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Debtor's Interest in ERISA Funds As Property of the Estate: A Question of Statutory Interpretation, A

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A Debtor's Interest in ERISA Funds as Property of the Estate: A Question of Statutory Interpretation

Anderson v. Raine (In re Moore)[1]

I. INTRODUCTION

An interest in a retirement plan qualified under the Employee Retirement Income Security Act ("ERISA")[2] of 1974 may be one of a person's major assets before filing a bankruptcy petition. How the Bankruptcy Code[3] treats that interest can have a great effect on the debtor's fresh start, on the amount of payments made to general creditors, and on the decision to file a bankruptcy petition. If the status of that interest is uncertain, the debtor may make the wrong decisions or be forced into litigation to determine whether the turnover of all or part of the debtor's interest in pension plan assets is required for the satisfaction of creditors.

Currently, the United States circuit courts of appeals are divided on how to treat a debtor's interest in an ERISA qualified pension plan. Several circuits have excluded from property of the bankruptcy estate[4] the debtor's interest in ERISA qualified pension plans only if the plans qualified as spendthrift trusts[5] under state law.[6] The Fourth Circuit Court of Appeals

1. 907 F.2d 1476 (4th Cir. 1990).

2. 29 U.S.C. §§ 1001-1144 (1988).

3. 11 U.S.C. §§ 101-1320 (1988).

4. Property of the bankruptcy estate is defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1988). The Code defines certain property that is excluded from property of the bankruptcy estate and is thus never under the control of the trustee in bankruptcy. 11 U.S.C. § 541(c)(2) (1988). The Code also defines some property that becomes property of the bankruptcy estate but is then allowed to be exempted out of the estate by the debtor. 11 U.S.C. § 522 (1988).

5. "A trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed is a spendthrift trust." RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959). A self-settled trust is a trust in which the settlor is a beneficiary. *Id.* § 114. The general rule is that "[w]here a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest." *Id.* § 156(1). This rule is because the settlor still retains control over the corpus of the trust, such as the power to terminate the trust and receive the corpus.

6. *See* Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1360

recently took a contrary view in *Anderson v. Raine (In re Moore)*.[7] The court held that the debtor's interest in an ERISA qualified pension plan was excluded from property of the bankruptcy estate whether or not the plan was a spendthrift trust under state law.[8]

II. FACTS AND HOLDING

Richard Allen Moore, Johnsie Dianne Moore, Stephen M. Haynes, Donna Haynes, and Judy Dianne Thomason were the debtors in the underlying bankruptcy case. The debtors were employees of Springs Industries, Inc., and participated in Springs Industries' comprehensive retirement program.[9] The program consisted of a Profit-Sharing and Pension Plan and Trust and a Retirement Plan and Trust ("Plans").[10] Robert F. Anderson was the trustee in bankruptcy for the debtors' estates.[11] Joseph S. Raine, Jr. was the plan administrator for the Plans, and Northern Trust Company was the trustee for the Plans.

The trustee in bankruptcy brought suit against the administrator of the Plans seeking turnover of the debtors' interests in the Plans as property of their bankruptcy estates.[12] Section 541(c)(2) of the Bankruptcy Code[13] states that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."[14] The administrator of the Plans claimed that the debtors' interests in the Plans were excluded from property of the estate because the Plans were qualified under ERISA and were therefore non-

(9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1985); Lichstrahl v. Banker's Trust *(In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985); Goff v. Taylor *(In re* Goff), 706 F.2d 574, 589 (5th Cir. 1983). *Compare with* Samore v. Graham *(In re* Graham), 726 F.2d 1268, 1272 (8th Cir. 1984) (stating that ERISA plans are presumed to be part of bankruptcy estate).

7. 907 F.2d 1476 (4th Cir. 1990).

8. *Id.* at 1477.

9. *Id.* at 1476-77.

10. *Id.* at 1476. The Plans were qualified under ERISA. *Id.*

11. *Id.*

12. *Id.* at 1477.

13. 11 U.S.C. § 541(c)(2) (1988).

14. 11 U.S.C. § 541(c)(2).

alienable.[15] The trustee in bankruptcy claimed that section 541(c)(2) only applied to state spendthrift trusts.[16]

The bankruptcy court found that the debtors interests in the Plans were non-alienable, and therefore, were excluded from property of the bankruptcy estate under section 541(c)(2).[17] The court thus found that the debtors' interests in the Plans were not subject to transfer to the trustee in bankruptcy.[18] The district court affirmed, and the trustee in bankruptcy appealed.[19]

The Fourth Circuit Court of Appeals decided that the plain language of section 541(c)(2) required the statute to apply to federal as well as state law.[20] The court found that the legislative history was irrelevant when the meaning of the statute was clear, and even if considered, the legislative history was inconclusive.[21] The court therefore found that "'applicable nonbankruptcy law' is not limited to state spendthrift trust law,"[22] and the debtors' interests in the Plans were not the property of the bankruptcy estates and were not subject to turnover to the trustee in bankruptcy.[23]

III. LEGAL BACKGROUND

A. *Enforceability of ERISA Restrictions on Alienation*

"The great weight of authority is to the effect that a debtor's interest in an ERISA pension fund is beyond the reach of his general creditors."[24] The bankruptcy court in *Liscinski v. Mosley (In re Mosley)*[25] considered whether ERISA created a federal prohibition on attachment of benefits under a qualified ERISA plan.[26] The court rejected the argument that because other federal statutes that create an exemption from creditors are more explicit, Congress intended to leave the interpretation of the required language in

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15. *Moore*, 907 F.2d at 1477. ERISA requires in 29 U.S.C. § 1056(d)(1) (1988) that each pension plan contain language preventing transfer of benefits under the plan. *See infra* notes 24-36 and accompanying text.

16. *Moore*, 907 F.2d at 1477.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1478-79.

22. *Id.* at 1477.

23. *Id.* at 1476.

24. Clotfelter v. CIBA-GEIGY Corp. *(In re* Threewitt), 24 Bankr. 927, 929 (D. Kan. 1982) (citations omitted).

25. 42 Bankr. 181 (Bankr. D.N.J. 1984).

26. *Id.* at 188-90.

ERISA plans to state law.[27] Hence, the court found that the state law preemption in ERISA[28] indicated that Congress did not intend to have state law determine whether the benefits of an ERISA qualified plan were beyond the reach of general creditors.[29]

In *Guidry v. Sheet Metal Workers National Pension Fund*,[30] the United States Supreme Court recently discussed ERISA's restriction on alienation. Curtis Guidry pleaded guilty to embezzling funds from the Sheet Metal Workers International Association, Local 9 ("Union").[31] In a subsequent suit Guidry and the Union stipulated to a judgment for the Union and against Guidry of $275,000.[32] The district court imposed a constructive trust on Guidry's interest in ERISA qualified pension funds in favor of the Union.[33] The Supreme Court held that ERISA's "statutory restrictions on assignment

27. *Id.* at 188-89. To be qualified under ERISA, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1988 & Supp. I 1989). Further, "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." 26 U.S.C. § 401(a)(13) (1988 & Supp. I 1989). The Treasury Regulations state as follows:

> Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

26 C.F.R. § 1.403(a)-13(b) (1989).

Compare ERISA restrictions to other federal statutes that state that "[p]ayment of benefits . . . shall not be assignable . . . and . . . shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process." 38 U.S.C. § 3101 (1988). Similarly, "[n]o assignment, release, or commutation of compensation or benefits . . . shall be valid, and such compensation or benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt." 33 U.S.C. § 916 (1988). *See In re* Goff, 706 F.2d 574, 585 (5th Cir. 1983).

28. ERISA states the following:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (1988).

29. *Mosley*, 42 Bankr. at 189.

30. 110 S. Ct. 680 (1990).

31. *Id.* at 682.

32. *Id.* at 682-83.

33. *Id.* at 684.

or alienation of pension benefits appl[ied] to garnishment" by creditors.[34] The Court decided that any exceptions to ERISA's restrictions on alienation were for Congress to create, not the courts.[35] The court held that the constructive trust the district court imposed violated ERISA's restrictions on alienation.[36]

B. Interpretation of "Applicable Nonbankruptcy Law"

Before the enactment of the Bankruptcy Code ("Code") in 1978, a debtor's interest in a spendthrift trust was excluded from property of the bankruptcy estate if the spendthrift trust was enforceable under state law.[37] The Code created a broad definition of property of the estate,[38] but allowed the debtor's interest in certain trusts to be excluded from this definition under section 541(c)(2). This exclusion is still present in the Code. Therefore, the question of whether a debtor's interest in a qualified ERISA pension plan becomes property of the estate is determined by the court's interpretation of "applicable nonbankruptcy law" as used in section 541(c)(2).

The circuit courts of appeals that have addressed this issue have generally relied on the legislative history of the Code to determine the meaning of "applicable nonbankruptcy law."[39] Every circuit court of appeals that considered this issue before *Moore* determined that "applicable nonbankruptcy law" only applied to spendthrift trusts and did not include ERISA plans that did not qualify as spendthrift trusts under state law.[40] The legislative history relied on by these courts states that section 541(c)(2) "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."[41]

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34. *Id.* at 685.

35. *Id.* at 687. The court noted that Congress provided that ERISA's restrictions on alienation would not apply to a "qualified domestic relations order" under 29 U.S.C. § 1056(d)(3) (1988 & Supp. I 1989). *Id.*

36. *Id.*

37. Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1271 (8th Cir. 1984).

38. 11 U.S.C. § 541(a) (1988). *See supra* note 4.

39. See Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352 (9th Cir. 1985), *cert. denied* 475 U.S. 1016 (1986); Lichstrahl v. Banker's Trust (*In re* Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985); *Graham*, 726 F.2d at 1272; Goff v. Taylor (*In re* Goff), 706 F.2d 574, 589 (5th Cir. 1983).

40. *Daniel*, 771 F.2d at 1359.

41. H.R. REP. NO. 595, 95th Cong., 2d Sess. 176, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6136. The legislative history also states that § 541(c)(2) "preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law." *Id.* at 369, 1978

Additionally, the Eighth Circuit Court of Appeals in *Samore v. Graham (In re Graham)*[42] considered the relation between section 522(d)[43] and section 541(c)(2) of the Code in determining the meaning of "applicable nonbankruptcy law."[44] The court stated that because pension benefits were specifically included in the list of exempt property, Congress clearly indicated that a debtor's ERISA plan benefits "were intended and assumed to be part of the estate."[45] The Eighth Circuit used this reasoning again in *Humphrey v.*

U.S. CODE CONG. & ADMIN. NEWS at 6325. The history further states that § 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust." S. REP. NO. 989, 95th Cong., 2d Sess. 83, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5869.

42. 726 F.2d 1268 (8th Cir. 1984).

43. 11 U.S.C. § 522(d) (1988). The Bankruptcy Code states that the following property may be exempted from property of the estate:

(10) The debtor's right to receive-

> . . .
>
> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless-
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
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> (ii) such payment is on account of age or length of service; and
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> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

11 U.S.C. § 522(d)(10) (1988).

44. *Graham*, 726 F.2d at 1272.

45. *Id. But see* Goff v. Taylor (*In re* Goff), 706 F.2d 574, 587 (5th Cir. 1983). *The Goff* the court stated the following:

> [s]ection 522(d)(10)(E) reaches a broad array of employment benefits, and exempts both qualified and unqualified pension plans, to the extent such benefits are reasonably necessary for the support of debtor and his dependents. Given this much broader exemption of benefits available only to those making a federal election, we find no reason to doubt that ERISA-qualified pension funds are included in Section 541 if they qualify as spendthrift trust plans under state law.

Goff, 706 F.2d at 587 (footnote omitted).

Buckley (In re Swanson).[46] In *Humphrey*, the court found that alienation restrictions on a state-created pension fund did not qualify as "applicable nonbankruptcy law" under section 541(c)(2) because section 522(d)(10)(E) deals specifically with pension funds.[47] The court in *Graham* also reasoned that because "ERISA specifically provides that its provisions were not to affect the operation of other federal statutes,"[48] the restrictions on alienation in ERISA may preempt state law, but do not prevent federal bankruptcy law from including the pension benefits in the bankruptcy estate.[49]

The Fifth Circuit Court of Appeals in *In re Goff*[50] considered "the overall congressional scheme embodied in the Bankruptcy Code,"[51] as well as the legislative history in determining that "applicable nonbankruptcy law" was a limited reference to spendthrift trusts enforceable under state law.[52] The debtors in *Goff* argued that their self-employed retirement (Keogh) plans were excluded from property of the estate because the plans were qualified under ERISA.[53] The court reasoned that "applicable nonbankruptcy law" did not include federal law because Congress mentioned "'federal law' or pension laws, including ERISA, when federal as opposed to state law [was] the subject of reference."[54] The court also noted that ERISA stated that it did not affect other federal law.[55] The court found that the debtors' Keogh plans did not qualify as spendthrift trusts under state law because the plans were self-settled, and therefore the plans were property of the bankruptcy estate.[56]

In *Lichstrahl v. Banker's Trust (In re Lichstrahl)*,[57] the Eleventh Circuit Court of Appeals dealt with a debtor's interest in ERISA qualified pension plans established by the debtor's professional association. The debtor was the sole director, officer, stockholder, and for most of the time since incorporation of the association, the sole employee.[58] The association was the settlor of

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46. 873 F.2d 1121, 1124 (8th Cir. 1989).

47. *Id.* at 1124-25.

48. *Graham*, 726 F.2d at 1273. ERISA provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1988).

49. *Graham*, 726 F.2d at 1273.

50. 706 F.2d 574 (5th Cir. 1983).

51. *Id.* at 582.

52. *Id.* at 589.

53. *Id.* at 577.

54. *Id.* at 582.

55. *Id.* at 587. *See supra* notes 48-49 and accompanying text.

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

57. 750 F.2d 1488 (11th Cir. 1985).

58. *Id.* at 1489.

the plans and had the power to amend or terminate the plans.[59] The court relied on the legislative history of section 541(c)(2) and on decisions in other circuits to determine that "applicable nonbankruptcy law" referred to state spendthrift trust law.[60] The court held that the plans did not qualify as spendthrift trusts under state law because the debtor had the power to terminate the trust, even though the debtor's power was as the sole officer and director of the association.[61]

The Fourth Circuit Court of Appeals had previously addressed this issue in part in *McLean v. Central States, Southeast & Southwest Areas Pension Fund (In re McLean)*.[62] In *McLean*, the court refused to limit the term "applicable nonbankruptcy law" to "traditional" spendthrift trusts.[63] The court determined that the ERISA qualified plan in question also qualified as a spendthrift trust under state law, and therefore was excluded under section 541(c)(2).[64] Because the plan qualified as a spendthrift trust under state law, the court did not decide whether "applicable nonbankruptcy law" included ERISA.

In circuits where the courts of appeals have not addressed this issue, several federal district courts and bankruptcy courts have interpreted "applicable nonbankruptcy law" to include ERISA.[65] These courts have generally relied on the plain language of section 541(c)(2) to decide that the debtor's interest in ERISA qualified pension plans was excluded from property

59. *Id.*

60. *Id.* at 1490.

61. *Id.*

62. 762 F.2d 1204 (4th Cir. 1985).

63. *Id.* at 1207. The court noted that there was no requirement in the statute for a "traditional" trust or a definition of what might constitute a "traditional" trust. *Id.*

64. *Id.*

65. *See Mosley*, 42 Bankr. at 191; Warren v. G.M. Scott & Sons (*In re* Phillips), 34 Bankr. 543, 544 (Bankr. S.D. Ohio 1983); Clottelti v. CIBA-GEIGY Corp. (*In re* Threewitt), 24 Bankr. 927, 929 (D. Kan. 1982). *But see In re* Gribben, 84 Bankr. 494, 497 (S.D. Ohio 1988); *In re* Velis, 109 Bankr. 64, 68 (Bankr. D.N.J. 1989) *aff'd, 123 Bankr. 497 (D.N.J. 1991).*

In *Velis*, the Bankruptcy Court for the District of New Jersey reconsidered the issues decided in *Mosley*. The court in *Velis* was faced with self-settled ERISA qualified plans and found that ERISA did not always create a valid restraint on alienation. The court relied on *Graham* and *Goff* in narrowly construing "applicable nonbankruptcy law." The court stated, however, that by "interpreting § 541(c)(2) to include ERISA, as in *Mosley*, the present case is an example that ERISA anti-alienation provisions do not per se create an enforceable restriction on the transfer of a beneficial interest of the debtor in the retirement trusts." *Velis*, 109 Bankr. at 68.

of the estate.[66] The district court in *Clottetti v. CIBA-GEIGY Corp. (In re Threewitt)*[67] stated:

> [s]ince Congress did not choose to use the term "spendthrift trust" in the language of the section itself, there is no reason to suppose that when the term appears in the legislative history it should be taken as a term of art; it is more reasonable to suppose that the term should be given its ordinary, more general meaning as "inclusive of all trusts which bar creditors from reaching a beneficiary's interest."[68]

In *Threewitt*, one of the debtors had participated for over six years in an ERISA qualified pension plan created by his employer.[69] Under the plan, beneficiaries who had participated in the plan for more than five years could make "unrestricted withdrawals from the Plan, or borrow against their interest in the Plan."[70] The court considered and rejected the argument that a comparison of section 522(d)(10)(E) and section 541(c)(2) indicated a congressional intent to include pension plans in property of the estate and then allow an exemption for part of the plan.[71] The court reasoned that since section 522(d)(10)(E) exempted a wide range of pension plans, and not just plans that cannot be reached by general creditors, it did not follow that Congress intended all pension plans to become property of the estate.[72] The court did "not consider it remarkable that Congress did not bother to further complicate an already complex code by taking pains to insure that there was no overlap between Section 522(d)(10)(E) and Section 541(c)(2)."[73]

The bankruptcy court in *Mosley* considered that Congress' purpose in enacting ERISA was to remove the effects of state law from qualified pensions.[74] The court reasoned that to give a narrow interpretation to the term "applicable nonbankruptcy law" would allow state law to affect ERISA qualified plans and decided that such an intent was unlikely.[75]

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66. *Phillips*, 34 Bankr. at 545; *Threewitt*, 24 Bankr. at 929.
67. 24 Bankr. 927 (D. Kan. 1982).
68. *Id.* at 929 (citing 76 AM. JR. 2D *Trusts* § 148 (1975)).
69. *Id.* at 928.
70. *Id.* (footnotes omitted).
71. *Id.* at 929-30.
72. *Id.* at 930.
73. *Id.*
74. *Mosley*, 42 Bankr. at 191.
75. *Id.*

IV. THE INSTANT DECISION

The court in *Moore* determined that the broad language, "applicable nonbankruptcy law," could not be reconciled with a narrow interpretation that only included state spendthrift trusts.[76] The court believed that Congress intended exactly what it said: that "applicable nonbankruptcy law" meant all nonbankruptcy law, including both state and federal law.[77] Other uses of the term "applicable nonbankruptcy law" in the Code apply to federal as well as state law, and the court found no reason to interpret similar sections of the same code differently.[78] Further, the court noted that when Congress wished to refer only to state law, it did so explicitly.[79] The court explained that this interpretation of "applicable nonbankruptcy law" was consistent with its earlier decision in *McLean.*[80]

The court distinguished *Moore* from cases decided by other circuits, stating that the other cases involved self-settled trusts,[81] while the beneficiaries in this case did not have the power to control, amend, make unrestricted withdrawals from, or borrow against the Plans.[82] The court explained that decisions in other circuits were based on the legislative history of the Code, which this court found irrelevant because the language of section 541(c)(2) was clear.[83] Furthermore, this court found the legislative history of section 541(c)(2) ambiguous. The House of Representatives Report and the Senate Report interpreted the section as "continuing" and "preserving" the exclusion of spendthrift trusts from property of the estate.[84] The court found that this only indicated a congressional desire to include spendthrift trusts in "applicable nonbankruptcy law," not to limit the meaning of that term.[85]

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76. *Moore,* 907 F.2d at 1477.

77. *Id.*

78. *Id.* at 1477-78.

79. *Id.* at 1478. *See* 11 U.S.C. §§ 109(c)(2), 522(b)(1), 522(b)(2) (1988).

80. *Moore,* 907 F.2d at 1478. *See supra* notes 62-64 and accompanying text. The court in *McLean* was not faced with the issue of whether "applicable nonbankruptcy law" included ERISA because it determined that the ERISA plan in question qualified as a spendthrift trust under state law. *McLean,* 762 F.2d at 1207.

81. *Moore,* 907 F.2d at 1478.

82. *Id.*

83. *Id.* at 1478-79. The court cited Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989), and Burlington Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987), for the rule that the court did not have the "authority to limit the scope of a clear statutory term by recourse to the views of a legislative subgroup." *Moore,* 907 F.2d at 1479.

84. *Moore,* 907 F.2d at 1479. *See supra* note 41 and accompanying text.

85. *Moore,* 907 F.2d at 1479.

Finally, the court determined that ERISA contained enforceable restrictions on transfer and there was a strong public policy against alienation of ERISA plan benefits.[86] Since ERISA contained enforceable restrictions on transfer, it constituted "applicable nonbankruptcy law" under section 541(c)(2).[87] Therefore, it would be enforceable against the trustee in bankruptcy.[88] The court reasoned that this holding prevented the potential problem of a trustee in bankruptcy disqualifying a plan from tax exempt status by requiring the turnover of a single participant's interest.[89]

V. RECENT DECISIONS

Moore has already affected how other courts interpret "applicable nonbankruptcy law." The Sixth Circuit Court of Appeals in *Forbes v. Lucas (In re Lucas)*[90] recently considered whether ERISA qualified as "applicable nonbankruptcy law." The court stated that "[i]t is an axiom of statutory construction that resort to legislative history is improper when a statute is unambiguous,"[91] and found that the language of section 541(c)(2) is unambiguous.[92] The court was persuaded by the reasoning in *Moore* that including ERISA within the meaning of "applicable nonbankruptcy law" was consistent with the plain language of the statute and that the legislative history was inconclusive.[93] The court further found that ERISA did create an enforceable restriction on alienation.[94] The court therefore agreed with *Moore* that "applicable nonbankruptcy law" includes ERISA and that this result harmonized the Bankruptcy Code and ERISA.[95]

In *John Hancock Mutual Life Ins. Co. v. Watson (In re Kincaid),*[96] the Ninth Circuit Court of Appeals again considered whether ERISA qualified as

86. *Id.* at 1480.
87. *Id.*
88. *Id.*
89. *Id.* at 1481. This problem could arise because tax exempt status depends upon the plan being qualified under ERISA. The plan must contain the required anti-alienation provisions to be qualified under ERISA, but if these provisions are violated the plan may lose its qualification. *See also* John Hancock Mutual Life Ins. Co. v. Watson (*In re* Kincaid), 917 F.2d 1162, 1170 (9th Cir. 1990) (Fletcher, J., concurring); *McLean,* 762 F.2d at 1206.
90. 924 F.2d 597 (6th Cir. 1991).
91. *Id.* at 600.
92. *Id.* at 601.
93. *Id.*
94. *Id.* at 603.
95. *Id.*
96. 917 F.2d 1162 (9th Cir. 1990).

"applicable nonbankruptcy law" under section 541(c)(2). The court admitted there was some "incongruity in the notion that only ERISA's anti-alienation provisions offer protection until bankruptcy, and only state spendthrift provisions do so in bankruptcy."[97] The court reaffirmed its decision in *Daniel v. Security Pacific Nat'l Bank (In re Daniel)*[98] that "applicable nonbankruptcy law" only encompassed spendthrift trusts, but found that the plans in question qualified as spendthrift trusts under state law.[99] Judge Fletcher concurred in the judgment, but expressed doubts about the validity of *Daniel*.[100] Judge Fletcher agreed with *Moore* that the language "applicable nonbankruptcy law" clearly referred to all nonbankruptcy law and there was no reason to resort to the legislative history.[101]

The Bankruptcy Court for the Western District of Texas in *In re Majul*[102] also considered the meaning of "applicable nonbankruptcy law." The debtors were beneficiaries of ERISA qualified pension plans created by the closely-held professional corporation of one of the debtors.[103] The court stated that the facts closely resembled *Brooks v. Interfirst Bank (In re Brooks)*[104] and *Goff*, decisions by the Fifth Circuit Court of Appeals.[105] The bankruptcy court considered United States Supreme Court, circuit courts of appeal and bankruptcy court cases decided after *Goff* and *Brooks*.[106] The court believed that *Guidry* indicated a broad construction of the anti-alienation provisions found in section 1056(d)(1) of ERISA, and indicated "a policy prohibition against assignment or alienation of pension benefits."[107] The court also agreed with *Moore* that "applicable nonbankruptcy law" is clear and there was no need to resort to the legislative history, which was "at best, cloudy, and that Congress [knew] the difference between 'state law' and

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97. *Id.* at 1166.

98. 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1985).

99. *Kincaid*, 917 F.2d at 1166, 1168.

100. *Id.* at 1169.

101. *Id.* Judge Fletcher also found that the purpose of ERISA and the language used in ERISA "indicate that it properly constitutes 'applicable nonbankruptcy law.'" *Id.* at 1169-70. Judge Fletcher found that the holding in *Daniel* created a clash between the Bankruptcy Code and ERISA. This clash raised a problem by severely disrupting the protections granted by ERISA. As a result, the judge believed that *Daniel* should be reconsidered. *Id.* at 1170.

102. 119 Bankr. 118 (Bankr. W.D. Tex. 1990).

103. *Id.* at 119.

104. 844 F.2d 258 (5th Cir. 1988) (reaffirming the court's earlier decision in *Goff*).

105. *Majul*, 119 Bankr. at 119.

106. *Id.*

107. *Id.* at 121-22.

'applicable nonbankruptcy law.'"[108] The court reasoned that the Bankruptcy Code and ERISA could best be harmonized by including ERISA as "applicable nonbankruptcy law" under section 541(c)(2). The court disagreed with *Goff* and *Brooks*, and held that ERISA qualified pension plans, even when self-settled, should be excluded from property of the bankruptcy estate.[109]

VI. CONCLUSION

The reasoning used by the Fourth Circuit Court of Appeals is clear and compelling. The term "applicable nonbankruptcy law" as found in section 541(c)(2) of the Code should mean exactly what it says and a court should not consider any legislative history to the contrary. Further, references in the legislative history to spendthrift trusts only indicate an intention to include spendthrift trusts within "applicable nonbankruptcy law," not an intention to limit that phrase.[110] This interpretation preserves Congress' intent about both ERISA and the Bankruptcy Code. Congress intended to remove the effects of state law from qualified pensions.[111] Making state law the benchmark for determining whether a trust is excluded from property of the estate would give state law control over the status of ERISA qualified trusts and undermine the congressional intent to place pension plans under federal control.[112] The argument relied on in *Graham* that ERISA is explicitly made subject to contrary federal law, and the Bankruptcy Code therefore controls, fails when section 541(c)(2) is given its clear meaning. ERISA creates a restriction on alienation that is enforceable outside of bankruptcy.[113] There is no conflict between the Bankruptcy Code and ERISA if "applicable nonbankruptcy law" is given its common meaning because the Bankruptcy Code recognizes the restrictions on alienation created by ERISA.

A comparison of section 541(c)(2) and section 522(d)(10) also reveals that a narrow construction of "applicable nonbankruptcy law" is not required. The analysis in *In re Threewitt*, that section 522(d)(10) exempts a wide range of benefits, is helpful.[114] The Bankruptcy Code is complicated, and a slight overlap between two sections should not affect the plain language of either section.

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108. *Id.* at 123 (footnote omitted).

109. *Id.* at 124.

110. *See supra* notes 41, 84-85 and accompanying text.

111. *See supra* notes 27-29 and accompanying text.

112. *See supra* notes 74-75 and accompanying text. *See also* Note, *Corporate Pension Plans as Property of the Bankruptcy Estate*, 69 MINN L. REV. 1113, 1120 (1985).

113. *See Guidry*, 110 S. Ct. at 685.

114. *See supra* notes 71-73 and accompanying text.

The Fourth Circuit Court of Appeals recognized that many of the contrary decisions involved self-settled trusts.[115] Those courts presumably believed that it was not equitable to exclude the trust from property of the estate when the debtor had almost complete access to the corpus of the trust. This approach does not supply a reason to construe a statute narrowly when it is clear on its face. Discussing a similar point, the Supreme Court in *Guidry* stated that "there may be a natural distaste for the result we reach here. The statute, however, is clear."[116]

Excluding self-settled pension plans from property of the estate appears unfair because the beneficiary has a large amount of control over the trust. If Congress does not like this result, Congress can change the statute so that self-settled ERISA qualified plans are part of the bankruptcy estate.[117] The self-settled pension plans could then be exempted from property of the bankruptcy estate to the extent reasonably necessary for support of the debtor or the debtor's dependents under section 522(d)(10). Similarly, if Congress does not want to exclude any ERISA qualified plans from property of the bankruptcy estate, Congress can change the phrase "applicable nonbankruptcy law" to "applicable state law."[118] In either of these cases, Congress would also need to create an exception in ERISA's anti-alienation provisions for any funds that are not excluded or exempted from property of the bankruptcy

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115. *See supra* note 81 and accompanying text.

116. *Guidry*, 110 S. Ct. at 688 (referring to 11 U.S.C. § 1056(d)(1) (1988 & Supp. I 1989) of ERISA). The same rationale applies to the phrase "applicable nonbankruptcy law" under § 541(c)(2).

The Bankruptcy Court for the Western District of Texas has noted that:

> It also seems incongruous that an imprisoned embezzler in *Guidry* received protection of his pension plan benefits, while an innocent, but insolvent, debtor in bankruptcy would not receive the ERISA anti-alienation protection. Surely Congress did not intend, and the United States Supreme Court would not permit, such inconsistent results in light of ERISA's policy objectives.

In re Majul, 119 Bankr. 118, 123 n.5 (Bankr. W.D. Tex. 1990).

117. Section 541(c)(2) could be amended to read as follows:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law (including the Employee Retirement Income Security Act of 1974) is enforceable in a case under this title provided, however, that a restriction on the transfer of a beneficial interest in a self-settled pension plan will not be enforceable under this title.

See supra note 14 and accompanying text for the text of § 541(c)(2) in its present form.

118. Benefits under an ERISA qualified pension plan could then be exempted out of property of the bankruptcy estate to the extent reasonably necessary for the support of the debtor or the debtor's dependents under § 522(d)(10).

estate so ERISA qualified plans do not lose qualification because of the transfer of the funds.[119]

The purpose of ERISA will be better served if the restrictions on transfer found in ERISA qualified plans continue to be enforceable in bankruptcy, as *Moore* held. Congress chose to protect a source of income so it will be available upon retirement.[120] Including ERISA within "applicable nonbankruptcy law" will continue the protection of that source of income. Creditors can not gain access to qualified pension benefits in State law proceedings,[121] and the result should not be different under the Bankruptcy Code.

Moore should mark the beginning of a new trend in the interpretation of section 541(c)(2) of the Bankruptcy Code. The result in cases dealing with self-settled ERISA pension plans may seem inequitable, but the statute is clear. Congress, and not the courts, should make any exception to the clear language of the statute.[122]

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119. Congress needs to create an exception in ERISA's anti-alienation provisions since many courts are interpreting "applicable nonbankruptcy law" to not include ERISA. If every circuit court of appeals followed *Moore*, there would be no need for any statutory changes to ERISA unless § 541(c)(2) of the Bankruptcy Code is changed.

120. *See Guidry*, 110 S. Ct. at 687.

121. *See supra* notes 24-36 and accompanying text.

122. *See supra* note 35 and accompanying text.