protection statutes.[300] In addition, trustees of tax-qualified plans[301] in receipt of a bankruptcy court order compelling distribution of pension benefits to a bankruptcy trustee are caught between "Scylla and Charybdis." The trustee risks either being held in contempt of the bankruptcy court order by obeying ERISA's anti-alienation rule or breaching his or her ERISA fiduciary duties[302] and disqualifying the qualified pension plan.[303]

Until the United States Supreme Court clarifies the application of *Mackey* and ERISA's preemption provision in the bankruptcy context to legislation such as New York's pension protection statutes,[304] or until Congress enacts legislation to harmonize ERISA and the Bankruptcy Code,[305] we can expect to see a continuing proliferation of conflicting court decisions in this area.

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299. *See supra* notes 18, 21 and accompanying text.

300. *See supra* notes 76-79, 94-106 and accompanying text.

301. *See supra* notes 18-22 and accompanying text.

302. *See supra* note 23 and accompanying text.

303. *Id.*

304. *In re* Creasy, 803 B.R. 404, 407 (Bankr. W.D. Va. 1988), *rev'd sub. nom.* Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991), *cert. granted,* no. 91-913, 1992 U.S. LEXIS 387 (Jan. 21, 1992). The United States Supreme Court recently granted certiorari on the issue of whether ERISA constitutes applicable nonbankruptcy law under Bankruptcy Code § 541(c)(2). *Id.* If the Court finds that ERISA is an applicable nonbankruptcy law under § 531(c)(2), state pension protection legislation for ERISA-covered pension benefits will no longer be necessary.

305. On November 19, 1991, Senators Heflin and Grassley introduced a bill which, *inter alia,* proposed the following amendment to § 514 of the Bankruptcy Code:

> (e) Title 11, United States Code, shall have no application to assets held in or benefits provided under an employee pension benefit plan that is qualified under section 401(a) or 403(a) or (b) or the Internal Revenue Code of 1986.

S. 1985, 102nd Cong., 1st Sess. (1991) ("National Bankruptcy Review Commission Act," Title II, § 201(F)(2)).
Although the bill was subsequently referred to the Senate Judiciary Committee, as of the time of this writing no further action has been taken.