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"WHO'S THE BOSS?": AN ANALYTICAL AND PRACTICAL APPROACH TO DETERMINE THE "EMPLOYER" IN A DEFINED CONTRIBUTION QUALIFIED RETIREMENT PLAN

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INTRODUCTION

Imagine: You're at a cocktail party on a Friday night. Not only are you there for the free cocktails, but also the night presents a huge opportunity to network and make a strong name for yourself in the community. Just out of law school, you've embarked upon a brand new career in law by trying to make it on your own. Relying on your business background, along with advice from friends who started their own firms, you decided to incorporate as a professional corporation to limit your liability as Smith, P.C. As you're meandering throughout the room, you have answered the same question innumerable times the same way, "I work for myself," and then hand over your card which, underneath your name, prominently displays your new firm's name, "Smith, P.C." But, who really is the employer? Do you work for yourself? Or do you work for Smith, P.C.? Who is the boss?

Over eight million people in this country are self-employed.[1] Small businesses employ almost forty percent of workers in the private sector. A majority of small employers, however, do not offer retirement benefits.[2] Seven percent of small employers feel they

* J.D., May 2005, The John Marshall Law School. I would like to dedicate this article to: My parents, for whom I could never show enough appreciation for their unquestioned love and encouragement and for teaching me the true meaning of hard work; Judd, whose patience, love and support carries me throughout law school's and life's challenges; and my sister and best friend, who handles conflict and stress with grace, focus, and with no complaints, provides me with constant inspiration. Also, in loving memory to Pat Gerdes, whose passionate, tireless, and no-nonsense attitude I will always admire and strive to maintain. The author attributes the title to the 1980s ABC television series "Who's the Boss?"

1. According to the U.S. Bureau of Labor Statistics, *at* http://www.employmentspot.com/know/self.htm (last visited, May 18, 2005).

2. See http://myfidelity.members.fidelity.com/investorsWeekly/index.html?bar=p (last visited Sept. 26, 2003), excerpting from MARGARET A. MALASPINA,

may start offering a retirement plan, while forty-three percent indicate it is unlikely that they will make a retirement plan available within the next two years.[3] The result is a substantial section of the work force without an important retirement savings vehicle.

Various provisions from the Internal Revenue Code, the Employee Retirement Income Security Act of 1974[4] ("ERISA"), and the Bankruptcy Code provide incentives to employers to begin retirement plans for the benefit of all employees. For example, the 2001 Economic Growth and Tax Relief Reconciliation Act[5] ("EGTRRA") provides tax incentives to small businesses for providing a retirement plan, but sixty-nine percent of small employers are oblivious to these enticements.[6] Increasingly, the country is faced with the scary notion that social security benefits may soon become depleted and the possibility that most people will not have enough money to retire.[7] The government continually attempts to address this issue by creating incentives for employers to offer retirement plans and for employees to participate in them. Examples of such enticements include: adding the Roth IRA to the menu of investment vehicles,[8] increasing the contribution limits to retirement plans and IRAs through provisions in EGTRRA,[9]

CRACKING YOUR RETIREMENT NEST EGG (WITHOUT SCRAMBLING YOUR FINANCES): 25 THINGS YOU MUST KNOW BEFORE YOU TAP YOUR 401(K), IRA, OR OTHER RETIREMENT SAVINGS PLAN (2003).

3. *Small Employers Decrease Coverage*, EMPLOYEE BENEFIT NEWS, July 1, 2003. However, almost thirty percent still offer retirement benefits. *Id.*

4. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2000) and in scattered sections of the Internal Revenue Code, 26 U.S.C.).

5. Treas. Reg. § 1.457-12 (as amended in 2003).

6. *Small Employers Decrease Coverage*, *supra* note 3.

7. Jay A. Soled & Bruce A. Wolk, *The Minimum Distribution Rules and Their Critical Role in Controlling the Floodgates of Qualified Plan Wealth*, 2000 BYU L. REV. 587, 597 (2000). "Many studies indicate that within the next two or three decades Social Security and Medicare will fall short of being able to sustain themselves financially." *Id.*

8. Congress created the Roth IRA as part of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788. *See* Michael S. McKinney, *The Roth IRA—Will It Increase Savings?*, 66 TENN. L. REV. 847, 848 (1999) (stating that Congress created the Roth IRA primarily to entice Americans into increasing their savings because Congress recognized that the United States personal savings rate is low when compared with the historical U.S. savings rate and that of other industrialized countries).

9. Treas. Reg. § 1.457-12. *See* Kenneth S. Cohen & Jeanne E. Hoenicke, *Recent ERISA and Tax Developments*, A.L.I.-A.B.A., Oct. 25–26, 2001, at 287 (summarizing the changes made to retirement savings and to tax law through EGTRRA). Title VI of the Economic Growth and Tax Relief Reconciliation Act of 2001 increased "the dollar limits on pension plan contributions and benefits and IRAs, simplify pension regulation, enhance pension portability, provide new incentives to small employers to start plans and remove barriers to sound pension funding." *Id.* at 289. *See also* John R. Thomas, *Highlights of Qualified*

enforcing ERISA to protect the benefits of participants in retirement plans,[10] and providing several tax incentives. One common benefit and incentive for participating in a retirement plan is the placement of assets in a trust out of reach from creditors.[11] However, if the owner of a business cannot partake in such a benefit, despite setting up the business as a limited liability professional corporation, then the "employer" will be discouraged from starting or continuing a retirement plan and from saving for his retirement altogether.[12] This is the issue hinging upon the decision by the United States Supreme Court in *Yates v. Hendon*.[13]

Retirement Plan Changes Under EGTRRA, S.C. LAW., Mar.–Apr. 2002, 12, 13 (concluding that EGTRRA symbolizes government's shift of policy toward encouraging employers to establish qualified retirement plans and attracting more employee participation). The changes made in EGTRRA will significantly augment many employees' retirement plans, particularly older employees with high compensations and, conversely, lower income employees. *Id.* at 18.

10. ERISA's primary purpose is to shield participants' and their beneficiaries' interests in employee benefit plans from creditors. David M. Landis & Jon E. Kane, *ERISA Exemptions in Bankruptcy: A Logical Solution*, 66 AM. BANKR. L.J. 253, 258 (1992).

11. Richard A. Naegele & Mark P. Altieri, *Enemies at the Gate: Creditors' Rights Against Tax Qualified Retirement Plans and IRAs*, 29 J. PENSION PLANNING & COMPLIANCE, Apr. 1, 2003, at 63. *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 524 (Cal. Ct. App. 2001) (refusing to include defendant O.J. Simpson's two pension plans valued over $4 million when calculating the damages award against him because the plans were "exempt from execution by creditors including plaintiffs as judgment creditors of a judgment awarding punitive damages").

12. Naegele & Altieri, *supra* note 11. Pension practitioners question the legal insulation of retirement accounts from creditors due to decisions like those coming from the Sixth Circuit.

13. 539 U.S. 957 (2003). The Supreme Court granted a writ of certiorari on June 27, 2003. All similarly situated owners of businesses will be affected by this Supreme Court decision. Naegele & Altieri, *supra* note 11. This Comment was written before the Supreme Court rendered its opinion on March 2, 2004. Yates v. Hendon, 547 U.S. 1 (2004), *remanded to* 365 F.3d 534 (6th Cir. 2004). Justice Ginsburg authored the majority opinion, and Justices Rehnquist, Stevens, O'Connor, Kennedy, Souter, and Breyer joined. Both Justices Scalia and Thomas concurred in the judgment, but filed separate opinions. Justice Ginsburg's opinion went straight to the point, stating at the beginning of her opinion:

> If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. In so ruling, we reject the position . . . that a business owner may rank only as an "employer" and not also as an "employee" for purposes of ERISA-sheltered plan participation.

Id. at 12. While this decision certainly helps buttress the legal barrier between the corporate entity and the owner, this decision does not solve all of the problems that exist given the current state of legislation and its definitions. As Justice Thomas noted in his concurring opinion, now that the court incorporated working owners into the definition of "employee," how do we now

This Comment will begin by explaining the facts and procedural aspects of *Yates v. Hendon* and the far-reaching implications of the Supreme Court decision. Then it will provide a basic understanding of the different statutes and common law history involved in the Sixth Circuit's decision that led the Supreme Court to hear this particular case. This Comment will also define various terms, such as "participant," "employer," "employee," "employee benefit plan," and "beneficiary," in order to establish a foundation for deciding the issues involved in this case. Once provided with the fundamental groundwork, the discussion will move into an analysis of the different federal circuits' holdings and will examine their diverse approaches and interpretations. Following this analysis, I will propose that the Supreme Court overrule the Sixth Circuit's interpretation of "employer" and include working owners as employees for the purposes of ERISA. Also, I suggest that Congress make semantical changes to the definitions of "employee" and "employer" in the statute to provide a more specific and understandable interpretation for the courts and the business world. The proposal will include many different policy considerations that underlie congress's intent when it enacted the Internal Revenue Code, ERISA, the Bankruptcy Code, and general principles of corporate law. The policies behind these legislative enactments and corporate law reflect common concerns of both the government and the people of this country's workforce—retirement, taxes and business—and will ultimately decide this case.

I. LAYING THE FOUNDATION

A. Climbing the "Court" Ladder: Facts and Procedural History of Yates v. Hendon

Dr. Raymond B. Yates owned and operated a professional corporation, Raymond B. Yates, M.D., P.C., which established and maintained a tax-qualified profit sharing pension plan.[14] Yates acted as the plan's administrator and trustee.[15] Dr. Yates and three other people participated in the plan as of June 30, 1996.[16]

In 1989, Dr. Yates borrowed $20,000 from the retirement

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define "working owner?" *Id.* at 46. "Hence, the existence of this exception tells us nothing about whether Congress 'intended working owners' to be 'employees' under ERISA." *Id.*

14. Hendon v. Yates (*In re* Yates), 287 F.3d 521, 524 (6th Cir. 2002), *reh'g denied*, No. 00-6023, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002), *cert. granted*, 539 U.S. 957 (2003). I.R.C. § 401 determines the tax qualification of a profit sharing pension plan. *Id.*

15. *Id.*

16. *Id.*

plan.[17] In mid-November of 1996, three weeks before creditors filed an involuntary Chapter 7 bankruptcy petition against him, Dr. Yates repaid the full amount of the loan, including principal and accrued interest,[18] totaling $50,467.46.[19]

Fairly soon afterwards, the bankruptcy trustee, William T. Hendon, asked the bankruptcy court to set aside the loan repayment as a preferential transfer and to order the money to be placed back into the debtor's estate for the benefit of Yates' creditors.[20] The bankruptcy court and district court found in favor of the bankruptcy trustee and set aside the loan repayment to make it available to Yates' creditors.[21] On appeal, the Sixth Circuit Court of Appeals affirmed, holding that due to the common law precedent of *Fugarino v. Hartford Life & Accident Insurance Co.*[22]

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17. *Id.* The loan contained a repayment term of five years at an eleven percent interest rate. Then, in 1992, Dr. Yates extended the term for another five years. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 524. The trustee brought the adversarial proceeding against the plan, Raymond B. Yates, M.D., P.C. Profit Sharing Plan, and the trustee, Dr. Yates, based on 11 U.S.C. §§ 547(b) and 550. Section 547(b) states:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
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> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Title 11 U.S.C. § 550 provides in part:

> Liability of transferee of avoided transfer
>
> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 547 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

21. *Hendon*, 287 F.3d at 523.

22. 969 F.2d 178, 186 (6th Cir. 1992). "[A] sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Id.*

and *Agrawal v. Paul Revere Life Insurance Co.*,[23] the court could not rule any other way.[24]

Yates then petitioned for a writ of certiorari to review, and ultimately reverse, the Sixth Circuit's decision.[25] The central question facing the Court was whether Yates, as a sole shareholder of a professional corporation, can enjoy the benefits of ERISA's protection from creditors as an "employee" of his practice's retirement plan.[26] If deemed an employer, he will not gain bankruptcy protection under ERISA and the Bankruptcy Code. If he is considered an employee, he will enjoy protection and will not have to set aside the loan amount. To answer this question, we must first analyze the statutory language in ERISA, the Internal Revenue Code, and the Bankruptcy Code.

B. By the Book: Analysis of Pertinent ERISA and Internal Revenue Code Sections and Policies

The government enacted ERISA because of the "significant impact that employee benefit plans have on employment, industry and commerce," and to ensure that plan benefits exist at retirement by prohibiting the voluntary or involuntary assignment of benefits.[27] When Congress enacted this massive legislation, it

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23. 205 F.3d 297, 302 (6th Cir. 2000). The court rationalized that "as an 'employer,' a sole shareholder cannot qualify as a 'participant or beneficiary' in an ERISA pension plan. The sole shareholder 'is not an ERISA entity' and 'does not have standing under the ERISA enforcement mechanisms.'" Id.

24. *Hendon*, 287 F.3d at 525. The court explained that under the Sixth Circuit court rules, they must comply with the decisions of *Fugarino* and *Agrawal*. *Id.* The only avenues available to overturn the strict constraints of precedent are to file for a rehearing en banc or appeal to the Supreme Court. *Id.* This is precisely what Dr. Yates decided to do.

25. 539 U.S. 957. The Supreme Court granted a writ of certiorari on June 27, 2003. The Court invited the Solicitor General to file a brief to express the United States' views. Yates v. Hendon, 537 U.S. 1043 (2002). The Solicitor General's brief favors Yates's contentions. *See generally* Brief for the United States as Amicus Curiae Supporting Petitioners, Yates v. Hendon, 539 U.S. 957 (2003) (No. 02-458), *available at* 2003 WL 21953912. In August and September, petitioner Yates filed a brief supporting his position. *See generally* Brief for Petitioner, Yates v. Hendon, 539 U.S. 957 (2003) (No. 02-458), *available at* 2003 WL 21939861. UNUMProvident Corporation filed an amicus curiae brief siding with Yates, as well. *See generally* Brief of UNUMprovident Corporation as Amicus Curiae in Support of Petitioners, Yates v. Hendon, 539 U.S. 957 (2003) (No. 02-458), *available at* 2003 WL 21953878. Respondent Hendon filed his brief expressing his views on September 15, 2003. Brief for Respondent, Yates v. Hendon, 539 U.S. 957 (2003) (No. 02-458), *available at* 2003 WL 22176071. The Supreme Court heard oral arguments on January 13, 2004.

26. *Hendon*, 287 F.3d at 523.

27. Donna Litman, *Bankruptcy Status of "ERISA Qualified Pension Plans"—An Epilogue to* Patterson v. Shumate, 9 AM. BANKR. INST. L. REV. 637, 639 (2001). ERISA primarily establishes these goals by requiring disclosure requirements, minimum participation, vesting requirements,

believed it very important and more efficient to do so in a widely uniform regulation.[28] Without such uniformity, Congress feared that widely varied state regulations would develop and ultimately lead to increased expenses and decreased incentives for employers to offer retirement plans.[29]

Several tax advantages exist under the Internal Revenue Code that encourage both employees and employers to establish and participate in employer-sponsored plans.[30] A tax-qualified plan under § 401 of the Internal Revenue Code[31] exempts tax from employee contributions made from a pay deferral or the earnings accrued over time until the employee withdraws the benefit at retirement.[32] The eventual withdrawal will be taxed at the retiree's marginal income tax rate, which is usually lower in retirement than when working full-time.[33] Employers also gain tax advantages by receiving immediate deductions when they make contributions to the plan for the benefit of their employees.[34]

ERISA is divided into five titles. Titles I and II, "Protection of Employee Benefit Rights" and "Amendments to the Internal Revenue Code" respectively, contain relevant procedural

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funding standards, and fiduciary responsibilities on plan trustees and administrators. *Id.*

28. C. Scott Pryor, *Rock, Scissors, Paper: ERISA, the Bankruptcy Code and State Exemption Laws for Individual Retirement Accounts*, 77 AM. BANKR. L.J. 65, 69-71 (2003).

29. *Id.* at 70-71. In *Velis v. Kardanis*, the court acknowledged Congress's "deep and continuing interest in the preservation of pension plans, and in encouraging retirement savings, as reflected in the statutes which have given us ERISA, Keogh plans and IRAs." 949 F.2d 78, 82 (3d Cir. 1991). The court found that, in the absence of fraud, Congress intended to shield pension plan assets from creditors. *Id.*

30. Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355, 399 (1999). The government allows a "tax-free build-up" of current contributions and earnings until withdrawn at retirement. *Id.* This tax advantage entices workers to provision their retirement so that the government will not have to subsidize their retirement for them. *Id.* at 399-400. This tax benefit represents just one of many tax incentives available.

31. I.R.C. § 401. This provision sets out the requirements for qualification for pension, profit-sharing and stock bonus plans.

32. Lisa M. Smith, Note, *ERISA Qualified Pension Plans as Part of the Bankruptcy Estate After* Patterson v. Shumate, 21 CARDOZO L. REV. 2119, 2122 (2000).

33. *Id.*

34. *Id.* Of course, the plan must meet the detailed requirements under I.R.C. § 401 in order to qualify for such treatment. If the plan qualifies as a trust, it gains preferential tax treatment, which not only allows the deduction for employer contributions to the trust, but also a federal income tax exemption for the trust, and "deferral of federal income tax for participants and beneficiaries until actual receipt of trust benefits." Litman, *supra* note 27, at 640.

information.[35] Sections 514(a)[36] and 206(d)(1)[37] address the preemption of state law exemptions. Congress grew concerned with the interstate character of employee benefit plans as the demands of growing pension plan assets and participants kept increasing.[38] In this regard, Congress wanted to provide a uniform law to "eliminat[e] the threat of conflicting or inconsistent state and local regulation of employee benefit plans."[39] Hence, the preemption law affords a very broad application to State or local governmental actions.[40]

A pension plan must, in accordance with ERISA and the Internal Revenue Code, contain a section that prohibits the assignment or alienation of an employee's benefits, which is known as the plan's "anti-alienation clause" or "spendthrift clause."[41] Since an employee benefit plan prohibits participants

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35. Pryor, *supra* note 28, at 71.

36. The section provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this title and 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 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)].

29 U.S.C. § 1144(a).

37. The section, I.R.C. § 401(a)(13)(A), provides: "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."

38. Pryor, *supra* note 28, at 71-72. Both the Senate Reports and Congressional Records, when enacting the pre-emption clauses, indicated Congress's intent that it have a wide, sweeping effect. *See id.* at 127 nn.42–43 (quoting from the Senate and Congressional reports that articulated their apprehension that multiple laws would develop throughout the country, creating more confusion).

39. *Id.* at 72.

40. *Id.*

41. Anthony Michael Sabina & John P. Clarke, *The Last Line of Defense: The New Test for Protecting Retirement Plans from Creditors in Bankruptcy Cases*, 48 ALA. L. REV. 613, 617 (1997). Also, a plan must constitute a pension plan under ERISA, which defines

> the terms "employee pension benefit plan" and "pension plan" [to] mean any plan, fund, or program which was heretofore or is hereafter 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) provided 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 the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A). This definition typically includes pension, profit-sharing, and 401(k) plans. A plan that exists without any benefit to common law employees falls outside the definition of an ERISA pension plan. Naegele

from spending their accrued savings before retirement, it does not make sense to allow creditors to access it indirectly when the participant cannot.[42]

C. Down the Tubes: The Bankruptcy Code and How It Applies to ERISA

In 1978, Congress enacted the Bankruptcy Reform Act ("the Code"). One purpose of the new Code was to make it easier for debtors to discharge debts and embark with a financial "fresh start."[43] This enactment led to the creation of a system of federal exemptions.[44] At the beginning of a bankruptcy case, the bankruptcy trustee creates an estate out of all of the debtor's property, known as the "[p]roperty of the estate."[45] However, under Section 541(c)(2)[46] of the Bankruptcy Code, if a debtor cannot transfer property to a creditor outside of the bankruptcy realm (or in other words, applicable nonbankruptcy law), then the Code creates an exclusion, thus exempting the property from the grips of the creditor.[47] Initially, the courts had difficulty interpreting the meaning of "applicable nonbankruptcy law."[48] Some courts

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& Altieri, *supra* note 11.

42. Pryor, *supra* note 28, at 73. *See generally* Landis & Kane, *supra* note 10 (stating that section 206(d) of ERISA reflects congressional intent and a clear policy choice). Congress enacted ERISA 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" and thereby "create a federal exemption from involuntary alienation of pension benefits by the adoption of § 206(d)." *Id.* at 260 & n.32.

43. Pryor, *supra* note 28, at 66. The Bankruptcy Code provides the debtor a "proverbial 'fresh start'" by protecting some of the debtor's assets from the bankruptcy estate. *Id.*

44. *Id.* Many states, however, opted out of the federal exemptions and kept their own state exemptions that could still be exercised by individual debtors in bankruptcy. *Id.*

45. Sabina & Clarke, *supra* note 41, at 618. The Bankruptcy Code defines property of the estate as:

> (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.

46. "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2).

47. Sabina & Clarke, *supra* note 41, at 620.

48. *Id.* at 620-22. Some courts considered ERISA relevant under the "applicable nonbankruptcy law" terminology of § 541(c)(2), and therefore found that the debtor's estate did not include the debtor's assets in the ERISA-qualified pension plan under the plan's anti-alienation provision. *See id.* at 621 (summarizing Gladwell v. Harline (*In re* Harline) 950 F.2d 669, 674 (10th

interpreted the phrase to only apply to state law, not federal law. However, after the Supreme Court decision in *Patterson v. Shumate*, "applicable nonbankruptcy law" now refers to state or federal law, including the anti-alienation clauses mandated by ERISA.[49]

The issue in *Yates*, however, turns not only on whether Yates's loan repayment should remain insulated from creditors, but also whether his plan is a tax-qualified ERISA plan that gains protection under Title I of ERISA and its anti-alienation clause. Another question is whether Yates, under ERISA, is considered an "employer" not eligible for participation in the plan or whether the professional corporation is considered the "employer." The Sixth Circuit found that Yates acted as an "employer"[50] in the traditional agency sense of the word. ERISA does not afford an "employer" protection because only a "participant or beneficiary"[51] in an ERISA tax-qualified pension plan has standing to enforce ERISA, which makes the anti-alienation clauses under ERISA and

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Cir. 1991); Velis v. Kardanis, 949 F.2d 78, 82 (3d Cir. 1991), *aff'd* 504 U.S. 753 (1992); Shumate v. Patterson, 943 F.2d 362, 364-65 (4th Cir. 1991); Forbes v. Lucas (*In re* Lucas), 924 F.2d 597, 600-01 (6th Cir. 1991); Anderson v. Raine (*In re* Moore), 907 F.2d 1476, 1477-78 (4th Cir. 1990)). Other courts, however, disagreed and held that ERISA did not apply to the meaning of "applicable nonbankruptcy law" intended by § 541 since it is federal law. Hence, the anti-alienation clauses found in ERISA-qualified retirement plans were not important and could not place these plans outside of bankruptcy creditors' grips. *See id.* at 621-22 (synthesizing the holdings of Heitkamp v. Dyke (*In re* Dyke), 943 F.2d 1435, 1441 (5th Cir. 1991); Daniel v. Sec. Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1359-60 (9th Cir. 1985); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1271 (8th Cir. 1984); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 580 (5th Cir. 1983)).

49. 504 U.S. 753, 757–59 (1992). In *Patterson*, the unanimous Supreme Court found in favor of Shumate, the debtor, holding that Shumate may exclude from the property of the estate his assets in his retirement plan because the retirement plan's status qualified under ERISA and § 541(c)(2) of the Bankruptcy Code. *Id.* at 765-66.

50. According to ERISA, "[t]he term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). And "[t]he term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(6).

51. According to ERISA:

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). A beneficiary is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8).

Tennessee state law[52] moot in Yates's case.[53] Therefore, the outcome of this case may have far-reaching implications because it will not only affect Dr. Yates, but under the arbitrary definition of "employer," will also impact all other working owners and possibly even partners and shareholder employees who hold a large portion of the corporation's stock.

II. UNDER THE MICROSCOPE: ANALYSIS OF CASE LAW

In order to address these questions, an understanding of the different courts' interpretations and applications of the multiple facets of law is a prerequisite. Therefore, this section will examine several different analyses used throughout this country and relate them back to the case at hand. First, I will address the several Supreme Court cases that address some of the sub-issues that exist in *Yates*. Second, I will synthesize the various federal circuit court cases according to the different approaches used. Then, I will conclude with a summary of the analyses as applied to *Yates*.

A. Supreme Court Cases Recognize ERISA's Policies but Ignore Corporate Principles

1. Applicable Non-Bankruptcy Law Includes ERISA

In *Patterson v. Shumate*, Joseph Shumate worked for Coleman Furniture Corporation for over thirty years and worked his way up to the position of president and chairman of the board of directors.[54] Coleman provided a qualified retirement plan for over 400 employees.[55] Unfortunately, the company filed for bankruptcy, and soon afterward Shumate followed suit.[56] The bankruptcy trustee filed an action in the Western District of Virginia seeking access to Shumate's assets in the plan for the benefit of his creditors.[57] The trustee claimed that Shumate's plan in particular did not qualify for an exclusion under § 541(c)(2) of the Bankruptcy Code because "applicable nonbankruptcy law" only includes state law, not federal law.[58] The Supreme Court held that 11 U.S.C. § 541(c)(2) applies not only to applicable state laws, but also to federal laws such as ERISA.[59] More specifically, the Court

52. TENN. CODE ANN. § 26-2-105(b) (2000). The statute provides an exemption for bankruptcy estates retirement assets of a participant or beneficiary of qualified plans. *Id.*

53. *Hendon*, 287 F.3d at 524.

54. 504 U.S. at 755.

55. *Id.*

56. *Id.*

57. *Id.* at 755-56.

58. *Id.*

59. *Id.* at 759. The Court, in its analysis of the issue, considered other references within the Bankruptcy Code. At other places in the legislation,

found that the anti-alienation provision included in the debtor's plan document qualified as a restriction on transfers enforceable as "applicable nonbankruptcy law" under the exclusions of § 541(c)(2) of the Code.[60]

In *Yates*, the plaintiff argued that either ERISA or Tennessee state law qualifies as "applicable nonbankruptcy law" under the Code, and therefore, the court should enforce the anti-alienation provision.[61] However, the Sixth Circuit found that under ERISA,[62] Yates acted as an employer and consequently was not entitled to bring suit under this provision and was not protected by ERISA.[63] Therefore, he could not use ERISA as "applicable nonbankruptcy law" under the Code's exclusion for trusts.[64]

2. *The Terms "Employer" and "Employee" Are Defined by Traditional Notions of Agency Law Without Respect to Corporate Law Policies and the Intent of Congress*

In *Nationwide Mutual Insurance Co. v. Darden*,[65] the Supreme Court confronted the task of construing the term "employee" under ERISA.[66] Darden worked as an independent

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Congress specifically used the term "state law" when it desired to limit the scope of the law. *Id.* at 758. Also, elsewhere in the Code when it refers to "applicable nonbankruptcy law," courts interpreted it to include federal law. *Id.* at 758 n.2.

60. *Patterson*, 504 U.S. at 760. The Court went so far as to mention that it has "vigorously . . . enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar." *Id.* It mentioned, as well, that the IRS in the past expressed its viewpoint on the matter that such a transfer of a beneficiary's pension plan interest to a bankruptcy trustee would disqualify the plan's preferential tax treatment under ERISA. *Id.* at 760 n.3. *See also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (finding that ERISA preempts state law if the state law relates to employee benefit plans); FMC Corp. v. Holliday, 498 U.S. 52, 65 (1990) (recognizing that Congress clearly intended for ERISA to preempt state insurance regulation).

61. *Hendon*, 287 F.3d at 525.

62. 29 U.S.C. § 1132(a)(3)(B)(ii). The applicable section in ERISA contains a description of parties eligible to bring a civil action claiming rights under ERISA. It provides that only a "participant," "beneficiary," or "fiduciary" may seek equitable relief to enforce the provisions of the plan. *See supra* notes 50–51 and accompanying text.

63. *Hendon*, 287 F.3d at 525-26. Yates also argued that section 26-2-105(b) of the Tennessee Code Annotated makes the spendthrift clause enforceable under the Bankruptcy Code. *Id.* at 526. The Tennessee Personal Property Owner's Rights and Garnishment Act of 1978 exempts qualified retirement plans from the debtor's property. *Id.* The court, however, reasoned that the Tennessee law "operates without regard to a transfer restriction that may be contained in the trust instrument," and therefore does not apply. *Id.* at 526-27.

64. *Id.* at 524.

65. 503 U.S. 318 (1992).

66. 29 U.S.C. § 1002(6). *See supra* note 50 and accompanying text.

contractor for the Nationwide Mutual Insurance Company.[67] When his employment ended with the company, he sued for his forfeited benefits in the company's retirement program.[68] The question centered on whether Darden could bring suit under ERISA as a participant to enforce the provisions of the statute.[69] The definition of participant only includes "employees."[70] Thus, the case turned on whether Darden, as an independent contractor, was an "employee" of Nationwide.[71] In resolving this question, the Court found that the definition used in the text of ERISA was completely "circular," and instead used basic agency law criteria to create a common-law test to find the answer.[72] The Court considered, for example, if a person's position enables them to exert control and make decisions over other employees, then that person is an "employer."[73] The Court adopted this approach even though it conflicted with Congress's intent when it enacted ERISA.[74]

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67. *Darden*, 503 U.S. at 319-20.

68. *Id.* at 320. Darden claimed that these benefits were already vested under ERISA and therefore a nonforfeitable right. *Id.*

69. *Id.* at 320-21; 29 U.S.C. § 1002(7). *See also supra* note 50 and accompanying text.

70. See *supra* note 50 and accompanying text for the definition of "employee."

71. *Darden*, 503 U.S. at 321.

72. *Id.* at 323. As a backing for the Court's interpretation of Congress's statutory language used in ERISA, it logically reasoned that when presented with ambiguous statutory language, it will look within the entire text of the statute. *Id.* at 322-23. If the statute doesn't clarify the meaning, then the Court may infer that Congress intended the common law meaning of the term. *Id.* In earlier cases, the Court used this method to determine that an undefined term "employee" when used in a statute means the "conventional master-servant relationship as understood by common-law agency doctrine." *Id.* See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 738-41 (1989), which determined the arbitrary term "employee" within the Copyright Act of 1976, 17 U.S.C. § 101, through the statutory interpretation process of checking for further definition within the entire text of the statute, and if none, then applying the common law definition.

73. *Darden*, 503 U.S. at 323. Some of these factors include: (1) the ability of the hiring party to dominate the ways in which the end result is achieved; (2) required job-related skills; (3) who provides the tools needed to accomplish the job; (4) location of the job; (5) how long the relationship between the parties existed; (6) authority of the hiring party to assign additional responsibilities; (7) the decision-making capabilities of the hired party to set the hours of work; (8) how the hired party gets paid; (9) the ability of the hired party to hire and pay assistants; (10) the similarity of the work to the hiring party's business; (11) if the hiring party is in business; (12) any applicable employee benefits provision; and (13) the hired party's tax treatment. *Id.* at 323-24. THE RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) provided the court with additional criteria to determine an employer-employee relationship, along with some other resources. *Id.* at 324.

74. *Id.* at 325, 328. The Court noted, as well, that the Fourth Circuit would not consider Darden an employee under common law principles. However, the Fourth Circuit still held that Darden constituted an employee under the

The holding in *Darden* affects the issue at hand in *Yates*, because if the Supreme Court uses traditional notions of common law agency to determine whether Yates can bring suit as an "employee" to enforce ERISA provisions and protections upon his retirement plan, then Yates will lose. If the Court decides, using this agency test, that Yates is not an "employee," as did the Sixth Circuit, then his loan repayments will not fall under the Bankruptcy Code exclusion under § 541(c)(2) and will instead go to his creditors.[75] This analysis completely ignores well-founded

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traditional principles of agency even though it created an inconsistency with Congress' express policy and purpose of enacting ERISA. *Id.* at 321.

75. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 123 S. Ct. 1673, 1681–83 (2003) (Ginsburg, J., dissenting). In *Clackamas*, the court recognized a split between circuits concerning who constitutes an "employee" and agreed to attempt to resolve the issue. *Clackamas* involved a plaintiff who brought suit under the American with Disabilities Act ("ADA") against a medical professional corporation owned by four shareholders. *Id.* at 1676-77. However, the ADA does not cover employers with fewer than fifteen employees. *Id.* at 1676. The decision of whether the ADA covers the defendant hinged upon whether the four shareholders constituted "employees." *Id.* at 1677-78. The Court applied the test set out in *Darden* and specifically focused on the common law idea of "control over the servant" as one of the more relevant factors. *Id.* at 1680. The Court took the position that courts should examine whether the shareholders: (1) operate independently; (2) manage the corporation; or (3) work under the business' control. *Id.* The Court also took into account the congressional intent behind the statute, noting that these considerations should be weighed. *Id.* at 1678-79. Here, the Court mentioned two opposing views: (A) the intent of Congress to rid the world of discrimination suggests that the shareholders are employees; versus (B) the idea that they are not employees because Congress excluded small employers in order to promote people to start businesses by making it easier for them to enter the competitive environment without having the expenses of providing ADA coverage. *Id.* Without determining the answer to the issue, the Court remanded the case back to the Court of Appeals, ordering the court to decide the case using these factors. *Id.* at 1681. However, the dissent, written by Justice Ginsburg, strongly favored another viewpoint. The crux of the dissent centered upon the fact that the shareholders received payment from the corporation, rendered services in the name of and for the benefit of the corporation, and held contracts with the corporation. Therefore, such shareholders were employees of the corporation. *Id.* at 1681-82. The dissent recognized that just because no other human being controls the day-to-day work of the shareholders, the enterprise controls them in the sense that they must do certain work and activities for the vitality of the business. *Id.* at 1682. One of the primary reasons of setting up the practice as a corporation was to gain qualification as an "employee" for ERISA protection. *Id.* Also, the very reason to organize as a professional corporation is to create a separate entity from the shareholders to limit liability for the business' debts. *Id.* All of these reasons suggest that shareholders in a professional corporation satisfy the common law principles of agency that define an "employee." *Id.* Justice Ginsburg's majority opinion in *Yates*, then, is not surprising since she predictably applied the same analysis used in her dissenting opinion in *Glackamas*. See also *Baker v. Texas & Pacific Railway*, 359 U.S. 227, 227-28 (1959) (per curiam), which addressed the issue of who constitutes an

corporate principles that separate the corporate entity from those that make decisions on behalf of the corporation.[76] It seems that this analysis would consider any upper-level manager an "employer" not eligible for the benefits under ERISA, which is illogical considering the context of ERISA and corporate law policies.[77]

3. The First and Sixth Circuits Interpret ERISA to Connote that Sole Shareholders Cannot Be "Employees"

The Sixth Circuit will not construe the term "employee" under ERISA to include a sole shareholder.[78] In *Fugarino*, the court examined whether the sole proprietor of a restaurant had standing under ERISA as an employee to bring suit in federal court.[79] While taking into consideration some of ERISA's policies to protect employees, the court held that the group insurance plan qualified under ERISA, but that the sole proprietor did not qualify as an employee and could only sue under state law.[80] The result of the decision is that Fugarino can only sue under state law, while the employees of the restaurant may bring suit under federal law to

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"employee" under the Federal Employers' Liability Act and finding that a jury should determine and weigh the evidence. The district court judge refused to introduce the evidence to a jury and found that as a matter of law no employment relationship existed between plaintiff and defendant. *Id.*

76. *See generally Clackamas*, 123 S. Ct. at 1681 (Ginsburg, J., dissenting) (describing in detail why the application of common law agency factors to the definition of the employer-employee relationship in this context defies the intent of Congress and corporate law principles).

77. *Id.* at 1681 (Ginsburg, J., dissenting). *See also* William Sluis, *Sidley Austin Brown & Wood: EEOC Files Age-Discrimination Suit*, CHI. TRIB., Jan. 16, 2005, at C3 (reporting that the Equal Employment Opportunity Commission filed anti-age discrimination suits against the large Chicago law firm for demoting or forcing retirement on thirty-one partners to replace them with younger attorneys). The law firm responded by stating that the partners were "owners," not "employees," and therefore are not covered by the Anti-discrimination laws. Of course, like the decision in *Yates*, this case has every law firm's proverbial ears perked and eyes open. As the article states: "Watch for this fight to be ferocious, because the stakes are high for numerous firms that concentrate decision-making authority in a small group of partners." *Id.*

78. *Fugarino*, 969 F.2d at 185-86 ("[A]n employer cannot ordinarily be an employee or participant under ERISA."). The court stated that a primary purpose of ERISA's existence was to prevent the employer from benefiting from the assets of a plan. Congress enacted ERISA to allow only participants and beneficiaries to use ERISA to recover. *Id.* at 186.

79. *Id.* at 178.

80. *Id.* In *Fugarino*, the plaintiffs owned a restaurant and provided its employees with a group health insurance policy. *Id.* at 181. Plaintiff's son, a dependent on the policy, became paraplegic in a car accident. *Id.* Other restaurant employees participated in the plan. *Id.* A dispute arose, however, between plaintiff and the insurance company over the payment of the medical expenses. *Id.*

enforce ERISA protections.[81]

However, in *Agrawal*, even though the court reached its decision in a manner consistent with *Fugarino*, the court recognized that its holding contradicted the policy considerations of ERISA because ERISA is meant to encourage and protect all employees, not to assign different rights to business owners and employees.[82] Although the Sixth Circuit refuses to find that a sole shareholder qualifies as an "employee" for ERISA purposes, multiple shareholders do qualify regardless of the type of business entity created.[83]

The First Circuit's analysis aligns with the Sixth Circuit in that sole owners constitute "employers" under ERISA, not employees, and therefore do not qualify for Title I coverage. In

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81. *Id.* at 186 "ERISA regulation applies to the employees of The Glens Restaurant who participate in the group health insurance coverage." *Id.*

82. *Agrawal*, 205 F.3d at 303. In *Agrawal*, a sole shareholder of a professional corporation purchased three disability policies in the name of Agrawal, Inc. *Id.* at 298-99. After sustaining injuries and submitting claims to defendant-insurer, the defendant stopped payments claiming that Dr. Agrawal no longer suffered disabilities. *Id.* at 299. The court also noted that if a sole proprietor operates a Keogh plan under which no common law employees are eligible, Title I of ERISA does not cover the sole owner. *Id.* at 303. However, Title I of ERISA would cover the working owner if at least one other employee participates in addition to the owner. *Id.* Moreover, it found that a limited definition of ERISA does not further the interests and purposes of the legislation. *Id.* This reading of the statute allows self-employed individuals to sue under state law and employees of working owners to sue under federal law but not state law. *Id.* This idea defies logic in that Congress would allow self-employed individuals a cause of action in state law but force the intended protected class of employees to go to federal court with their claims. *Id. See* Scarborough v. Perez, 870 F.2d 1079, 1084 (6th Cir. 1989) (holding that defendant, Peter Perez, as sole owner of Perez, Inc. did not qualify as an "employer" by using corporate principles and policies). Absent fraud or injustice, establishing a closely-held operation as a corporation limits the liability of the owners and should not subject them to personal liability simply because they run the business. *Id.* Finding otherwise "would not only subvert the major purpose of incorporation, but would discourage future participation in multiemployer pension plans." *Id.* It reasoned that Congress knows how to express when it wants the courts to disregard the fact of incorporation. *Id. See also* Hadden v. City of Gatlinburg, 746 S.W.2d 687, 689 (Tenn. 1988) (reasoning that even if one stockholder owns all the stock in a corporation, "distinct legal entities" still exist). Furthermore, the court found that where owners choose to do business in the corporate form for tax, accounting, and various other reasons, they cannot dispose of the corporate form when convenient. *Id.* at 690.

83. See *Santino v. Provident Life & Accident Ins. Co.*, 276 F.3d 772, 774–75 (6th Cir. 2001), where one of three shareholders in a professional corporation filed state law claims against the defendant provider of disability insurance, which argued that he did not qualify as an "employee" under ERISA and was therefore barred from bringing an ERISA claim. The court held that a joint shareholder who does not solely or with a spouse own all equity in a corporation qualifies as an "employee" under ERISA, thereby preempting his state law claims. *Id.* at 776.

Kwatcher v. Massachusetts Service Employees Pension Fund,[84] the plaintiff, a sole shareholder of a business, brought an ERISA claim to force the defendant to pay retirement benefits the company contributed to the pension plan for his benefit. The court found that "such 'dual status' individuals are barred from participation" in an ERISA-regulated pension plan.[85]

4. The Majority of Circuits Construe ERISA to Mean that the Company is the "Employer" Separate from the Owner

While the First and Sixth Circuits consider the sole owner of a business an "employer,"[86] the Third, Fourth, Fifth, Seventh, and Eleventh Circuits recognize the distinction between the owner and the business entity. Other circuits have not yet clearly decided the issue.

The Third Circuit decided this issue in *Leckey v. Stefano*,[87] and found that the sole owner of a business qualified as an "employee-participant" under ERISA because at all times another employee benefited, even if that other employee was the owner's step-daughter and co-owner.[88] According to the court, ERISA applied so long as another employee participated and benefited in

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84. 879 F.2d 957 (1st Cir. 1989). In *Kwatcher*, the plaintiff owned his own window washing business and presided over all employee contractual and bargaining matters. *Id.* at 958. It is interesting to note that the plaintiff-owner belonged to an employees' union as himself, and his company belonged to an employers' organization. *Id.* The company made contributions to a pension fund on plaintiff's behalf. *Id.*

85. *Id.* at 959. The court reasoned that in actuality, if a person controls the corporation's actions, it seems only fair to concede that he acts "in the interest of" the business entity and is therefore classified as an "employer." *Id.* at 960.

86. *Compare* Schwartz v. Gordon, 761 F.2d 864, 865 (2d Cir. 1985) (finding that Title I of ERISA did not apply to a sole owner who maintained, contributed, and benefited from the plan himself), *and* LaVenture v. Prudential Ins. Co. of Am., 237 F.3d 1042 (9th Cir. 2001) (finding that the sole shareholders of a company constitute "employers" under the ERISA definition when the disability plan benefits no one other than the owner, therefore ERISA does not preempt the plaintiff's claim), *with* Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 406-09 (9th Cir. 1995) (holding that the plaintiff, a partner whose company provided health insurance for the benefit of the other partner and another employee, constituted an "employee" for reasons of ERISA to bring suit in federal court because finding otherwise would create an ironic situation of requiring individuals under the same policy to pursue claims in different court systems), *and* Watson v. Proctor, 161 F.3d 593, 598-99 (9th Cir. 1998) (deciding that the debtor's interest in his retirement plan did not qualify as an employee benefit plan under ERISA because the debtor/sole shareholder remained the only person who contributed and benefited from the plan). Therefore, under ERISA, he did not qualify as an "employee" able to bring suit and enjoy the protections of Title I, which meant that he must include his savings as property of the estate under § 541(a) of the Bankruptcy Code. *Id.*

87. 263 F.3d 267 (3d Cir. 2001).

88. *Id.* at 272.

the plan.[89]

Likewise, the Fourth Circuit found that a sole proprietor who employed four other full-time workers and assisted in providing health insurance coverage for its employees qualified as a "beneficiary" and "participant" of the employee benefit plan and possessed rights to sue under ERISA.[90] In deciding the issue, the court reasoned that if an employee of the solely-owned corporation sued the plaintiff as an "employer" under ERISA, the corporation would deflect his liability.[91]

The Fifth Circuit, in *Vega v. National Life Insurance Services, Inc.*,[92] also concluded that a co-owner in a corporation falls within the ERISA definition because the corporation employs at least one other person.[93] It found that "[a]s long as a Texas business corporation maintains a plan and at least one employee participant (other than a shareholder or a spouse of the shareholder), an employee shareholder and his beneficiaries may be participants in the plan with standing to bring claims under ERISA."[94]

The Seventh, Tenth, and Eleventh Circuits' decisions parallel the above-mentioned circuit decisions.[95] All of these cases show a

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89. *Id.* at 271-72. The court's analysis used the rule laid out in a Department of Labor's regulation in 29 C.F.R. § 2510.3-3(c)(1) that says "an individual and the individual's spouse are not counted as employees for purposes of identifying an ERISA plan" if one individual or the individual and his or her spouse wholly owns the business. *Id.* at 270. This rule only prevents spouses from becoming employees. *Id.* at 271. *See also* Wolk v. UNUM Life Ins. Co. of Am., 186 F.3d 352, 353, 358 (3d Cir. 1999) (deciding that the term "beneficiary" encompasses partner-employers meant to benefit under an employee benefit plan and they therefore have standing to enforce the plan provisions under ERISA).

90. Madonia v. Blue Cross & Blue Shield, 11 F.3d 444, 450 (4th Cir. 1993).

91. *Id.* The court also recognized that by holding that the sole shareholder qualifies as an "employee" who can benefit from the plan, the decision would enhance uniformity of laws by preventing two different court systems from hearing matters having to do with the same policy/plan, which is consistent with Congress' intent when enacting ERISA. *Id.*

92. 188 F.3d 287 (5th Cir. 1999).

93. *Id.* at 294.

94. *Id.*

95. *See generally In re* Baker, 114 F.3d 636, 639 (7th Cir. 1997) (finding that § 541(c)(2) excludes the debtor's pension plan because the courts must respect corporate existence and recognize that the corporation and owner are two separate legal entities. Therefore the owner is considered an "employee" with rights under ERISA); Sipma v. Mass. Cas. Ins. Co., 256 F.3d 1006, 1010-11 (10th Cir. 2001) (holding that the shareholder in the corporation acts as an employee under the *Darden* analysis used by the Supreme Court and recognizing that people and corporations are two separate legal entities recognized at law); Gilbert v. Alta Health & Life Ins. Co., 276 F.3d 1292, 1302 (11th Cir. 2001) (deciding that a "sole shareholder is a "beneficiary," within the meaning of 29 U.S.C. § 1002(8), when he is entitled to benefits from a benefits plan which otherwise qualifies as an ERISA plan); Slamen v. Paul

trend that a majority of courts now hold that: (1) if a sole owner of a corporation or partnership provides an employee benefit plan within the definition of ERISA, and (2) the plan benefits other employees aside from the sole working owner and the owner's spouse, then (3) the owner will qualify as an "employee" distinct from the corporation and therefore fall within the protections of Title I of ERISA with standing to enforce those provisions. The First and Sixth Circuits' holdings, when confronted with this matter, rejected many of the policy decisions used by the majority of the circuits. For instance, the courts did not take into account basic corporate principles and the purposes of ERISA to provide for uniformity of laws and encourage owners to assist employees in providing health, disability, and retirement plans. If we take away the incentives for owners to offer these retirement benefits, then the effect is a decrease in the amount of benefit plans offered to the employees, which just ends up hurting the very employees that ERISA seeks to protect.

The First and Sixth Circuits, furthermore, do not treat the corporate entity and the owner as legally separate entities. The corporation may make transactions, file taxes, and buy and sell land as an independent legal "person." The money, taxes, and income streams are all kept entirely separate from the sole shareholder. The owner even gets paid by the corporation. Therefore, the corporation is constructively "the boss" and the owner acts on its behalf.

III. THINK OUTSIDE THE BOX: PROPOSED CHANGES

A. Corporation Policies Warrant a Legal Separation of the Business and the Owner

In *Clackamas Gastroenterology Associates, P.C. v. Wells*,[96] Justice Ginsburg disagreed with the majority's application of traditional common law principles to determine whether a sole owner is an "employee" or an "employer."[97] Justice Ginsburg faulted the majority's analysis, which applied common law agency factors of control.[98] Because the four shareholders of a professional corporation controlled the operation of the clinic, the doctors were considered "employers" under the *Darden* test.[99] While Justice

Revere Life Ins. Co., 166 F.3d 1102, 1106 (11th Cir. 1999) (holding that the sole owner in this case did not constitute an "employee" under ERISA because the disability plan only covered himself and no other employees).

96. 123 S. Ct. 1673, 1681–83 (2003) (Ginsburg, J., dissenting).

97. *Id.* at 1681 (Ginsburg, J., dissenting).

98. *Id.* at 1680 (Ginsburg, J., dissenting).

99. *Id.* at 1681 (Ginsburg, J., dissenting). Recall that the Court in *Darden* ascertained the definition of "employee" by applying common law agency principals to determine who is or who is not an employee, with no one factor

Ginsburg did not dispute the application of common law principles of a master-servant relationship, she disagreed with the majority because they placed too much emphasis on just one of the factors—control.[100]

Justice Ginsburg also pointed out that the shareholders in this professional corporation go to work every day functioning as common law employees.[101] She noted various state and federal laws that classify the doctors as employees for various reasons.[102] She stressed that the doctors fit the common law definition of an "employee" or "servant" because the doctors engaged in services for the benefit of the corporation and in the practice's name, were bound by contracts with the corporation, received salaries and bonuses from the corporation, and worked in facilities owned or leased in the name of the corporation.[103] While the doctors in that case argued that they did not qualify as "employees" under the Americans with Disabilities Act ("ADA")—which uses the exact same definition as "employee" in ERISA—they conceded that they qualified as "employees" under ERISA.[104] The shareholders even agreed that qualifying themselves as "employees" under ERISA is what led them to choose to organize as a corporation instead of something else, like a partnership.[105]

Most importantly, Justice Ginsburg pointed out that by organizing the practice in the form of a corporation, the doctors in effect "created an entity separate and distinct from themselves, one that would afford them limited liability for the debts of the enterprise."[106] Altogether, she found "no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal anti-

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more determinative than another. *Id.* (Ginsburg, J., dissenting).

100. *Id.* (Ginsburg, J., dissenting). Justice Ginsburg thought the majority's application of this test too narrow. *Id.* (Ginsburg, J., dissenting).

101. *Id.* (Ginsburg, J., dissenting).

102. *Id. at 1682 (Ginsburg, J., dissenting).*

103. *Id.* at 1681-82 (Ginsburg, J., dissenting). She also referenced the RESTATEMENT (SECOND) OF AGENCY, ch. 7 topic 2, tit. B, Introductory Note, at 479, which said, in essence, that employees positioned "high up" in a corporation "are no less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise." *Id.* at 1682 (Ginsburg, J., dissenting). This statement alone presents evidence against the majority's application of only one common law factor of agency law.

104. *Id.* at 1682 (Ginsburg, J., dissenting). *See* Sluis, *supra* note 77 (referencing Sidley Austin's defense to the anti-discrimination charges that the partners were not "employees" entitled to protection pursuant to the federal anti-discrimination laws because they were considered partners and owners in the law firm).

105. *Clackamas*, 123 S. Ct. at 1682 (Ginsburg, J., dissenting).

106. *Id.* (Ginsburg, J., dissenting).

discrimination statutes."[107]

In other cases addressing similar issues, corporate policies have swayed several courts' decisions. In *Scarbrough v. Perez*, the Sixth Circuit remarked that the definition of "employer" under ERISA would be "foolhardy" if it included the dominant shareholder and chief officer of a corporation as an employer because he acted "indirectly in the interest of the employer."[108] The court admitted that such an interpretation would mean that every person who exerts control and responsibility over the employee benefits plan qualifies as an "employer."[109] "Obviously Congress did not contemplate that," stated the court.[110] The opinion's very pointed analysis went on to say that "limited liability is a hallmark of corporate law"[111] and that owners do not subject themselves to corporate liability just by actively participating in the business.[112] To find otherwise, the court "would not only subvert the major purpose of incorporation, but would discourage future participation" in pension plans.[113]

Overall, by establishing a business in corporate form, such as a professional corporation, several factors enter the decision-making process. Owners of businesses incorporate to separate themselves from the corporation to limit personal liability.[114] To find that the sole owner of a company qualifies as an "employer" would not only go against the principle of separation of owner and company for tax, accounting, leasing, and other reasons, but it would also allow the sole owner and the court to "shunt aside at their convenience legal entities and the legal aspects thereof."[115]

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107. *Id.* (Ginsburg, J., dissenting).

108. 870 F.2d at 1083.

109. *Id.*

110. *Id.* (internal citations omitted).

111. *Id.* at 1084. (internal citations omitted).

112. *Id.*

113. *Id.* (citing Connors v. P & M Coal Co., 801 F.2d 1373, 1376 (D.C. Cir. 1986)).

114. Hadden v. City of Gatlinburg, 746 S.W.2d 687, 689 (Tenn. 1988). Even if one person owns all of the stock in a company, the stockholder and the corporation are still "distinct legal entities." *Id.* That sole shareholder may not even bring a suit when wrongs are done to the corporation. *Id.*

115. *Id.* at 690 (quoting Shelby County v. Barden, 527 S.W.2d 124, 130 (Tenn. 1975)). *See also Madonia*, 11 F.3d at 449 (using the *Darden* common law agency factor test, and noting that Virginia recognized the distinction between a corporation as a legal entity and the shareholders). In *Madonia*, the court held that Dr. Madonia, sole shareholder in his incorporated medical practice, qualified as an "employee" under ERISA because the employee welfare benefit plan benefited employees in his office other than his spouse. *Id.* Therefore, Dr. Madonia was held subject to ERISA as an "employee" and his business the "employer." *Id.* at 449-50. The court also went on to opine that since self-employed persons decide to incorporate and employ other people, no reason exists to disregard the corporate form. *Id.* at 450. There are recognized benefits that come along with the corporate form, such as limited liability and

Applying these principles to Dr. Yates's situation, for purposes of ERISA the law should recognize Raymond B. Yates, M.D., P.C. distinctly from Dr. Raymond B. Yates. After all, the tax credits were enjoyed by the practice, not Yates himself. Under Sixth Circuit precedent, if he invited one other person to become a shareholder in his business, it would change his pension status to that of an "employee."[116] This approach, then, effectively removes the reasons for incorporating as a sole shareholder. Nowhere in corporate law does it suggest that sole shareholders should be treated differently than businesses owned by more than one shareholder. Therefore, to ensure that all businesses and business owners are awarded equal treatment, courts must consistently treat the two entities as legally separate. This approach would promote efficiency within our judicial system, reduce confusion as to the benefits of incorporating, and encourage more business owners to incorporate. This distinction between company and owner as "employer" and "employee," respectively, would also support one of ERISA's primary purposes—the uniformity of laws for employee benefits.

B. ERISA Policies Promote Protection of Retirement Plan Savings

Admittedly, ERISA came into being in response to several employers taking advantage of retirement plans for their own individual purposes.[117] Congress passed ERISA primarily to ensure that the retirement benefits promised by employers to their employees would be there for them upon retirement.[118] However, ERISA currently addresses a broader range of issues in order to protect retirement benefits. For instance, it not only protects employees from their employers through various disclosure requirements,[119] but it also insulates these benefits from the reach of creditors in case of bankruptcy, so that the retirement money remains for the benefit of the participants.[120] Exposing the

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tax deductions. *Id.* If an employee sued Dr. Madonia, the corporate form would insulate him. *Id.* Since the corporation and the owner are treated separately in other areas of the law, they should be treated separately here. *Id.*

116. Santino v. Provident Life & Accident Ins. Co., 276 F.3d 772, 776 (6th Cir. 2001). Santino was one of three physician-shareholders in Wayne-Macomb Urology Associates P.C. *Id.* at 774. The court found that Sixth Circuit precedent limits sole shareholders as "employers." *Id.* at 776. Therefore, because the business had three shareholders, Santino qualified as an "employee" for ERISA purposes and had standing to sue under ERISA. *Id.*

117. *Kwatcher*, 879 F.2d at 959.

118. *Patterson*, 504 U.S. at 764-65.

119. Litman, *supra* note 27, at 639. ERISA requires many disclosure and reporting requirements, "minimum participation, vesting, and funding standards, and fiduciary obligations on plan trustees and administrators." *Id.*

120. *Id.* at 637-38. Congress attempted to preserve retirement benefits by instituting the very statutory clause under issue, which prevents voluntary or involuntary assignment of benefits. *Id.* at 639.

retirement assets to creditors subverts Congress's intent to encourage both owners and non-owners alike to save for retirement. Plenty of measures exist that achieve the protection of these concerns—both the monitoring of the employers and separating retirement funds from the eligible bankruptcy money pot. The outcome of the controversy in regards to whether a sole owner is an "employer" or an "employee" under ERISA will not increase the chances of owner misuse. However, the outcome will affect other ERISA policies, such as separating corporate entities from owners,[121] promoting companies to help provide for employee benefits,[122] encouraging all participants to save more for retirement,[123] and smoothing the legal playing field, thus forcing all employees, owners and non-owners alike, to use the federal system.[124]

The distinction between the owner and the corporation has far-reaching effects on several other areas of the law, bankruptcy being only one example.[125] Bankruptcy law is designed to give debtors a new beginning.[126] While it's true that the bankruptcy process in itself tries to maximize payments to creditors, an even more important policy consideration is the protection of the future income streams of retirees.[127]

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121. *Scarborough*, 870 F.2d at 1084.

122. *Madonia*, 11 F.3d at 450.

123. Litman, *supra* note 27, at 640.

124. *Agrawal*, 205 F.3d at 303. In this Sixth Circuit's opinion, the court agreed that its rationale, although handcuffed by precedent, did not logically coincide with ERISA principles. *Id.* The court noted specifically that by forcing a self-employed person to be governed by state law and everyone else by federal law, the law affords different people different remedies. *Id.*

125. Litman, *supra* note 27, at 638. Litman addressed the issue by recognizing that the classification of an individual's employment status under ERISA will ultimately affect determinations under the Internal Revenue Code and the Bankruptcy Code. *Id.* As discussed previously regarding the Sidley Austin anti-discrimination lawsuit, *supra* note 77, since other massive legislative enactments designed to protect employees include similar, if not identical, definitions of "employer" and "employee," this decision will ultimately trickle into those cases' mainstream analyses.

126. See Dilley, *supra* note 30, at 370 (stating that the purpose of bankruptcy is to maximize the repayment to creditors while giving debtors a fresh start).

127. *Patterson*, 504 U.S. at 764-65. The Court focused more upon the uniformity of treatment to individuals through different court systems. *Id.* at 765. Other concerns of the Court consisted of equal treatment of pension benefits no matter the beneficiary's bankruptcy status. *Id.* at 764. It stated that the Court previously refused to recognize exceptions to the anti-alienation provision of ERISA outside the bankruptcy realm. *Id.* By minimizing exceptions within the bankruptcy area, the Court effectively minimizes the chance that creditors would take advantage of bankruptcy laws to gain access to otherwise inaccessible funds. *Id.*

C. Statutory Changes Will Clear the Way to a More Certain Future for Business Owners and the Courts

Simply finding in favor of Yates or Hendon, I fear, may not solve future problems. It seems that much confusion exists about the definition of "employee" and "employer" in many different contexts. For example, the ADA and ERISA use the same definition of "employee"—"an individual employed by an employer."[128] Therefore, it seems appropriate for Congress to redefine these terms so that the courts may better interpret Congress' intent.[129] For instance, it would not be difficult for Congress to provide a list of exceptions as to who does not fit within the definition of "employee." Adding a "laundry list" of examples to the statutory definition would prevent a lot of future litigation. There is a limited amount of agency-type relationships in existence.[130] Congress could simply identify which organizations it desires to protect under ERISA. As business relationships change, Congress could easily adjust the appropriate statutory provisions to reflect those changes.[131]

IV. CLOCKING OUT

ERISA, the Bankruptcy Code, the Internal Revenue Code, and state laws, when analyzed together, lead to a great deal of

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128. 42 U.S.C. § 12111(4); 29 U.S.C. § 1002(6). This verbiage also appears in 26 U.S.C. § 51(i)(2) (defining nonqualified employees for the amount of credit allowed under the Internal Revenue Code); *id.* § 1396(d)(2)(C)-(E) (defining which employees are not eligible for a qualified zone employment credit); 29 U.S.C. § 152 (3) (describing "employee" with the above language, but also specifically noting that a person working for a spouse or parent or an independent contractor does not qualify in terms of the National Labor Relations Act); *id.* § 203(e)(1) (defining "employee" the same way under the Fair Labor Standards Act, except also listing several express exceptions as to who does not qualify as an employee). *See also id.* § 402(f) (setting out definitions for the procedures and requirements for labor-management disclosure); *id.* § 630 (f) (defining employee within the Age Discrimination in Employment chapter); 42 U.S.C. § 2000e(f) (using that definition of employee for the purposes of promoting equal employment opportunities). *See generally* Sluis, *supra* note 77 (exemplifying the continuing need for more accurate definitions as evidenced by Sidley Austin's argument that its partners, as owners, are not covered by the age discrimination statutes).

129. *See generally* Litman, *supra* note 27, at 697-700 (remarking on proposed legislative reform and summarizing the difficulties when trying to provide symmetry between ERISA, the Bankruptcy Code, and the Internal Revenue Code).

130. *See id.* at 685–86 (recognizing that Congress left a gap "as to whether a plan that only covers a sole owner or partners and spouses was included or excluded" from ERISA protections).

131. *See generally* Dilley, *supra* note 30, at 405-06.

confusion, and perhaps a lot of headaches.[132] Through all of this confusion, it all comes down to one question: "Who's the boss?" Only one interpretation results in an equitable relationship between saving for retirement and preserving corporate policy, that is, to infer that the employer is the company. After analyzing the applicable statutory codes, past precedent, and agency and corporate principles, it is the only connotation that balances all of the laws and policies. The alternative interpretation, that the owner is an employee, obliterates the many goals and policies discussed in this article. In lieu of statutory changes, the answer provided by the Supreme Court will suffice: The corporation is the boss, not Yates. However, that answer takes us up only one rung on the ladder to a clear answer of how people in ownership-type positions are to be treated under employee-protection laws.

132. See *id.* at 370 (entitling one of the sections of her Article "A Statutory Maze: Bankruptcy, Tax, and Pension Law Intertwined"). "The interplay among these four sets of statutes, and the varying interpretations of the relationship, are a principal source of confusion about how retirement accounts are and ought to be protected against creditors' claims. *Id.* *See also* *Kwatcher*, 879 F.2d at 958-59 (making many references, both in a literary and legal sense, to the confusing nature of this area of the law).