ERISA—EXCEPTIONS TO THE ANTI-ALIENATION PROVISION: STRENGTHENING ERISA’S PROTECTION THROUGH A FRAUD AMENDMENT

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ERISA—Exceptions to the Anti-Alienation Provision: Strengthening ERISA's Protection Through a Fraud Amendment

INTRODUCTION

Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974 as a comprehensive regulation of employee pension and benefit plans. Congress found pension regulation necessary because of both the large number of workers affected by pension and benefit plans and the plans' economic impact on the national economy. ERISA's overall goals include protecting pension plan participants and their beneficiaries, and providing clearly defined standards for plan participation and supervision.


2. Section 1001(a) provides, in part:
   The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; . . . that they have become an important factor in commerce because of the interstate character of their activities . . . .

The private pension system grew rapidly between 1950 and 1970. During that period, the aggregate amount of money held in private pension plans increased from 12.1 billion dollars to 137.1 billion dollars. E. ALLEN, J. MELONE, & J. ROSENBLOOM, PENSION PLANNING 3 (4th ed. 1981) (Table 1-1). The estimated total today stands at over one trillion dollars, and could rise to over four trillion dollars by the year 2000. N.Y. Times, July 27, 1985, § 1, at 46, col. 5.

3. Under ERISA, a plan participant is "any employee or former employee . . . who is eligible to receive a benefit of any type from an employee benefit plan . . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7) (1982). Plan beneficiaries are designated by the plan participant and may be entitled to receive a benefit from the ERISA plan. Id. § 1002(8). Persons supervising ERISA plans are considered plan fiduciaries. ERISA's fiduciary provisions are discussed infra at notes 25-39 and accompanying text.
ERISA provides pension regulation that includes plan coverage requirements, minimum vesting standards, and fiduciary duties and responsibilities for plan administrators. Congress enacted these and other ERISA provisions in order to provide greater protection to pension plan participants. Another ERISA protection is the anti-alienation...
tion provision, which prohibits assignment or alienation of pension and profit-sharing plan benefits. Each pension and profit-sharing plan must contain an anti-alienation provision in order to qualify as an ERISA plan. Since ERISA’s enactment, various courts have found implied exceptions to ERISA’s anti-alienation provision, based upon what the courts reason was the intent of Congress in the enactment. These implied exceptions include a now codified exception for qualified domestic relations orders, and an exception in the area of bankruptcy. Recently, two United States Courts of Appeals examined ERISA’s anti-alienation provision and disagreed over the existence of an implied exception for fraud. The United States Court of Appeals for the District of Columbia in Crawford v. La Boucherie Bernard, Ltd. held that ERISA’s anti-alienation provision does not prohibit the garnishment of pension plan funds in cases of fraud. In contrast, the United States Court of Appeals for the Sixth Circuit in United Metal Products Corp. v. National Bank of Detroit held that no fraud exception exists.

The Crawford and United Metal decisions illustrate the difficulty
that courts encounter when determining the scope and impact of ERISA’s anti-alienation provision. In order to analyze this difficulty, this comment first provides an overview of ERISA’s general purpose and its fiduciary provisions. It then describes the statute’s anti-alienation provision, considering the provision’s purpose and legislative history. Next, the comment examines the codified domestic relations exception and the judicially created bankruptcy exception. The comment then focuses on the judicial disagreement over the existence of an implied exception in cases of employee or fiduciary fraud. Concluding that a fraud exception is necessary in order to further ERISA’s goal of participant protection, this comment advocates amending ERISA’s anti-alienation provision to provide for such a statutory exception.

I. ERISA—THE GOAL OF PARTICIPANT PROTECTION

Prior to ERISA’s enactment, many pension plan participants found that plan fund mismanagement and other abuses by those controlling pension and benefit plans prevented their receiving earned pension benefits.16 Some plan participants invested in these plans for several years, expecting a retirement income, only to see their benefits disappear due to employment termination, fiduciary misconduct, or plan mismanagement.17

Early pension reform legislation proved to be inadequate in pro-


17. Congress recognized that these and other problems existed in the private pension system and made its intent to protect participants clear in 29 U.S.C. § 1001 (b) (1982), which provides:

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Id. Employee termination, prior to ERISA, could have meant the loss of pension benefits to the plan participant, a fact noted by the House Committee on Ways and Means: “[P]ension rights which have slowly stockpiled over many years may suddenly be lost if the employee leaves or loses his job prior to retirement.” H.R. REP. NO. 807, 93d Cong., 2d Sess. 53, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4719. When examining ERISA’s legislative history, the Supreme Court remarked that the “crucible of congressional concern was [the] misuse and mismanagement of plan assets . . . .” Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141 n.8 (1985).
providing protection to plan participants, investment security, and standards of conduct for those charged with managing pension and benefit plans. In the early 1970's, both labor and management called for reforms in the private pension system. In response to this call, Congress enacted ERISA.19

ERISA's primary purpose is to protect pension and benefit plan participants and their beneficiaries.20 By legislating various provisions concerning benefit vesting, plan funding, and plan termination, Congress intended to protect plan participants and their beneficiaries by improving the equitable character and soundness of pension and benefit plans.21 For example, ERISA's benefit vesting standards are designed to insure that employees receive their benefits once they meet required conditions of employment.22 Additionally, Title IV requires ERISA plans to maintain plan termination insurance in order to protect plan participants, should the employer or the pension plan go into bankruptcy.23 Another mechanism utilized by Congress to protect plan participants was increasing the accountability of persons who administer ERISA plans. This comment now discusses that protection mechanism.

18. ERISA repealed the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958) (previously codified at 29 U.S.C. §§ 301-309). Congress enacted the Welfare Pension Plans Disclosure Act primarily in response to problems in the area of employer/employee relations. Mismanagement and abuse in the private pension system led to the early general reforms. However, these early reforms did not go far enough in protecting plan participants because they did not provide the fiduciary standards and other protections provided by ERISA. For further discussion of the inadequacies of the earlier Act, see Issacs on, Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights, 59 COLUM. L. REV. 96 (1959).


20. See supra note 7 and accompanying text.

21. Section 1001(c) provides, in part:

It is hereby further declared to be the policy of this Chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

22. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980)) ("'[I]f a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required . . . he [should] actually receive[] it.' ").

23. 29 U.S.C. §§ 1301-1461 (1982 & Supp. II 1984). The plan termination requirements include the filing of notice to terminate an ERISA plan, the court appointment of a trustee to oversee the termination, allocation of plan assets to participants and beneficiaries, and an order of priority in the distribution of plan assets. Id.
A. *Fiduciary Obligations under ERISA*

Congress enacted ERISA's fiduciary provisions in response to the need for clearly defined duties and responsibilities for those who managed and controlled pension and benefit plans. In order to provide structure to the plan administrators' tasks, Congress enacted specific standards of conduct for persons in a fiduciary relationship to plan participants, and also provided remedies for breaches of fiduciary duties.

ERISA provides that a person is a fiduciary to a pension or benefit plan if "he exercises any discretionary authority or discretionary control respecting management of . . . [a] plan or exercises any authority or control respecting management or disposition of its assets . . . or . . . he has any . . . discretionary responsibility in the administration of such plan." Each employee benefit plan must be "established and maintained pursuant to a written instrument," and the writing is required to name one or more fiduciaries who jointly or severally will have the authority to control and manage the benefit plan. The fiduciaries may retain an investment counselor, financial advisor, or other money management service to assist them in operating the benefit plan. Financial consultants, however, become plan fiduciaries if they provide "investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan."

Benefit and pension plan fiduciaries are held to the "prudent man" standard of care. This standard provides that the plan fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." When managing ERISA plans, fiduciaries are to perform their duties solely in the interests of plan participants and their beneficiaries.

The widespread misuse and poor management of employee bene-
fit plans compelled Congress to impose fiduciary duties and responsibilities not only on plan administrators, but also on anyone exercising discretionary control over plan funds. As a further protection, ERISA prohibits various types of transactions which involve potential conflicts of interest. Self-dealing, dealing with parties whose interests are adverse to those of plan participants, and receiving personal consideration from those doing business with the plan are examples of prohibited transactions. Congress also provided remedies for plan participants when a fiduciary breach occurs. ERISA provisions allow a fiduciary to be held personally liable if the fiduciary's breach

33. S. Rep. No. 127, 93d Cong., 1st Sess. 29, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 5171, 5186. Both the House and Senate ranking committee members commented on imposing fiduciary duties. Representative Al Ullman, ranking majority member of the House committee, wrote: "Standards are established for fiduciaries of pension plans to protect against possible misuse of pension funds. Transactions likely to prove inimical to the interests of the plan participants are specifically prohibited." Id. at 35, 5171. Senator Harrison Williams, Jr. echoed these sentiments, pointing out that the fiduciary standards are in place "to prevent transactions which dissipate or endanger plan assets." Id. at 42, 5186.

34. 29 U.S.C. § 1106 (1982). Under § 1106, a fiduciary is prohibited from engaging in transactions involving plan assets if the fiduciary knows or should know that such transaction constitutes a direct or indirect — (A) sale or exchange, or leasing, of any property . . . ; (B) lending of money or other extension of credit . . . ; (C) furnishing of goods, services, or facilities between the plan and a party in interest; (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or (E) acquisition, on behalf of the plan, of any employer security or employer real property . . . .

Id.

ERISA defines a "party in interest" as any fiduciary, administrator, officer, trustee, custodian, counsel, or employee of an ERISA benefit plan, or a person providing services to the ERISA plan, or any employer whose employees are covered by the plan. Id. § 1002(14)(A)-(D) (1982). This section also includes as a party in interest those who own, directly or indirectly, fifty percent or more of the stock in a company or corporation providing an ERISA plan for its employees. Any shareholder, whether employee, director, or officer of a corporation, who holds ten percent or more of stock in the corporation, and any corporation that itself owns fifty percent or more of the stock or beneficial interest in a corporation also is considered a party in interest. Id.


36. 29 U.S.C. § 1109(a) (1982). In part, § 1109(a) provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.
causes a loss of plan assets.37 When a breach occurs, a civil action for recovery of plan assets can be brought against a plan fiduciary by a plan participant, beneficiary, other fiduciary, or by the Secretary of Labor.38 In order to give courts wide latitude when dealing with fiduciary duties and remedies for breaches, Congress made traditional trust principles applicable to situations involving breaches of fiduciary duty.39

Id.

One example of an equitable remedy used by the courts is the judicial rescission of unlawful transactions. In Marshall v. Kelly, 465 F. Supp. 341 (W.D. Okla. 1978), the court held that ERISA's fiduciary provisions granted wide latitude in adopting remedies for fiduciary breaches, including rescinding an illegal loan transaction entered into by a plan fiduciary. Id. at 344. More recently, the United States Court of Appeals for the Second Circuit examined several transactions between two corporations, Tower Capital, Inc. and Tower Securities, Inc., and concluded that several of these transactions violated ERISA's prohibited transaction provision because of dealings with parties whose interests were adverse to those of the plan members. The court held the corporations, and the individual officers, liable to the corporate pension plan in the amount of $1,087,787.00. Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1211-21 (2d Cir. 1987).


38. 29 U.S.C. § 1132(a) (1982). The statute provides:
A civil action may be brought—
(1) by a participant or beneficiary . . .
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title . . . .

Id.

An example of a court's interpretation of this provision is found in Morse v. New York State Teamsters Conference Pension and Retirement Fund, 580 F. Supp. 180, 184 (W.D.N.Y. 1983) (participant in a union pension fund allowed to bring an action against fiduciary). See also Crawford, 815 F.2d at 119 (plan participants allowed to bring action against plan fiduciaries); Lowen, 829 F.2d at 1209 (plan trustees brought an action against corporation and three majority shareholders for violations of ERISA's prohibited transaction provisions).

39. 120 CONG. REC. H8702 (Aug. 20, 1974) (Statement of Rep. Ullman), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5166, 5171. Congress, discussing the fiduciary duties and remedies enacted in ERISA, made clear that its objective was the application of the principles and remedies of trust law. As an additional protection, Congress directed that ERISA's corollary labor and tax provisions are also to apply to fiduciary breaches. Id. Cf. G. BOGERT, TRUSTS 341-48 (6th ed. 1987). An indication of this intent is found in § 1103, which provides that benefit plan assets will be held in trust. 29 U.S.C. § 1103(a) (1982). There are, however, some limited exceptions to this provision. See, e.g., 29 U.S.C.
ERISA's fiduciary provisions are an example of the protections that ERISA provides to plan participants. These provisions provide practical standards for persons managing and controlling ERISA plans. Another example of congressional protection for ERISA plan participants is the anti-alienation provision, which prohibits the assignment or alienation of ERISA plan benefits.

B. The Anti-Alienation Provision

ERISA's anti-alienation provision provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."40 In enacting this provision, Congress intended to expand ERISA protection to "ensure that the employee's accrued benefits are actually available for retirement purposes."41 A corollary anti-alienation provision is found in Internal Revenue Code section 401(a)(13), which expands on the incomplete language of the ERISA anti-alienation provision.42 Because Congress delegated ERISA tax enforcement to the Treasury Department,43 courts have used Internal Revenue Code section 401(a)(13) when faced with an issue requiring interpretation of the incomplete language of ERISA's anti-alienation provision.44 The Internal Revenue Code anti-alienation provision is given greater definition in its accompanying regulation, which provides that an ERISA-qualified plan must require that benefits may not "be anticipated, assigned (either at law or in equity),...

§ 1103(b) (1982) (providing that the trust requirement does not apply to plan assets that consist of insurance policies, insurance contracts, and plan assets which are exempted from this requirement by the Secretary of Labor). Section IV(C) of this comment explores the implications of applying traditional trust principles to cases of fraud by plan participants or fiduciaries.

42. ERISA's anti-alienation provision is incomplete in the sense that it fails to address explicitly the issues of attachment, garnishment, or levies against plan assets. Consequently, courts have differed on the interpretation of ERISA's anti-alienation provision, and have allowed for implied exceptions to the provision.
44. One court commented: "Garnishment is not mentioned in ERISA. However, both ERISA and the section of the Internal Revenue Code (IRC) dealing with 'qualified' pension . . . plans contain provisions against assignment or alienation of plan benefits." General Motors v. Buha, 623 F.2d 455, 460 (6th Cir. 1980). The Buha court also cited the Conference Committee report on the Treasury Department's involvement in ERISA, which provides that the Labor and Treasury Departments work cooperatively in establishing and prescribing regulations under ERISA's general provisions. Id. at 462 (citing H. Rep. No. 1280, 93d Cong., 2d Sess. 383, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5139).
alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process."\footnote{45}

Given the treasury regulation's language and its application to ERISA's anti-alienation provision, it appears that pension plan funds are untouchable. In the area of third party judgment creditors, courts consistently have disallowed garnishment of plan funds.\footnote{46} However, despite ERISA's seemingly unequivocal language, courts have inferred exceptions to the anti-alienation provision in the areas of domestic relations, bankruptcy, and fraud. The focus of this comment now turns to an examination of the domestic relations exception as first inferred by the courts and then codified by Congress.\footnote{47}

\section{The Domestic Relations Exception}

ERISA's stated purpose is to protect "the interests of participants in employee benefit plans and their beneficiaries."\footnote{48} Congressional concern focused on "the continued well-being and security of millions of employees and their dependents."\footnote{49} Notwithstanding this stated purpose, Congress failed to provide clearly for dependents of pension plan participants in the statute. As originally enacted, ERISA's anti-alienation provision did not address directly the issues raised in cases

\footnote{45. Treas. Reg. § 1.401(a)-13(b) (1978). The Buha court examined the I.R.C. anti-alienation provision, and the treasury regulation, and, in view of expressed congressional intent, held that these tax provisions apply to corollary ERISA provisions. Buha, 623 F.2d at 461-63.}


\footnote{48. 29 U.S.C. § 1001(b) (1982) (emphasis added). For a discussion of ERISA purposes and congressional intent in the enactment, see supra notes 16-23 and accompanying text.}

\footnote{49. 29 U.S.C. § 1001(a) (1982) (emphasis added).}
of divorce and family support. Before the 1984 amendment, courts decided whether ERISA plan benefits could be alienated pursuant to a state court order for family or spousal support, with the majority of courts allowing plan fund alienation for such support.50 There was, however, a divergence of judicial opinion that eventually induced Congress to amend ERISA's anti-alienation provision.51

There is a typical factual scenario in which domestic relations support claims arise. A married couple divorces while one spouse is a participant in an ERISA plan, and a state court orders the plan participant to provide spouse or child support. The participant falls into arrears on the support payments, and the former spouse brings an action to garnish all or part of the participant's interest in the pension plan in order to satisfy the support obligation. Prevailing in the garnishment proceeding, the former spouse then seeks to enforce the gar-


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

Id. at 2564 (footnotes omitted).
nishment order by serving notice on the administrators of the pension plan. The administrators then file an action to enjoin the garnishment pursuant to ERISA's anti-alienation provision.52

While the factual situations in domestic relations cases are often similar, both the courts' reasoning and conclusions as to the issue of benefit alienability are far from uniform. The differences among courts focus on ERISA's preemption provision53 and its applicability to domestic relations cases. The preemption provision calls for ERISA to supersede "any and all State laws insofar as they . . . relate to any employee benefit plan."54 Congress recognized the impact that pension plans have on the national economy, and intended ERISA to be the primary law of private pension plans.55 By enacting the preemption provision, Congress attempted to achieve this purpose. Requiring courts to consider pension claims under ERISA, rather than under state law, enforces congressional intent to have effective national pension regulation.

Many courts have held that, despite the preemption and anti-alienation provisions, ERISA provisions do not prohibit state courts from enforcing support orders by garnishing plan assets. These courts reason that the lack of express congressional intent, both in the statute itself and its legislative history, to preempt the states' right to regulate in the area of domestic relations bars ERISA from overriding state law.56 Another reason is the courts' recognition that domestic relations is an important area of state regulation under the states' police

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52. See, e.g., Operating Eng'rs' Local No. 428 v. Zamborsky, 650 F.2d 196, 198 (9th Cir. 1981); Cody v. Riecker, 594 F.2d 314, 314 (2d Cir. 1979); AT&T v. Merry, 592 F.2d 118, 120 (2d Cir. 1979).
54. Id.
55. Id. § 1001(a) (1982). See also 120 Cong. Rec. 29, 33, reprinted in 1974 U.S. Code Cong. & Admin. News 5177, 5188-89. Senator Williams, the Chairman of the Senate Committee on Labor and Public Welfare, when discussing the formulation of the preemption provision, stated:

[T]he substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments . . . .

56. See, e.g., Cartledge v. Miller, 457 F. Supp. 1146, 1154 (S.D.N.Y. 1978) ("As a fundamental principle of statutory interpretation, courts have presumed that the basic po-
power and, as such, should be given deference. 57

An illustration of this reasoning is found in one of the first cases in which the domestic relations exception issue was considered. In Cartledge v. Miller, 58 the United States District Court for the Southern District of New York allowed garnishment of pension plan funds in order to satisfy the plan participant's family support obligations. 59 After holding that ERISA provisions did not preempt state domestic relations regulations, 60 the court pointed out that other federal anti-alienation provisions also did not supercede the obligations of family support; 61 and held that ERISA provisions did not preempt state domestic relations regulations. 62 In rejecting the argument for strict construction of the anti-alienation provision, the Cartledge court quoted Judge Learned Hand on the subject of statutory interpretation: "[I]t is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning' and should be 'disregarded when it defeats the manifest purpose of the statute as a whole." 63 Because ERISA's purpose is to protect plan participants and their beneficiaries, the court reasoned that a literal construction of the anti-

lice powers of the States, particularly the regulation of domestic relations, are not superseeded by federal legislation unless that was the clear and manifest purpose of Congress."

57. See, e.g., AT&T v. Merry, 592 F.2d 118, 125 (2d Cir. 1979). However, courts typically do not extend preemption deference to states under ERISA's preemption provision. One recent example in which a court upheld ERISA's preemption provision is found in Teamsters Pension Trust Fund v. H.F. Johnson, Inc., 830 F.2d 1009 (9th Cir. 1987). In this case, the United States Court of Appeals for the Ninth Circuit held that, despite a Montana Probate Code provision which barred claims against a decedent's estate unless the claims were presented within four months of notice to creditors, ERISA provisions pre-empt the Montana provision, and plan trustees may present a claim to the estate. Id. at 1009-16. For a general discussion of ERISA preemption, see Gregory, The Scope of ERISA Preemption of State Law: A Study in Effective Federalism, 48 U. PITT. L. REV. 427, 429-35 (1987).


59. Cartledge, 457 F. Supp. at 1149. One case decided close in both time and reasoning to the Cartledge decision was Cody v. Riecker, 454 F. Supp. 322 (E.D.N.Y. 1978).

60. Cartledge, 457 F. Supp. at 1154. The Cartledge court discussed this point of statutory interpretation and stated that courts traditionally defer to the states when the states regulate under their police powers, especially regulations in the area of domestic relations. Id. The court reasoned that this deference to the states prohibited ERISA's preemption of state law in domestic relations claims. Id.


62. Cartledge, 457 F. Supp. at 1155 (concluding that ERISA's provisions were not enacted to insulate the family provider from support obligations).

63. Id. at 1154 (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (citing Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring))).
alienation provision would prevent the proper support of ERISA beneficiaries, and thereby undermine the protections that Congress intended. Additionally, the Labor and Treasury Departments filed an amicus curiae brief supporting the inapplicability of the anti-alienation provision to a family support claim. Considering ERISA's statutory purpose, the failure of Congress to explicitly preempt domestic relations law, principles of statutory construction, previous exemptions to other anti-alienation provisions, and the government's position, the Cartledge court held that the anti-alienation provision did not prevent the garnishment of a plan participant's plan assets pursuant to a state court support order.

The United States Court of Appeals for the Second Circuit reached a similar result in AT&T v. Merry. In Merry, a divorce decree obligated Mr. Merry to pay alimony and child support amounting to one-half of his retirement income from a pension plan at AT&T. Mr. Merry failed to make the support payments, and Mrs. Merry obtained a state court garnishment order on his pension plan interest. AT&T moved for a declaratory judgment, seeking to clarify its fiduciary obligations under ERISA's fiduciary and anti-alienation provisions. The Merry court followed much of the reasoning in Cartledge and rejected a strict construction of the anti-alienation provision.

The court took the position that prior decisions adopting a literal construction of the anti-alienation provision neglected to give proper consideration to public policy concerns in the area of family support and to the state's interest in having a spouse fulfill support obligations.

In the cases that followed, some courts followed the Cartledge and Merry position, while other courts held that pension plan bene-

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64. *Id.* The court noted passages of the Congressional Record which indicated that protection of dependents was a congressional concern. *Id.* For further discussion of congressional intent to protect dependents of plan participants, see *supra* notes 16-23 and accompanying text.

65. *Cartledge,* 457 F. Supp. at 1156. Citing the government's amicus brief, the court stated: "The Government takes the position, which appears reasonable and correct, that 'family support decrees were not intended to be within the scope of the anti-alienation provisions of ERISA.'" *Id.*

66. *Id.* at 1154.

67. 592 F.2d 118, 125 (2d Cir. 1979).

68. *Id.* at 120.

69. *Id.* at 119, 123, 125.

70. *Id.* at 123. For a general discussion of ERISA and non-ERISA pension fund distribution on divorce, see Freed & Walker, *Family Law in the Fifty States: An Overview,* 19 Fam. L.Q. 331, 379-84 (1986).

71. See, e.g., Smith v. Mirman, 749 F.2d 181, 183 (4th Cir. 1984); Tenneco v. First Va. Bank, 698 F.2d 688, 690 (4th Cir. 1983); Savings and Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038, 1041 (7th Cir. 1983).
fit were not alienable in family support claims. These early decisions applied a literal construction to state pension plans’ anti-alienation provisions and did not allow alienation in domestic relations claims.\textsuperscript{72} Since enactment of ERISA’s preemption provision, some courts have read the provision literally and have disallowed alienation in domestic relations claims.\textsuperscript{73} A literal interpretation of ERISA’s anti-alienation provision, or another similarly worded anti-alienation provision, in conjunction with the preemption provision, forces courts to refuse enforcement of a domestic relations support order because that order seeks to garnish ERISA or other pension plan funds.

Congress, seeing that the courts differed on the interpretation of the anti-alienation provision, codified a domestic relations exception in 1984.\textsuperscript{74} The anti-alienation provision now provides that “[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.”\textsuperscript{75} A qualified domestic relations order is an order that: (1) recognizes the right of an alternative payee to receive all or part of the plan participant’s interest in the pension plan, (2) relates to child support, alimony, or property rights in a non-member spouse or dependent, and (3) is issued pursuant to a state domestic relations or community property law.\textsuperscript{76} By codifying the judicially created exception for domestic relations support orders, Congress effectuated the notion that ERISA’s protection extends beyond the interests of the plan participant.

Another circumstance in which courts have inferred an exception

\textsuperscript{72} See, e.g., Ogle v. Heim, 69 Cal. 2d 7, 9, 442 P.2d 659, 663, 69 Cal. Rptr. 579, 581-83 (1968). In a case which arose prior to ERISA’s enactment, the Ogle court held that the right to child support was not enforceable against a state pension plan. Id. at 9-11, 442 P.2d at 659-63, 69 Cal. Rptr. at 583. See also Mueller v. Mueller, 166 N.J. Super. 557, 557, 400 A.2d 136, 136 (1979) (husband’s pension benefits are not subject to equitable distribution in divorce proceedings); Miller v. Superior Court, 69 Cal. 2d 14, 15, 442 P.2d 663, 664, 69 Cal. Rptr. 583, 583 (1968) (right to alimony is not enforceable against a state pension plan).

\textsuperscript{73} See, e.g., Merry, 592 F.2d at 123 (citing General Motors v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976), and Francis v. United Technologies Corp., 458 F. Supp. 84 (N.D. Cal. 1978)). The Merry court distinguished its own reasoning from that of the Townsend and United Technologies courts by pointing out that those courts failed to examine ERISA’s preemption provision in light of the states’ power to regulate domestic relations. The Townsend and United Technologies courts applied a rather perfunctory analysis to the domestic relations issue, relying solely on the explicit language of the anti-alienation provision. Id.


\textsuperscript{76} Id. § 1056(d)(3)(B)(ii)(II) (Supp. II 1984).
to ERISA's anti-alienation provision is in bankruptcy claims. Some courts allow ERISA plan assets to be alienated in bankruptcy, while others hold that ERISA plan assets cannot be included in the debtor's bankruptcy estate.

II. JUDICIALLY CREATED BANKRUPTCY EXCEPTION

Upon commencement of bankruptcy proceedings, all legal and equitable interests of the debtor become property of the debtor's estate pursuant to Bankruptcy Code section 541. Whether ERISA plan assets can be included in the debtor's estate has been the subject of numerous judicial opinions. Courts examine this question in relation to two sections of the Bankruptcy Code which, in some circumstances, allow the debtor to retain particular assets that otherwise would be included in the debtor's estate. Section 541(c)(2) excludes trust property from the estate of the debtor, and section 522(b)(2)(A) exempts property from the estate that otherwise is exempt under federal law. Some courts reason that neither section applies to ERISA plans and hold that ERISA plan assets are included in the debtor's estate, while others reason that ERISA plan assets are not included in the debtor's estate.

A. Purpose of Bankruptcy

The technical effect of filing a bankruptcy petition is to "suspend the normal operation of rights and obligations between the debtor and his creditors." After suspending operations, a court-appointed bankruptcy trustee distributes the debtor's assets to various credi-
From a practical standpoint, the purpose of bankruptcy is to allow the debtor to get a "fresh start" following the distribution of the debtor's estate to creditors. The Bankruptcy Code's focus, therefore, is twofold. First, it protects creditors' interests in the bankruptcy estate by gathering all of the debtor's legal and equitable interests, and second, it protects a debtor from unjust and false claims and from total financial ruin.

Under earlier versions of the Bankruptcy Code, these two purposes were often in conflict. Under the Bankruptcy Act of 1898, a recurring problem was the determination of what constituted the "property of the estate." Creditors sought any and all of the debtor's interests, stressing the need for recoupment of debts. Debtors, pointing to the "fresh start" purpose of the Act, argued for as many exclusions and exemptions as possible. This conflict in interests eventually led to the Bankruptcy Reform Act of 1978. Despite the
expansion of the "property of the estate" by Congress in the Bankruptcy Reform Act of 1978, this conflict continues.

One major purpose of the Bankruptcy Reform Act of 1978 (the Code) was to expand the concept of "the property of the estate." Under the Code, Congress intended that all property and interests of the debtor become part of the property of the debtor's estate. Thus, Congress favored creditors' interests when it attempted to resolve the conflicting interests in bankruptcy claims.91

Courts examining creditors' claims against ERISA plan participants are faced with conflicting statutory policies. This conflict grows out of the Bankruptcy Code's policy of including all debtor interests in the property of the estate and ERISA's policy of insuring that the plan participant receives his or her pension benefits. The creditors' claims arise in similar factual circumstances. Usually, an ERISA plan participant becomes insolvent and files a bankruptcy petition. The bankruptcy trustee seeks the plan participant's interests in the ERISA plan in order to recover some or all of the debt owed to creditors.92 The plan participant, administrator, or fiduciary then files suit to enjoin the garnishment of the plan interest, alleging that ERISA's anti-alienation provision prohibits the garnishment.93 Additionally, the plan participant or administrator alleges that ERISA plan assets are, first, excluded from the property of the debtor's estate under Bankruptcy Code section 541(c)(2), or, second, are exempt from the debtor's estate under Code section 522(b)(2)(A).

1. Excluding Pension Funds under Section 541(c)(2) of the Bankruptcy Code

Section 541(c)(2) allows exclusion of trust assets from the property of the estate.94 The section states: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under

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92. 11 U.S.C. § 323(a) (1982). Section 323(a) provides that "[T]he trustee in a case under this title is the representative of the estate . . . [and] has the capacity to sue and be sued." Id. A bankruptcy trustee acts on behalf of unsecured creditors and has several duties, including: (1) collecting and liquidating the property of the debtor's estate, (2) investigating the financial affairs of the debtor, (3) examining creditor claims, (4) furnishing bankruptcy estate information, as requested, to parties in interest, and (5) closing up all affairs of the bankruptcy estate as expeditiously as possible. Id. § 704 (1982).
93. See, e.g., Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488, 1488-90 (11th Cir. 1985); Daniel v. Security Pac. Nat'l Bank (In re Daniel), 771 F.2d 1352, 1353-54 (9th Cir. 1985); Samore v. Graham (In re Graham), 725 F.2d 1268, 1268-70 (8th Cir. 1984); Goff v. Taylor (In re Goff), 706 F.2d 574, 574-76 (5th Cir. 1983).
applicable nonbankruptcy law is enforceable in a case under this title.’’95 Therefore, a debtor's interest in a trust becomes property of the bankruptcy estate unless the restriction on alienation contained in the trust is enforceable under applicable nonbankruptcy law. Property excluded under section 541(c)(2) never enters the debtor's estate, and, thus, when courts find ERISA's anti-alienation provision to be applicable nonbankruptcy law under 541(c)(2), the ERISA pension fund assets do not enter the debtor's estate.96 Courts disagree, however, as to the proper interpretation, scope, and coverage of “applicable nonbankruptcy law.” This disagreement prompts the difference in judicial opinion over whether ERISA plan funds are excluded from the bankruptcy estate.97

Some courts read the legislative history of section 541(c)(2) to say that ERISA provisions do not qualify as “applicable nonbankruptcy law.” These courts interpret that phrase to include only those trusts that qualify as spendthrift trusts under relevant state spendthrift trust statutes.98 Other courts disagree with the restrictive nature of that reading of “applicable nonbankruptcy law” and reason that a proper reading is one which includes ERISA's anti-alienation provision. Because these courts read “applicable nonbankruptcy law” as including ERISA provisions, they exclude ERISA plan funds from the debtor's

95. Id.


98. See, e.g., Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985); Samore v. Graham (In re Graham), 725 F.2d 1268 (8th Cir. 1984); Goff v. Taylor (In re Goff), 706 F.2d 574 (5th Cir. 1983). These courts then examine the exemption scheme found in section 522(b)(2)(A) of the Bankruptcy Code, which is discussed in the next section.

Section 541(c)(2) is referred to as the “spendthrift trust exclusion” because of its legislative history. A spendthrift trust has been defined as a trust which “provide[s] for a right in a beneficiary to future income or principal of the trust, [and the] right to receive these payments in the future shall not be transferable . . . or liable to be taken for the payment of . . . debts.” G.G. BOGERT & G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 147 (5th ed. 1973).
bankruptcy estate. 99

Samore v. Graham (In re Graham), 100 is one example of a court's interpreting "applicable nonbankruptcy law" as not including ERISA's anti-alienation provision. In Graham, the Eighth Circuit Court of Appeals held that

[t]he change in the scope of property of the estate effectuated by the new Bankruptcy Code, [and] the legislative history of § 541(c)(2) ... convince[s] us that Congress did not intend "applicable nonbankruptcy law" to include ERISA. Rather, Congress only intended ... to preserve the status [of] traditional spendthrift trusts, as recognized by state law .... 101

The Graham court quoted extensively from the legislative history of section 541(c)(2), giving great weight to Senate and House references to "spendthrift" trusts. 102 Graham argued for a broad reading of "applicable nonbankruptcy law," one which would include ERISA's anti-alienation provision. 103 The Graham court rejected this argument,

99. For a list of cases in which courts held that ERISA's anti-alienation provision falls within the meaning of "applicable nonbankruptcy law," see supra note 96.

100. 726 F.2d 1268 (8th Cir. 1984).

101. Id. at 1271. Graham, a physician and the sole officer, director, and shareholder in Charles W. Graham, Ltd., a professional corporation, set up a corporate profit-sharing retirement plan in 1970, and amended the plan to comply with ERISA in November, 1976. The plan had two participants, Graham and a former corporation employee, Wayne Ryan. Three days prior to filing for bankruptcy, Graham, in his capacity as sole director of the corporation, amended the terms of the plan, providing that plan benefits accrued by plan participants were not payable until age 65, or upon the total disability of the participant. The bankruptcy trustee sued Graham, asking the court to include Graham's plan assets in the property of his bankruptcy estate. Id. at 1269-70.

102. Id. at 1271-72. While the statutory language does not mention the word "spendthrift," the language of the House Report is clear when comparing the new and the old bankruptcy schemes. The report reads:

The bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust.


The Senate Report also makes specific mention of a "spendthrift trust" in relation to the interpretation of the word "trust" in the statute. S. REP. NO. 989, 95th Cong., 2d Sess. 83, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5869 (Section 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust.") (emphasis added).

103. Graham, 726 F.2d at 1270. Graham argued that the anti-alienation provision should restrict transfer of his plan interests because under previous decisions, other courts had used the anti-alienation provision to bar plan interest garnishment in third party judgment creditor claims. Id. at 1270-71 (citing General Motors v. Buha, 623 F.2d 455 (6th Cir. 1980), and Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510 (N.D. Tex. 1981)).
holding that because Congress expressed its intent in expanding the property of the debtor's estate under the Code, ERISA plan funds are included in the property of the debtor's estate.\textsuperscript{104}

In \textit{Clotfelter v. Ciba-Geigy Corp. (In re Threewitt)},\textsuperscript{105} the Federal District Court for the District of Kansas held that ERISA plan funds are excluded from the property of the debtor's estate under the terms of section 541(c)(2) of the Bankruptcy Code.\textsuperscript{106} The \textit{Threewitt} court reasoned that because ERISA's anti-alienation provision bars third party judgment creditors from reaching ERISA plan assets, the provision also bars bankruptcy creditors.\textsuperscript{107} The \textit{Threewitt} court went even further, however, commenting that any trust which restricts alienation, or otherwise bars any creditor from garnishing the debtor's interest, is excluded from the debtor's estate.\textsuperscript{108}

Once a court concludes that ERISA funds are excluded from the property of the debtor's estate, the bankruptcy trustee must seek other available assets in order to satisfy the claims of unsecured creditors. When a court decides that ERISA plan funds are not excluded from the debtor's estate under section 541(c)(2) of the Code, the analysis then turns to whether the plan interests are exempt from the debtor's estate under section 522(b)(2)(A).\textsuperscript{109}

2. Pension and Benefit Exemption under Section 522(b)(2)(A)

Under section 522(b)(2)(A), a debtor is allowed to exempt property from his or her debtor's estate under one of two exemption schemes.\textsuperscript{110} The debtor can choose the federal exemptions under sec-

\textsuperscript{104} Id. at 1271. The \textit{Graham} court also discussed the exemptions available under section 522(b)(2)(A), and concluded that ERISA plan funds were not exempt from the bankruptcy estate. \textit{Id.} at 1274.

\textsuperscript{105} 24 Bankr. 927 (D. Kan. 1982).

\textsuperscript{106} \textit{Id.} at 929.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}


\textsuperscript{110} 11 U.S.C. § 522(b) (1982). Section 522(b) of the Bankruptcy Code provides: "Notwithstanding section 541 of this title, an individual debtor may exempt from property
tion 522(d) or the combination of state law exemptions and the federal nonbankruptcy law exemptions permitted under section 522(b)(2)(A). Additionally, the Bankruptcy Code allows the states to “opt out” of this system, forcing the debtor to proceed through bankruptcy using state exemptions. However, even if the debtor is forced to choose the state exemption scheme, the debtor still is protected by section 522(b)(2)(A), because that section provides that debtors can exempt assets as permitted under state law and any federal law of the estate . . . any property that is exempt under Federal law, . . . or [s]tate or local law that is applicable on the date of the filing of the petition . . . .” Id.

111. Id. This comment does not discuss the exemptions available under § 522(d) of the Bankruptcy Code. Section 522(d) allows the debtor to exempt pension plan payments, ERISA as well as others, from the bankruptcy estate, up to the amount needed by plan participants to provide support for their families. Section 522(d) does not require courts to choose between ERISA provisions and policies and those of the Bankruptcy Code; it simply allows an exemption to the extent needed for support. For a broader discussion of § 522(d), see Vukowich, Debtors’ Exemption Rights Under the Bankruptcy Reform Act, 58 N.C.L. REV. 769, 788 (1980).

112. 11 U.S.C. § 522(b)(1) (1982). “Opting out” has been a source of controversy in that some authors feel that the “opt out” provision gives the states too much power in regulating bankruptcy, an area which some argue should be left solely to federal control, because of the interests in having one uniform bankruptcy system. The commentators also raise constitutional issues surrounding the nonuniformity of this exemption system, arguing that allowing the states to “opt out” produces state policy that is at odds with stated federal policy, thereby violating the Supremacy Clause. See, e.g., Haines, Section 522’s Opt-Out Clause: Debtors’ Bankruptcy Exemptions in a Sorry State, 1983 ARIZ. ST. L.J. 1; Note, Federal Exemptions and the Opt-Out Provisions of Section 522: A Constitutional Challenge, 58 IND. L.J. 143 (1982).

except under the exemptions in section 522(d).\textsuperscript{113}

Under section 522(b)(2)(A), the judicial inquiry centers on the legislative intent surrounding the section. When addressing the exemption issue, courts examine the list of nonbankruptcy law exemptions contained in the House and Senate Reports on the Bankruptcy Reform Act.\textsuperscript{114} Some courts find that the absence of ERISA on that list is persuasive, and hold that no exemption exists for ERISA funds.\textsuperscript{115} Other courts hold that the list merely is illustrative and conclude that ERISA plan assets are exempted from the bankruptcy estate under section 522(b)(2)(A).\textsuperscript{116}

One case in which a court held that ERISA plan assets are not exempt is \textit{Goff v. Taylor (In re Goff)}.\textsuperscript{117} In that case, the Goffs sought to have their self-employment "Keough" retirement plan excluded or exempted from their bankruptcy estate.\textsuperscript{118} The \textit{Goff} court, after concluding that the plan assets are not excluded from the property of the bankruptcy estate under section 541(c)(2),\textsuperscript{119} analyzed the exemption

\textsuperscript{113} 11 U.S.C. § 522(b)(2)(A) (1982). A debtor may exempt "any property that is exempt under Federal law, other than subsection (d) of this section." \textit{Id.} (emphasis added).

\textsuperscript{114} The House and Senate reports contain identical lists of pension and benefit plans illustrative of property that might be exempt under federal law (other than bankruptcy law). \textit{Goff} v. \textit{Taylor (In re Goff)}, 706 F.2d 574, 583 (5th Cir. 1983). For a complete listing of exemption and benefit plans under this section, see S. REP. NO. 989, 95th Cong., 2d Sess. 75, \textit{reprinted in} 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5861; H.R. REP. NO. 595, 95th Cong., 2d Sess. 360, \textit{reprinted in} 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6316.

\textsuperscript{115} See, e.g., \textit{Goff}, 706 F.2d at 583 ("The restrictive nature of the exemption listed is marked."); \textit{Samore v. Graham (In re Graham)}, 726 F.2d 1268, 1274 (8th Cir. 1984). After listing the various pension plans set out in the legislative history of section 522(b)(2)(A), the \textit{Graham} court admitted that "[t]he legislative history provides no further indication of the intended scope of this provision." \textit{Id.} The court went on: "While the above list was not meant to be exclusive, we find the failure of Congress to include ERISA plan benefits probative of Congressional intent that ERISA was not a 'Federal law' upon which a § 522(b)(2)(A) exemption could be based." \textit{Id.}

\textsuperscript{116} See, e.g., \textit{In re Hinshaw}, 23 Bankr. 233, 234 (Bankr. D. Kan. 1982). The \textit{Hinshaw} court examined the anti-alienation provisions of the pension and benefit plans listed in the House and Senate Reports and compared them with the ERISA anti-alienation provision. Finding similar language in all of the anti-alienation provisions, the \textit{Hinshaw} court held that section 522(b)(2)(A) exempts ERISA plan benefits. \textit{Id.} at 236. For other examples of cases in which courts held in favor of exemption, see supra note 109.

\textsuperscript{117} 706 F.2d 574 (5th Cir. 1983).

\textsuperscript{118} \textit{Id.} at 576. For a full description and discussion of Keough plans, see M. \textit{Canan}, \textit{QUALIFIED RETIREMENT PLANS} 133-46 (1977 & West Supp. 1982). In general, a Keough plan is an ERISA-qualified retirement or profit-sharing plan which is set up and administered by self-employed persons for their own benefit. \textit{Id.}

\textsuperscript{119} \textit{Goff}, 706 F.2d at 582 ("[I]t is clear that Congress intended . . . to exempt from the estate only those 'spendthrift trusts' traditionally beyond the reach of creditors under state law.").
provisions of section 522(b)(2)(A).\textsuperscript{120} In addition to examining the list of nonbankruptcy law exemptions in the legislative history, and noting the absence of ERISA on that list,\textsuperscript{121} the court compared two conflicting bankruptcy court decisions on this issue.\textsuperscript{122} This analysis led the court to the conclusion that congressional failure to include ERISA on the list of exemptions was evidence that Congress did not intend the exemptions provided in section 522(b)(2)(A) to apply to ERISA plan assets.\textsuperscript{123}

In contrast to \textit{Goff} and \textit{Graham}, the court in \textit{In re Hinshaw}\textsuperscript{124} allowed the ERISA plan participant to exempt plan assets from the bankruptcy estate.\textsuperscript{125} The \textit{Hinshaw} court bypassed the 541(c)(2) analysis, accepting the proposition that the anti-alienation provision did not exclude ERISA plan assets from the debtor's estate as an enforceable restriction on a trust, and focused instead on the section 522(b)(2)(A) exemptions.\textsuperscript{126} In analyzing the exemptions, the \textit{Hinshaw} court examined the list of nonbankruptcy exemptions listed in the legislative history of 522(b)(2)(A), and concluded that “the similarity between the provisions of those statutes that are recognized as constituting a federal exemption and the provisions of ... [ERISA's anti-alienation provision] supports a conclusion that a federal exemption for ERISA plans was intended.”\textsuperscript{127} The \textit{Hinshaw} court reasoned that because ERISA's anti-alienation provision contained the same limitation on assignment and alienation as the anti-alienation provisions of the statutes listed in the legislative history of section 522(b)(2)(A), Congress intended the list to include ERISA plans.\textsuperscript{128}

These cases illustrate the different approaches and views that courts take when examining the issue of exempting ERISA plan assets

\textsuperscript{120} Id.

\textsuperscript{121} See \textit{supra} note 114.


\textsuperscript{123} \textit{Goff}, 706 F.2d at 585 (“Certainly, therefore, Congress did not ‘overlook’ ERISA. Given the extensive and general reach of ERISA-qualified plans, it is highly improbable that Congress intended their inclusion without mention in the Section 522(b)(2)(A) exemption in the midst of a listing of significantly less comprehensive and less well known statutes.”).

\textsuperscript{124} 23 Bankr. 233 (Bankr. D. Kan. 1982).

\textsuperscript{125} Id. at 235-36.

\textsuperscript{126} Id. at 234. For a discussion of the 541(c)(2) exclusion, see \textit{supra} notes 94-109 and accompanying text.

\textsuperscript{127} Id. at 235.

\textsuperscript{128} Id. at 235-36.
from the debtor's estate. The differing interpretations and analyses occur because of the inexplicit language and legislative history of the Bankruptcy Code. The recent trend of courts is to allow ERISA plan interests to be garnished by the bankruptcy trustee, thereby recognizing an exception to ERISA's anti-alienation provision. The courts inferred the bankruptcy exception to ERISA's anti-alienation provision, and the exception remains exclusively judicial. There are obvious conflicts between ERISA policy and the policies and provisions of the Bankruptcy Code, conflicts which have been discussed by various authors. The questions of interpretation will remain, however, until Congress amends ERISA to either allow for garnishment of plan interests in bankruptcy claims, or includes ERISA on the list of federal nonbankruptcy exemptions. Some courts also have interpreted ERISA's anti-alienation provision to permit another exception—one to remedy damage caused by fraud on the part of a plan participant or fiduciary. Similar to the bankruptcy exception, the propriety of this exception is in dispute. The focus of this comment now turns to an analysis of this dispute.

III. Judicially Implied Fraud Exception

The issue of an implied fraud exception to ERISA's anti-alienation provision arises when a fiduciary or an employee, who also is a pension or benefit plan participant, either defrauds or embezzles plan


130. This comment is not intended to provide an in-depth discussion of the policy conflicts between ERISA and the Bankruptcy Code. The focus of the comment is on exceptions to ERISA's anti-alienation provision. Creditor claims against an ERISA plan participant's plan interest provide one example of an implied exception. For a broader discussion of the Bankruptcy Code and conflicts with ERISA policy, see Seiden, Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can Be Used to Pay Claims?, 61 AM. BANKR. L.J. 219 (1987); Wohl, Pension and Bankruptcy Laws: A Clash of Social Policies, 64 N.C.L. REV. 3 (1985); Note, Exemption of ERISA Benefits under Section 522(b)(2)(A) of the Bankruptcy Code, 83 MICH. L. REV. 214 (1984); Note, Contra Goff: Of Retirement Trusts and Bankruptcy Code § 541(c)(2), 32 UCLA L. REV. 1266 (1985).

131. Some commentators focus on pension fund control as determinative of whether a court will allow an exception for bankruptcy. See Seiden, supra at note 130, at 251 (discussing plan participants that have self-settled trusts qualified under ERISA). Professor Seiden discusses, in detail, the background and implications of the bankruptcy exception issue, and concludes that "[j]udicial or legislative clarification is required now so that the Internal Revenue Code, ERISA, and the Bankruptcy Code can be interpreted consistently. . . ." Id. at 240.
funds, or embezzles funds from the employer who contributes to an ERISA plan for the benefit of the employees. The other plan participants, or the employer, seek to recover their loss by attempting to garnish the wrongdoer’s plan assets, usually after obtaining a civil judgment against the wrongdoer.\footnote{132} The wrongdoer, or the plan administrators, attempt to block the garnishment by arguing that ERISA’s anti-alienation provision prohibits the alienation of plan funds, regardless of the conduct of the wrongdoer or fiduciary.\footnote{133}

In one line of cases, courts have found an implied exception to ERISA’s anti-alienation provision based on traditional trust law principles found in ERISA.\footnote{134} In another line of cases, courts have held that no fraud exception exists, reading ERISA’s anti-alienation provision and the entire statute narrowly.\footnote{135}

The most recent illustrations of these divergent lines of cases are found in two recent United States Court of Appeals decisions. The United States Court of Appeals for the District of Columbia Circuit concluded that an implied exception to the anti-alienation provision does exist in cases involving fiduciary fraud,\footnote{136} while the Sixth Circuit Court of Appeals held that there was no implied exception for employee fraud.\footnote{137}

A. Crawford v. La Boucherie Bernard, Ltd.\footnote{138}

La Boucherie Bernard, Ltd. was a corporation owned and operated by Bernard Goldstein. Bernard’s brother, Jack Goldstein, worked for La Boucherie Bernard, Ltd. and for District Hotel Supply, Inc., another corporation owned and operated by Bernard Goldstein. District Hotel Supply, Inc. maintained a profit-sharing plan for the benefit of its employees, and both Jack and Bernard Goldstein were plan participants and trustees.


\footnote{133} Crawford, 815 F.2d at 119; United Metal, 811 F.2d at 298.

\footnote{134} See, e.g., Crawford, 815 F.2d at 120. See also St. Paul Fire and Marine Ins. Co. v. Cox, 752 F.2d 550, 552 (11th Cir. 1985); Guidry v. National Sheet Metal Workers Nat’l Pension Fund, 641 F. Supp. 360, 362 (D. Colo. 1986).

\footnote{135} United Metal, 811 F.2d at 299, 300. See also Ellis Nat’l Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466, 469-71 (2d Cir. 1986); Vink v. SHV North Am. Holding Corp., 549 F. Supp. 268, 271 (S.D.N.Y. 1982).

\footnote{136} Crawford, 815 F.2d at 120.

\footnote{137} United Metal, 811 F.2d at 300.

Among his other holdings, Bernard Goldstein was a principal in a real estate purchasing partnership named BRIL Associates. Goldstein's partners in BRIL Associates were his wife and children. Bernard and Jack Goldstein diverted $461,000.00 of District Hotel Supply profit-sharing plan funds to BRIL Associates, and transferred another $163,000.00 to La Boucherie Bernard, Ltd. At various times, the Goldsteins used plan money to pay their taxes, and for other private uses. No provision for repayment of the funds was ever made, and in fact, the funds have not been repaid.\footnote{Id. at 118.}

Fifteen plan participants brought suit in the United States District Court for the District of Columbia alleging that the Goldsteins misused plan funds, violating an ERISA fiduciary obligation.\footnote{Id. at 119.} On their motion for summary judgment, the court ruled for the plan participants. The court also found the Goldsteins jointly and severally liable, and awarded the plan participants $976,822.38 in damages.\footnote{Id.} Additionally, Bernard Goldstein was held personally liable in the amount of $20,999.00.\footnote{Id. at 120.} The Goldsteins failed to pay the judgment, and the court, on motion from the plan participants, garnished the Goldsteins' interests in the plan.\footnote{Id.} The Goldsteins appealed, claiming that ERISA's anti-alienation provision prohibited the garnishment.

The United States Court of Appeals for the District of Columbia held that notwithstanding the anti-alienation provision, the Goldsteins' plan assets were subject to garnishment.\footnote{Id. at 119-20.} In its analysis, the Crawford court focused on the trust language in ERISA's legislative history.\footnote{Id. at 119.} Citing the Senate Report, the Crawford court concluded that Congress "made clear the congressional direction to the federal courts to draw on principles of traditional trust law."\footnote{Id. at 120.} As trustees of the plan, the court held the Goldsteins accountable on the basis of ERISA's fiduciary standards and standards of traditional trust law. The trust law standards indicated that courts could use the trust interests of the fiduciary in order to offset the loss to the plan.\footnote{Id.} The

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\footnotesize{139. Id. at 118.}  
\footnotesize{140. Id. at 119.}  
\footnotesize{141. Id.}  
\footnotesize{142. Id.}  
\footnotesize{143. Id.}  
\footnotesize{144. Id. at 120.}  
\footnotesize{145. Id. at 119-20. ERISA provides that all ERISA-qualified funds are held in trust. 29 U.S.C. § 1103 (1982 & Supp. II. 1984).}  
\footnotesize{146. Crawford, 815 F.2d at 120.}  
\footnotesize{147. Id. The court discussed two authorities on the law of trusts. Both authorities agreed that a trustee's interest in a trust could be garnished by the beneficiaries harmed by the trustee's wrongful conduct. Id. (citing G. BOGERT, TRUSTS AND TRUSTEES § 191, at 484 (3d ed. 1979); III SCOTT ON TRUSTS § 257, at 2201 (3d ed. 1967)).}
Crawford court rejected the strict reading of the anti-alienation provision suggested by the Goldsteins, and indicated that the existing exception for domestic relations shows that the anti-alienation provision should not be "regarded as immutable."\textsuperscript{148}

In support of an implied exception for fraud, the Crawford court cited St. Paul Fire and Marine Insurance Co. v. Cox.\textsuperscript{149} In that case, Cox, a bank president, misapplied bank funds, and the plaintiff-insurer paid the bank $152,000.00 pursuant to its insurance contract.\textsuperscript{150} Under the terms of the insurance policy, St. Paul retained a subrogation right against Cox, and sought to garnish Cox's interest in the bank's profit-sharing plan.\textsuperscript{151} The Eleventh Circuit Court of Appeals held that St. Paul was entitled to Cox's interest in the plan, reasoning that "a wrongdoer should not benefit from his misdeeds."\textsuperscript{152} Referring to ERISA, the Cox court stated: "The legislation provides no indication whatsoever that it is intended to protect the employee against the consequences of his own misdeeds... [and] there is no reason to conclude that ERISA requires the abrogation of the equitable principle that a wrongdoer should not benefit from his misdeeds."\textsuperscript{153}

The Crawford court found the Cox reasoning to be persuasive. Relying on its own reading of ERISA, the statute's legislative history, and the Cox reasoning, it concluded that the plan participants could garnish the Goldsteins' interests in the profit-sharing plan.\textsuperscript{154} The Crawford decision stands in contrast to a decision by the Court of Appeals for the Sixth Circuit, in which that court refused to infer a fraud exception to ERISA's anti-alienation provision.

\textsuperscript{148} Id. at 121. The Goldsteins argued for a restrictive construction of the statute, citing General Motors v. Buha, 623 F.2d 455, 463 (6th Cir. 1980). The Buha court addressed the question of whether ERISA pension and benefit plan funds could be garnished by a tort judgment creditor. Id. at 457. The Buha court examined ERISA's anti-alienation provision, and the corresponding treasury regulation concerning alienation of pension benefits, and concluded that these anti-alienation provisions prohibited any voluntary or involuntary attachment or assignment. Id. at 460-63 (emphasis added).

\textsuperscript{149} 752 F.2d 550 (11th Cir. 1985).

\textsuperscript{150} Id. at 551.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 552.

\textsuperscript{153} Id.

\textsuperscript{154} Crawford, 815 F.2d at 122. Another example of a court's inferring a fraud exception to ERISA's anti-alienation provision is Guidry v. National Sheet Metal Workers Nat'l Pension Fund, 641 F. Supp. 360, 363 (D. Colo. 1986). The Guidry court imposed a constructive trust in favor of plan participants on the accrued pension benefits of a plan participant who embezzled plan funds. Id.
B. United Metal Products Corp. v. National Bank of Detroit 155

In *United Metal Products Corp. v. National Bank of Detroit*, the United Metal Products Corp. sued to garnish an employee's interest in the company profit-sharing plan, attempting to recover a loss due to the employee's embezzlement of company funds. Blandina Coelho, the company bookkeeper and participant in the company's profit-sharing plan, embezzled $441,408.72 of company funds and disappeared. After obtaining a judgment in absentia against Ms. Coelho, the company moved to garnish her interest in the profit-sharing plan. The United States District Court for the Eastern District of Michigan denied the requested relief, holding that there was no express or implied fraud exception to ERISA's anti-alienation provision. The United States Court of Appeals for the Sixth Circuit affirmed, holding that ERISA's anti-alienation provision does not allow garnishment of plan assets, even in cases of fraud or criminal conduct. 156

In analyzing the statute, the *United Metal* court found the meaning of the anti-alienation provision to be self-evident. 157 Accordingly, the *United Metal* court reasoned that a literal reading of the statute was required unless the resulting decision would cause "results so manifestly unreasonable that they could not fairly be attributed to congressional design." 158 The court examined ERISA in terms of the stated congressional purpose to protect the worker and his family, and concluded that Congress intended that "stability and certainty of pension and profit sharing plans . . . are important and legitimate goals of ERISA." 159 Thus, the court reasoned that a holding which refused to recognize an implied fraud exception would be consistent with congressional design. 160 The *United Metal* court distinguished the domestic relations exception from the fraud exception by pointing out that domestic relations is an area that is within the state's police power,

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156. *United Metal*, 811 F.2d at 298-99. While it is true that Ms. Coelho embezzled funds from her employer, and not from the profit-sharing plan as in *Crawford*, the *United Metal* majority pointed out that Ms. Coelho's criminal actions could have affected the profitability of the company, and thereby on the other plan participants. "Coelho's criminal conduct reduced plaintiff's profits and thereby adversely affected her coworkers." *Id.* at 300.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* The court stated that finding in favor of an implied fraud exception, and thereby allowing garnishment, could deprive plan participants' families of pension or profit-sharing benefits. The court claimed that this would undermine the congressional objectives of insuring receipt of benefits by participants and their families. *Id.*
and as such, is given deference when at odds with the terms of a federal statute.\textsuperscript{161}

In reviewing precedent, the \textit{United Metal} court found the reasoning of \textit{Vink v. SHV North American Holding Corp.}\textsuperscript{162} to be persuasive.\textsuperscript{163} The \textit{Vink} court held that an implied fraud exception to the anti-alienation provision would violate congressional intent,\textsuperscript{164} and expressed four areas of concern, all of which were reaffirmed by the \textit{United Metal} court.\textsuperscript{165}

First, the \textit{Vink} court distinguished the domestic relations exception based on necessary deference to the states' exercise of their police power.\textsuperscript{166} Second, the court expressed concern for the families of "faithless employees" who would lose the accrued pension benefits if an exception for fraud or criminal conduct was allowed.\textsuperscript{167} Because stated congressional intent was to protect employees and their beneficiaries, such an outcome would be inconsistent with the statute's purpose.\textsuperscript{168} Third, the court considered the fact that amicus briefs filed by the Labor and Treasury Departments in an earlier fraud exception case were opposed to the idea of a fraud or criminal conduct exception.\textsuperscript{169} Lastly, the \textit{Vink} court found no precedent which favored a

\begin{itemize}
  \item \textsuperscript{161} \textit{Id.} at 299. For a discussion of one court's reasoning on the "police power" issue, see note 60 and accompanying text.
  \item \textsuperscript{162} 549 F. Supp. 268 (S.D.N.Y. 1982). In \textit{Vink}, the plaintiff was the president of an SHV subsidiary company when he was dismissed because of his illegal activities. Vink pleaded guilty to mail fraud, accepting kickbacks, and bribery, and was sentenced to fourteen months in prison. Upon his release he sought pension benefits from SHV. SHV refused payment of the benefits, alleging that Vink had forfeited his right to pension benefits through his illegal activities. The \textit{Vink} court construed ERISA's anti-alienation provision narrowly, and Vink prevailed. \textit{Id.} at 269.
  \item \textsuperscript{163} \textit{United Metal}, 811 F.2d at 299. The court also referred to the holding of Ellis Nat'l Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466 (2d Cir. 1986). In \textit{Ellis}, Sam Kalil, Jr., committed theft and securities fraud while employed by Bache Group, Inc. Kalil was a participant in the ERISA-qualified Bache employee savings plan. The Ellis National Bank, damaged by Kalil's illegal activities, obtained two civil judgments against him. Kalil assigned his benefits in the plan to the bank in order to satisfy the judgments, and Bache sued to block the assignment, asserting its subrogation right against Kalil based upon Bache's payments to Kalil's defrauded customers. The Court of Appeals for the Second Circuit held that Kalil’s benefits were not assignable under ERISA’s anti-alienation provision. \textit{Id.} at 467-68.
  \item \textsuperscript{164} \textit{Vink}, 549 F. Supp. at 271.
  \item \textsuperscript{165} \textit{Id.; United Metal}, 811 F.2d at 299.
  \item \textsuperscript{166} \textit{Vink}, 549 F. Supp. at 271.
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.} at 271-72. The government's position on the fraud exception differs from its position on the domestic relations exception. \textit{See supra} note 65 and accompanying text. The amicus briefs cited by the \textit{Vink} court were filed by the Labor and Treasury Departments in relation to another fraud exception case, Winer v. Edison Bros. Stores Pension
The United Metal court found the Vink reasoning persuasive. The plaintiff in United Metal relied on the Cox reasoning, but the court declined to follow that case. The court did, however, acknowledge the equitable appeal of the plaintiff’s position, but refused to infer a fraud exception, stating: “[W]hether an exception should be created is a question for legislative rather than judicial judgment.”

Citing fear of “a boundless stream of suits and disputes” which might result if it did follow Cox, the United Metal court stated: “[W]e can conceive of countless factual situations that would present equally persuasive opportunities to create exceptions to the anti-alienation laws.”

The Crawford and United Metal decisions examined the accepta-
bility of an implied fraud exception and came to different conclusions. Each court cited relevant precedent and ERISA’s legislative history, and each reasoned that its decision was proper based on those factors. The next section of this comment analyzes the differences between the decisions, and then proposes that Congress amend ERISA’s anti-alienation provision to provide for a narrow fraud exception.

C. Crawford and United Metal—What’s the Real Difference?

The factual circumstances in Crawford and United Metal are analogous in many respects. ERISA plan participants, or employers who provide employees with ERISA-qualified plans, sought to recover monies either taken from the plan itself, or embezzled from the employer who supports the plan. The participants, or the employer, seek to garnish the wrongdoer’s plan interests as an offset of their own loss. In light of the different outcome reached by each court, the factual similarities highlight the issue of why the courts came to different conclusions. Analyzing the decisions indicates two areas of conflict.

1. Fiduciary Status

The first, and most obvious conflict is the status of the wrongdoer in each case. The Goldsteins were fiduciaries to the profit-sharing plan, as well as plan participants. In discussing ERISA’s fiduciary duties, the Crawford court initially examined the fiduciary standard of care and the liability for breaching that fiduciary duty. The court then reasoned, based on ERISA’s legislative history, that it could conduct a broad inquiry into trust principles, in order to adequately protect plan participants. The employment of traditional trust

that if ever there were a case to carve out a ‘fraud’ exception to ERISA’s . . . [anti-alienation] provision[, this might be such a case.” Vink, 549 F. Supp. at 273.

The dissent in United Metal criticized the majority’s narrow reading of ERISA. Agreeing with the Cox holding, the dissent would have allowed garnishment of Ms. Coelho’s pension plan assets. In reaching this result, the dissent stressed the fact that Congress also intended to protect other plan participants. Disagreeing with the majority’s fear of floodgate exceptions, the dissent reasoned that a narrow exception on these facts would not “produce the conjured ‘boundless stream of suits and disputes,’ ” and, therefore, adopted the rule of the Cox decision. United Metal, 811 F.2d at 301 (Wellford, C.J., dissenting) (quoting Vink v. SHV North America Holding Co., 549 F. Supp. 268, 273 (S.D.N.Y. 1982)).

176. Crawford, 815 F.2d at 118.

177. Id. at 119. The court pointed out that under ERISA, a fiduciary “shall be personally liable” for any losses sustained by a plan, when the losses result from a breach of a fiduciary duty. Id. For a discussion of ERISA’s fiduciary provisions, see supra notes 25-39 and accompanying text.

178. Id. at 119-20. The court held that it had broad remedial authority when com-
principles led the court to conclude that the Goldsteins’ plan interests were subject to garnishment by other plan participants. 179 The wrongdoer in United Metal was a company bookkeeper, and a participant in the company profit-sharing plan. 180 Unlike Crawford, the United Metal majority did not examine ERISA’s fiduciary provisions. Rather than broadening its inquiry into the equity and trust principles contained in ERISA’s legislative history, the United Metal majority focused solely on the anti-alienation provision. 181 This allowed the court to ignore ERISA’s legislative history, and the trust principles therein, and to hold that Ms. Coelho’s plan assets were not subject to garnishment, despite the damage that she caused to the employer and to the plan by her fraudulent and illegal acts. 182 The difference in wrongdoer status is important because the presence of plan fiduciaries in Crawford eventually led the court to apply traditional trust principles to the facts of the employee’s claim. 183 The United Metal majority did not examine these principles presumably because it believed that Ms. Coelho was not a plan fiduciary. 184

penating for a breach of a fiduciary duty. The court cited the Senate Report on ERISA, specifically the portions that discuss ERISA’s enforcement provisions, in order to justify its examination of trust principles. Id. at 120.

The legislative history discussed by the Crawford court outlines congressional intent to allow plan participants a “full range of legal and equitable remedies” when seeking redress for violations of fiduciary duties. Id. (S. REP. NO. 127, 93d Cong., 1st Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4838, 4871). The court also discussed the report of Senate Committee Chairman Harrison Williams, Jr., who stated: “‘The objectives of these [fiduciary] provisions are to make applicable the law of trusts.’ ” Id. (quoting 120 CONG. REC. S-15,737 (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5186). See also Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978); St. Paul Fire and Marine Ins. Co. v. Cox, 752 F.2d 550, 552 (11th Cir. 1985).

179. Crawford, 815 F.2d at 120. The court reasoned that allowing the garnishment of the Goldsteins’ plan assets was consistent with ERISA fiduciary policy enforcement and reinforced ERISA’s traditional trust principles. Id.

180. United Metal, 811 F.2d at 298. Although Ms. Coelho, as company bookkeeper, arguably could be considered a fiduciary to the company, she does not fall within ERISA’s fiduciary provisions, and, thus, is not a fiduciary to her fellow plan participants. One author asserts that non-fiduciaries who knowingly participate and aid in fiduciary breaches involving ERISA plans should be liable to the plan for its losses. See, e.g., Schwartz, Non-Fiduciary Liability Under the Employee Retirement Income Security Act, 69 MARQ. L. REV. 561, 564 (1986).

181. United Metal, 811 F.2d at 299-300. For a discussion of the court’s reasoning, see supra notes 156-74 and accompanying text.

182. Id. at 300.

183. Crawford, 815 F.2d at 120.

184. United Metal, 811 F.2d at 299-300. The United Metal majority did not discuss ERISA’s fiduciary provisions specifically. However, the dissent adopted the Cox reasoning, which upheld the separate equitable principle that wrongdoers not be allowed to benefit from their wrong. Id. at 301 (Wellford, C.J., dissenting).
2. ERISA Construction

The second area of conflict between the two decisions centers on statutory construction. Both courts recognized ERISA's basic goal of plan participant protection. However, analyzing the two decisions shows that the Crawford court analyzed ERISA's provisions in a general, policy-oriented manner, while United Metal focused almost exclusively on the language of the anti-alienation provision.

United Metal read the anti-alienation provision literally, making an exception "[o]nly when a literal construction of a statute yields results . . . [that are] manifestly unreasonable." Discussing the domestic relations exception, the majority agreed with the Vink court, that the implied domestic relations exception falls within a state's police power, and its existence illustrated judicial deference to the congressional intent of protecting workers' families. The United Metal

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185. Crawford, 815 F.2d at 119-20; United Metal, 811 F.2d at 299.
187. United Metal, 811 F.2d at 299. The majority only cited ERISA's anti-alienation provision and a similar provision contained in Section 7.7 of the United Metal profit-sharing plan. Id.
188. Id. at 300. The United Metal court simply set forth the language of the anti-alienation provision and moved on to the arguments of the parties, without examining ERISA's background or legislative history. Id. at 299. One possible explanation for the court's reluctance to examine ERISA's legislative history may be the "plain meaning" rule of statutory construction.

The plain meaning rule provides: "If the words [of the statute] convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted . . . ." R. Dickerson, The Interpretation and Application of Statutes 229 (1975) (citing Lake County v. Rollins, 130 U.S. 662, 670 (1889)). For further discussion of the plain meaning rule, see Singer, Sutherland Statutory Construction 681, 681-82, 794 (Sands 4th ed. 1986)(volume 3); R. Kelso & C. Kelso, Appeals in Federal Courts by Prosecuting Entities Other than the United States: The Plain Meaning Rule Revisited, 33 Hastings L.J. 187, 207-39 (1981).

However, the United Metal court's application of the plain meaning rule is questionable. A part of the plain meaning rule involves an examination of whether the particular provision contradicts other parts of the statute. Therefore, the proper interpretation of the anti-alienation provision would have to include an examination of the purposes and intent behind ERISA, in order to be consistent with both the plain meaning rule and the "whole statute" statutory interpretation rule. This rule provides that: "'An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter . . . and the purpose or intention of . . . the body which enacted . . . the statute . . . .'" Singer, supra volume 2A, at 90, (citing Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944)). For further discussion of the whole statute interpretation rule, see Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Philbrook v. Glodgett, 421 U.S. 707 (1975).

189. United Metal, 811 F.2d at 299. The majority contrasted the domestic relations exception with the fraud exception by making this "police power" distinction. Id. The majority reasoned that "the refusal to allow an employer to retain vested pension benefits of
court thus viewed the domestic relations exception as only providing family protection, and not as indicating that ERISA's anti-alienation provision is subject to implied exceptions.190

The Crawford court viewed the anti-alienation provision as a somewhat more flexible provision.191 The court examined both the domestic relations exception and ERISA's overall goals, and concluded that exceptions to the anti-alienation provision could be made, so long as the exception furthered ERISA's stated congressional intent.192 The Crawford court read ERISA as a whole, not just focusing on the language of the anti-alienation provision. This reading enabled the Crawford court to give greater effect to the congressional intent of protecting all plan participants and their beneficiaries. The court reasoned that a restrictive reading of the anti-alienation provision, and of ERISA policy, would not only undermine the protections intended by Congress, but would lead to the wrongdoer's unjust enrichment.193

In contrast, the United Metal court's reading of congressional policy focused on the beneficiaries of the one plan participant who was accused of wrongdoing, and the court chose to protect those persons, rather than protecting all plan participants. The United Metal majority concluded with two concerns about an implied exception to ERISA's anti-alienation provision. First, the majority stated its fear of an employee . . . convicted of fraudulent activity [while] in the course of his employment does not usurp any state function." Id. (citing Vink, 549 F. Supp. at 271).

190. United Metal, 811 F.2d at 299 (citing Vink, 549 F. Supp. at 271). The United Metal court's reasoning on this point is unpersuasive. The language of the anti-alienation provision seems unequivocal in prohibiting alienation of ERISA plan benefits. It was because of this seemingly unequivocal language that courts had to infer the domestic relations exception. The fact that Congress sanctioned this exception bolsters the proposition that the anti-alienation provision, indeed, is subject to exception. Without an exception, judicial or legislative, there could be no alienation of benefits for domestic relations support claims. Thus, although the United Metal court could assert that the only exception to the anti-alienation provision should be the domestic relations exception, it is illogical to assert that the provision is not subject to exception.

191. Crawford, 815 F.2d at 121 ("The anti-alienation rule has not been regarded as immutable . . . . [because] various decisions have implied a limited exception [to the rule] . . . ").

192. While examining precedent, the Crawford court stated: "Of prime importance to the courts in considering implied exceptions to the non-alienation provisions have been the congressional objectives behind ERISA, and the effect of the proposed exceptions on those goals." Crawford, 815 F.2d at 121 (quoting Cox, 752 F.2d at 552 (citing AT&T v. Merry, 592 F.2d 118, 120-25 (2d Cir. 1979); Cartledge v. Miller, 457 F. Supp. 1146, 1154-56 (S.D.N.Y. 1978))).

193. Id. ("A contrary interpretation [of ERISA's anti-alienation provision] would permit trustee wrongdoers to benefit from their misdeeds . . . "). The court explained that in Crawford, the Goldsteins owned over sixty percent of the interest in the plan. If the plan went into receivership as a result of their fiduciary breaches, the receiver might be forced to include the Goldsteins in the distribution of plan assets. Id. at 121-22.
floodgate litigation over the exception, and second, it concluded that the question of whether an implied exception should be created is better left to the legislature, and not the courts. In response to those concerns, and others raised by the two decisions, the next section of this comment proposes a statutory amendment model which provides a narrow fraud exception to ERISA's anti-alienation provision.

IV. PROPOSED ERISA FRAUD EXCEPTION AMENDMENT

Since ERISA's enactment, courts have examined its anti-alienation provision in various contexts, and have inferred exceptions in the areas of domestic relations, bankruptcy, and fraud. These exceptions are based upon the courts' readings of expressed or implied congressional intent. The domestic relations exception was inferred judicially, but eventually codified in 1984. The bankruptcy exception remains a creature of judicial inference, with a majority of courts reasoning that ERISA plan interests are included in the debtor's estate. Congress acted on the domestic relations exception through an amendment to the anti-alienation provision, but has not acted on the bankruptcy exception. Arguably, there remains a conflict over the bankruptcy exception, and it is therefore imperative that any exception to the anti-alienation provision be codified in order to avoid the potential conflicts over statutory interpretation.

194. United Metal, 811 F.2d at 300 ("[W]e can conceive of countless factual situations that would present equally persuasive opportunities to create exceptions to the anti-alienation laws."). The dissent disagreed, arguing that a narrow exception could better serve ERISA policy without opening a flood of new litigation. Id. at 301 (Wellford, C.J., dissenting).

195. Id. at 300 (quoting U.S. v. Rutherford, 442 U.S. 544, 559 (1979)). While arguing that a fraud exception to ERISA's anti-alienation provision weakens the effectiveness of ERISA's preemption provision, one author also notes that exceptions to ERISA should be left to the legislature. See Note, infra at note 204.

196. See supra notes 48-77 and accompanying text.

197. See supra notes 79-131 and accompanying text.


Congress clearly has spoken on the issue of plan fund alienation for domestic relations support orders. However, Congress has yet to act on the issue of plan fund alienation in bankruptcy. In light of explicit congressional approval of the domestic relations exception, opponents of the bankruptcy exception could assert that congressional silence indicates disapproval of the bankruptcy exception. In order to prevent any judicial disagreement
A. Amendment Policy

Examining ERISA policy and legislative history demonstrates that the *Crawford* court made the proper inquiry into the congressional intent behind ERISA's enactment. The *Crawford* court examined ERISA as an entire statute, including its legislative history and purpose, and concluded that Congress intended to protect all plan participants and their beneficiaries. The court refused to protect the interests of a wrongdoer at the expense of other plan participants, and agreed with the *Cox* reasoning, that there is no indication that ERISA's anti-alienation provision was intended to be used as a shield by those who commit fraud against an ERISA plan. The purpose of protecting plan participants is undermined when plan participants are not permitted to garnish the plan interests of those who defraud or embezzle from pension and benefit plans, or who place plan funds at risk by embezzling from employers who maintain ERISA plans. The decisions in *United Metal* and *Vink* cannot be squared with the general policy concerns that led to ERISA. These decisions rejected an implied fraud exception in favor of protecting the interests of the wrongdoer. The policy of this amendment is to provide greater protection to *all* plan participants and their beneficiaries by providing a means by which other plan participants, or the employer who administers the ERISA plan, may recover some of the loss to the plan caused by the wrongdoer's fraud or fiduciary breach.

B. Scope of the Amendment

The proposed amendment would be added to the anti-alienation provision where the codified domestic relations exception is contained. The scope of the amendment extends participant protection beyond that provided against third party/commercial judgment creditors in *General Motors v. Buha*. In *Buha*, tort judgment creditors were not permitted to garnish the plan interests of an ERISA plan participant. The *Buha* court held that the anti-alienation provision, in the case of third party judgment creditors, prohibits all voluntary or over the interpretation of the fraud exception, this comment advocates a model fraud amendment to ERISA's anti-alienation provision.

199. See supra notes 138-154 and accompanying text for a discussion of the *Crawford* decision. For a discussion of the "whole statute" statutory interpretation rule, see supra note 189.

200. For a discussion of the *Cox* reasoning, see supra notes 149-54 and accompanying text.


202. 623 F.2d 455 (6th Cir. 1980).
involuntary encroachments on the ERISA plan participant's plan interests. 203 Under the amendment, a wrongdoer who defrauds or embezzles from an ERISA plan, or from an employer who maintains an ERISA plan for the benefit of the employees, may have his or her plan interests garnished pursuant to a civil or criminal court judgment which is within the parameters of the amendment. Additionally, consistent with the Crawford decision, any plan fiduciary who breaches a fiduciary duty, when that breach causes a loss either; (1) to the employer, the loss threatening continuation of the plan, or (2) to the plan itself, shall have his or her plan interests subject to garnishment under this amendment.

The scope of this amendment is intended to encompass all parties with vested benefits in an ERISA-qualified plan. This includes plan participants and fiduciaries whose wrongful conduct has a detrimental effect on the plan and its participants.

C. Text of the Amendment

The language of the proposed amendment states:

(1) Subject to Paragraph (3) of this amendment;
(A) Paragraph (1) of this section shall not apply to the assignment, attachment, alienation, or garnishment, whether voluntary or involuntary, of the plan interests of a plan participant or fiduciary who:
(i) embezzles from, defrauds, breaches a fiduciary duty to, or otherwise causes an economic loss to a plan qualified under this Chapter, or
(ii) embezzles from, defrauds, breaches a fiduciary duty to, or causes an economic loss to an employer who is maintaining a qualified plan for the benefit of the employees, where that embezzlement or fraud or fiduciary breach causes an economic loss to the plan maintained by the employer, and thereby, to plan participants.

(a) The employer, in order to show that the wrongdoer's actions caused a loss to the plan or to plan participants, must show that those actions jeopardize the continuation of the employer's contributions to, and maintenance of the plan. The evidence must show that the employer has been affected by the wrongdoer's actions to an extent that the employer:
(i) is forced into bankruptcy;
(ii) is no longer able to contribute to or maintain an ERISA plan; or

203. "Id. at 463."
(iii) is forced to reduce the contributions to the ERISA plan to the extent that there is a reduction in benefits to plan participants.

(C) A criminal conviction of the wrongdoer, in a criminal action arising from the illegal activity against the plan or the contributing employer, presents a rebuttable presumption in favor of alienation. Alternatively, a civil judgment against a wrongdoer arising from the activity against the plan or the contributing employer presents the same rebuttable presumption in favor of alienation.

(2) A civil court must apply a standard of clear and convincing evidence to any claim or action made under this amendment.

(3) Notwithstanding Paragraph (1) of this amendment;

(A) All other attachable or garnishable interests of the wrongdoer shall become subject to attachment or garnishment prior to the attachment or garnishment of the wrongdoer's ERISA plan interests.

D. Application of the Amendment

This model amendment provides the narrow exception required in cases of plan participant or fiduciary fraud. The general policy and legislative intent of protecting all plan participants is reinforced by the model amendment. Plan participants continue to be protected from garnishment by third party judgment creditors, while their protection from those who defraud or embezzle to the detriment of the plan is increased.

Both Crawford and United Metal provide examples of cases in which the fraud amendment would apply. In United Metal, the employee/plan participant embezzled company funds and the company obtained a civil judgment against her. Under this amendment, in a garnishment action subsequent to the civil judgment, the company must prove that the wrongdoer has no other garnishable assets, or that the assets are inadequate to compensate the loss. The company then would have to show that the effect of the fraudulent action jeopardizes continued company support of the profit-sharing plan, reduces company contributions to the plan, or likely will force the company into bankruptcy. Upon the showing of a lack of other garnishable assets, and upon the showing of harm to the plan, either directly through the employer's inability to continue maintenance of the plan, or by way of a civil or criminal judgment against the wrongdoer, the company would be entitled to garnish the wrongdoer's plan assets. If the company establishes that the wrongdoer had other assets adequate to cover the company's loss, the garnishment would be disallowed.

The Crawford facts also provide an example applicable to the parameters of this amendment. In Crawford, plan fiduciaries misapplied
plan assets for their own gain, and made no provision for paying back the profit-sharing funds. Plan participants obtained a civil judgment and then sought to garnish the wrongdoers’ plan interests. Under the amendment, the plan participants must show that the wrongdoers have either no assets or have insufficient assets with which to pay back the plan before the court will proceed to the next step of the analysis. The plan participants must then show harm to the plan either directly under section 1(A)(i) of the amendment, or indirectly, by way of a precedent criminal or civil judgment against the wrongdoer.

The Goldsteins owned various properties and corporations, and the plan participants would be forced to explore all avenues of garnishment against those interests prior to garnishing the ERISA interests. This requirement insures that all ERISA policies are given equal consideration, and satisfies the United Metal court’s concern of protecting the wrongdoer’s plan interests. While this comment advocates and proposes a narrow fraud amendment to ERISA’s anti-alienation provision, the comment also recognizes the legitimate congressional concern that plan participants’ receipt of accrued pension benefits be protected. Forcing those seeking garnishment of plan assets to explore all other assets of the wrongdoer gives effect to this congressional policy.204

Under both Crawford and United Metal, any civil court hearing evidence of the fiduciary breach, fraud, or embezzlement must apply a “clear and convincing evidence” standard. The clear and convincing evidence standard falls between the “preponderance of the evidence” standard required in most civil cases and the “beyond a reasonable

204. One author, discussing the fraud exception as it arose in St. Paul Fire and Marine Ins. Co. v. Cox, 752 F.2d 550 (11th Cir. 1985), argues that a fraud exception to ERISA’s anti-alienation provision weakens ERISA’s preemptive powers, because the application of the fraud exception is not uniform. See Note, Weakening ERISA’s Preemptive Powers: St. Paul Fire & Marine Insurance Co. v. Cox Creates an Implied Exception to the Anti-Alienation Provision for Employee Fraud, 6 VA. TAX REV. 185, 218-19 (1986). The author asserts that any exception to the anti-alienation provision should be enacted by the legislature, id. at 220, a concern that is addressed by this comment through the proposed fraud amendment.

The author’s secondary concern is that an implied or legislated fraud exception will signal a return to the days of “forfeiture” or “bad boy” clauses. Id. at 217. These clauses, placed in retirement plan contracts, allowed an employer to evade payment of retirement benefits to an employee if the employee was “disloyal” or fired for cause. Id. at 203 (citing Lee, ERISA’s “Bad Boy”: Forfeiture for Cause in Retirement Plans, 9 LOY. U. CHI. L.J. 137 (1977)). The proposed amendment provides that ERISA plan assets stand last in the line of the wrongdoer’s garnishable interests in cases of plan participant fraud or fiduciary breach. In addition, employers must show a loss to the plan participants prior to garnishment. These amendment provisions are in place specifically to avoid the unconscionable forfeitures which occurred prior to ERISA’s enactment. See Lee, supra at 141-48.
doubt" criminal evidentiary standard. The amendment requires proof by clear and convincing evidence in a civil adjudication for two reasons. First, the anti-alienation provision's underlying premise is to protect plan participants from their own financial improvidence, and from third party judgment creditors. The "clear and convincing" standard requires those persons seeking attachment or garnishment to prove their claims on a higher evidentiary level, and therefore provides greater protection to the wrongdoer/plan participant. Secondly, a clear and convincing evidence standard traditionally has been applied to fraud claims, and therefore should be applied to fraud claims raised under the anti-alienation provision.

V. CONCLUSION

An examination of ERISA's purpose and legislative history indicates that Congress intended ERISA to serve as a protection for all private pension plan participants and their beneficiaries. Courts that find in favor of an implied fraud exception give effect to this policy.

205. MCCORMICK ON EVIDENCE § 340 (E. Cleary ed. 1984).
206. General Motors v. Buha, 623 F.2d 455, 460-63 (6th Cir. 1980). The protection against a plan participant's financial improvidence is distinguishable from protection against fraud judgments. While Congress did not want to penalize the plan participant for poor financial judgment, this comment asserts that Congress had no intention to protect those persons who commit fraud against ERISA-qualified plans.
A few jurisdictions, however, apply less than a clear and convincing standard to fraud claims. See, e.g., Miller v. Lay Trucking Co., Inc., 606 F. Supp. 1326, 1339 (N.D. Ind. 1985) (Indiana law provides that fraud may be proven by a preponderance of the evidence). In one jurisdiction requiring less than clear and convincing evidence, a United States Court of Appeals allowed a jury instruction requiring only a preponderance of the evidence to prove fraud, but stated: "[A]n instruction noting the 'clear and convincing evidence' standard would have been more satisfactory . . . ." First Va. Bankshares v. Benson, 559 F.2d 1307, 1320 (5th Cir. 1977).
208. See supra notes 16-23 and accompanying text.
The implied exception protects the majority of plan participants from fraud that causes a loss to the ERISA plan. It also allows the participants to recover a part of their loss, as well as reinforcing basic principles of equity and trust law principles Congress intended to apply to ERISA.

Congress should amend ERISA’s anti-alienation provision. The proposed amendment provides a guide for congressional action, provides adequate protection of the wrongdoer’s plan interests, and gives courts a standard with which to examine and decide plan interest garnishment claims. The model also upholds the overall ERISA policy of protecting the plan participant, and will provide more uniformity in court decisions.

Michael Alan Frazee