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Are Retirement Funds Exempt from the Reach of Creditors in Mississippi

Richard A. Montague Jr.

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ARE RETIREMENT FUNDS EXEMPT FROM THE REACH OF CREDITORS IN MISSISSIPPI?

Richard A. Montague, Jr. *

One court has stated, "The ERISA[1] quicksand is fast swallowing up everything that steps in or near it."[2] After grappling with ERISA issues another court concluded that "quicksand may not [have been] all that it . . . stepped into."[3]

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

2. Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822, 827 (N.D. Ala. 1988).

3. *In re* Volpe, 100 Bankr. 840, 842 (Bankr. W.D. Tex. 1989). Chief Bankruptcy Judge Larry E. Kelly of the Western District of Texas expresses the frustration of many bankruptcy judges and practitioners who have dealt with issues addressed in this article. As stated by Judge Kelly: "The issues before the Court are complicated because of the less than clear interplay between certain provisions of ERISA, the Bankruptcy Code, and the Texas Property Code." *Id.*

I. INTRODUCTION

Are private retirement and pension funds exempt from the reach of creditors in Mississippi? Are IRA's exempt? Although Congress and most state legislatures have enacted laws placing retirement funds, public and private, beyond the reach of creditors,[4] the majority of bankruptcy court decisions have produced a contrary result.[5] In a recent Mississippi bankruptcy case, *In re McLeod,* a federal district

4. See discussion below regarding ERISA anti-alienation provisions, Bankruptcy Code exclusions and exemptions and the Mississippi exemptions relating to private retirement funds, beginning at note 18.

5. Recent cases holding retirement funds available to the bankruptcy trustees include:

Second Circuit: *In re* Tisdale, 112 Bankr. 61 (Bankr. D. Conn. 1990) (deferred contribution account not spendthrift trust under Connecticut law, therefore not excluded from the estate; portion of plan contributions made by employer excluded as spendthrift trust).

Third Circuit: *In re* Velis, 109 Bankr. 64 (Bankr. D. N.J. 1989) (ERISA-qualified plan not excluded where debtor had control over plan); White v. Babo (*In re* Babo), 97 Bankr. 827 (Bankr. W.D. Pa. 1989) (ERISA-qualified plan not excluded; not exempt); *In re* Atallah, 95 Bankr. 910 (Bankr. E.D. Pa. 1989) (IRA not excluded; applicable nonbankruptcy law means only state spendthrift trust law).

Fourth Circuit: Tyler v. Putman (*In re* Putman), 110 Bankr. 783 (Bankr. E.D. Va. 1990) (interest in ERISA-qualified profit-sharing plan excluded to extent that transfer restrictions enforceable under state law) (overruled by Anderson v. Raine (*In re* Moore), 907 F.2d 1476 (4th Cir. 1990)).

Fifth Circuit: Brooks v. Interfirst Bank (*In re* Brooks), 844 F.2d 258 (5th Cir. 1988) (ERISA-qualified plan not spendthrift trust, debtor had sufficient control over plan to be settlor); Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983) (ERISA-qualified plan not excluded because not spendthrift trust); Judson v. Witlin (*In re* Witlin), 640 F.2d 661 (5th Cir. 1981) (Keogh plan not exempt because self-settled spendthrift trust void as to creditors); Deposit Guaranty Nat'l Bank v. McLeod (*In re* McLeod), 102 Bankr. 60 (Bankr. S.D. Miss. 1989) (ERISA-qualified plan and IRA not exempt; state exemption preempted); Heitkamp v. Dyke (*In re* Dyke), 99 Bankr. 343 (Bankr. S.D. Tex. 1989) (ERISA-qualified plan not spendthrift trust, therefore not excluded; ERISA plan not exempt under § 522(b)(2)(A) and Texas exemption preempted); *In re* Connally, 94 Bankr. 908 (Bankr. W.D. Tex. 1989) (deferred compensation not spendthrift trust, therefore property of estate); *In re* Komet, 93 Bankr. 498 (Bankr. W.D. Tex. 1988) (Komet I) (withdrawn).

Sixth Circuit: *In re* Gribben, 84 Bankr. 494 (Bankr. S.D. Ohio 1988) (ERISA-qualified plan not excluded, not exempt); *In re* Smith, 103 Bankr. 882 (Bankr. N.D. Ohio 1989) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* Leimbach, 99 Bankr. 796 (Bankr. S.D. Ohio 1989) (ERISA plan not excluded because not spendthrift trust); *In re* Sellers, 107 Bankr. 152 (Bankr. E.D. Tenn. 1989) (vested interest in ERISA-qualified profit-sharing plan not excluded because not spendthrift trust); *In re* Witte, 92 Bankr. 218 (Bankr. W.D. Mich. 1988) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* Slezak, 63 Bankr. 625 (Bankr. W.D. Ky. 1986) (ERISA-qualified plan not excluded because not spendthrift trust; not exempt under § 522(b)(2)(A)); *In re* Ridenour, 45 Bankr. 72 (Bankr. E.D. Tenn. 1984) (ERISA-qualified plan not excluded because not spendthrift trust).

Seventh Circuit: Morter v. Farm Credit Servs., 110 Bankr. 390 (N.D. Ind. 1990) (retirement fund excluded as spendthrift trust; annuity included in estate because annuity not a trust under New York law); *In re* Silldorff, 96 Bankr. 859 (C.D. Ill. 1989) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* Tomer, 117 Bankr. 391 (Bankr. S.D. Ill. 1990) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* Smith, 115 Bankr. 144 (Bankr. C.D. Ill. 1990) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* Pulley, 111 Bankr. 715 (Bankr. N.D. Ind. 1989) (portion of ERISA plan ESOP not excluded because not spendthrift trust under Indiana law); *In re* Gifford, 93 Bankr. 636 (Bankr. N.D. Ind. 1988) (ERISA-qualified plan not excluded because not spendthrift trust).

Eighth Circuit: *In re* Swanson, 873 F.2d 1121 (8th Cir. 1989) (statutory retirement fund not excluded because not spendthrift trust under Minnesota law); *In re* Graham, 726 F.2d 1268 (8th Cir. 1984) (ERISA-qualified plan not excluded unless spendthrift trust, not exempt under § 522(b)(2)(A); Weir v. O'Brien (*In re* O'Brien), 94 Bankr. 583 (W.D. Mo. 1988) (ERISA-qualified plan not excluded where corporate veil pierced to make spendthrift provisions unenforceable); *In re* Boykin, 118 Bankr. 716 (Bankr. W.D. Mo. 1990) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* Nuttleman, 117 Bankr. 975 (Bankr. D. Neb. 1990) (ERISA-qualified plan not excluded because not spendthrift trust, ERISA did not preempt Nebraska pension exemption statute); Wear v. Green (*In re* Green), 115 Bankr. 1001 (Bankr. W.D. Mo. 1990) (ERISA-qualified plan not excluded because not spendthrift trust, no discussion of ERISA preemption); *In re* Fritsvold, 115 Bankr. 192 (Bankr. D. Minn. 1990) (ERISA-qualified plan not excluded because not spendthrift trust under Minnesota law, state ERISA exemption preempted by ERISA); *In re* Hartman, 115 Bankr. 171 (Bankr. W.D. Ark. 1990) (ERISA-qualified plan not excluded because not spendthrift trust under Arkansas law); Berman v. Mead (*In re* Mead), 110 Bankr. 434 (Bankr. W.D. Mo. 1990) (ERISA-qualified plan not excluded because not spendthrift trust under Missouri law); *In re* Gaines, 106 Bankr. 1008 (Bankr. W.D. Mo. 1989) (ERISA preempted state exemption statute; fraudulent conduct resulted in disallowed exemptions); Federman v. Gallagher (*In re* Gallagher), 101 Bankr. 594 (Bankr. W.D. Mo. 1989) (ERISA-qualified plan not excluded because not spendthrift trust and turnover did not disqualify the plan); Brown v. Shelter Ins. Employees Retirement Plan (*In re* Kendrick), 106 Bankr. 605 (Bankr. W.D. Mo. 1988) (ERISA plan included, no discussion of spendthrift trust or ERISA preemption).

Ninth Circuit: *In re* Ullman, 116 Bankr. 228 (Bankr. D. Mont. 1990) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* Conroy, 110 Bankr. 492 (Bankr. D. Mont. 1990) (ERISA-qualified plan excluded only to extent of employer's contribution, state exemption preempted); Watson v. Kincaid (*In re* Kincaid), 96 Bankr. 1014 (9th Cir. BAP 1989) (ERISA-qualified plan not excluded because not spendthrift trust); Kaplan v. Primerit Bank (*In re* Kaplan), 97 Bankr. 572 (9th Cir. BAP 1989) (ERISA-qualified plan not excluded because not spendthrift trust); Siegel v. Swaine (*In re* Siegel), 105 Bankr. 556 (D. Ariz. 1989) (ERISA-qualified plan not excluded because not spendthrift trust and Arizona ERISA exemption preempted by ERISA); Fogler v. Flindall (*In re* Flindall), 105 Bankr. 32 (Bankr. D. Ariz. 1989) (ERISA-qualified plan not excluded because not spendthrift trust, state exemptions preempted); Daniel v. Security Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352 (9th Cir. 1985) (ERISA-qualified plan not excluded because not spendthrift trust, not exempt under § 522(b)(2)(A)).

Tenth Circuit: Williams v. Threet (*In re* Threet), 118 Bankr. 805 (Bankr. N.D. Okla. 1990) (ERISA-qualified plan not excluded because not spendthrift trust); *In re* McIntosh, 116 Bankr. 277 (Bankr. N.D. Okla. 1990) (ERISA-qualified plan not excluded because not spendthrift trust and not exempt under § 522(b)(2), state exemption laws preempted by ERISA); Martin v. Verwer (*In re* Martin), 115 Bankr. 311 (Bankr. D. Utah 1990) (ERISA-qualified plan not excluded because not spendthrift trust, state exemption preempted by ERISA); *In re* Mata, 115 Bankr. 288 (Bankr. D. Colo. 1990) (IRA not excluded because not spendthrift trust; state IRA exemption statute with different rules for debtors in and out of bankruptcy invalid; *In re* Walker, 108 Bankr. 769 (Bankr. N.D. Okla. 1989) (IRA or annuity not excluded because not spendthrift trust and exemptions not governed by ERISA are not preempted); *In re* Alagna, 107 Bankr. 301 (Bankr. D. Colo. 1989) (ERISA-qualified plan not excluded because not spendthrift trust; plan not exempt under § 522 (b)(2)(A) and state exemption preempted); *In re* Weeks, 106 Bankr. 257 (Bankr. E.D. Okla. 1989) (ERISA-qualified plan not excluded because not spendthrift trust; state exemption preempted); *In re* Toner, 105 Bankr. 978 (Bankr. D. Colo. 1989) (ERISA-qualified plan not excluded because not spendthrift trust; not exempt under § 522(b)(2)(A);, ERISA preemption not discussed); *In re* Brown, 95 Bankr. 216 (Bankr. N.D. Okla. 1989) (state exemption preempted, plan not exempt under § 522(b)(2)(A), § 541(c)(2) not discussed).

Eleventh Circuit: Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488 (11th Cir. 1985) (ERISA-qualified plan not excluded because not spendthrift trust; not exempt under § 522(b)(2)(A)); Stilson v. Gulf States Paper Corp. (*In re* Pilkington), 89 Bankr. 911 (N.D. Ala. 1987) (ERISA-qualified plan not excluded because not spendthrift trust under Alabama law); *In re* Schlein, 114 Bankr. 780 (Bankr. M.D. Fla. 1990) (exemption statute preempted by ERISA); *In re* Seilkop, 107 Bankr. 776 (Bankr. S.D. Fla. 1989) (state exemption for annuity not unconstitutional and state pension exemption not preempted); *In re* Martinez, 107 Bankr. 378 (Bankr. S.D. Fla. 1989) (state exemption not preempted by federal law where no conflict between state and federal law); *In re* Bryant, 106 Bankr. 727 (Bankr. M.D. Fla. 1989) (ERISA-qualified plan not excluded because not spendthrift trust and state exemption statute preempted); *In re* Sheppard, 106 Bankr. 724 (Bankr. M.D. Fla. 1989) (ERISA-qualified plan not excluded because not spendthrift trust and state exemption statute preempted).

Contra: D.C. Circuit: Tatge v. Cheaver (*In re* Cheaver), 121 Bankr. 665 (Bankr. D.C. 1990) (ERISA transfer restrictions are "applicable nonbankruptcy law" and provide exclusion of the plan from the bankruptcy estate under § 541(c)(2)).

Second Circuit: *In re* Kleist, 114 Bankr. 366 (Bankr. N.D. N.Y. 1990) (qualified employee benefit funds conclusively presumed to be spendthrift trust under New York law and excluded from estate under § 541(c)(2)).

Third Circuit: *In re* Hysick, 90 Bankr. 770 (Bankr. E.D. Pa. 1988) (ERISA-qualified plan also spendthrift trust under Pennsylvania law, plan excluded under § 541(c)(2)).

Fourth Circuit: Anderson v. Raine (*In re* Moore), 907 F.2d 1476 (4th Cir. 1990) (restrictions on transfers in ERISA-qualified plans constitute "applicable nonbankruptcy law," plan excluded under § 541(c)(2)).

Fifth Circuit: *In re* Felts, 114 Bankr. 131 (Bankr. W.D. Tex. 1990) (ERISA-qualified plan exempt under § 522(b)(2)(A); *In re* Kirk, 101 Bankr. 476 (Bankr. N.D. Tex. 1989) (ERISA-qualified plan excluded as spendthrift trust); *In re* Volpe, 100 Bankr. 840 (Bankr. W.D. Tex. 1989) (state exemption not preempted by ERISA, ERISA plan and IRA exempt).

Sixth Circuit: *In re* Messing, 114 Bankr. 541 (Bankr. E.D. Tenn. 1990) (ERISA-qualified plan exempt under 11 U.S.C. § 522(b)(2)(A)); *In re* Elmore, 108 Bankr. 612 (Bankr. N.D. Ohio 1989) (ERISA-qualified plan excluded as valid spendthrift trust under Ohio law); *In re* Stansberry, 101 Bankr. 508 (Bankr. E.D. Tenn. 1989) (ERISA-qualified plan excluded where all requirements for spendthrift trust under Tennessee law were met except technical filing requirements); Chrysler-UAW Pension Plan v. Watkins (*In re* Watkins), 95 Bankr. 483 (W.D. Mich. 1988) (debtor's interest in ERISA-qualified plan excluded as spendthrift trust under Michigan law).

Seventh Circuit: *In re* LeFeber, 906 F.2d 330 (7th Cir. 1990) (ERISA-qualified plan excluded as spendthrift trust under Indiana law).

Eighth Circuit: Jacobs v. Shields, 116 Bankr. 134 (D. Minn. 1990) (ERISA-qualified plan excluded as spendthrift trust under Michigan law); *In re* Vickers, 116 Bankr. 149 (Bankr. W.D. Mo. 1990) (ERISA-qualified plan not excluded because not spendthrift trust, but ERISA did not preempt state ERISA exemption); *In re* Bartlett, 116 Bankr. 1015 (Bankr. S.D. Iowa 1990) (ERISA-qualified plan excluded as spendthrift trust; ERISA did not preempt generic Iowa pension exemption); Boon v. Miner (*In re* Boon), 108 Bankr. 697 (W.D. Mo. 1989) (ERISA-qualified plan excluded as spendthrift trust under Missouri law); Baron v. Moorman Mfg. Co. (*In re* Colsden), 105 Bankr. 500 (N.D. Iowa 1988) (ERISA-qualified plan excluded as spendthrift trust under state law); *In re* Montgomery, 104 Bankr. 112 (Bankr. N.D. Iowa 1989) (ERISA-qualified plan annuity excluded as spendthrift trust under New York law); *In re* Loe, 83 Bankr. 641 (Bankr. D. Minn. 1988) (ERISA-qualified plan not excluded because not spendthrift trust, but trustee had no immediate right of turnover).

Ninth Circuit: *In re* Kincaid, 917 F.2d 1162 (9th Cir. 1990) (ERISA-qualified plan excluded as spendthrift trust).

Tenth Circuit: *In re* Starkey, 116 Bankr. 259 (Bankr. D. Colo. 1990) (ERISA-qualified plan not excluded because not spendthrift trust, state exemption preempted by ERISA, but ERISA benefits exempt under § 522(b)(2)(A)); *In re* Dickson, 114 Bankr. 740 (Bankr. N.D. Okla. 1990) (state retirement plan exempt even though not spendthrift trust because state plan exemption not preempted by ERISA); *In re* Burns, 108 Bankr. 308 (Bankr. W.D. Okl. 1989) (ERISA-qualified plan not excluded because not spendthrift trust, state exemption preempted by ERISA, but ERISA exemption allowed under § 522(b)(2)(A)).

Eleventh Circuit: *In re* Spears, 121 Bankr. 896 (Bankr. M.D. Fla. 1990) (plans which qualified as spendthrift trusts excluded from estate); *In re* Williams, 118 Bankr. 812 (Bankr. N.D. Fla. 1990) (ERISA-qualified plan not excluded because not spendthrift trust, state exemption statute not preempted); *In re* Ewell, 104 Bankr. 458 (Bankr. M.D. Fla. 1989) (state IRA exemption not preempted by ERISA); *In re* Griggs, 101 Bankr. 393 (Bankr. M.D. Ga. 1989) (anti-alienation provision of ERISA-qualified plans enforceable, therefore, funds in plan are excluded).

court affirmed the bankruptcy court decision that a Chapter 7 debtor's IRA and Keogh funds are available for distribution to his creditors.[6]

Despite apparently clear statutory language providing that retirement funds are beyond the reach of creditors, the courts have been reluctant to protect retirement funds from creditors in cases in which the beneficiaries exercised some degree of control over the funds. Although most of the cases holding that retirement funds are not excluded or exempt have involved self-directed plans, the same reasoning could be applied to group plans that do not qualify as spendthrift trusts under state law,[7] with far reaching effects. The IRS contends that a bankruptcy filing by an individual member of a group pension plan whose interest in the plan is neither excluded nor exempt may create a transfer that disqualifies the entire plan from favorable tax treatment.[8] As a result, each plan participant may owe tax on the income which had previously been deferred in the plan. This position has been rejected by the Second Circuit Court of Appeals and several bankruptcy courts.[9]

The problem could conceivably affect great numbers of people and large sums of money. Department of Labor statistics show that in the United States in 1987 there were 733,000 private retirement plans (with two or more participants) with a total of seventy-seven million participants.[10] These plans controlled an estimated $1,539,700,000,000 in assets.[11] The end-of-1989 estimates show an increase in participants to seventy-nine million and an increase in assets to two trillion dollars.[12]

The 1987 figures for Mississippi show a total of 3,436 private retirement plans.[13] The majority (2,031) were plans with between one and nine participants;

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6. *See* discussion of Deposit Guaranty Nat'l Bank v. McLeod, (unreported) (S.D. Miss. Feb. 27, 1990) (Civil Action No. H89-0183(W)), Order dated February 27, 1990, at note 46 and following. This was not a final judgment from which an appeal could be taken, and the case is now back in bankruptcy court on cross motions for summary judgment.

7. A spendthrift trust is "[a] trust created to provide a fund for the maintenance of a beneficiary and at the same time to secure it against his improvidence or incapacity . . . . " BLACK'S LAW DICTIONARY 1400 (6th ed. 1990). In Mississippi, as in most other states, spendthrift provisions are void in trusts in which the settlor is the beneficiary. Johnson v. First Nat'l Bank of Jackson, 386 So. 2d 1112, 1115 (Miss. 1980) and Deposit Guaranty Nat'l Bank v. Walter E. Heller & Co., 204 So. 2d 856, 860 (Miss. 1967).

8. Priv. Ltr. Rul. 89-51-067 (Sept. 26, 1989); Priv. Ltr. Rul. 89-10-035 (Mar. 10, 1989); Priv. Ltr. Rul. 81-31-020 (May 5, 1981).

9. *See* Regan v. Ross, 691 F.2d 81 (2d Cir. 1982) (dealing with state retirement funds); Williams v. Threet (*In re* Threet), 118 Bankr. 805 (Bankr. N.D. Okla. 1990); Federman v. Gallagher (*In re* Gallagher), 101 Bankr. 594 (Bankr. W.D. Mo. 1989); White v. Babo (*In re* Babo), 97 Bankr. 827 (Bankr. W.D. Pa. 1989); *In re* Gribben, 84 Bankr. 494 (S.D. Ohio 1988); Firestone v. Metropolitan Life Ins. Co. (*In re* Di Piazza), 29 Bankr. 916 (Bankr. N.D. Ill. 1983); and *see also infra* note 92.

10. United States Department of Labor statistics, from a telephone interview with analyst Dan Beller, October 29, 1990. Participant figures include active and retired participants, along with those who have separated from a company but still have vested pension rights. There is some double-counting of participants since some participate in more than one plan.

11. 1990 Statistical Abstract of the United States, *citing* the Board of Governors of the Federal Reserve System, *Flow of Funds Accounts, Assets and Liabilities Outstanding*, 1957-83; Annual Statistical Digest; and unpublished data.

12. Department of Labor, Beller *supra* note 10.

13. The *ERISA Red Book of Pension Funds 1988/1989* Market Analysis Report Section. Dun's Marketing Services, Dun & Bradstreet, 49 Old Bloomfield Ave., Mt. Lakes, NJ 07046. Information in this volume is compiled from filings with the Department of Labor of Form 5500, a plan's annual report to the government.

thirty-nine had 500 or more participants.[14] There were 715 plans with assets of between $100,000 and $249,999. Five hundred and forty-three plans had assets of between $1,000 and $24,999, and six plans had assets totaling $25 million or more.[15]

This article analyzes the *Deposit Guaranty* case, the statutory tension between ERISA, the Bankruptcy Code and the Mississippi exemption laws[16] as they relate to ERISA-qualified plans and attempts made by other states to resolve the problems. Finally, the article discusses legislative options which may clarify the law in Mississippi.[17]

II. Did Congress and the Mississippi Legislature Exempt ERISA-qualified Retirement Funds from the Reach of Creditors?

A. Favorable Tax Treatment of Erisa-qualified Plans Is Conditioned on Plan Language Restricting Alienation of Benefits

Congress illustrates its intent that retirement funds should be protected from creditors in several anti-alienation provisions in laws regarding both public and private pension plans and in the Bankruptcy Code. Also, thirty-one states purport to exempt private retirement funds.[18] As part of ERISA, Congress established a set of criteria for retirement or pension benefit plans, which if satisfied, confer on those plans tax benefits to the employer and employee.[19] When a plan satisfies the criteria, the plan is referred to as a "tax qualified plan," an "ERISA-qualified

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14. *Id.* The number of participants and corresponding number of plans in 1987 were: 1-9, 2,031 plans; 10-24, 510; 25-49, 291; 50-99, 143; 100-499, 183; 500 and up, 39. The total number of plans does not equal 3,436 (the number filing Form 5500) because some sponsors failed to indicate the number of participants.

15. *Id.* The number of Mississippi plans and range of assets they controlled in 1987, were: 543 plans with assets of $1,000-$24,900; 384 at $25,000-$49,999; 542 at $50,000-$99,999; 715 at $100,000-$249,999; 367 at $250,000-$499,999; 216 at $500,000-$999,999; 152 at $1 million-$4.9 million; 22 at $5 million-$9.9 million; 6 at $10 million-$24.9 million; 6 at $25 million plus. The number of plans does not equal 3,436 (the number filing Form 5500) because not all sponsors listed assets.

16. Miss. Code Ann. § 85-3-1(1)(b)(iii) (Supp. 1989).

17. *See infra* note 93.

18. Sterbach, Weiss & Salerno, *Pre-Bankruptcy Planning for Professionals and ERISA Qualified Pension Plans: Are State Created Statutory Exemptions D.O.A. in Bankruptcy Proceedings?*, 94 Com. L.J. 229, 251 n.93 (1989) [hereinafter Sterbach, Weiss & Salerno, *Pre-Bankruptcy Planning*]. *See also* appendix to the excellent article by Sterbach, Weiss & Salerno, which provides a snapshot of the retirement fund exemption, whether there has been a ruling on the ERISA preemption issue, and if not, whether a ruling is likely or possible. *Id.* at 257-67.

19. *See generally* 26 U.S.C. § 401(a) (1988).

plan," or simply a "qualified plan." One of the requirements of a qualified plan is that the plan provides that the benefits be beyond the reach of creditors.[20]

B. The Bankruptcy Code Excludes from Property of the Estate Property in a Trust with Transfer Restrictions Enforceable Under "Applicable Nonbankruptcy Law"

Two bankruptcy code sections dealing with *exclusions* and *exemptions,* 11 U.S.C. §§ 541(c)(2) and 522, illustrate congressional intent to protect retirement funds. 11 U.S.C. § 541 defines the property interests of the debtor which become property of the bankruptcy estate. 11 U.S.C. § 541(a) provides:

> The commencement of a case 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.[21]

Excluded from the broad definition of estate property is property in a trust with transfer restrictions enforceable under a nonbankruptcy law. 11 U.S.C. § 541(c)(2) provides:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under . . . [the Bankruptcy Code].[22]

Most courts have limited the applicability of § 541(c)(2) to trusts which qualify as spendthrift trusts under state law.[23] According to the vast majority of courts, if a

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20. 26 U.S.C. § 401(a)(13), which requires compliance in return for tax qualification, provides the following anti-alienation/anti-assignment rule: "A trust shall not constitute a qualified trust under this section unless the plan . . . may not be assigned or alienated." The Treasury Regulation issued relative to § 401(a)(13) (1988) 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 provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

Treas. Reg. 1.40(a)-13(b)(1) (1979).

> Title 1, section 206(d)(1) of ERISA applies to all pension benefit plans and provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1988).

See, e.g., Sterbach, Weiss & Salerno, *Pre-Bankruptcy Planning* at 235 n.24.

A sample anti-alienation provision in an ERISA-qualified plan is as follows:

> Subject to the exceptions provided below, no benefit which shall be payable out of the Trust Fund to any person (including a participant or his beneficiary) shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void; and no such benefit shall in any manner be liable for, or subject to, the debts, contracts, liabilities, engagements, or torts of any such person, nor shall it be subject to attachment or legal process for or against such person, and the same shall not be recognized by the Trustee, except to such extent as may be required by law.
>
> This provision shall not apply to the extent a participant or benefieicary is indebted to the Plan, for any reason, under any provision of this Agreement. This provision shall not apply to a "qualified domestic relations order" defined in Code Section 414(p) and those other domestic relations orders permitted to be so treated by the Administrator under the provisions of the Retirement Equity Act of 1984.

In re Leimbach, 99 Bankr. 796, 798 (Bankr. S.D. Ohio 1989).

21. 11 U.S.C. § 541(a).

22. 11 U.S.C. § 541(c)(2).

23. Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983); *see also supra* note 5.

debtor's retirement funds are held in a plan or trust that qualifies as a spendthrift trust under state law, then those funds are not property of the bankruptcy estate.[24] The Fourth Circuit has recently interpreted § 541(c)(2) more broadly to exclude ERISA-qualified plan benefits from property of the estate under § 541(c)(2) without considering whether the plan also qualified as a spendthrift trust.[25]

C. The Federal "Generic Exemption Scheme" Excludes Retirement Funds to the Extent Reasonably Necessary for Support of the Debtor

11 U.S.C. § 522 itemizes a debtor's available exemptions. The exemption framework provides for two different exemption systems allowing exemptions from up to three sources. 11 U.S.C. § 522(d) contains a list of exemptions known as the generic exemptions. The generic bankruptcy exemption relating to retirement funds provides evidence of congressional intent to protect retirement funds from creditors, with limits:

> (d) The following property may be exempted under subsection (b)(1) of this section;
> (10) The debtor's right to receive–
> (E) a payment under stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or the length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless–
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
> (ii) such payment is on account of age or length of service; and
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. §§ 401(a), 403(a), 403(b), 408, or 409).[26]

This exemption is available only to debtors in states whose legislatures have not voted to limit the exemptions available to their debtors to the exemptions provided by state law and by their debtors to the exemptions provided by state law and by federal nonbankruptcy law. The Bankruptcy Code provides that states can "opt out" of the generic exemptions. 11 U.S.C. § 522(b) provides:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate . . .
> (1) 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,
> (2)(A) *any property that is exempt under Federal law, other than subsection (d) of this*

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24. *Id.*

25. Anderson v. Raine (*In re* Moore), 907 F.2d 1476 (4th Cir. 1990).

26. 11 U.S.C. § 522(d)(10)(E).

section, or state or local law that is applicable on the date of the filing of the petition . . . .[27]

Mississippi, along with most other states, has "opted out" of the federal exemptions and thereby has eliminated the availability of the § 522(d)(10)(E) exemptions for Mississippi debtors.[28]

D. Mississippi Law Exempts All ERISA-qualified Property and Pension Trusts

The Mississippi legislature has attempted to exempt ERISA benefits. The Mississippi legislature echoed Congress in exempting ERISA benefits but expanded the exemption by eliminating the requirement that the funds be reasonably necessary for the support of the debtor. The Mississippi exemption available to debtors pursuant to 11 U.S.C. § 522(b)(2)(A) for retirement funds provides:

> (1) There shall be execution or attachment:
> (b)(iii) All property and pension trusts which are qualified under the Employee Retirement Income Security Act of 1974 (ERISA) (P.L. No. 93-406), including, but not limited to, self-employment retirement (Keogh) plans and individual retirement accounts (IRA). However, no contribution made to any such plan, account or trust shall be exempt if made less than one (1) calendar year from the date of filing for bankruptcy, whether voluntary or involuntary, or less than one (1) calendar year from the date of service of any writ of execution, attachment or garnishment on the person having such plan, account or trust in his possession or under his control.[29]

In light of the ERISA anti-alienation provisions, the bankruptcy exclusions and exemptions for retirement trusts, why have so many bankruptcy and appellate courts refused to allow debtors to keep their retirement plans? Remember the ERISA quicksand? We have only just begun to sink. Consider the following hypothetical.

III. *In re Spentitall*

Attorney Mel Practice represents Trustburst Guaranty Bank of Mississippi. The President of the Bank, I. M. Gullible, tells Practice the Bank just received a Chapter 7 bankruptcy notice from Dr. I. Spentitall, a Jackson plastic surgeon. Dr. Spentitall owes the Bank $1 million and change. The Bank has as collateral a five-story office building, whose only tenant, Dr. Spentitall, just moved out. The Bank also has a second lien on Dr. Spentitall's ten percent interest in a perpetual energy machine. Dr. Spentitall makes $350,000 a year lifting faces and other body parts.

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27. 11 U.S.C. § 522(b)(1), (2)(A) (emphasis added).

28. MISS. CODE ANN. § 85-3-1(2) (Supp. 1989) provides:

> (2) In accordance with the provisions of Section 522(b) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.A. § 522(b) [11 USCS § 522(b)]), residents of the State of Mississippi shall not be entitled to the federal exemptions provided in Section 522(d) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.A. § 522(d) [11 USCS § 522(d)]). Nothing in this subsection shall affect the exemptions given to individuals of Mississippi by the Constitution and statutes of the State of Mississippi.

See *infra* note 32 for a list of other states that have opted out of the generic exemptions.

29. MISS. CODE ANN. § 85-3-1(1)(b)(iii) (Supp. 1989).

Dr. Spentitall has $1.2 million in a retirement plan established by a professional corporation of which he is the only employee. He also has $65,000 in an IRA.

Dr. Spentitall is claiming his retirement funds and IRA as exempt property. Mr. Gullible wants to know if the doctor can do that. Gullible has talked to I. M. Crafty, Dr. Spentitall's attorney, who assured Gullible that retirement funds are exempt. Crafty even gave Gullible the Mississippi Code section that says retirement funds are exempt.[30] Gullible tells Practice all this and wants to know what can be done to stop this injustice. Surely the good doctor cannot walk out on his creditors and keep over a million dollars in his retirement fund.

Mel Practice reviews the Code section and realizes things look bad for good ol' Trustburst Guaranty Bank of Mississippi. Mississippi Code Section 85-3-1(1) says that all property and pension trusts qualified under the Employee Retirement Income Security Act of 1974 (ERISA) are exempt, except for contributions made a year prior to filing.[31]

Mel Practice reads on to section 85-3-1(2) which states that "residents of the State of Mississippi [will] not be entitled to the federal exemptions provided in section 522(d) of the Bankruptcy [Code] . . . " in accordance with section 522(b)(1).[32] That is no help. Why on earth would the good doctor want to use the federal exemption if he can keep all that retirement money? Mel Practice calls his old buddy and client, Gullible, and reminds him that they both should have taken chemistry in college, because if they had, they would both be doctors and could have all that money in their retirement accounts just like that fat sucker, Dr. Spentitall. "Let's go get a drink," says Practice.

However, all is not lost. Del I. Gent, Mel Practice's new associate, did not stop his research with the Mississippi exemption statute and the Bankruptcy exemption statute. He figured that a $1.2 million plum is worth a little more research, so while Practice and Gullible were having a few cold sodas, he read with interest the ERISA statute and discovered 29 U.S.C. § 1144(a), which says:

> (a) Supersedure; effective date
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter *shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.[33]

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30. *Id.*

31. *Id.*

32. 11 U.S.C. § 522(b)(1). This is the "opt-out" provision referred to in the text at note 28. Mississippi has joined 34 other states by opting out or limiting the exemptions to debtors to those available under state law. Other states that have opted out include: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. It is unclear whether Alaska has opted out. *See* 7 COLLIER ON BANKRUPTCY 19 (15th ed. 1990).

33. 29 U.S.C. § 1144(a) (1988); ERISA, Pub. L. No. 93-406, § 514(a), 88 Stat. 829, 897 (1974) (codified as amended at 29 U.S.C. § 1144 (1988)) (emphasis added).

Del I. Gent checked his calendar and discovered that it was 1991. Hmmm. What does "relate to" mean? Gent ran this section through WESTLAW and out popped *Mackey v. Lanier Collection Agency & Service*.[34] "Relate to" is broadly interpreted in *Mackey*. According to *Mackey*, "[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."[35]

The Mississippi exemption statute refers specifically to ERISA.[36] Therefore, it is preempted.[37] The bank gets its money, and Del I. Gent makes partner.

"Ah, but there is more," says Crafty. "What about 29 U.S.C. § 1056(d)(1), Mr. Gent? What about that? Did you skip over that section while you were reading ERISA? Surely you passed section 1056 on your way to section 1144. Or, were you reading the statute backwards? You must have gone to school in another state." Section 1056(d)(1) states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[38]

"So what?" asks Gent.

"Here's what," says Crafty. "Take another look at section 522 of the Bankruptcy Code." Section 522(b) states that "[n]otwithstanding section 541 of this title, an individual debtor may exempt from property of the estate . . . (2)(A) [a]ny property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable . . . ."[39]

Section 206(d)(1) of ERISA is federal law, it is not subsection (d) of 11 U.S.C. § 522, and it prohibits alienation of funds in qualified pension plans.[40] "Slam dunk, Mr. Gent," says Crafty. "The retirement fund is an ERISA-qualified pension plan, so the doctor keeps his retirement money."

"Oh, but no," says Gent, who has just run ERISA section 206(d)(1) through WESTLAW. Out popped *In re Goff*.[41] "Read *Goff* and weep," says Gent as he thumbs through his Hawaiian travel brochures and ponders how he will spend all his bonus money.

Crafty read *Goff* and he wept.

"Why did the Fifth Circuit say all that stuff about 'other federal law,' when the Goffs were claiming that their ERISA-qualified plan should not be property of the estate under Bankruptcy Code section 541(c)(2)?" moaned Crafty. Why, indeed?

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34. 486 U.S. 825 (1988).

35. *Id.* at 829 (citations omitted).

36. *See* MISS. CODE ANN. § 85-3-1(1)(b)(iii) (Supp. 1984).

37. Most cases recently considering the issue have held that state exemption statutes were preempted by ERISA. The only case to date narrowly construing *Mackey* and holding that a state exemption statute that mentioned ERISA, but did not conflict with ERISA, is *In re* Volpe.

38. 29 U.S.C. § 1056(d)(1) (1988); ERISA, Pub. L. No. 93-406, § 206 (d)(1), 88 Stat. 829, 864 (1974) (codified as amended at 29 U.S.C. § 1056 (1988)).

39. 11 U.S.C. § 522(b)-(b)(2)(A) (1988).

40. At least five bankruptcy courts have held that ERISA-qualified funds are exempt as property that is exempt under "other federal law": *In re* Komet, 104 Bankr. 799 (Bankr. W.D. Tex. 1989); *In re* Burns, 108 Bankr. 308 (Bankr. W.D. Okla. 1989); *In re* Messing, 114 Bankr. 541 (Bankr. E.D. Tenn. 1990); *In re* Felts, 114 Bankr. 131 (Bankr. W.D. Tex. 1990); *In re* Starkey, 116 Bankr. 259 (Bankr. D. Colo. 1990).

41. 706 F.2d 574 (5th Cir. 1983).

Gent pondered that question as the waves lapped over his toes. "Lawyers and judges don't want doctors to keep large sums of money in their self-directed retirement plans when they go belly up, regardless of what their lobbyists might sneak by Congress or the Legislature," thought Gent. "Get me another pina colada," said Mr. Del I. Gent.

IV. WHAT HATH *Goff* WROUGHT?

Just what exactly in *Goff* made Crafty (and Spentitall) cry? "The damn list didn't have ERISA in it. That list is not part of the statute," ranted Practice. "It's not even an exclusive list. *Goff* is about spendthrift trusts, not about 'other federal law.' The Fifth Circuit spent five (5) pages extolling the virtue of an Iowa Bankruptcy judge's opinion[42] that ignores the plain language of section 522(b)(2)(A) in favor of an illustrative list in the legislative history that doesn't include ERISA."[43]

The Fifth Circuit discussed this legislative history in dicta in *Goff:*

> The failure of Congress to include ERISA in its listing of illustrative federal statutes is highly probative of congressional intent that ERISA was not within the group of "federal law" based exemptions . . . .
>
> Given the extensive and general reach of ERISA-qualified plans, it is highly improbable that Congress intended their inclusion without mention in the section 522(b)(2)(A) exemption in the midst of a listing of significantly less comprehensive and less well known statutes. The often-stated admonition that it may be treacherous to attach great weight to congressional silence in interpreting its laws does not apply in this case in light of the comprehensive consideration of this issue which is revealed by this history.[44]

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42. *See In re* Graham, 24 Bankr. 305 (N.D. Iowa 1982), *aff'd*, 726 F.2d 1268 (8th Cir. 1984).

43. In the House and Senate reports explaining the "other federal law" provision of 11 U.S.C. § 522(b)(2)(A), Congress provided a list of illustrative property which might be exempted under the Bankruptcy Code. Funds in ERISA-qualified plans are not in the list, even though several types of public retirement funds are listed. The list is quoted in Goff v. Taylor (*In re* Goff), 706 F.2d 574, 583 (5th Cir. 1983), and is reprinted in COLLIERS 1990 pamphlet edition of the Code:

> Subsection (b), the operative subsection of this section, is a significant departure from present law. It permits an individual debtor in a bankruptcy case a choice between exemption systems. The debtor may choose the federal exemptions prescribed in subsection (d), or he may choose the exemptions to which he is entitled under other federal law and the law of the State of his domicile. If the debtor chooses the latter, some of the items that may be exempted under other Federal laws include:
>
> - Foreign Service Retirement and Disability payments, 22 U.S.C. § 1104; [Ed. Note: 22 U.S.C. § 4060 replaced repealed 22 U.S.C. § 1104, which was the applicable statutory provision at the time of the enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.]
> - 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); [Ed. Note: Correct citation is 38 U.S.C. §§ 770(g), and 3101.]
> - 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.

H. R. REP. No. 595, 95th Cong., 2d Sess. (1977).

44. Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1988). This is the majority view as shown in note 5.

"Congressional silence!" screamed Crafty. "I lose because Congress left ERISA off of a list that wasn't even part of the statute. Who was on that panel, anyway?"[45]

V. THE MISSISSIPPI DECISION: *Deposit Guaranty National Bank v. McLeod*

All of this brings us back to our original question: Are retirement funds exempt in Mississippi? The answer is, it depends. For a debtor who files bankruptcy, ERISA-qualified retirement funds are not exempt according to *Deposit Guaranty National Bank v. McLeod.*[46] For a debtor who does not file bankruptcy, the anti-alienation provision of ERISA, section 206(d)(1), would apparently keep ERISA-qualified funds beyond the reach of creditors.[47] *Goff's* analysis that bankruptcy law supersedes ERISA[48] obviously does not apply if the debtor is not in bankruptcy.

Deposit Guaranty affirmed the bankruptcy court decision of Judge Gaines in *In re McLeod.*[49] *Deposit Guaranty* and *McLeod* each hold that ERISA preempts the Mississippi exemption statute.[50] *McLeod* also held that ERISA-qualified plans are not exempt under "other federal law," pursuant to section 522(b)(2)(A), following the dicta of *Goff.*[51] Although *Deposit Guaranty* affirmed *McLeod,*[52] *Deposit Guaranty* did not discuss the issue of "other federal law" exemptions available under section 522(b)(2)(A).

Curiously, *Deposit Guaranty* cites with approval *In re Komet*[53] on the preemption issue. *Komet* follows the preemption rationale of *Mackey,* but vigorously attacks the dicta in *Goff* regarding the "other federal law" exemption[54] and holds that the debtor's ERISA-qualified plan is exempt under section 522(b)(2)(A).[55] Although Texas is not an opt-out state as Mississippi is, the debtor in *Goff* had chosen the state and other federal law exemptions under section 522(b)(2)(A).

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45. (Johnson, Williams, and Jolly). *Id.* at 576.

46. No. H89-0183 (S.D. Miss. Feb. 27, 1990).

47. *In re* Volpe, 100 Bankr. 840, 845 (Bankr. W.D. Tex. 1989) (citing Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510 (N.D. Tex. 1981)). *In Mackey,* the U.S. Supreme Court noted that ERISA § 206(d)(1) "bars (with certain numerated exceptions) the alienation or assignment of benefits provided for by ERISA pension benefit plans." 29 U.S.C. § 1056(d)(1). *Mackey,* 486 U.S. 825, 836 (1988).

48. *Goff,* 706 F.2d at 587. The Court stated:

> [T]he Bankruptcy Code was, generally, intended to broaden the "property of the estate" available to creditors in bankruptcy and, specifically, intended to limit any exemption of pension funds. These policy-based provisions of the Code would be frustrated were ERISA's anti-alienation and assignment provisions applied with a sweeping brush. Thus, ERISA's specific provision precluding interference with the operation of federal law renders the Bankruptcy Code effective over any ERISA provisions to the contrary.

Id.

49. 102 Bankr. 60 (Bankr. S.D. Miss. 1989).

50. *Deposit Guaranty,* No. H89-0183, slip op. at 3; *In re* McLeod, 102 Bankr. 60, 63 (Bankr. S.D. Miss. 1989).

51. *McLeod,* 102 Bankr. at 63.

52. *Deposit Guaranty,* No. H89-0183, slip op.

53. *In re* Komet, 104 Bankr. 799 (Bankr. W.D. Tex. 1989) (original opinion, 93 Bankr. 840 (Bankr. W.D. Tex. 1988) withdrawn).

54. *Komet,* 104 Bankr. at 813-16.

55. *Id.* at 816-17.

VI. *In re Komet:* MUST WE WAIT ANOTHER SEVENTY-SIX YEARS TO SEE THE LIGHT?

Wake up, Crafty, and file an appeal. Will somebody get Gent off of the beach and tell him to read *Komet* and let us know what he thinks. Crafty and Gent should also read several recent articles reviewing cases on the exemption of ERISA-qualified pension plans.[56] While the reasoning of *Komet* is persuasive, *Komet* faces an uphill battle because "nearly every court that has considered the issue has held that Congress did not intend to allow a non-bankruptcy federal exemption for ERISA plans."[57] Three other circuits have followed *Goff,* without expanding its reasoning, while no circuit has adopted *Komet's* reasoning or holding.[58]

No circuit has ruled on this issue since *Mackey*. However, the Fourth Circuit has parted company with the Fifth, Eighth, Ninth, and Eleventh Circuits by holding that ERISA-qualfied plan funds are excluded from the estate under 11 U.S.C. § 541(c)(2).[59] *Mackey* strongly suggests that ERISA § 206(d)(1) is a "federal law" exemption[60] notwithstanding its exclusion from the "non-exclusive" list relied upon by *Goff.*[61] This point is not lost in *Komet:* "The *Mackey* Court does not shrink from characterizing ERISA § 206(d) as, functionally, a federal exemption."[62]

The Bankruptcy Court for the Western District of Oklahoma, sitting en banc, has followed *Komet* in *In re Burns.*[63] *Burns,* adopting a broad reading of *Mackey,* concluded that the state exemption statute was preempted.[64] *Burns* also concluded that the ERISA plans in question did not qualify as spendthrift trusts under Oklahoma law and were therefore not excluded from the estate under § 541(c)(2).[65] The *Burns* court held: "ERISA plans may be exempted from the bankruptcy estate under § 522(b)(2)(A), as 'property that is exempt under Federal law, other than [§ 522(d)] . . . .' "[66] *Burns* implies that the *Goff* analysis "[flies] in the face of ERI-

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56. *See, e.g.,* Sterbach, Weiss & Salerno, *Pre-Bankruptcy Planning for Professionals and ERISA-Qualified Pension Plans: Are State Created Statutory Exemptions D.O.A. in Bankruptcy Proceedings,* 94 COMM. L.J. 229 (1989).

57. *Id.* at 243-48. The authors analyze in detail the *Komet* opinion by Judge Clark, which they praise as "scholarly and well articulated," and "provid[ing] an interesting (although not surefire) alternative argument for debtors faced with preemption of a state ERISA pension plan statute." *Id.* at 243.

58. *Komet,* 104 Bankr. at 808 n.21. *See In re* Daniel, 771 F.2d 1352, 1359-61 (9th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); *In re* Lichstrahl, 750 F.2d 1488, 1491 (11th Cir. 1985); *In re* Graham, 726 F.2d 1268, 1274 (8th Cir. 1984). The Bankruptcy Court opinion in *In re* Graham, 24 Bankr. 305 (Bankr. N.D. Iowa 1982), provided the reasoning for the dicta in *Goff,* which has been followed by the Eighth, Ninth, and Eleventh Circuits.

59. Anderson v. Raine (*In re* Moore), 907 F.2d 1476, 1478-89 (4th Cir. 1990).

60. *Mackey,* 486 U.S. at 836.

61. *Goff,* 706 F.2d at 583.

62. *In re* Komet, 104 Bankr. 799, 807 (Bankr. W.D. Tex. 1989).

63. 108 Bankr. 308 (Bankr. W.D. Okla. 1989).

64. *Id.* at 311.

65. *Id.* at 313.

66. *Id.* at 315.

SA's principle purpose."[67] In its conclusion, the *Burns* court addressed one reason why the bankruptcy courts are having so much difficulty with the exemption of ERISA funds by stating: "This court fully recognizes that as a result of [the] decision in this case, a substantial sum will be withheld from creditors and preserved for the benefit of debtors."[68]

VII. *In re Volpe:* LIMITING *Mackey*

Another bankruptcy judge in the Western District of Texas allowed debtors to keep their retirement plans in *In re Volpe*.[69] The court in *Volpe* distinguished *Mackey* and held that the Texas statute creating an exemption for private retirement funds was not preempted by ERISA because it did not purport to regulate the terms and conditions of employee plans. The court held that any relationship between the Texas exemption statute and ERISA was simply "too tenuous, remote and peripheral . . . to 'relate to' employee benefit plans within the meaning of 29 U.S.C. § 1144(a)."[70]

The Bankruptcy Court for the Southern District of Florida, in *In re Martinez*,[71] has been the only court to follow *Volpe*. Sterbach, Weiss, and Salerno argue that *Volpe's* reliance on language in *Shaw v. Delta Air Lines, Inc.*[72] to limit the "relate to" language of *Mackey* is misplaced:

> On close inspection, it seems that the *Volpe* Court failed to note that *Shaw* rejected the view that preemption applies only when state laws attempt to affect or regulate an area expressly covered by ERISA. In sum, the *Volpe* Court ignored or overlooked

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67. *Id.* The court stated as follows:

> In this court's opinion, the analysis of the *Komet* court is correct, represents the proper interpretation of the statute in question, and should be followed. The stated policy of ERISA is, *inter alia*, "to protect . . . the interests of participants in private pension plans and their beneficiaries . . . . " 29 U.S.C. § 1001. In order to provide a degree of uniformity, ERISA preempts State law relating to such plans. By such preemption, ERISA effectively thwarts the clear State policy which would afford its citizens exemptions from the claims of their creditors for such plans. However, ERISA itself provides protections from claims of creditors for qualifying plans. To hold that these protections are similarly ineffectual, simply because the Congress failed to specify ERISA in a nonexclusive list of legislative examples in the legislative history, would fly in the face of ERISA's principle [sic] purpose. *Id.*

68. *Burns*, 108 Bankr. at 315. Very few bankruptcy courts would allow debtors to keep $700,000 in a retirement fund, as this court did. However, the court also recognized that allowing creditors to reach retirement funds may not be a "good" result in other cases.

> [The court] also recognizes that this decision will constitute precedent within this district, and that it will have the same effect upon other debtors, and their creditors, who are similarly situated. It is noted, however, that the decision may also have the effect of protecting from creditors far more modest accumulations of capital for the benefit of debtors who have no other source or prospect of funding for their welfare or retirement.
>
> Section § [sic] 522(b)(2)(A) contains no monetary or other limitations. It is not for this court, by judicial fiat, to establish any such limitations, whether based upon this court's personal perception of fairness and equity or otherwise. Should the Congress determine that some limitation upon the available exemption is appropriate, or that ERISA plans should not be includable under § 522(b)(2)(A), it is within its province, not that of this or any other court, to enact appropriate legislation in furtherance of such determination.

Id. at 315-16.

69. 100 Bankr. 840 (Bankr. W.D. Tex. 1989).

70. *Id.* at 849.

71. 107 Bankr. 378 (Bankr. S.D. Fla. 1989).

72. 463 U.S. 85 (1983).

the broad interpretation and application of the phrase "relate to" espoused by the United States Supreme Court in *Shaw*, and underscored in *Mackey*.[73]

VIII. WHAT ABOUT IRA'S?

Through all of this the second question remains unanswered. Are IRA's exempt in Mississippi? The Mississippi exemption statute says IRA's are exempt.[74] However, the Mississippi exemption statute also implies that IRA's are qualified under ERISA. Both Judge Gaines and Judge Wingate discuss this issue in *McLeod* and *Deposit Guaranty*, implying that IRA's are not exempt.[75]

In re Ewell[76] considered a similar argument based on a Florida statute which exempted IRA's. Unlike the Mississippi statute which classifies IRA's as a subsection of ERISA-qualified plans, Florida's statute deals separately with IRA's: "[A]ny interest in a . . . plan that is qualified under section 401(a), s. 403(a), s. 403(b), s. 408 or s. 409 of the Internal Revenue Code of 1986, as amended, is exempt from all claims of creditors of the beneficiary or participant."[77]

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73. Sterbach, Weiss & Salerno, *Pre-Bankruptcy Planning*, *supra* note 18, at 249 n.82.

74. MISS. CODE ANN. § 85-3-1(1)(b)(iii) (Supp. 1989).

75. Judge Gaines discusses the issue in *In re* McLeod as follows:

> The debtor has also argued that even if the Court determines that the state exemptions are preempted, the debtor may still exempt his interest in certain IRA and Keogh plans upon the premise that they are not covered by ERISA, and, therefore, the state exemption statute would not be preempted by ERISA as to those funds. The debtor misreads the Mississippi statute on this point.
>
> Section 85-3-1(1)(b)(iii) of the Mississippi Code provides that there shall be exempt from seizure, "All property and pension trusts *which are qualified under the Employee Retirement Income Security Act of 1974 (ERISA)* (P.L. No. 93-406), including, but not limited to, self-employment retirement (Keogh) plans and individual retirement accounts (IRA)." (emphasis added). Under the language of this statute, there is no exemption provided for any pension fund *unless* it is qualified under ERISA. Therefore, the debtor may not claim exemptions under this section whether the pension plans are qualified under ERISA or not, and the Court need not determine whether each fund is so qualified under ERISA.
>
> It is interesting to note that the debtor's amended schedule B-4 on exemption, filed April 17, 1989, lists $515,511.88 in "vested, unmatured interest in ERISA-qualified retirement funds." The last memorandum filed by the debtor, in which the argument that certain funds are not ERISA funds, was received by the Court on March 23, 1989. By filing the amended schedule B-4 on exemptions, and by the failure to list thereon any non-ERISA funds as exempt, the debtor has effectively abandoned his own argument.

In re McLeod, 102 Bankr. 60, 64-65 (Bankr. S.D. Miss. 1989). Judge Wingate discusses the IRA issue in *Deposit Guaranty* as follows:

> The defendant has also presented the case of *In re* Calvin E. Ewell, 104 B.R. 458 (Bkrtcy. M.D. Fla. 1989), a case which held that Individual Retirement Accounts (IRA's) under certain sections of Title 26 of the Internal Revenue Code could be exempt from the claims of creditors, notwithstanding ERISA preemption. However, this decision made no reference whatsoever to the *Mackey* case, and was subsequently rejected by the same court in the case of *In re* Bryant, 106 B.R. 727 (Bkrtcy. M.D. Fla. 1989). This court has reviewed the authorities on this point, and hereby determines that the bankruptcy court's decision is correct. *See, In re* Dyke, 99 B.R. 343 (Bkrtcy. S.D. Tex. 1989); *In re* Hirsch, 98 B.R. 1 (Bkrtcy. D. Ariz. 1988). Additionally, this court finds that the defendant clearly and unequivocally designated the assets in question as ERISA qualified on schedule B-4 in the bankruptcy court and finds no error in the bankruptcy court's conclusion that the assets in question were thereby subjected to ERISA preemption of state law exemptions. The court also agrees that there would be no exemption at all if the assets in question were not covered by ERISA.

Deposit Guaranty Nat'l Bank v. McLeod, No. H89-0183 (S.D. Miss. Feb. 27, 1990).

76. 104 Bankr. 458 (Bankr. M.D. Fla. 1989).

77. FLA. STAT. § 222.21(2)(a) (1987).

Notwithstanding Judge Wingate's statement to the contrary,[78] *Ewell* does discuss *Mackey,* but holds that IRA's are not covered by ERISA or its preemption.[79]

IX. SPENDTHRIFT TRUSTS AND 11 U.S.C. § 541(c)(2)

Many of the cases in which debtors have attempted to protect ERISA-qualified funds, and trustees and creditors have attempted to reach the funds for satisfaction of their debtors, have turned on whether the ERISA-qualified funds should be excluded from property of the estate under Title 11 U.S.C. § 541(c)(2).[80] Section 541(c)(2) excludes from the debtor's estate properties which are subject to restrictions on transfer of the beneficial interest of the debtor under trust; such restrictions are enforceable under applicable non-bankruptcy law. Until the Fourth Circuit decided in *In re Moore,*[81] the courts have uniformly held that where an ERISA plan did not also qualify as a spendthrift trust under state law, ERISA plan benefits could not be excluded from the estate under section 541(c)(2).[82] Indeed, the debtor in *McLeod* recognized that his ERISA plan was not a spendthrift trust under Mississippi law and stipulated that the ERISA funds were property of the estate.[83]

The Fourth Circuit in *In re Moore* rejected the notion that the term "applicable nonbankruptcy law" is limited to state spendthrift trust law. According to *Moore:*

> "Applicable nonbankruptcy law" means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "ap-

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78. *Deposit Guaranty,* H89-0183(W) at 2-3.

79. *Ewell,* 104 Bankr. at 460-61. In *Mackey,* the Supreme Court held that a Georgia statute exempting "employee welfare benefit plans" from garnishment was preempted by ERISA, therefore, the exemption created by the Georgia statute could not be enforced. *Mackey,* 486 U.S. at 830. The Court struck down the Georgia statute on the strength of ERISA, § 514(a) which provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter [ERISA Title I] and subchapter III of this chapter [ERISA Title IV] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a).

Section 1002(3) defines "employee benefit plan" as a welfare or pension plan which is established or maintained by an employer or by an employee organization which represents employees. 29 U.S.C. § 1002(3) (1988). Even a cursory examination of § 514(a) leaves no doubt that its preemption provision is not applicable to IRA accounts. For instance, an individual who establishes an IRA for himself is not necessarily an employer or an employee organization. In addition, ERISA expressly excludes IRA's from its coverage. 29 U.S.C. § 1051(6) (1988).

80. *See* Watson v. Kincaid (*In re* Kincaid), 917 F.2d 1162 (9th Cir. 1990).

81. 907 F.2d 1476 (4th Cir. 1990).

82. *See, e.g., Goff,* 706 F.2d at 580; *Ewell,* 104 Bankr. at 459-60.

83. *McLeod,* 102 Bankr. at 62.

> plicable nonbankruptcy law" or in the remainder of § 541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.[84]

Under the *Moore* analysis, any restriction on transfer enforceable under an ERISA plan would be enforceable to exclude the plan from the bankruptcy estate. It is not clear from the *McLeod* decision whether Dr. McLeod's plan would have contained enforceable transfer restrictions, although we can assume that as an ERISA-qualified plan, it contained some if not all of the transfer restrictions required by ERISA.

The Ninth Circuit refused to follow *Moore* in *In re Kincaid.*[85] In that case the court ruled that state spendthrift trust law is not preempted by ERISA, while following *In re Daniel,*[86] in holding that "applicable nonbankruptcy law" under § 541(c)(2) is limited to state spendthrift trust law.[87] In a concurring opinion, Circuit Judge Fletcher would have followed the reasoning of *Moore*, and attacks the reasoning of *Daniel* (and by implication *Goff*):

> As *Daniel* permits no harmonization of federal bankruptcy law and ERISA law, and as it undercuts the purposes of ERISA, no doubt one day our court must face directly the serious problems it presents.[88]

If state spendthrift trust law determines whether a plan is excluded and all plans contain spendthrift provisions in order to qualify for favorable tax treatment, then the issue in Mississippi will be whether equity will deny enforcement of the spendthrift provisions.[89]

Factors which the courts have considered to determine whether to enforce the spendthrift provisions under state law include ownership and control of the plan, employer contributions, termination of employment, loan provisions, and hardship distributions.[90] The court in *Kincaid* considered each of these factors to determine whether the plan qualified as a spendthrift trust.[91]

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84. 907 F.2d 1476 at 1477 (4th Cir. 1990). *Moore* discussed the fact that four other circuits have construed § 541(c)(2) to refer only to state spendthrift trust law as follows:

> We acknowledge that several circuit courts have read the term "applicable nonbankruptcy law" in § 541(c)(2) narrowly to refer only to state spendthrift trust law. *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). These decisions have, in the main, involved self-settled trusts in which the settlor is the beneficiary with the power to amend or to terminate the trust without penalty, whereas, here the beneficiaries do not control the plan, cannot make unrestricted withdrawals from it, cannot borrow against it, and cannot amend it. The decisions have reached the conclusion that "applicable nonbankruptcy law" refers solely to state spendthrift trust law based on the legislative history of § 541(c)(2). Because we believe this legislative history to be irrelevant and in any event inconclusive, we respectfully decline to follow this course.

907 F.2d at 1478.

85. 917 F.2d 1162 (9th Cir. 1990).

86. 771 F.2d 1352 (9th Cir. 1985).

87. 917 F.2d at 1166.

88. *Id.* at 1170.

89. *See* Golden, *What Have We Stepped Into? Qualified Plans in Bankruptcy,* FAULKNER & GRAY'S BANKR. L.R., (1990).

90. *Id.*

91. 917 F.2d at 1166-68.

X. THE ROCK AND THE HARD PLACE

End of story? Not quite. Spentitall does not have possession of his retirement funds. Those assets are held in the plan, and the plan is administered by a trustee. "No problem," says Gent. "Just get the bankruptcy court judge to order the plan trustee to turn over the funds."

What is the plan trustee's reaction to all of this? If he is at all versed in his fiduciary responsibilities as a plan trustee, he will object to any order of the bankruptcy court to turn over plan assets to creditors. The Internal Revenue Service, *Goff* notwithstanding, looks with a jaundiced eye at plan trustees who turn over plan assets in violation of the anti-alienation provision of ERISA and the Internal Revenue Code. As Al Capone could attest, you just do not mess with the IRS.

"What does the IRS have to do with all this?" cries Gent. "The IRS has no authority to countermand a bankruptcy court order."

Gent is right, for what it is worth. The IRS will not tell the plan trustee to disregard the bankruptcy court order. The IRS will simply point out that, if the plan trustee does comply with the order, Spentitall's plan loses its tax-qualified status as of the date of the prohibited assignment of plan assets.[92] Why should that concern the plan trustee? Because under ERISA § 3(21), the trustee is a fiduciary and, under ERISA § 404(a)(1)(D), a fiduciary has a duty to administer the plan in accordance with the documents and instruments governing the plan. If the plan trustee complies with a bankruptcy court order in violation of the plan's anti-alienation provisions, he is subject to civil and criminal penalties under ERISA §§ 501 and 502. In addition, under ERISA § 409, a fiduciary who breaches his obligations with respect to the plan may be personally liable to make good to the plan any losses to the plan resulting from the breach.

These might include taxes due to plan participants as a result of disqualification. Since the bankruptcy filing itself results in a transfer of property of the estate, the filing of bankruptcy by one plan participant may disqualify the entire plan. Once the plan becomes disqualified, the contributions to the plan made by the employer become currently taxable to the employees, even though they will not actually receive the funds until retirement. Needless to say, it does not take too many employees participating in a plan for the tax liability to mount to astronomical sums.

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92. The court dismissed this argument in *In re* Poe, 118 Bankr. 809 (Bankr. N.D. Okla. 1990):

> The Plan Administrator raises a "red herring" in its second argument. The Plan Administrator contends that if this Court enforces the clear provisions of the Bankruptcy Code that this would be an improper distribution of the retirement fund and it would lose its tax exempt status. Apparently the Plan Administrator is arguing that if he has to turn over to the Trustee the Debtor's interest in the fund this would destroy the tax exempt status of the fund for all the other thousands of employees of Atlantic Richfield Company. The Plan Administrator cites no authority for this draconian result other than private letter rulings of the Internal Revenue Service issued some 10 years ago. These letters state that any unauthorized disbursement would disqualify an entire plan from tax exempt status.
>
> This argument has been addressed by other courts and rejected. *See* Regan v. Ross, 691 F.2d 81 (2d Cir. 1982); *In re* DiPiazza, 29 U.S.C. § 1144(d) (1979) provides in substance that nothing in the ERISA statute shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States. Since it is clear that pension funds are part of the Debtor's estate, unless they are part of a spenthrift trust, any provision of ERISA that prevents a distribution to a trustee in bankruptcy would fail.

XI. LEGISLATIVE REFORM: WHAT CAN BE DONE?

Have Congress and the Mississippi legislature clearly articulated their intent regarding whether ERISA-qualified pension benefits should be beyond the reach of creditors? The generic federal exemption regarding retirement benefits, out of which Mississippi opted, provides: "The following property may be exempted under subsection (b)(1) of this section: . . . (10) The debtors right to receive— . . . (E) a payment under a . . . pension . . . plan . . . to the extent necessary for the support of the debtor and any dependent of the debtor . . . ."[93]

Since Mississippi opted out, it has available the state exemptions and other federal exemptions. The Mississippi ERISA exemptions are preempted under *Mackey*,[94] and the anti-alienation provisions of ERISA do not qualify as a federal exemption available to opt-out states under *Goff*.[95] Even though the Mississippi legislature stated unequivocally that all ERISA-qualified pension funds are exempt[96] and Congress said those funds cannot be assigned or alienated,[97] those funds are subject to the claims of creditors in bankruptcy.

Regarding IRA's, even though the Mississippi exemption statute intended to exempt IRA's, it erroneously refers to IRA's as qualified under ERISA. As such, the exempting language is probably preempted, and *McLeod* has so held.[98] The solution for IRA's is simple. The legislature should simply separate the language exempting IRA's from the ERISA exempting language.

The solution for ERISA-qualified plans is not so clear. One possible solution is suggested by the holding in *Mackey* that specific references to ERISA in the state statute will result in preemption.[99] The general Georgia garnishment statute, while it might have some effect on ERISA-qualified welfare benefit plans, did not "relate to" ERISA because ERISA-qualified plans were not singled out for special treatment.[100] An Iowa bankruptcy court has held that Iowa's exemption statute is not preempted by ERISA since it makes no reference to ERISA or to attendant IRS provisions.[101] Iowa's generic exemption section provides as follows:

> A debtor who is a resident of this state may hold exempt from execution the following property: . . .
> 8. The debtor's rights in: . . .
> e. A payment under a pension, annuity, or similar plan or contract on account of ill-

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93. 11 U.S.C. § 522(d)(10)(E) (1988).

94. *Mackey*, 486 U.S. at 829. The Court stated that "ERISA § 514(a) preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by the statute." *Id.*

95. *Goff*, 706 F.2d at 579.

96. MISS. CODE ANN. § 85-3-1 (Supp. 1989).

97. ERISA, Pub. L. No. 93-406, § 206(d)(1), 88 Stat. 829, 864 (1974) (codified as amended at 29 U.S.C. § 1056 (1988)).

98. *See supra* note 46 and accompanying text.

99. *Mackey*, 486 U.S. at 829.

100. *Id.* at 831.

101. *In re* Bartlett, 116 Bankr. 1015 (Bankr. S.D. Iowa 1990).

> ness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.[102]

The bankruptcy court holds that the Iowa statute is not preempted by ERISA. The *Bartlett* court states:

> Iowa Code section 627.6(8)(e) is generic on its face. It can not be construed as making any reference to ERISA or to attendant IRS provisions. Thus, it is not preempted by ERISA section 514(a).[103]

Kansas has adopted a novel approach. Its exemption statute provides that all ERISA-qualified pension plans "shall be conclusively presumed to be a spendthrift trust under [Kansas exemption statutes] and the common law of the state [of Kansas]."[104] To legislate that all ERISA-qualified plans are spendthrift trusts, the Mississippi legislature would have to ignore strong language from the Mississippi Supreme Court holding that a self-settled trust cannot be a spendthrift trust under Mississippi law:

> Even in jurisdictions in which spendthrift trusts are permitted, the settlor cannot create a spendthrift trust for his own benefit . . . . If it were so that the settlor could reach the funds (in the trust), we think the creditors should be able to reach them; and that which the California court said in *In re Camm's Estate,* 76 Cal. App. 2d 104, 172 P.2d 547 (1946), is appropos, and at least in line with our sense of justice and right:
>
> If this trust, as to the accrued and accumulated income to which the settlor was entitled before death could be upheld as against this creditor's claim, it would be possible for anyone to create a trust for his benefit in which he retained the right to receive and use all income during his life, with remainder to another at the moment of death, free from claims of creditors, and then keep large credit accounts running and die leaving his debts unpaid, thus cheating his creditors. *Equity will not permit this.*[105]

XII. CONCLUSION

As it now stands, self-employed individuals, professionals, and others with self-settled retirement trusts are not allowed to exempt their ERISA-qualified retirement funds nor are they allowed to exempt their IRA's in Mississippi if they file bankruptcy. This may change if the Fifth Circuit reconsiders its holding in *Goff* in light of the arguments in *Komet* and *Moore*. The legislature could very easily address the problem relating to IRA's, but any state statute dealing with private retirement funds faces probable preemption. Meanwhile, lawyers will continue to drink cold sodas and pina coladas.

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102. IOWA CODE § 627.6(8)(e) (Supp. 1990).

103. 116 Bankr. at 1023.

104. *See* KAN. STAT. ANN. § 60-2308(b) (1989) (Supp. 1989).

105. Deposit Guaranty Nat'l Bank v. Walter E. Heller & Co., 204 So. 2d 856, 860, 862 (Miss. 1967) (emphasis added).