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# Pension Funds in Bankruptcy: The Spendthrift Trust "Safe Harbor"

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# PENSION FUNDS IN BANKRUPTCY: THE SPENDTHRIFT TRUST "SAFE HARBOR"*


I. INTRODUCTION . . . . . . . . . . 67

II. DEBTORS' RELIEF THROUGH THE BANKRUPTCY LAWS . . . . . . . . . . 70

III. BANKRUPTCY ACT OF 1898: PROPERTY EXEMPT OR EXCLUDED FROM THE BANKRUPTCY ESTATE . . . . . . . . . . 71
- A. *Property Related to Employment: Sufficiently-Rooted Test* . . . . . . . . . . 72
- B. *Pension Plans: Wage Substitute Test* . . . . . . . . . . 74

IV. BANKRUPTCY REFORM ACT OF 1978: PROPERTY EXEMPT OR EXCLUDED FROM THE BANKRUPTCY ESTATE . . . . . . . . . . 76

V. THE SPENDTHRIFT TRUST "SAFE HARBOR" . . . . . . 77

VI. PENSION PLANS AS SPENDTHRIFT TRUSTS . . . . . . . 78

VII. CASE LAW SURVEY: HOW MUCH DOMINION AND CONTROL WILL DESTROY THE SPENDTHRIFT TRUST "SAFE HARBOR" . . . . . . . . . . 80
- A. *Self-Settled Plans* . . . . . . . . . . 81
- B. *Employer-Created Plans and the Distribution Upon Termination Factor* . . . . . . . . . . 84

VIII. A STATUTORY SOLUTION TO THE BANKRUPTCY/ERISA POLICY CONUNDRUM . . . . . . . . . . 88
- A. *ERISA Preemption* . . . . . . . . . . 91
- B. *Spendthrift Trust Roll-Over* . . . . . . . . . . 93

IX. CONCLUSION . . . . . . . . . . 99


## I. INTRODUCTION

The dual objectives of bankruptcy are first, the financial rehabilitation of debtors and second, the satisfaction, to the greatest extent

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*Dedicated to my husband, Cliff, and daughter, Danielle. Special thanks to Professor Jeffrey Davis; Willis W. Williams, III; my advisor, Kevin O'Brien; and Diane Tomlinson.

Florida Law Review, Vol. 43, Iss. 1 [1991], Art. 3


possible, of creditors' claims.[1] The first objective promotes the "fresh start" notion, by holding some of debtor's assets outside the reach of creditors thereby preventing the bankrupt from becoming a ward of the state.[2] Leaving the debtor with no post-bankruptcy assets would make the promise of a fresh start merely illusory.[3] In contrast, the second objective implies that, in satisfying their claims, creditors should have the benefit of everything the debtor owns upon entering bankruptcy.[4]

A recent debate focuses on the juxtaposition of these dual bankruptcy objectives and the policy encompassed by the Employee Retirement Income Security Act of 1974 (ERISA).[5] ERISA plans, and pension plans similar to ERISA plans, encourage and protect accumulated savings for retirement years.[6] Whether such pension assets are subject to creditors' attachment in bankruptcy is the topic of continued legal debate.[7] The interfacing of the policies behind the two statutory

1. *See* Burlingham v. Crouse, 228 U.S. 459, 473 (1913) ("[i]t is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched").

2. *Id.*

3. *Id.*

4. *See* Segal v. Rochelle, 382 U.S. 375 (1966), in which the United States Supreme Court, recognizing the conflicting policies, stated: "The main thrust of § 70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." *Id.* at 379.

5. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988) [hereinafter ERISA]).

6. *See* 29 U.S.C. § 1001-1001(b) (1988). These sections of ERISA state congressional findings and declaration of policy. One of the principal purposes of ERISA is to insure that employees and their beneficiaries will not be deprived of anticipated retirement benefits. *Id.* ERISA was enacted to guarantee, through federal regulation regarding establishing, operating, and administering multi-employer and single-employer pension plans, that workers who are promised defined pension benefits upon retirement and who fulfill the required conditions actually receive the benefits. *Id.*

7. *Compare In re* Graham, 726 F.2d 1268 (8th Cir. 1984) (debtor's interest under ERISA plan is not excluded as property of the estate pursuant to § 541(c)(2)); *In re* Goff, 706 F.2d 574 (5th Cir. 1983) (ERISA-qualified pension plans are included as property in the estate since the plans are not spendthrift trusts under state law); *and* Regan v. Ross, 691 F.2d 81 (2d Cir. 1982) (pension benefits from state employees' retirement system may be used to fund Chapter 13 plan); *with* Lucas v. Holiday Corp., 924 F.2d 597 (6th Cir.), *cert. denied sub nom.* Forbes v. Holiday Corp., 111 S. Ct. 2275 (1991); *In re* McLean, 762 F.2d 1204 (4th Cir. 1985); *In re* Pruitt, 30 Bankr. 330 (Bankr. Colo. 1983); *and In re* Threewitt, 24 Bankr. 927 (Bankr. Kan. 1982) (these courts hold that debtors' interests in funds held in ERISA-type plans are excluded from estate property); *also, compare In re* Johnson, 724 F.2d 1138 (5th Cir. 1984) (anti-alienation provisions in debtor's annuity do not exclude the annuity from property of the estate under § 541(c)(2)) *with* Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) (the anti-alienation provision of ERISA § 1056(d) is a bar to assignment or alienation by creditors).

schemes of ERISA and bankruptcy leaves creditors arguing for attachment and debtors arguing for protection.[8] Further complicating this tension between debtors and creditors are employers who, because of possible liability, worry about the outcome of this policy conundrum.[9]

The United States Supreme Court has addressed the issue of ERISA's preemptive effect on state laws that exempt ERISA plans from creditors' claims,[10] but, based on Florida's spendthrift trust law, the question of whether pension funds are part of the bankruptcy estate remains open in Florida.[11] Spendthrift trust law is significant to the issue of whether, in bankruptcy, pension assets are attached or protected, because of the statutory language of the Bankruptcy Reform Act of 1978 (Code).[12] The Code provides a broad, encompassing

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8. *Graham*, 726 F.2d at 1269.

9. Corporations and employers creating ERISA-qualified retirement plans for their employees are concerned that if these plans are included in bankruptcy estates subject to creditors' claims, several negative consequences will flow. One fear is that these plans could lose their favorable tax treatment under I.R.C. § 401(a)(13) and both employers and employees would be required to pay income tax on the plan assets. A second fear is that employers could face civil and criminal penalties for violation of federal pension law. *See, e.g.*, 29 U.S.C. §§ 1109, 1131, 1132(1) (1988). For a more detailed discussion of the feared unfavorable tax consequences, see also *In re* Balay, 113 Bankr. 429 (Bankr. N.D. Ill. 1990); Brief for Intervenor at 33-36, *In re* Rosenquist, 122 Bankr. 775 (Bankr. M.D. Fla. 1990) (No. 89-02287 BKC-6C7).

10. Mackey v. Lanier Collections Agency & Servs., 486 U.S. 825 (1988). The Supreme Court held that a Georgia statute exempting an "employee welfare benefit plan" from garnishment was preempted by ERISA. *Id.* at 840-41. Therefore, the exemption provided by the Georgia statute was unenforceable. *Id.* The Court said the Georgia statute was preempted by ERISA § 514(a) which provides: "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. . . ." *Id.*; 29 U.S.C. § 1144(a) (1988).

Florida Statutes § 222.21 exempts from creditors' claims "a retirement or profit-sharing plan that is qualified under § 401(a), § 403(a), § 403(b), § 408 or § 409 of the Internal Revenue Code of 1986, as amended." FLA. STAT. § 222.21(2)(a) (1989). On the authority of *Mackey* and Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983), which hold that ERISA preempts any state legislation that exempts from creditors' claims either ERISA plans or ERISA-qualified plans, Florida's statute is preempted by ERISA. The statute does not have to specify ERISA plans to be preempted; it is enough that the statute affect an ERISA-qualified plan. *See Shaw*, 463 U.S. at 96-97; *Mackey*, 486 U.S. at 829-30; *see also In re* Polombo, 106 Bankr. 724 (Bankr. M.D. Fla. 1989); *In re* Bryant, 106 Bankr. 727 (Bankr. M.D. Fla. 1989); *accord* Sommers Drugstores v. Corrigan Enters., 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, *cert. denied*, 479 U.S. 1089 (1987); *In re* Siegel, 105 Bankr. 556 (Bankr. D. Ariz. 1989); *In re* McLeod, 102 Bankr. 60 (Bankr. S.D. Miss. 1989); *In re* Komet, 93 Bankr. 498 (Bankr. W.D. Tex. 1988), *vacated in part*, 104 Bankr. 799 (Bankr. W.D. Tex. 1989).

11. *See* cases cited *supra* note 7.

12. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1979) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). The federal bankruptcy laws have gone through a series of changes. The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, was substantially revised

definition of property belonging to the bankruptcy estate.[13] One exception to the Code's expansive definition is property qualifying under applicable nonbankruptcy law as a spendthrift trust.[14] Therefore, pension assets characterized as a spendthrift trust under Florida law will be excluded from the bankruptcy estate.

This note will focus on the pension fund as a spendthrift trust issue and conclude with a recommendation for a statutory solution. First, however, in section I the note will trace the history of the bankruptcy and pension policies involved in this conflict. A brief introduction on the types of relief available to debtors through bankruptcy will be provided in section II. Sections III and IV will trace the evolution of the bankruptcy laws' treatment of property excluded or exempt from the estate, with a focus on early cases that dealt with employment-related property and pension plans. Section V will explain section 541(c)(2) of the Code which carves out the spendthrift trust "safe harbor," one of the Code's possible protections for pension assets in bankruptcy. Section VI will highlight various pension plan options. Section VII will present a survey of primarily Florida bankruptcy cases that focus on the issue of pension plans as spendthrift trusts. Finally, the note will suggest a statutory solution in the nature of a spendthrift trust rollover statute with a caveat about ERISA preemption.

## II. Debtors' Relief Through the Bankruptcy Laws

The bankruptcy laws protect individuals from overwhelming debt through either a liquidation or reorganization plan.[15] Chapter 7, the liquidation plan[16] of the Code, requires the debtor to turn over all nonexempt assets for immediate liquidation in order to pay, to the fullest extent possible, creditors' claims.[17] In turn, the debtor is re-

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by the Chandler Act of 1938, ch. 575, 52 Stat. 840, and then repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (effective Oct. 1, 1979). The 1978 Act was amended by: the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 99-554, § 301(f), 100 Stat. 3124 (1986); and Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, § 1, 102 Stat. 610 (1988).

Following common usage, this note will refer to the Bankruptcy Act of 1898 and the Chandler Act of 1938 as the Bankruptcy Act, and to the Bankruptcy Reform Act of 1978 and subsequent amendments as the "Code."

13. 11 U.S.C. § 541 (1988).

14. *Id.* § 541(c)(2). This section has been narrowly construed to refer to spendthrift trusts under applicable state law. *See In re* Graham, 726 F.2d 1268 (8th Cir. 1984); *see also infra* notes 78-81 & 94-101 and accompanying text.

15. *See* 11 U.S.C. §§ 701-766, 1101-1146 (1988).

16. *Id.* §§ 701-766.

17. *Id.*

lieved from any further personal liability for pre-bankruptcy debts.[18] In reorganization, debtors seek protection under Chapter 11[19] or Chapter 13[20] and agree to a court supervised plan for the payment of some or all debts. The debtor dedicates a portion of future earnings to regular payments in accordance with the plan.[21] The issue of whether pension assets become property of the bankruptcy estate to be liquidated and distributed to creditors will be discussed in the context of Chapter 7 bankruptcies. The identification of pension assets as property of the estate is relevant in reorganization bankruptcies to the extent that these funds inflate the total amount of the bankruptcy estate. The parties to the bankruptcy consider the total amount of the estate in calculating disposable income available from future earnings to repay debts.[22]

## III. Bankruptcy Act of 1898: Property Exempt or Excluded from the Bankruptcy Estate

The Bankruptcy Act of 1898 (the Act) governed bankruptcy cases filed prior to October 1, 1979.[23] One of its primary objectives was to "protect debtors and their families from pauperism and to facilitate [their] rehabilitation."[24] One way to meet this objective through the statutory framework was to exempt certain property of a debtor from attachment by creditors.[25]

Statutes guided the task of identifying exempt property.[26] Initially, exempt property comes into the estate.[27] Debtors, however, can claim their statutorily-created exemptions, which protect the property from

18. *Id.* § 727.

19. *Id.* §§ 1101-1146.

20. *Id.* §§ 1301-1330.

21. *Id.* §§ 1101-1146, 1301-1330.

22. *Id.*

23. October 1, 1979, was the effective date of the Code. For discussion of the evolution of the Act, see *supra* note 12.

24. Plumb, *The Recommendations of the Commission on the Bankruptcy Laws — Exempt and Immune Property*, 61 VA. L. REV. 1, 4 (1975).

25. Under the Bankruptcy Act debtors were allowed only those exemptions permitted by the debtor's state of domicile. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (effective Oct. 1, 1979). Now, debtors can choose between a federal exemption scheme, or the exemptions of the state of domicile. 11 U.S.C. § 522(b)(1), (d) (1988). This choice is available to debtors unless the state in which the debtor resides has enacted "opt out" legislation. *Id.* § 522(b)(2).

26. Bankruptcy Act of 1898, ch. 541, § 24, 30 Stat. 544, 553, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401, 92 Stat. 2549, 2682 (effective Oct. 1, 1979).

27. 11 U.S.C. §§ 522(d), 541 (1988).

creditors' claims, up to the value of the exemption.[28] Another approach the Act used to meet this objective was to exclude certain property from the bankruptcy estate altogether.[29] As a result, the subject of much litigation under the Act was whether property should be included, excluded or exempted from the bankruptcy estate.[30]

Under the Act, the provisions for statutory exemptions governed questions of whether certain property was exempt from the estate.[31] Courts, however, determined questions of excluded property based on judicial interpretation of the purposes of the bankruptcy laws.[32] Because the bankruptcy laws reflect the conflict between the social policies of making the creditor whole and providing the debtor a "fresh start," judicial decisions focused on this tension.[33] The courts often weighed the value of a piece of property to pay creditors' claims against the debtor's reliance on the property to survive post-bankruptcy without public assistance.[34] While there were no "bright line" tests, the courts determined excludability based upon whether the asset in question was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the [debtor's] ability to make an unencumbered fresh start that it should be regarded as 'property' under [Bankruptcy Act section] 70a(5)."[35]

### A. *Property Related to Employment: Sufficiently-Rooted Test*

The United States Supreme Court has applied the "sufficiently rooted" test to various types of property arising from employment activities. In *Segal v. Rochelle*,[36] the Court determined that the debtor's tax refund from past business losses was included in the bankruptcy estate even though debtor's entitlement to the funds did not accrue until after the bankruptcy was filed.[37] The refund, according

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28. *Id.* § 522(d).

29. Bankruptcy Act of 1898, ch. 541, § 70, 30 Stat. 544, 565, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95 598, § 401, 92 Stat. 2549, 2682 (effective Oct. 1, 1979).

30. *See, e.g.*, Kokoszka v. Belford, 417 U.S. 642 (1974); Lines v. Frederick, 400 U.S. 18 (1970); Segal v. Rochelle, 382 U.S. 375 (1966).

31. Bankruptcy Act of 1898, ch. 541, § 24, 30 Stat. 544, 553, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95 598, § 401, 92 Stat. 2549, 2682 (effective Oct. 1, 1979).

32. *See* Lee, *Leading Case Commentary:* Lines v. Frederick, 45 AM. BANKR. L.J. 115 (1972).

33. *See id.*

34. *See* Segal v. Rochelle, 382 U.S. 375 (1966).

35. *Id.* at 380.

36. 382 U.S. 375 (1966).

37. *Id.* at 380. The property at issue in *Segal* was a tax refund from loss "carry backs." *Id.* The tax laws permit business losses to be "carried back" to prior years that were profitable.

to the Court, was sufficiently rooted in the past to be considered more properly as property of the estate, rather than as an asset needed for a fresh start.[38] Two factors guided the *Segal* decision. First, the tax refund resulted from activities of the debtor's pre-bankruptcy past.[39] Second, the Court determined that the debtor's fresh start was not dependent upon the refund.[40]

In comparison, in *Lines v. Frederick*,[41] the United States Supreme Court came to the opposite conclusion by ruling that accrued vacation pay was excluded property.[42] Holding that the vacation pay was part of the debtor's fresh start, the Court analogized future vacation pay to a wage substitute necessary to the debtor's future financial well-being.[43] The fact that wages are typically given special protection by the courts influenced the *Lines* decision.[44]

A later decision, however, emphasized that not all property having its origin in wages constitutes a wage substitute.[45] A wage substitute is employment-linked income saved for the debtor's future support.[46] In *Kokoszka v. Belford*,[47] the Court held that an income tax refund is property of the estate.[48] The Court distinguished between funds related to wages that were merely saved and wages set aside specifically to take the place of wages in the future.[49] According to the *Belford* court, an item rooted in wages would be excluded from property of the bankruptcy estate only if it was "designed to function as a wage substitute at some *future* period and, during that *future* period, [was intended] to 'support the basic requirements of . . . [a debtor's life].'"[50]

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I.R.C. § 172(a), (b) (1991) (unless otherwise indicated, all references to the Internal Revenue Code are to the Internal Revenue Code of 1986, as amended and in effect for 1991). The "carry backs" can be used to reduce the profits of the earlier profitable years for tax purposes. *See generally* E. WARREN & J. WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 180 (1986) (discussing tax loss carry backs).

38. *Segal*, 382 U.S. at 379-80.
39. *Id.*
40. *Id.*
41. 400 U.S. 18 (1970).
42. *Id.* at 20.
43. *Id.*
44. *Id.*
45. Kokoszka v. Belford, 417 U.S. 642 (1974).
46. *Id.* at 647.
47. 417 U.S. 642 (1974).
48. *Id.* at 648.
49. *Id.*
50. *Id.* (quoting *Lines*, 400 U.S. at 20); *see also Segal*, 382 U.S. at 379 ("future wages of the bankrupt do not constitute 'property' at the time of bankruptcy").

### B. *Pension Plans: Wage Substitute Test*

A theme throughout these early cases is the courts' struggle to balance the tension between excluding property for the benefit of the debtor's fresh start and including property for the satisfaction of creditors' claims.[51] The courts developed a two-prong test to aid in the determination of whether property should be excluded from the estate. First, as the *Segal* Court hypothesized, courts would determine whether the property was sufficiently rooted in the debtor's pre-bankruptcy past or whether the property was necessary to the debtor's fresh start.[52] Secondly, if the property was necessary to the debtor's fresh start, courts would determine whether the property constituted a wage substitute.[53] This would be accomplished by applying a "property akin to wages" test as set forth in *Lines* and *Belford*. The second test differentiated property rooted in wages but having no specific designated future use from other wage-related property specifically designated for the debtor's future support and maintenance.[54] The latter property constituted a wage substitute.[55] Courts excluded wage substitutes earmarked for the debtor's future support from the estate.[56]

Courts have used the wage substitute line of reasoning to determine whether pension assets belonged to the bankruptcy estate.[57] In *Turpin v. Wente*,[58] for instance, the United States Court of Appeals for the Fifth Circuit found that pension benefits were excluded from the bankruptcy estate.[59] The court reasoned that pension assets constitute a wage substitute or future wages necessary to provide the debtor with the basic requirements of life.[60]

Other courts, however, have been less willing to accept the wage substitute argument in the case of Keogh plans[61] and individual retire-

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51. *See supra* notes 1 & 4 and accompanying text.
52. *See Segal*, 382 U.S. at 380.
53. *Lines*, 400 U.S. at 20.
54. *See id.*; *Belford*, 417 U.S. at 658.
55. *See supra* note 50 and accompanying text.
56. *See supra* notes 41-44 & 50 and accompanying text.
57. *See* Turpin v. Wente, 644 F.2d 472 (5th Cir. 1981); *In re* Nunnally, 506 F.2d 1024 (5th Cir. 1975) (pension benefits were not included in the bankruptcy estate in these cases because they were held to be wage substitutes).
58. 644 F.2d 472 (5th Cir. 1981). Although decided subsequent to the effective date of the new Code, the old Bankruptcy Act was controlling in this case. *Id.*
59. *Id.* at 475.
60. *Id.*
61. A Keogh plan is a retirement plan maintained by a sole proprietorship or partnership, but is otherwise similar to a corporate pension or profit sharing plan. Keogh plans are authorized

ment accounts (IRAs).[62] The distinction in cases dealing with IRA and Keogh plans turned on the ability of the debtor to have access and control of the plan assets after debts had been discharged in bankruptcy, but before the debtor's retirement.[63] The possibility that the debtor could access and control the assets before retirement provided less certainty to the courts that the pension funds would be used at a time when a wage substitute was necessary.[64] Thus, because the debtor maintained control, the property lost its wage substitute characterization and became property of the estate due to the property being "sufficiently rooted in pre-bankruptcy."[65]

Control by the debtor over pension assets influenced court decisions regarding excludability from the estate.[66] Courts have attempted to set standards for distinguishing assets which were excluded from the bankruptcy estate because they were vital to the debtor's fresh start from assets which were included in the estate because of their accessibility to the debtor before retirement. Courts have based some of these standards on whether payments were to be made "during a time when the pensioner may well have no or few other sources of income,"[67] and whether the debtor had the right to withdraw money from a pension fund prior to retirement.[68]

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under ERISA and are tax exempt under I.R.C. §§ 401, 501. Pre-retirement withdrawals are subject to a penalty tax. I.R.C. § 72(m)(5).

62. An individual retirement account is similar to a Keogh plan but can be maintained by any individual whether employed by others or self-employed. Contributions to an IRA are tax deductible. I.R.C. § 408.

63. *See In re* Mace, 4 Bankr. Ct. Dec. (CRR) 94 (Bankr. D. Or. 1978). After reviewing cases involving tax loss carrybacks, income tax withholding, vacation pay plans and government retirement plans, the *Mace* court decided to include the debtor's IRA as property of the estate:

> While the ostensible purpose of establishing an IRA is to put funds away for future use when the depositor is retired and in need of a substitute for wages, this Court is convinced that to treat an IRA as a substitute for future wages would be incorrect. In each of the foregoing cases [analyzed by the court] where the asset was determined to be a substitute for future wages, the bankrupt had only limited control over the fund so that there was a substantial certainty that the funds would be used at a time when a wage substitute was necessary.

*Id.* at 96-97.

Two years later the same bankruptcy court reached a similar conclusion in a case which involved a Keogh plan. *In re* Mendenhall, 4 Bankr. 127 (Bankr. D. Or. 1980). The *Mendenhall* court based its decision on the ability to withdraw funds. "The Keogh plan in the case at bar provides for withdrawal of contributed funds at any time. . . ." *Id.* at 129.

64. *Mendenhall,* 4 Bankr. at 129.

65. *See* Lines v. Frederick, 400 U.S. 18 (1970); *Segal,* 382 U.S. at 375.

66. *See supra* note 63.

67. *In re* Nunnally, 506 F.2d 1024, 1026 (5th Cir. 1975).

68. *See In re* Mendenhall, 4 Bankr. 127 (Bankr. D. Or. 1980); *In re* Mace, 4 Bankr. Ct. Dec. (CRR) 94 (Bankr. D. Or. 1978).

Florida Law Review, Vol. 43, Iss. 1 [1991], Art. 3


## IV. BANKRUPTCY REFORM ACT OF 1978: PROPERTY EXEMPT OR EXCLUDED FROM THE BANKRUPTCY ESTATE

The Code was enacted in 1978[69] and shifted the determination of whether assets are property belonging to the estate from a question of excludability, to a question of statutory exemption.[70] The Code broadly defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case."[71] This expansive definition allows most property to be included in the estate and furthers the policy of enlarging the estate to satisfy creditors' claims.[72] The counter-balancing policy of providing the debtor a fresh start is achieved through statutory exemptions created by the Code or state law.[73]

Entitled to exempt certain property from the bankruptcy estate, the debtor has the option under the Code to assert the exemptions permitted under the laws of the state of domicile.[74] Alternatively, the debtor may claim the schedule of exemptions set forth in the Code.[75] The Code empowers states to enact legislation precluding resident debtors from choosing the Code's statutorily-created exemptions.[76] Thus, the second alternative is not available to debtors who reside in states that have enacted legislation which elects state exemptions to the exclusion of the Code exemptions.[77]

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69. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1974) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). For discussion of the evolution of bankruptcy law, see *supra* note 12.

70. Plumb, *supra* note 24, at 57.

71. 11 U.S.C. § 541(a)(1) (1988).

72. *See supra* note 4 and accompanying text.

73. *See* Plumb, *supra* note 24, at 57; 11 U.S.C. § 522(b) (1988).

74. 11 U.S.C. § 522 (1988).

75. *Id.* This section, entitled "Exemptions," reads in part:

> (b) [A]n individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection . . . .
>
> (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 section, of State or local law that is applicable . . . .

*Id.* § 522(b).

76. *Id.* For states that have opted out of the Code's § 522(d) exemptions, the applicable Code provision is § 522(b)(2)(A). *Id.*

77. *Id.*

For states that have opted out of the Code's schedule of exemptions, the applicable laws of exemptions are "other federal law" and state law.[78] Florida has enacted legislation "opting out" of the Code's schedule of exemptions.[79] Therefore, an examination of nonbankruptcy law and Florida law relating to exemptions is essential to the issue of creditors' ability to attach pension assets in Florida. Crucial to the nonbankruptcy law examination is spendthrift trust law.[80] A Code provision creates the nexus between bankruptcy, spendthrift trust law, and the issue of whether pension assets belong to the estate.[81]

## V. THE SPENDTHRIFT TRUST "SAFE HARBOR"[82]

The Code provides one exception to its broad definition of property belonging to the estate.[83] This exception excludes from the bankruptcy estate an interest of the debtor in property that contains "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law."[84] Courts, after examining the legislative history of this provision, have concluded that Congress intended by its reference to "applicable nonbankruptcy law" to exclude from the estate only those "spendthrift trusts" traditionally beyond the reach of creditors under state trust law.[85] There-

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78. 11 U.S.C. § 522(b)(2)(A) (1988). The reference to "under Federal law other than subsection (d)" means other-than bankruptcy (nonbankruptcy) federal law. *Id. See supra* note 75. Debtors living in states that have opted out under § 522(b) cannot take advantage of § 522(d) exemptions. *In re* Goff, 706 F.2d 574, 579 (5th Cir. 1983).

79. FLA. STAT. § 222.20 (1989).

80. *See* 11 U.S.C. § 541(c)(2) (1988).

81. *See supra* note 14.

82. The author refers to the spendthrift trust "safe harbor" throughout this note. This is a reference to Code § 541(c)(2), the spendthrift trust restriction. *See infra* notes 83 & 85.

83. 11 U.S.C. § 541 (1988). This section, entitled "Property of the estate," reads in part:

> (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate . . . .
>
> (2) 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.

*Id.* § 541(c)(1), (2).

84. *Id.* § 541(c)(2).

85. *See In re* Goff, 706 F.2d 574 (5th Cir. 1983). Section 541 of the Code which defines property was intended to have a sweeping scope. *Id.* at 578. The automatic inclusion of property was intended to remedy much of the old Act's perceived deficiencies: "[The Act was] a complicated melange of references to State law, and [did] little to further the bankruptcy policy of distribution of the debtor's property to satisfaction of his debts." *Id.* (quoting H.R. REP. NO. 595, 95th Cong., 2d Sess. 175 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6136).

fore, property characterized as a spendthrift trust[86] under applicable state law is excluded from the bankruptcy estate under Code section 541(c)(2).[87] This exclusion provision applies independent of the statutory exemptions and thus, applies in states that have opted out of the Code-created exemptions.[88]

The question of whether a pension fund qualifies as a spendthrift trust under state law is central to two issues: (1) Code excludability, and (2) state exemptions. In theory, if a pension fund qualifies as a spendthrift trust under Florida law, it is excluded from the bankruptcy estate by virtue of the Code's exception to its broad definition of property belonging to the estate.[89] In addition, pension assets qualifying as a spendthrift trust would be exempt, if spendthrift trusts are entitled to an exemption under applicable state exemption claims.[90]

## VI. PENSION FUNDS AS SPENDTHRIFT TRUSTS?

There are several different types of pension or retirement funds; these include profit sharing plans, savings plans, and deferred income plans.[91] These plans have differing characteristics as to who makes

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*See* S. REP. NO. 989, 95th Cong., 2d Sess. 82 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5868.

The issue in *Goff* was whether the anti-alienation provision in an ERISA-qualified plan was the type of restraint required under Code § 541(c)(2) to exclude the plan from the bankruptcy estate. *Goff*, 706 F.2d at 586. The *Goff* court concluded that the provision was merely a condition of obtaining qualified tax status. *Id.* at 585. This court distinguished an ERISA anti-assignment and alienation provision from the absolute prohibitions contained in public funded or created pension and welfare systems. *Id.* at 585. According to the court, the ERISA anti-alienation provision encourages and favors qualified plans — it does not prohibit alienation or assignment of pension funds. *Id.* In essence, ERISA's anti-alienation provision is directory and not mandatory and therefore, does not rise to the level of "applicable nonbankruptcy law" that would exclude the plan from property of the estate. *Id. Goff* is frequently cited for the proposition that § 541 is a broad, sweeping definition of property and § 541(c)(2) is a narrowly defined exclusion for property qualifying as a spendthrift trust under applicable state law. *See* Lichstral v. Bankers Trust, 750 F.2d 1488 (11th Cir. 1985); *see also* cases cited *infra* note 108. *But see* Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990); cases cited *supra* note 7.

86. For discussion of qualification as spendthrift trust under Florida law, see *infra* notes 145-52 and accompanying text.

87. 11 U.S.C. § 541(c)(2) (1988).

88. *Id.* § 522(d).

89. *See supra* note 85.

90. This is only theory, because the ERISA preemption doctrine has superseded most state exemption statutes that either directly refer to ERISA plans or indirectly refer to ERISA plans by describing an ERISA-qualified plan. *See supra* note 10.

91. *See generally* A. COLLINS, FEDERAL INCOME TAXATION OF EMPLOYEE BENEFITS § 5.02 (1978) (describing pension plan characteristics); Sherman, *Spendthrift Trusts and Employee Pensions: The Problem of Creditors' Rights*, 55 IND. L.J. 247 (1980) (discussing the impact of ERISA spendthrift trust provisions and I.R.C. § 401 on pension plans).

contributions to the plan, who assumes the risk of investment loss, and who controls the conditions for payment under the plan.[92] Despite these differences, however, many pension plans are funded through a trust.[93] A trust permits the legal title and the beneficial title to exist in separate parties or entities.[94] Typically, the employer retains legal title and control over the investment, administration and distribution of the plan assets. The employee maintains beneficial title and will receive the assets according to the plan's provisions.[95]

The beneficial interest in a trust is considered a property right; therefore, the beneficiary's creditors can attach that interest unless prohibited by direction of the settlor or by statute.[96] Concerned that creditors might appropriate the funds designated for a participant's retirement, pension trusts often include spendthrift clauses.[97] A spendthrift clause is a provision prohibiting assignment and alienation of a beneficial interest.[98]

Congress responded to the problem of ensuring that accrued pension benefits are available to a participant at retirement through ERISA legislation.[99] ERISA requires that pension plans contain spendthrift clauses providing that benefits under the plan cannot be

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92. I.R.C. § 401 sets forth requirements for tax-qualified pension, profit-sharing, and stock bonus plans. I.R.C. § 412 describes minimum amounts that can be contributed annually by employees and employers to corporate or Keogh pension and profit sharing plans, and I.R.C. § 415 sets maximum amounts.

93. I.R.C. § 501 exempts pension trusts that meet the requirements of I.R.C. § 401 from taxation. I.R.C. § 501(a), (c)(18). Only contributions to trusts qualifying under I.R.C. §§ 401 and 501 are deductible under I.R.C. §§ 219, 404(a)(1)(A). To qualify for exemption, each pension plan shall provide that benefits provided under the plan may not be assigned or alienated. *Id.*

94. G.G. BOGERT & G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 71 (5th ed. 1973).

95. Sherman, *supra* note 91, at 247.

96. 2 A. SCOTT, THE LAW OF TRUSTS 1131 (3d ed. 1967).

97. *See* Sherman, *supra* note 91, at 247-50.

98. *See* A. SCOTT, *supra* note 96, at 1131.

> The term [spendthrift] is not altogether felicitous, since it is quite immaterial whether or not the beneficiary is in fact a spendthrift. The term does, however, connote the general idea that the purpose of the settlor in creating such a trust is to protect the beneficiary against his own folly or inefficiency or misfortune. It is useful, at any rate, as a short phrase indicating that the interest of the beneficiary is subject to a restraint on alienation, whether the restraint is proposed by the terms of the trust or by statute.

*Id.*

99. 29 U.S.C. § 1056(d) (1988). This section, entitled "Assignment or alienation of plan benefits," reads in part: "(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *Id.* § 1056(d)(1).

assigned or alienated.[100] Therefore, an ERISA qualified pension plan funded through a trust must contain a spendthrift provision.[101]

A pension plan trust with a spendthrift clause, however, is not synonymous with a spendthrift trust under state law.[102] As discussed above, the spendthrift trust characterization is germane to whether pension assets are safe from the reach of creditors in bankruptcy,[103] because the Code provides a narrow exclusion for property recognized as a spendthrift trust under applicable state law.[104] The Code, however, expressly provides that property belongs to the estate "[n]otwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law . . . that restricts or conditions transfer of [the debtor's] interest."[105] Therefore, the mere existence of a spendthrift clause does not protect property from the reach of creditors in bankruptcy.[106] The spendthrift clause must qualify the trust as a spendthrift trust under state law before the pension assets will be excluded from the bankruptcy estate.[107]

## VII. Case Law Survey: How Much Dominion and Control Will Destroy the Spendthrift Trust "Safe Harbor"

A survey of recent Florida case law demonstrates that the determination of whether a pension fund qualifies as a spendthrift trust focuses on the amount of "dominion and control" the debtor has over the assets prior to retirement.[108] These cases examine various types of pension plans, from self-settled IRAs to corporate retirement plans, in the context of bankruptcy. Differing relationships among the em-

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100. *Id.*

101. *Id.*

102. *In re* Goff, 706 F.2d 574, 585-86 (5th Cir. 1983). Section 541(c)(2) is narrowly construed and does not cover ERISA anti-alienation clauses. Therefore, pension funds with ERISA anti-alienation clauses are not excluded from the bankruptcy estate. *But see* Lucas v. Holiday Corp. 924 F.2d 597, 603 (6th Cir.), *cert. denied sub nom.*, Forbes v. Holiday Corp., 111 S. Ct. 2275 (1991) (pension funds containing ERISA anti-alienation clauses are excluded from the bankruptcy estate under § 541(c)(2)).

103. *Id.*

104. *Id.*; *see also supra* note 85.

105. 11 U.S.C. § 541(c)(1) (1988).

106. *See* cases cited *supra* note 102.

107. *Id.*

108. *See In re* Bryant, 106 Bankr. 727 (Bankr. M.D. Fla. 1989); *In re* Colvin, 81 Bankr. 679 (Bankr. M.D. Fla. 1988); *In re* Monahan, 68 Bankr. 997 (Bankr. S.D. Fla. 1987); *In re* Forbes, 65 Bankr. 58 (Bankr. S.D. Fla. 1986); *In re* Lawson, 67 Bankr. 94 (Bankr. M.D. Fla. 1986); *In re* Nichols, 42 Bankr. 772 (Bankr. M.D. Fla. 1984) (cases discussed in text *infra*, pp. 83-88).

ployer, the employee, and the plan lead to different degrees of control over plan assets by the beneficiary. There is an inverse relationship between the amount of control the debtor exercises over the plan and the likelihood that the plan will qualify as a spendthrift trust. The more control the debtor/beneficiary has over the pension funds, the less likely that the court will characterize the plan as a spendthrift trust.[109]

Two factors are pivotal in determining if a plan qualifies as a spendthrift trust. First, courts consider whether a plan is employer-created or employee-created. An employee-created fund is commonly referred to as a self-settled plan.[110] Second, courts consider whether the beneficiary has any control over or a right to distribution from the plan.[111] Distribution upon voluntary termination of employment may constitute sufficient control so as to disqualify the plan as a spendthrift trust.[112]

### A. *Self-Settled Plans*

In a seminal case, *In re Goff*,[113] the Fifth Circuit Court of Appeals determined that self-settled Keogh plans which place only a ten percent tax penalty limitation on withdrawal do not qualify as spendthrift trusts.[114] In *Goff*, both the self-settled nature of the plan and the possibility of distribution constituted control by the beneficiary/debtor over the plan.[115] Therefore, the plan did not qualify as a spendthrift trust safe from the reach of creditors in bankruptcy.[116] The court left open the question of whether employer-created plans that allow withdrawal only upon termination qualify as spendthrift trusts under state law.[117]

The United States Court of Appeals for the Eleventh Circuit followed *Goff* in *Lichstrahl v. Bankers Trust*.[118] The *Lichstrahl* debtor was the sole director, officer, and stockholder of a professional association that created two ERISA-qualified plans.[119] Despite the anti-

109. See cases cited *supra* note 108.
110. *See* Brooks v. Interfirst Bank, 844 F.2d 258, 261 (5th Cir. 1988).
111. *Id.*
112. *Id.*
113. 706 F.2d 574 (5th Cir. 1983). For additional discussion of *Goff*, see *supra* note 85.
114. *Goff*, 706 F.2d at 589.
115. *Id.*
116. *Id.*
117. *Id.*
118. 750 F.2d 1488 (11th Cir. 1985).
119. *Id.* at 1489.

alienation provisions in the trusts, the settlor reserved the power to amend or terminate the trusts.[120] Also, under the trust provisions employees could borrow from the trusts.[121]

The court ruled that these self-settled plans did not qualify as spendthrift trusts under Florida law.[122] According to the *Lichstrahl* court, "because the purpose of a spendthrift trust is to protect the beneficiary from himself and his creditors, such a trust fails where the beneficiary exercises 'absolute dominion' over the property."[123] Because the debtor, as sole officer and director of the settlor professional association, could amend or terminate the trusts, the court reasoned that he "enjoyed 'absolute dominion' over the property of the trusts."[124]

Public policy persuaded the *Lichstrahl* court that the plan was not a spendthrift trust.[125] "[T]here is . . . a strong public policy that will prevent any person from placing his property in what amounts to a revocable trust for his own benefit which would be exempt from the claims of his creditors."[126] The court recognized the inequities in allowing the debtor absolute dominion over assets that are, at the same time, unavailable to satisfy creditors' claims.[127] Such funds, according to the court, would induce creditors to extend credit, while remaining immune from creditors' claims for satisfaction of the debt.[128] The court concluded that the following factors constituted "absolute dominion" over the trust property: contribution by the employee, control to amend or terminate the plan, and ability to borrow from the plan.[129]

Another type of self-settled plan is an IRA.[130] A Florida court addressed the issue of IRAs in *In re Gillett.*[131] In that case, the debtor argued that his IRA was protected by a state exemption statute and met the anti-alienation provision requirements of ERISA.[132] The court, however, found that the self-settled nature of the account and the

120. *Id.*
121. *Id.*
122. *Id.* at 1490.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. I.R.C. § 408. For brief discussion of IRA accounts, see *supra* note 62.
131. 46 Bankr. 642 (Bankr. S.D. Fla. 1985).
132. *Id.* at 643.

right to withdraw the funds at any time subject only to an interest and tax penalty for premature withdrawal constituted "complete and unfettered" control over the funds by the debtor.[133] Consequently, the IRA was not exempt property of the bankruptcy estate.[134]

Following this line of cases, the Fifth Circuit Court of Appeals in *Brooks v. Interfirst Bank*[135] concluded that the debtor's ERISA plan did not qualify as a spendthrift trust and thus, was included in the bankruptcy estate.[136] The debtor was one of thirty-two doctors comprising a professional association that had established the plan in question.[137] The doctors rotated turns serving as directors of the association.[138] The directors determined the amount to contribute to the plan and whether to amend or terminate the fund.[139] Therefore, the *Brooks* court reasoned that the debtor, either directly or through elected representatives, had control over the fund.[140]

Furthermore, the court found that the debtor could "borrow from the trust to buy a house, educate his children or to meet any hardship, a term not defined by the Plan."[141] In addition, the debtor could terminate his membership with the association and receive his funds.[142] All these factors, according to the court, created a self-settled plan with the right to control distribution.[143] Consequently, the plan did not qualify as a spendthrift trust because the debtor had dominion and control over the funds.[144]

A final example of a self-settled plan that did not qualify as a spendthrift trust is illustrated by *In re Nichols*.[145] The debtor in *Nichols* had a right to receive $5,000 from the trust and could compel its distribution.[146] Further noting the debtor's ability to borrow from the trust fund, the court concluded that the debtor had sufficient control over the funds to disqualify the funds from protection under Florida spendthrift trust law.[147]

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133. *Id.* at 644.
134. *Id.* at 645.
135. 844 F.2d 258 (5th Cir. 1988).
136. *Id.* at 264.
137. *Id.* at 259.
138. *Id.* at 260.
139. *Id.*
140. *Id.* at 263.
141. *Id.*
142. *Id.*
143. *Id.* at 263-64.
144. *Id.*
145. 42 Bankr. 772 (Bankr. M.D. Fla. 1984).
146. *Id.* at 776.
147. *Id.*

The *Nichols* court reviewed Florida law pertaining to spendthrift trusts. The court cited three factors that are essential to the creation of a spendthrift trust.[148] First, the trust must be secured against the beneficiary's own "improvidence and incapacity."[149] Secondly, the trust must bar the voluntary or involuntary alienation of the life beneficiary's interest in his right to receive income.[150] Finally, the settlor must clearly manifest an intention to restrain the beneficiary from alienating his interest.[151] Absent these factors, the *Nichols* court determined that a plan does not qualify as a spendthrift trust under Florida law.[152]

The above cases involve self-settled plans in which the debtor/beneficiary could amend, terminate or borrow against the plan. Such factors combined to disqualify the plans' protection from creditors' claims under a spendthrift trust characterization. In contrast, the following cases involve employer-created corporate plans in which the debtor/beneficiary is one of hundreds or thousands comprising the plan's participants. These cases demonstrate that even where the control of establishing, maintaining and administering the plan is far removed from the individual debtor/beneficiary, courts differ as to whether the plan is a spendthrift trust.

### B. *Employer-Created Plans and the Distribution Upon Termination Factor*

A Martin-Marietta retirement fund was the subject of dispute in *In re Bryant.*[153] The plan in question was basically a savings plan in which the company matched employee contributions.[154] The debtors argued that "the [assets] held in the plan on their behalf are not property of the estate to begin with because they, in fact, qualify as spendthrift trusts."[155] Under the plan, the employee could receive the funds from the plan either upon death, retirement or reaching the age of seventy.[156] In the event, however, that the employee terminated

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148. *Id.* The court cited to a 1911 Florida Supreme Court case which recognized spendthrift trusts as "[d]esigned to provide a fund for the maintenance of the beneficiary while at the same time securing it against the beneficiary's own improvidence and incapacity." *Id.* at 776 (citing Croom v. Ocala Plumbing & Elec. Co., 62 Fla. 460, 57 So. 243 (1911)).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. 106 Bankr. 727 (Bankr. M.D. Fla. 1989).

154. *Id.* at 728.

155. *Id.*

156. *Id.*

employment with the company, he was entitled to withdraw the value of his vested interest in the plan.[157]

The *Bryant* court refused to exclude the funds from the bankruptcy estate.[158] The determining factors that disqualified the plan from spendthrift trust protection, according to the court, were the ability to borrow against the funds and the ability to withdraw the vested portion upon termination of employment.[159] Important to the court's reasoning was the fact that the debtor had the ability to manipulate the funds.[160] This control over the funds was sufficient to disqualify protection under the Code's spendthrift trust exclusion.[161]

Another case involving a corporate plan answered the question left open by *Goff*.[162] *In re Lawson*[163] focused on whether an employer-created plan allowing withdrawal upon termination qualifies as a spendthrift trust.[164] The corporation's Employee Stock Ownership Plan (ESOP) allowed distribution only upon retirement, death or termination of employment.[165] In addition, the plan did not allow loans to participants.[166]

Distinguishing the ESOP from a self-settled plan like the one in *Goff*, the *Lawson* court held that the ESOP was a spendthrift trust and therefore, excluded from the property of the estate.[167] Because of the distribution limitations and the "no loan" provision, the court determined that the debtor did not exercise "absolute dominion" over the assets in the plan.[168] The debtor's ability to withdraw funds upon termination of employment did not disqualify the plan as a spendthrift trust in *Lawson*.[169]

In contrast, the *Bryant* court weighed the factor of distribution upon termination on the side of disqualifying the plan from spendthrift trust protection.[170] The distribution factor in *Bryant* was coupled with the debtor's ability to borrow against the plan.[171] Unlike the *Bryant*

157. *Id.*
158. *Id.* at 730.
159. *Id.* at 729.
160. *Id.*
161. *Id.*
162. *See supra* notes 113-17 and accompanying text.
163. 67 Bankr. 94 (Bankr. M.D. Fla. 1986).
164. *Id.* at 98.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Bryant*, 106 Bankr. at 729; *see supra* text accompanying notes 157-61.
171. *Bryant*, 106 Bankr. at 729.

plan, the *Lawson* plan did not have a loan provision.[172] In reconciling *Lawson* and *Bryant*, the courts appear persuaded by the notion that the distribution upon termination factor alone is not enough to disqualify the employer-created type plan as a spendthrift trust. Rather, courts will examine additional factors, specifically whether employees may borrow against the plan.

Two Florida cases addressed the distribution upon job termination factor and determined that this factor will not destroy the plan's status as a spendthrift trust. The court in *In re Colvin*[173] recognized that the right of a debtor to leave a job and thus, access plan funds, lies within the debtor's discretion.[174] Such discretion, the court held, does not constitute "absolute dominion" over a retirement plan.[175] The *Colvin* court noted, "[h]aving to leave employment in order to receive retirement benefits is a significant restriction upon the exercise of that right."[176] Similarly, the court in *Gennet v. ICMA Retirement Corp.*[177] held that "employment termination is a significant restraint upon withdrawal of [debtor's] benefits."[178] In these cases, as in the *Lawson* case, the courts excluded the plans from the bankruptcy estate based on the plans' status as a spendthrift trust.[179]

One final case presents a different combination of the factors previously discussed. The plan in *In re Monahan*[180] included both employee and employer contributions.[181] The court held that the employer-contributed portion of the plan was a spendthrift trust protected from creditors' claims in bankruptcy.[182] The employee-contributed portion of the plan, however, was property belonging to the estate and thus, not a spendthrift trust.[183] The distinction, according to the court, turned on the amount of control the employee/debtor exercised over each portion of the plan.[184]

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172. *Lawson*, 67 Bankr. at 93; *see supra* text accompanying note 166.
173. 81 Bankr. 679 (Bankr. M.D. Fla. 1988).
174. *Id.* at 681.
175. *Id.*
176. *Id.*
177. 65 Bankr. 58 (Bankr. S.D. Fla. 1986).
178. *Id.* at 59.
179. *See Colvin*, 81 Bankr at 682; *Gennet*, 65 Bankr. at 59.
180. 68 Bankr. 997 (Bankr. S.D. Fla. 1987).
181. *Id.* at 998.
182. *Id.* at 1000.
183. *Id.*
184. *Id.*

In analyzing the plan, the *Monahan* court followed *Colvin*[185] and *Gennet*[186] in determining that a distribution upon termination factor was a sufficient restraint on the employee's control over the plan.[187] As in *Colvin*[188] and *Gennet*,[189] the employee/debtor in *Monahan* could withdraw his total interest in the plan upon termination of employment.[190] In all three cases, the distribution upon termination factor did not disqualify the plan as a spendthrift trust.

The factor in *Monahan* that did disqualify the employee contributed portion of the plan from spendthrift trust protection was the hardship loan provision.[191] The employee in *Monahan* could request, in the event of extreme hardship, a loan against his contributed interest in the plan.[192] According to the court, these hardship requests were within the sole discretion of the plan's advisory committee and trustee to grant or deny.[193] Noting that the hardship loan decisions were outside the control of the employee, the *Monahan* court reasoned that a circumstance such as bankruptcy made distribution through loan approval certain.[194] Therefore, the employee-contributed portion of the plan became property of the estate based on the court's determination that the debtor's bankruptcy would affect early distribution of the funds.[195]

In addition, the *Monahan* court distinguished a showing of hardship through bankruptcy from the affirmative action of quitting a job.[196] As in *Colvin*[197] and *Gennet*,[198] the *Monahan* court characterized a distribution upon termination as a significant restraint on the debtor's absolute control over the funds.[199] The *Monahan* court, however, did not provide reasoning for its distinction between filing for bankruptcy

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185. Receiving a lump sum payment from an employer-created retirement plan upon early termination of employment did not disqualify the plan as a spendthrift trust under Florida law. *Colvin*, 81 Bankr. at 681-82.

186. The debtor's deferred compensation plan was excluded from property of the estate as a spendthrift trust. *Gennet*, 65 Bankr. at 59.

187. *Monahan*, 68 Bankr. at 1000.

188. *Colvin*, 81 Bankr. at 681-82.

189. *Gennet*, 65 Bankr. at 59.

190. *Monahan*, 68 Bankr. at 1000.

191. *Id.*

192. *Id.* at 999.

193. *Id.*

194. *Id.* at 1000.

195. *Id.*

196. *Id.*

197. *Colvin*, 81 Bankr. at 681-82; *see supra* note 185.

198. *Gennet*, 65 Bankr. at 59; *see supra* note 186.

199. *Monahan*, 68 Bankr. at 1000.

and leaving a job as factors used in determining the debtor's amount of dominion and control over the funds. While both actions potentially lie within the discretion of the debtor,[200] filing bankruptcy in order to access the funds seems to be as significant a restraint upon withdrawal of benefits as terminating employment.[201]

In analyzing the *Monahan* case, a more obvious reason for the differing results in the court's treatment of the employer contributed and the employee-contributed portions of the plan emerges.[202] Consistently courts have treated self-settled plans differently than employer-created plans in the spendthrift trust analysis.[203] As the preceding analysis indicates, a self-settled plan in which the beneficiary has any control over distribution before retirement, typically will not qualify as a spendthrift trust.[204] The employee-contributed portion of the *Monahan* plan was, essentially, a self-settled plan with a loan provision.

Another factor which contributed to the disparate outcomes of these cases involving self-settled and corporate plans was a loan provision in the plan. The cases of *Brooks*,[205] *Bryant*, and *Monahan* illustrate that courts equate an employee's ability to borrow with dominion and control. When a beneficiary can control distribution of assets through loan requests, even when the total discretion rests in a third party and even when conditions of severe hardship are required, the plan will not qualify for protection in bankruptcy under the "safe harbor" of a spendthrift trust.

## VIII. A STATUTORY SOLUTION TO THE BANKRUPTCY/ERISA POLICY CONUNDRUM

The courts' treatment of pension plans in bankruptcy has come full-circle. The sufficiently-rooted[206] and wage substitute[207] tests of the

200. *Id.*

201. While a discussion of the effects of bankruptcy on an individual debtor is beyond the scope of this note, the *Monahan* court's distinction between employment termination and bankruptcy raises the following caveat. A Chapter 7 debtor relinquishes all his nonexempt property for liquidation. 11 U.S.C. §§ 541, 704 (1988). The process of turning over assets is certainly more intrusive to an individual than a scenario in which an individual leaves one job for another. Also, the effects of bankruptcy linger with the individual debtor for six years under Chapter 7 and three to five years, depending on the length of the plan, under Chapters 11 and 13. *See* 11 U.S.C. §§ 701-766, 1101-1146, 1301-1330 (1988). Perhaps, the *Monahan* court's discussion on this point was directed toward other unexplained hypothetical circumstances.

202. *Monahan*, 68 Bankr. at 998.

203. *See In re* Goff, 706 F.2d 574, 589 (5th Cir. 1983); *supra* note 85.

204. *Goff*, 706 F.2d at 589.

205. Brooks v. Interfirst Bank, 844 F.2d 258 (5th Cir. 1988).

206. *See supra* notes 34-35 and accompanying text.

pre-Code courts are strikingly similar to the dominion and control[208] test of today. All three tests require a judicial weighing of the ability of the property in question to serve the policies of bankruptcy. The judicial determination focuses on the value of the property to serve the conflicting policies of making the creditors whole or providing the debtor a fresh start.[209] The problem of placing pension funds on either side of the judicial scale is complicated by the fact that pension assets are encumbered with a purpose. As previously stated, the purpose of pension plans is to encourage and protect accumulated savings for retirement years.

In balancing the policies of bankruptcy against the purpose served by pension funds, the courts are in agreement under one set of circumstances. When a plan is established with the express purpose of providing for retirement income, courts, under any test, place this type of pension plan on the side of providing the debtor a fresh start. Courts have determined that this type of plan is property that is not sufficiently-rooted in the pre-bankruptcy past,[210] is a wage substitute,[211] and is not under the dominion and control of the beneficiary/debtor.[212]

The problem for the courts and for the parties whose interests are in doubt, arises when the plan, in its operation, dilutes the original purpose supporting pension plans in general. Essentially, when the plan's funds can be accessed before retirement, balancing the rights of debtors and creditors within the context of a social policy that encourages and protects the accumulation of retirement income leads to disparate court results.[213] This policy conundrum creates uncertainty for parties in bankruptcy.[214]

While a tension in conflicting policies is certainly not unique to the issue of pension plans in bankruptcy, the principles courts have relied upon to resolve this issue have been flux. The Code's framework for determining property of the estate shifted from the pre-Code exclusion analysis to an exemption analysis.[215] One of the key differences occasioned by this shift is the "seat" or location of the decisionmaking

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207. *See supra* notes 45-50 and accompanying text.

208. *See supra* text accompanying notes 123-29.

209. *See supra* notes 1-4 and accompanying text; *see also supra* text accompanying notes 33-34.

210. *See supra* notes 34-35 and accompanying text.

211. *See supra* notes 45-50 and accompanying text.

212. *See supra* text accompanying notes 123-29.

213. *See supra* notes 113-44 and accompanying text.

214. *Id.*

215. *See supra* note 70 and accompanying text.

process. As previously discussed, the exclusion analysis is based on judicial interpretation;[216] an exemption analysis is based on statutory construction.[217]

The courts become the "seat" of the decisionmaking process in the exclusion analysis while legislatures become the "seat" of the decisionmaking process under an exemption analysis. To recognize the court or legislature as the "seat" of the decisionmaking process is to identify the source making the policy choices.[218] This distinction is important when considering that individual debtors in bankruptcy do not have the financial resources to pursue extended litigation in order to protect their pension assets from creditors' claims in bankruptcy.[219]

In addition, a change in the Code's treatment of property belonging to the estate empowered the individual states to make their own policy choices.[220] The Code provides in section 522(b) that individual states could apply state-created exemptions to resident debtors in bankruptcy in lieu of the Code created exemptions.[221] Florida has opted out of the Code's section 522(d) exemptions.[222] Therefore, Florida exemption statutes control decisions regarding property exempt from creditors' attachment in bankruptcy.[223]

In theory, then, the Florida legislature has the authority to make the policy choices determining the protection or attachment of pension funds in bankruptcy. Indeed, the Florida legislature created an exemption for "[a]ny interest . . . in a retirement or profit-sharing plan . . . from all claims of creditors."[224] In practice, however, ERISA preemption[225] threatens the controlling force of Florida's statute protecting pension funds from creditors in bankruptcy.[226] Because of the uncer-

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216. *See supra* notes 32-33 and accompanying text.

217. *See supra* note 31 and accompanying text.

218. *See generally* Note, *Jurisprudence: The "New Haven School" and the Emergence of Secondary Authority — Is Number Two Trying Harder?*, 41 FLA. L. REV. 1031, 1054 (1989) (provides a jurisprudential viewpoint regarding decisions being a series of policy choices).

219. *Id.*

220. 11 U.S.C. § 522(b)(2)(A) (1988).

221. *Id.*

222. FLA. STAT. § 222.21 (1989).

223. *Id.*

224. *Id.* § 222.21(2)(a).

225. *See infra* notes 233-34 and accompanying text.

226. *See, e.g.*, *In re* Hirsch, 98 Bankr. 1 (Bankr. D. Ariz. 1988); *In re* McLeod, 102 Bankr. 60 (Bankr. S.D. Miss. 1989); *In re* Brown, 95 Bankr. 216 (Bankr. N.D. Okla. 1989); *In re* Sellers, 107 Bankr. 152 (Bankr. E.D. Tenn. 1989) (held that state law exempting ERISA-qualified plan was preempted by ERISA § 514(a) [re-codified as § 1144(a)] of ERISA). *But see In re* Dyke, 119 Bankr. 536 (Bankr. S.D. Tex. 1990) (held that state law exempting ERISA-qualified plan was not preempted by ERISA § 514(a)).

tainty of state exemption statutes, the treatment of pension funds in bankruptcy has come "full circle" and resulted in a post-Code exclusion analysis very similar to the pre-Code treatment. Once again, courts, instead of the Florida legislature, are making decisions based on a judicial, rather than legislative, weighing of the policies in conflict.

### A. *ERISA Preemption*

Although an in-depth discussion of ERISA is beyond the scope of this note, some elementary principles of ERISA are important to the issue of pension plans in bankruptcy. ERISA differentiates between welfare benefit plans and retirement plans.[227] A welfare benefit plan provides benefits to employees up to retirement.[228] An employee hardship loan provision is an example of a welfare benefit plan.[229] In comparison, retirement plans cover retirement or death benefits only.[230] Under ERISA, welfare benefit plans are subject to creditors' claims.[231] ERISA, however, protects retirement plans from the reach of creditors.[232]

Section 1144(a) of ERISA provides in part that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[233] The United States Supreme Court has recognized that Congress intended ERISA to have broad, sweeping preemptive power.[234] A state statute that mentions or relates to an ERISA plan is subject to ERISA preemption.[235]

In addition, courts have held that Congress intended to federalize the private employee welfare and pension plans.[236] Consequently, ERISA preemption reaches "state laws that in fact affect covered plans, whether or not those laws were expressly made applicable to

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227. 29 U.S.C. § 1002(1) (1988).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* § 1056(d).
232. *Id.*
233. *Id.* § 1144(a).
234. *See* Mackey v. Lanier Collections Agency & Servs., 486 U.S. 825, 830 (1988); *supra* note 10.
235. *See supra* note 10.
236. *See* Sommers Drugstores v. Corrigan Enters., 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, *cert. denied*, 479 U.S. 1089 (1987) *In re* Komet, 93 Bankr. 498 (Bankr. W.D. Tex. 1988), *vacated in part*, 104 Bankr. 799 (Bankr. W.D. Tex. 1989) (these cases held that ERISA preempts state law if the state statute specifically refers to ERISA or if the state statute refers to the qualifying provisions of the Internal Revenue Code).

such plans."[237] Courts have held that state laws governing such plans interfered with ERISA and therefore, were invalid.[238]

As a result, the sweeping scope of ERISA has undercut the authority of states to apply state exemption laws under the Code. Courts rejected the argument that debtors applying state exemption laws under the authority of Code section 522 should be protected from preemption.[239] The courts held that the Code's reference to state exemptions did not override ERISA preemption.[240]

Consequently, a Florida debtor, attempting to protect pension assets from creditors' claims in bankruptcy, must rely on the Florida exemption statute and "hope" that ERISA does not preempt it. The uncertainty of whether ERISA will preempt a state exemption statute is based on the number of different retirement plan options[241] and the numerous types of specific plans.[242] A threshold issue affecting ERISA preemption is determining if the plan in question is ERISA-qualified[243] and whether it is a welfare benefit plan or a retirement plan according to ERISA definitions.[244]

In contrast to debtors in states that apply state exemptions only, debtors in states that provide an option between state and federal exemptions can exempt pension plans under Code section 522(d).[245] The Code exempts certain types of pension and retirement benefits from the bankruptcy estate "to the extent [the funds are] reasonably necessary for the support of the debtor and any dependent of the debtor."[246]

According to an ERISA provision, ERISA preemption does not threaten the Code-created exemptions. "[ERISA shall not] alter, amend, modify, invalidate, impair, or supersede any law of the United States."[247] Therefore, debtors, having an option between state and federal exemptions, can apply the Code exemptions to protect a plan

237. Sherman, *supra* note 91, at 255.

238. *See* cases cited *supra* note 236.

239. *See* cases cited *supra* note 7.

240. *Id.*

241. *See generally* Schlosser, *Exempting Retirement Benefits from Bankruptcy in Colorado*, 18 COLO. LAW. 17 (1989) (there are four broad categories of retirement plans: the welfare benefit plan, the employee contribution plan, the Keogh plan, and the IRA).

242. *See id.*

243. *See* 29 U.S.C. § 1144(a) (1988).

244. *See id.*

245. *Id.* § 522(d)(10)(E).

246. *Id.*

247. *Id.* § 1144(d).

that otherwise would not be exempt under the ERISA preemption doctrine. Here, there is no uncertainty because the Code's section 552(d), exempting pension assets from creditors' claims, is not subject to the ERISA preemption doctrine.[248]

### B. *Spendthrift Trust Roll-Over*

A survey of various states indicates that the problem of pension funds in bankruptcy has been addressed by state exemption statutes. For example, Georgia, Colorado, Tennessee, and Texas created statutes providing for the exemption of a debtor's interest in: (a) ERISA employee welfare benefit plans;[249] (b) ERISA-qualified pension plans;[250] (c) pension plans qualified under the Internal Revenue Code;[251] and (d) retirement plans qualified under the Internal Revenue Code of 1986.[252] ERISA preemption has rendered most of these statutes inapplicable to debtors' pension assets in bankruptcy.[253]

Unique statutes have not survived ERISA preemption.[254] Most recently, the Bankruptcy Court of the Middle District of Florida ruled

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248. *Id.*

249. *See, e.g., Mackey*, 486 U.S. at 825 (the Court invalidated a Georgia statute exempting ERISA employee welfare benefit plans from attachment and garnishment actions).

250. *See, e.g., In re* Alagna, 107 Bankr. 301 (Bankr. Colo. 1989) (holding that the Colorado statute exempting a debtor's interest in an ERISA-qualified pension plan was preempted by ERISA).

251. *See, e.g., In re* Sellers, 107 Bankr. 152 (Bankr. E.D. Tenn. 1989) (holding that a Tennessee statute exempting a debtor's interest in pension plans qualified under the I.R.C. §§ 401(a), 403(a)-(b) was preempted by ERISA).

252. *See, e.g., In re* Dyke, 119 Bankr. 536 (S.D. Tex. 1990) (holding that a Texas statute exempting a debtor's interest in a retirement plan qualified under the Internal Revenue Code of 1986 was not preempted by ERISA).

253. *See* cases cited *supra* notes 249-52.

254. *See In re* Mata, 115 Bankr. 288 (Bankr. Colo. 1990) (a garnishment and levy statute, for the purposes of claiming an exemption in bankruptcy only, held not valid); *In re* Lennen, 71 Bankr. 80 (Bankr. N.D. Cal. 1987) (The court invalidated a statute creating a separate exemption scheme for bankruptcy cases under a geographic uniformity test. This case was decided pre-*Mackey* and the ERISA preemption cases.).

*See also In re* Perkins, 902 F.2d 1254 (7th Cir. 1990); *In re* Summers, 108 Bankr. 200 (Bankr. S.D. Ill. 1989) (The court discussed the application of a new pension exemption statute providing a conclusive presumption that a retirement plan is a spendthrift trust. Both cases were decided on procedural grounds without reaching the question of ERISA preemption of the new statute.); *In re* Rosenquist, 122 Bankr. 775 (Bankr. M.D. Fla. 1990) (court held that Fla. Stat. §§ 222.21(2)(a) and 222.201 are preempted by ERISA); *In re* Balay, 113 Bankr. 429 (Bankr. N.D. Ill. 1990) (discussing an Illinois exemption statute giving a conclusive presumption that retirement funds are spendthrift trusts, but not deciding on the merits of the statute). *Balay* also provides a discussion of the issue of timing and whether a trustee can claim rights to property in which

that ERISA preempted a 1987 Florida statute permitting an individual debtor in bankruptcy to claim federal exemptions in addition to state exemptions.[255] Debtors argued that Florida Statutes section 222.201 allowed the exemption of pension assets to the extent permitted under Code section 522(d)(10)(E).[256] Although the Florida statute did not mention ERISA-qualified pension plans, the court held that ERISA preempted the Florida exemption statute.[257]

Another statute, so new that it has not yet been challenged under the ERISA preemption doctrine, provides that a retirement plan is conclusively presumed to be a spendthrift trust under Illinois law.[258] This is a novel approach that shifts the burden of proof to the bankruptcy trustee. Under the Illinois statute, the bankruptcy trustee has the burden to prove that the debtor's retirement fund is not a spendthrift trust.[259] This provision attaches to the trustee not only the burden of proof, but the burden of expensive litigation.

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the debtor does not have a present right. *Balay*, 113 Bankr. at 443. The debtor's right to access pension funds was contingent on a triggering event of death, retirement or termination. *Id.* The court held that "to the extent an interest is limited in the hands of a debtor, it is equally limited as property of the estate." *Id.* at 444 (quoting 4 COLLIER ON BANKRUPTCY § 541.06, at 541-27 (15th ed. 1989)).

255. *See In re* Rosenquist, 122 Bankr. 775, 783 (Bankr. M.D. Fla. 1990) ("In 1987, the Florida Legislature enacted what is now Section 222.201, Florida Statutes 1989, which provides that: (1) Notwithstanding § 222.20, an individual debtor under the federal Bankruptcy Reform Act of 1978 may exempt, in addition to any other exemptions allowed under state law, any property listed in subsection (d)(10) of § 522 of that act.").

256. *Id.*

257. *Id.* Other Florida bankruptcy cases have held that ERISA preempts Fla. Stat. § 222.21(2)(a) which expressly exempts pension and retirement plans. *See In re* Schlein, 114 Bankr. 780 (Bankr. M.D. Fla. 1990); *In re* Lee, 119 Bankr. 833 (Bankr. M.D. Fla. 1990); *In re* Sheppard, 106 Bankr. 724 (Bankr. M.D. Fla. 1989); *In re* Bryant, 106 Bankr. 727 (Bankr. M.D. Fla. 1989); *but see In re* Martinez, 107 Bankr. 378 (Bankr. S.D. Fla. 1989); *In re* Seilkop, 107 Bankr. 776 (Bankr. S.D. Fla. 1989); *In re* Bryan, 106 Bankr. 749 (Bankr. S.D. Fla. 1989).

258. Illinois Public Act. No. 86-0393, enacted Aug. 28, 1989, amending the Illinois Code of Civil Procedure ¶ 12-1006(c), provides that:

> A retirement plan that is (i) intended in good faith to qualify as a retirement plan under the applicable provisions of the Internal Revenue Code of 1986, as now or hereafter amended, or (ii) a public employee pension plan created under the Illinois Pension Code, as now or hereafter amended, is conclusively presumed to be a spendthrift trust under the law of Illinois.

ILL. ANN. STAT. ch. 110, ¶ 12-1006(c) (1989).

Cases focusing on the application of ¶ 12-1006(c) have all been determined on procedural grounds. *See In re* Perkins, 902 F.2d 1254 (7th Cir. 1990); *In re* Peacock, 119 Bankr. 605 (Bankr. N.D. Ill. 1990); *In re* Balay, 113 Bankr. 429 (Bankr. N.D. Ill. 1990); *In re* Lyons, 114 Bankr. 572 (Bankr. C.D. Ill.), *rev'd on other grounds* 118 Bankr. 634 (C.D. Ill. 1990); *In re* Smith, 115 Bankr. 144 (Bankr. C.D. Ill. 1990); *In re* Summers, 108 Bankr. 200 (Bankr. S.D. Ill. 1989).

259. ILL. ANN. STAT. ch. 110, ¶ 12-1006 (1989).

The Illinois approach, however, is not a solution to be followed by Florida for the following reasons. First, Illinois case law defines spendthrift trust more narrowly than Florida case law.[260] Second, the Illinois statute only applies to retirement plans.[261] While the statute does not define the term retirement plan, under ERISA a retirement plan is distinguished from a welfare benefit plan.[262] ERISA defines a retirement plan as covering retirement or death benefits only.[263]

Arguably, those funds available upon termination of employment are not traditional retirement plans. Therefore, the Illinois statute would not apply to the "distribution upon termination" issue addressed by many Florida courts.[264] To broaden the conclusive presumption to all pension funds, however, would increase the likelihood of ERISA preemption, and possible invalidation. The third reason for carefully scrutinizing the Illinois statute relates to the creation of the presumption itself. Using evidentiary rules to change substantive law without a showing of the probabilities involved is questionable.[265]

Florida might avoid the complication and uncertainty of ERISA preemption by focusing the solution to the "pension fund in bankruptcy" conundrum on the spendthrift trust issue. As previously discussed, the nexus between bankruptcy, spendthrift trust law and the issue of whether pension assets belong to the estate is created by section 541(c)(2) of the Code.[266] This section carves out a narrow exception for spendthrift trusts recognized under applicable state law from the Code's broad definition of property of the estate.[267]

Florida courts have defined a spendthrift trust as a fund that provides for the maintenance of the beneficiary while at the same time secures against alienation or assignment of the beneficiary's interest

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260. *See supra* notes 148-52 and accompanying text. *Compare In re* Balay, 113 Bankr. 429, 442 (Bankr. N.D. Ill. 1990) (Illinois law defines a spendthrift trust as "(1) the trust must contain an anti-alienation provision; (2) the trust must not be self-settled; and (3) the property of the trust must be out of the control of the beneficiary.") *with In re* Nichols, 42 Bankr. 772, 776 (Bankr. M.D. Fla. 1984) (Florida law recognizes spendthrift trusts as "designed to provide a fund for the maintenance of the beneficiary while at the same time securing it against the beneficiary's own improvidence.").

261. ILL. ANN. STAT. ch 110, ¶ 12-1006(c) (1989).

262. 29 U.S.C. § 1002(1) (1988).

263. *Id.*

264. *See supra* notes 162-90 and accompanying text.

265. Interview with Christopher Slobogin, Professor of Law, University of Florida College of Law, in Gainesville, Fla. (Nov. 6, 1989). *See generally* Note, *The Improper Use of Presumptions in Recent Criminal Law Adjudication,* 38 STAN. L. REV. 423 (1986) (arguing that permissive presumptions improperly influence jury verdicts).

266. 11 U.S.C. § 541(c)(2) (1988).

267. *See supra* notes 81-90 and accompanying text.

either by the beneficiary or by the beneficiary's creditors.[268] Pension plans that provide for accumulated savings of retirement income and are outside the dominion and control of the beneficiary are consistent with the definition of spendthrift trusts under Florida law.[269] In proposing a solution to the pension fund in bankruptcy issue, this note suggests a spendthrift trust rollover statute.[270] The legislature can stipulate that property distributed upon termination of employment maintains its spendthrift trust characterization if rolled over into another spendthrift trust plan.

In fashioning a statutory solution, the ERISA preemption doctrine looms as a threat to a state-created policy regarding pension plans in bankruptcy.[271] A spendthrift trust rollover statute, however, addressing the state qualifications for spendthrift trusts may escape ERISA preemption for the following two reasons. First, a statute stipulating state qualifications for spendthrift trusts does not mention or relate to an ERISA qualified welfare benefit plan.[272] Therefore, ERISA section 1144(a), providing that ERISA supersedes state laws regarding ERISA-qualified plans, may not apply.[273]

Secondly, the authority to exclude spendthrift trusts emanates from the Code.[274] As discussed above, ERISA does not preempt other federal laws. Because ERISA does not interfere with the Code provision excluding spendthrift trusts from the estate, a state statute defining spendthrift trusts should survive ERISA preemption.

Far from interfering with any federal laws, a state-defined qualifying statute for spendthrift trusts merely replaces the current "dominion and control" test with a state mandated policy choice. A definitional statute places the "seat" of the decisionmaking process in the legislature rather than the courts.[275] As a result, the courts do not have to weigh the value of the property against the rights of debtors and creditors in bankruptcy. Also, debtors with limited financial resources will not be at a disadvantage, as compared to creditors, trying to protect their pension assets through expensive litigation.

In developing a statutory solution, the legislature can affirmatively address the issue that has created varying results in the courts. The issue that presents the most uncertainty is the distribution upon ter-

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268. *See supra* note 148.

269. *See* cases cited *supra* note 108.

270. The author thanks Willis W. Williams, III, J.D., C.P.A., Lakeland, Fla., who helped crystallize these ideas — especially the spendthrift trust statutory solution.

271. *See* cases cited *supra* notes 7 & 10.

272. *See supra* notes 233-35 and accompanying text.

273. *See id.*

274. *See* 11 U.S.C. § 522(b) (1988).

275. *See* Note, *supra* note 218.

mination factor.[276] The courts have disagreed on whether the ability to receive funds upon termination of employment constituted dominion and control over the plan by the beneficiary/debtor.[277] Some courts have determined that the ability to receive funds upon termination disqualified the plan as a spendthrift trust.[278]

Central to the distribution-upon-termination factor are the competing tensions which evince the question of who has a right to the property and for what purpose. Ideally, retirement funds should be unavailable until retirement. This view is consistent with ERISA and traditional spendthrift trust law. The reality in today's workforce, however, is that employees are mobile, rarely staying with one employer until retirement. It would be unfair to jeopardize an individual's pension assets merely because he or she changes employment. Similarly, employers do not want the administrative responsibility of controlling the pension funds of employees who worked for a short time and moved on to another employer.

The practical aspects of employment today necessitate a more flexible approach to the safeguarding of retirement funds. Therefore, a spendthrift trust rollover statute, stipulating that a fund to be distributed upon termination of employment can be rolled over without losing its spendthrift trust characterization, provides a clear legislative statement to guide courts. The message is clear that a distribution upon termination provision will not automatically disqualify a plan as a spendthrift trust.

In addition, the intent of this proposed solution is to ensure that the funds, even if within the temporary control of the beneficiary/debtor, are safeguarded for retirement. The rollover stipulation preserves the plan's purpose to accumulate and protect funds for retirement.[279] This solution is consistent with the equities of ERISA and the Code.

While a state rollover statute is a "forced" solution,[280] it is necessary because Congress's silence has created a gap in the law. The ideal solution is for Congress to speak. The possibilities for Congress to clarify the problem and create a uniform applicable solution are, no doubt, numerous. Congress could amend Code section 541(c)(2) to include pension funds. Alternatively, Congress could add a provision

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276. *See supra* notes 162-90 and accompanying text.

277. *Id.*

278. *Id.*

279. *See supra* note 6 and accompanying text.

280. The proposed rollover statute provides a solution of "form" not "substance." The solution does not address the substantive issue of whether "distribution upon termination" constitutes "dominion and control" over the plan by the debtor/beneficiary. While not answering

to the Code that specifically addresses pension funds and applies to debtors whether residing in "opting out" states or not.[281] In addition, Congress could amend ERISA to limit its preemptive scope or expressly exempt ERISA plans from the reach of creditors altogether.

In the absence of a federal solution, the proposed Florida rollover statute attempts to provide an answer that protects what often is the single largest asset of many debtors in bankruptcy, while also safeguarding these funds for retirement years. The statutory schemes of both ERISA and the Code are aimed at protecting funds set aside for retirement from creditors' claims.[282] It is inequitable that assets should lose this well established protection merely because an employee can withdraw from the plan upon termination of employment. A rollover statute, however, would prevent an employee from exercising absolute control over funds that, at the same time, are exempt from creditors' claims.[283] This latter scenario would violate the policies of the Code, ERISA, and spendthrift trust law.

Finally, a solution in the nature of a spendthrift trust rollover statute places the "seat" of policymaking with the state legislature. This is consistent with the Code. The Code carves out the spendthrift trust "safe harbor," but allocates to the state the definitional task.

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the substantive issue, this solution provides a "bright line" test that presumably offers ease of applicability and a measure of predictability. In addition, the rollover statute answers the issue on which courts vary and dispenses with the need for an in-depth factual determination.

One of the flaws of this solution is that the debtor/employee's ability to receive the funds by quitting his or her job can be construed as "dominion and control" by the beneficiary over the plan. In other words, the decision to voluntarily quit one's job is within the total control of the employee. Indeed, many courts have held that distribution upon termination is sufficient dominion and control to disqualify the plan as a spendthrift trust. *See supra* notes 173-90 and accompanying text.

There is a line of cases, however, that has applied to pension assets the well established principle that a trustee's claim to property (for the estate) is no greater than a debtor's claim at the time of filing. *See In re* Perkins, 902 F.2d 1254 (7th Cir. 1990)); *In re* Smith, 103 Bankr. 882 (Bankr. N.D. Ohio 1989); *In re* Silldorff, 96 Bankr. 859 (Bankr. C.D. Ill. 1989); *In re* DeWeese, 47 Bankr. 251 (Bankr. W.D. N.C. 1985). While this issue is more a question of timing which is not a part of the spendthrift trust analysis, this line of reasoning supports the notion that the arbitrary "line-drawing" of this rollover proposal does not violate the spirit of the Code.

If, hypothetically, a debtor could go through a Chapter 7 or 13 bankruptcy, get his or her debts discharged, and subsequently withdraw accumulated pension assets by quitting a job, this seems unfair. Perhaps, under such a scenario, creditors would have recourse to seek revocation of the discharge under a theory of fraud. This proposal, however, does not answer those hypotheticals.

281. *See supra* notes 75-77 and accompanying text.

282. *See supra* notes 2 & 6 and accompanying text.

283. The proposed statute would bring pension plans within the definition of spendthrift trusts as defined by Florida. *See In re* Nichols, 42 Bankr. 772, 776 (Bankr. M.D. Fla. 1984); *supra* note 148.

Day: Pension Funds in Bankruptcy: The Spendthrift Trust "Safe Harbor"



## IX. CONCLUSION

Pension assets in bankruptcy present a dilemma of competing policy choices. Traditionally, public policy has protected pension assets from the claims of creditors because society encourages the accumulation and protection of income for retirement. Public policy, however, has disfavored "any person from placing his property in what amounts to a revocable trust for his own benefit which would be exempt from the claims of his creditors."[284]

Today, with the many pension plan options, it is difficult to classify property that is strictly saved for retirement from property in which employees enjoy present benefits. If employees have use of the funds before retirement, the underlying purpose of a pension plan is not served. The mobility of today's workforce, however, has resulted in pension plans that allow employees to withdraw funds upon termination of employment. This latter factor, distribution upon termination, creates uncertainty among courts about the actual use of the funds for retirement income. As a result, courts have allowed pension assets, where in doubt about their intended purpose, to be available for the satisfaction of creditors' claims in bankruptcy.

One protection of pension assets in bankruptcy is the Code's spendthrift trust restriction. This provision carves out a "safe harbor" for spendthrift trusts recognized under applicable state laws and excludes the trust property from being classified as estate property. The Code allocated the task of defining a spendthrift trust to the states. States, however, have abdicated the job of deciding when and if a pension plan qualifies as a spendthrift trust and have left the courts to decide. One reason for this abdication is the sweeping power of ERISA preemption.

This note proposes a solution to protect pension assets in bankruptcy that hopefully will survive ERISA preemption. The solution is in the nature of a spendthrift trust rollover statute. Because the proposed statute defines spendthrift trusts, the legislature is acting within the authority mandated by the Code. In addition, this solution allows the legislature to dictate to the courts the policy of choice and spares individual debtors the expense of extended litigation. The Code carves out the spendthrift trust "safe harbor;" it is for state legislatures to make the policy choices that define a spendthrift trust.

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284. Lichstrahl v. Bankers Trust, 750 F.2d 1488, 1489 (11th Cir. 1985); *see supra* text accompanying notes 125-29.

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