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Preemption of ERISA Pension Plan Exemptions in the Aftermath of *Mackey v. Lanier Collections Agency & Service, Inc.*: A Glimmer of Light at the End of the Tunnel

by David M. Landis and Jon E. Kane

I. Introduction

As the partner in charge of your firm's bankruptcy and creditors' rights practice, you are consulted by a prominent orthopaedic surgeon. Your client informs you that he has recently been named as a defendant in two serious medical malpractice actions and may be substantially underinsured with respect to such claims. Further, he tells you that during the early 1980s he invested in a number of tax shelter schemes in the form of real estate limited partnerships on which he has executed personal guaranties for several million dollars of indebtedness. You are aware that many of these investments suffered significant depreciation during the past several years due to a softening real estate market. A few of the lenders holding the loan guaranties have already informed him that the loans are in default and that, if the projects are foreclosed upon, there will likely be substantial deficiencies which the lenders expect to collect from him.

As have most of his colleagues, your client has invested heavily (over $2,000,000.00 in his case) in an ERISA-qualified retirement plan.[1] He says that some years ago he was advised (not, thank heavens, by your firm) that the pension plan asset would be considered exempt if, as he is fearful is now happening, claims or judgments based upon medical malpractice suits or real estate partnership loan guaranties caused him to file a voluntary petition under Chapter 7 of the United States Bankruptcy Code to discharge the debts.

You then ask him to be seated as you begin to explain the ramifications of a 1988 United States Supreme Court decision, *Mackey v. Lanier Collection Agency & Service, Inc.*[2] You watch the color slowly disappear from his face as you explain that the monies which he had so prudently invested when he set up his ERISA retirement plan in 1975 could be taken away from him. If he should become a debtor in a bankruptcy proceeding, you explain, the pension plan is likely to be considered part of the bankruptcy estate and thus subject to distribution to assist in paying the claims of his creditors.

The doctor is incredulous and protests that he knows from having attended a seminar on pension planning some years ago put on by the local medical society that the plan is exempt under the laws of your state. In fact, as you are acutely aware, your state "opted out" of the federal exemption scheme set forth in 11 U.S.C. §522(d).[3] This seemingly makes immune to creditor claims "any monies or other benefits payable from, or any interest in, certain retirement plans, such as those qualified under §401(a), §403(a), §403(b), §408, §414(d), or §414(e) of the United States Internal Revenue Code of 1986, as amended."[4]

As your client sinks more deeply into his chair, you explain that the *Mackey* case to which you have alluded will probably serve to invalidate the exemption statute. *Mackey* held that "state laws which are specifically designed to affect employee benefits plans are preempted under §514(a)" of ERISA, 29 U.S.C. §1144(a).[5]

You tell him that upon the filing of a Chapter 7 bankruptcy petition in which a claim for an exemption for his interest in the retirement plan is made, the bankruptcy trustee will no doubt object to the declared exemption. The trustee will argue that the statute which purports to allow the exception is preempted by ERISA, and therefore he should not be entitled to an exemption for the assets held in the pension plan.

Your client's face goes from white to red. He angrily states that ERISA, according to the seminar put on by the medical society, was designed to protect pension plans from the very fate which you are describing. How could it be construed as preempting a state law which purports to have the identical intention, *i.e.*, protecting retirement plans from interference by creditors of a plan participant?

His day only gets worse as you explain the ruling in *In re Hirsch*,[6] which eventually became the first district court ruling adopting the *Mackey* decision to ERISA pension plan benefit exemptions in bankruptcy. In *Hirsch*, the court voided the Arizona statutory exemption for ERISA-qualified pension plans[7], which is similar in substance to most other state pension plan exemption statutes, and held that the debtor's interest in such pension plans were not protected from the claims of bankruptcy creditors.

The *Mackey* decision, you explain to your now thoroughly exasperated client, has served to create a windfall to the bankruptcy estate by rendering ineffective the traditional state law ERISA pension plan benefit exemptions. As both you and he know, many business professionals who may earn hundreds of thousands or perhaps millions of dollars per year often set aside tens or sometimes hundreds of thousands of dollars into ERISA-qualified pension plans, assuming that the funds will be exempt from claims of bankruptcy creditors by virtue of either the state or federal exemption scheme. However, following *Mackey* and its progeny, most bankruptcy courts have held that a debtor's interests in such pension plans are not protected under the state law exemption statutes from the reach of a bankruptcy trustee. Those state statutes are deemed expressly preempted by ERISA, despite the recognition that the state ERISA pension plan exemption statutes may help effectuate ERISA's underlying purposes of protecting certain benefits from creditor execution.[8] Further, with the exception of a few recent decisions, most courts have also held that there is no applicable federal exemption from property of the bankruptcy estate provided by ERISA.

At the conclusion of your analysis, your client appears confused and distraught. He implores you to give him his "bottom line," what he can expect; *i.e.*, is there any possibility that his pension plan will not be taken from him by a bankruptcy trustee? Under present case law, the answer, is that the plan will probably be deemed a bankruptcy estate asset and thus subject to claims of creditors although a few recent cases may provide a glimmer of hope.

The dicta in the *Mackey* decision regarding the applicability of ERISA's anti-aliention provision to state garnishment procedures was recently revisited in *Guidry v. Sheet Metal Workers National Pension Fund*.[9] The Guidry Court affirmatively declared that §206(d)(1) of ERISA[10] places explicit statutory restrictions on assignment or alienation of pension benefits, creating an absolute bar to garnishment of plan benefits, unless some exception to the general statutory plan is applicable.

Based upon the dicta in *Mackey*, as clarified by the holding in *Guidry* concerning the anti-alienation provisions of ERISA and the intention of Congress to create a federal exemption from involuntary alienation of pension benefits by the adoption of §206(d)(1) of ERISA, some courts have recently concluded that §206(d)(1) of ERISA serves to create an available nonbankruptcy exemption for ERISA pension plan benefits under 11 U.S.C. §522(b)(2)(A).[11] However, at least one court has recognized §206(d)(1) as creating a restriction on the transfer of ERISA plan benefits that is enforceable under applicable nonbankruptcy law as provided under 11 U.S.C. §541(c)(2).[12] This article will discuss the status of the law regarding state ERISA plan exemption statutes in the aftermath of the *Mackey* decision, recent case law developments interpreting the *Guidry* decision as providing a separate federal exemption for ERISA pension plan benefits, and how the different approaches taken by bankruptcy courts to the ERISA pension plan benefit problem tend to further serve or negate the congressional intent in enacting §206(d) of ERISA, 29 U.S.C. §1056(d).

II. Preemption of State Law: ERISA Exemptions Under *Mackey*

In *Mackey v. Lanier Collections Agency & Service, Inc.*,[13] the Supreme Court considered whether and to what extent a Georgia statute[14] barring the garnishment of funds or benefits of an employee benefit plan or program which was subject to ERISA was preempted by §514(a)[15] governing such plans. A collection agency obtained a money judgment against several pension plan participants and instituted an action in a Georgia state court to garnish the plan benefits. The plan participants asserted that the Georgia statute, barring the garnishment of "[f]unds or benefits of... [an] employee benefit plan or program subject to [ERISA]"[16] exempted those plan benefits from garnishment. The trial court granted the garnishment request, but the Georgia Court of Appeals reversed and held that the Georgia statute barred garnishment. The Georgia Supreme Court reversed the appellate court, holding that the Georgia garnishment exemption relating to ERISA employee welfare benefit plans was preempted and displaced by ERISA "'since it purports to regulate garnishment of ERISA funds and benefits, a matter specifically provided for' in the federal scheme."[17]

Due to conflicting decisions among state and federal courts on the ERISA preemption issue, the United States Supreme Court granted certiorari and affirmed the holding of the Georgia Supreme Court. In affirming the judgment, the Supreme Court examined the preemption issue as follows:

> ERISA §514(a) pre-empts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. §1144(a). We believe that under our precedents, Ga. Code Ann. §18-4-22.1 is such a state law.
>
> The Georgia statute at issue here expressly refers to — indeed, solely applies to — ERISA employee benefit plans. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." On several occasions since our decision in *Shaw* [*v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)], we have reaffirmed this rule, concluding that state laws which make "reference to" ERISA plans are laws that "relate to" those plans within the meaning of §514(a). In fact, we have virtually taken it for granted that state laws which are "specifically designed to effect employee benefit plans" are preempted under §514(a).[18]

The Supreme Court also considered the argument that the statute should not be preempted by ERISA because it was enacted by the Georgia legislature to help effectuate ERISA's underlying purposes, and as such was not in conflict with ERISA. In this regard, the Court held as follows:

> The possibility that §18-4-22.1 was enacted by the Georgia Legislature to help effectuate ERISA's underlying purposes — the view of the Georgia Court of Appeals below, *see* 178 Ga. App., at 467, 343 S.E.2d, at 493 — is not enough to save the state law from preemption. "The pre-emption provision [of §514(a)]... displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substan-

tive requirements." . . . Legislative "good intentions" do not save a state law within the broad preemptive scope of §514(a).

Consequently, adhering to our precedents in this area, we hold that Ga. Code Ann. §18-4-22.1, which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures, is preempted under §514(a). The state statute's express reference to ERISA plans suffices to bring it within the federal law's preemptive reach.[19]

An overwhelming majority of bankruptcy courts have interpreted the *Mackey* decision as a mandate to invalidate those state statutes which serve to effectuate the underlying purposes of ERISA by providing certain exemptions from the reach of creditors and bankruptcy trustees for ERISA-qualifed pension plan benefits.[20] As expressly provided in ERISA, the primary policy of ERISA is to protect the interests of participants in employee benefit plans and their beneficiaries from certain creditor execution.[21] However, in order to create a uniform pension law, §514(a) also explicitly preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[22] The Supreme Court's interpretation §514(a) in *Mackey* has served to create a windfall to the bankruptcy estate by rendering ineffective traditional state law ERISA-qualfied pension plan benefit exemptions. This interpretation or such an interpretation is clearly contrary to the congressional intent expressed in ERISA §2(b) to extend antialienation protection to certain ERISA pension plan benefits.[23]

III. *Guidry v. Sheet Metal Workers National Pension Fund: Mackey* Revisited

The Supreme Court revisited *Mackey* in *Guidry v. Sheet Metal Workers National Pension Fund,*[24] and, in so doing, may have provided an avenue for relief from the harsh effect of the *Mackey* decision upon the interests of a bankruptcy debtor in an ERISA-qualified pension plan. At issue in *Guidry* was whether a labor union could impose a constructive trust upon an employee's pension benefits under an ERISA-qualified plan in order to recover losses incurred by the union resulting from the employee's embezzlement of pension trust funds. The employee, Guidry, pleaded guilty to embezzling funds from a labor union in violation of §501(c) of the Labor-Management Reporting and Disclosure Act of 1959.[25] Guidry then filed suit in United States District Court against two of the union pension plans after the plan trustees asserted that he had forfeited his rights to benefits under those plans as a result of his criminal activity. The labor union then intervened as a third party and prior to trial stipulated with Guidry to the entry of a money judgment in its favor.[26]

"[T]he primary policy of ERISA is to protect the interests of participants in employee benefit plans and their beneficiaries from certain creditor execution."

The district court rejected the contention that Guidry had forfeited his rights to benefits as a result of his criminal activity, but ruled that a constructive trust in favor of the union should be imposed upon Guidry's pension benefits until the judgment was satisfied.[27] Accordingly, the court held that a narrow exception to the ERISA prohibition on assignment or alienation of pension benefits under §206(d)(1) of ERISA was appropriate where "the viability of a union and the members' pension plans was damaged by the knavery of a union official."[28] The decision of the district court was affirmed by the Court of Appeals for the Tenth Circuit, which concluded that §206(d)(1) did not preclude the imposition of a constructive trust, and it was unlikely that Congress intended to ignore equitable principals by protecting plan beneficiaries such as Guidry from the consequences of their misconduct.[29]

Because the various federal courts of appeal had expressed differing views concerning the availability of the exceptions to ERISA's anti-alienation provision, the Supreme Court granted certiorari, and held that the remedy of a constructive trust against Guidry's ERISA plan was not available. In so doing, the Court looked to its dicta in *Mackey,* in which the Court previously held that, although ERISA does not bar the garnishment of welfare (*e.g.,* vacation) benefits, §206(d)(1) does erect a general bar to the garnishment of pension benefits from plans covered by the Act.[30] In analyzing the precise language in *Mackey,* the Court stated as follows:

> The view that the *statutory restrictions on assignment or alienation of pension benefits apply to garnishment* is consistent with applicable administrative regulations, with the relevant legislative history, and with the view of other federal courts. It is also consonant with other statutory provisions designed to safeguard retirement income. We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case. That remedy is therefore prohibited by §206(d)(1) unless some exception to the general statutory ban is applicable.[31]

In reaching this conclusion, the Supreme Court expressed its views on the congressional intent behind the anti-alienation provisions of ERISA §206(d) as follows:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.[32]

Accordingly, the Supreme Court held that it was the clear intent of Congress to create a federal exemption from involuntary alienation of pension benefits by the adoption of ERISA §206(d).

IV. General Issues Addressed by Claim of Exemption for ERISA Plan Benefits

When a trustee objects to a debtor's claim of exemption for ERISA-qualified pension plan benefits, there are two general issues which will arise: first, whether the debtor's interest in the plan becomes property of the bankruptcy estate under §541 of the Bankruptcy Code upon filing of the bankruptcy petition; and second, if the interest of the debtor in an ERISA pension plan becomes property of the estate under §541, whether the interest may be declared exempt by the debtor from administration of the bankruptcy estate under §522(b) of the Bankruptcy Code. Further, in attempting to declare the debtor's interest in an ERISA-qualified pension plan exempt under §522(b) of the Bankruptcy Code, two additional issues may arise: first, whether the debtor's interest may be delcared exempt under a state statutory exemption; and second, whether the debtor's interest may be declared exempt under applicable federal nonbankruptcy law as prescribed by §522(b)(2)(A) of the Bankruptcy Code.

V. Treatment of Debtor's Interest in ERISA Plan Under §541

The threshold question when a bankruptcy debtor claims an exemption for his interest in an ERISA-qualified pension plan is whether the debtor's plan interests are property of the bankruptcy estate pursuant to §541 of the Bankruptcy Code. Under §541 all property in which a debtor has a legal or equitable interest at the time of filing becomes part of the bankruptcy estate.[33]

Section 541(c)(2) of the Bankruptcy Code, however, grants an exception to §541(a)(1) by providing that "[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."[34] Accordingly, §541(c)(2) prevents any such interest from being included in the bankruptcy estate.[35]

Courts have traditionally construed §541(c)(2) as not including ERISA-qualified pension plans, holding that "applicable non-bankruptcy law," as referenced in §541(c)(2), referred only to state law concerning spendthrift trusts, so that ERISA-qualifed pension plans containing anti-alienation provisions were excluded pursuant to §541(c)(2) only if they were enforceable under state spendthrift trust law.[36] Recently, however, courts have begun to recognize that the anti-alienation provision set forth in ERISA §206(d)(1) should qualify as "applicable nonbankruptcy law" for purposes of §541(c)(2).

In *In re Moore,*[37] the Court of Appeals for the Fourth Circuit addressed the issue of whether the interests of several debtors in an ERISA-qualified profit sharing and pension plan were property of their bankruptcy estates under §541 of the Bankruptcy Code. The bankruptcy trustee filed suit seeking turnover of the debtors' interests in the ERISA-qualified plan. The plan administrator asserted that the debtors' interests in the plan were not subject to turnover because they were protected by an enforceable restriction on transfer under ERISA which the Bankruptcy Code recognized as dispositive "applicable non-bankruptcy law" for purposes of exclusion from property of the bankruptcy estate under §541(c)(2). On appeal, the Court of Appeals for the Fourth Circuit agreed with the plan administrator and held that the debtors' interests in the plan were not property of their respective bankruptcy estates due to the provisions of §541(c)(2), and therefore were not subject to turnover to the trustee in bankruptcy.[38]

The court of appeals looked to the meaning of the term "applicable nonbankruptcy law" as used in §541(c)(2) and rejected the notion that the term as used in that statute was strictly limited to state spendthrift trust law.[39] In support of its holding, the court stated as follows:

> The trustee in bankruptcy's narrow interpretation of §541(c)(2) cannot be squared with the section's broad language. "Applicable nonbankruptcy law" means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "applicable nonbankruptcy law" or in the remainder of §541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.
>
> In addition to violating the plain language of §541(c)(2), the trustee's interpretation of "applicable nonbankruptcy law" is not consistent with other uses of the identical phrase throughout the Bankruptcy Code. In numerous places in the Bankruptcy Code, the term "applicable nonbankruptcy law" is used to refer to federal as well as state law. . . .
>
> "[A] word is presumed to have the same meaning in all subsections of the same statute." It is incongruous to give the same phrase in §541(c)(2) a narrower construction than the identical phrase in other parts of the Bankruptcy Code, particularly since the disparate sections of the Bankruptcy Code were enacted together in a single comprehensive statute.[40]

In considering the congressional intent behind §541(c)(2) and the "applicable nonbankruptcy law" language, the court stated:

> "[I]f Congress had intended §541(c)(2) to only apply to state spendthrift trusts, the term 'spendthrift trust' would have appeared in the statute, rather than the phrase 'applicable nonbankruptcy law.'" The term "applicable nonbankruptcy law" suggests no limitation to state spendthrift trust law, and we refuse to read such a limitation into the statute.[41]

Although the *Moore* court recognized that several circuits had defined the term "applicable nonbankruptcy law" in §541(c)(2) narrowly to refer only to state spendthrift trust law,[42] it rejected those decisions because they were purportedly based upon the legislative history of §541(c)(2), which the court deemed irrelevant because it found the language of the statute on its face unambiguous:

> An appeal to legislative history is inappropriate here because the language of §541(c)(2) is clear. "Legislative history is irrelevant to the interpretation of an unambiguous statute." . . . Congress enacted §541(c)(2), not its accompanying legislative reports. We have no authority to limit the scope of a clear statutory term by recourse to the views of a legislative subgroup.[43]

Consequently, the court concluded that

"[t]he clarity of the statutory term ['applicable nonbankruptcy law' under §541(c)(2)] is simply not clouded by the legislative history,"[44] such that the anti-alienation provisions of §206(d)(1) of ERISA contain an enforceable transfer restriction that would bring the statute within the meaning of the term "applicable nonbankruptcy law" excluding the plan benefits from the bankruptcy estate pursuant to §541(c)(2).[45]

Likewise, in *In re Kincaid*,[46] Judge Fletcher, in a persuasive concurring opinion, expressed his doubts about the traditional ruling that the term "applicable nonbankruptcy law" under §541(c)(2) referred solely to state spendthrift trust law. In his concurrence, Judge Fletcher stated that the debtor's interest in an ERISA-qualified pension plan was properly protected by ERISA's restrictions on transfer from the bankruptcy estate pursuant to §541(c)(2) of the Bankruptcy Code. Recognizing the reasoning of the fourth circuit in *Moore*, he also exposed the flaws in the legislative history approach taken by numerous other circuits in interpreting the term "applicable nonbankruptcy law" under §541(c)(2). In addition, he acknowledged the congressional intent in establishing §206(d)(1) of ERISA, as set forth in the applicable provisions of the Internal Revenue Code and accompanying Treasury Regulations, and concluded as follows:

> Further, both ERISA's purpose and its statutory scheme indicate that it properly constitutes "applicable nonbankruptcy law." ERISA aims to ensure that "if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he actually will receive it." To attain this goal, statutes and regulations restrict the assignment and alienation of benefits. ERISA provisions therefore seek to prevent alienation of benefits, either voluntarily or involuntarily. As such, ERISA falls within the plain meaning of the term "applicable nonbankruptcy law."[47]

These recent opinions reflect the congressional intent set forth in ERISA §2(b) (further buttressed by the holdings in *Guidry* and *Mackey*) that §206(d)(1) erects a general bar to the garnishment of pension plans covered by the Act.[48] Unlike prior court decisions which ignore the anti-alienation provisions of §206(d)(1) on the basis of some vague and inconclusive legislative history regarding the statute, the recognition of §206(d)(1) as a restriction on alienation qualifying as "applicable nonbankruptcy law" under §541(c)(2) of the Bankruptcy Code serves to further the congressional intent of ERISA. It is also consonant with the strong view expressed by the Supreme Court that, in its opinion, it was the intention of Congress to create a federal exemption from involuntary alienation of pension benefits by the adoption of ERISA §206(d).[49]

"It would appear . . . that any state ERISA pension plan exemption statute would be deemed preempted by ERISA. . . ."

VI. Exemption of ERISA Plan Pursuant to State Exemption

Provided the debtor's interest in an ERISA-qualified pension plan is determined to be property of the estate under §541 of the Bankruptcy Code, the next question is whether the debtor's interest in an ERISA-qualified pension plan may be declared exempt under the pertinent state statutory exemption. In this regard, the overwhelming majority of bankruptcy courts have concluded that the various state exemption laws have been preempted by §514(a) of ERISA to the extent they apply to ERISA-qualifed employee pension benefit plans.[50] The courts have relied upon the *Mackey* decision which concluded that the preemption provision of §514(a) of ERISA displaces all state laws that fall within its sphere, even including those state laws that are consistent with ERISA's substantive requirements, and that the state law will relate to an employee benefit plan, under ERISA, if it has connection with or reference to such a plan.[51]

Many state ERISA plan exemption statutes have not yet been the subject of published bankruptcy court opinions on the ERISA preemption issue.[52] It would appear, however, in light of the clear ruling in *Mackey* regarding the preemptive scope of §514(a) of ERISA, that any state ERISA pension plan exemption statute would be deemed preempted by ERISA and thus rendered ineffective for purposes of exemption in bankruptcy.

VII. Exemption of ERISA Plan Benefits Under §522(b)(2)(A) of the Bankruptcy Code

The next issue to be addressed, assuming the debtor's interest in an ERISA-qualified pension plan is considered to be property of the estate under §541, is whether the anti-alienation provisions of ERISA, set forth at §206(d)(1), serve to create a federal nonbankruptcy exemption from property of the bankruptcy estate under §522(b)(2)(A) of the Bankruptcy Code. While most courts that considered the issue prior to *Guidry* held that Congress did not intend to allow a nonbankruptcy federal exemption for ERISA plans under that statute, in light of the *Guidry* holding, some courts recently have interpreted §206(d)(1) of ERISA as providing a nonbankruptcy federal exemption pursuant to §522(b)(2)(A) of the Bankruptcy Code.

A. Analysis of §522(b)(2)(A) Exemption Prior to *Guidry*

1. Majority Analysis — No Exemption for ERISA Plans Under §522 (b)(2)(A)

Under §522(b)(2)(A) of the Bankruptcy Code, debtors in those states that have opted out of the federal bankruptcy exemption shceme[53] would still be entitled to an exemption for their interests in ERISA plans provided such an interest is characterized as a *federal nonbankruptcy* exemption.[54] In this regard, the vast majority of courts have traditionally interpreted the anti-alienation provisions of §206(d)(1) so as not to create a separate federal nonbankruptcy exemption and, in support of this contention, have relied upon an interpretation of the respective legislative histories of the anti-alienation provisions of ERISA and §522(b)(2)(A) of the Bankruptcy Code. Based upon the legislative history of §206(d) of ERISA and §522(b)(2)(A) of the Bankruptcy Code, until recently, nearly every court that has considered the issue has held that Congress did not intend to allow a federal nonbankruptcy exemption for ERISA plans under §522(b)(2)(A).[55]

For example, in *In re Lichstrahl*,[56] the United States Court of Appeals for the Eleventh Circuit addressed the issue of whether a debtor's interest in an ERISA-qualified pension plan could be exempted out of the bankruptcy estate pursuant to §522(b)(2)(A) of the Bankruptcy Code as "any property that is exempt under federal law, other than subsection (d) of this section." Because Florida had opted out of the federal exemption scheme pursuant to §522(d) of the Bankruptcy Code, the court concluded that the debtor's interest could only be exempted if the ERISA-qualifed pension plan fell within the sphere of §522(b)(2)(A) as federal nonbankruptcy law. In looking at whether Congress intended to exempt ERISA-qualifed pension plans under §522(b)(2)(A) as an applicable federal nonbankruptcy law exemption, the court referred to the appropriate House and Senate reports which provided a list of property that could be exempted under that section. Accordingly the Court noted that ERISA-qualified pension plans were not included. Although the court recognized that Congress may not have intended that list to be exhaustive, it stated that Congress' failure to include ERISA within the list was nonetheless indicative of congressional intent because Congress was aware of the existence of the ERISA statute when it issued the House and Senate reports on §522(b)(2)(A) in 1977 and 1978, but did not choose to include ERISA in those reports.[57] Further, when the *Lichstrahl* court compared the ERISA anti-alienation provisions to the list of property that could be exempted under federal law as set forth in the House and Senate reports, the court noted that, unlike the ERISA pension plan anti-alienation provision, the other property exemptions were "peculiarly federal" in nature, so that Congress might have intended to exclude ERISA from the federal nonbankruptcy exemptions of §522(b)(2)(A) on those grounds as well. Accordingly, the court concluded that the failure to mention ERISA in connection with §522(b)(2)(A) of the Bankruptcy Code was intentional, so that the ERISA anti-alienation provision, §206(d), would not be available to the debtor as a federal nonbankruptcy exemption under that statute.[58]

2. Komet Analysis — ERISA Plan as Federal Nonbankruptcy Law Exemption Under §522(b)(2)(A)

Prior to the Supreme Court's holding in *Guidry*, a few bankruptcy courts disagreed with the analysis of the Eleventh Circuit in *Lichstrahl*. For example, in *In re Komet*,[59] the court, despite the Fifth Circuit's decision in *In re Goff*,[60] and other authority to the contrary, concluded that the ERISA anti-alienation provision was in fact a federal nonbankruptcy exemption available under §522(b)(2)(A) to debtors in (1) those states that had opted out of the federal exemption scheme pursuant to §522(d), and (2) those states that did not choose to opt out of the federal exemption scheme but opted to use the applicable statutory exemptions rather than the alternative federal scheme set forth in that section. In so doing, the court rejected the "strong dicta to the contrary" in *Goff*,[61] and challenged that decision on four separate grounds. First, the court said *Goff* erroneously concluded that the only function of the anti-alienation language in §206(d)(1) of ERISA is to qualify plans for favorable tax treatment.[62] Instead, said the court, the threat of losing tax benefits was merely an effective means to induce voluntary compliance with ERISA's labor regulations and to enforce the equitable requirements imposed by Part I of ERISA.[63]

Next, the *Komet* court rejected the *Goff* court's interpretation of the congressional policy behind promulgating Bankruptcy Code §522(b)(2)(A). While the *Goff* court stated that the Bankruptcy Code was generally intended to broaden the "property of the estate" available to bankruptcy creditors, and was specifically intended to limit any exemption of pension funds,[64] the *Komet* court stated that "the structure and development of the applicable provisions of the Bankruptcy Code belie this conclusion."[65] The court argued that *Goff* improperly assumed that an intention to bring as much property as possible into the estate also assumed the intention to limit the exempt property which could be removed from the estate; instead, §541 and §522 serve two very discrete purposes which coexist quite comfortably without conflict.[66] In enacting §541 of the Bankruptcy Code, said *Komet*, Congress chose to depart from a scheme which had previously relied heavily upon state law to define estate property with the simple intent to achieve national uniformity and broad jurisdiction for the Bankruptcy Court consistent with the expanded powers conferred on the court by the new Code.[67] In connection therewith, Congress enacted §522(b) with the intent to reflect a policy generally favoring debtors retaining their retirement benefits. The legislative history of §522(b) clearly reflects a congressional intent to accord the debtors sufficient property to effectuate a fresh start, "with nary a hint of an intent to penalize debtors for chosing one exemption scheme over the other."[68] Consequently, "[A]s §522(b)(2)(A) contemplates honoring existing exemptions available under 'other federal law,' the holding in *Commercial Mortgage* [*Insurance Inc. v. Citizens National Bank*, 526 F. Supp. 510 (N.D. Tex. 1981)] representing as it does a statement of federal common law construing ERISA §206(d)(1) as an exemption, compels this court to honor as exempt the benefits accruing from ERISA-regulated plans which are in compliance with ERISA §206(d)(1)."[89]

Third, the *Komet* court rejected *Goff's* legislative history argument of Bankruptcy Code §522(b)(2)(A), which relies upon the "illustrative list" set forth in the House and Senate reports to support its conclusion that the Code section reference to other "applicable federal law" was not intended to cover §206(d)(1) of ERISA. Rather, upon a detailed examination of the legislative history of §522(b)(2)(A), the court concluded, had Congress intended to depart from prior law exempting ERISA plan benefits in the bankruptcy context, it would have done so by choosing explicit statutory language: "[I]t is dangerous to rely upon illustrative lists in the legislative history to add such a limitation to the statute."[70] Also, the *Komet* court recognized that, in taking the legislative history approach, "*Goff* breaks a cardinal rule of statutory construction when it relies so heavily on the listing in the legislative history to support its conclusion that Congress did not intend to include ERISA plans under the 'other federal law' rubric," in that, where the meaning of the statute is clear on its face, it is improper to resort to legislative history to interpret the statute.[71]

Lastly, the *Komet* court rejected *Goff's* conclusion that the Bankruptcy Code was overruled by ERISA, and instead stated that the proper analysis when two federal statutes conflict is to determine whether the two statutes can be construed so as to avoid any conflict. If such a way cannot be found, then the conflict should be resolved in such a way as to serve the congressional intent impressed upon both statutes and do the least damage to either one.[72] Accordingly, the court concluded that §522(b)(2)(A) permitted a debtor who had elected the "state and other federal law" exemption scheme to claim his or her ERISA pension benefit plan, to the extent provided by §206(d) of ERISA, as exempt under "other federal law" as provided by the statute.[73]

B. Analysis of §522(b)(2)(A) Subsequent to *Guidry* — Adoption of *Komet* Analysis

Due to the holding in *Mackey,* as clarified in *Guidry,* there have been an increasing number of courts which have supported the proposition set forth in *Komet* that §522(b)(2)(A) of the Bankruptcy Code provides an additional federal nonbankruptcy exemption for a debtor's interest in an ERISA-qualified pension plan pursuant to the anti-alienation provisions of §206(d)(1) of ERISA. For example, in *In re Starkey,*[74] the court considered objections by Chapter 7 and Chapter 13 trustees to debtors' claims of exemption of their interests in pension plans qualified under ERISA, and held that pension benefits could be properly claimed by the debtors as exempt under §522(b)(2)(A) of the Bankruptcy Code granting an exemption in any property that is exempt under federal law. In *Starkey* the debtors were participants in a "401(k)" ERISA-qualified benefit plan at their respective places of employment. In each case, the debtors had made contributions to the plan, and benefits attributable to the debtors' and employers' (except as to one debtor) contributions were accrued to the debtors' accounts.[75] Although the court recognized that the status of ERISA plans in bankruptcy in Colorado had been visited recently by the judges of that court,[76] those opinions needed to be revisited in light of the recent Supreme Court decision in *Guidry* which touched, at least in dicta, on the problems in interpreting the law in that area.[77]

The *Starkey* court began its analysis of ERISA plans in bankruptcy with the provisions of §541(c) of the Bankruptcy Code, and determined, in that area, no law had been clearly developed to establish that ERISA was not considered "other applicable nonbankruptcy law" for purposes of §541(c)(2). Further, the debtors' pension plans were not valid spendthrift trusts meriting exclusion from the bankruptcy estate under §541(c)(2).[78] Because the court concluded that the debtors' interests in the plans constituted property of their respective estates under §541 of the Code, the question then became whether some or all of the interests could be claimed to be exempt pursuant to the provisions of §522(b)(2).[79] The court first recognized that Colorado elected to opt out of the federal exemption scheme pursuant to §13-54-107 of the Colorado Revised Statutes, so that the right of the debtors to claim an exemption in their pension funds was governed by the provisions of §522(b)(2) of the Bankruptcy Code. The court then noted that, under *Mackey,* as well as under a recent decision from a bankruptcy court in the District of Colorado, the relevant Colordo state statutes, C.R.S. §13-54-104 and §13-54.5-101, were preempted by ERISA and were also an invalid and unconstitutional attempt by the state to create a special bankruptcy exemption.[80] Therefore, the court's analysis of §522(b)(2) was restricted to §522(b)(2)(A) and whether the debtors' interests in their respective ERISA plans were property exempt under other applicable federal nonbankruptcy law for purposes of the statute.[81]

In determining whether the provisions of ERISA §206(d) constitute a separate federal exemption for purposes of §522(b)(2)(A) of the Bankruptcy Code, the court stated that, based upon the Supreme Court's holding in *Mackey,* the majority of courts throughout the country have concluded that the anti-alienation provisions of ERISA do not constitute such a separate federal exemption.[82] However, the court also recognized the analysis set forth by the Bankruptcy Court of the Western District of Texas in *Komet* and noted that support for the conclusions reached by that court can now be found in the Supreme Court's opinion in *Guidry.* In particular, the court looked to the *Mackey* decision, as clarified by *Guidry,* and noted that the dicta in *Mackey* clearly stated that ERISA contains explicit anti-alienation language for pension benefits. ERISA, therefore, provides a general bar to the alienation or assignment of benefits provided for by ERISA pension benefit plans under §206(d)(1), rather than merely setting up guidelines to qualify pension plans for tax exempt treatment, as previously contended by the *Goff* court.[83] With these statements by the *Mackey* court in mind, the court next looked to the *Guidry* decision which revisited *Mackey* and stated that the statutory restrictions on assignment or alienation of pension benefits established by §206(d) of ERISA provide a bar to the alienation or garnishment of ERISA plan benefits, and that such a view is consistent with the applicable administrative regulations, relevant legislative history, and views of other federal courts.[84]

Based upon a review of the dicta in *Mackey* and the holding in *Guidry,* the court set forth its opinion as follows:

> Considering the *dicta* in *Mackey,* the holding in *Guidry,* and the strong view expressed by the Supreme Court that, in its opinion, it was the intention of Congress to create a federal exemption from involuntary alienation of pension benefits by the adoption of 29 U.S.C. §1056(d)(2), this Court concludes that ERISA must be considered to be another federal exemption for purposes of 11 U.S.C. §522(b)(2)(A). Thus, the ERISA pension benefits of these debtors can properly be claimed by them to be exempt pursuant to those provisions. The conclusion reached by the Court is consistent with the legislative history and properly harmonizes

otherwise potentially conflicting results.[85]

As to the legislative history, the court reviewed the committee notes on the provisions of §522(b)(2), which set forth the list of some items that may be exempted under other federal law for purposes of that section, and concluded the failure of Congress to include the ERISA anti-alienation provision on a clearly non-exclusive, illustrative list, is not probative of an intent to exclude it from that list. If Congress had desired to limit §522(b)(2)(A) to only certain federal laws, it would have done so by incorporating the list into the statute and making it exclusive rather than merely illustrative.[86] Further, in reconciling the provisions of §541 (property of the estate) and §522(b)(2) (exemptions), the court set forth its analysis as follows:

> As to harmonizing potentially conflicting or disparate provisions of the Code, it is instructive to first look to the results which would occur in Colorado in the absence of a bankruptcy filing. Because ERISA preempts the state's garnishment statutes, immediately before filing of a bankruptcy case a judgment creditor in this state would not be able to garnish or otherwise levy upon any ERISA pension benefits of these Debtors. By this Court's holding, the same result will occur in bankruptcy. However, if the anti-alienation provisions of ERISA are not recognized as being another federal exemption for purposes of 11 U.S.C. §522(b)(2), in Colorado (and in other opt-out states), a debtor would have no exemption at all in his bankruptcy case for ERISA pension benefits, a result clearly not to be countenanced under the policy expressed in both *Mackey* and *Guidry*.[87]

Accordingly, the *Starkey* court concluded that the debtors were entitled to the benefits of the exemptions provided by §206(d) of ERISA by virture of §522(b)(2)(A) of the Bankruptcy Code. Judgment was entered in favor of the debtors finding that all benefits in their respective ERISA-qualified plans which had accrued as of the date the petitions were filed were exempt pursuant to §522(b)(2).[88] This holding set forth by the *Starkey* court reflects a small but growing trend among bankruptcy courts to allow an exemption for ERISA pension benefits as "any property that is exempt under federal law" pursuant to §522(b)(2)(A) of the Bankruptcy Code.[89]

VIII. Conclusion

In the aftermath of *Mackey*, numerous bankruptcy courts and circuit courts have rendered decisions serving to void state pension plan exemption statutes as they "relate to" ERISA-qualified pension plans. Additionally, a vast majority of bankruptcy courts have also construed the legislative history of the related statutes so as to preclude finding either (1) ERISA is "applicable nonbankruptcy law" for purposes of exclusion from property of the estate under §541(c)(2), or §206(d) (the anti-alienability provision) creates an available federal exemption for plan benefits under §522(b)(2)(A). The result of this trend is that the state and federal exemptions for ERISA pension plans, upon which professionals have relied heavily to safeguard substantial assets from the reach of creditors, have been effectively eliminated. This elimination of ERISA pension plan exemptions in the aftermath of *Mackey* is clearly in conflict with the strong view expressed by the Supreme Court in dicta in *Mackey*, and as clarified in *Guidry*, that it was the intention of Congress to create a federal exemption from involuntary alienation of pension benefits by the adoption of the anti-alienation provisions set forth in ERISA §206(d).

> ***"[I]t would be prudent for courts to affirmatively declare that ERISA-qualified pension plans are included in the 'other federal law. . .'"***

Thus, in light of the dicta in *Mackey*, as recently clarified by the holding in *Guidry*, the current state of the law regarding ERISA exemptions in bankruptcy needs to be altered in order to more effectively reflect the intent of Congress in promulgating §206(d) of ERISA. Recently, certain decisions coming out of the bankruptcy and district courts have recognized the congressional intent behind ERISA, and have proposed means for interpreting the potentially conflicting provisions of ERISA §206(d) and §541 and §522(b) of the Bankruptcy Code. The courts have proposed two alternative solutions to this problem: (1) interpreting §541(c)(2) of the Code as encompassing the anti-alienation provisions of ERISA;[90] or (2) providing debtors with the right to claim an exemption for their interests in pension funds under the provisions of §522(b)(2)(A) of the Code.[91]

Although a strong argument can be made in favor of interpreting §541(c)(2) as encompassing the anti-alienation provisions of ERISA, that argument may be tainted by the fact that such a conclusion would render all ERISA benefits excluded from property of the estate. Thus, such an interpretation would render ineffective §522(d)(10)(E) of the Bankruptcy Code, which allows a debtor to retain a limited interest in his ERISA plan, as a federal exemption, to the extent reasonably necessary for the support of the debtor.[92]

The better approach towards harmonizing the potentially conflicting provisions of §206(d) of ERISA and §541 and §522(b) of the Bankruptcy Code is to conclude that ERISA must be considered to be another federal exemption for purposes of §522(b)(2)(A). By taking this approach, the courts will be consistent with the congressional intent recognized in *Mackey* and *Guidry* to create a federal exemption from involuntary alienation of pension benefits by the adoption of ERISA §206(d), and will still recognize the effect and congressional intent behind §541, §522(b)(2), and §522(d)(10)(E) of the Bankruptcy Code. In particular, treating ERISA §206(d) as a federal exemption for purposes of §522(b)(2)(A) of the Code will resolve any conflict between §541(c)(2) and §522(d)(10)(E) while still giving effect to both statutes under the current interpretation of the majority of bankruptcy courts. Such an interpretation also resolves the potential conflict under the current state of the law in most bankruptcy courts where a debtor in a state that has not opted out of the federal exemption scheme would have a limited exemption for ERISA benefits under §522(d)(10)(E) available, but a debtor in a state that has chosen to opt out of the federal scheme would have no exemption at all because he would be forced to attempt to utilize the voided state exemption pursuant to §522(b)(2) of the Code.

Until there is either additional legislation in the area of ERISA exemptions, either on a state level (making ERISA-qualified pension plans spendthrift trusts under the applicable state law), or on a federal level (providing for a specific ERISA pension plan exemption in bankruptcy), or until the various United States Circuit Courts or the United States Supreme Court affirmatively determine that ERISA-qualified pension plans qualify as "other federal law" for purposes of the §522(b)(2)(A) bankruptcy exemption, uncertainty will continue to prevail. Therefore, to resolve potential conflicts in the area of ERISA exemptions in bankruptcy, it would be prudent for courts to affirmatively declare that ERISA-qualified pension plans are included in the "other federal law" for purposes of the §522(b)(2)(A) bankruptcy exemption so that those conflicts which currently exist between the related ERISA and Bankruptcy Code provisions may finally be put to rest.

Endnotes

[1]Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 (1988).

[2]486 U.S. 825 (1988).

[3]As of the date of this article, thirty-five states have "opted out" of the federal exemption scheme as set forth at 11 U.S.C. §522(d). Those states include: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming. 7 *Collier on Bankruptcy* 1 n.6 (15th ed. 1989). Moreover, it is uncertain whether Alaska has opted out of the federal exemption scheme. *Id.* at 19.

[4]*See, e.g., infra* note 52.

[5]*Mackey,* 486 U.S. at 829.

[6]98 Bankr. 1 (Bankr. D. Ariz. 1988), *aff'd sub nom. In re Siegel,* 105 Bankr. 556 (D. Ariz. 1989).

[7]Ariz. Rev. Stat. §33-1126(B) (1990). This statute provides, in pertinent part:

> B. Any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§401(a), 403(a), 403(b), 408 or 409 of the United States Internal Revenue Code of 1986, as amended, shall be exempt from any and all claims of creditors of the beneficiary or participant. This section shall not apply to any of the following:
>
> 1. An alternate payee under a qualified domestic relations order, as defined in §414(p) of the United States Internal Revenue Code of 1986, as amended.
>
> 2. Amounts contributed within one hundred twenty days before a debtor files for bankruptcy.
>
> 3. The assets of bankruptcy proceedings filed before July 1, 1987. The interest of any and all alternate payees shall be exempt from any and all claims of any creditor of the alternate payee.

[8]*Mackey,* 486 U.S. at 829-30.

[9]110 S.Ct. 680 (1990).

[10]29 U.S.C. §1056(d)(1) (1988). This section provides as follows:

> (d) Assignment or alienation of plan benefits
>
> (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

[11]Section 522(b)(2)(A) provides, in pertinent part, as follows:

> (b) Notwithstanding §541 of this title [11 U.S.C.S. §541], an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this sub-section.... Such property is — ...
>
> (2)(A) — *any property that is exempt under Federal law,* other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place....

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

[12]11 U.S.C. §541. For the text of this statute, *see infra* note 33.

[13]486 U.S. 825.

[14]Ga. Code Ann. §18-4-22.1 (1982). The Georgia statute provided, in pertinent part:

> Funds or benefits of a pension, retirement, or employee benefit plan or program subject to the provisions of the Federal Employee Retirement Income Security Act of 1974, as amended, shall not be subject to the process of garnishment... unless such garnishment is based upon a judgment for alimony or for child support....

This statute was subsequently repealed by 1990 Ga. Laws 360, §2, effective July 1, 1990.

[15]29 U.S.C. §1144(a). This section provides as follows:

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

[16]Ga. Code Ann. §18-4-22.1.

[17]*Mackey,* 486 U.S. at 827-28 (quoting *Lanier Collection Agency & Serv., Inc. v. Mackey,* 256 Ga. 499, 501, 350 S.E.2d 439, 442 (1986)).

[18]*Mackey,* 486 U.S. at 829 (citations omitted) (quoting *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 739 (1985)). *See also FMC Corp. v. Holliday,* 111 S.Ct. 403 (1990) (a law "relates to" an employee benefit plan if it has connection with or reference to such a plan).

[19]*Mackey,* 486 at 829-30 (footnote omitted).

[20]*See* cases cited *infra* notes 50-52 and accompanying text.

[21]*See* ERISA §2(b), 29 U.S.C. §1001(b).

[22]See ERISA §514(a), 29 U.S.C. §1144(a), as set forth *supra* at note 15.
[23]29 U.S.C. §1001(b). *See also* ERISA §206(d)(1), 29 U.S.C. §1056(d)(1), which bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA pension plans.
[24]110 S.Ct. 680 (1990).
[25]29 U.S.C. §§401-531 (1988).
[26]*Guidry,* 110 S.Ct. at 683.
[27]*Id.* at 684.
[28]*Id.* (quoting *Guidry v. Sheet Metal Workers' Nat'l Pension Fund,* 641 F. Supp. 360, 363 (D. Colo. 1986)).
[29]*Id.* at 684.
[30]*Id.* at 685 (citing *Mackey,* 486 U.S. at 836).
[31]*Guidry,* 110 S.Ct. at 685 (emphasis added).
[32]*Id.* at 687. As an exception to the congressional policy, the Supreme Court in *Guidry* pointed to §104(a) of ERISA which mandates that the anti-alienation provision of §206(d) should not apply to a "qualified domestic relations order." *Id.* at 687 n.18.
[33]11 U.S.C. §541. Section 541 provides, in pertinent part:

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

11 U.S.C. §541.
[34]11 U.S.C. §541(c)(2).
[35]*In re Lichstrahl,* 750 F.2d 1488, 1489-90 (11th Cir. 1985).
[36]*In re Kincaid,* 917 F.2d 1162, 1166 (9th Cir. 1990); *In re Brooks,* 844 F.2d 258, 261 (5th Cir. 1988); *In re Daniel,* 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); *In re Lichstrahl,* 750 F.2d at 1490; *In re Graham,* 726 F.2d 1268, 1271 (8th Cir. 1984); *In re Goff,* 706 F.2d 574, 582 (5th Cir. 1983).
[37]907 F.2d 1476 (4th Cir. 1990).
[38]*Id.* at 1476.
[39]*Id.* at 1477.
[40]*Id.* at 1477-78 (citations omitted).
[41]*Id.* at 1478 (citations omitted) (quoting *In re Ralstin,* 61 Bankr. 502, 503 (Bankr. D.N.J. 1984)). *See also McLean v. Central States, Southeast & Southwest Areas Pension Fund,* 762 F.2d 1204, 1207 n.1 (4th Cir. 1985) (holding that §541(c)(2) should not be confined in its recognition of enforceable transfer restrictions to those found in traditional spendthrift trusts since the language of §541(c)(2) does not suggest such a limitation).
[42]*See supra* note 36 and accompanying text.
[43]*In re Moore,* 907 F.2d at 1478-79 (citations omitted). Moreover, the court noted that, even if the legislative history of §541(c)(2) were relevant, the legislative history is inconclusive as to whether the term "applicable nonbankruptcy law" in §541(c)(2) is restricted to state spendthrift trust law. Upon review of the appropriate passages from the House and Senate Reports, the court concluded that "[a]t most, these passages suggest that Congress intended state spendthrift trust law to be included within the meaning of 'applicable nonbankruptcy law,'" such that the congressional emphasis and the legislative reports on preserving and continuing restrictions on transfer of a state spendthrift trust meant only that Congress wanted to ensure that state spendthrift trust law be included within the restrictions on transfer enforceable under "applicable nonbankruptcy law" for purposes of §541(c)(2). *Id.* at 479. Accordingly, the court concluded that "[N]othing in the legislative history indicates, however, that Congress meant 'applicable nonbankruptcy law' to refer exclusively to state spendthrift trust law." *Id.*
[44]*Id.* at 1479. Additionally, the court addressed whether §206(d) of ERISA contained an enforceable transfer restriciton for purposes of §541(c)(2). In this regard, the court noted that, since ERISA's nonalienability provisions prevent both voluntary and involuntary encroachment on vested benefits, neither plan participants nor general creditors may reach benefits under an ERISA-qualified profit-sharing and pension fund. Accordingly, since the court could find no evidence that Congress intended to create a situation in which ERISA anti-alienation provisions would be enforceable against general creditors but unenforceable against a bankruptcy trustee, it concluded that the ERISA anti-alienation provisions constituted "applicable nonbankruptcy law" under which restrictions on the transfer of pension interests could be enforced pursuant to §541(c)(2). *Id.* at 1480.
[45]*See also In re Lucas,* 924 F.2d 597, 600-02 (6th Cir. 1991); *In re Wyles,* 123 Bankr. 733, 734-45 (Bankr. E.D. Va. 1991); *In re Majul,* 119 Bankr. 118, 124 (Bankr. W.D. Tex. 1990) (holding that the exemption contained in §206(d)(1) of ERISA constitutes "applicable nonbankruptcy law" for purposes of §541(c)(2)). *In re Komet,* 104 Bankr. 799 (Bankr. W.D. Tex. 1989); *In re Ralstin,* 61 Bankr. 502 (Bankr. D. Kan. 1986); *In re Mosley,* 42 Bankr. 181 (Bankr. D. N.J. 1984); *Warren v. G.M. Scott & Sons,* 34 Bankr. 543 (Bankr. S.D. Ohio 1983); *In Re Threewitt,* 24 Bankr. 927 (D. Kan. 1982).
[46]917 F.2d 1162 (9th Cir. 1990).
[47]*Id.* at 1169-70 (citations omitted). Additionally, Judge Fletcher also recognized the accompanying problems with disqualification of an ERISA plan and loss of tax exempt status should the corpus of an ERISA plan be able to be invaded by a bankruptcy trustee. In his concurrence, Judge Fletcher noted that, in order for a plan to qualify for tax exempt status under ERISA, the plan must comply with the anti-alienation provisions of 26 U.S.C. §401(a)(13) and 29 U.S.C. §1056(d)(1). Consequently, the failure to exclude the ERISA-qualified plan from the bankruptcy estate would violate these provisions and could, therefore, subject the plan to ERISA disqualification and loss of tax exempt status. *Id.* at 1170. *See also In re Moore,* 907 F.2d at 1480; *McLean,* 762 F.2d at 1206. Surely, Congress did not intend to permit the bankruptcy trustee to unilaterally eviscerate the protection granted ERISA benefit plans simply by attaching a plan participant's interest in that plan as part of a bankruptcy estate.
[48]*See also In re Komet,* 104 Bankr. 799 (Bankr. W.D. Tex. 1989), *infra* notes 59

- 73 and accompanying text; *In re Starkey,* 116 Bankr. 259 (Bankr. D.Colo. 1990), *infra* notes 74 - 88 and accompanying text; *In re Majul,* 119 Bankr. 118 (Bankr. W.D. Tex. 1990); *In re Messing,* 114 Bankr. 541 (Bankr. E.D. Tenn. 1990); *In re Felts,* 114 Bankr. 131 (Bankr. W.D. Tex. 1990); *In re Burns,* 108 Bankr. 308 (Bankr. W.D. Okla. 1989).

[49]*But see In re Starkey,* 116 Bankr. 259, 262 n.1 (Bankr. D. Colo. 1990) (refusing to read §206(d)(1) of ERISA as "other nonbankruptcy law" for purposes of §541(c)(2) as more particularly set forth *infra* note 78).

[50]*See, e.g., In re Morrow,* 122 Bankr. 151 (Bankr. M.D. Fla. 1990) (holding Fla. Stat. §222.21(2)(a), purporting to exempt retirement funds from claims of creditors, was preempted by ERISA §514(a)); *In re Gaines,* 121 Bankr. 1015 (Bankr. W.D. Mo. 1990) (holding Mo. Rev. Stat. §513.427, which provided that bankruptcy debtors may exempt from property of the estate any property which is exempt from attachment and execution under either state or federal law, was preempted by ERISA to the extent that it purported to allow debtors to exempt ERISA pension benefit plans in bankruptcy); *In re Majul,* 119 Bankr. 118 (Bankr. W.D. Tex. 1990) (holding that attempts by states to create statutory exemptions for ERISA-qualified pension plans are invalid as being preempted by the broad preemptive reach of ERISA); *In re Lee,* 119 Bankr. 833 (Bankr. M.D. Fla. 1990) (holding Florida pension plan exemption statute preempted by ERISA); *In re Martin,* 119 Bankr. 297 (Bankr. M.D. Fla. 1990) (holding Florida pension plan exemption statute preempted by ERISA); *In re McIntosh,* 116 Bankr. 277 (Bankr. N.D. Okla. 1990) (holding ERISA preempted Oklahoma exemption laws applying to ERISA-qualified employee benefit pension plans); *In re Conroy,* 110 Bankr. 492 (Bankr. D. Mont. 1990) (holding Montana pension plan exemption statute preempted by ERISA); *In re Burns,* 108 Bankr. 308 (Bankr. W.D. Okla. 1989) (holding Oklahoma pension plan exemption statute preempted by ERISA); *In re Alagna,* 107 Bankr. 301 (Bankr. D. Colo. 1989) (holding Colorado pension plan exemption statute preempted by ERISA).

[51]*See supra* notes 13 through 19 and accompanying text. It should be noted, however, that a small minority of courts have held that the state statutory exemption for ERISA-qualified pension and profit sharing plans is not preempted by ERISA, and as such, under those cases, certain ERISA-type plans would be beyond the reach of a trustee or creditors in bankruptcy. *In re Vickers,* 116 Bankr. 149 (Bankr. W.D. Mo. 1990); *In re Williams,* 118 Bankr. 812 (Bankr. N.D. Fla. 1990); *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); *In re Volpe,* 100 Bankr. 840 (Bankr. W.D. Tex. 1989). These cases hold that ERISA does not preempt the applicble state statute because the state statute does not attempt to regulate the terms and conditions of ERISA plans, but merely provides an exemption for profit sharing benefits and pension plan money, which is an area of law traditionally governed by the state, and does not interfere with the field of employee pension plans now governed by federal law. *In re Martinez,* 107 Bankr. at 378. In other words, these courts have held that the state ERISA plan exemption statutes merely complement ERISA's purpose in seeking to protect pension money from creditors, and therefore, there is no need for ERISA preemption absent a conflict between the state and federal law. However, this approach has been widely discounted by the overwhelming majority of bankruptcy courts because it clearly disregards the Supreme Court's broad interpretation of the preemptive language of §514(a) of ERISA, as set forth in *Mackey,* and the Supreme Court's unequivocal statement that good legislative intentions are insufficient to save a state statute from ERISA preemption.

[52]For example, there have been no published opinions from any of the bankruptcy courts in the State of Maryland regarding §11-504(h) of the Courts and Judicial Proceedings article which provides, in pertinent part:

> (h) *Interest in retirement plan.* — (1) in addition to the exemption provided in subsections (b) and (f) of this section and any other provisions of law, any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan qualified under §401(a), §403(b), §408, §414(d), or §414(e) of the United States Internal Revenue Code of 1986, as amended, or §409 (as in effect prior to January 1984) of the United States Internal Revenue Code of 1954, as amended, shall be exempt from any and all claims of the creditors of the beneficiary or participant....

Md. Cts & Jud. Proc. Code Ann. §11-504(b) (1989).

In substance, the Maryland statute is similar to §222.21(2)(a) of the Florida Statutes, and nearly all other state statutes which provide exemptions for ERISA-qualified pension plans. Therefore, it is likely that the state statutory exemption provided in the Maryland statute would be subject to preemption by ERISA and, therefore, unavailable in bankruptcy, much like virtually all other state ERISA pension plan exemption statutes across the country.

[53]*See supra* note 3.

[54]*See* 11 U.S.C. §522(b)(2)(A), as set forth *supra* note 11, which limits the assertion of exemptions by debtors in states that have opted out of the federal scheme to: (1) the state exemption scheme outlined in the applicable state statutes; and (2) any federal or applicable state nonbankruptcy exemptions.

[55]*See, e.g., In re Daniel,* 771 F.2d 1352, 1359-61 (9th Cir. 1985) *cert. denied,* 475 U.S. 1016 (1986); *In re Lichstrahl,* 750 F.2d 1488, 1491 (11th Cir. 1985); *In re Graham,* 726 F.2d 1268, 1274 (8th Cir. 1984); *In re Goff,* 706 F.2d 574, 581-86 (5th Cir. 1983); *In re Knowles,* 123 Bankr. 428, 433 (Bankr. M.D. Fla. 1991); *In re Rosenquist,* 122 Bankr. 775, 782 (Bankr. M.D. Fla. 1991); *In re Morrow,* 122 Bankr. 151, 155 155 (Bankr. M.D. Fla 1990); *In re Gaines,* 121 Bankr. 1015, 1019 (Bankr. W.D. Mo. 1990); *In re Gardner,* 118 Bankr. 860, 864 (Bankr. M.D. Fla. 1990); *In re McIntosh,* 116 Bankr. 277, 280 (Bankr. N.D. Okla. 1990); *In re Alagna,* 107 Bankr. 301, 314 (Bankr. D. Colo. 1989); *In re Toner,* 105 Bankr. 978, 980 (Bankr. D. Colo. 1989); *In re Dyke,* 99 Bankr. 343, 347 (Bankr. S.D. Tex. 1989); *In re Brown,* 95 Bankr. 216, 219 (Bankr. N.D. Okla. 1989); *Matter of O'Brien,* 94

Bankr. 583, 589 (Bankr. W.D. Mo. 1988); *In re Gribben,* 84 Bankr. 494, 497 (Bankr. S.D. Ohio 1988); *In re Loe,* 83 Bankr. 641, 646 (Bankr. D. Minn. 1988).
[56]750 F.2d 1488 (11th Cir. 1985).
[57]*Id.* at 1491 (citing *In re Goff,* 706 F.2d at 585, which contends that the only function of the anti-alienation language in ERISA is to qualify plans for favorable tax treatment).
[58]*Id.* at 1491. *See also In re Knowles,* 123 Bankr. 428 (Bankr. M.D. Fla. 1991) (relying on *In re Lichstrahl,* 750 F.2d 1488 (11th Cir. 1985)).
[59]104 Bankr. 799 (Bankr. W.D. Tex. 1989).
[60]706 F.2d 574 (5th Cir. 1983).
[61]*In re Komet,* 104 Bankr. at 805. The dicta in *Goff,* 706 F.2d at 581-86, and its supporting rationale was reaffirmed by the Eleventh Circuit in *In re Lichstrahl,* 750 F.2d 1448. *See supra* notes 56-58 and accompanying text.
[62]*See In re Goff,* 706 F.2d at 585 (stating that "ERISA merely provides that *as a condition of obtaining qualified status* — with its attendant tax and other benefits — a pension plan must preclude alienation or assignment of its benefits." (Emphasis in original.)
[63]*In re Komet,* 104 Bankr. at 809. In support of this contention, the *Komet* court recognized that §501 of ERISA serves to impose criminal liability on any person who willfully violates Part I of ERISA which includes the anti-alienation/anti-assignment language of ERISA §206(d)(1), and further, that ERISA §502 serves to impose civil liability for the same offense. *Id.*
[64]*In re Goff,* 706 F.2d at 587.
[65]*In re Komet,* 104 Bankr. at 809.
[66]*Id.* at 810.
[67]*Id.*
[68]*Id.* at 813.
[70]*Id.* at 814 (citations omitted).
[71]*Id. See also In re Moore,* 907 F.2d 1476; *supra* notes 39-41 and accompanying text.
[72]*Id.* at 815-16.
[73]*Id.* at 816.
[74]116 Bankr. 259 (Bankr. D. Colo. 1990).
[75]*Id.* at 261.
[76]*See e. g., In re Alagna,* 107 Bankr. 301 (Bankr. D. Colo. 1989); *In re Toner,* 105 Bankr. 978 (Bankr. D. Colo. 1989).
[77]*In re Starkey,* 116 Bankr. at 261.
[78]*Id.* at 261-62. In this regard, the court recognized that a strong argument could be made in favor of interpreting §541(c)(2) as encompassing the anti-alienation provisions of ERISA, such that all ERISA benefits would be excluded from property of the estate under that section. *See, e.g., In re Moore,* 907 F.2d 1476; *supra* notes 33-41 and accompanying text. However, such a conclusion would mean that all ERISA benefits would be excluded from property of the estate, and as a result, there would never be a claim of exemption as to ERISA benefits. This interpretation would be contrary to §522(d)(10)(E) which allows, as a federal exemption, a debtor to retain at least a limited interest in tax-advantaged ERISA plans, as well as other tax-advantaged pension plans, and would render that statute moot. Therefore, the *Starkey* court refused to read §201(d)(1) of ERISA as being "other applicable nonbankruptcy law" for purposes of §541(c)(2). *In re Starkey,* 116 Bankr. at 262 n.1.
[79]*In re Starkey,* 116 Bankr. at 262.
[80]*Id.* at 262-63 (citing *Mackey,* 486 U.S. 825; *In re Mata,* 115 Bankr. 288 (Bankr. D. Colo. 1990)).
[81]*Id.* at 263.
[82]*Id.*.
[83]*Id.* at 264 (citing *Mackey,* 486 U.S. at 835-39).
[84]*Id.* (citing *Guidry,* 110 S.Ct. at 685).
[85]*Id.* at 265.
[86]*Id.*
[87]*Id.* (citation omitted). In this regard, the *Starkey* court recognized that this conclusion is consistent as well in states that have not elected to opt out of the federal exemption scheme of §522(d) of the Bankruptcy Code in which debtors can choose to either utilize the federal exemptions under §522(d) or the exemptions provided under §522(b)(2)(A). Should debtors elect the federal exemptions, they would be permitted to retain their benefits in an ERISA plan to the extent necessary for the support of the debtor pursuant to §522(d)(10)(E). However, should they elect the benefits of other federal exemptions and the available state exemptions, pursuant to §522(b)(2), then they would be permitted a full exemption for all of their ERISA benefits. A contrary conclusion would result in debtor's having available in the non-opt-out states a limited exemption for ERISA benefits under §522(d)(10)(E), but no exemption at all should they elect to utilize the state exemptions under §522(b)(2). *Id.* at 265-66.
[88]*Id.* at 266-67. In this regard, it is worthwhile to note that the court, upon review of the Fourth Circuit case of *Tenneco, Inc. v. First Virginia Bank of Tidewater,* 698 F.2d 688 (4th Cir. 1983) (cited with approval in *Guidry,* 110 S.Ct. at 685 n.12), also held that the anti-alienation provisions of ERISA were not limited to the benefits payable under the plan from non-beneficiary contributions, but instead extended to all benefits payable under the plan, including the contributions of the debtor to the plan. *Id.* at 266.
[89]*See, e.g., In re Majul,* 119 Bankr. 118 (Bankr. W.D. Tex. 1990); *In re Messing,* 114 Bankr. 541 (Bankr. E.D. Tenn. 1990); *In re Felts,* 114 Bankr. 131 (Bankr. W.D. Tex. 1990); *In re Burns,* 108 Bankr. 308 (Bankr. W.D. Okla. 1989). *See also In re Komet,* 104 Bankr. 799, *supra* notes 59-73 and accompanying text. All of the cases cited herein support the rationale set forth in *Komet* and *Starkey,* 116 Bankr. 259, as buttressed by the recent Supreme Court decisions of *Mackey* and *Guidry.*
[90]*See supra* notes 37-48 and accompanying text.
[91]*See supra* notes 59-89 and accompanying text.
[92]*See supra* note 78.

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