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Recent Developments: In re Moore: Debtors' Interests in ERISA-Qualified Profitsharing and Pension Plan beyond the Reach of Bankruptcy Trustee

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such a finding would be sufficient to validate the entry. *Id.* at 2801.

The Court rejected Rodriguez's argument that permitting entry based on the "reasonable belief" of common authority vicariously waives a defendant's fourth amendment rights. *Id.* The Court, in rejecting this contention, de-emphasized Rodriguez's waiver of his fourth amendment rights and highlighted the reasonableness of the officers' belief in Fischer's authority to consent. *Id.* at 2800. The Court stated that "at issue in a claim where apparent consent is raised is not whether the right to be free of searches has been *waived,* but whether the right to be free of *unreasonable* searches has been *violated.*" *Id.* at 2801 (emphasis original). Noting that the fourth amendment is the source from which Rodriguez's trial rights regarding the exclusionary rule derives, the Court reasoned that to violate a defendant's rights against the admission of exclusionary evidence, the fourth amendment itself must first be violated. *Id.* In analyzing whether a fourth amendment violation occurred, the Court reasoned that the fourth amendment itself does not assure that a government search of a home will not occur, but assures only that an "unreasonable" search will not occur. *Id.* at 2799.

As the Court stated in *Schenckloth v. Bustamonte,* 412 U.S. 218 (1973), "[n]othing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." *Rodriguez,* 110 S. Ct. at 2799 (1990) (quoting *Schneckloth v. Bustamonte,* 412 U.S. at 241 (1973)). The *Rodriguez* Court, therefore, reasoned that the fourth amendment only guaranteed Rodriguez protection against "unreasonable" governmental searches, not freedom from searches without his consent.

Justice Marshall wrote a lengthy dissent, joined by Justices Brennan and Stevens. The dissent contended that a search pursuant to an officer's reasonable but erroneous belief that a third party had authority to consent differs from valid third party authority to consent to governmental entry. *Id.* at 2802 (Marshall, J., dissenting). The dissent reasoned that giving a third party authority to consent to entry limits an owner's ability to challenge the reasonableness of a search because allowing another person access to or control of property reduces an owner's expectation of privacy. *Id.* at 2802 (Marshall, J., dissenting). The dissent believed that where no actual relinquishment of access or control occurs, and a third party lacks actual authority to consent, there cannot be an exception to the warrant requirement because there would remain an expectation of privacy. *Id.* The dissent reasoned that subjecting a person to a warrantless search without authorized consent or exigency would erode the fourth amendment's protection of a home from "unreasonable" governmental intrusion. *Id.* at 2807 (Marshall, J., dissenting).

Rodriguez is significant in that it broadens the third party consent exception to the warrant requirement for entry into an individual's home. The practical effect of the decision is that if a third party convinces law enforcement officials of his apparent authority to consent to entry, no warrant for entry will be required and thus, the homeowner's expectation of privacy will be diminished. In addition, *Rodriguez* illustrates the present Court's reluctance to restrict governmental action in drug related cases.

— *Daryl D. Jones*

In re Moore: DEBTORS' INTERESTS IN ERISA-QUALIFIED PROFIT-SHARING AND PENSION PLAN BEYOND THE REACH OF BANKRUPTCY TRUSTEE.

The United States Court of Appeals for the Fourth Circuit in *In re Moore,* 907 F.2d 1476 (4th Cir. 1990) reconciled provisions of the U.S. Bankruptcy Code with those of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. (1976) (ERISA). The court found that debtors' interests in an ERISA-qualified profit-sharing and pension plan were not subject to turnover to the trustee in bankrutpcy, because ERISA constitutes applicable non-bankruptcy law.

A number of employees of Springs Industries who participated in their company's comprehensive retirement program became involved in Chapter 7 bankruptcy proceedings. The program's Profit-Sharing and Pension Plan and Trust and Retirement Plan and Trust contained anti-assignment provisions which prohibited the employees from alienating their interests. The anti-assignment provisions were necessary to qualify the employees' interests in the plans as ERISA funds and maintain their tax-exempt status. Under the plans, distributions were to be made to beneficiaries "only upon retirement, disability or termination of service." *Moore,* 907 F.2d at 1477. The debtors had received no distributions from the plans at the time they petitioned for bankruptcy and were not eligible to do so in the near future.

The trustee in bankruptcy sought to compel the Profit-Sharing and Pension Plan and Trust administrator to turn over the employees' interests to the bankruptcy estates. The trustee argued that the interests in the plan were not subject to restrictions on transfer, because the plan was not a spendthrift trust under South Carolina law. Without addressing whether the plan was a spendthrift trust under South Carolina law, the bankruptcy court determined that since the plan was ERISA-qualified, the debtors' interests in the plan were nonalienable and thus excludable from the bankruptcy estates. The trustee in bankruptcy appealed the decision. *Id.*

The United States Court of Appeals for the Fourth Circuit noted that under the Bankruptcy Code, the property of a bankrupt's estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." *Moore,* 907 F.2d at 1477 (citing 11 U.S.C. §541(a)(1)). However, the Code excludes the debtors' interests in certain trusts from their bankruptcy estates by recognizing restrictions on transfers of such interests. Specifically, "[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.* (citing 11 U.S.C. §541(c)(2)). Thus, if ERISA constitutes applicable nonbankruptcy law, and the debtors' interests are enforceable under ERISA, the trustee would be precluded from reaching those interests.

The trustee in bankruptcy argued that "applicable nonbankruptcy law" under section 541(c)(2) did not encompass the restrictions on alienation of plan benefits in 29 U.S.C. §1056(d)(1). Rather, the trustee argued that the term referred "only to plans with transfer restrictions enforceable under state spendthrift trust law." *Moore,* 907 F.2d at 1477. The court of appeals rejected the trustee's overly restrictive interpretation of section 541(c)(2) and held that the term was not limited to state spendthrift trust law. *Id.*

First, the court found nothing in the plain language of section 541(c)(2) to suggest that the term "applicable nonbankruptcy law" refers exclusively to state law. The court stated that the language means exactly what it says, thus encompassing all laws, state and federal, under which a restriction on transfer can be enforced. *Id.*

Furthermore, the court found that the identical language in other provisions of the Bankruptcy Code had been determined to apply to federal as well as state law. For example, in *In re Ahead By a Length, Inc.,* 100 B.R. 157 (Bankr., S.D.N.Y. 1989), the bankruptcy court found "applicable nonbankruptcy law" within the provisions of 11 U.S.C. §108(a) to include, inter alia, the Racketeer Influence and Corrupt Organization Act. The court thus concluded that it would be "incongruous to give the same phrase in Section 541(c)(2) a narrower construction than the identical phrase other parts of the Bankruptcy Code, particularly since the disparate sections of the Bankruptcy Code were enacted together in a single comprehensive statute." *Moore,* 907 F.2d at 1478. The court further concluded that, had Congress intended the term "applicable nonbankruptcy law" to encompass only state law, it would have stated so explicitly, as it had in other sections of the Code. *Id.* (citing 11 U.S.C. §522(b)(1) & (2)).

Acknowledging the trustee's argument that several circuit courts have determined the term "applicable nonbankruptcy law" in section 541(c)(2) to refer only to state spendthrift trust laws, the court distinguished those decisions as involving self-settled trusts where the settlor was the beneficiary and had powers to amend or terminate the trust without penalty. *Id.* In contrast, the beneficiaries of the Springs Industries' plan could not control the trust, could not borrow against it, and could not amend the trust.

The court also rejected the trustee's appeal to the legislative history of section 541(c)(2), finding such an approach inappropriate, since the language of the statute was clear. *Id.* at 1478-79. Furthermore, the court noted that even if a review of the legislative history were relevant, it would be inconclusive. The court found that Congress' repeated emphasis on state spendthrift trust law in the legislative reports accompanying section 541(c)(2) indicated merely its intentions to include state spendthrift law within the restrictions of transfer enforceable under "applicable nonbankruptcy law." *Id.* at 1479. Thus, found the court, Congress was treating interests in plans containing valid spendthrift clauses in the same way as prior to the Bankruptcy Reform Act of 1978, when such interests were not property of the bankrupt's estate. *Id.* The court reiterated, "[n]othing in the legislative history indicates ... that Congress meant 'applicable nonbankruptcy law' to refer exclusively to state spendthrift trust law." *Id.*

Having concluded that the term "applicable nonbankruptcy law" may include federal law, the court went on to consider the issue of whether ERISA constitutes "applicable nonbankruptcy law" so that the debtors' interests in the ERISA-qualified plan were properly excluded from the estates under section 541(c)(2). The court found that the primary purpose of ERISA was to secure employees' retirement income so that a worker promised a retirement benefit would actually receive it. *Id.* ERISA secures pension benefits primarily by restricting the assignment and alienation of those benefits. *Id.* at 1480. Because these non-alienability provisions deny general creditors, as well as plan participants, access to vested benefits, the court concluded that ERISA "constitutes 'applicable nonbankruptcy law' under which restrictions on the transfer of pension interests may be enforced." *Id.* Thus, the court concluded, "'[u]nder the plain and simple language of section 541(c)(2), if the ERISA anti-alienation provisions are enforceable against general creditors, they are enforceable against the bankruptcy trustee.'" *Id.* at 1478 (quoting *In re Threewitt,* 24 B.R. 927, 929 (D. Kan. 1982)).

In finding ERISA to constitute applicable nonbankruptcy law within the meaning of section 541(c)(2) of the Bankruptcy Code, the United States Court of Appeals for the Fourth Circuit ensured that neither the vagaries of state laws, nor the particularities of state spendthrift trust law would continue to threaten the security of employee retirement benefits, thus furthering ERISA's purpose of uniform treatment of pension benefits across the country.

— Mary Jo Murphy

Mandel v. O'Hara: GOVERNOR ENJOYS ABSOLUTE IMMUNITY BASED ON APPROVAL OR VETO OF LEGISLATIVE ENACTMENTS.

In *Mandel v. O'Hara,* 320 Md. 103, 576 A.2d 766 (1990), the Court of Appeals of Maryland held that a governor could not be held liable for damages in tort based upon his veto or approval of legislation. The absolute immunity is of the same type which members of the General Assembly enjoy when voting for or against legislative bills and applies even if corrupt motives underlie the exercise of power.

During 1971, Marlboro racetrack made an agreement to buy eighteen racing days from another track which conducted horse racing with parimutuel betting. The General Assembly approved the transfer which subsequently was vetoed by Governor Mandel. As a result, James F. O'Hara, III and Michael P. O'Hara sold their stock in Marlboro. Thereafter, the General Assembly overrode the veto and Marlboro merged with another entity that conducted horse racing with parimutuel betting.

The O'Haras brought suit against the governor and others, based on a theory of conspiracy. They contended that by vetoing the bill, Governor Mandel planned to depress the value of the Marlboro stock, acquire the stock, then restore its value by inducing the General Assembly to override the veto. At trial, the governor's motion for summary judgment based on absolute immunity was denied. Governor Mandel appealed to the Court of Special Appeals of Maryland where he was granted a stay. The court of appeals granted certiorari before determination on the merits to determine if a Governor