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# Balancing ERISA's Anti-Alienation Provisions against Garnishment of a Convicted Criminal's Retirements Funds: Unscrambling the Approaches to Protecting the Retirement Nest Egg

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**BALANCING ERISA'S ANTI-ALIENATION PROVISIONS  
AGAINST GARNISHMENT OF A CONVICTED CRIMINAL'S  
RETIREMENTS FUNDS: UNSCRAMBLING THE  
APPROACHES TO PROTECTING THE RETIREMENT NEST  
EGG\***

**Alan K. Ragan†**

In marble walls as white as milk, lined with a skin as soft as silk;  
Within a fountain crystal clear, a golden apple doth appear.  
No doors there are to this strong-hold. Yet things break in and steal  
the gold.<sup>1</sup>

**I. INTRODUCTION**

The Employee Retirement Income Security Act of 1974 (ERISA)<sup>2</sup> is a comprehensive statutory scheme designed to protect the interests of employee benefit plan participants and beneficiaries.<sup>3</sup> Pensions generally are regarded as one of the legs in the three-legged retirement fund stool, along with social security and personal savings.<sup>4</sup> Safeguarding the three legs helps prevent impoverishment

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\* One etymologist explains the origin of the term *nest egg* as follows: "Before the days of scientific egg production, farmers would place a fake egg, made of porcelain or white glass, in the hens' nests, which supposedly encouraged the appearance of more real eggs. A financial nest egg will, hopefully, lead to the appearance of more money." ROBERT CLAIBORNE, *LOOSE CANNONS, RED HERRINGS, AND OTHER LOST METAPHORS* 165 (1988).

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1. THE NURSERY RHYMES OF ENGLAND 81 (James Orchard Halliwell ed., London, John Russell Smith 1846), available at <http://www.presscom.co.uk/nursery/nurs4th.html>.
2. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001-1461 (2006)).
3. ERISA § 2, 29 U.S.C. § 1001.
4. Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 939 (2007); John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 176 (2004);

in old age, while allowing for varying degrees of maintenance of a retiree's lifestyle.<sup>5</sup> In support of this concept, one of ERISA's controversial provisions prohibits assignment or alienation of retirement plan benefits.<sup>6</sup> Since 1974, the courts and Congress have wrestled with how to balance the desire to preserve ERISA retirement funds for ultimate use by participants and their beneficiaries against equitable claims against such funds brought by third parties.<sup>7</sup>

Despite the simplicity and possible allure of a complete bar to the alienation of pension benefits, it would be unreasonable to prevent diversion of plan funds for certain situations such as divorce or criminal activity. In recognition of this balancing of interests, Congress amended ERISA in 1984 to allow alienation where the spouse of a pension plan member obtained an order relating to child support, alimony, or marital property rights under specific circumstances (Qualified Domestic Relations Order (QDRO)).<sup>8</sup> When numerous federal district and appellate courts attempted to override ERISA's "anti-alienation" or "spendthrift" provisions in circumstances involving plan administrators who embezzled from a plan or otherwise breached fiduciary duties, the Supreme Court rejected such judicially crafted attacks and stated, "[i]f exceptions to this policy are to be made, it is for Congress to undertake that task."<sup>9</sup> Congress responded by amending ERISA in 1997 to allow assignment and alienation where plan participants are ordered to reimburse the plan following an adjudication of liability, upon conviction for malfeasance concerning the plan, or based on a settlement entered into by the plan participant and the Secretary of Labor or the Pension Benefit Guaranty Corporation for breach of a fiduciary duty involving the plan.<sup>10</sup>

Some recent decisions relied on the federal Mandatory Victims Restitution Act (MVRA)<sup>11</sup> as a permissible means of alienating

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Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 TAX L. REV. 433, 501-02 (1987).

5. Eason, *supra* note 4, at 176-77.
6. ERISA § 206(d), 29 U.S.C. § 1056(d) (2006); I.R.C. § 401(a)(13) (2006) (generally referred to as either the "anti-alienation" or "spendthrift" clause). See *Ablamis v. Roper*, 937 F.2d 1450, 1454 (9th Cir. 1991).
7. See *infra* Part II.B-C.
8. See 29 U.S.C. § 1056(d)(3); I.R.C. § 401(a)(13)(B); see also Treas. Reg. § 1.401(a)-13(g) (as amended in 1988).
9. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990), quoted in *Patterson v. Shumate*, 504 U.S. 753, 765 (1992).
10. See 29 U.S.C. § 1056(d)(4); I.R.C. § 401(a)(13)(C); see also Treas. Reg. § 1.401(a)-13(f) (as amended in 1988).
11. 18 U.S.C. §§ 3663A, 3664 (2006).

ERISA pension funds even though the criminal activity bore no relationship to the victim's retirement.<sup>12</sup> This article looks at ERISA's anti-alienation provision, including its history, interpretation, and application, and addresses arguments for and against using the MVRA to create an exception to ERISA's anti-alienation provision. Part I summarizes the background that preceded the congressional enactment of ERISA, as well as the varied results reached by courts faced with interpreting the Spendthrift Clause. Part II looks at the recognized exceptions to ERISA's Spendthrift Provisions—exceptions that are noncontroversial either because of their inclusion within ERISA<sup>13</sup> or their generally unquestioned acceptance by the courts.<sup>14</sup> Part III discusses recent decisions that have addressed whether the MVRA creates an exception to ERISA's prohibition against assignment or alienation. Part IV examines the arguments and policy considerations for and against an MVRA-based exception to ERISA's spendthrift provisions, concluding that the competing policy considerations of protecting retirement funds versus providing restitution reveal that the MVRA is an incomplete means of balancing the equities of pensioners and victims. Congress should amend ERISA to incorporate a spendthrift exception for qualified criminal restitution orders, similar to that which exists for QDROs. Such a limited carve-out from the anti-alienation provisions should allow recovery under specific circumstances from the pension funds of a criminal subject to an order of restitution, regardless of whether such an order originated in a state or federal prosecution.

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12. See *United States v. Novak*, 476 F.3d 1041, 1047 (9th Cir. 2007); *United States v. Miller*, 588 F. Supp. 2d 789, 795–97 (W.D. Mich. 2008); *United States v. James*, 312 F. Supp. 2d 802, 804–05 (E.D. Va. 2004).
  13. See, e.g., I.R.C. § 401(a)(13)(A); 29 U.S.C. § 1056(d)(2) (allowing certain participant and beneficiary loans, as well as voluntary and revocable assignments of future benefits not to exceed ten percent of a benefit payment once the benefits are in pay status, to be included in a qualified trust); see also I.R.C. §§ 401(a)(13)(B), 414(p); 29 U.S.C. § 1056(d)(iii) (providing an exception to ERISA's anti-alienation provisions for QDROs); I.R.C. § 401(a)(13)(C); 29 U.S.C. § 1056(d)(4) (establishing a spendthrift exception for breaches of fiduciary duty or criminal activity involving the plan).
  14. See, e.g., *McIntyre v. United States*, 222 F.3d 655, 659–60 (9th Cir. 2000); *United States v. Sawaf*, 74 F.3d 119, 122–25 (6th Cir. 1996); *Shanbaum v. United States*, 32 F.3d 180, 183 (5th Cir. 1994) (holding that ERISA's anti-alienation provisions did not bar the Internal Revenue Service from levying against an individual's pension plan assets); *United States v. Rogers*, 558 F. Supp. 2d 774, 785–86 (N.D. Ohio 2008).

## II. BACKGROUND

### A. *Events Leading to ERISA—Foxes in the Hen House*

Congressional enactment of ERISA in 1974 represented the culmination of a presidential study commissioned twelve years earlier.<sup>15</sup> In a March 28, 1962 memorandum establishing the Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, President John F. Kennedy provided no direct indication of the turbulent economic events prompting the Committee's formation.<sup>16</sup> The President's memorandum merely alluded to his first Economic Report to Congress, delivered in January 1962, which called for a "reappraisal of legislation" governing corporate pension funds and other private retirement programs,<sup>17</sup> and charged the Committee "to review legislation and administrative practice relating to [private retirement] programs."<sup>18</sup> The economic setting was known only too well to the executive, Congress, Committee members, and the nation at large, but dire events were unfolding even as the Committee commenced its work.<sup>19</sup>

For a decade and a half following the end of World War II, the United States avoided a major economic depression but suffered four recessions.<sup>20</sup> Measures for strengthening the financial system—and consequently the economy—included scrutiny of and change to the nation's private retirement systems.<sup>21</sup> In 1963, during what might be described as America's worst pension crisis since American Express

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15. William J. Chadwick & David S. Foster, *Federal Regulation of Retirement Plans: The Quest for Parity*, 28 VAND. L. REV. 641, 668 (1975).

16. PRESIDENT'S COMM. ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS app. C (President's Memo dated Mar. 28, 1962) (Washington, D.C.: U.S. Government Printing Office 1965) [hereinafter PRESIDENT'S COMM.].

17. Economic Report of the President, 1962 ECON. REP. PRES. 3, 23 (Jan. 1962).

18. PRESIDENT'S COMM., *supra* note 16, at app. C. The memorandum also directed the Committee to review "the implications of the growing retirement and welfare funds for the financial structure of the economy, as well as . . . the role and character of the private pension and other retirement systems in the economic security system of the nation," and to consider "how they may contribute more effectively to efficient manpower utilization and mobility." *Id.*

19. JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 73-87 (2004).

20. Economic Report of the President, *supra* note 17, at 4.

21. *Id.* at 17, 21-25.

created the country's first pension system in 1875,<sup>22</sup> Studebaker-Packard closed its South Bend, Indiana plant and terminated its employee pension plan.<sup>23</sup> Over 4,000 workers, ranging from forty to sixty years old, lost roughly eighty-five percent of the value of their vested retirement benefits.<sup>24</sup> Another low point during the 1960s and 1970s occurred when the Teamsters Union misused tens of millions of dollars in the Central States pension funds amid allegations of improper investments and organized criminal activity.<sup>25</sup> Although the 1960s ushered in a new era of hope, as demonstrated in the President's Economic Report to Congress, much remained to be done.<sup>26</sup>

Hearings were being conducted on Capitol Hill, but legislation was slow in coming. In 1967, Senator Jacob Javits introduced a pension reform bill that would evolve into ERISA.<sup>27</sup> After years of surveys, studies, reports, and hearings—and against significant opposition from business and labor groups—ERISA was enacted and signed into law on Labor Day 1974.<sup>28</sup> Although ERISA's initial focus primarily involved pension plans, over the next several decades, Congress amended ERISA to cover other retirement vehicles, as well as health and welfare benefit plans.<sup>29</sup> With regard to covered retirement plans,

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22. Patrick W. Seburn, *Evolution of Employer-Provided Defined Benefit Pensions*, 114 MONTHLY LAB. REV. 16, 16–17 (1991) (citing 1 MURRAY W. LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA 21-22 (1932)).
  23. S. REP. NO. 93-383, at 78–79 (1973); *Private Pension Plans: Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 89th Cong., 103–106, 123 (1966) (statement of Clifford M. MacMillan, Vice President, Studebaker Corporation).
  24. *Id.*
  25. U.S. GEN. ACCT. OFF., REPORT TO THE PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON GOVERNMENTAL AFFAIRS, THE DEPT. OF LABOR'S OVERSIGHT OF THE MANAGEMENT OF THE TEAMSTERS' CENTRAL STATES PENSION AND HEALTH AND WELFARE FUNDS app. I, 2–3 (1985); see also Mary Williams Walsh, *Teamsters Find Pensions at Risk*, N.Y. TIMES, Nov. 15, 2004, at A1 (“In the 1960’s and 1970’s, the Teamsters’ huge Central States pension fund was a wellspring of union corruption. Tens of millions of dollars were loaned to racketeers who used the money to gain control of Las Vegas casinos. Administrative jobs were awarded to favored insiders who paid themselves big fees. A former Teamster president and pension trustee was convicted of trying to bribe a United States senator.”).
  26. Economic Report of the President, *supra* note 17, at 3–4.
  27. Pension and Employee Benefit Act of 1967, § 1103, 90th Cong. (1967).
  28. See WOOTEN, *supra* note 19, at 241–70.
  29. See generally Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1210 (1980); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982); Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984); Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426

ERISA's extensive rules include standards of conduct for fiduciaries, reporting and disclosure provisions, and measures aimed at protecting plan funds and ensuring the ultimate receipt of funds by qualified participants and beneficiaries.<sup>30</sup>

*B. The Spendthrift Provision's Deceptively Simple Language and Vague Underlying Policy—Well-Hidden Eggs*

According to the legislative findings codified in ERISA's initial section, the congressional rationale for enactment included a determination that "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans."<sup>31</sup> As part of the comprehensive rules regulating employee benefits, the statute contains a provision relating to anti-alienation, which specifies that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."<sup>32</sup> A corresponding provision in I.R.C. § 401(a)(13)(A) states that "[a] trust shall not constitute a qualified trust under [I.R.C. § 401] unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."<sup>33</sup>

Neither ERISA nor the related I.R.C. sections supply meanings for the terms "assign" or "alienate." Instead, Treasury Regulations collectively define "assignment" and "alienation" to include payment of the employee's plan benefits to the employer and any arrangement by a participant or beneficiary giving his or her interest

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(1984); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986); Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 (1986); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

30. 29 U.S.C. §§ 1021, 1082, 1103, 1104 (2006).

31. 29 U.S.C. § 1001(a) (2006).

32. 29 U.S.C. § 1056(d)(1) (2006).

33. I.R.C. § 401(a)(13)(A) (2006). The Code continues:

For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by a participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1).

*Id.*

in any part of the plan to a third party.<sup>34</sup> The regulations also list five arrangements that will not fall within the rubric of assignment or alienation<sup>35</sup> and two general categories of exceptions to the proscription against assignment or alienation.<sup>36</sup>

The statute and legislative history yield almost no clues as to the intent behind ERISA's anti-alienation provision. The Report of the House Ways and Means Committee contains only a limited reference to alienation in its explanation of the statute's provisions:

To further ensure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated. (Of course, this provision is not intended to prevent the transfer of benefit rights from one qualified plan to another.)<sup>37</sup>

Since 1974, ERISA's anti-alienation provisions have undergone significant legislative modification, while the courts and governing agencies have struggled to define the correct parameters of anti-alienation.<sup>38</sup>

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34. Treas. Reg. § 1.401(a)-13(c)(1) (as amended in 1988).

35. Treas. Reg. § 1.401(a)-13(c)(2) (excluding the following "[s]pecific arrangements" from "'assignment' and 'alienation'": federal, state, or local tax withholdings on benefit payments; recovery of overpayments; transfer of benefit rights between plans; direct deposit of benefit payments; and recapture of certain payments).

36. Treas. Reg. § 1.401(a)-13(d) (exempting from the rule against assignment and alienation (1) a voluntary, revocable assignment by a beneficiary or participant receiving payments of not more than ten percent in the aggregate of any future payment provided that the assignment is not to defray plan administration costs, and (2) benefits alienated or assigned as security for plan loans under certain conditions).

37. H.R. REP. NO. 93-807, at 68 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4734.

38. *See generally* Dana M. Muir, *Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains*, 54 WASH. & LEE L. REV. 1351, 1389-1405 (1997) (explaining that interpretation of ERISA's prohibition against assignment and alienation has "proven far more difficult than the relatively simple sounding description indicates").

C. *The Supreme Court's Views on Anti-Alienation—“The Egg Seems to Get Further Away”*<sup>39</sup>

Following the enactment of ERISA, federal courts wrestled in general with interpreting and applying such a comprehensive statute, and in particular with the Act's prohibition on assignment and alienation. The paucity of legislative guidance on the meaning and contours of assignment or alienation raised questions as to whether pension plan funds could be reached by bankruptcy creditors,<sup>40</sup> victims of criminal misconduct,<sup>41</sup> spouses and former spouses,<sup>42</sup> or a plan itself to recover from a breaching fiduciary.<sup>43</sup> Not surprisingly,

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39. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 111-12 (London, MacMillan & Co. 1872), available at <http://www.sabian.org/Alice/lgchap05.htm>:

“I should like to buy an egg, please,” she said timidly.

“How do you sell them?”

“Fivepence farthing for one—twopence for two,” the Sheep replied.

“Then two are cheaper than one?” Alice said in a surprised tone, taking out her purse.

“Only you *must* eat them both, if you buy two,” said the Sheep.

“Then I'll have *one*, please,” said Alice, as she put the money down on the counter. For she thought to herself, “They mightn't be at all nice, you know.”

The Sheep took the money, and put it away in a box: then she said “I never put things into people's hands—that would never do—you must get it for yourself.” And so saying, she went off to the other end of the shop, and set the egg upright on a shelf.

“I wonder *why* it wouldn't do?” thought Alice, as she groped her way among the tables and chairs, for the shop was very dark towards the end. “*The egg seems to get further away the more I walk towards it.*”

*Id.* (emphasis added).

40. Compare *In re Harline*, 950 F.2d 669, 674 (10th Cir. 1991) (concluding that ERISA exempted pension funds from bankruptcy estate), with *In re Daniel*, 771 F.2d 1352, 1360 (9th Cir. 1985) (rejecting the argument that ERISA's anti-alienation provision barred inclusion of debtor's pension funds in bankruptcy).
41. *Ellis Nat'l Bank of Jacksonville v. Irving Trust Co.*, 786 F.2d 466, 470-71 (2d Cir. 1986) (analyzing, but refusing to adopt, a “criminal misconduct” exception to ERISA's prohibition on assignment or alienation).
42. Compare *Francis v. United Tech. Corp.*, 458 F. Supp. 84, 88 (N.D. Cal. 1978) (holding that ERISA did not provide a cause of action for a non-employee spouse's claim against a retirement fund), with *Cartledge v. Miller*, 457 F. Supp. 1146, 1156 (S.D.N.Y. 1978) (reasoning that in passing ERISA, Congress did not intend to “insulate a breadwinner from the valid support claims of spouse and offspring”).
43. Compare *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550, 552 (11th Cir. 1985) (characterizing theft from pension fund as basis for an equitable exception to ERISA's

the federal judiciary divided into two camps. One view held that the proper role of the courts included application of equity in certain situations to create exceptions to ERISA's broad anti-alienation language. As expressed by the Eleventh Circuit: "There is no reason to conclude that ERISA requires the abrogation of the equitable principle that a wrongdoer should not benefit from his misdeeds."<sup>44</sup> The opposing view regarded protection of an employee's pension as the "fundamental" congressional objective. In addition to the difficulty in deciding which litigants to exempt from the anti-alienation rule, one appeals court concluded that "even a narrow judicially created 'criminal misconduct' exception would undermine, rather than promote, the stability of the pension plan and its employee members by creating uncertainty and potentially delayed receipt or non-receipt of promised benefits."<sup>45</sup>

In 1990 the Supreme Court concluded that ERISA's anti-alienation provisions protected a union official's pension benefits from equitable attack even though the official was convicted of embezzling union funds.<sup>46</sup> Curtis Guidry, a union chief executive officer and pension fund trustee, pleaded guilty to pocketing close to \$400,000 in union pension money.<sup>47</sup> Although ERISA's anti-alienation provisions precluded garnishment of pension funds, the district court reasoned that by reading ERISA *in pari materia* with section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959,<sup>48</sup> the damage to the union pension fund caused by Guidry's "knavery" justified an exception to ERISA's anti-alienation requirement.<sup>49</sup> The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision and upheld the constructive trust imposed by

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non-alienation provision), *with Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268, 273 (S.D.N.Y. 1982) (refusing to recognize a fraud exception to ERISA's anti-alienation provision that would enable a company to attach a defrauding employee's pension fund). *See also* *Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 493 U.S. 365, 376-77 (1990), *superseded by statute*, Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (1996); *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117, 118-19 (D.C. Cir. 1987).

44. *St. Paul Fire & Marine Ins. Co.*, 752 F.2d at 552.

45. *Ellis Nat'l Bank*, 786 F.2d at 471.

46. *Guidry*, 493 U.S. at 367, 376.

47. *Id.* at 367.

48. Pub. L. No. 86-257, § 501(c), 73 Stat. 536 (1959) (codified at 29 U.S.C. § 501(c) (2006)) ("Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.").

49. *Guidry*, 493 U.S. at 370.

the district court on Guidry's undistributed pension benefits.<sup>50</sup> The appellate court deemed it unlikely that Congress intended courts to ignore "'equitable principles'" and thereby shield individuals such as Guidry from being fiscally accountable for their misdeeds.<sup>51</sup>

The Supreme Court disagreed with the lower courts and observed that ERISA's anti-alienation provision "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them."<sup>52</sup> Rejecting the practicability of defining equitable exceptions to ERISA's anti-alienation that would not "swallow the rule," the Court stated "that the identification of any exception should be left to Congress."<sup>53</sup> The Court neglected to address the obvious difficulty in expecting legislators to fashion prospective anti-alienation exceptions when the judiciary arguably would be better equipped to tailor remedies in individual cases based on specific facts and circumstances.<sup>54</sup> The Court's observation that "[i]t makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable"<sup>55</sup> raises the possibility that even if Congress amended ERISA's anti-alienation language to give courts the discretion to craft equitable exceptions, such legislatively-granted leeway might be impermissibly vague.<sup>56</sup>

Two years after the *Guidry* decision, the Court again decided a case involving alienation in the context of ERISA. In *Patterson v. Shumate*,<sup>57</sup> the issue centered on the interaction between ERISA and the Bankruptcy Code; specifically, whether ERISA's anti-alienation provisions were a transfer restriction "enforceable under applicable nonbankruptcy law"<sup>58</sup> such that the debtor could exclude his interest

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50. *Id.*

51. *Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 856 F.2d 1457, 1460 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990)).

52. *Guidry*, 493 U.S. at 376.

53. *Id.* at 377.

54. *See, e.g., Crawford v. La Boucherie Ltd.*, 815 F.2d 117, 122 (D.C. Cir. 1987).

55. *Guidry*, 493 U.S. at 376-77.

56. *See, e.g., Arnett v. Kennedy*, 416 U.S. 134, 158-59 (1974) (discussing constitutional challenges to a noncriminal statute based on overbreadth and vagueness).

57. 504 U.S. 753 (1992).

58. The Bankruptcy Code places trust property subject to transfer restrictions outside the bankruptcy estate: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2) (2006).

in a pension plan from the bankruptcy estate.<sup>59</sup> During a period spanning more than 30 years, Joseph B. Shumate, Jr., rose through the ranks at Coleman Furniture Company to become its president, chairman of the board of directors, and majority shareholder.<sup>60</sup> After Coleman Furniture's bankruptcy proceeding was converted from Chapter 11 to Chapter 7, Shumate began experiencing personal financial difficulties, eventually resulting in his own Chapter 7 filing.<sup>61</sup> The trustee of Shumate's bankruptcy estate sought to compel Coleman Furniture's bankruptcy trustee to turn over Shumate's \$250,000 interest in Coleman Furniture's pension plan to Shumate's bankruptcy trustee for the benefit of Shumate's creditors.<sup>62</sup> Writing for the Court as he had in *Guidry*, Justice Blackmun once more focused on ERISA's statutory language that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."<sup>63</sup>

In reconciling the applicable ERISA and Bankruptcy Code terminology, the Court paid little attention to ERISA's policies other than to reiterate that Congress intended to safeguard pension income.<sup>64</sup> The Justices failed to address ERISA's countervailing goal of preventing the manipulation of pension funds by the wealthy.<sup>65</sup> The narrow question focused on by the Court—the degree to which ERISA's anti-alienation language could be read to protect all pension assets—obscured consideration of the more fundamental question of the degree to which pension trusts, particularly those representing sums well beyond an individual's basic needs in retirement, should be protected.<sup>66</sup> Although *Patterson* settled the debate on whether ERISA pension plans formed part of the debtor's estate in bankruptcy, the Court's use of the misnomer "ERISA-qualified plans"<sup>67</sup> added to the confusion and may have played a role in obscuring the fundamental policy underpinnings of whether and to what extent a pension fund should be insulated from the reach of

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59. *Patterson*, 504 U.S. at 755, 757.

60. *Id.* at 755; *Shumate v. Patterson*, 943 F.2d 362, 363 (4th Cir. 1991), *aff'd*, 504 U.S. 753 (1992).

61. *Patterson*, 504 U.S. at 755.

62. *Id.* at 755–56.

63. *Id.* at 759 (quoting 29 U.S.C. § 1056(d)(1) (2006)).

64. *Id.* at 764–65. The Court also rejected the need to consider the legislative history of the relevant bankruptcy provision, finding such analysis obviated by "the clarity of the statutory language at issue . . ." *Id.* at 761.

65. Patricia Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 *IND. L.J.* 355, 387 (1999).

66. *Id.* at 386–87.

67. *Patterson*, 504 U.S. 753.

third parties.<sup>68</sup> One scholar observed that by framing the decision on the Bankruptcy Code, the Court “inevitably precluded consideration of the underlying question of *whether, and how best, to protect debtors from impoverishment in old age.*”<sup>69</sup> By focusing primarily on statutory language and eschewing any in-depth examination of ERISA’s policies, the Court actually undermined the balance between protecting retirement assets and compensating innocent victims or creditors.<sup>70</sup> The decision also averted scrutiny of the fundamental precept of why pension funds should be shielded from creditors at all.<sup>71</sup>

Over the next several years, the Court granted certiorari in two more cases to resolve continuing questions as to the reach of ERISA’s anti-alienation rules.<sup>72</sup> Of the two decisions, the more recent is less controversial. In *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*,<sup>73</sup> a unanimous Court determined that ERISA’s anti-alienation provision did not “invalidate” a divorced spouse’s non-QDRO waiver of benefits under her ex-spouse’s pension plan.<sup>74</sup> Instead, because the plan specified the procedure by which the divorced spouse could waive entitlement to her ex-spouse’s pension benefits, the plan administrator correctly disregarded the non-QDRO waiver as inconsistent with the plan documents.<sup>75</sup> In *Boggs v. Boggs*,<sup>76</sup> the issue was whether ERISA preempted the testamentary transfer of a community property interest in an undistributed pension

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68. See *In re Baker*, 114 F.3d 636, 638 (7th Cir. 1997) (discussing the “mysterious” provenance of the term “ERISA-qualified”).

69. Dilley, *supra* note 65, at 385 (emphasis added).

70. Sharon Reece, *The Gilded Gates of Pension Protection: Amending the Anti-Alienation Provision of ERISA Section 206(d)*, 80 OR. L. REV. 379, 430–35 (2001).

71. Dilley, *supra* note 65, at 387.

72. See *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009); *Boggs v. Boggs*, 520 U.S. 833 (1997). The Supreme Court mentioned ERISA’s anti-alienation provision in two other post-*Shumate* opinions, but the provision was not part of the Court’s analysis. In *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001), the lower court included a discussion of anti-alienation under ERISA, but the Supreme Court focused its analysis on preemption and did not address assignment or alienation. *Id.* at 145–46. In *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004), the Court noted that the plan in question complied with the anti-alienation provisions of I.R.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1), but alienation was not a factor in the Court’s determination that a business’s working owner qualified under ERISA as a participant in a pension plan if the business employed at least one other person who was not the owner’s spouse. *Id.* at 8.

73. 129 S. Ct. 865.

74. *Id.* at 868.

75. *Id.*

76. 520 U.S. 833 (1997).

plan by the nonparticipant spouse.<sup>77</sup> Isaac Boggs was employed by South Central Bell (Bell) from 1949 to 1985, during which time he participated in various Bell system retirement plans.<sup>78</sup> Isaac and his wife Dorothy were married during the entire period of his employment with Bell until Dorothy died in 1979.<sup>79</sup> Dorothy bequeathed to Isaac the equivalent of a life estate in her community property interest in Isaac's pension benefits, with the remainder to the couple's three children.<sup>80</sup> Isaac remarried within a year of Dorothy's death, worked for five more years, and died four years later.<sup>81</sup> Upon Isaac's death, his second wife contested Dorothy's attempted testamentary transfer of her community property interest in Isaac's pension benefits to Isaac and Dorothy's children, contending that Dorothy's putative bequest to the children was preempted by ERISA.<sup>82</sup> The district court and a divided panel of the Fifth Circuit upheld the transfer.<sup>83</sup>

In a controversial decision,<sup>84</sup> a divided Supreme Court reasoned that ERISA mandated uniformity of pension benefit treatment regardless of state property laws.<sup>85</sup> Although much of the majority opinion in *Boggs* dealt with ERISA's preemption of Louisiana common law,<sup>86</sup> the Court buttressed its conclusions with a discussion of ERISA's anti-alienation provision.<sup>87</sup> The Court noted that the Retirement Equity Act of 1984 amended ERISA's anti-alienation provisions to provide an exception for qualified domestic relations orders (QDROs).<sup>88</sup> Because the statute created an exception to anti-

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77. *Id.* at 835–36.

78. *Id.* at 836.

79. *Id.*

80. *Id.* at 836–37.

81. *Id.* at 836.

82. *Id.* at 837. The retirement assets in controversy included an annuity of approximately \$1,800 per month, 96 shares of AT&T stock from Bell's employee stock ownership plan (ESOP), and a lump-sum distribution of approximately \$150,000 from Bell's Savings Plan for Salaried Employees that Isaac rolled over into an individual retirement account (IRA) upon his retirement from Bell. *Id.* at 836; *id.* at 856 (Breyer, J., dissenting).

83. *Id.* at 837–38.

84. See Heather J. Rose, Comment, *Boggs v. Boggs: Creating Real-Life Cinderellas*, 33 J. MARSHALL L. REV. 271, 271 (1999) (casting the second wife in the role of the wicked stepmother in a fairy tale).

85. *Boggs*, 520 U.S. at 839–41.

86. *Id.* at 841–44.

87. *Id.* at 851–52.

88. *Id.* at 843, 846–47. As discussed more fully below, a QDRO is a judgment or order that provides child support, alimony, or marital property rights, that has been issued

alienation for QDROs, the majority essentially applied the statutory construction maxim *expressio unius est exclusio alterius*,<sup>89</sup> without characterizing it as such, to reach the conclusion that Congress intended to exclude all other formulations:

The surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme. ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist.<sup>90</sup>

Although the majority opinion in *Boggs* avoided labeling the maxim, reliance on the doctrine's concept is at odds with the Court's less than favorable comments a decade earlier in a securities fraud case:

We also reject application of the maxim of statutory construction, *expressio unius est exclusio alterius* ... As we stated in *SEC v. Joiner Corp.*, 320 U.S. 344, 350–351, 64 S. Ct. 120, 123, 88 L. Ed. 88 (1943), such canons 'long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose' ... We believe the maxim cannot properly be applied to a situation where the remedies redress different misconduct and where the remedial purposes of the Acts would be undermined by a presumption of exclusivity.<sup>91</sup>

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pursuant to a state's domestic relations laws, and that meets specific statutory requirements set forth in I.R.C. § 414(p) and 29 U.S.C. § 1056(d)(3). *Id.*

89. See *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (“[T]he expression of one is the exclusion of others . . .”).

90. *Boggs*, 520 U.S. at 847–48.

91. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (citations omitted); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 282 (1985) (“The canon *expressio unius est exclusio alterius* is . . . based on the assumption of legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate. Although this canon seemed dead for a while, it has been resurrected by the Supreme Court to provide a basis for refusing to create private remedies for certain statutory violations. Its recent disparagement by a unanimous Court [in *Herman & MacLean v. Huddleston*] puts its

The majority in *Boggs* likely would contend that it construed ERISA's anti-alienation provisions in conformity with ERISA's general purpose of protecting pension accounts. The dissent and some commentators would disagree.<sup>92</sup>

In a dissent joined fully by Justice O'Connor and in part by Chief Justice Rehnquist and Justice Ginsburg, Justice Breyer pointed out the inequity of the Court's decision.<sup>93</sup> If Dorothy had divorced Isaac shortly before her death and obtained a QDRO, the terms of her will would have been honored and the couple's children would have received their mother's interest in Isaac's pension upon Isaac's death.<sup>94</sup>

The dissent also explained in detail why ERISA's anti-alienation provisions did not mandate the result reached by the majority.<sup>95</sup> First, ERISA only barred *assignment or alienation* of pension benefits.<sup>96</sup> Dorothy obtained her ownership interest in Isaac's pension through Louisiana's community property laws, not through assignment or alienation.<sup>97</sup> Second, because Dorothy and Isaac owned the retirement assets equally as community property, Dorothy had as much right as Isaac to direct the disposition of her property at her death.<sup>98</sup> ERISA had no effect on what a pension fund beneficiary did with the pension funds after death "for after the death of a beneficiary the money is no longer needed for that beneficiary's support."<sup>99</sup> Third, the dissent addressed the conclusion that when Congress amended ERISA to exempt QDROs from the bar against alienation, it rendered all other orders ineffectual.<sup>100</sup> By its terms, the QDRO

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future in some doubt but more likely confirms that judicial use of canons of construction is opportunistic.").

92. *Boggs*, 520 U.S. at 855 (Breyer, J., dissenting); see also Cynthia A. Samuel & Katherine S. Spaht, *Fixing What's Broke: Amending ERISA to Allow Community Property to Apply Upon the Death of a Participant's Spouse*, 35 FAM. L.Q. 425, 426–27 (2001); Erica S. Phillips, Comment, *Equality in Life, Inequality in Death: The Ramifications of the United States Supreme Court Decision in Boggs v. Boggs*, 34 IDAHO L. REV. 623, 625 (1998); Tony Vecino, Note, *Boggs v. Boggs: State Community Property and Succession Rights Wallow in ERISA's Mire*, 28 GOLDEN GATE U. L. REV. 571, 599 (1998).

93. *Boggs*, 520 U.S. at 854–55 (Breyer, J., dissenting).

94. *Id.* at 868.

95. *Id.* at 863–68.

96. 29 U.S.C. § 1056(d)(1) (2006).

97. *Boggs*, 520 U.S. at 864 (Breyer, J., dissenting).

98. *Id.* at 865. Under Louisiana law, even though Dorothy predeceased Isaac, any testamentary transfer would take effect only following an accounting after Isaac's death. See *id.*

99. *Id.* at 864–65.

100. See *id.* at 866–67.

amendment was concerned only with the treatment of domestic relations orders that were “qualified” under the terms provided in the statute.<sup>101</sup> Congress gave no indication that its amendment would affect other orders, such as those entered in probate, that did not assign or alienate pension benefits.<sup>102</sup>

As might be expected, the exclusion of equity from statutory applications sometimes produces inequitable results. The strict reading mandated by the Supreme Court has not produced predictability, but instead has produced results that even the Court has recognized as “distaste[ful].”<sup>103</sup>

### III. EXAMINING NONCONTROVERSIAL ANTI-ALIENATION EXCEPTIONS

#### A. *Exceptions to Anti-Alienation Specifically Within the Spendthrift Provisions—Borrowing an Egg*

When Congress enacted ERISA, the statute included two exceptions to the prohibition on alienation: (1) a participant or beneficiary could borrow against her accrued non-forfeitable benefit,<sup>104</sup> and (2) a pension recipient could voluntarily assign up to ten percent of a benefit payment, as long as the assignment was revocable and not made to defray plan administration costs.<sup>105</sup> The limited legislative history supporting the voluntary revocable assignment and loan exceptions provides that:

Under the conference substitute, a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment. Vested benefits may be used as collateral for

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101. *Boggs*, 520 U.S. at 866–67 (Breyer, J., dissenting).

102. *See id.* at 867.

103. *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 377 (1990).

104. I.R.C. § 401(a)(13)(A) (2006); *see also* Treas. Reg. § 1.401(a)-13(d)(2) (as amended in 1988).

105. I.R.C. § 401(a)(13)(A); *see also* Treas. Reg. § 1.401(a)-13(d)(1).

reasonable loans from a plan, where the fiduciary requirements of the law are not violated.<sup>106</sup>

Over the next two decades, Congress supplemented these two exceptions with ERISA amendments that provide exceptions for orders entered in domestic relations actions<sup>107</sup> and judgments based on breach of fiduciary duty as to pension plans.<sup>108</sup>

### 1. Participant Loans—Fashionable, Glittering Eggs<sup>109</sup>

Within a few years of ERISA's initial enactment, which included an anti-alienation exception for loans made to plan participants, Congress became concerned that widespread use of such loans could adversely affect retirement savings.<sup>110</sup> Balanced against this concern was the recognition that a blanket prohibition against loans might deter non-highly compensated employees from participating in retirement savings programs.<sup>111</sup> As originally enacted, ERISA required that plan loans state a reasonable interest rate, be adequately secured, establish a sound repayment schedule, and be available in a manner not discriminating against rank-and-file workers.<sup>112</sup> These requirements have been and continue to be augmented by other limitations such as the rule stating that the amounts received from a pension plan as a loan will be taxed as a distribution unless the conditions in I.R.C. § 72(p) and the applicable regulations are met.<sup>113</sup>

With the addition of § 72(p) through the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Congress created a presumption that plan loans constituted taxable distributions unless the loan met specific requirements relating to loan balance<sup>114</sup> and

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106. H.R. REP. NO. 93-1280, at 280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5061.

107. I.R.C. § 401(a)(13)(B).

108. I.R.C. § 401(a)(13)(C); 29 U.S.C. § 1056(d)(4) (2006).

109. *See* F. SCOTT FITZGERALD, *THE GREAT GATSBY* 22 (Eleanor Lanahan et al. eds., Scribner 1992) (1925) (“Across the courtesy bay the white palaces of fashionable East Egg glittered along the water . . .”).

110. JOINT COMM. ON TAXATION, *GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982*, H.R. DOC. NO. 97-4961, at 294–95 (1982).

111. *Id.*

112. 29 U.S.C. § 1108(b)(1) (2006); *see also* Treas. Reg. § 1.401(a)(4)-4(a), -4(e)(1)(i), -4(e)(3)(iii)(A) (as amended in 1988).

113. *See* I.R.C. § 72(p) (2006); Treas. Reg. § 1.72(p)-1 (2009); *see also* I.R.C. § 4975(d)(1) (2006) (providing an exception to the prohibited transaction rules for participant loans).

114. I.R.C. § 72(p)(2)(A), (D).

repayment terms.<sup>115</sup> Labor and Treasury Regulations further refined and clarified areas such as maximum loan amounts<sup>116</sup> and loan agreement formalities.<sup>117</sup> Failure to comply with the statutory and regulatory mandates in either form or operation may result in a deemed distribution of the full loan balance, including accrued interest.<sup>118</sup> In addition to a tax on the distribution, the plan participant risks an additional ten percent early distribution tax.<sup>119</sup> Despite the stringent rules and possible tax implications for pension plan loans, allowing a participant to borrow against these funds provides significant flexibility and control over plan benefits prior to retirement.

## 2. Ten Percent Limit on Alienation of Benefits in Pay Status—

### Keeping Most of the Eggs in the Basket<sup>120</sup>

As part of ERISA's original framework, Congress included a cap on the amount of benefits in pay status that may be alienated.<sup>121</sup> Section 401(a)(13)(A) allows participants receiving benefits to assign up to ten percent of their benefit payment if the assignment is voluntary, revocable, and not used for plan administration costs.<sup>122</sup> If strictly applied, this requirement seems somewhat paternalistic and formal—once a participant is receiving benefits, it is difficult to justify the government's interest in how the money is spent, let alone its enforcement of such restrictions. One author posits that Congress possibly intended this to be a protection "in perpetuity" that gives some latitude to the pension recipient "while restricting the pensioner and other possible third party claimants from pouncing on the payments at a time when the retiree needs [them] most."<sup>123</sup> Several

115. I.R.C. § 72(p)(2)(B)–(C).

116. See 29 C.F.R. § 2550.408b-1(c)(1)–(3), (f) (2008).

117. Treas. Reg. § 1.72(p)-1, Q&A (3)(b).

118. Treas. Reg. § 1.72(p)-1, Q&A (3), (10)(b), (11)(a), (14), (15).

119. I.R.C. § 72(t)(1). I.R.C. § 72(m) imposes an additional tax for certain key employees who are "5-percent owner[s]" of the business, as defined in I.R.C. § 416(i)(1)(B)(i). Treas. Reg. § 1.72(p)-1, Q&A (11).

120. See MARK TWAIN, *THE TRAGEDY OF PUDD'NHEAD WILSON* 197 (1894) available at <http://etext.lib.virginia.edu/railton/wilson/facsimile/twapu197.jpg> ("Behold, the fool saith, 'Put not all thine eggs in the one basket'—which is but a manner of saying, 'Scatter your money and attention;' but the wise man saith, 'Put all your eggs in the one basket and—WATCH THAT BASKET.'").

121. ERISA, Pub. L. No. 93-406, § 206(d), 88 Stat. 829, 864-65 (1974); 29 U.S.C. § 1506(d)(2) (2006); I.R.C. § 401(a)(13)(A) (2006).

122. I.R.C. § 401(a)(13)(A); 29 U.S.C. § 1506(d)(2).

123. Reece, *supra* note 70, at 392.

courts have interpreted the provisions as a prohibition only on the alienation of undistributed funds.<sup>124</sup>

### 3. Qualified Domestic Relations Orders—Tending the Egg<sup>125</sup>

In its original form, ERISA provided no anti-alienation exception for orders awarding child support or alimony payments. Although many courts fashioned exceptions for domestic relations orders,<sup>126</sup> under a strict reading of the statute such orders constituted an attempted assignment or alienation of pension benefits contrary to and preempted by ERISA.<sup>127</sup> Ten years after ERISA's enactment, Congress added an exception for orders entered in domestic relations actions<sup>128</sup> based on its observation that the interpretive case law revealed a lack of uniformity:

Generally, under present law, benefits under a pension, profit-sharing, or stock bonus plan (pension plan) are subject to prohibitions against assignment or alienation (spendthrift provisions.) Under present law, certain provisions of ERISA supersede (preempt) State laws relating to pension, etc., plans. A plan that does not include these required spendthrift provisions is not a qualified plan under the Code, and State law permitting such an assignment or alienation is generally preempted by ERISA.

Several cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations (e.g., alimony, separate maintenance, and child support

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124. See *Hoult v. Hoult*, 373 F.3d 47, 54–55 (1st Cir. 2004); *Robbins v. DeBuono*, 218 F.3d 197, 203–04 (2d Cir. 2000); *Central States, Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 678–79 (6th Cir. 2000); *Wright v. Riveland*, 219 F.3d 905, 919–21 (9th Cir. 2000); *Trucking Employees of N.J. Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54–56 (3d Cir. 1994). *But see* *United States v. Smith*, 47 F.3d 681, 682–84 (4th Cir. 1995).

125. See DR. SEUSS, *HORTON HATCHES THE EGG* 22 (1940) (“No matter WHAT happens, This egg must be tended!”).

126. See, e.g., *Am. Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 121–22 (2d Cir. 1979).

127. See *Gen. Motors Corp. v. Buha*, 623 F.2d 455, 460–61 (6th Cir. 1980) (comparing decisions that differed in their conclusions as to whether ERISA's anti-alienation provision preempted garnishment or attachment in situations including family support obligations).

128. 29 U.S.C. § 1056(d)(3)(A) (2006); see also I.R.C. § 414(p)(1)(B)(i) (2006). The term “domestic relations order” encompasses formal court approval of property settlement agreements. 29 U.S.C. § 1056(d)(3)(B)(ii).

obligations). In some of these cases, the courts have held that ERISA was not intended to preempt State domestic relations law permitting the attachment of vested benefits for the purpose of meeting these obligations. Some courts have held that the ERISA preemption provision does not prevent application of State law permitting attachment of nonvested benefits for the purpose of meeting family support obligations. There is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc., plan.<sup>129</sup>

In rectifying the dilemma created by the courts' diverging opinions, the Senate Finance Committee recognized the importance of "establish[ing] guidelines for determining whether the exception to the spendthrift rules applies," and indicated that the QDRO amendment was "necessary to ensure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA."<sup>130</sup>

Against this backdrop, Congress created detailed criteria that must be met for a QDRO to escape ERISA's prohibition on alienation or assignment.<sup>131</sup> A threshold determination entails a characterization of five aspects of the order: (1) type—whether it is a judgment, decree, or order;<sup>132</sup> (2) subject—concerning child support, alimony, or marital property rights;<sup>133</sup> (3) parties—spouses, former spouses, children, or other dependents;<sup>134</sup> (4) legal basis—issued under a state's domestic relations law;<sup>135</sup> and (5) effect—creating, recognizing, or assigning pension benefit rights to an alternate payee.<sup>136</sup> By satisfying the preceding five criteria, a legal document is considered a "domestic relations order."<sup>137</sup> To become a *qualified* domestic relations order, ERISA requires inclusion of specific information such as the identities and mailing addresses of the plan participant and each

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129. S. REP. NO. 98-575, at 18-19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2564-65 (citation omitted).

130. *Id.* at 19, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2565.

131. 29 U.S.C. § 1056(3)(A)-(E).

132. 29 U.S.C. § 1056(d)(3)(B)(ii); I.R.C. § 401(a)(13)(B) (2006).

133. 29 U.S.C. § 1056(d)(3)(B)(ii)(I); I.R.C. § 414(p)(1)(B)(i).

134. 29 U.S.C. § 1056(d)(3)(B)(ii)(I); I.R.C. § 414(p)(1)(B)(i).

135. 29 U.S.C. § 1056(d)(3)(B)(ii)(II); I.R.C. § 414(p)(1)(B)(ii).

136. 29 U.S.C. § 1056(d)(3)(B)(i)(I); I.R.C. § 414(p)(1)(A)(i).

137. 29 U.S.C. § 1056(d)(3)(B)(i); I.R.C. § 414(p)(1)(B).

alternate payee whose rights are affected by the order;<sup>138</sup> the amount, percentage, or method for determining the benefits to be paid to each alternate payee;<sup>139</sup> the period or number of payments covered;<sup>140</sup> and identification of the plans affected.<sup>141</sup> Moreover, the order will not be qualified if it modifies the type, form, or amount of an alternate payee's benefits in a manner inconsistent with the plan or, in certain respects, with a previous QDRO.<sup>142</sup>

Despite the apparent rigidity of the statutory text for QDROs, in practice the requirements have become somewhat malleable. ERISA's anti-alienation provisions apply to pension benefits, but not welfare benefits.<sup>143</sup> A QDRO is an exception to ERISA's anti-alienation provisions and therefore should be limited in applicability to pension benefits. Several courts have expanded the anti-alienation requirements to include welfare benefits in domestic relations cases, typically where life insurance is concerned.<sup>144</sup> Other courts have gone so far as to dispense with strict compliance with the statutory QDRO requirements.<sup>145</sup> Recently, a district court treated a restraining order as a QDRO, while acknowledging that the order "fail[ed] to meet every one of [the statutory] requirements."<sup>146</sup>

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138. 29 U.S.C. § 1056(d)(3)(C)(i); I.R.C. § 414(p)(2)(A).

139. 29 U.S.C. § 1056(d)(3)(C)(ii); I.R.C. § 414(p)(2)(B).

140. 29 U.S.C. § 1056(d)(3)(C)(iii); I.R.C. § 414(p)(2)(C).

141. 29 U.S.C. § 1056(d)(3)(C)(iv); I.R.C. § 414(p)(2)(D).

142. 29 U.S.C. § 1056(d)(3)(D); I.R.C. § 414(p)(3). The Pension Protection Act of 2006 directed the Secretary of Labor to promulgate regulations clarifying, among other things, circumstances in which a domestic relations order could be considered a QDRO even though it is issued after or revises another QDRO. Pension Protection Act of 2006, Pub. L. No. 109-280 § 1001, 120 Stat. 780, 1052-53 (2006) (codified at 29 C.F.R. § 2530.206 (2008)).

143. See 29 U.S.C. § 1056(d)(1) (stating that "[e]ach *pension plan* shall provide that benefits under the plan may not be assigned or alienated") (emphasis added). ERISA's framework distinguishes between two types of benefits: (1) "pension," which pertains to retirement income, and (2) "welfare," which relates to items such as health insurance, vacation benefits, training, day care, scholarship funds, and prepaid legal services. Compare 29 U.S.C. § 1002(1) (2006), with 29 U.S.C. § 1002(2)(A) (2006).

144. See, e.g., *Cent. States, Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 678-79 (6th Cir. 2000); *Carland v. Metro. Life Ins. Co.*, 935 F.2d 1114, 1119 (10th Cir. 1991).

145. See, e.g., *Metro. Life Ins. Co. v. Marsh*, 119 F.3d 415, 422 (6th Cir. 1997) (stating that substantial compliance with ERISA's QDRO requirements is sufficient); *Metro. Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1085 (7th Cir. 1994) (stating that "[i]t is asking too much of domestic relations lawyers and judges to expect them to dot every *i* and cross every *t* in formulating divorce decrees that have ERISA implications").

146. *Unicare Life & Health Ins. Co. v. Phanor*, 472 F. Supp. 2d 8, 12 (D. Mass. 2007).

#### 4. Fiduciary Breach of Trust—Faithless Egg-Sitters<sup>147</sup>

Seven years after the Supreme Court's decision in *Guidry*,<sup>148</sup> the Taxpayer Relief Act of 1997 added an anti-alienation exception to ERISA for claims against a pension plan based on breach of a fiduciary duty owed to the plan.<sup>149</sup> Recognizing that “[c]ourts have been divided in their interpretation of the prohibition on assignment or alienation” in situations where a pension plan suffered from a participant's criminal conduct or breach of fiduciary duty, Congress amended ERISA to allow an offset against the participant's plan benefits.<sup>150</sup> The amendment permits reimbursement of a plan from a participant's pension benefits only upon conviction of a crime involving the plan,<sup>151</sup> a civil judgment for breach of ERISA's fiduciary provisions,<sup>152</sup> or settlement between the participant and the

147. See DR. SEUSS, *supra* note 125, at 4 (“‘Very well,’ said the elephant, ‘since you insist . . . . You want a vacation. Go fly off and take it. I’ll sit on your egg and I’ll try not to break it. I’ll stay and be faithful. I mean what I say.’ ‘Toodle-oo!’ sang out Mayzie and fluttered away.”).

148. See discussion *supra* Part II.C. In *Guidry*, the Court noted that although the convicted union official embezzled union funds, he “has not been found to have breached any fiduciary duty to the pension plans.” 493 U.S. at 373. Accordingly, the Court did not reach the question of whether a fiduciary's personal liability for plan losses that resulted from his breach constituted an exception to ERISA's anti-alienation provisions that would allow recovery from the fiduciary's own plan benefits. *Id.* at 372–73 (discussing 29 U.S.C. § 1109(a) (2006) (relating to fiduciary personal liability) and 29 U.S.C. § 1056(d)(1) (2006) (regarding anti-alienation)).

149. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1502, 111 Stat. 788, 1058-61; I.R.C. § 401(a)(13)(C)(i) (2005); 29 U.S.C. § 1506(d)(4)(A)-(B) (2006).

150. H.R. REP. NO. 105-220, at 756–57 (1997) (Conf. Rep.) (noting that “[s]ome courts have ruled that there is no exception in ERISA for the offset of a participant's benefit to make a plan whole in the case of a fiduciary breach,” while “[o]ther courts have reached a different result and permitted an offset of a participant's benefit for breach of fiduciary duties”).

151. 29 U.S.C. § 1056(d)(4)(A)(i); I.R.C. § 401(a)(13)(C)(i)(I) (2005).

152. 29 U.S.C. § 1056(d)(4)(A)(ii); I.R.C. § 401(a)(13)(C)(i)(II). The statute technically might allow alienation of plan benefits even if the judgment is not based on a breach of fiduciary obligations to a plan. As written, the civil judgment provision merely requires that the judgment be “entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 [(i.e., the fiduciary provisions of ERISA title I)].” I.R.C. § 401(a)(13)(C)(i)(II) (emphasis added). Thus, if a multi-count complaint is brought against a plan fiduciary, but the ERISA count is dismissed or otherwise fails to form the basis for the defendant's liability, the mere fact that the action was brought “in connection with . . . [an] alleged violation” of ERISA's fiduciary provisions arguably would support an offset against the fiduciary's own plan benefits. The language in the Conference Committee report would restrict any offset by requiring that “the participant's benefit in the plan be applied to satisfy the liability.” H.R. REP. NO. 105-220, at 757 (1997) (Conf. Rep.) (emphasis added). The actual

Secretary of Labor or the Pension Benefit Guaranty Corporation for the participant's breach of fiduciary responsibilities regarding the plan.<sup>153</sup> The judgment, order, or settlement document must specify that the offset is to be paid from the participant's plan benefits.<sup>154</sup> Additionally, the interests of a participant's spouse will only be affected under the detailed circumstances described in the statute.<sup>155</sup>

*B. Exceptions to Anti-Alienation Not Specifically Within the Anti-Alienation Provisions—Garnishment and “Bedeviled” Eggs*

1. Federal tax liens

Failure to pay federal taxes results in a federal tax lien<sup>156</sup> and gives the government the right to levy on the delinquent taxpayer's property and property rights.<sup>157</sup> Although I.R.C. § 6334 exempts specific property from levy, pension plan funds are not one of the enumerated items.<sup>158</sup> Also, ERISA directs that “[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . .”<sup>159</sup> Along

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- wording of the statute, however, is not similarly restrictive, requiring only that “the judgment, order, decree, or settlement agreement expressly provide[d] for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan . . . .” 29 U.S.C. § 1056(d)(4)(B); I.R.C. § 401(a)(13)(C)(ii).
153. 29 U.S.C. § 1056(d)(4)(A)(iii); I.R.C. § 401(a)(13)(C)(i)(III).
154. 29 U.S.C. § 1056(d)(4)(B); I.R.C. § 401(a)(13)(C)(ii).
155. See 29 U.S.C. § 1056(d)(4)(C) and I.R.C. § 401(a)(13)(C)(iii) (directing that where survivor annuity requirements are present, attaching a nonparticipant spouse's interest requires written consent, an effective waiver, or the specific inclusion of the nonparticipant spouse's interest in the judgment, order, decree, or settlement).
156. I.R.C. § 6321 (2006) (“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”).
157. I.R.C. § 6331(a) (2006) (“If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.”).
158. See I.R.C. § 6334(a)(1)–(7) (2006) (exempting property such as apparel, school books, undelivered mail, and benefits for unemployment or workers' compensation, as well as limited amounts of fuel, provisions, furniture, and books or tools needed for the taxpayer's trade, business, or profession). While § 6334(a)(6) exempts a narrow class of certain pension and annuity payments, ERISA-based pension benefits do not fall within the exemption.
159. 29 U.S.C. § 1144(d) (2006).

with the language in the Code and ERISA, the Federal Debt Collection Procedure Act (FDCPA) supports collection of debts owed to the United States through “garnishment against property (including nonexempt disposable earnings) in which the debtor has a substantial nonexempt interest and which is in the possession, custody, or control of a person other than the debtor, in order to satisfy the judgment against the debtor.”<sup>160</sup> The FDCPA’s broad definition of property includes present and future interests, either legal or equitable, held in any manner, and expressly embraces “spendthrift and pension trusts.”<sup>161</sup>

Numerous courts have considered the question of whether ERISA’s anti-alienation language precludes enforcement of a federal tax lien against undistributed pension funds.<sup>162</sup> It is generally accepted that ERISA does not hinder the government’s rights to levy against a delinquent taxpayer’s interest in her pension benefits.<sup>163</sup> Not surprisingly, the IRS agrees that tax liens in favor of the United States are not subject to ERISA’s anti-alienation provision.<sup>164</sup> The Service also takes the position that ERISA plans may be garnished to satisfy federal criminal fines.<sup>165</sup>

## 2. Bankruptcy

Although a detailed examination of the interplay between ERISA and bankruptcy laws is beyond the scope of this article, many of the complexities and uncertainties that thrived following *Patterson v. Shumate*<sup>166</sup> persisted for several years. One bankruptcy judge observed that “disputes over how to construe *Shumate* have bedeviled

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160. 28 U.S.C. § 3205(a) (2006).

161. 28 U.S.C. § 3002(12) (2006).

162. See *McIntyre v. United States*, 222 F.3d 655, 657, 660 (9th Cir. 2000); *United States v. Sawaf*, 74 F.3d 119, 120 (6th Cir. 1996); *Shanbaum v. United States* 32 F.3d 180, 183 (5th Cir. 1994); *Ameritrust Co. v. Derakhshan*, 830 F. Supp. 406, 409–10 (N.D. Ohio 1993).

163. See *McIntyre*, 222 F.3d at 660; *Sawaf*, 74 F.3d at 122–25; *Shanbaum*, 32 F.3d at 183; see also *Lawler v. Suntrust Sec. Inc.*, 740 So. 2d 592, 594 (Fla. Dist. Ct. App. 1999) (commenting in a suit by an IRA owner against her financial institution for releasing IRA funds to the IRS pursuant to levy, that “[t]he IRS has a well-grounded reputation for being the King Kong of creditors in terms of its powers to collect tax delinquencies.”).

164. Treas. Reg. § 1.401(a)-13(b)(2) (as amended in 1988).

165. I.R.S. Priv. Ltr. Rul. 200426027 (Mar. 30, 2004) (citing *United States v. Tyson*, 265 F. Supp. 2d 788 (E.D. Mich. 2003); *United States v. Clark*, No. 02-X-74872, 2003 WL 22889389 (E.D. Mich. June 11, 2003); *United States v. Rice*, 196 F. Supp. 2d 1196, 1201 (N.D. Okla. 2002); I.R.S. Priv. Ltr. Rul. 200342007 (July 23, 2003).

166. 504 U.S. 753 (1992).

later cases and limited the force of the policies [relating to the protection of pension benefits].”<sup>167</sup>

In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)<sup>168</sup> included an amendment to Bankruptcy Code § 522 that exempted “retirement funds” from bankruptcy court claims if the funds or accounts were exempt from taxation.<sup>169</sup> That Congress chose to solidify the link between alienation and tax exempt status still begs the question of whether “the fundamental principles governing tax treatment of deferred compensation [are] consistent with or even relevant to the appropriate treatment of deferred compensation in bankruptcy.”<sup>170</sup>

#### IV. PURSUING RECOVERY FROM A CRIMINAL'S PENSION BENEFITS—NOT ALL EGGS KEEP LONGER IN THE COOLER

Recent cases have focused attention on convicted criminals' interests in pension plan assets. In one decision, a state government attempted to recoup its incarceration expenses from prisoners' undistributed pension funds.<sup>171</sup> In other cases, the federal government has sought to invade a criminal's pension plan to provide restitution to the offender's victims.<sup>172</sup>

The controversy in *DaimlerChrysler Corp. v. Cox*<sup>173</sup> involved several Michigan laws that required pension plans to send a prisoner's benefit payments to the inmate's prison account, from which the state had authority to take ninety percent of the funds to defray the costs of incarceration.<sup>174</sup> The relevant Michigan statutes, known as the State Correctional Facility Reimbursement Act (SCFRA), gave the state's attorney general authority to file a complaint in state court for reimbursement from a prisoner's assets

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167. *In re Handel*, 301 B.R. 421, 430–31 (Bankr. S.D.N.Y. 2003).

168. Pub. L. No. 109-8, 119 Stat. 23 (2005).

169. See 11 U.S.C. § 522(b)(3)(C), (d)(12) (2006) (listing I.R.C. §§ 401 (qualified pension, profit-sharing, and stock bonus plans), 403 (taxation of employee annuities), 408 (IRAs), 408A (Roth IRAs), 414 (definitions and special rules), 457 (deferred compensation plans of state and local governments and tax-exempt organizations), and 501(a) (tax exemption for qualified retirement plan trusts) (2005)).

170. Dilley, *supra* note 65, at 401.

171. *DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 969–70 (6th Cir. 2006).

172. *United States v. Novak*, 441 F.3d 819, 820 (9th Cir. 2006), *vacated*, *United States v. Novak*, 476 F.3d 1041 (9th Cir. 2007) (en banc); *United States v. Miller*, 588 F. Supp. 2d 789, 791 (W.D. Mich. 2008).

173. *Cox*, 447 F.3d at 967.

174. *Id.* at 968–69.

for up to ninety percent of the state's "cost of care."<sup>175</sup> Under SCFRA, "[a]ssets" included "property, tangible or intangible, real or personal, belonging to or due a prisoner or former prisoner including income or payments to such prisoner from social security, . . . pension benefits, . . . annuities, retirement benefits, or from any other source whatsoever . . . ."<sup>176</sup>

The state recognized that ERISA's anti-alienation language prohibited the state court from ordering the pension plan to send prisoners' pension funds directly to the state.<sup>177</sup> Instead, the state court ordered four prisoners with pension assets to direct their pension plans to forward payments to the inmates' prison accounts.<sup>178</sup> Because the Michigan Department of Corrections restricted prisoners from having any bank accounts other than a prison account, funds transferred to a prison account could then be redirected by the prison warden to the Michigan treasury.<sup>179</sup> When three inmates refused to notify DaimlerChrysler to forward their pension benefit payments to the prison for deposit in the prison accounts, the attorney general advised DaimlerChrysler to send the pension checks to the prisoners at their prison addresses.<sup>180</sup> DaimlerChrysler did not comply with the state's notices, but instead sought a declaratory judgment in federal district court as to its obligations regarding the state's attempted diversion of the prisoners' pension funds.<sup>181</sup>

The district court determined that the state court's orders and the state's notices were rendered invalid by ERISA's anti-alienation provision.<sup>182</sup> On review, the appeals court affirmed the district court's judgment, concluding that delivery of the pension funds to the prisoners' institutional addresses was "a mere formalism . . . not dispositive of whether an alienation ha[d] occurred."<sup>183</sup> The court noted that its ruling did not bar Michigan's right to reimbursement;

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175. MICH. COMP. LAWS ANN. §§ 800.403(3), .404(1) (West 1998); *Cox*, 447 F.3d at 968–69.

176. MICH. COMP. LAWS ANN. § 800.401(a) (West 1998).

177. *See* Petition for Writ of Certiorari, at 7, *Cox v. DaimlerChrysler*, 127 S. Ct. 2971 (2006) (No. 06-273).

178. *Cox*, 447 F.3d at 968–69.

179. *Id.* at 969–70.

180. *Id.* at 970.

181. *Id.* at 970, 975. DaimlerChrysler argued that the Michigan laws were preempted by ERISA's anti-alienation provision, as well as the general preemption provision contained in 29 U.S.C. § 1144(a). *Id.* at 972.

182. *Id.* at 971.

183. *Id.* at 975–76.

the state remained free to proceed against pension funds after the prisoners received them.<sup>184</sup>

Although *Cox* prevented a state court from encumbering undistributed pension plan funds,<sup>185</sup> the federal government has fared better in its attempts to garnish pension accounts. In addition to the federal government's rights to reach plan assets to satisfy fines and tax liens,<sup>186</sup> courts generally have interpreted the Mandatory Victims Restitution Act (MVRA) as an exception to ERISA's ban on assignment and alienation.<sup>187</sup> The recent en banc decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Novak*<sup>188</sup> illustrates the arguments for and against applying MVRA to enforce restitution orders against pension plan benefits.<sup>189</sup>

Raymond Novak worked as director of telecommunications for Robinsons-May Department Stores (May Company) from 1990 to 2000, during which time he participated in May Company's retirement and profit sharing plans.<sup>190</sup> Novak's then-wife, Norma Ortega Nance, worked for Nestle U.S.A., Inc. (Nestle), in a position where her duties involved access to telephone equipment.<sup>191</sup> Over a four-year period, the couple engaged in a scheme whereby Norma ordered \$3.3 million worth of telephone boards for Nestle and passed them on to her husband, who then sold the equipment and pocketed the proceeds.<sup>192</sup> Novak pleaded guilty to conspiracy to transport stolen goods<sup>193</sup> and filing a false tax return,<sup>194</sup> was sentenced to 24 months in prison, and was ordered to pay restitution of over \$3.3

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184. *Id.* at 976. Concluding that ERISA's anti-alienation provision prohibited SCFRA's garnishment procedures, the Sixth Circuit declined to reach the question of whether the Michigan statute also was barred by ERISA's general preemption provision, 29 U.S.C. § 1144(a). *Id.*

185. *Id.*

186. See discussion *supra* Part III.B.1.

187. See *United States v. Irving*, 452 F.3d 110, 126 (2d Cir. 2006); *United States v. Himebaugh*, No. 02-CR-0077-022-CVE, 2007 WL 1462430, at \*2 (N.D. Okla. May 17, 2007); *United States v. First Bank & Trust E. Tex.*, 477 F. Supp. 2d 777, 780–81 (E.D. Tex. 2007); *United States v. Wahlen*, 459 F. Supp. 2d 800, 822 (E.D. Wis. 2006); *United States v. Lazowitz*, 411 F. Supp. 2d 634, 636–37 (E.D.N.C. 2005); *United States v. James*, 312 F. Supp. 2d 802, 805 (E.D. Va. 2004); *In re True*, 340 B.R. 597, 602 (Bankr. N.D. Ohio 2006).

188. 476 F.3d 1041 (9th Cir. 2007).

189. *Id.* at 1043.

190. *United States v. Novak*, 441 F.3d 819, 820 (9th Cir. 2006), *vacated*, 476 F.3d 1041 (9th Cir. 2007) (en banc).

191. *Novak*, 476 F.3d at 1043.

192. *Id.*

193. 18 U.S.C. § 371 (2006).

194. I.R.C. § 7206(1) (2006).

million.<sup>195</sup> The restitution order in *Novak* was premised on the MVRA, which provides in part:

Civil remedies for satisfaction of an unpaid fine

(a) ENFORCEMENT.—The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that—

(1) property exempt from levy for taxes pursuant to section 6334(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986 shall be exempt from enforcement of the judgment under Federal law;

(2) section 3014 of chapter 176 of title 28 shall not apply to enforcement under Federal law; and

(3) the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law.<sup>196</sup>

Novak opposed the government's efforts to garnish his pension funds, relying on ERISA's anti-alienation provision.<sup>197</sup>

The district court quashed the writ of garnishment and the government appealed.<sup>198</sup> Following reversal by a divided panel of the Ninth Circuit,<sup>199</sup> the appellate court concluded in a divided en banc opinion that the MVRA reflected a congressional intent of allowing alienation of ERISA-covered retirement funds to satisfy MVRA-based criminal restitution orders.<sup>200</sup> In balancing MVRA's statutory purpose of holding offenders accountable to compensate their victims

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195. *Novak*, 476 F.3d at 1043.

196. 18 U.S.C. § 3613(a) (2006).

197. *Novak*, 476 F.3d at 1044.

198. *Id.*

199. *Id.*

200. *Id.* at 1044, 1047–49.

in an amount that reflects the impact of the criminal activity<sup>201</sup> with the Supreme Court's conclusion that ERISA required holding retirement funds "inviolable" until retirement,<sup>202</sup> the court engaged in a detailed discussion of these two competing provisions.<sup>203</sup>

The court began its opinion with a nod to the competing policies underlying MVRA and ERISA: the "MVRA rests on the recognition that '[i]t is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that [the] offender be held accountable to repay these costs.'"<sup>204</sup> On the other hand, "ERISA is meant to assure that '[r]etirement funds shall remain inviolate until retirement.'"<sup>205</sup> Other than a quotation from the Supreme Court's decision in *Guidry*<sup>206</sup> that ERISA "[s]ection 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . and their dependents . . . ,"<sup>207</sup> the majority continued for 20 more pages without analyzing or even mentioning the divergent policies at the crux of the case.

One aspect of apparent significance to the majority's analysis involved the use of the word "notwithstanding" in the MVRA's enforcement provision:

The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. *Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that—* (1) property exempt from [tax levies under specified I.R.C. provisions] shall be exempt [from MVRA]; (2) [FDCPA exemption procedures shall be inapplicable]; and (3) . . . Consumer Credit Protection Act [provisions limiting disposable

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201. S. REP. NO. 104-179, at 18 (1995).

202. *Novak*, 476 F.3d at 1043 (quoting *Boggs v. Boggs*, 520 U.S. 833, 851 (1997) (quoting JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 547 (2d ed. 1995))).

203. *See id.* at 1043.

204. *Id.* (quoting S. REP. NO. 104-179, at 18 (1995)).

205. *Id.* at 1043 (quoting *Boggs*, 520 U.S. at 851 (quoting JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 547 (2d ed. 1995))) (internal quotation mark omitted).

206. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

207. *Novak*, 476 F.3d at 1045-46 (quoting *Guidry*, 493 U.S. at 376).

earnings garnishment] shall apply to enforcement of the judgment under Federal law or State law.<sup>208</sup>

By using the term “notwithstanding,” the majority determined that Congress swept away all conflicting laws, including ERISA’s anti-alienation provision, insofar as such laws were at odds with the MVRA.<sup>209</sup>

In a brief consideration of the background leading up to the enactment of the MVRA, the court noted Senator John McCain’s concern that the version of the MVRA bill under consideration did not include an amendment to ERISA that would permit garnishing pension plans to provide restitution to victims of crimes.<sup>210</sup> The conclusion drawn by the majority, however, was that Senator McCain’s concern, together with Judiciary Committee Chairman Orrin Hatch’s response that the committee would consider his points, indicated that the MVRA’s “notwithstanding” phrase was meant to establish the MVRA as an exception to ERISA’s anti-alienation provision.<sup>211</sup> With the exception of a short look at some of the MVRA’s legislative history,<sup>212</sup> the majority opinion primarily parsed the language of the conflicting statutes with very limited examination of the underlying policies and purposes. The opinion did recognize that the Supreme Court’s jurisprudence forbade the judicial creation of implied exceptions to ERISA’s prohibition on alienation or assignment of pension benefits.<sup>213</sup> However, by construing the MVRA as an express exception to ERISA’s alienation language,<sup>214</sup> the court side-stepped the need to explain why the MVRA’s policy of compensating victims should take precedence over ERISA’s policy of safeguarding pension benefits.

The *Novak* dissent chastised the majority for trying to resolve ambiguities in the MVRA when the court’s limited role should have been deciding whether the MVRA “evinces an *unmistakable* intention to override ERISA’s anti-alienation provision.”<sup>215</sup> With regard to legislative history, the dissent did not view Senator McCain’s concerns with creating a crime victim restitution exception to ERISA as support for the theory that the MVRA’s

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208. *Id.* at 1045 (citing 18 U.S.C. § 3613(a) (2006)).

209. *Id.* at 1046–50.

210. *Id.* at 1051.

211. *Id.* at 1051–52.

212. *See id.* at 1051.

213. *Id.* at 1054–55.

214. *Id.* at 1052–53.

215. *Id.* at 1064 (Fletcher, J., dissenting).

“notwithstanding” clause embodied such congressional intent.<sup>216</sup> To the contrary, none of Senator McCain’s detailed amendments to the tax and labor provisions of ERISA were enacted.<sup>217</sup> Additionally, the year following passage of the MVRA, Congress actually amended ERISA through the Taxpayer Relief Act of 1997 (TRA) to add an anti-alienation exception to ERISA for claims against a pension plan based on breach of a fiduciary duty owed to the plan.<sup>218</sup> The Senate Report on the TRA noted that ERISA lacked any exception that “would permit the offset of a participant’s benefit against the amount owed to a plan by the participant as a result of a breach of fiduciary duty to the plan or criminality involving the plan . . . .”<sup>219</sup> If the MVRA, passed in 1996, really did create an ERISA anti-alienation exception to allow recovery from a participant whose “criminality involv[ed] the plan,” it seems unlikely that in 1997, the House and Senate Reports would have stated the opposite.

As discussed above, the 1997 ERISA amendments that exclude offsets for crimes or breaches of fiduciary duty owed to the plan contain detailed and explicit requirements.<sup>220</sup> In comparison, the MVRA’s “notwithstanding” clause is relatively bare.<sup>221</sup> According to the *Novak* dissent, “the majority creates a world in which it is more difficult to attach the ERISA-covered pension benefits of individuals who have committed crimes against pension funds than it is to garnish the ERISA-covered benefits of individuals who have committed other offenses.”<sup>222</sup>

Comparing the majority and dissenting opinions in *Novak* underscores the difficulty of trying to impute a single legislative purpose to two coordinate legislative bodies comprised of over 500 individuals.<sup>223</sup> The majority opinion might constitute an impermissible departure from *Guidry*; as pointed out by the dissent, if Congress wanted assignment and alienation exceptions beyond QDROs and recoveries for wrongs against the plan itself, such exceptions should have been drafted to clearly indicate an abrogation

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216. *Id.* at 1065.

217. *Id.*

218. See discussion *supra* Part III.A.4.

219. REVENUE RECONCILIATION ACT OF 1997, S. REP. NO. 105-33, at 310 (1997), *quoted in Novak*, 476 F.3d at 1072 (Fletcher, J., dissenting); see also H.R. REP. NO. 105-220, at 756–57 (1997) (Conf. Rep.).

220. See discussion *supra* Part III.A.4.

221. *Novak*, 476 F.3d at 1072-73 (Fletcher, J., dissenting).

222. *Id.* at 1073.

223. Compare *id.* at 1041–64 (majority opinion), with *id.* at 1064–77 (Fletcher, J., dissenting).

of ERISA's anti-alienation provision.<sup>224</sup> Still, the majority arguably accomplishes a gut-level result that just *seems* fair: providing crime victims with a means of recovery even if the criminal has nothing but pension plan assets. After all, depending on the sentence imposed, the criminal might never be able to use his pension funds. The obvious problem with such reasoning is that it ignores the Supreme Court's repeated admonitions against climbing the slippery slope of equity to judicially craft ERISA anti-alienation exceptions.<sup>225</sup>

Even more recently, a district court rejected a convicted criminal's attempt to invoke the protection of ERISA's anti-alienation provisions to shield pension benefits from the MVRA.<sup>226</sup> In *United States v. Miller*,<sup>227</sup> the owners and operators of an adult care facility defrauded one of the facility's elderly residents.<sup>228</sup> Defendant Charles Miller entered a plea of guilty to charges that included conspiracy to commit bank fraud, identity theft, access fraud, and mail fraud.<sup>229</sup> Following entry of a restitution order of almost \$150,000, the United States Attorney sought to garnish Miller's \$1,715.72 monthly pension benefit.<sup>230</sup> Miller's objections to garnishment included an argument that ERISA's spendthrift provisions prohibited the government from seizing any portion of his pension benefits.<sup>231</sup> The Magistrate's report and recommendations, which the district court adopted,<sup>232</sup> relied in large measure on the Ninth Circuit's en banc decision in *Novak*, particularly the court's holding that the MVRA allowed garnishment of pension benefits where the "defendant has a current, unilateral right to receive payments under the terms of the retirement plan."<sup>233</sup> The district judge noted that the court was joining "[d]istrict courts across the country..." in refusing to regard

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224. The *Novak* majority opinion gains no support from the Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.). In this highly publicized pension reform enactment, the only reference to ERISA's anti-alienation provision involves a direction to the Department of Labor to issue regulations regarding the timing and modification of QDROs. See Pub. L. No. 109-280, § 1001, 120 Stat. at 1052-53.

225. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999); *Patterson v. Shumate*, 504 U.S. 753, 765 (1992); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990).

226. *United States v. Miller*, 588 F. Supp. 2d 789, 797 (W.D. Mich. 2008).

227. 588 F. Supp. 2d 789.

228. *Id.* at 791.

229. *Id.*

230. *Id.* at 791-92.

231. *Id.* at 791.

232. *Id.* at 792-93.

233. *Miller*, 588 F. Supp. 2d at 803 (quoting *Novak*, 476 F.3d at 1043).

ERISA's anti-alienation provision as an impediment to garnishing a criminal's pension plan distributions where the MVRA created an exception to anti-alienation.<sup>234</sup>

As observed by the district court judge in *Novak*, the federal circuit and district courts have presented a relatively unified front in treating the MVRA as an express exception to ERISA's spendthrift provisions.<sup>235</sup> The difficulty with such an assault is that, despite its apparent logic and arguable fairness, the courts nevertheless are filling in the legislative gaps to write an MVRA-based exception to ERISA. Careful reading of the majority's en banc opinion in *Novak* reveals that the textual underpinning for its decision is premised to an extraordinary degree on the MVRA's assertion that its application is "[n]otwithstanding any other Federal law."<sup>236</sup> Given the Supreme Court's past insistence on express congressional exceptions to ERISA's spendthrift provisions, it seems likely that such gap-filling would be declared invalid.

#### V. QUARRELS AND ADDLED EGGS<sup>237</sup>—THE ELEPHANT IN THE ROOM—WITH AN EGG

Equity considerations persistently creep into ERISA's bar on assignment and alienation.<sup>238</sup> In spite of the Supreme Court's prohibition against equitable tinkering,<sup>239</sup> significant numbers of the remaining judiciary whose chambers are not one block east of the Capitol appear unable to resist the lure of attempting to do justice. Combating this occupational hazard seems to be a difficult task, particularly when a victim's restitutionary rights are at stake. But one person's leafy ground cover may be someone else's kudzu. As Justice Blackmun cautioned more than once, ERISA's anti-alienation provision "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them."<sup>240</sup>

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234. *Id.* at 796.

235. *United States v. Novak*, 476 F.3d 1041, 1044–53 (9th Cir. 2007) (en banc).

236. *Id.*

237. See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* 130, act 3, sc. 1 (Alan Durband, ed., Barron's Educational Series, Inc. 1984) ("Thy head is as full of quarrels as an egg is full of meat, and yet thy head hath been beaten as addle as an egg for quarrelling.").

238. See, e.g., *Novak*, 476 F.3d at 1045–46.

239. See *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

240. *Patterson v. Shumante*, 504 U.S. 753, 765 (1992) (quoting *Guidry*, 493 U.S. at 376); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999).

The facts in *Novak* underscore Justice Blackmun's caution because there are few reasons to sympathize with Raymond Novak or his ex-wife: two white-collar criminals who got caught.<sup>241</sup> As an almost instinctive reaction, many people (regardless of legal training) would find it fair and proper to deprive this greedy pair of their pensions, even though the relevant decisions say nothing about whether the Novaks had innocent dependents who might be forced to suffer too. In a case such as *Novak*, where criminals defrauded a business but did no direct harm to individuals, it becomes somewhat difficult to articulate the policy supporting restitution. Depleting Novak's retirement accounts will make his ex-wife's former employer, Nestle Food Company, wealthier by the approximately \$140,000 in Novak's fully vested pension benefit with May Company's retirement and profit-sharing plans—a mere pittance for Nestle. Upon closer consideration, it might seem as if society is exalting *punishment* as the prevailing policy, rather than preserving retirement assets or even compensating victims. Perhaps the facile slide from restitution to retribution is part of what worried Justice Blackmun in *Guidry*.<sup>242</sup>

Meanwhile, Nestle's shareholders, officers, directors, employees, and perhaps creditors likely would be appalled if anyone suggested protecting Novak's retirement assets, even though they were worth only approximately \$140,000—after all, the Novaks' scheme cost Nestle over \$3.3 million.<sup>243</sup> If the anti-alienation provisions were construed *too* broadly and thereby protected individual retirees' pension funds to the detriment of a corporation or its creditors, every employee with larcenous propensities would receive the resultant message as if it were printed in the company newsletter. Allowing ERISA's anti-alienation provisions to eclipse the MVRA might obscure some of the deterrent effect of having to make restitution. In addition, ERISA's legislative history declared its "most important purpose" to be "assur[ing] American workers . . . [the ability to] look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society."<sup>244</sup> Holding criminals financially accountable could help further financial security of the non-criminal element, while "restor[ing] credibility and faith in the private pension plans . . . ."<sup>245</sup>

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241. 476 F.3d at 1043.

242. See *Guidry*, 493 U.S. at 376–77.

243. *Novak*, 476 F.3d at 1043–44.

244. S. REP. NO. 93-127, at 11 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4849.

245. *Id.*

Using the MVRA to create an exception to ERISA's anti-alienation provision also could strengthen ERISA's goal of protecting pensions. By forcing the criminal to bear the burden of his crimes without any protection for his pension plan assets, society might reduce the risk-sharing that otherwise would be borne by innocent victims. Assume that a criminal cleverly filled her retirement plans coffers, but retained few liquid assets. Failing to require the criminal to use pension funds to reimburse her victim could adversely affect the victim's own non-retirement savings—thus eroding the third leg of the victim's retirement fund stool. To the extent that the victim lacked sufficient assets to compensate for her financial loss, the federal fisc likely would be called on to underwrite the victim's loss from criminal activity. Naturally, a contrary argument could be made that the government would similarly have to subsidize the criminal's retirement if her pension and private savings were to be depleted for restitution.

An additional question involves examining why the ability to invade a miscreant's retirement fund should depend on the existence of a federal criminal adjudication, rather than a state court conviction. Victims have little if any say as to which arm of the government chooses to prosecute.<sup>246</sup> It is difficult to imagine a policy that would support restitution to the victim when the United States Attorney elects to proceed with a case, but no restitution if an equivalent crime with concurrent state jurisdiction is handled by the state prosecutor.

The basic premise of retirement income security involves two components: (1) a minimum standard of living, and (2) lifestyle maintenance.<sup>247</sup> Typically Social Security is cited as the source of the basic life needs, while retirement plans and personal savings are seen as providing augmenting funds to enable the retirees to maintain or approach a pre-retirement lifestyle.<sup>248</sup> In view of these two levels of funding, which might be thought of as "base" and "surplus," it seems curious that alienation of a criminal's pension plan assets has been approached consistently as an all-or-nothing proposition. As indicated above, unless the driving policy in alienation of otherwise protected retirement funds is retribution, there is little reason to design a system for accessing a convicted criminal's retirement assets around the criminal's lifestyle. Although the criminal's retirement means should be a consideration, it should be an ancillary concern when compared to her victim's needs.

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246. See 18 U.S.C. § 3663(a)(1)(A) (2006).

247. Eason, *supra* note 4, at 177.

248. See *id.* at 184.

Finally, since its enactment, ERISA has allowed participant plan loans.<sup>249</sup> Regardless of whether the MVRA or an equivalent law is ever modified to encompass state court restitution orders, plan participants frequently have rather extensive rights to draw on their plan benefits prior to retirement.<sup>250</sup> Although the tax penalty can be substantial, pre-retirement plan participants have the flexibility to use the funds if necessary.<sup>251</sup> If a criminal participant is free to borrow against her plan to buy a Porsche or add a home theatre to her summer cottage, it is difficult to explain why the legal system should not be able to “require” that same individual to borrow from plan assets to pay restitution. If a MVRA case reaches the Supreme Court and a majority of the Justices agrees with the type of reasoning expressed by the *Novak* dissent,<sup>252</sup> these questions could be more than just idle curiosities.

Senator McCain’s proposed legislation provided a comprehensive and effective amendment to ERISA that would have established a criminal restitution exception to ERISA’s anti-alienation provision.<sup>253</sup>

249. *See, e.g.*, 29 U.S.C. § 1056(d)(2) (2006).

250. *See* discussion *supra* Part III.A.

251. *See* 29 U.S.C. § 1108(b)(1) (2006); I.R.C. § 72(p)(1)(A) (2006).

252. *United States v. Novak*, 476 F.3d 1041, 1064–77 (9th Cir. 2006) (Fletcher, J., dissenting).

253. S. 1570, 104th Cong. (1996):

(1) IN GENERAL.—Section 206(d) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1056(d)) is amended by adding at the end the following new paragraph:

‘(4)(A) Paragraph (1) shall not apply to a qualified criminal restitution order and each pension plan shall provide for payments in accordance with the applicable requirements of a qualified criminal restitution order.

‘(B) For purposes of this paragraph, the term ‘qualified criminal restitution order’ means a judgment, order, or decree—

‘(i) which is issued by a Federal or State court in connection with a criminal conviction of a participant under a plan,

‘(ii) which imposes a criminal fine on the participant or which requires the participant to make restitution to 1 or more victims of the crime for which convicted,

‘(iii)(I) which creates or recognizes a right to attach all or a portion of the benefits payable with respect to the participant under a plan, or

‘(II) which creates or recognizes the existence of a victim’s right to, or assigns to a victim the right to, receive all or a part of those benefits, and

‘(iv) with respect to which the requirements of subparagraphs (C) and (D) of paragraph (3) are met (determined after application of paragraph (3)(E)), except that in applying such

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subparagraphs, the term 'criminal restitution order' shall be substituted for the term 'domestic relations order'.

'(C) The requirements of subparagraphs (G), (H), and (I) of paragraph (3) shall apply to any plan administrator or fiduciary of a plan to which this paragraph applies.

'(D) Rules similar to the rules of subparagraph (J) and (N) of paragraph (3) shall apply for purposes of this paragraph.'

(2) PREEMPTION—Paragraph (7) of section 514(b) of such Act (29 U.S.C. 1144(b)(7)) is amended by inserting "or to qualified criminal restitution orders (within the meaning of section 206(d)(3)(B))" before the period at the end.

(b) AMENDMENTS TO INTERNAL REVENUE CODE OF 1986—

(1) IN GENERAL—Paragraph (13) of section 401(a) of the Internal Revenue Code of 1986 (relating to assignment of benefits) is amended by adding at the end the following new subparagraph:

'(C) SPECIAL RULES FOR CRIMINAL RESTITUTION ORDERS— Subparagraph (A) shall not apply to a qualified criminal restitution order (within the meaning of section 414(u)).'

(2) QUALIFIED CRIMINAL RESTITUTION ORDER— Section 414 of such Code is amended by adding at the end the following new subsection:

'(u) QUALIFIED CRIMINAL RESTITUTION ORDER— For purposes of this title—

'(1) IN GENERAL—The term 'qualified criminal restitution order' means a judgment, order, or decree—

'(A) which is issued by a Federal or State court in connection with a criminal conviction of a participant under a plan,

'(B) which imposes a criminal fine on the participant or which requires the participant to make restitution to 1 or more victims of the crime for which convicted,

'(C)(i) which creates or recognizes a right to attach all or a portion of the benefits payable with respect to the participant under a plan, or

'(ii) which creates or recognizes the existence of a victim's right to, or assigns to a victim the right to, receive all or a part of those benefits, and

'(D) with respect to which the requirements of paragraphs (2) and (3) of subsection (p) are met (determined after application of subsection (p)(4)), except that in applying such paragraphs, the term 'criminal restitution order' shall be substituted for the term 'domestic relations order'.

(2) PLAN AND FIDUCIARY—The provisions of paragraphs (6) and (7) of subsection (p) shall apply to any plan administrator or fiduciary of a plan to which this paragraph applies.

Congress should enact a provision such as that introduced by Senator McCain. Failing to do so will ensure years of future ambiguity over whether the MVRA really creates an exception to ERISA's spendthrift provisions. Victims deserve better.

## VI. CONCLUSION

ERISA reflects a congressional policy of providing significant protection to a broad range of retirement benefits. The ERISA anti-alienation provisions have made plan participants' assets difficult, if not nearly impossible at times, to access prior to retirement. Although the statutory exceptions to anti-alienation have grown over the years, the circumstances under which plan participants, the federal government, the plans themselves, and third parties are able to invade the plan are still quite limited.

Despite the Supreme Court's repeated refusal to allow application of equitable principles to the alienation of plan funds, lower courts continue to inject their own concepts of fairness into decisions concerning plan benefit alienation. The result is that participants, practitioners, and third parties are faced with real uncertainty in many situations involving the alienability of a criminal's pension assets. Instead of a system of bright-line rules, pension alienation determinations frequently depend on tortured readings of statutes and inconsistent policy approaches. As long as the courts avoid

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'(3) SPECIAL RULES—Rules similar to the rules of paragraphs (9), (10), (11), and (12) of subsection (p) shall apply for purposes of this subsection.'

(3) TAX TREATMENT OF DISTRIBUTIONS—

(A) Section 402(e)(1) is amended by adding the end [sic] the following new subparagraph:

'(C) CRIMINAL RESTITUTION ORDERS—Rules similar to the rules of subparagraphs (A) and (B) shall apply to payments or distributions to victims of a criminal offense pursuant to a qualified criminal restitution order described in section 414(u).'

(B) Section 72(m)(10) is amended—

(i) by adding at the end the following new sentence: "The preceding sentence shall also apply to payments or distributions made to victims of a criminal offense pursuant to a qualified criminal restitution order described in section 414(u).", and

(ii) by inserting "or qualified criminal restitution orders" after "orders" in the heading.

(C) Subparagraph (J) of section 402(d)(4) is amended by adding at the end the following new sentence: "This subparagraph shall also apply to any distributions or payments to victims of a criminal offense pursuant to a qualified criminal restitution order described in section 414(u)."

discussing or analyzing the competing policy interests at stake, the contours of alienation will remain vague and somewhat unpredictable.

Congress twice amended ERISA's spendthrift provision, creating exceptions for QDROs<sup>254</sup> and for fiduciary breaches involving pension plans.<sup>255</sup> Although courts have treated the MVRA as an exception to ERISA's prohibition against alienation of plan benefits,<sup>256</sup> the legal support for such treatment is questionable at best. Congress should recognize that victims of criminal activity deserve to recover from the pension plans of those who have harmed them. Enacting appropriate legislation to accomplish this result would be relatively straightforward and would foster predictability and fairness.

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254. 29 U.S.C. § 1056(d)(3)(A); I.R.C. § 401(a)(13)(B) (2006).

255. 29 U.S.C. § 1056(d)(4); I.R.C. § 401(a)(13)(C).

256. *See, e.g.*, *United States v. Jaffe*, 417 F.3d 259, 266–67 (2d Cir. 2005); *United States v. Himebaugh*, No. 02-CR-0077-002-CVE, 2007 WL 1462430 (N.D. Okla. May 17, 2007).