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THE GILDED GATES OF PENSION PROTECTION: AMENDING THE ANTI-ALIENATION PROVISION OF ERISA SECTION 206(D)

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"[I]f a lie may do thee grace, I'll gild it with the happiest terms I have."

-- William Shakespeare, The First Part of King Henry the Sixth, act 5, sc. 4

***380** Congress designed the Employee Retirement Income Safety Act (ERISA) to protect pension funds from dissipation due to actions like employer mismanagement and/or misconduct or even the employee's own error in financial judgment. ERISA, in trying to achieve the goal of retirement income security, enacted the anti-alienation provision in section 206(d), which specifically prohibits the invasion of pension accounts with very few exceptions. The Internal Revenue Service also requires a tax-qualified plan to adhere to the same prohibition. This protection is designed to lead to an economically stable future for the participant. It has, however, proved in operation to be broader than is equitable and has collided with other crucial social and legal policies. In fact, the anti-alienation provision provides gilded gates behind which deceit and other forms of abuse can occur. By insisting that pension plans are sacrosanct in any and all circumstances, the anti-alienation provision prevents victims of torts and crimes, as well as honest creditors, from recovering compensation from these pension accounts. Effectively, this sacrosanct treatment shifts the economic burden from pensioner, who is protected behind the ERISA gilded gates, to the innocent victim. The innocent victim, who suffers economic strain and indignity and is unable to obtain recourse from a pension account, can become that burden to society ERISA sought ultimately to prevent. By reevaluating the purposes behind ERISA's section 206 anti-alienation provision, and the statutory exceptions, this Article posits that in light of the recent insistence and amendment to restrict like abuses under the Bankruptcy Code, the time is ripe to implement restrictions on the anti-alienation provision, thereby bringing ERISA's anti-alienation provision the integrity of a more equitable and realistic application.

I

ERISA

A. ERISA: Purposes and Policies

Retirement is a concept born from increased urbanization and longer lifespans. No longer does grandfather stop driving the tractor and remain on the homestead to advise son and grandson who continue to operate the family farm. Today, many retirees maintain economic independence from their families, and while reducing their production levels, strive to continue their pre- retirement consumption levels. Statistics demonstrate that families ***381** no longer support retirees, who rely on Social Security, pensions, savings, part- time employment, welfare benefits and charity. [FN1] Social Security replaces pre-retirement income at a higher rate for low-income bracket individuals because the replacement rate for a minimum wage earner is 71%. [FN2] However, Social Security is insufficient to maintain wealthier standards of living, where it only replaces approximately 25% of former earnings. [FN3] Prior to the vote adopting ERISA, Senator Jacob Javits stated:

[T]his legislation will make better pension plans and undeniably, better pension plans will make a significant contribution to the economic security of large numbers of older people who need a much more realistic level of living in retirement. Even a substantially liberalized Social Security could not do the job private pensions can do.

Right now--even with recent substantial increases in its benefits--social security is just barely enough to support

people, even at poverty levels. Nor do people save or invest enough money over a lifetime. The result is they cannot really cope with soaring food costs or any other forms of inflation. [FN4]

The private pension plan system insures that higher wage earners are able to continue lifetime consumption levels while in retirement. [FN5]

***382** The private pension plan system, however, has had a checkered past. Prior to federal regulation, many retirees were denied the benefits on which they had relied. [FN6] Many retirees' hopes of receiving retirement benefits were frustrated because many employers designed the plans as conditional gifts and could thus deny even a vested employee benefits should they deem that the economics of the situation warranted it. Employers contracted dispensed pension benefits at that time under the gratuity theory of pensions. [FN7] This high probability of forfeiture to so many employees threatened to strain the economy with individuals who would have to seek governmental support when their planned nest egg failed to hatch. In response to those failed pension promises, and in an effort to bring uniformity to the pension system, Congress passed the Employee Retirement Income Security Act of 1974 (ERISA). [FN8] ERISA added a measure of control over plans through a combination of prohibitions, disclosures, and fiduciary responsibilities which were all aimed at providing security for employees and recourse if the employer or other fiduciary violated the rules. The statute provides a series of rules for the employer regarding vesting, [FN9] participation, [FN10] funding, [FN11] disclosure, ***383**[FN12] fiduciary responsibilities [FN13] and remedial provisions. [FN14] Congress designed other rules, like the anti-alienation provision, [FN15] to protect the employee participant from his or her own consumption tendency, and from others trying to punish the participant in his or her pension plan. [FN16] The object of the statute is to protect plan participants and beneficiaries. [FN17]

Some describe ERISA's regulatory provisions as paternalistic, because the parties lose the freedom to bargain or to make concessions with respect to the provisions. For example, the employer and employee cannot agree to longer vesting periods than the statutory minima and they cannot agree to violate the anti-***384** alienation provisions. The congressional history elaborates the benefits sought through ERISA's paternalistic approach:

Its most important purpose will be to assure American workers . . . look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society. The enactment . . . is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are in [sic] integral part of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers. [FN18]

This sound social policy behind congressional involvement is easily understood: We do not want elderly people living in the street or entire generations of retirees forced to depend on social programs that would be strained beyond capacity. In fact, ERISA expressly excludes from its coverage certain plans that are perceived not to threaten the policies ERISA was designed to protect. [FN19] Although the policies underlying ERISA's provisions ***385** are understandable, the anti-alienation provision in its current form may overreach the policy and may directly conflict with other social policies, such as preventing unjust enrichment.

***386** B. ERISA Section 206(d)--Anti-Alienation: Purposes and Policy

The anti-alienation provision of ERISA section 206(d)(1) requires that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." [FN20] This simply means that the plan account cannot be accessed except under prescribed statutory provisions. Additionally, "[p]resent law encourages employers to establish retirement plans for their employees by granting favorable tax treatment where plans qualify by meeting nondiscrimination and other rules set forth in the Internal Revenue Code." [FN21] Under Internal Revenue Code § 401(a)(13), a qualified plan not only must reflect the anti-alienation language of ERISA itself, but also must unequivocally prohibit any access to plan funds by creditors of participants. [FN22] Furthermore, under Treasury regulations, "a trust will not be qualified unless the plan of which the trust is a part provides that benefits 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." [FN23]

In this way, the Internal Revenue Code (I.R.C.) supports investment in pension plans, encouraging the taxpayer to

defer wages that would be taxed at the higher bracket during the individual's production years, into pension income taxed at a lower rate in retirement years. [FN24] This incentive supports the ERISA policy by favoring those individuals who defer these wages and save for their own retirement.

In order for a plan to be a qualified plan, [FN25] this provision must be both stated in the plan and adhered to operationally. Indications ***387** of the social policy behind the provision appear in congressional records and include ensuring retirees have adequate income at retirement. [FN26] Congress stated the proscription was codified to "ensure that the employee's accrued benefits are actually available for retirement purposes." [FN27] Congress did not want the pension touched--even by the potential retiree. Neither the employer nor the employee can assign or alienate the benefits. The provision's "most important purpose" is to "assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." [FN28]

Most experts believe the tax incentive, in concert with the anti-alienation provision, protects retirees not only from outside creditors and irresponsible employers, but also from their own financial foolhardiness. [FN29] Often, legal and economic experts recognize that people will choose current consumption over future savings, ***388**[FN30] choosing the immediate gratification over the delayed. Scholars and economists also recognize consumers are likely to be deluded or in error about what their future consumption requirements will be in retirement. [FN31] ERISA, and its mirrored tax benefits within the IRC, inspire individuals who might otherwise be urged toward current consumption and later forced into welfare status to choose pension contributions instead.

In recognition of this legislative purpose of ERISA and the anti-alienation provision in particular, courts have interpreted this provision quite broadly, using the few "cryptic" [FN32] indications of congressional intent as evidence of the broad nature of the provision, and thereby limiting any and all voluntary or involuntary encroachments [FN33] on the pension account.

II

Section 206(d)(2)--Exceptions to ERISA Section 206(d) in the Original Enactment

Upon enactment, Congress did choose to narrow the scope of section 206(d) through the limited use of a qualified loan on accrued pension benefits and a limited allowance of alienation of received benefits. The few initial exceptions to section 206(d) highlight the breadth of the anti-alienation provision.

***389** A. Section 206(d)(2)--The Loan Exception

A loan, "secured by the participant's accrued nonforfeitable benefit," is not treated as an assignment or alienation under ERISA section 206(d)(2), [FN34] if the loan is exempt from the prohibited transaction and distribution rules, or if it would be exempt if the participant were a qualified person. [FN35] The legislative history to the provision merely states, "[v]ested benefits may be used as collateral for reasonable loans from a plan, where the fiduciary requirements of the law are not violated." [FN36] Fiduciary requirements account for numerous requirements throughout ERISA. [FN37] Generally, ERISA section 406(a)(1)(B) prohibits loans from plans, [FN38] but ERISA section 408 makes an exception to the prohibition for certain secured loans. [FN39] This compromise can add ***390** value to the pension benefit by assuring that participants can access the funds under well-controlled circumstances rather than having to wait for decades to benefit from what some consider a sacrifice. [FN40]

B. Section 206(d)(2)--The 10% Limit on Alienation of Received Benefits-- Protection in Perpetuity

The original ERISA statute also provided another narrow exception to the anti-alienation provision. Section 206(d)(2) allows "any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment . . . ." [FN41] The purpose behind this exception is unclear in the legislative texts. [FN42] The IRC mimics ***391** this provision and provides, pursuant to I.R.C. § 401(a)(13), an exception which states that, in essence, a plan will maintain its qualified status if it provides "any voluntary and revocable assignment of not to exceed ten percent of

any benefit payment made by any participant who is receiving benefits under the plan." [FN43] Nevertheless, since only 10% of a benefit in pay status can be assigned, it seems that Congress intended to protect most of the pension funds in perpetuity. [FN44] Some courts have interpreted this differently by essentially ignoring the ten percent limit, holding that once the funds leave the account they are no longer immune to alienation under ERISA. [FN45]

***392** Considering the seemingly perpetual protection under the proscribed 10% exception to anti-alienation for benefit payments, a strong argument exists that Congress intended plan amounts to be protected in perpetuity. Presumably, this exception is a method to allow some freedom to the pensioner while restricting the pensioner and other possible third party claimants from pouncing on the payments at a time when the retiree needs it most. Allowing those third party claimants to wait outside the gilded gates of ERISA's protection to gain access to funds once the pensioner is in pay status would seem to defeat the purpose of ERISA. The absolute protection of the anti-alienation rules within the gilded gates may, however, force this type of action as a last resort for victims of the participants' actions.

III

Exceptions to Section 206(d) in Later Amendments

Some courts have unhinged the gilded gates of ERISA to achieve a just result in egregious circumstances. Judicial activism has resulted in congressional action in the form of amendments to the anti-alienation provisions in two notable circumstances.

A. Section 206(d)(3)--The QDRO Exception

Prior to the enactment of section 206(d)(3), multiple courts refused to permit the sanctity of pension funds to allow a participant to escape his or her responsibilities under domestic support orders. Courts agreed that an exception to the rule to allow payment to spouses and children would not offend the policies of ERISA, and an absence of the exception would actually actively negate the social policy of continuing support for the retiree's dependents. In essence, the exception would support the intent of ERISA to "combat increases in welfare payments resulting from an inability to compel payment of support obligations from solvent but unwilling parents." [FN46]

One such case was Cartledge v. Miller, [FN47] in which for over twenty years the husband failed to provide support for his wife and children in violation of court orders directing him to do so. He was jailed for the offense, and his failure to provide support ***393** led to his dependents relying upon public assistance for their support. The social service department tried to garnish his pension account in order to recoup the payments they made to his dependents. [FN48] When payment was sought from his pension, the plan refused to comply, citing the anti-alienation provision. [FN49] The court held that ERISA did not preclude execution of a valid court order of support for wife and children who were not third-party creditors but protected directly under ERISA. [FN50] The court felt that this result was an obvious extension of ERISA's desire to protect not only the participant but also his or her dependents from burdening social programs. [FN51] The court also held that preemption [FN52] did not provide a bar to this relief since preemption should not be used to thwart legitimate state police powers. [FN53] In essence, the court reasoned that although ERISA preempts most state laws, [FN54] it did not preempt the court order and actually aligned with state police powers that uphold the common law responsibility to support one's dependents and remained internally consistent by turning the economic burden to the responsible party, thereby limiting externalities.

In 1984, six years after that rationale was espoused in Cartledge v. Miller, Congress cured the statutory oversight and codified the judicially implied exception in section 206(d)(3). [FN55] The congressional ***394** report simply mentions the judicial support of state police powers over domestic relations and hints that ERISA's purpose includes the support of dependents by indicating IRS approval of compliance with a court order for support over and above the anti-alienation provision. [FN56]

This exception logically flowed from ERISA's own policy goals to economically protect not only the pensioners, but also their ***395** dependents, from burdening the welfare system. This was a laudable exception considering the

potential abuse that could be visited upon a family and dependents.

B. Section 206(d)(4)--The Fiduciary Breach of Trust Exception

The courts engaged in twenty years of judicial activism before Congress created another exception to the anti-alienation rule. The courts attempted to offset pension benefits for those who, as fiduciaries, were guilty of a breach of duty to the fund. Following general fiduciary law, ERISA section 409(a) required fiduciaries to plan to "make good to such plan any losses to the plan resulting from each such breach . . . and . . . be subject to such other equitable or remedial relief as the court may deem appropriate." [FN57] The anti-alienation provision, however, long disallowed offsets against the fiduciaries' own pensions, even in the face of a breach of duty to the plan itself. Even if other assets were not available to make the plan whole, the fiduciary's pension account was immune, and could not be used to assist in making the plan whole.

In Crawford v. La Boucherie Bernard, Ltd., [FN58] owner-trustees to the company's pension plan stole, for the benefit of their other business interests, nearly one million dollars from the plan over five years. The victims, fifteen plan participants, obtained an equitable judgment for that amount and sought to offset it from the trustees' own pensions. Using the legislative history of ERISA section 409, [FN59] which alluded to the law of trusts in allowing full use of legal and equitable remedies to compel the trustee to make good against the breach, including payment from his or her own trust share, [FN60] the court supported the offset. [FN61] The court ***396** recognized the obvious inequity of interpreting the anti-alienation provision so as not to allow an offset: "A contrary interpretation would permit trustee wrongdoers to benefit from their misdeeds at the expense of those whom ERISA was designed to protect." [FN62] The Crawford court was willing to imply an exception where the plan was the direct victim. The court used the plan assets of the perpetrator to preserve the plan assets of the victim, with the plan at all times being the focal point. This approach clearly supports ERISA's philosophy of plan security.

Three years following Crawford, the Supreme Court examined the anti- alienation provision as it applies to employee criminal acts against the employer in Guidry v. Sheet Metal Workers National Pension Fund. [FN63] Here, the victim was not the plan but the employer. The preservation stance of ERISA is not to make an employer whole. The lower court was willing to make an exception, but the Supreme Court reiterated its strict adherence to the anti- alienation rule. The issue before the Court did not concern fiduciary breach of duty to a pension plan. In Guidry, a union official embezzled $275,000 from the union, not the union pension plan, and the union, as employer, attempted to offset the official's pension to collect restitution. [FN64] The Supreme Court refused to allow the offset and stressed that the congressional purpose of the anti-alienation provision was not only to protect the pensioner, but his or her dependents, and loss of the benefits to the innocent dependents would be inequitable. [FN65] It also distinguished the issue before it from one where the fiduciary steals from the plan itself, indicating the decision might be otherwise if the defendant "breached any fiduciary duty to the pension plan [ ]." [FN66]

Some courts have focused on the Guidry Court's admonition against courts acting as legislators, and refused to carve out an exception where the plan itself was injured by a fiduciary. In Herberger v. Shanbaum, [FN67] the trustee was found to have breached his fiduciary duty to the plan and to be liable to it ***397** under ERISA section 409. The newly appointed plan trustee sought to offset the retired defendant's pension for the $168,000 judgment. [FN68] In acknowledging the Supreme Court's reservation of the question of fiduciary breach of duty to the plan, [FN69] the Herberger court refused to rule in favor of an offset, citing the Supreme Court's admonishment against courts acting the part of legislator as the determinative part of the opinion to which they were compelled to follow. [FN70]

Other courts focused on the Guidry court's differentiation between stealing from the employer and stealing from the plan itself. [FN71] In Pension Benefit Guaranty Corp. v. Solmsen, [FN72] the president of the corporation breached his fiduciary duty to the plan by failing to deposit nearly $190,000 of employer and employee contributions into the plan. As a result of the breach, for one part of the plan, "$75,963 was [no longer guaranteed, so] the beneficiaries, absent reimbursement from this action, [would] not recover the benefits that would have come from these lost assets." [FN73] The Solmsen Pension court rejected the Herberger rationale, finding it in error for largely ignoring the Guidry Court's differentiation between employee and fiduciary misconduct. Where the trustee had embezzled from the plan itself, the broad interpretation given to section 206(d) in the holding in Guidry did not apply, so the court allowed the offset. [FN74]

The Third Circuit case of Coar v. Kazimir [FN75] represents a striking example of fiduciary breach of duty that ultimately inspired congressional codification. In Coar, a judgment of over $25 million was obtained by the plan against the former trustee for taking kickbacks in exchange for purchasing speculative investments ***398** on behalf of the fund. [FN76] Following Crawford, and utilizing Guidry's dictum differentiating between stealing from the employer and stealing from the plan itself, the court in Coar stated, "[W]e read section 206(d)(1) and, by extension Guidry, as shielding only the beneficiaries' interest under the pension plan from third-party creditors." [FN77] Coar added: "[P]ermitting the set-off in this case best implements Congress's purpose to guarantee pension beneficiaries the broadest protection possible against fiduciaries who breach their fiduciary duties to a pension fund and thereby cause it losses." [FN78]

Eventually, Congress enacted section 206(d)(4), which provides, in part, that the anti-alienation provision,

shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if --

(A) the order or requirement to pay arises --

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle. [FN79]

***399** The implied exception rationale in Coar, stressing that wrongdoers should not profit from their wrongs, easily merged with the congressional intent to protect pension plans. [FN80] The legislative history to the passage of this exception seems to leave open the possibility that other circumstances could warrant an exception. [FN81] Like the QDRO exception, the breach of trust exception aligns with ERISA's own purposes and policy goals and places the economic burden on the logical party. If the fiduciary injures the plan, endangering the sacred protection of retirement benefits to others, that fiduciary is liable under ERISA itself, so the obvious remedy is to reimburse the plan directly from the funds of the breaching fiduciary.

"This is adding insult to injuries."

-- Edward Moore

IV

Abuses Remaining Under ERISA's Broad Section 206(d)

Numerous abuses under the anti-alienation provision are not so easily cured and remain, sauntering proudly within the provisions's broad gilded gates and parading around the provision's limited pillars of exceptions. Lower courts have tried to carve out two additional exceptions to the anti-alienation rule. One for the employee participant's misconduct and the other for bankruptcy cases. The Supreme Court has refused to uphold these ***400** exceptions as inherently contradictory to ERISA, although these cases have conflicted with other important social policies including the policies of not allowing a wrongdoer to profit from his or her wrong [FN82] and the policy of equitably reimbursing bankruptcy creditors. [FN83] The Supreme Court and Congress have not yet addressed other abuses when the anti-alienation provision is used to escape payment of civil and criminal penalties. This Article now examines the questions of what makes these issues of employee misconduct and bankruptcy different from the QDRO and fiduciary breach exceptions that Congress responded to, and what is the reality of the status quo.

A. The Repudiated Judicially Implied Exceptions

1. Employee Criminal Misconduct

Prior to the Supreme Court's ruling finding no implied exception to the anti- alienation provision for employee

misconduct, [FN84] a number of courts examined the problem. [FN85] Four courts determined that no exception could be made even in the face of especially egregious circumstances. In one of the earliest cases, Helmsley-Spear, Inc. v. Winter, [FN86] the employee was charged with a number of fraudulent activities, including falsification of invoices, misappropriation of checks, and the acceptance of kickbacks from the employer's suppliers at an alleged cost to the employer of $665,549. [FN87] He was convicted of grand larceny for the theft of two checks totaling $8,584. [FN88] The employer sought attachment of the employee's pension account, but the appellate court refused to make an exception to the anti-alienation provision, largely focusing on the powerful non-forfeiture intent behind ***401** ERISA. [FN89] Any attempt to use the employee's misconduct as an excuse to access such employee's pension account collided with ERISA's disdain for "bad boy" clauses (or, more appropriately, "bad person" clauses). The courts felt that carving out an exception under the anti-alienation rules for employees' misconduct would thwart the policies against "bad boy" clauses.

Specifically, ERISA was implemented, in part, to protect "bad boy" employees from forfeiture provisions once elemental to pension plans. [FN90] In these provisions, employers could deny benefits due to employee misconduct. To interpret the anti-alienation provision to include such a misconduct exception would violate Congress's intent to protect and secure the vested pension from employer whim. In Vink v. SHV North American Holding Corp., [FN91] the court clearly stated this concern, citing the overwhelming intent in ERISA via the vesting [FN92] and anti-alienation provisions to avoid the "bad boy" forfeiture result. The court recognized the result was required within the limits of the statute, even if "faithful employees [would] suffer at the expense of the faithless ones." [FN93] The fact of the matter is that employee misconduct that is grounds for a criminal conviction is not a result of employer whim.

Vink added an additional argument, stating that an exception to the anti-alienation provision would harm innocent dependents of the guilty employee. [FN94] The Sixth Circuit, in United Metal Products Corp. v. National Bank of Detroit, agreed with the earlier decisions, stressing that the intent of ERISA was to protect the dependents, who were quite blameless, from losing their benefits. ***402**[FN95] The court declined to create an exception, although it called the case before it, "an almost ideal case for creation of an implied exception," [FN96] because the employee had embezzled more than $440,000 and fled, harming the company's profit and her co-workers and leaving only a pension behind. [FN97]

The arguments against creating an employee misconduct exception to the anti- alienation rule are that such an exception could create an end run around the "bad boy" policies and would not protect the funds for innocent dependents. Although these arguments seem subordinate where an employee places commissions obtained through fraudulent transfers into the pension fund, the court in Ellis National Bank v. Irving Trust Co. [FN98] still determined that no exception existed. The court ruled the company could not take the funds back out of his pension since ERISA protected retirement benefits to workers and their families. [FN99] The court determined such an exception "not only would be harmful to employees' dependents, but could also result in increasing the number of public charges." [FN100] Again, courts were reluctant to narrow the anti-alienation provision in light of the strong public policy for economic stability in retirement and against the possibility that implying a fraud or criminal conduct exception would create a slippery slope, [FN101] bringing a flood of suits that might threaten the certainty of the stream of retirement income Congress sought to protect. The Ellis court went on to stress that the QDRO exception, codified under section 206(d)(3), [FN102] supported the general protection of retirees and their dependents, and also allowed state police powers to protect dependents where a fraud exception would not fall under state police powers. [FN103]

The Supreme Court agreed with the lower courts' policy rationale and put to rest any judicial attempt to narrow section ***403** 206(d), resulting in the current sacred treatment afforded pension benefits. In Guidry v. Sheet Metal Workers, [FN104] the union as employer attempted to offset Guidry's pension to collect $275,000 restitution for his embezzlement from them. The Court refused to allow such an offset and stated: "Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." [FN105] The Court felt that even if a plan participant was a tortfeasor or a criminal, the innocent beneficiaries of the plan should not be penalized. [FN106] The retiree also benefits by hiding within the gilded gates with the innocent dependents. The Court, therefore, expanded its protection to a universe of dependents in concert with the stated legislative history. [FN107]

The Court validated the lower courts' concerns that to rule otherwise would endanger the protection ERISA afforded to pensioners, although it did not specifically address the protection from "bad boy" forfeiture provisions. [FN108] The Court did indicate section 206 was to restrict creditors from dissipating retirement funds in a vital effort to insure economic stability for retirees over any other social policy and doing so would risk a slippery slope into annihilation of the provision. [FN109]

2. Bankruptcy

ERISA's section 206(d) anti-alienation rule also protects the pension account in bankruptcy proceedings. In Patterson v. Shumate, [FN110] the Supreme Court firmly resolved the judicial debate as ***404** to whether an exception to anti-alienation of pension funds existed for inclusion in the bankruptcy estate through examination of bankruptcy code and ERISA language. [FN111] The Patterson Court held that pension funds were subject to the anti-alienation provision of ERISA as "applicable non-bankruptcy law" [FN112] via the Bankruptcy Code's § 541(c)(2), [FN113] and therefore were not included in the bankruptcy estate.

The breadth of the opinion and its effects on debtors and creditors is obvious. However, for purposes of this Article, the opinion's dearth of policy discussion is the critical fact. [FN114] The Court reflected on its reason for not addressing policy, stating, "In any event, to the extent that policy considerations are even relevant where the language of the statute is so clear, we believe that our construction of § 541(c)(2) is preferable to the one petitioner urges upon us." [FN115] The sole policy argument contained in Justice Blackmun's opinion reasoned that if

a creditor could not reach a debtor-participant's plan right or interest in a garnishment or other collection action outside of a bankruptcy case but indirectly could reach the plan right or interest by filing a petition . . . [the creditor could use that right] to place the debtor in bankruptcy involuntarily. [FN116]

***405** Other commentators have submitted that an exception for bankruptcy would lead to a slippery-slope and eventual evisceration of the intended congressional protection of ERISA. [FN117]

3. The Difference Between the Accepted and Repudiated Exceptions

Although the policies of the QDRO and fiduciary fraud exceptions remove some of the protection that the anti-alienation provision affords pensioners, they ultimately align with ERISA's inherent and obviously intended policies to protect dependents and protect plans through punishment of fiduciary breach. In both situations, the dependents were the direct subject of the violation and faced reduced support. In the QDRO exception, it is as if they received a prepayment on the benefits to which they were entitled. Where the plan itself is assaulted, the protection of those dependents is again at the core.

The employee criminal misconduct exception, however, seems to revolve around the fact of punishment for the employee through his pension account. Since others, like dependents, may have an interest in these accounts, they may indeed need additional protection from this type of employee. A participant in a pension plan who goes bankrupt may demonstrate the type of fiscal irresponsibility from which ERISA needs to protect dependents.

B. The Reality of the Status Quo--Mayhem at the Gates

1. Judicial Exceptions

Currently, pensioners can protect ERISA-covered pensions from creditor garnishment or in bankruptcy. There is no criminal misconduct exception, but the courts are still in turmoil about whether exceptions to the anti-alienation provisions are appropriate ***406** for criminal restitution [FN118] outside of the employer/employee relationship. The courts and the public also severely question the justice of the anti-alienation provisions in protecting accounts from being reached to satisfy civil damage awards.

a. Criminal Restitution--Split in Circuits

In a New Jersey case reminiscent of Guidry, the defendant, Pulasty, had embezzled more than $600,000 from the New Jersey State Firemen's Association of which he was treasurer. [FN119] As a part of the plea bargain, Pulasty agreed to pay restitution to his former employer. [FN120] The court implied an exception for criminal penalties, determining the Guidry Court's holding applied only to civil penalties. [FN121] The Pulasty court relied on equitable principles, which outweighed the anti-alienation provisions, and the fact that ERISA did not preempt state criminal law under 29 U.S.C. § 1144, [FN122] stating:

Like punishment, rehabilitation and deterrence, the other aims of criminal restitution, disgorgement of the ill-gotten gain is a far reaching goal quite distinct from the traditional compensatory rationale of the civil law. . . . The goal of ERISA is to protect the "spendthrift" pension beneficiary from squandering his pension by outspending his benefits, and suffering assignment of those benefits to creditors. It is not to eliminate a legitimate sentencing tool of the state criminal court.

***407** . . . .

In our view, the restitution provision of N.J.S.A. 2C:44-2 is a generally applicable criminal law and does not "relate to" an employee benefit plan; thus, it is not preempted by ERISA. [FN123]

Two additional cases have carved out an exception to the anti-alienation provision to prevent a beneficiary murderer from profiting from his crime. [FN124] This is clearly in concert with public policy. The courts focus on the exception to state criminal law preemption under ERISA section 1144, and determine the result via the common law rule that killers should not profit from their crimes. [FN125]

However, not all courts feel free after Guidry to imply an exception. In Stephenson, the defendant was convicted of three counts of forgery and five counts of felony theft to perpetrate embezzlement from her employer amounting to $39,000. [FN126] In negotiating probation, the trial court ordered as an alternative to incarceration, her pension funds to be paid as restitution. [FN127] The court quoted Guidry and insisted the plan, not yet in payment, was subject to anti-alienation under ERISA and could not be alienated to pay restitution. [FN128]

b. Civil Penalties--Split in Circuits

In the disturbing but little known case of Mills v. Mills, [FN129] the court awarded a daughter damages from her father's pension after finding he physically and sexually abused her. The appellate court reversed and would not allow her to collect, insisting her only means to do so would be through a QDRO. [FN130] The court, ***408** quoting Guidry's "natural distaste for the result," added it was bound to uphold, not make the law. [FN131]

The abuse through ERISA's anti-alienation provision for which the public is most keenly aware is its protection of pensions from tort damage remedies. O.J. Simpson made that awareness possible when he was found liable for Nicole Brown Simpson and Ronald Goldman's deaths, but avoided paying the damage award from his major source of wealth: his pensions.

According to published reports, Simpson has stashed the bulk of his assets in two pension and retirement funds set up long before Nicole Brown Simpson and Ronald Goldman were murdered. It's unlikely that outsiders will be able to touch these funds, yet Simpson can borrow from them and use them to fund his retirement. Similarly, pension checks Simpson will receive for his football and acting careers are also off-limits. [FN132]

"Simpson reportedly has at least $2.5 million saved in two pension and retirement funds. But under federal law designed to protect retirees, that nest egg is untouchable." [FN133] Obviously, Mr. Simpson has the assets to compensate the victims, but he also has those gilded pension gates to protect his pension account.

The dissent in Helmsley-Spear [FN134] eloquently captured the public outrage when it stated:

We have concluded that as a matter of public policy the exemption statutes and the provisions of the trust indenture were not designed for this purpose.

. . . .

That statute and the exemptions contained therein were designed to insure that an employee who worked loyally

for an employer with a pension plan would not find himself without any pension because of some action or inaction by the employer or the fiduciary by way of mismanagement, wasting, looting or arbitrary vesting rules. The statute was not designed to aid thieves in retaining their loot.

Plainly, the exemption provision contained in the trust indenture here in issue was not intended to provide a shield to one in [the defendant's] position.

***409** . . . .
There are obviously strong public policy considerations in favor of insuring the support of wives and children. Public policy also requires the conclusion that the exemption statutes and the trust agreement may not be interpreted to shield an employee, proven to be a thief, from the reach of remedies designed for the enforcement of judgments. [FN135]

2. Protection in Perpetuity

The criminal court in Stephenson directly relied on the fact that the benefits were not yet in payment status to conclude ERISA's anti-alienation provision still applied. [FN136] The Tenth Circuit applied this same rationale to the Guidry case on remand. [FN137]

Other courts do not make that distinction and deem that ERISA still prevents alienation after pension benefits are in pay status. Citing ERISA's section 206(d)(1) exception for alienation of 10% of benefit payments, [FN138] the court in United States v. Smith [FN139] held that ERISA's anti-alienation provision is valid even after the plan is in pay status. Its protection cannot be negotiated away. Smith was retired and receiving approximately $1,200 a month in pension benefits from two ERISA plans. He was convicted of fraud and expressed a willingness to pay restitution to his victims. [FN140] The district court ordered him to relinquish his entire monthly pension when received. [FN141] Although Smith consented to repaying his victims, he nevertheless appealed the district court's order on the basis of ERISA's anti- alienation provision. [FN142] The appellate court vacated the order reasoning that since Smith did not draw on his pension account before retirement, he did not forfeit the protection of ERISA's anti-alienation provision. [FN143] Other courts have fervently agreed. [FN144]

***410** As previously discussed, the section 206(d)(2) allowance of "any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment," [FN145] and the corresponding tax provisions, give evidence Congress intended to protect at least ninety percent of pension benefits in perpetuity. [FN146] The status quo appears to allow criminals, tortfeasors and debtors to forever protect all, or at least 90% of their pension benefits to the detriment of innocent victims.

C. The Natural Distaste for Injustice and the Call for Legislation

Unlike the apparent intent to protect in perpetuity, whether Congress intended the anti-alienation provision to protect stolen property is doubtful. [FN147] The Ellis case, where the court allowed just that, presents the most compelling case for an exception. [FN148] Unlike the employee or non- employee tortfeasors and criminals in other cases, the employee in Ellis deposited stolen funds into his own pension account which was then untouchable. [FN149] Congress surely did not intend the defendant and his dependents to be supported with stolen property. Criminals cannot use stolen property to support their dependents; how then can stolen property be used in the pension context? In criminal law, a family does not have a right to be supported with stolen property, and if such funds can be traced to a bank account, they will be recovered. [FN150] That same principle should apply here, yet the legislature ***411** has yet to codify such an exception.

The Supreme Court summed up the reality under the status quo, stating: "Understandably, there may be a natural distaste for the result we reach here." [FN151] As it stands, ERISA allows: criminals to escape paying restitution from their pensions and even to stash the loot in those sacred pensions; employees, when found guilty of criminally fraudulent acts against their employers, to evade paying restitution or damages from their pension funds; tortfeasors to live on and to avoid paying damage awards from pension funds; and debtors, with millions in pension funds, to dodge paying creditors from those funds. Most importantly, ERISA seems to offer this inequitable protection in

perpetuity since only 10% can be alienated while in pay status. One would be hard-pressed to believe this standard does not lead to a potent moral hazard. ERISA appears as gilded gates that offer pure protection.

Remaining outside those gates, however, are the victims: the wrongful death plaintiff whose family may have to turn to welfare; the injured who have to live on Medicaid or exhaust their own medical insurance; the honest creditor who now charges higher rates to the honest debtor; and the emotionally damaged who find no retribution. These are the innocent victims who have the right but no remedy. We can be sure Congress did not intend these results, and was not ignorant of the other social policies. It cannot ignore the egregious effects any longer.

In both Guidry and Patterson, the Court called for congressional involvement. In Guidry, the Court noted since Congress had recently made an exception for qualified domestic relations orders, and Congress could have codified other exceptions, its silence in the wake of numerous Guidry-like abuses indicated ***412** disinterest in narrowing the restriction on alienation any further. [FN152] If any authority were to narrow the exception, Congress would be the one "to undertake that task." [FN153] The Court was fervent in announcing it, and any other courts should not take the role of legislator--no matter how egregious the circumstances:

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress. [FN154]

The Patterson Court reiterated the Guidry caveat. [FN155] The call for legislation is clear and necessary.

"The injustice done to an individual is sometimes of service to the public."

-- Janius

V

Controlling Abuses: Offering a Solution

A. Conservatively Approaching the Gilded Gates

The protection of retirement assets under ERISA's anti-alienation provision section 206(d) upholds vital policies. Yet, support ***413** of those ERISA policies, within the current statutory framework, allows, and even encourages, other strains on the economic system and violations of other sacredly held social policies. The issue remains of how to balance the interests of innocent dependents and innocent victims, both groups dependent on a guilty participant in a pension plan. Which group has the greater claim against the pension account: the innocent dependents or the innocent victims? In creating an exception for the QDRO and for loans, Congress seemed to signal a preference for the innocent dependents and for the participant. [FN156]

Notably, the exception for loans has been tempered by the limitation to 50% of vested benefits. [FN157] Congress should answer the Supreme Court's call for legislation and make a similar carve-out for victims, where up to a certain percentage of a participant's account is exposed to make restitution to an innocent victim in certain carefully prescribed circumstances. This would satisfy the principle against unjust enrichment [FN158] and would, to some extent, deter the moral hazards as demonstrated in the previous section, whereby the sacred treatment of pension funds encourages some to "[c]ome on in and hide your money behind these gilded gates."

Somehow, Congress should not throw the gilded gates of pension protection ajar but should create just enough of an opening, adopting a similar paradigm to that used for loans, in order to obtain equitable treatment for the non-dependent victim.

B. Bankruptcy Reform--A Timely Parallel

Recently, the Bankruptcy Code underwent an overhaul to curb abuses. The abuses under the Bankruptcy Code were similar to those under ERISA to the extent the debtor could have certain assets protected from the reach of creditors and nevertheless lead an affluent lifestyle. The creditor seeking payment in bankruptcy parallels the innocent victim seeking payment from pensions. However, the victim who is barred from collecting under the anti-alienation rule is in an even more compelling position than the creditor who affirmatively assumed the risk by extending credit to the debtor.

***414** In March of 2001, both the Senate and the House passed similar bankruptcy reform bills aimed at curbing a number of abuses in the bankruptcy system. [FN159] The need for bankruptcy reform was clear considering the statistical increase in filings in the past quarter century [FN160] juxtaposed with increasing displeasure with the use of bankruptcy as a financial planning tool. [FN161] The reforms ***415** center on curbing abuses such as using chapter 7 [FN162] over chapter 13 [FN163] to avoid repayment even when the debtor has the means to make payment. Some debtors even use pre-bankruptcy planning to convert nonexempt assets into exempt assets (i.e., using a state homestead exemption or the purchase of other items to shield assets from creditors). The exemptions under the Bankruptcy Code provide similar protection to that provided by the gilded gates of ERISA's anti-alienation rules. Both the Senate and House stressed that the Bankruptcy Code's "fresh start" policy should not be a financial shelter or method of planning for those who are able to pay at a cost to "innocent" small businesses and "innocent" American consumers who bear the burden of others' failure to repay debt. Effectively, the reforms deny a full "fresh start" to those who have the means to pay, thus upholding the intention of the "fresh start" policy while securing the policies of protecting creditors and consumers. The paradigm of balancing important social policies in this manner is the approach Congress should take to reform ERISA's anti-alienation provision.

1. Similarities Between the Purposes of the Bankruptcy Code Exemptions and ERISA'S Anti-Alienation Rule

"The classic goals of bankruptcy relief is to provide the debtor with a 'fresh start' from overwhelming debts while also ensuring that each creditor receives an equitable share of the debtor's bankruptcy estate." [FN164] Although the creditors' rights to equitable shares are procedurally spelled out clearly in the Bankruptcy Code, the fresh start policy is inferred substantively from the language of the statute and interpreted through state law. [FN165]

***416** Based on contract avoidance, as in infancy or impossibility, bankruptcy provides the means to grant relief and allows a "fresh start" to one who is "honest" but "unfortunate." This sentiment is clearly stated in Local Loan Co. v. Hunt: [FN166] Bankruptcy "gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." [FN167] This fresh start policy is based on providing the debtor with a means to begin again without the anguish of overwhelming debt so as to internalize those externalities that could be harmful to society.

The bankruptcy "fresh start" policy and the exemptions from the bankrupt's estate, parallels ERISA's pension protection. [FN168] Both policies seek to protect certain assets, while allowing and encouraging the individual to maintain a secure economic future. Yet, as with ERISA's anti-alienation provision, the "fresh start" policy had gilded gates to protect assets of the debtor while the creditor stared helplessly inside the gates, and could witness the debtor using the exempt property and continuing a luxurious lifestyle. This moral hazard led to severe abuses of the bankruptcy ***417** process. [FN169]

In the same way that ERISA section 206(d) assures pension protection, the Bankruptcy Code uses a number of provisions, including the ability to discharge debts and enumerated exclusions or exemptions that keep or remove items from the bankruptcy estate to assure a "fresh start." For example, § 541 sets out a broad definition of the bankruptcy estate, and then narrows its scope to exclude certain assets. [FN170]

After the bankruptcy estate is compiled with all non-excluded assets, § 522 of the Bankruptcy Code [FN171]

provides for exemptions to certain debtor property to enable the debtor to begin with some resources for the "fresh start." [FN172] The exemptions include ***418** general personal items (like the family bible or other family treasures), tools of trade, wage replacement plans, and the homestead exemption. [FN173] The homestead exemption is by far the one with the greatest potential for abuse. A debtor may purchase in the new state an expensive home that then cannot be touched by any creditors as long as the debtor has maintained residency in that new state home for 180 days. [FN174] "All too often, millionaire debtors take advantage of this loophole by buying mansions in states with unlimited exemptions like Florida and Texas, and declaring bankruptcy--yet continuing to live like kings." [FN175]

***419** Additionally, a debtor may choose to give current or future assets towards the debt. Under chapter 7, all future income is relieved from debt (human capital) in exchange for a surrender of current assets. Under chapter 13, future income is apportioned to debt while current assets remain largely untouched. [FN176]

***420** These provisions were meant to provide debtors with the ability to survive and rebuild, as clearly stated in Local Loan, [FN177] but were not meant to assist a debtor who, capable of repaying some or all of his or her debt, uses the discharge and exemption provisions as a means to rid themselves of debt while effectively "hiding" assets in exempt or excluded properties. Observers term the practice a "head start" as opposed to a "fresh start." [FN178] Essentially, one who is honest and unfortunate deserves a fresh start, while one who hides assets is either dishonest or fortunate, or both dishonest and fortunate, and should not be provided with the same options.

2. Hiding Behind the Gilded Gates of Bankruptcy Exemptions

In the bankruptcy context, hiding assets, called either "pre-bankruptcy planning," "pre-bankruptcy conversion," or "eve of bankruptcy planning," is accomplished in a number of ways. All methods are designed to achieve the same result. Pre-bankruptcy planning generally includes the conversion of nonexempt or non-excluded assets (such as money in a debtor's bank account) to exempt or excluded assets (such as a home or an annuity), prior to debtor's filing for bankruptcy. This strategy increases the debtor's post-bankruptcy share of assets at the expense of the creditors of the debtor's bankruptcy estate. [FN179]

Pre-bankruptcy planning is a legal way of converting nonexempt assets into exempt assets. Logically, the debtor has an inherent right to use assets freely prior to bankruptcy. [FN180] However, when this right is abused, for instance, when a millionaire converts most nonexempt assets into exempt assets just prior to filing, creditors have no means to collect and the debtor walks ***421** away rich and debt free. [FN181] These "fortunate" debtors have the ability to pay but avoid paying their debts via the bankruptcy exceptions and exemptions. A pension plan participant can also place all resources into a pension plan to protect it from bankruptcy, civil damages or criminal fines, and this presents the same serious moral hazard.

In one way, the "load up," the deadbeat can either take nonexempt property and convert it into cash which is then invested towards the primary residence mortgage or repairs--increasing the equity up to the allowable state exemption. The cash can also be converted into any other exempt or excluded asset--a pension, for instance. [FN182]

Alternatively, the deadbeat can "jurisdiction jump." Because Bankruptcy Code § 522 allows for states to "opt out" of the federal standard amounts for exemptions, through congressional support of federalist policy to respect states' determinations for the amount and character of property to be exempted, the debtor can easily take advantage by "jurisdiction jumping" to a state with a high or no-cap exemption.

According to Senator Joseph R. Biden, bankruptcy abuse "costs every single American consumer." [FN183]

Experts have studied this; economists have studied it. They have concluded that the average debt-paying American citizen who pays his bills is annually imposed a bankruptcy cost of $450. That is about $40 a month they are having to pay every month because other people in this country don't pay their debts. [FN184]

***422** In addition to added costs for consumers, according to Senator Orrin G. Hatch, "[b]ankruptcy abuse also hurts our Nation's small businesses. . . . Without congressional action, losses from bankruptcy abuses will continue to break the banks, and backs, of the Nation's small businesses and retailers, which work with slim profit margins and

an even smaller margin for error." [FN185]

3. Judicial Activism to Curb Bankruptcy Abuses

The Code does not provide a definition for "fresh start." As a result, the legislature vested the courts with significant power to determine the precise meaning of a fresh start for debtors, and, implicitly, to decide the acceptable level of pre-bankruptcy planning. [FN186] In the same way that courts examined the scope of the ERISA anti-alienation provision, they have also examined the scope of the Bankruptcy Code "fresh start" provisions.

Ultimately, the customary reasoning employed by courts when determining whether a debtor's pre-bankruptcy transfer of assets is permissible is found in the analogy that, "'when a pig becomes a hog, it is slaughtered' . . . and the bankruptcy court 'has the primary duty to distinguish hogs from pigs." ' [FN187] The courts have been divided in determining whether the circumstances demonstrate abuse or not.

Under 11 U.S.C. § 727(a)(2), a debtor can be denied discharge for transfer with intent to hinder, delay or defraud creditors. [FN188] This provision is sometimes used to examine pre-bankruptcy conversions, yet overwhelmingly, pre-bankruptcy conversions are seen as legal per se.

For example, in In re Silansky, [FN189] the court held that denying the discharge based upon the conversion of nonexempt property ***423** to exempt property (insurance policies), absent extrinsic fraud, would "defeat the purpose of the [state exemption statutes]." [FN190] This common law fraud examination is the only means for most courts to view the transaction. [FN191] Most courts have been unable to use the common law fraud to attack pre-bankruptcy conversions, especially since exemptions are to be broadly and liberally construed in favor of the debtor. [FN192]

In the case of In re Primack, [FN193] where the debtor purchased a $450,000 homestead just eighteen months prior to filing, in the new resident state of Florida, the court allowed the exemption and any pre-bankruptcy planning to utilize the exemptions as completely allowable, specifically stating: "Section 522(b)(2)(A) grants to debtors in a bankruptcy proceeding all exemptions permitted by State law. It does so without any restriction or limitation whatsoever. And it imposes no restriction on the conversion of nonexempt property into exempt property." [FN194] Notably, the Govaert court quoted the House and Senate reports: "As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." [FN195]

A transfer explicitly permitted under the law cannot be fraudulent no matter the contradictory results, so the bankruptcy courts faced the same moral dilemmas that the courts faced in applying ERISA's anti-alienation provision.

The other provisions through which courts could examine the ***424** conversion were 11 U.S.C. § 707(a), where a court can dismiss "for cause" and § 707(b), where the petition is subject to dismissal for substantial abuse. These provisions are often used where the debtor is not "honest but unfortunate." [FN196]

Prior to the revision discussed below, § 707(b), entitled "Dismissal," allowed the court to dismiss a bankruptcy petition if primarily consumer debt was owed and relief would be a "substantial abuse" of the Bankruptcy Code provisions. [FN197] Courts using this provision have chosen three approaches: 1) Chapter 13 Per Se: per se substantial abuse upon finding the debtor can fund a chapter 13 plan paying three quarters of the debt in three years; [FN198] 2) Chapter 12 Plus: the capability to fund a chapter 13 plan, without more, is insufficient for finding substantial abuse. The court must find egregious circumstances or an unfair advantage; [FN199] or 3) Totality of the Circumstances. [FN200] Circumstances include:

***425** (1) whether the bankruptcy petition was filed because of a sudden illness, calamity, disability, or unemployment; (2) whether the debtor incurred cash advances and made consumer purchases far in excess of his [or her] ability to repay; (3) whether the debtor's proposed family budget is excessive or unreasonable; (4) whether debtor's schedules and statement of current income and expenses reasonably reflect the true financial condition; and

(5) whether the petition was filed in good faith. [FN201]

The most obvious evidence of substantial abuse is the ability to fund a chapter 13 bankruptcy plan yet choosing to file under chapter 7. [FN202] Prior to the reform, though, those who were able to pay could still elect to file chapter 7 and be relieved of all debt with losses to the creditors and costs to the consumer in the form of increased interest rates. The policy being diluted by the uncertainty was a moral and equitable one, in recognition of the dual purpose of the Bankruptcy Code: If a debtor can afford to pay and be responsible for debt, or an amount of it, he or she should do so. The "fresh start" purpose should not be an excuse for avoidance of responsibility. [FN203]

***426** 4. The Imposed Bankruptcy Reform

James Sensenbrenner, Jr., a Republican representative from Wisconsin and chairman of the House Judiciary Committee, said, "Bankruptcy should never be an item of financial planning." [FN204] The Senate bill addresses "debtors stuffing their cash into homesteads immediately before declaring bankruptcy . . . [or] moving to another State that has a more favorable homestead law . . . ." [FN205] To address these abuses, congressional reforms center around revision of two provisions: § 522 and § 707.

Section 102 of S. 420 amends Bankruptcy Code § 707 to force dismissal or conversion of a chapter 7 filing based upon a "means test." The revised § 707, entitled, "Dismissal of a case or conversion to a case under chapter 11 or 13," provides for a court, in response to a trustee, administrator or creditor motion or sub sponte, to dismiss a claim or convert a chapter 7 liquidation petition (complete relief in bankruptcy) to a chapter 11 or chapter 13 claim (adjustment of debts of an individual with regular income) upon finding "abuse" of the bankruptcy chapter provisions. [FN206] Abuse is presumed if the debtor's income is within a certain range--indicating the debtor has the means to repay debt under a chapter 13 plan. The presumption may only be rebutted under ***427** extreme hardship even if the debtor does meet the means test, with a "safe harbor" [FN207] for those under the median income so such debtors do not have to meet the means test at all. Abuse is determined through a finding of bad faith or under the totality of the circumstances.

According to Senator Grassley:

The test employs a legal presumption that chapter 7 proceedings should be dismissed or converted into chapter 13 whenever the filer earns more than the State medium income and can repay at least $6,000 of his or her unsecured debt over 5 years. In calculating a debtor's income, living expenses are deducted as permitted under IRS standards for the State and locality where that debtor lives. Legitimate expenses--such as food, shelter, clothing, medical, transportation, attorney's fees, and charitable contributions--are taken into account in this analysis as provided for under these IRS guidelines . . . a debtor may rebut the presumption by demonstrating some sort of special circumstances . . . takes into account a debtor's income and expenses and then, even beyond that, allows the debtor to show special circumstances which would justify adjustments to this IRS benchmark means test . . . the bankruptcy reform bill preserves the fresh start I have talked about for people who have been overwhelmed by medical debt or sudden unforeseen emergencies. [FN208]

In an effort to clearly restrict "fresh start" to those who are honest and unfortunate, the § 707 reform focuses on presumptions to filter out those who are either dishonest or fortunate or both. The Senate was

trying to identify those who don't qualify and should be contained in their filing. So this is a fundamental change in bankruptcy. We adopted what has come to be called a means test. It says if you have the means to pay some or all of your debt, we ought to set up a plan for you to do so. . . . Basically, we drew a bright line. We said: Based on the size of your family and the income of your family, if you make below median income, which in America for a family of four is $50,000, you will be able to file bankruptcy any way you want, 7 or 13, just like today. There is no change for them in that regard. We believe probably 70, 80, 85 percent of the people who file bankruptcy are below median income, but for that 20, that 10, that 15 percent who make above median income--some make $70, $80, $90, $200,000, $250,000, some are doctors, some are lawyers, some have professional incomes, and so forth--to them we say: We are going to look at your income. We are ***428** going to look at your earning possibilities. If you are able to pay back at least 25 percent of that debt over 3 to 5 years, we are going to put you in chapter 13, as half the people in my State do anyway, and we are going to ask you to try to pay those debts over that period of time. You will be monitored by the court. [FN209]

Some legislators were concerned the means test would obliterate the fresh start and the social policies behind it. The balance was achieved, however, through the § 707 reform by reworking it to support equitable principles while reinforcing the fresh start ***429** policy and respecting the additional policy of treating creditors fairly. The burden was thus placed on the debtor, relieving honest creditors from higher interest rates.

In most cases, people who lose their jobs will likely not be affected by the means test. For those who still have the ability to repay a meaningful portion of their debts--because they are independently wealthy, regardless of employment--the fact that the person lost a job has nothing to do with whether the debtor can repay a meaningful portion of his or her debt." [FN210]

The second important reform, an amendment to § 522, addresses jurisdiction jumping. It provides that in order for a debtor to claim the state homestead exemption, he or she must have established domicile for 730 days (that is an increase from the previous 180 days). Additionally, for a debtor electing under § 522(b) to exempt under state or local law, the residence value exempted caps at $125,000. [FN211] If a debtor has maintained domicile prior to filing, the state exemption is allowed in full up to the federal cap (most are below the cap anyway). If the debtor moves to utilize another state's higher exemption, or lives in one of the five states with high or unlimited homestead exemption, [FN212] the amendment disallows any value in equity over $125,000 not acquired in the two years prior to filing.

The two-year provision was thought to still allow wealthy persons to evade the intent until the time limit expired and would do nothing for the very wealthy person who maintained a residency in one of the states with unlimited or high exemptions, but the Senate further amended the provision to include a $125,000 cap. ***430** "Avoiding personal responsibility and using the bankruptcy laws as a method of financial planning is contrary to the stated purpose of this bill. A hard cap is not only the best policy; it also sends the best message: Bankruptcy is a tool of last resort, not financial planning." [FN213]

Again, the reform balanced the policy goals in bankruptcy, providing the honest and unfortunate with a fresh start while preventing abuse of innocent creditors. Additionally, the reform supports the equitable principle of responsibility for one's debt. In amending the Bankruptcy Code, Congress accomplished the difficult balancing of social policy goals. Likewise Congress should now take the gild off the gates of total pension protection through the anti-alienation provisions to prevent similar abuses.

Conclusion: Using Bankruptcy Reform Standards to Amend ERISA [FN214]

The fresh start policy, with its ultimate goal to prevent reliance on social programs and to also provide an incentive to remain a productive member of society, was meant to apply to those who were honest and unfortunate. Congress could not tolerate that policy to provide fodder for those who chose to use the bankruptcy code as a means of financial planning, resulting in detriment to innocent creditors, small business owners and honest consumers who are harmed by higher interest rates. The anti-alienation provision of ERISA should also not be a source of financial planning.

Congress, in making the statutory exceptions to the anti-alienation provision within ERISA, recognized the reality of abuses in certain situations and enacted the QDRO and fiduciary fraud exceptions after judicial activism acknowledged the exception ultimately supported the rule. The policy of ERISA is to protect the pensioners and their dependents from burdening society by relying on social programs, and this policy could only be further supported by making an exception to anti-alienation for dependents with qualifying rights and for fiduciaries who had damaged what they promised to protect.

***431** Other policies are harmed through the broad application of the anti- alienation rule and any contradictions must be rectified. The policies now being ignored--satisfying creditors in bankruptcy, not letting wrongdoers profit from their wrongs, insisting on restitution to compensate the victim-- effectively would afford economic protection to the innocent victims. How can ERISA claim to protect the nation from becoming a welfare state when its anti-alienation provision simply shifts the economic burden to another innocent party? The provision may protect the guilty community from becoming reliant on social programs, but it then contradicts itself by not protecting the innocent community from becoming the same burden to society. How does this occur?

Allowing dishonest, fortunate debtors to stash away assets on the eve of bankruptcy into pension plans may be deterred through the finding of abuse under the new § 707 reforms and the general approach in most courts. [FN215] This possibility, however, is only a possibility, and still may continue to prove quite difficult. [FN216] Considering the severity of the abuse, Congress should make an exception very clear, especially since the Supreme Court has not clarified the relative importance of the policy goals ***432** involved. [FN217] One author criticizes Patterson for a holding contrary to one of the major goals of ERISA, "which was to prevent abuse of the pension tax rules by wealthy individuals using pension funds simply as tax shelters." [FN218] Ironically, the 2001 bankruptcy reform legislation may now encourage potential filers in bankruptcy to pursue financial planning, not within the gilded gates of the bankruptcy exemptions, but within ERISA's gilded gates that protect pension accounts in perpetuity. Additionally, the entire economy is harmed through abuse of the process. [FN219] Congress in no way intended, and in fact may not have foreseen, that ERISA could be counterproductive by encouraging this inequitable advantage to pension participants. As in the bankruptcy reform, Congress must balance important social policy considerations, acknowledging the creditor staring helplessly from outside the gilded gates to witness the debtor enjoying life in a multimillion-dollar home. Encouraging and protecting pension savings is an honorable goal, but total protection of the pension account of the criminal or tortfeasor and those who misuse the system, at the expense of those who do not, is beyond inequitable, and against public policy.

The innocent victim of theft or the maimed victim in a personal injury, staring beyond the gilded gates to the retiree living luxuriously on protected pension assets, remains another ignored population. Although states have attempted to use 29 U.S.C. § 1144(b)(4) to enforce state criminal law and police powers over the anti-alienation provision, [FN220] Congress must also make that exception clear. For those who commit crimes and owe restitution, or torts and owe damages, the inconsistency inherent in ERISA is obvious: anti- alienation places the financial burden on the innocent, risking their economic stability in return for sheltering the guilty pensioner. Neither utilitarian nor retributive punishment approaches are satisfied through the current approach. As the bankruptcy reform refuses to shift the burden of debt from the undeserving to the innocent, ERISA reform should give some protection to the pension but leave a portion available to compensate an innocent victim.

***433** Importantly, ERISA should not protect pension assets from garnishment for adjudicated crimes or torts--no matter whom the crime or tort is perpetrated against. The employee misconduct exception was duly dismissed under the guise of being contrary to ERISA's intent to eliminate pension risk from "bad boy" forfeiture provisions. [FN221] However, this is not exactly the reality. The only case to imply an exception for employee misconduct, prior to Guidry, was heard in the Eleventh Circuit. [FN222] That court acknowledged that the danger of interpreting ERISA with a "bad boy" exception could allow employers to punish vested pensioners unfairly, but distinguished employee disloyalty from criminal behavior and stressed the anti-alienation provision should not and does not require the abrogation of the equitable principle that a wrongdoer should not benefit from his misdeeds. [FN223] Other courts also found the legislative history to indicate that the "bad boy" provision addressed employee disloyalty but not criminal acts. [FN224] A criminal act, punished through the courts, adds the element of an impartial review of the circumstances. This same concept can apply to tortuous acts committed against the employer and adjudicated through the courts. If an employee is found guilty or liable through an impartial adjudication, why should he or she deserve greater protection under ERISA than any other criminal or tortfeasor? ERISA can remain intact and continue to protect employees from "bad boy" provisions ***434** meant to punish disloyalty while making an exception for all adjudicated penalty awards. The fiduciary fraud exception addresses judgments against the fiduciary.

Allowing ERISA to protect pensions under egregious circumstances places the burden on other consumers and victims under the guise of public policy. Considering the tremendous assets, totaling over $3.1 trillion dollars invested in private pension plans in 1996, these individuals would be hard- pressed to find reason not to use any legal means to avoid dissipation of those funds for damage awards, restitution or in discharge of debt. [FN225]

Congress needs to intercede by attacking the circularity of ERISA's attempted support of social policy: Those persons who have assets in pensions and owe creditors as consumers, criminals or tortfeasors should have certain percentages placed at risk for such contingencies in the same way a percentage in pay status can be assigned and a certain percentage of one's pension account can be placed at risk through loans. [FN226] Others should not ***435** suffer the wrongs of someone using ERISA to shield assets. Congress recognized and rectified the self-defeating nature inherent in the Bankruptcy Code. Congress should recognize and act to rectify the self-defeating nature

inherent in ERISA. The Bankruptcy Code, in recognition of the social policy it supports, no longer affords dishonest and fortunate debtors the fresh start protection. ERISA cannot choose to economically protect the guilty or irresponsible over the innocent or unfortunate and claim to uphold economic protection for society.

***436** APPENDIX

[Amended section 707] - SEC. 102. DISMISSAL OR CONVERSION. [FN227]

(a) In General. Section 707 of title 11, United States Code, is amended --

(1) by striking the section heading and inserting the following:

"Sec. 707. Dismissal of a case or conversion to a case under chapter 11 or 13";

and
(2) in subsection (b) --

(A) by inserting "(1)" after "(b)";

(B) in paragraph (1), as redesignated by subparagraph (A) of this paragraph --

(i) in the first sentence --

(I) by striking "but not at the request or suggestion of" and inserting "trustee, bankruptcy administrator, or";

(II) by inserting ", or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title," after "consumer debts"; and

(III) by striking "a substantial abuse" and inserting "an abuse"; and

(ii) by striking the next to last sentence; and

(C) by adding at the end the following:

"(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of --

"(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or

"(II) $10,000.

"(ii)(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the entry of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Notwithstanding ***437** any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act (42 U.S.C. 10408), or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

"(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case) who is not a dependent and who is unable to pay for such reasonable and necessary expenses.

"(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

"(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child under the age of 18 years up to $1,500 per year per child to attend a private or public elementary or secondary school, if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and that such expenses are not already accounted for in the Internal Revenue Service standards referred to in section 707(b)(2) of this title.

"(V) In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities ***438** issued by the International [sic] Revenue Service, based on the actual expenses for home energy costs, if the debtor provides documentation of such expenses.

"(iii) The debtor's average monthly payments on account of secured debts shall be calculated as --

"(I) the sum of --

"(aa) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

"(bb) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by

"(II) 60.

"(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as --

"(I) the total amount of debts entitled to priority; divided by

"(II) 60.

"(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

"(ii) In order to establish special circumstances, the debtor shall be required to --

"(I) itemize each additional expense or adjustment of income; and

"(II) provide --

"(aa) documentation for such expense or adjustment to income; and

"(bb) a detailed explanation of the special circumstances that make such expenses or adjustment to income

necessary and reasonable.

"(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

"(iv)The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of --

"(I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000, whichever is greater; or

***439** "(II) $10,000.

"(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that shows how each such amount is calculated.

"(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not apply or has been rebutted, the court shall consider --

"(A) whether the debtor filed the petition in bad faith; or

"(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

"(4)(A) The court shall order the counsel for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion brought under section 707(b), including reasonable attorneys' fees, if --

"(i) a trustee appointed under section 586(a)(1) of title 28 or from a panel of private trustees maintained by the bankruptcy administrator brings a motion for dismissal or conversion under this subsection; and

"(ii) the court --

"(I) grants that motion; and

"(II) finds that the action of the counsel for the debtor in filing under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

"(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, at a minimum, the court shall order --

"(i) the assessment of an appropriate civil penalty against the counsel for the debtor; and

"(ii) the payment of the civil penalty to the trustee, the United States trustee, or the bankruptcy administrator.

"(C) In the case of a petition, pleading, or written motion, the signature of an attorney shall constitute a certification that the attorney has --

"(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

"(ii) determined that the petition, pleading, or written motion --

"(I) is well grounded in fact; and

"(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

***440** "(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

"(5)(A) Except as provided in subparagraph (B) and subject to paragraph (6), the court may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion brought by a party in interest (other than a trustee, United States trustee, or bankruptcy administrator) under this subsection if --

"(i) the court does not grant the motion; and

"(ii) the court finds that --

"(I) the position of the party that brought the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

"(II) the party brought the motion solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

"(B) A small business that has a claim of an aggregate amount less than $1,000 shall not be subject to subparagraph (A)(ii)(I).

"(C) For purposes of this paragraph --

"(i) the term 'small business' means an unincorporated business, partnership, corporation, association, or organization that --

"(I) has less than 25 full-time employees as determined on the date the motion is filed; and

"(II) is engaged in commercial or business activity; and

"(ii) the number of employees of a wholly owned subsidiary of a corporation includes the employees of --

"(I) a parent corporation; and

"(II) any other subsidiary corporation of the parent corporation.

"(6) Only the judge, United States trustee, or bankruptcy administrator may bring a motion under section 707(b), if the current monthly income of the debtor, or in a joint case, the debtor and the debtor's spouse, as of the date of the order for relief, when multiplied by 12, is equal to or less than --

"(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner last reported by the Bureau of the Census;

"(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals last reported by the Bureau of the Census; or

"(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals last reported by the Bureau of the Census, plus $525 per month for each individual in excess of 4.

***441** "(7) No judge, United States trustee, panel trustee, bankruptcy administrator or other party in interest may bring a motion under paragraph (2), if the current monthly income of the debtor, or in a joint case, the debtor and the debtor's spouse, as of the date of the order for relief when multiplied by 12, is equal to or less than --

"(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner last reported by the Bureau of the Census;

"(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals last reported by the Bureau of the Census; or

"(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals last reported by the Bureau of the Census, plus $525 per month for each individual in excess of 4." .

(b) Definition. Section 101 of title 11, United States Code, is amended by inserting after paragraph (10) the following:

"(10A) 'current monthly income' --

'(A) means the average monthly income from all sources which the debtor, or in a joint case, the debtor and the debtor's spouse, receive without regard to whether the income is taxable income, derived during the 6-month period preceding the date of determination, which shall be the date which is the last day of the calendar month immediately preceding the date of the bankruptcy filing. If the debtor is providing the debtor's current monthly income at the time of the filing and otherwise the date of determination shall be such date on which the debtor's current monthly income is determined by the court for the purposes of this Act; and

"(B) includes any amount paid by any entity other than the debtor (or, in a joint case, the debtor and the debtor's spouse), on a regular basis to the household expenses of the debtor or the debtor's dependents (and, in a joint case, the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act and payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;'.

(C) United States Trustee and Bankruptcy Administrator Duties. Section 704 of title 11, United States Code, is amended --

(1) by inserting "(a)" before "The trustee shall --"; and

(2) by adding at the end the following:

"(b)(1) With respect to an individual debtor under this chapter --

"(A) the United States trustee or bankruptcy administrator shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, ***442** file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and

"(B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.

"(2) The United States trustee or bankruptcy administrator shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee or bankruptcy administrator does not believe that such a motion would be appropriate, if the United States trustee or bankruptcy administrator determines that the debtor's case should be presumed to be an abuse under section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than --

"(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner last reported by the Bureau of the Census; or

"(B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals last reported by the Bureau of the Census.

"(3) In any case in which a motion to dismiss or convert, or a statement is required to be filed by this subsection, the United States trustee or bankruptcy administrator may decline to file a motion to dismiss or convert pursuant to section 704(b)(2) if the product of the debtor's current monthly income multiplied by 12 exceeds 100 percent, but does not exceed 150 percent of --

"(A)(i) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner last reported by the Bureau of the Census; or

"(ii) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals last reported by the Bureau of the Census; and

"(B) the product of the debtor's current monthly income, reduced by the amounts determined under section 707(b)(2)(A)(ii) (except for the amount calculated under the other necessary expenses standard issued by the Internal Revenue Service) and clauses (iii) and (iv) of section 707(b)(2)(A), multiplied by 60 is less than the lesser of --

"(i) 25 percent of the debtor's nonpriority unsecured claims in the case or $6,000, whichever is greater; or

"(ii) $10,000.

(d) Notice. Section 342 of title 11, United States Code, is amended by adding at the end the following:

"(d) In an individual case under chapter 7 in which the presumption of abuse is triggered under section 707(b), the clerk shall give ***443** written notice to all creditors not later than 10 days after the date of the filing of the petition that the presumption of abuse has been triggered."

(e) Nonlimitation of Information. Nothing in this title shall limit the ability of a creditor to provide information to a judge (except for information communicated ex parte, unless otherwise permitted by applicable law), United States trustee, bankruptcy administrator or trustee.

(f) Dismissal for Certain Crimes. Section 707 of title 11, United States Code, as amended by this section, is amended by adding at the end the following:

"(c)(1) In this subsection --

"(A) the term 'crime of violence' has the meaning given that term in section 16 of title 18; and

"(B) the term 'drug trafficking crime' has the meaning given that term in section 924(c)(2) of title 18.

"(2) Except as provided in paragraph (3), after notice and a hearing, the court, on a motion by the victim of a crime of violence or a drug trafficking crime, may when it is in the best interest of the victims dismiss a voluntary case filed by an individual debtor under this chapter if that individual was convicted of that crime.

"(3) The court may not dismiss a case under paragraph (2) if the debtor establishes by a preponderance of the evidence that the filing of a case under this chapter is necessary to satisfy a claim for a domestic support obligation."

(g) Confirmation of Plan. Section 1325(a) of title 11, United States Code, is amended --

(1) in paragraph (5), by striking "and" at the end;

(2) in paragraph (6), by striking the period and inserting a semicolon; and

(3) by adding at the end the following:

"(7) the action of the debtor in filing the petition was in good faith;"

(h) Applicability of Means Test to Chapter 13. Section 1325(b) of title 11, United States Code, is amended --

(1) in paragraph (1)(B), by inserting "to unsecured creditors" after "to make payments"; and

(2) by striking paragraph (2) and inserting the following:

"(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended --

"(A) for the maintenance or support of the debtor or a dependent of the debtor or for a domestic support obligation that first becomes payable after the date the petition is filed and for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as that ***444** term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

"(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

"(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than --

"(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner last reported by the Bureau of the Census;

"(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals last reported by the Bureau of the Census; or

"(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals last reported by the Bureau of the Census, plus $525 per month for each individual in excess of 4."

(i) Special Allowance for Health Insurance. Section 1329(a) of title 11, United States Code, is amended by inserting the following new paragraph --

"(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor and any dependent of the debtor (if those dependents do not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that --

"(A) such expenses are reasonable and necessary;

"(B)(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy, or;

"(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance and who has similar income, expenses, age, health status, and lives in the same geographic location with the same number of dependents that do not otherwise have health insurance coverage; and

"(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title.

Upon request of any party in interest the debtor shall file proof that a health insurance policy was purchased."

(j) Clerical Amendment. The table of sections for chapter 7 of title 11, United States Code, is amended ***445** by

striking the item relating to section 707 and inserting the following:

"707. Dismissal of a case or conversion to a case under chapter 11 or 13."

SEC. 307. DOMICILIARY REQUIREMENTS FOR EXEMPTIONS.

Section 522(b)(3)(A) of title 11, United States Code, as so designated by this Act, is amended --
(1) by striking "180 days" and inserting "730 days"; and

(2) by striking, "or for a longer portion of such 180-day period than in any other place" and inserting "or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place" .

SEC. 308. LIMITATION.

Section 522 of title 11, United States Code, is amended --
(1) in subsection (b)(3)(A), as so designated by this Act, by inserting "subject to subsection (o)," before "any property"; and

(2) by adding at the end the following new subsection:

"(o)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that exceeds, in the aggregate, $125,000 in value in --

"(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;

"(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence; or

"(C) a burial plot for the debtor or a dependent of the debtor.

The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of that farmer."

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[FN1]. Social Security is the largest source of income for the currently retired, accounting for, on average, 40% of their income. Pension and retirement plans accounted for 20%, income from assets accounted for another 20%, while income from earnings accounted for 18%. Employment Benefit Research Inst., Retirement Income Research: 2001 Findings, at http:// www.ebri.org/findings/ret_findings.htm (last visited Dec. 31, 2001). According to the Social Security Administration, quoting the March 2000 Income Supplement, Current Population Survey of the U.S. Census Bureau, sources of income for the aged in 1999, in order of reliance, are: Social Security (90%); asset income (62%); retirement benefits other than Social Security, including pensions, annuities, government pensions, Railroad Retirement, IRA, Keogh and 401(K) payments (43%); earnings (22%); public assistance (5%) and veteran's benefits (5%). Office of Policy, U.S. Social Security Admin., Annual Statistical Supplement (2000).

[FN2]. The Congressional Research Service of the Library of Congress reports that, as of 1998, Social Security

provides 71% of the minimum wage earner's final year's earnings, while only providing for 42% for the average wage earner and 25% for the maximum wage earner. David Stuart Kortz, The Concord Coalition, Social Security: Brief Facts and Statistics (1998), available at www.concordcoalition.org/entitlements/crs050198.html#benefit (last updated May 26, 1998). The Social Security Administration reports, "[f]inancial advisers often tell people that, when they quit work, they'll need about 70 percent of preretirement income to live comfortably. By itself, Social Security replaces about 40 percent of an average wage earner's salary." U.S. Social Security Admin., Basic Facts About Social Security (Jan. 2001), at http:// www.ssa.gov/pubs/10080.html.

[FN3]. Id.

[FN4]. 120 Cong. Rec. 29,943 (1974).

[FN5]. "Because the tax benefits are in the form of deferral on income from high tax years to low tax years, and a deduction from taxable income for the employer, the higher the employee's and the employer's tax bracket, the greater the economic benefit to each." Patricia E. Dilley, Hidden in Plain View: The Pension Shield Against Creditors, 74 Ind. L.J. 355, 360 n.10 (1999); see also Lisa M. Smith, Note, ERISA Qualified Pension Plans as Part of the Bankruptcy Estate After Patterson v. Shumate, 21 Cardozo L. Rev. 2119, 2131 (2000) (explaining the regressive nature of the Supreme Court opinion in Patterson v. Shumate, 504 U.S. 753 (1992)).

[FN6]. The well known Studebaker Incident demonstrated the severity of the problem. In December 1963, the Studebaker Corporation announced it was closing its South Bend, Indiana plant. When a Big Company Quits ... the South Bend Story, U.S. News & World Rep., Dec. 23, 1963, at 76.
In the process, almost 10,000 workers lost their jobs and almost 4,000 of those who were vested in their pensions lost 85% of their pension benefits when the plan was terminated. See Private Pension Plans: Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm., 89th Cong. 128 (1966); John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 54 (2d ed. 1995). For a history of pre-ERISA benefit plans, see G. Waldron Snyder, Employee Retirement Income Security Act of 1974, 11 Wake Forest L. Rev. 219 (1975); Stuart N. Alperin et al., Comment, The Employee Retirement Income Security Act of 1974: Policies and Problems, 26 Syracuse L. Rev. 539 (1975).

[FN7]. Experts now disregard the gratuity theory of pensions and instead view the arrangement under the deferred wage theory. See William C. Greenough & Francis P. King, Pension Plans and Public Policy 27-47 (1976); see also McNevin v. Solvay Process Co., 53 N.Y.S. 98 (N.Y. App. Div. 1898) (finding pension unenforceable as promise of a future gift).

[FN8]. 29 U.S.C. § § 1001-1053 (1994 & Supp. V 2000).

[FN9]. ERISA § 203, 29 U.S.C. § 1053 (1994), amended by Pub. L. No. 107-16, 115 Stat. 127 (2001) (employees must vest after a certain specified minimum period of employment).

[FN10]. Id. § 202, 29 U.S.C. § 1052 (participation in the plan cannot be unduly delayed).

[FN11]. Id. § § 301-306, 29 U.S.C. § § 1081-1085(a) (1994 & Supp. V 2000) (plans must be adequately funded); see also I.R.C. § 412 (1994).

[FN12]. ERISA § § 101-111, 29 U.S.C. § § 1021-1031 (1994 & Supp. V 2000) (participants must know their rights

and obligations).

[FN13]. Id. § § 401-414, 29 U.S.C. § § 1101-1114 (1994 & Supp. V 2000).

[FN14]. Id. § § 501-511, 29 U.S.C. § § 1131-1141 (1994 & Supp. V 2000).

[FN15]. ERISA section 206 provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1994 & Supp. V 2000).

[FN16]. See infra notes 29-30 and accompanying text.

[FN17]. The purposes and federal jurisdictional hook behind ERISA appear in 29 U.S.C. § 1001:

(a)... the continued well-being and security of millions of employees and their dependents are directly affected by these plans;... [which] have become an important factor affecting the stability of employment and the successful development of industrial relations;... and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b)... 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 requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, 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.

(c)... It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and 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.

ERISA § 2(a)-(c), 29 U.S.C. § 1001(a)-(c) (1994 & Supp. V 2000).

[FN18]. S. Rep. No. 93-727, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4849; see also Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) (holding that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans"); ERISA § 2(c), 29 U.S.C. § 1001(c) (1994).

[FN19]. ERISA does not cover all "retirement" funds--for example, government or church sponsored plans are not covered. ERISA's favor of tax-deferred plans may explain the preference. For example, ERISA does not cover plans where the sole beneficiary is the owner of the related business. See Kaplan v. First Options of Chicago, Inc., 189 B.R. 882 (Bankr. E.D. Pa. 1995) (holding that the interest of the debtor in a profit sharing plan was not exempted from debtor's bankruptcy estate by ERISA's anti-alienation restrictions contained in 29 U.S.C. § 1056(d)(1) because the only participants in the plan were the owners of the company which sponsored the plan, so the plan was not subject to ERISA); In re Witwer, 148 B.R. 930 (Bankr. C.D. Cal. 1992) (stating that a pension plan, in which the only beneficiary of the plan was the owner of all of the stock of the employer, was not excluded from the bankruptcy estate because the beneficiary was not a "participant" in the plan, which under ERISA is defined as a present or former employee of the employer); In re Watson, 192 B.R. 238 (Bankr. D. Nev. 1996). But see Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank of Dallas, 526 F. Supp. 510 (N.D. Tex. 1981) (rejecting the argument of a bank that the exemption of pension benefits under 29 U.S.C. § 1056(d) from garnishment by commercial creditors should not apply in a case where the sole beneficiary of the plan is the sole owner of the business to which the plan relates because the state statute under which the plan was created was intended to allow professionals to obtain full tax benefits for contributions to qualified plans and ERISA was intended to eliminate the discrimination in retirement laws against the self-employed).

Additionally, the anti-alienation provision and ERISA's vesting and funding provisions only apply to employee pension benefit plans and not to welfare benefit plans. Because pension plan savings accrue over such a long term, the potential for forfeiture is much greater than the vacation or health benefits used on a short-term, pay-as-you-play basis.

ERISA defines an "employee welfare benefit plan" as:

[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of [the Labor Management Relations Act of 1947] (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (1994).

ERISA defines "employee pension benefit plans" as:

(A) any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Id. § 1002(2).

Welfare benefits can, therefore, be freely assigned and alienated. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988).

[W]hen Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and not ERISA welfare benefit plans. In a comprehensive regulatory scheme like ERISA, such omissions are significant ones.

Id. (emphasis in original); see also Equitable Life Assurance Soc'y of United States v. Crysler, 66 F.3d 944, 948 (8th Cir. 1995); United States v. Bruchey, 810 F.2d 456, 458 (4th Cir. 1987); Sun Life Assurance Co. of Can. v. Dunn, 134 F. Supp. 2d 827, 836 (S.D. Tex. 2001); Metro. Life Ins. Co. v. Williams, 82 F. Supp. 2d 1346 (M.D. Fla. 1999); Noel C. Ice, What Are Creditors' Rights in Retirement Plan Benefits?, 21 Est. Plan. 30 (1994) (discussing generally the effects on welfare benefit and other non-ERISA qualified plans).

[FN20]. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1994).

[FN21]. S. Rep. No. 93-383 (1974), reprinted in 1974 U.S.C.C.A.N. 4889, 4891.

[FN22]. I.R.C. § 401(a)(13) (1994).

[FN23]. Treas. Reg. § 1.401-13(a)-(b)(1) (2001).

[FN24]. See supra note 5 and accompanying text.

[FN25]. A qualified plan is one that receives certain tax benefits as a result of adhering to § § 401(a)-416 of the Internal Revenue Code.

A plan may still be regulated under ERISA, but fail to be tax "qualified." In Patterson v. Shumate, 504 U.S. 753 (1992), the Supreme Court uses the term "qualified plan" seemingly to mean one that ERISA regulates. For general discussions of the judicial confusion over what is an "ERISA- qualified plan" after Patterson, see Anthony Michael Sabino & John P. Clarke, The Last Line of Defense: The New Test for Protecting Retirement Plans from Creditors

in Bankruptcy Cases, 48 Ala. L. Rev. 613 (1997); In re Hall, 151 B.R. 412, 420 (Bankr. W.D. Mich. 1993); and In re Hanes, 162 B.R. 733, 738-39 (Bankr. E.D. Va. 1994).

[FN26].

One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire. This legislation is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income.... [T]he objective is to increase the number of individuals participating in employer-financed plans; to make sure to the greatest extent possible that those who do participate in such plans actually receive benefits and do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the pension plan to accumulate and retain sufficient funds to meet its obligations; and to make the tax laws relating to qualified retirement plans fairer by providing greater equality of treatment under such plans for the different taxpayer groups concerned.

H.R. Rep. No. 93-807, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4678.

[FN27]. Id. at 68, reprinted in 1974 U.S.C.C.A.N. 4670, 4734 (emphasis added).

[FN28]. S. Rep. No. 93-127, at 13 (1974), reprinted in U.S.C.C.A.N. 4838, 4849.

[FN29]. AT &T v. Merry indicated that the purpose of section 206(d)(1) was "to protect an employee from his own financial improvidence in dealings with third parties." 592 F.2d 118, 124 (2d Cir. 1979); see also Boggs v. Boggs, 520 U.S. 833, 864 (1997); Roberts v. Baugh, 986 F. Supp. 1074, 1076 (E.D. Mich. 1977) (holding that the "purpose of ERISA's proscription on alienation and assignment is to protect an employee from his own financial improvidence in dealing with third parties"). For enlightening discussions about motivation behind thrift or lack thereof, see Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives, 73 Wash. U. L.Q. 1, 17 (1995); Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393 (1985) (arguing that societal intervention is justified as self-insurance against bad decisions in order to ensure the debtor, and not society, internalizes the costs of debt); Laurence B. Wohl, Pension and Bankruptcy Laws: A Clash of Social Policies, 64 N.C. L. Rev. 3, 15 (1985).

[FN30]. See George A. Akerlof & William T. Dickens, The Economic Consequence of Cognitive Dissonance, 72 Am. Econ. Rev. 307, 317 (1982) (arguing that compulsory old-age insurance is justified by the fact that cognitive dissonance may lead people to under-save); P.A. Diamond, A Framework for Social Security Analysis, 8 J. Pub. Econ. 275, 281-96 (1977) (arguing for paternalism because people would under-save otherwise); Jackson, supra note 29, at 1401-04 (discussing why people choose not to save and underestimate future economic needs); Hirsch, supra note 29.

[FN31]. See supra note 29 and accompanying text.

[FN32]. The courts have combed the legislative history for clear direction in interpreting section 206(d). See United Metal Prods. Corp. v. Nat'l Bank of Detroit, 811 F.2d 297 (6th Cir. 1987); Commercial Mortgage Ins. Inc. v. Citizens Nat'l Bank of Dallas, 526 F. Supp. 510, 516 (N.D. Tex. 1981) ("The legislative history is similarly cryptic with only three references to the sections in all the six committee reports prepared during congressional consideration of the statute ...."). Courts have also deemed the history to be "sparse," Ellis Nat'l Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466, 470 (2d Cir. 1986), and inconclusive, Gen. Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980).

[FN33]. Some judicial disagreement surfaced over whether alienation included garnishments, but resulted in

ultimate inclusion considering the broad interpretation. United Metal Prods., 811 F.2d at 301; Smith v. Mirman, 749 F.2d 181, 183 (4th Cir. 1984); Gen. Motors Corp., 623 F.2d at 463; Northwest Airlines, Inc. v. Roemer, 603 F. Supp. 7 (D. Minn. 1984); Commercial Mortgage Ins. Inc., 526 F. Supp. at 523.

[FN34]. ERISA section 206(d)(2) discusses form and payment of benefits:

(d) Assignment or alienation of plan benefits

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

(2)... For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

29 U.S.C. § 1056(d)(2) (1994).

[FN35]. Treas. Reg. § 1.401-13(a)-(d)(2); see also 26 U.S.C. § 4975 (1994) (I.R.C. partner provision); I.R.C. § 401(a)(13) (1994) (allowing a plan itself, but not a third party, to make a loan to a participant secured by his accrued nonforfeitable benefit, so long as other statutory criteria are met); I.R.C. § 72(p) (1994 & Supp. V 2000).

[FN36]. H.R. Conf. Rep. No. 93-1280, at 280 (1974), reprinted in 1974 U.S.C.C.A.N. 5037, 5061.

[FN37]. ERISA § § 401-414, 29 U.S.C. § § 1101-1114 (1994 & Supp V 2000).

[FN38]. Prohibited transactions under ERISA § 406(a)(I)(B) include:

(a) Transactions between plan and party in interest. Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect --

....

(B) lending of money or other extension of credit between the plan and a party in interest....

29 U.S.C. § 1106(a)(1)(B) (1994).

[FN39]. Exemptions from prohibited transactions under ERISA section 408(b)(1):

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions: (1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

Id. § 1108(b)(1).

[FN40]. See supra note 7 and accompanying text.

[FN41]. 29 U.S.C. § 1056 governs the form and payment of benefits:

(d) Assignment or alienation of plan benefits

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

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or

alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.
29 U.S.C. § 1056(d)(1)-(2) (1994).

[FN42]. The three unadorned references appear as follows:
1) In addition to the minimum participation, vesting and funding standards provided in the bill, your committee has adopted a number of specific provisions to protect the rights of employees and beneficiaries under qualified plans. Qualified plans must provide that retirement benefits may not be assigned or alienated, except for voluntary and revocable assignments of not more than 10 percent of the benefits.
H.R. Rep. No. 93-807, at 28 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4695.
2) To further ensure that the employee's accured [sic] benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated.... Nevertheless, a plan will be permitted to provide for voluntary and revocable assignments (not to exceed 10 percent of any benefit payment).
Id. at 68-69, reprinted in 1974 U.S.C.C.A.N. 4670, 4734.
3) Under the conference substitute, a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment ....
H.R. Conf. Rep. No. 93-1280, at 280 (1974), reprinted in 1974 U.S.C.C.A.N. 5037, 5061.

[FN43]. I.R.C. § 401(a)(13) (1994) (emphasis added).

[FN44]. See also United States v. Smith, 47 F.3d 681 (4th Cir. 1995) (holding amounts paid are still not alienable); Travelers Ins. Co. v. Fountain City Fed. Credit Union, 889 F.2d 264 (11th Cir. 1989) (holding that creditor could not garnish or attach proceeds of ERISA-qualified pension plan, even though plan was terminating and holding debtor's plan participants were scheduled to receive lump-sum payment prior to retirement); Tenneco Inc. v. First Va. Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983) (concluding that funds taken pre-retirement are no longer protected under ERISA, but those taken in retirement are still protected).

[FN45]. A rationale is the anti-alienation provision applies to rights against the plan and not against the pensioner (in other words, a creditor cannot sue the plan for the funds, but can sue the pensioner who receives such funds). See Robbins v. DeBuono, 218 F.3d 197 (2d Cir. 2000) (holding ERISA's anti-alienation provision protected benefits only while they were held by plan administrator and not after they reached hands of beneficiary); Wright v. Riveland, 219 F.3d 905 (9th Cir. 2000); Trucking Employees of N.J. Welfare Fund, Inc. v. Colville, 16 F.3d 52 (3d Cir. 1994); Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078 (10th Cir. 1994) (discussing ERISA regulation providing that the prohibited assignment and alienation of pension plan benefits refers to any arrangement whereby a party acquires from participant or beneficiary a right or interest in plan benefit payments, but that does not specifically prohibit garnishment of benefits actually paid); In re Toone, 140 B.R. 605 (Bankr. D. Mass. 1992); NCNB Fin. Servs., Inc. v. Shumate, 829 F. Supp. 178 (W.D. Va. 1993), aff'd, 45 F.3d 427 (4th Cir. 1994); Brosamer v. Mark, 561 N.E.2d 767 (Ind. 1990).

[FN46]. AT&T v. Merry, 592 F.2d 118, 124 (2d Cir. 1979) (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 587 n.20 (1979) (citing S. Rep. No. 93-1356, at 42-43 (1974), reprinted in 1974 U.S.C.C.A.N. 8133)).

[FN47]. 457 F. Supp. 1146, 1149 (S.D.N.Y. 1978).

[FN48]. Id.

[FN49]. Id. at 1150.

[FN50]. Id. at 1156.

[FN51]. See also Boggs v. Boggs, 520 U.S. 833 (1997); Metro. Life Ins. Co. v. Wheaton, 42 F.3d 1080 (7th Cir. 1994) (opinion by Posner, C.J.) (discussing general application of provision); Ablamis v. Roper, 937 F.2d 1450, 1453 (9th Cir. 1991) (holding the QDRO exception was enacted to protect the financial security of divorcees); AT&T, 592 F.2d at 118; Stone v. Stone, 632 F.2d 740 (9th Cir. 1980); Cody v. Riecker, 454 F. Supp. 22 (E.D.N.Y. 1978); Kikkert v. Kikkert, 427 A.2d 76 (N.J. 1981); Weir v. Weir, 413 A.2d 638 (N.J. 1980).

[FN52]. See supra note 17 and accompanying text demonstrating congressional intent that ERISA attempt to ensure natural uniformity through the protection of interstate commerce. In the attempt to ensure national uniformity, ERISA preempts state law under 29 U.S.C. § 1144, but does not preempt, for instance, state criminal law. Section 1144(a) provides: "[e]xcept as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws... (b) Construction and application... (4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State." 29 U.S.C. § 1144(a), (b)(4) (1994).

[FN53]. Boggs, 520 U.S. at 848; AT&T, 592 F.2d at 122; Cartledge, 457 F. Supp. at 1154.

[FN54]. See supra note 51.

[FN55]. The exception was codified under the Retirement Equity Act of 1984. ERISA section 206 provides:
(d) Assignment or alienation of plan benefits.
(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.
....
(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.
(B) For purposes of this paragraph --
(i) the term "qualified domestic relations order" means a domestic relations order --
(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which --
(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
(II) is made pursuant to a State domestic relations law (including a community property law).
ERISA § 206, 29 U.S.C. § 1056(d)(1), (3) (1994 & Supp. V 2000).

[FN56].
Several cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations.... In some of these cases, the courts have held that ERISA

was not intended to preempt state domestic relations law permitting the attachment of vested benefits for the purpose of meeting these obligations. Some courts have held that the ERISA preemption provision does not prevent application of state law permitting attachment of nonvested benefits for the purpose of meeting family support obligations.... The IRS has ruled that the spendthrift provisions are not violated when a plan trustee complies with a court order requiring the distribution of benefits of a participant in pay status to the participant's spouse or children in order to meet the participant's alimony or child support obligations.
S. Rep. No. 98-575, at 18 (1984), reprinted in 1984 U.S.C.C.A.N. 2147, 2564 (footnotes omitted).

[FN57]. ERISA § 409(a), 29 U.S.C. § 1109(a) (1994).

[FN58]. 815 F.2d 117, 118 (D.C. Cir. 1987).

[FN59]. Id. at 120. Senator Harrison A. Williams, Jr., chairman of the Senate Committee on Labor and Public Welfare stated: "The objectives of these provisions are to make applicable the law of trusts;... to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust." 120 Cong. Rec. S15,737 (1974), reprinted in 1974 U.S.C.C.A.N. 5177, 5186.

[FN60]. Crawford, 815 F.2d at 119 (citing George Gleason Bogert, Trusts and Trustees § 191, at 484 (rev. 2d ed. 1979); 3 Austin Wakeman Scott, The Law of Trusts § 257, at 2201 (3d ed. 1967)).

[FN61]. Crawford, 815 F.2d at 120 ("In short, the offset remedy adopted by the District Court is not only consistent with ERISA's purpose of providing effective remedies for fiduciary breaches, but it is also among the traditional trust principles that Congress intended to be incorporated into the law of employee benefit plans under ERISA.").

[FN62]. Id. at 121.

[FN63]. 493 U.S. 365 (1990).

[FN64]. Id. at 368.

[FN65]. Id. at 376.

[FN66]. Id. at 373 (emphasis in original).

[FN67]. 897 F.2d 801, 802 (5th Cir. 1990).

[FN68]. Id.

[FN69]. Id. at 803.

[FN70]. See id.at 804 (discussing how Congress proscribed the domestic order exception--but did not do so for criminal misconduct, so the court infers Congress did not want to do so and "will create exceptions where it sees

fit"); see also McLaughlin v. Lindemann, 853 F.2d 1307, 1310 (5th Cir. 1988).

[FN71]. See discussion infra Part III.B.

[FN72]. 743 F. Supp. 125, 126-27 (E.D.N.Y. 1990).

[FN73]. Id. at 127.

[FN74]. Id. at 129; see also Friedlander v Doherty, 851 F. Supp. 515 (N.D.N.Y. 1994) (holding that the liability of a former trustee of profit- sharing and pension plans to the plans for withdrawing funds for his personal use could be offset against the pension plan benefits, and stating that it defied common sense to allow a breaching fiduciary to collect from the very fund he has fraudulently depleted).

[FN75]. 990 F.2d 1413, 1414 (3d Cir. 1993).

[FN76]. Id.

[FN77]. Id. at 1420-21.

[FN78]. Id. at 1424.

[FN79]. Section 206(d)(4) provides:
(d) Assignment or alienation of plan benefits.
(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated....
....
(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if --
(A) the order or requirement to pay arises --
(i) under a judgment of conviction for a crime involving such plan,
(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle [29 U.S.C.S. § § 1101 et seq.], or
(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle [29 U.S.C.S. § § 1101 et seq.] by a fiduciary or any other person,
(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan ....
ERISA § 206(d)(4), 29 U.S.C. § 1056(d)(4) (1994).

[FN80]. See supra notes 57 and 59.

[FN81].
There is no specific exception under [ERISA] or the Internal Revenue Code [permitting] offset of a participant's benefit against the amount owed to a plan by the participant as a result of a breach of fiduciary duty to the plan or criminality involving the plan. Courts have been divided.... Some courts have ruled that there is no exception in ERISA for the offset of a participant's benefit to make a plan whole in the case of a fiduciary breach. Other courts

have reached a different result.... The Committee believes that the assignment and alienation rules should be clarified by creating a limited exception that permits participants' benefits under a qualified plan to be reduced under certain circumstances including the participant's breach of fiduciary duty to the plan.
S. Rep. No. 105-33, at 310 (1997).

[FN82]. See discussion infra Part IV.

[FN83]. See discussion infra Part IV.A.1.

[FN84]. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990).

[FN85]. See United Metal Prods. Corp. v. Nat'l Bank of Detroit, 811 F.2d 297 (6th Cir. 1987); Ellis Nat'l Bank of Jacksonville v. Irving Trust Co., 786 F.2d 466 (2d Cir. 1986); St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550 (11th Cir. 1985); Calhoun v. FDIC, 653 F. Supp. 1288 (N.D. Tex. 1987); Kann v. Keystone Res. Inc., 575 F. Supp. 1084 (W.D. Pa. 1983); Vink v. SHV N. Am. Holding Corp., 549 F. Supp. 268 (S.D.N.Y. 1982); Helmsley-Spear, Inc. v. Winter, 426 N.Y.S.2d 778 (N.Y. App. Div. 1980), aff'd, 419 N.E.2d 1078 (N.Y. 1981); Nat'l Bank of N. Am. v. Int'l Bhd. of Elec. Workers Local No. 3, Pension & Vacation Funds, 419 N.Y.S.2d 127 (N.Y. App. Div. 1979).

[FN86]. 425 N.Y.S.2d at 779.

[FN87]. Id.

[FN88]. Id.

[FN89]. Id. at 781.

[FN90]. Nedrow v. MacFarlane & Hays Co. Employees' Profit Sharing Plan & Trust, 476 F. Supp. 934, 935 (E.D. Mich. 1979).
Prior to ERISA, pension plans commonly included clauses under which, for a variety of what the employer felt were improper activities, an employee could forfeit part or all of the pension benefits which he or she had in some cases worked many years to build up. One of the major reasons for the enactment of ERISA was to do away with this practice and thus to help workers claim the benefits they had earned.
Id.; see also Fremont v. McGraw-Edison Co., 606 F.2d 752 (7th Cir. 1979); Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979).

[FN91]. 549 F. Supp. 268, 269-70 (S.D.N.Y. 1982).

[FN92]. ERISA § 203, 29 U.S.C. § 1053 (1994), amended by Pub. L. No. 107-16, 115 Stat. 127 (2001) (employees must vest after a certain specified minimum period of employment).

[FN93]. 549 F. Supp. at 273.

[FN94]. Id. at 271. Via a slippery-slope argument, the Vink court also noted such an exception would be

administratively difficult to administer. Id. at 273.

[FN95]. United Metal Products Corp. v. Nat'l Bank of Detroit, 811 F.2d 297, 300 (6th Cir. 1987).

[FN96]. Id.

[FN97]. Id. at 298.

[FN98]. 786 F.2d 466, 467 (2d Cir. 1986).

[FN99]. Id. at 470.

[FN100]. Id. at 471 (citation omitted).

[FN101]. See supra note 94 and accompanying text.

[FN102]. See discussion infra Part III.A; ERISA § 206, 29 U.S.C. § 1056(d)(1)-(2) (1994 & Supp. V 2000).

[FN103]. Ellis Nat'l Bank of Jacksonville, 786 F.2d 466, 471 (2d Cir. 1986); see also discussion infra Part III.A; supra note 51.

[FN104]. 493 U.S. 365, 368 (1990).

[FN105]. Id. at 376.

[FN106]. Id.

[FN107]. See ERISA § 2(a)-(c), 29 U.S.C. § 1081(a)-(c) (1994); supra notes 18, 56 and accompanying text.

[FN108]. Vink v. SHV N. Am. Holding Corp., 549 F. Supp. 268, 269-70 (S.D.N.Y. 1982).

[FN109]. Guidry, 493 U.S. at 377. "A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be 'especially' inequitable. The impracticability of defining such a standard... should be left to Congress." Id. Courts have followed Guidry's caveat. Since Guidry, a small number of cases have examined the employee misconduct exception. See In re Bell & Beckwith, 5 F.3d 150 (6th Cir. 1993); United States v. Gaudet, 966 F.2d 959 (5th Cir. 1992); State v. Kenyan, 593 N.W.2d 491 (Wis. Ct. App. 1999); Pomeranke v. Williamson, 478 N.W.2d 800 (Minn. Ct. App. 1991).

[FN110]. 504 U.S. 753 (1992).

[FN111]. Judicial discussion of the relationship between the anti-alienation provision and the Bankruptcy Code strictly revolved around whether or not the anti-alienation provision was included in Bankruptcy Code section 541 ("applicable nonbankruptcy law"). Decision depended upon whether or not "applicable non-bankruptcy law" included federal and state law. If so, the pension funds so protected would be excluded from the bankruptcy estate under ERISA. See Velis v. Kardanis, 949 F.2d 78, 82 (3d Cir. 1991); In re Lucas, 924 F.2d 597, 600-01 (6th Cir. 1991); In re Harline, 950 F.2d 669, 674 (10th Cir. 1991); In re Moore, 907 F.2d 1476 (4th Cir. 1990). If not, the pension funds so protected would be included in the bankruptcy estate, or possibly excluded under state law as the "applicable nonbankruptcy law." See In re Dyke, 943 F.2d 1435, 1441 (5th Cir. 1991); In re Reed, 951 F.2d 1046, 1049 (9th Cir. 1991); In re Daniel, 771 F.2d 1352, 1359-60 (9th Cir. 1985); In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Goff, 706 F.2d 574, 582 (5th Cir. 1983).

[FN112]. Patterson, 504 U.S. 753.

[FN113]. 11 U.S.C. 541(a), (c)(2) (1994). Section 541(a) provides broad inclusion in the bankruptcy estate of "all legal or equitable interests of the debtor," while § 541(c)(2) allows for a "restriction on the transfer of a beneficial interest of the debtor that is enforceable under applicable nonbankruptcy law."

[FN114]. Patterson, 504 U.S. at 753. For comment, see Ice, supra note 19, at 30 (explaining that the Court made an "end run" around the analysis of the statutes involved); Dilley, supra note 5, at 366 (stating the Court "failed to address the larger policy issues").

[FN115]. Patterson, 504 U.S. at 764.

[FN116]. Id. at 764-66 (quoting Donna L. 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. 301, 317 (1987)).

[FN117]. See Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991); In re Lucas, 924 F.2d 597 (6th Cir. 1991); In re Moore, 907 F.2d 1476 (4th Cir. 1990); Smith v. Mirman, 749 F.2d 181, 185 (4th Cir. 1984); see also Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economic and Cognitive Perpectives, 73 Wash. U. L.Q. 1, 63 (1995) ("But what of the case where a person solicits credit with a spendthrift trust already in hand? Of course, debtors could again respond that lenders extend credit with their eyes open and that they are savvy enough to distinguish exempt from nonexempt property when they see it."); id. at n.229 (In other words, creditors do not rely on spendthrift trusts because the law does not allow them to do so.").

[FN118]. Criminal restitution requires the criminal, as a condition of his or her sentence, to repay the victim or society. For example, under 18 U.S.C. § 3663, the criminal may be required to return property or money to the victim or the deceased victim's estate or to perform community service. The purpose is to "restore victims to as whole a position as possible." United States v. Satterfield, 743 F.2d 827, 833 (11th Cir. 1984).

Essentially, "restitution" means "restoration." Restatement (Third) of Restitution and Unjust Enrichment § 1 (2000). "'Restitution' means both recovery based on and measured by unjust enrichment. It also means restoration in kind of a specific thing." Hubbard v. EPA, 949 F.2d 453, 465 (D.C. Cir. 1991), aff'd in part, 982 F.2d 531 (D.C. Cir. 1992) (en banc). The equitable idea involves returning an unjustified benefit to its rightful owner. The Restatement Third of Restitution stresses that "criminal restitution" is not based upon unjust or unjustified enrichment. The criminal has not obtained a benefit at the expense of the victim. Criminal restitution is based on compensation for harm, which is a tort-like concept. Restatement (Third) of Restitution and Unjust Enrichment § 1 (2000); see also People v. Stephenson, 12 P.3d 266, 267 (Colo. Ct. App. 1999).

[FN119]. State v. Pulasty, 612 A.2d 952, 953 (N.J. Super. Ct. App. Div. 1992).

[FN120]. Id.

[FN121]. Id. at 956-57.

[FN122]. 29 U.S.C. § 1144(b)(4) (1994); see also supra note 50.

[FN123]. Pulasty, 612 A.2d at 957 (citations omitted).

[FN124]. New Orleans Elec. Pension Fund v. DeRocha, 779 F. Supp. 845, 851 (E.D. La. 1991); Mendez-Bellido v. Bd. of Trustees of Div. 1181, 709 F. Supp. 329, 331 (E.D.N.Y. 1989) (where the participant was slain by his wife).

[FN125]. See New Orleans Elec. Pension Fund, 779 F. Supp. at 831; Mendez-Bellido, 709 F. Supp. at 331.

[FN126]. 12 P.3d 266, 267 (Colo. Ct. App. 1999).

[FN127]. Id.

[FN128]. Id. at 268; see also United States v. Jackson, 229 F.3d 1223 (9th Cir. 2000) (holding that the district court, as part of criminal sentence, may not order that undistributed funds from pension plan covered by ERISA be used to make immediate payment of restitution, unless crime involved ERISA pension plan in question and restitution is ordered to that plan); Pomeranke v. Williamson, 478 N.W.2d 800 (Minn. Ct. App. 1991) (finding funds in ERISA qualified pension and profit-sharing plan were exempt from alienation under state court restitution order entered in criminal case).

[FN129]. 790 F. Supp. 172, 174 (S.D. Ohio 1992).

[FN130]. See discussion infra Part III.A.

[FN131]. Mills, 790 F. Supp. at 177 (quoting Guidry v. Sheet Metal Workers, 493 U.S. 365, 376 (1990)).

[FN132]. Dilley, supra note 5, at 357 n.7 (quoting Jeffrey Krasner, O.J. Has Protection--Court Can't Touch His Retirement Funds, Boston Herald, Feb. 6, 1997, at 5).

[FN133]. Douglas Feiden, O.J. Nest Egg Tough to Crack, N.Y. Daily News, Feb. 5, 1997, at 18; see also Krasner, supra note 132.

[FN134]. See infra Part III.B (discussing Helmsley-Spear). Although the issue in Helmsley-Spear was one of

employee misconduct and not non-employee torts or crimes, the policies supported are similar for both exceptions.

[FN135]. Helmsley-Spear, Inc. v. Winter, 426 N.Y.S.2d 770, 782-83 (N.Y. App. Div. 1980) (Fein, J., dissenting).

[FN136]. People v. Stephenson, 12 P.3d 266, 268 (Colo. Ct. App. 1999).

[FN137]. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078 (10th Cir. 1994) (en banc). For cases ruling ERISA's antialienation protection does not cover benefits in pay status, see supra note 45.

[FN138]. See discussion infra Part II.B.

[FN139]. 47 F.3d 681 (4th Cir. 1995).

[FN140]. Id. at 682-83.

[FN141]. Id. at 682.

[FN142]. Id.

[FN143]. Id. at 684; see also Roberts v. Baugh, 986 F. Supp. 1074 (E.D. Mich. 1997) (The Roberts court held that where a state treasurer sought from the prisoner reimbursement for incarceration expenses, ERISA prohibits alienation. The benefit was in payment status, but could not be directed from plan to treasurer as this would violate ERISA protection). Similarly, courts have also held that restitution orders violate ERISA's anti-alienation clause. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990); Pomeranke v. Williamson, 478 N.W.2d 800 (Minn. Ct. App. 1991).

[FN144]. See supra note 44 and accompanying text.

[FN145]. See supra note 42 and accompanying text.

[FN146]. See discussion infra Part II.B.

[FN147]. State v. Pulasty, 612 A.2d 952, 953 (N.J. Super. Ct. App. Div. 1992).

[FN148]. See discussion infra Part IV.A.1.

[FN149]. Id.

[FN150]. This is such an obvious concept that the result in cases like Ellis is ludicrous. Protecting the pension is a necessary action, but protecting it in violation of basic common law principles is an assault on common sense. In

essence, by protecting stolen property from being returned to its rightful owner, this application of ERISA assists commission of yet another theft and is a violation of Federal and state receipt of stolen property laws. See 18 U.S.C. § 2315 (1994) (discussing the sale or receipt of stolen goods, securities, monies or fraudulent state tax stamps). In the case of pensioners or dependents, as in Ellis, who were permitted to retain stolen property through application of ERISA's anti-alienation rule, the injured party could successfully argue an unconstitutional taking.

Clearly, and especially considering ERISA section 514(d), which states: "Nothing 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) (1994), avoidance of other Federal laws was not what Congress intended. Ellis seems an aberration, though, as in most cases the tortfeasor or criminal has not, per se, deposited funds into his or her pension fund, but is left with the pension fund as the only resource from which third party creditors can collect. In the case of fraudulent transfers in bankruptcy, see discussion infra Part V.A, debtors essentially do "steal" from their own assets and hide them within pensions. In the case of limited assets, where the criminal or tortfeasor has no other assets from which to pay restitution or damages, see discussion infra Part IV.A.1-3 (using O.J. Simpson as an example), the "theft" concept is not as applicable.

[FN151]. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 377 (1990).

[FN152]. See discussion infra Part II.B.

[FN153]. Guidry, 493 U.S. at 376.

[FN154]. Id. at 376-77 (emphasis in original). Additionally, in Boggs v. Boggs, 520 U.S. 833, 851 (1997), the Supreme Court revisited this area and held, citing Guidry, that "[s]tatutory anti-alienation provisions are potent mechanisms to prevent the dissipation of funds.... ERISA's pension plan anti- alienation provision is mandatory and contains only two explicit exceptions, see § § 1056(d)(2), (d)(3)(A), which are not subject to judicial expansion."

[FN155]. Patterson v. Shumate, 504 U.S. 753, 764-66 (1992).

[FN156]. See discussions infra Part II.A (discussing loans); Part III.A (discussing QDRO).

[FN157]. See discussion supra Part II.A.

[FN158]. See State v. Pulasty, 612 A.2d 952, 953 (N.J. Super. Ct. App. Div. 1992).

[FN159]. The enacted versions of S. 420 and H.R. 333 replace the year 2000 bankruptcy reform bill vetoed by President Clinton. Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001). The Senate and the House bill differ in a number of ways, although both aim to deter the same abuses, and remains in conference. President Bush is expected to readily sign the final version.

[FN160]. Philip Shenon, Senate Panel Approved Bill for Overhauling Bankruptcy Laws, N.Y. Times, Mar. 1, 2001, at A15 (reporting in 1999 that there were 1.26 million personal bankruptcies and 1.4 million personal bankruptcies in 1998 up from 718,000 at the beginning of 1990s); see also Riva D. Atlas, Bill to Restrict Bankruptcies May Lead to Surge in Filings, N.Y. Times, Mar. 9, 2001, at C1 (reporting that Lundquist Consulting, on behalf of Visa's network, shows a 20.3% increase in consumer bankruptcies in the first quarter of 2001 compared with 2000).

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Am. Bankr. Inst., U.S. Bankruptcy Filings 1980-2000, available at www.abiworld. org/stats/1980annual.html (last visited Dec. 31, 2001).

[FN161]. 147 Cong. Rec. S1,794 (2001). Senator Orrin G. Hatch stated:

[A survey by] the Credit Union National Association... indicates broad public support for reforming our bankruptcy system.... According to the poll, the vast majority of people believe that individuals who file for bankruptcy should be required to pay back some of their debts if they have the means to do so.

Id.

[FN162]. A chapter 7 liquidation petition constitutes complete relief in bankruptcy. A chapter 13 claim is an adjustment of debts of an individual with regular income. Under chapter 7, all future income (human capital) is relieved from debt in exchange for the surrender of current assets. Under chapter 13, future income is apportioned to debt while current assets largely remain untouched.

[FN163]. Wells M. Engledow, Cleaning Up the Pigsty: Approaching a Consensus on Exemption Laws, 74 Am. Bankr. L.J. 275, 276 (2000).

[FN164]. Id. at 275-76 (emphasis added).

[FN165]. See Jackson, supra note 29, at 1396.

The fresh-start policy is... substantively unrelated to the creditor-oriented distributional rules that give bankruptcy law its general shape and complexity.... Even though it makes sense to locate an individual's financial fresh start in a statute largely concerned with collection procedures, the social and economic concerns that lie behind the fresh-start policy are distinctly different.

Id.

[FN166]. 292 U.S. 234 (1934).

[FN167]. Id. at 244.

[FN168]. A number of authors fail to see this nexus because they do not probe deeply enough into why legislators support the policies behind fresh start and anti-alienation. Both ultimately seek to paternalistically control individual's savings choices to ensure they do not end up burdening social programs. But see Dilley, supra note 5, at 363.

[B]ankruptcy, tax, and pension law all have distinct policy purposes and theoretical frameworks, and the combination of the three rarely produces an obviously defensible result. It has been the unenviable task of individual bankruptcy judges to interpret federal tax and labor law in addition to the bankruptcy statutes, and determine whether public policy favoring retirement requires them to either support creditors' rights, or apply the protection of the state statute to a broad range of retirement savings arrangements.

Id.; see also Laurence B. Wohl, Pension and Bankruptcy Laws: A Clash of Social Policies, 64 N.C. L. Rev. 3, 5 (1985). Wohl provides a general discussion about how the purpose behind bankruptcy, to pay creditors equitably, and the purpose behind ERISA, to protect debtors pensions, clash. "The sanctity and protection of retirement benefits cannot be maintained if those benefits can be attached by creditors. Conversely, the maximum amount of a debtor's assets is not made available to creditors if a substantial portion of those assets is in a retirement account that is unavailable to creditors." Id.

[FN169]. See discussion infra Part V.A; infra note 169 and accompanying text.

[FN170]. See discussion infra Part II.B.

[FN171]. Exemptions under § 522 include:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.... Such property is --

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable non-bankruptcy law.

11 U.S.C. § 522(b)-(d) (1994).

Property to be exempted under § 522(d) includes life insurance policies, the right to receive certain benefits (like social security, alimony, pension benefits and unemployment), up to $17,425 in value of a residence, and limited values for a motor vehicle, personal items, jewelry, and tools of the trade. Id. § 522(d) (dollar amount automatically adjusted pursuant to 11 U.S.C. § 104(b) (1994)); 66 Fed. Reg. 10,910-11 (Feb. 20, 2001).

[FN172]. 11 U.S.C. § 522(f) (1994); see also William J. Woodward, Jr., Exemptions, Opting Out, and Bankruptcy Reform, 43 Ohio St. L.J. 335 (1982) (describing the important interplay between exemption laws and a debtor's fresh start); Engledow, supra note 163, at 279 (quoting Alan N. Resnich, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L. Rev. 615, 616 (1978).

The oft-quoted public policy goals of exemption laws are: (1) To provide the debtor with [the] property necessary for his survival; (2) To protect the dignity and the cultural and religious identity of the debtor; (3) To enable the debtor to rehabilitate himself financially and earn income in the future; (4) To protect the debtor's family from the adverse consequences of impoverishment; [and] (5) To shift the burden of providing the debtor and his family with minimal financial support from society to the debtor's creditors.

Id.

[FN173]. G. Marcus Cole, The Federalist Cost of Bankruptcy Exemption Reform, 74 Am. Bankr. L.J. 227, 228 (2000) ("These exemption statutes have historically been property based, rather than dollar value based, largely in recognition of the uniqueness of tools of trade, the family bible, and other items thought necessary for a new beginning.").

[FN174]. See In re Arrol, 207 B.R. 662 (Bankr. N.D. Cal. 1997) (exemption allowed in new jurisdiction); Cole, supra note 173, at 230.

Jurisdiction jumping by deadbeats is a straightforward phenomenon. A debtor with extensive assets and comparably extensive debts, changes her state of residence on the eve of bankruptcy. She converts her assets into property that the new state exempts from creditor levy, and then files a petition for bankruptcy under Chapter 7 of the Bankruptcy Code.

Id. Cole's piece includes studies on bankruptcy migration.

[FN175]. 147 Cong. Rec. S2,329 (daily ed. Mar. 15, 2001). Expounding on numerous examples of abuse, Senator Herb Kohl reported:

Let me give you a few of the numerous examples of rich debtors taking advantage of this loophole: Abe Gosman, a

health care and real estate magnate, declared bankruptcy last week in Florida citing debts of over $233 million. Despite these debts incurred from business losses in Massachusetts and Rhode Island, he will hold onto his 64,000 square foot mansion in West Palm Beach on a street known as "Billionaire's Row."

This January, convicted Wall Street financier Paul Bilzerian filed bankruptcy for the second time while owing at least $140 million in debts, but still kept his $5 million, 37,000 square foot Florida mansion. Movie star Burt Reynolds wrote off more than $8 million in debt through bankruptcy, but still held onto his $2.5 million estate, named Valhalla.

Sadly, those examples are just the tip of the iceberg. We asked the General Accounting Office to study this problem. They estimated that 400 homeowners in Florida and Texas--all with over $100,000 in home-equity profit from this unlimited exemption each year. While they continue to live in luxury, they write off an estimated $120 million owed to honest creditors. A Brown University study estimated that 3 percent of all people who move to Texas and Florida are motivated by bankruptcy concerns.

Id. at S1,794 (daily ed. Mar. 5, 2001).

Senator Hatch added to the examples of abuses of the exemption:

There are numerous examples of people who take advantage of loopholes at the expense of everyone else. I recently heard from the President of a credit union in Wisconsin who told me about a young couple who wanted a "clean financial slate" before they got married. What did they do? They ran up their credit card purchases. One of them prepaid on a car loan with the credit union to have the other cosigner released. Then, although they were both employed full time, they filed for bankruptcy to wipe out all their debt. The credit union--and its members--had to eat the $3,000 in credit card debt and another couple of hundred dollars on the car.

Id.

SenatorDianne Feinstein's comments included the following:

Let me give an example of homestead abuse that has been highlighted in the press and even on "Sixty Minutes." When this Wall Street financier and convicted felon finally declared bankruptcy, he listed more than $140 million in debts and only $15,805 in assets.

But one particular asset was not itemized, and the financier was not obligated to itemize it. That asset was his 37,000 square foot Florida mansion, worth an estimated five to $6 million. This "house" has ten bedrooms, two libraries, a business center, a double gourmet kitchen, an indoor squash and racquetball court, an indoor basketball court complete with electronic scoreboard, a private movie theater, full weight and exercise rooms, a swimming pool, a spa, an outdoor entertainment area, game rooms, a nine-car garage, a lakefront gazebo, an elevator, 21 bathrooms, and a 6,000 square foot quest [sic] house. The quest [sic] house alone has been described as a mansion in and of itself.

But in Florida, the entire home, 21 bathrooms and all, as well as the property on which it sits, is completely exempt from the bankruptcy laws. The "bankrupt" financier owes millions, but through careful planning he can continue to live like a king.

Meanwhile, his creditors can only stand outside the gates of the home and look with awe upon the home they paid for--$140 million in debts, and nothing his creditors can do.

And this case is not all that unique. Actors, Wall Street financiers, participants in felonious savings and loan scandals, and others, all have taken advantage of the homestead exemption loophole.

Essentially, these five States act as heavens [sic] for the most determined avoiders of debt, an escape of last resort for wealthy individuals who play fast and loose with their money.

A General Accounting Office study of bankrupt debtors who take advantage of the homestead loophole in Florida and Texas alone found that each year more than 400 wealthy debtors are able to protect more than $100,000 in equity in their home, at a cost to creditors of $120 million.

Id. at S2,332-34 (daily ed. Mar. 15, 2001).

[FN176]. See Jackson supra note 29, at 1440 n.147.

The election that many debtors face between seeking protection under Chapter 7 or Chapter 13 may be seen as an example of this choice: whereas Chapter 7 protects human capital at the expense of other assets, see 11 U.S.C.A. § § 524, 727 (West 1979 & Supp. 1985), Chapter 13 protects existing assets at the expense of some human capital.

Id.

[FN177]. See discussion infra Part V.B.1.

[FN178]. Lines v. Frederick, 400 U.S. 18, 21 (1970) (Harlan, J., dissenting); In re Moore, 177 B.R. 437, 441 (Bankr. N.D.N.Y. 1994); In re Cerny, 17 B.R. 221, 224 (Bankr. N.D. Ohio 1982).

[FN179]. See Woodword supra note 172, at 376.

[FN180]. See Lawrence Ponoroff & F. Stephen Knippenberg, Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?, 70 N.Y.U. L. Rev. 235 (1995) (arguing that debtor has a right to convert assets since conversion is a property issue).

[FN181]. See In re Myerson & Kuhn, 121 B.R. 145 (Bankr. S.D.N.Y. 1990) (discussing part of the case against the infamous and well-publicized bankruptcy of Bowie Kuhn, where the court indicates fraud might be present in his new Florida home purchase).

[FN182]. See Engledow supra note 163 ("Prebankruptcy planning generally includes the conversion of nonexempt assets (such as money in a debtor's bank account) to exempt assets (such as a home or an annuity) prior to debtor's filing for bankruptcy."). "In other words, exemptions, at any given level, are 'fair' to the vast majority of debtors and creditors. The only times they become 'unfair' are those few cases involving deadbeats engaged in jurisdiction jumping." Cole, supra note 173, at 234.

[FN183]. Philip Shenon, Senate Rejects Industry Curbs on Bankruptcy, N.Y. Times, Mar. 8, 2001, at A18.

[FN184]. 147 Cong. Rec. S2,344-45 (daily ed. Mar. 15, 2001) (statement of Sen. Jeff Sessions); see also id. at S1,805-07 (daily ed. Mar. 5, 2001) (statement of Sen. Charles E. Grassley); id. at S2,376 (daily ed. Mar. 15, 2001) (statement of Sen. Tom Daschle); id. at S1,794 (daily ed. Mar. 5, 2001) (Sen. Hatch stating that as much as $550 per year per family in hidden tax); Philip Shenon, Hard Lobbying on Debtor Bill Pays Dividend, N.Y. Times, Mar. 13, 2001, at A1 (quoting Rep. George W. Gekas who stated that bankruptcy is "costly to all of us who don't go bankrupt"); Philip Shenon, Bill on Bankruptcy to Make It Harder to Wipe Out Debts, N.Y. Times, Mar. 14, 2001, at A1 ("The Banking industry says that bankruptcies drive up the cost of borrowing for everyone else by $400 to $500 per person per year."); id. ("I can see no good reason why a schoolteacher earning $30,000 a year should have to pay more for a mortgage or more for a new couch because some guy making $100,000 a year finds it inconvenient to pay his debts.") (quoting Todd J. Zywicki, a bankruptcy specialist at George Mason University Law School).

[FN185]. 147 Cong. Rec. S1,794 (daily ed. Mar. 5, 2001) (statement of Sen. Hatch).

[FN186]. Engledow, supra note 163, at 277.

[FN187]. Id.; see also In re Swift, 3 F.3d 929, 931 (5th Cir. 1993) (quoting In re Zouhar, 10 B.R. 154, 157 (Bankr. D.N.M. 1981) (quoting Dolese v. United States, 605 F.2d 1146, 1154 (10th Cir. 1979) (discussing corporate transfers in dividend transaction)).

[FN188]. 11 U.S.C. § 727(a)(2) (1994).

[FN189]. 21 F. Supp. 41 (E.D. Pa. 1937).

[FN190]. Id. at 42.

[FN191]. See In re Adlman, 541 F.2d 999 (2d Cir. 1976); Forsberg v. Sec. State Bank, 15 F.2d 499, 501 (8th Cir. 1926); Wudrick v. Clements, 451 F.2d 988, 989 (9th Cir. 1971) ("It has long been the rule in this and other jurisdictions that the purposeful conversion of nonexempt assets to exempt assets on the eve of bankruptcy is not fraudulent per se."); In re Curry, 160 B.R. 813, 817 (Bankr. D. Minn. 1993) (must rise to the level of fraudulent conveyance); In re Levine, 134 F.3d 1046, 1053 (11th Cir. 1998) (fraud found using badges of fraud); Ponoroff & Knippenberg, supra note 180, at 235 (finding that denials of exemptions result when court finds fraud in most cases); Engledow, supra note 163, at 275 (asserting that federal courts rule on whether exemption exceeds state law or whether there is evidence of fraud).

[FN192]. See, e.g., In re Glass, 164 B.R. 759 (B.A.P. 9th Cir. 1994).

[FN193]. 89 B.R. 954, 959 (Bankr. S.D. Fla. 1988).

[FN194]. Id. at 959.

[FN195]. Id.; H.R. Rep. No. 95-595, at 361 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6317 (citation omitted); S. Rep. No. 95-989, at 76 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5862.

[FN196]. See In re Huckfeldt, 39 F.3d 829, 832 (8th Cir. 1994) (ex- husband converted assets to hide them from ex-wife); see also id. (quoting 4 Collier on Bankruptcy § § 707.03-.11 (Lawrence P. King et al. eds., 15th ed. rev. 1992)

(Bad faith may be found when the debtor has a frivolous, noneconomic motive for filing a bankruptcy petition, when there is a sinister or unworthy purpose, or when there is an abuse of the judicial process. That the debtor is merely taking advantage of its legal rights is not, by itself, sufficient to support a finding of bad faith."));
In re Spoor-Weston, Inc., 139 B.R. 1009 (Bankr. N.D. Okla. 1992) (denial of exemptions under substantial abuse standard).

[FN197]. 11 U.S.C. § 707(a)-(b) (1988).

The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including --

(1) unreasonable delay by the debtor that is prejudicial to creditors; (2) nonpayment of any fees or charges required under chapter 123 of title 28; and (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.
Id.

[FN198]. See In re Kelly, 841 F.2d 908, 914 (9th Cir. 1988).

[FN199]. In re Keniston, 85 B.R. 202, 222-23 (Bankr. D.N.H. 1988).

[FN200]. In re Renner, 70 B.R. 27, 29 (Bankr. D.N.D. 1987) ("The Debtors' financial situation appears to be the result not of irresponsible consumer spending, but rather a result of unfortunate health problems.").

[FN201]. Michael D. Bruckman, The Thickening Fog of "Substantial Abuse:" Can 707(a) Help Clear the Air?, 2 Am. Bankr. Inst. L. Rev. 193 (1994). For an examination of per se substantial abuse, see Fonder v. United States, 974 F.2d 996 (8th Cir. 1992); In re Walton, 866 F.2d 981 (8th Cir. 1989); and In re Kelly, 841 F.2d at 908. For an examination of the facts and circumstances test in approaching section 707(b), see In re Green, 934 F.2d 568, 573 (4th Cir. 1991) (the facts and circumstances are not only better suited to examine then the per se rule, but is "consistent with the statutory presumption in favor of granting the relief requested by the debtor"); and In re Heller, 160 B.R. 655 (D. Kan. 1993).

[FN202]. Lawrence Ponoroff and F. Stephen Knippenberg suggest:

[G]ranting of relief under chapter 7 [in such "deadbeat" cases] would amount to a substantial abuse. While neither 707(b) itself nor the legislative history offers a clear or explicit definition of what constitutes a substantial abuse of chapter 7, the courts have to one degree or another come to accept the debtor's ability to fund a chapter 13 plan as relevant to the determination, if not actually dispositive of the issue.

Ponoroff & Knippenberg, supra note 180, at 297-98 (footnotes omitted).

[FN203]. See Jackson, supra note 29, at 1443.

With this provision in mind, consider whether a debtor should be denied discharge for converting his nonexempt assets to exempt ones on the eve of bankruptcy in order to maximize his exemptions in an anticipated bankruptcy proceeding. Despite a legislative statement suggesting that the Bankruptcy Code does not reach acts of this kind, courts frequently treat such intentional conversions as falling under the ban of section 727(a)(2). The court in the principal case reaching that result commented: It would constitute a perversion of the purposes of the Bankruptcy Code to permit a debtor earning $180,000 a year to convert every one of his major nonexempt assets into sheltered property on the eve of bankruptcy with actual intent to defraud his creditors and then emerge washed clean of future obligation by carefully concocted immersion in bankruptcy waters.

Id.; see also Cole, supra note 173, at 249 (quoting 11 U.S.C. § 727(a)(2) (1994)

(Where a bankruptcy court sees evidence of "fraudulent conversion" of nonexempt property to exempt property on the eve of a bankruptcy filing, the court has the power to withhold the debtor's discharge, provided a timely complaint objecting to discharge is filed. Section 727(a)(2) of the Code instructs the court to grant a discharge to a debtor, "unless--the debtor, with intent to hinder, delay, or defraud a creditor... has transferred, removed, destroyed, mutilated, or concealed... property of the debtor, within one year before the date of the filing of the petition...." This power to confront fraudulent conversion has obvious limitations, however. If the debtor converts her property to exempt property in the destination state, waits the respectable one year, and then files the petition, the letter of the Code requires that she receive her discharge. If creditors attempted to collect during the waiting period, the state exemptions govern any collection action and protect the freshly converted assets. As a result, jurisdiction jumping has the effect of conferring sanctuary immediately to converted assets, while the formality of a discharge may be postponed)).

[FN204]. Philip Shenon, House Passes Tighter Rules on Filing for Bankruptcy, N.Y. Times, Mar. 2, 2001, at A20.

[FN205]. 147 Cong. Rec. S1,810 (daily ed. Mar. 5, 2001) (statement of Sen. Sessions).

[FN206]. See infra app.

[FN207]. 147 Cong. Rec. S1,807 (daily ed. Mar. 5, 2001) (statement of Sen. Hatch).

[FN208]. Id. (daily ed. Mar. 5, 2001) (statement of Sen. Grassley).

[FN209]. Id. at S2,344 (daily ed. Mar. 15, 2001) (statement of Sen. Sessions); see also id. at S1,794 (daily ed. Mar. 5, 2001) (statement of Sen. Hatch) ("Make wealthy people who can repay their debts actually honor them. I suppose we can call this a tax cut for the responsible people in America."); id. at S2,376 (daily ed. Mar. 15, 2001) (statement of Sen. Daschle) ("Paying your debts isn't a matter of choice. It's a matter of honor. And it is a legal responsibility to which you will be held accountable."); id. at S2,376 (daily ed. Mar. 15, 2001) (statement of Sen. Pete V. Domenici). Just prior to the Senate passing the reforms, Senator Domenici summarized the policies upheld:

Although there has been a slight decline in bankruptcies recently, the 1990s saw a steady increase, despite a robust economy. There are now more than a million bankruptcies a year. Many people are concerned that bankruptcy is being used as a financial planning tool and the public has become frustrated with many stories of bankruptcy abuse.

This bill goes a long way to curbing the abuse without undercutting the truly needy debtor's right to a fresh start. This legislation accounts for the honest but unfortunate debtor who faces mounting bills as a result of medical expenses, divorce, and other reasonable causes.

However, it prevents a debtor from pursuing a lavish lifestyle and then using bankruptcy to avoid obligations. Debtors must take responsibility for their spending. After all, the money creditors lose in bankruptcy is passed on to consumers in higher prices for consumer goods, services, and credit. This often has the greatest adverse affect on the neediest in our society.

This bill strikes a fair balance between the interests of debtors and creditors. Those who truly need bankruptcy relief will receive a "fresh start" under Chapter 7. Those debtors who can afford to repay some of their debt will be required to do so under a Chapter 13 repayment plan. It is just common sense that a debtor who can afford to repay some of their debt should do so. Here's how the crux of the bill works. The bankruptcy court looks at 100 percent of the debtor's living expenses, priority expenses, and secured debt. If after their review, the debtor can still pay $10,000 or 25 percent of his or her debt, they are required to do so under a Chapter 13 repayment plan. This makes sense.

The legislation also provides a $125,000 homestead exemption cap so that the debtor cannot declare bankruptcy but still retain his million dollar home. Again, this makes sense.

This is reasonable reform that benefits debtors, consumers, and creditors alike and I will again vote for its passage.

Id.; see also Shenon, supra note 196 (quoting Thomas Donohue, president of United States Chamber of Commerce: "Congress needs to send a message to wealthy debtors that it's time to pay their bills.").

[FN210]. 147 Cong. Rec. S2,328 (daily ed. Mar. 15, 2001) (statement of Sen. Hatch); see also id. at S2,376 (statement of Sen. Daschle). In Professor Wohl's early article on the alignment complications between ERISA and the Bankruptcy Code, he quotes two studies indicating why people file for bankruptcy. In a report by the United States Comptroller General prepared for the House of Representatives in 1983, the authors indicated the reasons for declaring bankruptcy included: cost of living increases (67% of chapter 7 respondents and 72% of the chapter 13 respondents); unemployment (36% of the chapter 7 respondents and 34% of the chapter 13 respondents); and unusual medical bills (36% of chapter 7 and chapter 13 respondents). In the second study, the four most cited reasons for filing were, ranking highest to lowest: rises in cost of living (45%), excessive credit purchasing (44%), medical bills (43%), creditor collection attempts (29%) and marital problems or easy access to credit (28%). Wohl, supra note 29, at 36 n.6.

[FN211]. See infra app.

[FN212]. Thirty-six states opt out and use state law only. Mary Brenner, State Bankruptcy Exemption Choices, at http://www.debtworkout.com/statex.html (last modified Apr. 14, 1999). The remaining fourteen provide a choice. Id.

[FN213]. 147 Cong. Rec. S2,329 (daily ed. Mar. 15, 2001) (statement of Sen. Kohl); see also id. at S2,333 (statements of Sen. Hutchinson).

[FN214]. For support of the legislation this article recommends, see Charles T. Caliendo, Jr., Note, Removing the "Natural Distaste" from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA's Anti-alienation Rule, 68 St. John's L. Rev. 667 (1994).

[FN215]. See discussion infra Part V.B.

[FN216]. See discussion infra Part IV.A.1; see also Planned Consumer Mktg. v. Coats & Clark, Inc., 71 N.Y.2d 442 (1988) (arguing in dicta similar to the testimony of Velis v. Kardanis, 949 F.2d 78, 82 (3d Cir. 1991), that inclusion may be possible for fraudulent transfers); In re Shailam, 144 B.R. 626, 632 (Bankr. N.D.N.Y. 1992) (In a brief submitted prior to Patterson, the trustee of the bankruptcy estate sought to include pension monies valuing over $500,000 via a fraudulent transfer theory under state law. The court determined the fraudulent law was not preempted under ERISA, but the debtors were not deemed to have made fraudulent transfers and the funds were therefore excluded from the bankruptcy estate.); In re Goldschein, 241 B.R. 370, 379 (Bankr. D. Md. 1999) (holding it is possible to void a debtor's transfer if fraudulent).

Arguably, however, the nature of fraudulent conveyance law requires a different conclusion. Because creditors can avoid fraudulent conveyances, the debtor, in effect, has never alienated them. If the fraudulently conveyed funds are still debtor property, the pension fiduciary (here, the debtor's president), in effect, held funds for the employer's creditors, not for the beneficiary.

Smith, supra note 5, at 2144 (footnote omitted). But see Majteles v. AVL Co., 696 N.Y.S.2d 748 (N.Y. Sup. Ct. 1999) (arguing even fraudulent transfers are protected under Patterson); In re Loomer, 198 B.R. 755, 760-62 (Bankr. D. Neb. 1996) (The court argued that, through Patterson and Guidry, even fraudulent transfers cannot be touched, but that other bankruptcy relief may exist. "A situation where debtor makes large contributions or loan repayments to a pension plan on the eve of filing is [like prebankruptcy planning]. In egregious situations, an adversary proceeding could be filed seeking to deny discharge or dismiss the case for substantial abuse... [under] § § 707, 727.").

[FN217]. For a discussion of Patterson v. Shumate, see infra Part IV.A.2.

[FN218]. Dilley, supra note 5; Adam David Elfenbein, Patterson v. Shumate: Interpretive Error, 66 Am. Bankr. L.J. 439 (1992).

[FN219]. For discussion of abuses, see infra Part IV.C.; supra notes 169- 70.

[FN220]. For a discussion on how states have used the police power exception to avoid preemption, see infra Part III.A, IV.A.1 and supra note 50.

[FN221]. For an explanation of "bad boy" forfeiture provisions, see infra Part IV.A.1 and supra note 88 and accompanying text. The Court's dismissal occurred in Guidry, discussed infra Part IV.A.1.

[FN222]. St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550 (11th Cir. 1985).

[FN223]. Id. In one opinion, while distinguishing criminal behavior from dishonest or disloyal behavior, the court went as far as to allow a "bad boy" exception. Nat'l Bank of N. Am. v. Int'l Bhd. of Elec. Workers, 419 N.Y.S.2d 127, 128 (N.Y. Sup. Ct. 1979) (ERISA permits denial of benefits to employee guilty of non-criminal misconduct, but the fact that the appellant (defendant) in this case was convicted of criminal conduct militates more strongly in favor of the application of the equitable principle that a wrongdoer should not benefit from his or her misdeeds.);

United Metal Prods. Corp. v. Nat'l Bank of Detroit, 811 F.2d 297, 300-01 (6th Cir. 1987) (Wellford, J., dissenting) (quoting St. Paul Fire & Marine Ins. Co., 752 F.2d at 550) ("These standards are intended to protect the employee against mismanagement or the provision of misinformation by the employer. The legislation provides no indication whatsoever that it is intended to protect the employee against the consequences of his own misdeeds.").

[FN224]. See, e.g., St. Paul Fire & Marine Ins. Co., 752 F.2d at 552; see also H.R. Rep. No. 95-807, at 60 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4726 ("[A] vested benefit is not to be forfeited because the employee later went to work for a competitor, or in some other way was considered 'disloyal' to the employer.").

[FN225]. According to the U.S. Department of Labor's Pension and Welfare Benefits Administration, "[a]ssets held by private pension plans in 1996 totaled $3.1 trillion..." and "total active participants in private provision plans increased by 3% in 1996 to 679 million in 1996." Pensions & Welfare Benefits Admin., U.S. Dep't of Labor, Highlights from the 1996 Form 550 Reports, at http:// www.dol.gov/dol/pwba/public/programs/opr/bullet1996/hilites.htm (last visited Dec. 31, 2001). Smaller plans are not considered in that total. The Pension Benefit Guaranty Corporation, responsible in year-2000 for the pensions of 541,000 participants, paid over $903 million in benefits to 226,700 persons. Pension Benefit Guaranty Corp., 2000 Annual Report 8 (2000), available at http://www.pbgc.gov/publications/annrpt/00annrpt.pdf.

[FN226]. Professor Wohl offered a unique approach to satisfying the creditor's claims and the protection of the retiree's pension funds in his 1985 article. By recognizing ERISA pension plans are dual in nature, namely a retirement scheme and a tax-deferred savings account, the tax-deferred savings could become the property of the bankruptcy estate, while leaving the retirement plan excluded. Wohl, supra note 29, at 3; see also Smith, supra note 5, at 2159 (footnote omitted).

Section 1056(d) of ERISA could be amended by adding another exception to the anti-alienation provision. That new provision would provide that funds deposited into a pension plan to hide assets from creditors will be subsequently recovered from the pension plan in accordance with Bankruptcy Code sections 544 and 548 and applicable state law. Thus, a new section... would authorize the recovery of a fraudulent transfer from an employee's pension plan pursuant to section 548, because, under the Bankruptcy Code, a bankruptcy trustee can avoid a transfer to a pension plan made with actual intent to hinder, delay, or defraud creditors.

Id. Additionally, if pension assets were on as exclusions, the means to protect them under the exemption law would still be effective and would allow courts to consider the necessity of protection. In recognition of the Supreme Court's treatment of the bankruptcy exclusion of deferred wages, when considering the fortunate debtor's entire pool of assets, and the choice to defer that income, Congress could create a means test similar to that in the bankruptcy reform that would assess the amount the debtor could have used currently and should not have deferred. Some difficulties, though, may result in drawing a line between when and how much a debtor may need or may have time to acquire prior to retirement. This concept could be applied as in United States v. Bruchey, 810 F.2d 456, 458 (4th Cir. 1987), where the court stated:

[A court must] balance the victim's interest in compensation against the financial resources and circumstances of the defendant, all while remaining faithful to the usual rehabilitative, deterrent, retributive and restrictive goals of criminal sentencing. Section 3580(a) accordingly provides that the judge in determining whether to order restitution... and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

[FN227]. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. § § 102, 307-08 (2001) (emphasis added).

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