American Bankruptcy Institute Law Review

Volume 9 Number 2 Winter 2001

Bankruptcy Status of "ERISA Qualified Pension Plans" – an Epilogue to *Patterson v. Shumate*

Professor Donna Litman [1]

I. Introduction

This article addresses whether retirement plans that are covered by ERISA [2] and are the type that may qualify under the Internal Revenue Code are excluded from the bankruptcy estate, even if the plan is statutorily or administratively exempted from some of the labor provisions of ERISA or does not comply with all of the requirements for qualification under the Internal Revenue Code. [3] This issue derives from the Supreme Court's reference in *Patterson v. Shumate* [4] to an "ERISA−qualified pension plan" [5] and subsequent bankruptcy cases that have applied or misapplied the Supreme Court's decision.

To understand this issue, one must consider the definition of the estate of a debtor under Bankruptcy Code section 541(a); [6] the exclusion under section 541(c)(2) for trust interests that are subject to a restriction against alienation under applicable nonbankruptcy law; and the dual provisions of ERISA under the labor and tax sections that require that plan benefits not be assigned or alienated. Also, one must review and apply the Supreme Court's 1992 decision in *Patterson v. Shumate* which held that ERISA qualified as applicable nonbankruptcy law and concluded its opinion with a reference to "an ERISA−qualified pension plan." [7] This reference has spawned a number of interesting bankruptcy decisions, some of which have construed this reference narrowly in order to expand the scope of the bankruptcy estate for plans that benefit only owners and spouses and for plans that may not be qualified for federal income tax purposes because of provisions that are included or omitted from the plan documents or facts existing outside of those documents.

A. Bankruptcy and Nonbankruptcy Law

Section 541 of the Bankruptcy Code provides a general inclusionary rule for property in the bankruptcy estate and a specific exception for certain trust interests with restricted transferability. Section 541 provides the general rule that the estate of a debtor is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case, . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law . . . that restricts or conditions transfer of such interest by the debtor." [8] Section 541(c)(2) contains the exception that has created significant controversy with respect to ERISA plans. This exception provides: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." [9]

ERISA refers to the Employee Retirement Income Security Act of 1974, and its subsequent amendments. ERISA is a federal law with jurisdiction over retirement plans that was enacted because of the significant impact that employee benefit plans have on employment, industry, and commerce. [10] Congress enacted ERISA to address the lack of disclosure to participants and loss of benefits due to lack of vesting, inadequate funding, plan terminations, and fiduciary misconduct. [11] ERISA was designed to provide security for employees and their dependents by imposing reporting and disclosure requirements, minimum participation, vesting, and funding standards, and fiduciary obligations on plan trustees and administrators. [12] In addition, Congress sought to assure the availability of plan benefits at retirement by preventing the voluntary or involuntary assignment or anticipation of benefits and to protect spouses of participants by providing certain spousal annuities.

ERISA was enacted to regulate the design and administration of employee benefit plans under the jurisdiction of the Department of Labor and to provide the income tax consequences for employers, retirement trusts, and participants through the Internal Revenue Code. In order to prevent self−dealing and discriminatory plans, the labor and tax provisions of ERISA contain rules governing coverage, benefits, and fiduciary administration that are subject to the jurisdiction of the Department of the Treasury or the Internal Revenue Service. [13] In addition, ERISA provides plan termination insurance for certain plans and the creation and regulation of the Pension Benefit Guaranty Corporation.

One of the labor provisions of ERISA, section 206(d)(1), states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." [14] A pension plan is a plan established or maintained by an employer (or employee organization) that provides retirement income to employees or defers employees' income for a period of time up to or after termination of employment. [15] For this purpose, a pension plan includes a profit−sharing plan, a 401(k) plan, a money purchase pension plan, a target benefit plan, a defined benefit pension plan, a Keogh plan of any of the foregoing types, and a stock bonus plan. [16] The antialienation requirement in the labor portion of ERISA is contained in Part 2 of title I, and this requirement does not apply to an individual retirement account. [17] The labor regulations provide that a Keogh plan which covers only partners or a sole proprietor or owner (and spouses) is not covered under title I; although, there is some question as to the scope and validity of this regulation as it relates to the antialienation provision in title I. [18]

The Internal Revenue Code contains preferential treatment for a "qualified trust," allowing a deduction for employer contributions to the trust, a federal income tax exemption for the trust, and deferral of federal income tax for participants and beneficiaries until actual receipt of trust benefits. [19] The trust may be part of a profit−sharing plan, pension plan, or stock bonus plan if it is "for the exclusive benefit of employees or their beneficiaries" and if a number of other statutory provisions are met. [20] One of the tax provisions of ERISA, which was codified as section 401(a)(13) of the Internal Revenue Code, provides that: "A trust shall not constitute a qualified trust under this section [401] unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." [21]

In the 1992 case of *Patterson v. Shumate*, the Supreme Court considered whether a plan that complied with the dual requirements of ERISA that plan benefits not be assigned or alienated was subject to a restriction against transfer that was enforceable under applicable nonbankruptcy law. [22] The Court held that applicable nonbankruptcy law "encompasses any relevant nonbankrupty law, including federal law such as ERISA." [23] The Court considered both the labor and tax provisions of ERISA and stated:

Section 206(d)(1) of ERISA, which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), clearly imposes a "restriction on the transfer" of a debtor's "beneficial interest" in the trust. The coordinate section of the Internal Revenue Code, 26 U.S.C. § 401(a)(13), states as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated," and thus contains similar restrictions. [24]

Further, the Court noted that:

these transfer restrictions are "enforceable," as required by section 541(c)(2). Plan trustees or fiduciaries are required under ERISA to discharge their duties in accordance with the documents and instruments governing the plan. 29 U.S.C. § 1104(a)(1)(D). A plan participant, beneficiary, or fiduciary, or the Secretary of Labor may file a civil action to "enjoin any act or practice" which violates ERISA or the terms of the plan. §§ 1132(a)(3) and (5). Indeed, this Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar. [25]

The Court concluded that:

The antialienation provision required for ERISA qualification and contained in the Plan at issue in this case thus constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate. [26]

In addition, the Court referred to its "conclusion that a debtor's interest in an ERISA−qualified pension plan may be excluded from the property of the bankruptcy estate pursuant to § 541(c)(2)." [27]

The Court also indicated some of the policy considerations underlying its decision. The Court stated that its decision "ensures that the treatment of pension benefits will not vary based on the beneficiary's bankruptcy status," "gives full and appropriate effect to ERISA's goal of protecting pension benefits," "furthers another important policy underlying ERISA: uniform national treatment of pension benefits," and "ensures that the security of a debtor’s pension benefits will be governed by ERISA, not left to the vagaries of state spendthrift trust law." [28]

The Supreme Court referred to both the ERISA labor and tax requirement regarding the alienation of plan benefits when it referred to the "antialienation provisions required for ERISA qualification" and "an ERISA−qualified plan." Technically, the labor provisions do not require plan qualification; instead, various sections state that they "apply to" or "do not apply to" certain plans. [29] If Part 2 of title I of ERISA applies to a pension plan, that plan must prohibit the alienation and assignment of plan benefits. Title I applies to a pension plan within the meaning of ERISA, and a pension plan may include a plan that is qualified under section 401(a) of the Internal Revenue Code as well as a nonqualified plan. [30] Certain plans are exempted from the application of title I, including governmental plans, nonelecting church plans, and unfunded excess benefit plans. [31] In addition, Part 2 of title I of ERISA does not apply to unfunded deferred compensation plans for a select group of management or highly compensated employees, funded or unfunded excess benefit plans, individual retirement accounts or annuities, and supplemental retirement income payments to the extent treated as welfare plans under labor regulations. [32] Thus, if a plan is a pension plan within the meaning of ERISA and is not excepted from all of the provisions of title I or from Part 2 of title I, the plan is required to provide that benefits not be assigned or alienated. This required provision is enforceable under ERISA so that the plan interest should not be property of the estate pursuant to the holding in *Patterson v. Shumate.*

If a plan is a stock bonus, pension, or profit−sharing plan, and it contains a trust organized in the United States, the trust will be qualified under the Internal Revenue Code if it complies with the provisions of section 401 of the Internal Revenue Code, and related sections. Section 401(a)(13) provides: "A trust shall not constitute a qualified trust under this section [401] unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." Title I of ERISA supersedes or preempts state laws as they "relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)" and should preempt state law from preventing a stock bonus, pension, or profit−sharing plan from qualifying under section 401(a)(13) by reason of a state law or doctrine that otherwise would render an antialienation provision unenforceable. [33] Further, ERISA grants participants, beneficiaries, and fiduciaries the right to enforce the provisions of the plan, such as an antialienation provision. [34]

B. Definition of ERISA Qualified Pension Plan

The term, "ERISA qualified pension plan" is a term that was used by the Supreme Court in *Patterson v. Shumate* as well as the lower courts in that decision: the Fourth Circuit and the District Court for the West District of Virginia. It also is a term that has been used by various circuit and district courts prior to the *Patterson v. Shumate* decision in bankruptcy and nonbankruptcy contexts. [35]

The term, "ERISA qualified pension plan," is not a term that is defined by ERISA nor it is a term that is defined by the Internal Revenue Code. The term "pension plan" is a term that is defined by ERISA and also has a more limited meaning under the Internal Revenue Code. In general, ERISA defines a "pension plan" as a plan established or maintained by an employer (or employee organization) that provides retirement income to employees or defers employees' income for a period of time up to or after termination of employment. [36] This definition would include profit sharing plans as well as pension plans. By contrast, the Internal Revenue Code portions of ERISA refer to pension plans separately from profit sharing plans, particularly with respect to the limitations on deductible contributions. [37]

The term, "qualified trust," is a term used by the Internal Revenue Code. A trust that is part of a deferred compensation plan that complies with the requirements of section 401 of the Internal Revenue Code is referred to as a "qualified trust" in the Internal Revenue Code. A determination letter may be requested and received from the Internal Revenue Service that a plan is qualified under section 401(a), based on the plan documents and facts submitted;

nevertheless, a plan that receives a determination letter may be found to be disqualified if it is discriminatory in operation or otherwise violates the provisions of the plan or the Internal Revenue Code in practice. In addition, a plan that receives a favorable determination letter as of a certain date may be disqualified if the law changes but the plan is not amended timely to comply with the new changes. The authority to issue determination letters as to qualification has been granted to the Internal Revenue Service and not to the Department of Labor; however, there are statutory provisions for judicial determination regarding qualification. [38] The term "qualified plan" is sometimes used in practice to refer to a plan that contains a trust that has received a favorable determination letter from the Internal Revenue Service. In addition, the term, "qualified plan" is a term that is used in practice to differentiate between qualified and nonqualified deferred compensation plans under the Internal Revenue Code. For example, a profit sharing or pension plan that is designed to be qualified under section 401 of the Internal Revenue Code might be referred to as a "qualified" deferred compensation plan; whereas, an unfunded deferred compensation plan or a plan that provides benefits in excess of the amounts allowed by section 415 of the Internal Revenue Code might be referred to as a "nonqualified" deferred compensation plan.

When the Supreme Court used the term "ERISA−qualified pension plan" in *Patterson v. Shumate,* it was a hybrid of some of these defined terms. In *Patterson v. Shumate,* the Court stated: "The Plan satisfied all applicable requirements of the Employee Retirement Income Security Act of 1974 (ERISA) and qualified for favorable tax treatment under the Internal Revenue Code." [39] Further, the Court noted that "Article 16.1 of the Plan contained the antialienation provision required for qualification under section 206(d)(1) of ERISA, 29 U.S.C. section 1056(d)(1) ('Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated')." [40] Later in its opinion, the court also noted that this plan provision complied with the requirement in section 206(d)(1) as well as the requirement of section 401(a)(13) of the Internal Revenue Code and that these "transfer restrictions are 'enforceable.'" [41] In addition, the court referred to the "antialienation provision required for ERISA qualification and contained in the plan." Thus, the plan in *Patterson* was subject to title I of ERISA, was qualified under section 401 of the Internal Revenue Code, and contained the antialienation provision required by the labor and tax sections of ERISA. Therefore, the plan in *Patterson* satisfied all possible prongs for an "ERISA−qualified pension plan." It was a pension plan within the meaning of ERISA and the definition of ERISA section 3(2)(A). Further, it contained a qualified trust under the Internal Revenue Code. Also, it contained the antialienation provision required by both section 206(d)(1) of ERISA and section 401(a)(13) of the Internal Revenue Code.

The Supreme Court used the terms "ERISA−qualified pension plan" and "ERISA− qualified plans" in its 1992 opinion in *Patterson v. Shumate*. [42] It also affirmed the Fourth Circuit's 1991 appellate decision in *Patterson v. Shumate* [43] and noted that the Fourth Circuit had relied on the 1990 Fourth Circuit's decision in *Anderson v. Raine (In re Moore).* [44] Both of these Fourth Circuit opinions included references to an "ERISA−qualified" plan or pension plan. Thus, it is helpful to review these two cases to help understand the Supreme Court's terminology.

In the appellate decision of *Patterson v. Shumate*, the Fourth Circuit referred to an "ERISA−qualified pension plan" and "ERISA−qualified plans." [45] The court stated that both before and after the debtor joined the company and became its president and chairman of the board, the company "had an ERISA−qualified pension plan." [46] Further, in a footnote, the court referred to the antialienation provision required for tax qualification, stating:

In order to gain tax−exempt status, every plan must contain a nonalienation provision. See 26 U.S.C. § 401(a)(13) ("Benefits provided under the [qualified trust] plan may not be assigned or alienated"); see also Treas. Reg. § 1.40[1](a)−13(b)(1) ("[A] trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process."). Appellees suggest, relying on the Fifth Circuit opinion in Goff, that because this requirement is imposed through the tax laws and is not an affirmative law, the requirement has less force. Aside from the unassailable point that many things are accomplished through tax laws that, for one reason or another, are not done through affirmative laws, this suggestion also ignores case law, which has enforced the non−alienation provision in a number of ERISA plans. See, e.g., Tenneco Inc. v. First Virginia Bank, 698 F.2d 688 (4th Cir. 1983) (a debtor's interest in a qualified ERISA plan held exempt from a third party creditor's garnishment, based on the nonalienation provision). However imposed, the non−alienation provision has teeth. [47]

Thus, the Fourth Circuit appeared to be relying on the tax requirement as the applicable nonbankruptcy law. However, the Fourth Circuit also relied on *Moore* as authority for excluding the debtor's interest from the bankruptcy estate and stated: "We think it is not giving Moore undue weight to say that it stands for the proposition that all ERISA−qualified plans, which by definition have a non−alienation provision, constituted "applicable nonbankruptcy law" and contain enforceable restrictions on the transfer of pension interests." [48] Further, the Fourth Circuit cited to both the labor and tax provisions of ERISA requiring that plan benefits not be assigned or alienated. The court stated:

Congress passed ERISA to guarantee that "if a worker has been promised a defined pension benefit upon retirement−−and if he has fulfilled whatever conditions are required to obtain a vested benefit−−he actually will receive it." [citation omitted]. To make sure this guarantee was not eroded, Congress imposed restrictions on the assignment and alienation of pension benefits. See 29 U.S.C. § 1056(d)(2); 26 U.S.C. § 401(a)(13). [49]

Thus, it appears that the Fourth Circuit was relying on both the dual requirements in the tax and labor provisions of ERISA; however, the tax qualification provision alone would be sufficient authority.

In *Moore*, the Fourth Circuit used the terms "ERISA−qualified plan," "ERISA−qualified profit−sharing and pension plan," and "ERISA−qualified trust" and referred to both the labor and tax requirements. [50] In *Moore*, several debtors had interests in their employer's profit−sharing and pension plans and trusts, which contained anti−assignment provisions. The court noted that: "The plans must include these anti−assignment provisions in order to qualify as ERISA funds, 29 U.S.C. § 1056(d)(1), and to maintain their tax−exempt status, 26 U.S.C. § 501." [51] Further, the court noted:

One of the primary means by which ERISA protects workers' pension benefits is through restrictions on the assignment and alienation of these benefits. ERISA provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). In addition, the Internal Revenue Code conditions qualification under ERISA and thus exemption from federal taxation on the non−transferability of pension benefits:

A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.

26 U.S.C. § 401(a)(13). The Treasury Regulation issued under 26 U.S.C. § 401(a)(13) is even more detailed:

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

Treas. Reg. § 1.40[1](a)−13(b)(1). These provisions each exhibit "a strong public policy against the alienability of an ERISA plan participant's benefits." [52]

In *Moore*, the Fourth Circuit further stated: "ERISA's non−alienability provisions prevent both voluntary and involuntary encroachments on vested benefits" and "[b]ecause ERISA clearly prevents general creditors from reaching a debtor's interest in this ERISA−qualified trust, it constituted 'applicable nonbankruptcy law' under which restrictions of pension interests may be enforced." [53] Thus, it appears that the Fourth Circuit relied on both the labor and tax provisions of ERISA requiring the anti−assignment provision as applicable nonbankruptcy law. The court was concerned that if ERISA was not recognized as applicable nonbankruptcy law, "the plan's anti−alienation provisions will be violated and the plan may be subject to disqualification and loss of tax−exempt status." [54] The court concluded that the plan was "ERISA−qualified;" however, it did not consider the possibility that the plan could be disqualified for not complying with another provision of the Internal Revenue Code or the effect of such a disqualification. [55] Further, the plan in issue was subject to title I of ERISA. [56]

The District Court for the West District of Virginia involving Shumate was decided under the name of *Creasy v. Coleman Furniture Corp.* [57] In that case, the district court referred to an "ERISA−qualified Keogh plan," an "ERISA−qualified pension" plan or plans, and an "ERISA−qualified spendthrift trust." [58] The court cited the labor and

tax antialienation requirements, stating: "The plan prohibits the alienation of benefits or the transfer of plan assets for the benefit of creditors, as required by 29 U.S.C. § 1056(d)(1) (Employee Retirement Income Security Act (ERISA)) and 26 U.S.C. § 401(a)(13) (Internal Revenue Code)." [59] The bankruptcy court stated that it was bound to apply state law; thus, it did not discuss ERISA as applicable nonbankruptcy law. [60] In addition, the bankruptcy court cited the 1983 Fifth Circuit decision of *Goff v. Taylor (In re Goff)*. [61] *Goff* was one of the earliest bankruptcy decisions to use the term "ERISA−qualified pension plan." In *Goff*, the Fifth Circuit used the terms "ERISA−qualified pension plan," "ERISA−qualified Keogh plan," "ERISA−qualified retirement trust," and "ERISA−qualified pension funds." [62] The court in *Goff* described the Keogh plan as an "ERISA−qualified pension plan" and also noted that the parties did not question the Keogh plan's "ERISA−qualified status;" however, the Fifth Circuit cited to both the labor and tax provisions requiring an antialienation provision and referred to other cases involving "ERISA−qualified retirement trusts, which contained provisions prohibiting assignment or alienation as required for qualification under the Act, 26 U.S.C. § 401(a)(13); 29 U.S.C. § 1056(d)(1)." [63]

A number of other bankruptcy and appellate decisions involving retirement plans and the meaning of "applicable nonbankrupty law" referred to "ERISA−qualified" plans prior to the Supreme Court's opinion in *Patterson v. Shumate.* [64] In some cases, the courts referred to both the labor and tax provisions as authority for the nonalienability of plan benefits or the requirement that the plan provide that benefits not be assigned or alienated, with occasional references to only the labor provision or only the tax provision. In other cases, the phrase was used summarily to describe a particular plan or plans in general, without differentiating as to what qualifies the plan under ERISA. A summary of the use of this term in appellate decisions involving bankruptcy by various circuit courts follows.

The Fourth and Fifth Circuits used the term in decisions other than *Moore*, *Patterson*, and *Goff*. An earlier Fourth Circuit opinion referred to both the labor and tax provisions, stating that the "anti−assignment provision was required to be included in the trust agreement in order for [the plan] to qualify as an ERISA fund" under the labor section of ERISA and "was required to maintain [the plan]'s tax exempt status" under section 501 of the Internal Revenue Code, pursuant to which the plan "had to meet the qualifications of a . . . section 401(a) qualified trust." [65] In one Fifth Circuit opinion after *Goff*, the court referred to both the labor and tax requirements as authority for the statement that "ERISA−qualified plans must contain anti−alienation provisions;" [66] while in another opinion, the Fifth Circuit referred to only the labor provision, noting that: "Section 206(d)(1) of ERISA states that '[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.'" [67]

The term "ERISA−qualified" plan also had been used in other circuits prior to the Supreme Court's decision in *Patterson v. Shumate*. In an opinion by the Sixth Circuit, the court discussed ERISA's labor requirement that plan benefits not be assigned or alienated as well as the Internal Revenue Code requirement for tax−exempt status, concluding that "a debtor's interest in an ERISA pension fund is beyond the reach of his creditors" and that "if the ERISA anti−alienation provisions are enforceable against general creditors, they are enforceable against the bankruptcy trustee." [68] The Ninth Circuit used the term and referred to both the plan's "anti−alienation, anti−assignment clause required by ERISA, 29 U.S.C. § 1056(d)(1), and the Internal Revenue Code, 26 U.S.C. § 401(a)(13) in order to qualify the plan as tax exempt," and noted that the plan had been qualified by the Internal Revenue Service, but also seemed to have tested each provision of the law separately, concluding that neither or both were applicable nonbankruptcy law. [69] The Tenth Circuit focused on tax qualification, when it stated that "there is no doubt that a 'qualified' pension or profit sharing plan containing provisions protecting against creditors' claims, as required by ERISA, would override any state law to the contrary" and "[t]o be 'qualified' means the contributions are tax deductible and neither the contributions nor their earnings are taxed as income to the beneficiary until taken out in accordance with the plan;" however, it cited both the labor and tax provisions of ERISA as authority. [70] The Eleventh Circuit referred to "ERISA−qualifying pension plans containing anti−alienation provisions," without referring to any specific ERISA provisions; although, the court did footnote to section 401 of the Internal Revenue Code. [71] Other courts also have used the term "ERISA−qualified" with respect to employee benefit plans. Some have used the term with specific reference to ERISA and the Internal Revenue Code regarding alienation. [72] Others have used the term in the context of another specific issue involving ERISA. [73] Still others have used the term generally without any definition or reference to any specific provision of ERISA. [74]

Some of the courts that have applied the Supreme Court's holding in *Patterson v. Shumate* have attempted to formulate a definition of an "ERISA−qualified pension plan." Some have developed a two−prong test, whereby an

ERISA qualified plan is a plan that is (1) subject to title I of ERISA and (2) contains the required plan provision prohibiting plan benefits from being assigned or alienated. [75] Other courts have expanded the two prong test to include the section 541(c)(2) requirement of enforceability, defining an ERISA qualified plan as a plan that (1) is governed by ERISA, and (2) that contains an antialienation provision that is enforceable under ERISA. [76] Still others have adopted a three prong test, requiring (1) the plan to be subject to title I of ERISA, (2) the trust to be qualified under the section 401 of the Internal Revenue Code, and (3) the trust to contain the antialienation provision required by (1) and (2). [77] Some of these courts also have required proof of tax qualification or have made their own determination as to tax qualification. [78] Further, at least one court has enunciated its own two−prong test requiring the plan to be (1) subject to ERISA and (2) qualified under the Internal Revenue Code, [79] with the plan having to include a provision that plan benefits not be assigned or alienated in order to satisfy these two prongs because both ERISA and the Internal Revenue Code require that provision.

The Fifth and the Seventh Circuits have adopted the two prong test that a plan be subject to title I of ERISA and contain the required antialienation provision, dispensing with any requirement or showing of tax qualification. [80] The Seventh Circuit stated that: "Most likely, the [Supreme] Court used 'ERISA−qualified' to mean 'covered by Subchapter I of ERISA' and that the circuit court understood the term, 'ERISA−qualified' to mean nothing more complex than 'containing the anti−alienation clause required by § 206(d)(1) of ERISA,'" and that "[t]axation has nothing to do with the question at hand." [81] The Fifth Circuit noted that one of the labor provisions of ERISA requires a plan to provide that benefits not be assigned or alienated and that the Internal Revenue Code requires that provision in order for the "plan to be 'qualified' for tax purposes." [82] In addition, the Fifth Circuit noted that ERISA does not require a plan to be tax qualified in order to be governed by ERISA and further that an "ERISA plan that is not or may not be tax qualified nevertheless continues to be governed by ERISA for essentially every other purpose." [83] Thus, both the Fifth and Seventh Circuits have held that a plan that is required to contain an anti−alienation provision by the labor provisions of ERISA and contains such a provision will be excluded from the bankruptcy estate, whether or not the plan's trust is qualified under the Internal Revenue Code. Both courts also opened the door for a plan to be included in the bankruptcy estate to the extent "money [is] readily available to participants for current consumption" even if the plan is governed by ERISA and contains the required antialienation provision. [84] By contrast, the Ninth Circuit held that conducting "a functional analysis focusing on the debtors' control of the assets in the ERISA Plan has been rejected by the Supreme Court." [85] The Seventh and Ninth Circuits also have held that if a plan is not covered by title I of ERISA, the interest is not excludable under the authority of ERISA even if the plan's trust is qualified under the Internal Revenue Code. [86] Other circuits have cited *Patterson v. Shumate* and its holding, referring to "ERISA−qualified" plans, without specifically defining the term. [87] Some of the circuit cases have cited the holding in *Patterson v. Shumate* regarding "ERISA−qualified" plans and either have assumed that the plans were ERISA−qualified or have remanded for a determination regarding qualification. [88]

In many cases, a debtor's interest will be excluded from the bankruptcy estate under the two−prong or three−prong test, or one of the variations of these tests, because the plan is subject to title I of ERISA, contains a trust that is facially qualified under section 401 of the Internal Revenue Code, and contains the antialienation provision required by Part 2 of title I and the Internal Revenue Code. In other cases, a plan may not satisfy all of the requirements under the two or three prong test, or a variation. Some plans are not subject to Part 2 of title I but contain qualified trusts, while some plans are subject to Part 2 of title I but do not have qualified trusts. An example of a plan that is not subject to title I but may have a trust that is qualified under the Internal Revenue Code is a governmental plan or nonelecting church plan. An example of a plan that is subject to title I but may not be qualified under the Internal Revenue Code is a stock−bonus, profit sharing, or pension plan that does not comply with the provisions of the Internal Revenue Code either in the plan's document or in the plan's operation. This raises the question of whether a plan and trust that is qualified under section 401 of the Internal Revenue Code will be included as property of the debtor's estate if it is *not* subject to Part 2 of title I of ERISA. Further, it raises the question of whether a plan that is subject to Part 2 of title I of ERISA will be included as property of the debtor's estate if it contains the required antialienation provision but is *not* qualified under section 401 of the Internal Revenue Code, either because it is a nonqualified plan or a disqualified trust.

In the case of *Patterson v. Shumate,* the plan involved was both subject to title I of ERISA and qualified under the Internal Revenue Code. Thus, it is necessary to analyze the Supreme Court's holding in *Patterson v. Shumate* and consider the provisions of title I of ERISA and the Internal Revenue Code to determine which statutory provisions

must apply for a plan interest to be excluded under section 541(c)(2) (and whether the plan must contain an antialienation provision).

Based on the Supreme Court's reasoning, its holding in *Patterson v. Shumate* should be construed in the context of the Bankruptcy Code and ERISA, including the Internal Revenue Code, so that the interest of a debtor in a trust, that is part of a plan that is required by Part 2 of title I to provide that benefits not be assigned or alienated, is not property of the bankruptcy estate. Further, it should be construed so that any plan and trust that contains an antialienation provision that is enforceable under Part 5 of title I by a plan participant, beneficiary, or fiduciary is not property of the bankruptcy estate, even if the plan is not subject to Part 2 of title I. Thus, a debtor's interest in a trust that is part of a plan and that includes an antialienation provision, in order to be qualified under section 401(a)(13) of the Internal Revenue Code, should not be property of the estate if the plan is subject to Part 5 of title I of ERISA. In addition, that plan should not be property of the estate even if it is disqualified for not complying with any of the other provisions of the Internal Revenue Code. The Supreme Court stated that section 206(d) of ERISA "clearly imposes 'a restriction on the transfer' of a debtor's 'beneficial interest' in the trust." [89] A plan should contain the required antialienation provision; however, if it fails to do so, a plan participant, beneficiary, or fiduciary would have standing to enforce the provisions of title I, including the antialienation requirement of section 206(d) of title I. [90] Thus, it is arguable that if the trust is required by Part 2 to contain an antialienation provision, but fails to do so, then the debtor's interest in such plan and trust still should be excluded from the bankruptcy estate because ERISA imposes a restraint on transfer on the plan and a plan participant, beneficiary, or fiduciary would have standing to enforce this requirement of ERISA. If a plan contains a trust that is not subject to any part of title I, but is qualified under section 401(a) of the Internal Revenue Code, then *Patterson v. Shumate* states that the Internal Revenue Code contains a restriction on transfer "similar" to the restriction that ERISA section 206(d) "imposes." [91] This restriction should be enforceable under federal nonbankruptcy law in order to enable this class of plans to qualify under the Internal Revenue Code; however, there is some question as to whether this is true if the enforcement provisions of title I of ERISA are not applicable and if it is necessary to test the enforceability of the restriction under applicable state law.

Not all courts have applied this analysis or reached these conclusions. Instead, some courts have held that a plan that covers only owners or owners and spouses is not subject to title I of ERISA and is not excluded from the bankruptcy estate under the authority of ERISA. Further, some courts have held that the issue of the tax qualification of a plan and trust is relevant to a plan subject to title I, allowing the introduction of objections or evidence regarding qualification or the judicial determination of tax qualification by the bankruptcy court. This article will discuss some of these cases, as well as provisions and interpretations of ERISA in nonbankruptcy contexts, to determine what plans are subject to title I and whether plans that are tax qualified but are not subject to title I are to be included as property of the bankruptcy estate. Further, it will consider the bankruptcy status of interests in plans that are subject to title I but may not be tax qualified.

II. Application of *Patterson v. Shumate* to Plans that are Subject to Title I or Plans with qualified Trusts

A. Interests in Plans that are not Subject to Title I of ERISA but have Qualified Trusts

There are potentially two classes of plans that are not subject to title I of ERISA but may be qualified and exempt under the Internal Revenue Code. The first class are those that are specifically excluded by statute from title I, such as governmental and nonelecting church plans. The second class are those that are administratively excluded from title I by regulation, such as plans whose sole participants are owners or spouses.

1. Governmental Plans and Church Plans

ERISA provides that the provisions of title I do not apply to an employee benefit plan that is a governmental plan. [92] A governmental plan is a plan that is established or maintained by the federal government, a state government, a government of a political subdivision of a state, or any of its agencies or instrumentalities, for the benefit of its employees. [93] Governmental plans also include certain plans subject to the Railroad Retirement Act of 1935 or 1937 and certain plans of international organizations that are tax−exempt under the International Organizations Immunities Act. A governmental plan can qualify under title II of ERISA, which contains Internal Revenue Code provisions, and obtain an advance determination of qualification by the Internal Revenue Service in accordance with the provisions of

title III of ERISA. A governmental plan is not subject to title IV of ERISA involving the Pension Benefit Guaranty Corporation and plan termination insurance.

A governmental plan may contain a trust that qualifies under section 401 of the Internal Revenue Code and that is exempt under section 501 of the Internal Revenue Code. The Internal Revenue Code contains a number of exceptions for governmental plans, so that a governmental plan is not required to comply with all of the qualification provisions of the Internal Revenue Code, including certain provisions regarding participation, vesting, and funding. [94] Further, a governmental plan is relieved from complying with section 401(a)(13) of the Internal Revenue Code. [95] Thus, a governmental plan is not required to provide that plan benefits not be assigned or alienated in order to qualify under the Internal Revenue Code.

ERISA also provides a general rule that the provisions of title I of ERISA do not apply to a church plan and that a church plan's trust may qualify and be exempt under the Internal Revenue Code, with church plans being excepted from some of the qualification provisions such as section 401(a)(13). [96] A church plan may elect under section 410(d) of the Internal Revenue Code to be subject to the qualification provisions of the Internal Revenue Code, including section 401(a)(13), as if it were not a church plan, and if so, the plan will become subject to title I of ERISA. [97] A church plan generally is a plan established and maintained by a church or a convention or association of churches for the benefit of its employees or their beneficiaries, which plan is exempt under section 401 of the Internal Revenue Code. [98]

Thus, a governmental plan is not subject to title I of ERISA or required by title I, the labor provisions, to provide that plan benefits not be assigned or alienated. In *Patterson v. Shumate*, the Supreme Court acknowledged that "pension plans established by governmental entities and churches need not comply with Subchapter I of ERISA, including the antialienation requirement of § 206(d)(1)." [99] Further, although a governmental plan with a trust may qualify under section 401 of the Internal Revenue Code and have an exempt trust under section 501, it is not required to provide that plan benefits not be assigned or alienated in order to be qualified. [100] The same applies to a church plan, except that a church plan may make a section 410(d) election and thus be subject to title I and title II of ERISA. A church plan that makes a section 410(d) election will be required by section 206(d) of ERISA and by section 401(a)(13) of the Internal Revenue Code to provide that plan benefits not be assigned or alienated.

A governmental or nonelecting church plan may provide that plan benefits not be assigned or alienated even though it is not required to do so by the labor or tax provisions of ERISA. If a governmental plan or a nonelecting church plan contains an antialienation provision, then whether a debtor's interest in that plan will be included in his or her bankruptcy estate depends on applicable state or federal law, other than title I of ERISA or section 401(a)(13) of the Internal Revenue Code. [101] Some courts have considered whether a governmental plan that qualifies as an eligible deferred compensation plan under section 457 of the Internal Revenue Code is excluded based on the provisions of section 457 which in some cases require that plan assets remain the property of the employer "subject only to the claims of the employer's general creditors" and in other cases require that plan assets be "held in trust for the exclusive benefit of participants and their beneficiaries." [102]

If a debtor's interest in a governmental plan or nonelecting church plan is included in the bankruptcy estate, it may qualify for a federal or state exemption. [103] ERISA's preemption of state law does not apply to plans that are statutorily exempt from title I. [104] These plans are not regulated by title I of ERISA and instead are regulated by other applicable federal or state law involving governments, churches, and plans and trusts. One of the rationales behind the Supreme Court's decision in *Patterson v. Shumate* was to ensure the "uniform national treatment of pension benefits" under ERISA and that "the security of a debtor's pension benefits will be governed by ERISA, not left to the vagaries of state spendthrift trust law." [105] This reasoning does not apply to governmental or nonelecting church plans that are statutorily exempted from title I of ERISA and that may be regulated by other federal law or by state law. Instead, whether a governmental or nonelecting church plan is excluded from the bankruptcy estate depends on whether the debtor has an interest in a trust that contains or is subject to a restriction on transfer and whether that restriction is enforceable under other federal or state law.

2. Private Plans whose Only Participants are Owners or Spouses

Some plans are excluded from title I by administrative interpretation of the ERISA definitions of an employee and an employee benefit plan. These plans either have only one participant who is a sole proprietor or the sole shareholder or owner of the plan sponsor or have more than one participant but all of the participants are either owners or spouses. If a plan is administratively excluded, a question arises as to whether title I requires the plan to provide that plan benefits not be assigned. It raises the question whether a participant's interest in such a plan will be excluded from the bankruptcy estate of such participant on the basis of ERISA. Further, it raises potential issues regarding the qualification of such a plan outside of bankruptcy. To determine whether a plan that benefits only the owners of the employer and their spouses is an "employee benefit pension plan" subject to Part 2 of title I of ERISA, or whose provisions are enforceable under Part 5, one must consider the statutory definitions of an "employee," "employer," "employee benefit pension plan," "participant," and "beneficiary," as well as the labor law regulations defining some of these terms for purposes of title I of ERISA.

Title I of ERISA defines an "employee" as "any individual employed by an employer." [106] The House, Education, and Labor Committee Report to ERISA indicates: "The definition of 'employee' is intended to encompass any person who has the status of an 'employee' under a collective bargaining agreement." [107] Thus, the term "employee" would include those persons who are treated as employees for collective bargaining purposes; but, it should not be limited to that class of employees. The term also should include employees who are not represented by a union or whose benefits are not subject to collective bargaining. It generally would not include an independent contractor, and the Supreme Court has held that the general common law of agency applies to determine whether an individual is an employee or an independent contractor. [108] The statutory definition is broad enough to include a person who is employed by a corporation, even though he or she is the sole shareholder of that corporation or one of its shareholders or the spouse of a shareholder. Further, the definition is broad enough to include a sole proprietor or a partner who performs services for the partnership or an employed spouse of the sole proprietor or a partner. The Internal Revenue Code provisions in title II and the title I additions relating to continuation and portability of group health plans contain specific references to a sole proprietor or partner as an employee; [109] whereas, generally the 1974 provisions of title I do not. [110] This raises a question as to whether the general rules and definitions in title I are broad enough to include a sole proprietor or shareholder or a partner as an employee or whether a specific statutory reference is required to include them. The legislative history of ERISA supports the first interpretation that title I includes a plan that covers only a sole proprietor, a sole shareholder, or partners.

Title I of ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." [111] The term employer can include an individual or a partnership, corporation, limited liability company, or other entity. It may include publicly−held or closely−held corporations or other entities. The statutory definition is broad enough to include a partnership or the partners. It also should be broad enough to cover a sole proprietor who is self−employed with the dual capacity of employer and employee. There are, however, no specific references to a sole proprietor or partner or a self−employed individual or owner−employee in the 1974 provisions of title I, as there are in title II of ERISA or the title I amendments relating to continuation and portability of group health plans. [112]

The term "employer" is defined by reference to an "employee benefit plan," which includes an "employee pension benefit plan." Title I of ERISA defines an "employee pension benefit plan" as "any plan, fund, or program which was heretofore or is hereafter established by an employer or by an employee organization, or by both," that "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." [113] This definition refers to a plan that provides retirement income to "employees" or a deferral of income to "employees." A very literal reading of ERISA could result in the exclusion of a plan that has only one participant; however, the Department of Labor and case law have held that a plan that covers only one employee can qualify as an employee pension plan subject to ERISA. [114]

In addition, ERISA defines a "participant" as:

any employee or former employee of an employer, or any member of any employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. [115]

The definition of a participant is syntactically complex; however, it appears that there are three components to the definition:

1) an employee, former employee, member of an employee organization, or beneficiary of an employee, former employee, or member, who is

2) entitled to receive any type of benefit from

3) an employee benefit plan which covers employees or members.

Further, ERISA defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." [116] The definition of a beneficiary has three components:

1) a person designated by a participant or by the terms of the plan

2) to receive benefits from

3) a plan that provides retirement income to employees or results in employees deferring income until termination of employment or thereafter.

Thus, a plan must provide retirement income to employees or defer income of employees before a plan can have a beneficiary.

Part 2 of title I of ERISA contains the antialienation requirement. Part 2 applies to any employee benefit plan where there is a sufficient nexus to commerce by an employer or employee organization or the industry or activity of the employer or employee organization that is not specifically excluded by statute. Title I specifically excludes certain plans, such as governmental plans, nonelecting church plans, excess benefit plans, and partnership buyout agreements. [117] Parts 2 and 4 also exclude unfunded plans maintained primarily for a select group of management or highly compensated employees and partnership agreements providing for liquidation of the interest of a retired or deceased partner. [118] In addition, Part 2 also excludes other plans, such as unfunded excess benefit plans, employee welfare plans, individual retirement accounts, and supplemental retirement plans that are treated as welfare plans under the labor regulations. [119] Thus, Part 2 applies to most employee pension plans, established or maintained by an employer or employee organization, that provide deferred compensation or retirement income to individuals employed by an employer. [120]

Title I does not specifically exclude a plan from coverage because of the character or quantity of participants in the plan. The Welfare and Pension Plans Disclosure Act in effect prior to ERISA provided that it did not apply to an employee welfare or pension plan that covered less than twenty−six employees. [121] Several reform bills were proposed to replace the Welfare and Pension Plans Disclosure Act, with the final version being enacted as the Employee Retirement Income Security Act of 1974 (ERISA). In the late 60's and early 70's, some of these proposals provided that the act or title would not apply to a plan that did not cover a minimum number of participants (9 or 26) or that provided contributions or benefits for a sole proprietor or a partner owning more than ten percent of the capital or profits interest of the partnership. These exclusions were rejected when the final version of ERISA was enacted in 1974. [122] ERISA does not contain any blanket exclusions for plans with less than a certain number of participants or for plans that cover a sole owner or partner; however, ERISA does authorize the Secretary of Labor to simplify the reporting and disclosure for pension plans with less than 100 participants. [123]

Other changes were made to the final version of ERISA that reflect congressional intent to include plans covering only a sole owner or owners under the coverage of title I. For example, when the proposed revisions excluded plans covering a limited number of employees or benefiting a sole proprietor or certain partners, all assets of covered plans were required to be held in trust. When the proposal did not apply to a plan that provided benefits for a sole proprietor or more than 10 percent partner, this meant that the trust requirement also did not apply to such a plan. When the final version deleted the exception so that ERISA did apply to a plan benefiting a sole proprietor or partner, it was

necessary to amend the trust requirement to provide that it did not apply to a plan where some or all of the participants were self−employed individuals, such as a sole proprietor or partner. [124] Thus, when the final version of ERISA was proposed, it deleted these coverage restrictions and added an exception to the trust provisions for plans where "some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code." In 1986, this provision was amended so that the trust requirement does not apply to a plan "some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code . . . to the extent such plan's assets are held in one or more custodial accounts which qualify under section 401(f) . . . of such Code." [125] Thus, ERISA, as amended, provides that the trust requirement of title I applies to a plan where all of the participants are self−employed individuals under section 401(c) of the Internal Revenue Code if the plan's assets are not held in a non−trust custodial account that qualifies under section 401(f) of the Internal Revenue Code. In addition, when the final version of ERISA was proposed and enacted, without a general exception for plans covering a limited number of employees or benefiting a sole proprietor or certain partners, title IV was changed to provide an exception for plans "established and maintained exclusively for substantial owners" or "established or maintained by a professional service employer which does not . . . have more than 25 active participants in the plan." [126]

The statutory definition of a pension plan under Title 1 of ERISA does not specifically exclude plans whose only participant or participants are the owners or partners of the employer or plan sponsor (or their spouses) and does not give the Secretary of Labor authority to issue regulations to that effect. By contrast, title I grants the Secretary of Labor specific authority to promulgate regulations whereby severance pay arrangements and supplemental retirement income payments may be treated as welfare plans rather than pension plans. Thus, the changes that were made during the legislative process resulting in the final version of ERISA, as well as the provisions of ERISA in 1974 and through subsequent amendments, reflect congressional intent to statutorily include plans that benefit only a sole owner or partners or their spouses within the scope of title I.

The Secretary of the Department of Labor is given the authority "to prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title [I]," including definitions of "technical and trade terms used in such provisions." [127] The Supreme Court has stated that the judiciary "must reject administrative constructions which are contrary to clear congressional intent." [128] Further, the Court has stated that the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" [129] and that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." [130]

The labor regulations provide that certain employees will not be treated as employees. Labor Regulations section 2510.3−3(c) provides:

Employees

. For purposes of this section [regarding employee benefit plans]:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

In addition, Labor Regulations section 2510.3−3(b) provides that Title I will not apply to plans without employees. Section (b) specifically provides:

Plans without employees.

For purposes of Title I of the Act and this chapter, [131] the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so−called "Keogh" or "H.R. 10"

plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees in addition to the self−employed individuals are participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.

Most plans are not excluded from Title 1 because of these regulations. Although some plans cover employees who also are owners or spouses, most participants are not owners or spouses. The regulations encompass plans sponsored by a sole proprietor, a partnership, a corporation, or other trade or business; but exclude from title I plans that have only one sole participant who is the sole owner or the spouse of the sole owner or that only have participants who are owners or partners and their spouses. The stated purpose of the regulation is to define an employee benefit plan, including a pension plan; however, some courts also have applied this regulation for purposes of determining whether an owner or spouse may participate in a plan or has standing to sue under ERISA as a plan participant or beneficiary.

Generally, a plan will cover only an owner or partners or spouses in the limited situation where there are no other eligible employees B in most cases, an employee is eligible if he or she works at least 1,000 hours per year and satisfies the minimum age requirement. Only limited numbers of plans, during the years they are in existence, cover only owners and spouses because of the minimum participation rules of ERISA. [132] For example, few businesses are run solely by an owner or an owner and spouse with no full−time employees. In some cases, a plan may cover only an owner or spouse if there is another comparable plan that covers other employees or employees of members of an affiliated service group. [133]

In a plan's final years, participation in the plan may dwindle as distributions are made to participants who terminate their employment or in the event of the termination of the plan. [134] For example, in *Patterson v. Shumate*, the plan in issue covered almost 400 employees, all of whom except Shumate had received a distribution of their plan benefits after the plan was terminated by the bankruptcy trustee for the corporate sponsor. [135]

When the first version of these regulations was proposed, the Notice of Rulemaking contained the following comment:

The definition of the term "employee" in section 3(6) of the Act could be read as broadly as section 401(c)(1) of the Code, which sweeps almost any working individual under the term "employee" for purposes of section 401, regardless of common law or other established concepts of the employment relationship. In view of the policies set forth in section 2 of the Act, however, the basic thrust of the protections which Congress provided in Title I is not directed toward so wide a class of individuals. In situations where Title I protections are unnecessary where the abuses which Congress sought to prevent are unlikely to occur enforcement of Title I would not only impose unnecessary costs on benefit plans, but also divert resources of the Department of Labor from administering Title I in situations where genuine abuses existed or could arise.

Consequently, the definition of "employee" in section 3(6) of the Act should not be read as broadly as the definition of "employee" in section 401(c)(1) of the Code.

. . . The sole proprietor and his or her spouse have no need for the protections of Title I with respect to a benefit plan controlled by the sole proprietor. [136]

In addition, when the final version of the regulations was adopted, the following additional commentary was published:

the exclusion of sole proprietors and their spouses from the definition of "employee" has been extended to sole proprietors of incorporated as well as unincorporated trades or businesses, since the risk of abuse in the case of a plan covering only an incorporated sole proprietor and his or her spouse is no greater than in the case of a plan covering only an unincorporated sole proprietor and his or her spouse. [137]

These labor regulations are administrative regulations and make sense from a cost−benefit analysis with respect to the disclosure requirements (Part 1) and the jurisdictional provisions affecting plans and the Department of Labor. In many cases, the provisions of title I are provided in order to protect employees and require that the plan or its fiduciaries provide the Department of Labor or participants with certain information and provide certain benefits to certain employees. Title I contains methods for counting service and minimum participation, vesting, and funding standards. These provisions are designed to protect employees and provide them with the security that they will be covered as required by law and receive certain promised benefits. The Department of Labor is given jurisdiction to enforce such rules and to administratively handle certain complaints from participants. In the case of a participant who is the sole proprietor or sole owner of the employer, such protection may not be necessary and the requirement to provide or file certain information and documents could impose an unnecessary burden on the plan. Further, it would create an administrative burden on the Department of Labor to oversee that the sole owner of a business accounts to himself or herself as the sole participant while the department could be overseeing other plans and protecting other employees. It is arguable that this rationale regarding the burden and limited benefits of reporting and disclosure also extends to plans that only cover a sole owner and his or her spouse. With respect to some partnership plans, it might not be necessary to require a plan adopted by a partnership that only covers partners to file certain information with the Department of Labor in order to protect the partners. In other cases the number of partners might be sufficiently large or the respective interests of some partners might be sufficiently small that they would benefit from being subject to the reporting and disclosure requirements of title I and the supervision of the Department of Labor. Nevertheless, the regulations apply to all plans in which the sole participants are partners or spouses, without making any distinction as to the number of partners or their respective interests in the capital or profits of the partnership. By contrast, the restriction in the Internal Revenue Code that apply to owner−employees who are partners of a partnership only include a partner who owns "more than 10 percent of either the capital interest or the profits interest in such partnership." [138]

Title 1 of ERISA as promulgated in 1974 and as subsequently amended contains some provisions that should apply even to a plan with a sole participant who is the sole owner or to a plan with two married participants, one of whom is the sole owner, or to certain plans sponsored by closely−held partnerships or other employers, with no common law employees. For example, the Retirement Equity Act of 1984 protects spouses and surviving spouses of certain participants by providing rules governing joint and survivor annuities. The labor regulations cannot waive compliance by certain plans sponsored by a sole proprietor, partnership, or solely−owned corporation with these ERISA requirements. In addition, Title 1 contains provisions governing the fiduciaries of a plan, and a plan that includes only a sole proprietor or owner or partners should be covered by these provisions with respect to fiduciaries other than the sole proprietor or owner. Similarly, the requirement that plan benefits not be assignable is to protect the beneficiary from his or her own improvidence and creditors and to prevent the participant from anticipating the receipt of his or her benefits by assignment, and this requirement should not be waivable by labor regulation.

If these regulations are correct, different combinations of facts incongruously result in certain Keogh or corporate plans being subject to title I while others are not. Under these regulations, a plan sponsored by a sole proprietor will not be covered by title I if the only participant is the sole proprietor or if the only participants are the sole proprietor and his or her spouse. On the other hand, the plan would be subject to title I if at least one common law employee participates in the plan, even if the plan also covers the sole proprietor or his or her spouse. Further, a plan sponsored by a partnership would not be covered by title I if the only participants in the plan are partners or partners and spouses; however, if there are any common law employees participating, the plan would be covered. In addition, a plan sponsored by a corporation would not be covered by title I if the corporation is owned by a single individual or by that individual and his or her spouse, if the only participant is the sole shareholder or the sole shareholder and his or her spouse. Yet, a corporate plan covering the sole shareholder and another employee who is not the shareholder's spouse would be subject to title I of ERISA. Further, a plan sponsored by a corporation having at least two shareholders who are not married to each other would be covered even if the only participants are those two shareholders. If these results are correct, the scope and interpretation of the rights of participants who are not common law employees and of their spouses would differ depending on whether the plan covers a common law employee.

When considering the labor regulations, it is helpful to see how they apply to a specific form of ownership and then to review the regulations from an overall perspective, regardless of form of ownership. First, the prevailing case law and application of *Patterson v. Shumate* in the bankruptcy context, including consideration of the labor regulations, will be

discussed with respect to a Keogh plan adopted by a sole proprietor, a Keogh plan adopted by a partnership, and a corporate plan. Then, the appellate decisions applying these regulations, regardless of the form of entity, will be reviewed and discussed.

a. Keogh Plan adopted by a Sole Proprietor

If a person is the sole owner or proprietor of his or her business, that person may establish a Keogh plan. The sole proprietor could be the only participant, or if the sole proprietor employs his or her spouse, the sole proprietor and his or her spouse might be the only participants. Alternatively, the sole proprietor may employ one or more common law employees, other than his or her spouse, and the plan could cover those employees as well. In some cases, the plan may cover only common law employees and may exclude the sole proprietor. [139]

If a sole proprietor sponsors a plan and the sole proprietor or spouse, or both, are the only participants in the plan, the regulations provide that the plan is not subject to title I. If this regulation is correct, title I of ERISA does not apply to require the plan to provide that plan benefits not be assigned or alienated. The Ninth Circuit applied this regulation to a pension plan sponsored by a sole proprietor when he was the sole participant in the plan for the last seven years and upheld its validity. [140] The Ninth Circuit stated that "ERISA does not cover a pension plan of which the only beneficiary is the sole owner of the company funding the plan" and "[b]ecause Debtor could not have enforced the transfer restriction in the Pension Plan outside of bankruptcy, he cannot now enforce it under 11 U.S.C. § 541(c)(2)." [141] The Second Circuit also upheld the validity of this regulation with respect to a different part of Title I when it determined that the fiduciary duties imposed by title I of ERISA did not apply to an account in a Keogh plan maintained by a self−employed individual for his benefit and his wife's benefit. [142] Other courts also have applied this regulation in the bankruptcy context or in other contexts with respect to a pension or welfare plan to determine whether a plan was subject to ERISA. [143]

If a sole proprietor and a common law employee participate in a plan sponsored by the sole proprietor, then the plan will be subject to title I. The regulations define an employee and exclude the sole proprietor only for the purpose of determining if the plan is subject to title I. The regulations contemplate that a Keogh plan may cover the sole proprietor, evidenced by the reference in the regulations when "one or more common law employees in addition to the self−employed individuals are participants covered under the plan." [144] The administrative history of the proposed and final regulations reflects this interpretation. When the proposed regulations were published, they contained a separate section 2510.3−6 that provided: "for purposes of Title I of the Act, a sole proprietor of an unincorporated trade or business and his or her spouse are not employees with respect to the unincorporated trade or business." [145] When the final regulations were adopted, this definition was incorporated into the section defining an employee benefit plan for purposes of title I and was changed so that it applied only for purposes of the regulation, rather than for all of title I. The commentary preceding the published final regulations contained the following explanation for this change:

proposed § 2510.3−6, defining the term "employees," has been incorporated in § 2510.3−3. In the proposal, the definition of "employee" applied to Title I of the Act and 29 CFR chapter XXV in their entirety. However, comments pointed out that the definition of the term "participant" in section 3(7) of the Act is keyed to the term "employee" and that section 404(a)(1) of the Act requires a plan fiduciary to discharge his duties with respect to a plan 'solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries * * * According to the comments, a definition of "employee" excluding self−employed individual might raise problems under section 404(a)(1) with respect to disbursements to self−employed individuals from "Keogh" or "H.R. 10" plans covering both self−employed individuals and "common law" employees. Therefore, the definition of "employee" formerly appearing in proposed § 2510.3−6 has been inserted into § 2510.3−3 and restricted in scope to that section. [146]

In addition, other provisions of title I of ERISA contemplate that a person may be an owner−employee with respect to a plan. [147] For this purpose, an owner−employee includes "an employee who B (A) owns the entire interest in an unincorporated trade or business." [148] Further, legislative proposals to exclude a plan that "provides contributions or benefits for a sole proprietor" or "is established by a self−employed individual for his own benefit or for the benefit of his survivors" were not incorporated into the 1974 version of ERISA. [149] Thus, a plan that covers a sole proprietor and a common law employee would be an employee benefit plan subject to title I, and the sole proprietor would be an

employee and a participant in the plan for purposes of title I.

Under the labor regulations, a sole proprietor and his or her spouse are not considered employees for purposes of determining if the plan covers employees. If the plan covers at least one common law employee, then the plan will be treated as an employee benefit plan subject to title I and the sole proprietor will be considered an employee. Further, if the sole proprietor satisfies the eligibility requirements, he or she will be considered a participant in the plan for purposes of title I. Thus, a sole proprietor may be covered by a Keogh plan and can have standing as a participant in the plan, if the plan covers at least one common law employee. Further, the plan may be operated by the fiduciaries "solely in the interest of the participants and beneficiaries," including the sole proprietor if eligible to participate under the terms of the plan, and for the "exclusive purpose" of "providing benefits to participants." [150] Therefore, providing a benefit for the sole participant will not violate the anti−inurement provision of ERISA. Further, if the sole proprietor is a participant in the plan and the plan provides death benefits or other benefits payable to the participant's spouse or other designated person, that spouse or other person would be considered a "beneficiary" of the plan for purposes of title I. [151]

Not all courts have agreed with this interpretation or shown an awareness of the legislative history of ERISA and the regulations. Some courts have held that a sole proprietor may not participate in an employee benefit plan because the sole proprietor is treated as the employer and cannot serve in the dual capacity of employer and employee. [152] For example, the Tenth Circuit stated: "Our reading of ERISA convinces us that dual status individuals are not eligible for inclusion in employee pension benefit plans." [153] Some of these courts also based their reasoning on the anti−inurement and exclusive benefit rules of ERISA. [154] ERISA provides the general rule that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries." [155] These courts begin with the premise that a sole proprietor is the employer and cannot also be an employee so that if the sole proprietor participates in the plan, plan assets would inure to the benefit of the employer and thus would violate the anti−inurement rule of ERISA. Therefore, some courts have prohibited the sole proprietor from participating in an employee benefit plan. Others have created two classes of Keogh plans depending on whether the plan covers or does not cover any common law employee. [156] The first class is a Keogh plan that benefits at least one common law employee who is not married to the owner. This class of Keogh plans is subject to title I and its trust can qualify under the Internal Revenue Code. The second class is a Keogh plan that does not benefit any common law employee who is not married to the owner. This class of Keogh plan is not subject to title I of ERISA but can have a trust that can qualify under the Internal Revenue Code (assuming the plan can comply with the antialienation requirement). Thus, these courts are concerned with whether a sole proprietor is permitted to be a participant in a retirement plan and if so, whether the plan is governed by title I and whether any causes of action are governed by ERISA or state law.

The labor regulations confirm that a sole proprietor may be a participant in a plan if there is at least one other employee participating in the plan who is not married to the sole proprietor. If so, the sole proprietor may receive benefits as a participant without violating the anti−inurement and sole benefit rules of ERISA. In addition, if a sole proprietor receives benefits under the plan based on his or her self−employment, he or she is receiving benefits as a participant in the plan not as a beneficiary of the plan. It is unnecessary and incorrect to classify a sole proprietor who is eligible to participate in a plan as a beneficiary rather than a participant, because the definition of a plan beneficiary presupposes the existence of a present or former participant. [157] A sole proprietor may participate in an ERISA plan and have standing as a participant, without having to be classified as a plan beneficiary. Nevertheless, it is reasonable for the labor regulations to provide that a plan that covers only a sole proprietor or his or her spouse, or both, is not subject to title I for the limited purpose of the reporting and disclosure requirements in Part 1. This is consistent with the administrative intent underlying the regulations that the "sole proprietor and his or her spouse have no need for the protections of title I with respect to a benefit plan controlled by the sole proprietor." [158]

Even if a plan is administratively exempted from the reporting and disclosure requirements, the plan should remain subject to title I with respect to certain substantive provisions, such as those regarding the alienation of benefits and the provisions governing joint and survivor annuities. [159] The sole proprietor needs the protection of ERISA in order to provide the security that plan benefits will be available at his or her retirement and cannot be voluntarily anticipated by the participant or attached by the participant's creditors. The spouse of a participating sole proprietor needs the protection of the applicable joint and survivor annuity provisions. The sole participant should not have the option of

determining whether plan benefits will be alienable or whether a joint and survivor annuity must be provided by choosing whether to employ or cover a common law employee. Further, a sole proprietor or spouse should be assured that a third party fiduciary will be subject to the fiduciary duties imposed by ERISA. Also, a sole proprietor or employed spouse who is eligible to participate in the plan should have standing as a participant to enforce the provisions of the plan under title I.

b. Keogh Plan adopted by a Partnership for the Benefit of Partners

A partnership may adopt a Keogh plan to fund retirement benefits. The plan may benefit only partners, only employees, or both. In some cases, the plan also may benefit employed spouses of partners. These benefits may arise if the partnership does not have any other employees. Or it may happen if the partnership adopts a separate plan for the other employees. [160] Also, the partnership may be part of an affiliated service group and there may be a comparable plan for the other employees sponsored by other members of the group.

If a plan benefits only partners or their employed spouses (or both), the labor regulations provide that the plan is not subject to title I of ERISA because the plan has no employees within the meaning of that term in the regulations. The regulations would apply this rule to a partnership that has two or three equal partners as well as to one that has 100 or 1,000 partners with interests of one percent or less. Further, the regulations appear to apply equally to a general partner as well as a limited partner. If the plan benefits at least one common law employee, then the plan is subject to title I of ERISA. [161] By contrast, the special federal income tax rules that govern owner−employees who are partners only apply to "a partner who owns more than 10 percent of either the capital interest or the profits interest in such partnership." [162] Even when Congress proposed to limit ERISA's coverage for certain partnership plans, it only excluded plans that provided contributions or benefits for "a partner who owns more than 10 per centum of either the capital interest or the profits interest in such partnership" or for a plan "established by one or more owner−employers exclusively for his or their benefit or for the benefit of his or their survivors." [163] The only partnership plans statutorily excluded from Part 2 of title I are partnership agreements to purchase a partner's interest upon retirement or death which involve the liquidation of the partnership interest rather than payment of deferred compensation. [164]

Most partnership retirement plans benefit common law employees, so that they qualify as employee benefit plans under title I of ERISA. In a minority of plans, the retirement plan benefits only partners. If the plan only covers partners, some courts have applied the labor regulations to hold that the plan is not subject to ERISA. This rule has been applied in nonbankruptcy cases [165] and in bankruptcy cases. In the bankruptcy context, the courts have held that a Keogh plan covering only partners is not subject to title I and thus is part of the bankruptcy estate unless excluded or exempt under state law. [166] In some nonbankruptcy cases, the courts have reviewed the partnership agreement and substantive rights of various partners to determine if a person who is named as a partner under a partnership agreement is considered an employee for purposes of ERISA. [167] If at least one person covered by the plan is treated as an employee, then the plan is subject to title I of ERISA.

In a nonbankruptcy case, the Fifth Circuit considered the reason why a plan that covers only partners should not be covered by ERISA. The court stated:

One of the purposes of ERISA was to correct the abuses occurring in the management of pension plans that constitute the retirement benefits held in trust for workers in traditional employer−employee relationships. . . . Employees in the traditional employer−employee relationship are more vulnerable than partners in a partnership are to abuses because workers typically lack control over pension plan management and input into the decision whether to extend pension benefits to certain employees. . . . On the other hand, a partner has more control and input than does an employee since a partner has a vote in partnership affairs. Furthermore, a partnership contains a self−policing feature largely absent in the typical employer−employee relationship.

In the partnership situation the partners have an incentive not to agree to provisions that may harm certain members of the partnership because each partner knows that he could end up being the partner who is harmed. For example, while partners may want to discourage each other from withdrawing from the partnership, each partner has an incentive not to make the withdrawal provision too harsh since someday he might want to withdraw. . . . On the other hand, the self−policing function is less strong in the typical employer−employee relationship. The employer wants to earn

profits for himself or for the shareholders and has less incentive to treat the employees as fairly as a partner would treat his partners. Because of the difference between the partnership situation and the typical employer−employee relationship Congress easily may have intended only to regulate the latter relationship. [168]

In another nonbankruptcy case, the District Court for the Southern District of Ohio stated: "Self−employed persons, unlike employees, have complete control over the amount, investment, and form of the retirement fund and do not need ERISA protection." [169]

Similar issues arise in the context of a welfare plan providing health or disability insurance for partners. As issue may arise as to whether the welfare plan covers any employees other than partners. [170] If the plan covers at least one employee who is not a partner, then the plan is subject to ERISA. [171] Some courts have held that a partner cannot participate in an ERISA welfare plan because of the anti−inurement rule, and that if a health or disability policy covers a partner, the partner's rights will be governed by state law even if the policy covers other employees. [172] This results in the anomaly that the partners' remedies under a policy will be governed by state law while the employees' remedies will be governed by ERISA. Other courts have held that a partner cannot be a participant in an ERISA welfare plan that covers other employees; however, the partner may be a beneficiary under the plan with standing to sue under ERISA. [173] These interpretations are not consistent with the provisions of the labor regulations.

The labor regulations limit the definition of an employee only for purposes of determining whether a plan is an employee benefit plan. The labor regulations acknowledge that a partner may be a participant in a plan; however, the plan may not be covered under title I. [174] If a plan covers partners and at least one common law employee, the labor regulations provide that the plan is an employee benefit plan under ERISA. Once that determination is made, a partner will qualify as an employee and a participant for purposes of title I and will have standing under ERISA to bring a cause of action under title I.

The labor regulations are particularly broad with respect to partners because the regulations apply to any partner, regardless of his or her ability to participate in management, control decisions, or receive a share of the capital or profits. Thus, the regulations apply equally to a general partner as well as to a limited partner who has no role in management and to a 99 percent partner as well as to a one percent partner. By contrast, title II limits its restrictions on partners to partners who own more than a 10 per cent interest in either the capital or profits of the partnership. The stated reason for adopting the labor regulation regarding partners not being deemed employees was that "in a plan or program covering only partners, the protection which title I was designed to provide is unnecessary, because partners are generally capable of protecting their own interest under existing law." [175] The regulation, however, excludes plans from the protection of title I, even when the plan covers partners who are not capable of protecting their own interests without the benefit of ERISA. Further, all partners need the protection accorded by the antialienation rules with respect to third parties and should be limited in their ability to anticipate their benefits. Some partners also need the protection accorded by title I with respect to the participation and coverage requirements. Further, spouses of partners need the protection accorded them by the joint and survivor annuity rules. Thus, a plan that benefits only partners or spouses should be subject to the substantive provisions of title I.

The labor regulations should be construed so that they do not exempt any partnership plans from being subject to the substantive provisions of title I, such as the antialienation provision, the joint and survivor annuity rules, and the fiduciary rules. In addition, a partner or employed spouse should have standing as a participant under title I to enforce the provisions of that title and of that plan. Further, plans that cover only partners and spouses should be exempt from the reporting and disclosure requirements (Part 1) only if all of the covered partners have a significant degree of control over the design and administration of a retirement plan. The dual protection of title I and title II should protect all partners and spouses to the extent they need the protection of ERISA; and the Secretary of Labor should not have the authority to administratively and uncategorically exclude these partners and their plans from the protection afforded them by title I. The labor regulations should be amended so that they exempt only certain partnership plans from the reporting and disclosure requirements – those with partners that do not need the protection of the reporting and disclosure requirements. This could be done on an objective basis, similar to the way partners are classified as owner−employees under the Internal Revenue Code (although a 10 percent ownership requirement may not be the appropriate objective definition of a partner with effective control who does not need the protection of ERISA) or on a subjective basis, which would be more difficult from a planning and compliance standpoint.

c. Corporate Plan

A corporation may adopt a plan for its employees. If a shareholder is an employee of the corporation, the plan may cover that person in his or her capacity as an employee. In some cases, the only covered employees may be shareholders or spouses. In other cases, the plan may not cover any shareholders or spouses. In some cases, the corporation may be part of a controlled group of corporations or an affiliated service group that may have a separate plan for its employees. [176] Occasionally, a corporation may have one plan for owners who are employees and another comparable plan for other employees. [177]

The labor regulations provide that the sole shareholder and his or her spouse are not considered employees for purposes of determining whether the plan is subject to title I of ERISA. This applies equally to a C corporation as well as to an S corporation. If the plan covers at least one employee who is not the sole shareholder or spouse of the sole shareholder, the plan is subject to title I of ERISA.

When these regulations were being proposed, the Notice of Proposed Rulemaking stated:

In many instances an executive of a smaller or medium−sized corporation who is also a shareholder of the corporation occupies a position with respect to an employee benefit plan maintained by the corporation similar to the position occupied by a partner with respect to a plan maintained by a partnership. No provision for plans covering only such corporate executive−shareholders has been included in proposed § 2510.3−6. In view of the greater complexity of corporate relationships, and in view of the fact that virtually every individual who is an employee of a publicly traded corporation may readily acquire a few shares of the corporation, a blanket exclusion for corporate shareholders from the term "employee" would be inappropriate. [178]

When the final regulations were issued, the preliminary commentary referred to "sole proprietors of incorporated . . . trades or businesses." [179] This reference is an oxymoron because by definition, a sole proprietor is the owner of an unincorporated business while a shareholder is an owner of an incorporated business. [180] The commentary stated that "the exclusion of sole proprietors and their spouses from the definition of 'employee' has been extended to sole proprietors of incorporated as well as unincorporated trades or businesses, since the risk of abuse in the case of a plan covering only an incorporated sole proprietor and his or her spouse is not greater than in the case of a plan covering only an unincorporated sole proprietor and his or her spouse." [181]

The Ninth Circuit applied the labor regulations to a plan sponsored by a medical corporation, where the sole shareholder was the sole participant in the plan, so that the plan was not subject to title I of ERISA and was not excluded from the bankruptcy estate under ERISA. The court upheld the validity of the regulations, making the following comment:

Congress recognized that workers, i.e., traditional "employees," are vulnerable to abuse by employers because employers typically maintain exclusive control over the pension funds of their employees. In contrast, a self−employed individual such as Watson, has complete control over the amount, investment and form of the fund because he voluntarily creates and manages it for his own retirement. Congress had no reason to extend ERISA coverage to self−employed owners such as Watson. Self interest provides adequate protection. Therefore, it was reasonable for the Department of Labor to exclude self−employed shareholders from its definition of "employees" for purposes of ERISA. [182]

A number of bankruptcy courts also have applied this regulation to a plan whose sole participant is the sole shareholder or whose sole participants are spouses, one or both of whom own the entire corporation. [183]

In a nonbankruptcy context, the Sixth Circuit applied the regulation to a pension plan that covered the sole shareholder and also may have benefited his wife, but did not have any other participants. [184] The court held that the plan was not subject to title I of ERISA or the prohibition against alienation and that the Securities and Exchange Commission could reach plan assets in order to satisfy a disgorgement order. Other nonbankruptcy courts also have applied these regulations to determine whether a corporate plan was subject to ERISA. [185]

Some courts have disagreed as to whether a sole shareholder may participate in a plan, even if there are other participating employees. [186] In a nonbankruptcy case involving collective bargaining, the First Circuit held that "an individual who owns all of the issued and outstanding stock of a corporate employer is himself an 'employer' for purposes of Part I of ERISA" and "[b]ecause an 'employer' cannot be an 'employee' under ERISA (Part I), a sole shareholder is ineligible to participate in an ERISA−qualified pension plan." [187] In another collective bargaining setting, the District Court for the Northern District of Illinois held that a plan providing health, welfare, and pension benefits did not exclude the sole shareholder from participating in the plan merely because of his stock ownership. [188] Thus, some courts have held that a sole shareholder can participate in a pension plan but that the plan will be subject to title I of ERISA only if the plan has other present participants; while other courts have held that ERISA prohibits the sole shareholder from participating regardless of whether other employees participate. Some court have held that a plan will not be considered subject to title I of ERISA in a year when the sole shareholder is the sole remaining participant even if it may have been subject to title I of ERISA in a prior year when there were participants other than the sole shareholder. [189]

If the sole participant is a shareholder of the corporate sponsor but neither the sole participant nor his or her spouse are the only shareholders, then the plan will be subject to ERISA. [190] This is true even if the sole participant is a majority or controlling shareholder. Thus, the Seventh Circuit held that a plan whose sole participant was the majority shareholder was subject to title I of ERISA. [191] If there is more than one participant in the plan and those participants, alone or with their spouses, own all of the shares in the corporation, the plan should be subject to title I of ERISA. Some cases, however, have treated these corporate plans in a manner similar to a partnership plan. For example, in a nonbankruptcy context, the Ninth Circuit stated that if the two owners of a corporation were the only participants in the plan, the plan would not be subject to ERISA. [192]

Based on the provisions of title I and the labor regulations, a sole shareholder can participate in a retirement plan. Further, the regulations provide that a plan that covers a sole shareholder or his or her spouse will be subject to title I if there is at least one employee other than the sole shareholder or his or her spouse who is participating in the plan. Thus, if a corporation has at least two shareholders who are not married to each other, the shareholders may participate in a retirement plan and the plan will be subject to title I.

If a plan only covers the sole shareholder or his or her spouse, or both, then it is difficult to justify why that plan should not be subject to title I. The comments to the final labor regulations seem to treat sole shareholders as being in substance "sole proprietors of incorporated . . . trades or businesses." The rationale for this portion of the regulation is more tenuous than the provisions relating to a sole proprietor because a shareholder who provides services for a corporation should not be considered self−employed and the corporation should be treated as a separate entity and employer under state law unless facts exist to pierce the corporate veil. [193] Because a corporation is a separate entity under state law, the roles of employer and employee should not be affected by an employee's separate role as the sole shareholder of the corporation. For most federal tax purposes, a shareholder−employee is not treated as a self−employed individual. [194] There are limited exceptions where a shareholder of an S corporation is statutorily treated as a partner for income tax purposes and subject to similar restrictions that apply to a sole proprietor or certain partners; [195] however, when the Treasury Department was adopting the labor regulations, it chose not to treat shareholders of closely held corporations as partners, stating:

Some comments urged that corporate shareholders, particularly, in closely held corporations, be treated like partners for purposes of Title I coverage. Such treatment of corporate shareholders is not included at this time because the established judicial concept of "employee" includes employees who are shareholders in the corporations by which they are employed, but excludes partners. Furthermore remedies under state law available to minority shareholders are generally less extensive than those available to dissatisfied partners. Application of the protections of Title I, particularly the fiduciary requirements, seems therefore justified with respect to employees who are shareholders in their corporate employers. However, the Department of Labor is currently considering a proposal to relieve employee benefit plans covering only shareholders of closely held corporations from most of the reporting and disclosure requirements of Part 1 of Title I of the Act. [196]

Thus, a plan that covers only a sole shareholder or only the sole shareholder and his or her spouse may be exempted from complying with the reporting and disclosure requirements of title I. On the other hand, a plan covering only a

sole shareholder and spouse should be required to contain an antialienation provision, [197] be subject to the joint and survivor annuity rules, and comply with ERISA's trust requirement. Further, third party fiduciaries should be subject to the fiduciary duties and other fiduciary rules of title I. Also, a participating shareholder or employed spouse should have standing under title I as a participant to enforce the provisions of the plan and of the title.

d. Application of Labor Regulations by Circuit Courts

The preceding analysis considered the application of the labor regulations separately for sole proprietors, partners, and corporations. It also is important to consider the various positions taken by the circuit courts with respect to the labor regulations, regardless of the form of entity involved. A number of circuit courts have applied this regulation to sole proprietorships, partnerships, and corporation. [198] Some of these cases have involved whether a pension plan was included in the bankruptcy estate under the authority of ERISA. [199] Others have involved pension plans and ERISA in nonbankruptcy contexts relating to eligibility to participate or receive benefits and breach of fiduciary duty. [200] Other nonbankruptcy cases have applied this regulation to welfare plans in a nonbankruptcy setting. [201]

The Ninth Circuit applied the labor regulations to pension plans involving a sole owner as the sole participant. [202] The Ninth Circuit upheld the validity of the labor regulations, holding that ERISA was ambiguous "with respect to the classification of a 'dual status' employer/employee," that the regulations were issued pursuant to the authority of the Secretary of Labor to issue regulations to fill gaps in the law, and that the regulations did not conflict with the plain meaning of ERISA, were reasonable, and did "properly serve the congressional purpose to the extent ascertainable from the text and legislative history." [203] In addition, the Ninth Circuit held that the regulations did not violate the equal protection clause of the Constitution, finding that it was rational to exclude a plan "from the scope of ERISA" when the "plan's sole participant is simultaneously employer, employee, fiduciary and beneficiary." [204] Both of these cases involved marital claims of former spouses where the spouses had available to them the protective mechanism afforded them under ERISA by use of a qualified domestic relations order which is authorized as a statutory exception to the prohibition against alienation; thus, nonassignability of plan benefits was not an issue. [205]

The Seventh Circuit applied the labor regulations to pension plans involving a majority shareholder, did not disregard the corporation as an entity separate from its shareholders, and held that the corporation was the employer and its majority shareholder was an employee for purposes of ERISA. [206] The Seventh Circuit did state, however, that "a one−person corporation must use a Keogh plan rather than an ERISA plan for its solitary employee." [207]

The Sixth Circuit applied the regulations in a nonbankruptcy case involving alienation of benefits in order to allow the Securities and Exchange Commission to reach the interest of a participant in pension plans to satisfy a disgorgement order. [208] This participant was the sole shareholder of the corporation and also the only participant in the plans, and he had signed consent decrees providing for the disgorgement of profits resulting from certain securities activities. Application of the labor regulations enabled the court to avoid the judicial interpretation that ERISA prohibits alienation of a participant's benefits even if the participant has been involved in criminal activities or for other equitable reasons. [209]

In a nonbankruptcy context involving collective bargaining, the First Circuit extended the scope of the regulations, holding that a sole shareholder could not participate in an ERISA plan even if there were other employees participating in the plan. [210] The court could have decided the case on the contract issue of whether the plan permitted such participation, because the plan covered only employees within a bargaining unit, or on the basis of whether the exclusive benefit rule of the Labor Management Relations Act prohibited such participation; however, the parties argued the case based on whether the sole shareholder was an employer or employee under ERISA. [211] Further, in a nonbankruptcy context involving a fiduciary bond, the Ninth Circuit extended the regulation to a pension plan when the only two participants in the plan were the corporation's two shareholders. [212]

Thus, several of the Circuits have applied the labor regulations and held that various provisions of title I do not apply to a plan whose sole participant is the sole owner of the plan sponsor or whose only participants are a sole owner and spouse, partners, or partners and spouses. Nevertheless, the legislative history of ERISA and other provisions of ERISA do not support the conclusion that Congress left a gap as to whether a plan that only covers a sole owner or partners and spouses was included or excluded from title I. Title I contemplates that an owner−employee may

participate in an employee benefit plan and further that a employee benefit plan includes a plan whose only participants are self−employed individuals. [213] In addition, when the Supreme Court decided *Patterson v. Shumate*, it was resolving a conflict among the circuits and several of the conflicting cases involved Keogh or corporate plans in which the only participants were owners or spouses – these cases indicated that the plans were subject to ERISA; however, the courts disagreed as to whether ERISA qualified as applicable nonbankruptcy law or formed a basis for a federal exemption under section 522(b)(2)(A) of the Bankruptcy Code.

In some cases, the protection afforded a participant by the reporting and disclosure provisions of ERISA is not necessary for the participants of a plan that benefits only owners and spouses. In other cases, the protection accorded by ERISA is essential for all participants, including owners and spouses. These include the protection afforded a participant from creditors by reason of the nonalienation requirement, the protection afforded a spouse by the joint and survivor annuity provisions, and the protection afforded a participant by the trust requirement and fiduciary obligations imposed on a fiduciary who is not the sole participant. Further, such participants need the standing of participants under ERISA to enforce the provisions of the plan and of title I.

Accordingly, the labor regulations excluding plans that benefit only owners and spouses should be limited in application to those provisions of ERISA that are *not* necessary for the protection of the participants of such plans or their spouses. For example, the labor regulations could limit the coverage of title I by waiving the application of the participation and vesting requirements for sole owners who participate in the plan as far as the jurisdiction of the Department of Labor because the Internal Revenue Code contains adequate provisions. Similarly, the labor regulations could waive the fiduciary responsibility provisions if the sole owner is the sole participant and the sole trustee. [214] By contrast, the regulations should not limit the applicability of the joint and survivor annuity requirement. Similarly, the regulations should not waive the antialienation provision. Accordingly, the requirement of title I that plan benefits not be assigned or alienated should apply to all employee benefit plans, regardless of the number of participants and the ownership or marital relationship of participants (*i.e.*, as sole proprietor, sole shareholder, partner, or spouse). Thus, a plan that covers a sole proprietor or shareholder or partners alone or with any of their spouses should be subject to title I and should be an ERISA−qualified pension plan for purposes of *Patterson v. Shumate.*

e. Consideration of Internal Revenue Code as Applicable Nonbankruptcy Law

If a plan covers only employees who are owners, partners, or spouses, it still is required to provide that plan benefits not be assigned or alienated in order to have a qualified trust under the Internal Revenue Code. If the labor regulations are not limited in application, then the regulations operate to exclude a plan that covers only owners, partners, or spouses from title I. If so, the antialienation requirement of section 206(d) and the enforcement provisions of section 502 would not apply to the plan. If title I is not applicable to a plan that contains an antialienation provision for qualification, then it is necessary to consider whether the Internal Revenue Code qualifies as applicable nonbankruptcy law that will enforce a restriction against transfer under section 541(c)(2) of the Bankruptcy Code. Alternatively, an issue may arise as to whether the antialienation provision is enforceable under applicable state law. The application of state law on a case by case basis to determine excludability would result in a regression to the case law prior to the Supreme Court's decision in *Patterson v. Shumate*; [215] although, such rules may be tempered by the availability of an applicable federal or state exemption. [216] Further, it may resurrect the argument as to whether the debtor's interest in a qualified plan is exempt under the Internal Revenue Code and thus can qualify for the exemption under section 522(b)(2)(A) of the Bankruptcy Code. [217]

For a trust to be qualified under section 401 of the Internal Revenue Code and exempt under section 501, the trust must provide that plan benefits may not be assigned or alienated. [218] If a trust is established in order to qualify a plan under section 401 of the Internal Revenue Code, and the trust contains an antialienation provision, this provision in conjunction with section 401(a)(13) of the Internal Revenue Code should operate to impose a restriction on transfer. In *Patterson v. Shumate*, the Supreme Court stated that section 206(d)(1) of ERISA "imposes a 'restriction on the transfer' of a debtor's 'beneficial interest'" in a trust and that the "coordinate section of the Internal Revenue Code, 26 U.S.C. § 401(a)(13), . . . contains similar restrictions." [219] Further, the Supreme Court noted that the Court "vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits," cited to an earlier Supreme Court decision, and footnoted that: "The Internal Revenue Service at least on occasion has espoused the view that the transfer of a beneficiary's interest in a pension plan to a bankruptcy trustee would disqualify the plan from taking

advantage of the preferential tax treatment available under 'ERISA.'" [220]

The Secretary of Treasury and thus, the Internal Revenue Service, has authority to enforce the provisions of title II and to promulgate regulations regarding assignment and alienation of plan benefits for purposes of title I and title II of ERISA. [221] The enforcement mechanisms available to the Secretary of Treasury are powerful but indirect methods. First, the Internal Revenue Service can determine that a trust is not qualified under section 401 of the Internal Revenue Code or exempt from tax under section 501. In most cases, the favorable income tax benefits of qualification and the unfavorable detriments of disqualification are sufficient to induce compliance with the Internal Revenue Code and the provisions of the plan; however, the Internal Revenue Service cannot compel a plan or trust to qualify. In addition, the Internal Revenue Service has the power to impose an excise tax on a prohibited transaction. For this purpose, a prohibited transaction includes a direct or indirect loan between a plan and a disqualified person and a direct or indirect "transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan." [222] Further, a disqualified person includes a person who is a sole proprietor or a 10 percent or more shareholder or partner of the plan sponsor. [223] In addition, it includes an employee who earns 10 percent or more of the yearly wages of an employer. Accordingly, a sole proprietor or a sole shareholder is a disqualified person. Most partners also will be disqualified persons.

The Internal Revenue Code imposes an excise tax on a prohibited transaction to be paid by any disqualified person who engages in a prohibited transaction. [224] The initial excise tax is fifteen percent of the amount involved with the prohibited transaction; however, if the prohibited transaction is not corrected within the time provided, an additional excise tax is imposed equal to 100 percent of the amount involved. [225] Thus, the cost of engaging in a prohibited transaction and not correcting it can be greater than the amount involved in the prohibited transaction. For example, if a sole proprietor or sole shareholder of an employer assigns his or her interest in the plan in violation of section 401(a)(13) of the Internal Revenue Code, the sole proprietor or shareholder will be required to pay 15 percent of the amount assigned and if he or she does not "unassign" the benefits, the additional tax will equal 100 percent of the amount assigned. Thus, there is no incentive for a disqualified person to assign his or her plan benefits in violation of the Internal Revenue Code. Further, there is a considerable detriment because it will cost the disqualified person more to engage in a prohibited assignment of benefits than to wait until the benefits are received; however, the excise tax does not undo the prohibited transaction. Instead, it requires the disqualified person who engaged in the transaction to pay up to 115 percent of the amount involved to the Internal Revenue Service.

Some courts have acknowledged that the Internal Revenue Service cannot compel a trust to qualify. Some courts have stated that the Internal Revenue Code does not create any individual causes of action. [226] By contrast, title I grants individual parties and fiduciaries standing to enforce the provisions of title I and the provisions of a plan. When the Supreme Court addressed the enforceability of the ERISA restrictions against transfer, the Court was considering a plan that was subject to title I and the court cited the enforcement provisions in title I. [227] The Court also footnoted to the view occasionally "espoused" by the Internal Revenue Service that "the transfer of a beneficiary's interest in a pension plan to a bankruptcy trustee would disqualify the plan from taking advantage of the preferential tax treatment available under ERISA." [228] It is unclear from the Supreme Court's decision whether the qualification requirement of section 401(a)(13) alone or in conjunction with the enforcement mechanisms available under the Internal Revenue Code regarding qualification, disqualification, and excise taxes are sufficient under section 541(c)(2) of the Bankruptcy Code for that restriction to be enforceable under federal nonbankruptcy law. When the Supreme Court decided *Patterson v. Shumate*, it did not contemplate that a Keogh or corporate plan would not be an ERISA−qualified pension plan merely because it only covered a sole owner or partners or their spouses. [229] The case law on the subject is limited; although most of the courts that have applied the labor regulations to a plan and concluded that it was not subject to title I have not excluded the debtor's interest under the authority of title II of ERISA. [230] Instead, such courts have focused on the provisions of applicable state law involving trusts or statutory exclusions or exemptions. [231]

Some cases have discussed whether section 401(a)(13) qualified as applicable nonbankruptcy law in the context of a plan whose sole participant was the sole shareholder. The Bankruptcy Court for the Central District of California stated: "As I.R.C. § 401(a) by its literal terms grants no private right of action, this Court finds that the Debtor lacks standing to enforce his Plan's anti−alienation provision." [232] In that case, the court held that the plan was not subject to title I because the sole shareholder was the sole participant, that the debtor's interest was not excludable under California law because of the debtor's "unbridled control over the Plan and his immediate access to the Plan assets,"

but that the plan interest was fully exempted by a California statutory exemption. [233] The Bankruptcy Court for the Northern District of California held that "the I.R.C. does not create any substantive rights that a participant of any employee benefit plan can enforce." [234] In that case, the court affirmed the bankruptcy court's decision that the debtor's interest in plans in which he was the sole participant and sole shareholder of the corporate sponsor were not excludable under either ERISA or the Internal Revenue Code.

Some cases also have discussed whether the Internal Revenue Code is applicable nonbankruptcy law in the context of governmental plans; however, these plans are not required to comply with section 401(a)(13) of the Internal Revenue Code. One bankruptcy case that was decided before *Patterson v. Shumate*, but consistently with the Supreme Court's holding, relied on section 401 of the Internal Revenue Code as "applicable nonbankruptcy law" and stated: "The term 'applicable nonbankruptcy law' extends to retirement plans qualified under IRC § 401(a) without regard to whether those plans meet the various state law criteria essential to the establishment of a spendthrift trust." [235] In addition, a bankruptcy case decided after *Patterson v. Shumate*, contains dicta that section 401(a)(13) is enforceable under ERISA; however, it cites two provisions in title I of ERISA as authority for the statement. [236] Another bankruptcy court held that "I.R.C. § 401(a) provides no enforcement for the transfer restriction" in a city annuity savings plan and that the "transfer restriction is thus not enforceable under any federal nonbankruptcy law." [237] In another case, involving a different debtor but the same plan, the court stated: "because an IRC § 401(a) qualified plan does not, by itself, create such a substantive right, it alone does not automatically create an enforceable restriction;" thus, the court looked to state law to determine whether the trust restriction was enforceable under state law or the plan interest was exempt.

The issue of whether a restriction required for qualification under the Internal Revenue Code is enforceable under applicable nonbankruptcy law should be relevant only to a plan that is not subject to title I of ERISA. If the labor regulations are limited in application, so that a plan that benefits only owners, partners, or spouses remains subject to section 206(d), then an antialienation provision adopted in order to comply with title I and title II of ERISA would be enforceable under title I. If the labor regulations are valid to the extent that they exclude plans covering only owners, partners, or spouses from title I, then the issue of whether an antialienation provision contained in the plan for qualification is enforceable by reason of the Internal Revenue Code is relevant. In addition, the issue of whether the provision is enforceable under state law is relevant (with state law not being preempted if title I does not apply). Further, for a plan that is not excluded under either federal or state law, the issue of whether the plan interest is exempt under federal or state law is relevant. The Internal Revenue Code has significant enforcement mechanisms; however, these are indirect methods that cannot directly require compliance with the Internal Revenue Code. A court of law may be required to enforce the plan restriction and there is some question whether the requirement imposed for qualification or the enforcement mechanisms under the Internal Revenue Code satisfy the requirements of section 541(c)(2) of the Bankruptcy Code when a plan is not subject to title I of ERISA.

If a plan contains an antialienation provision in order to qualify under the Internal Revenue Code and that provision is not enforceable under federal or state law, then the ramifications of that result is much greater than whether a particular debtor's interest is includible in his or her bankruptcy estate. It raises the potential for a class of plans to be incapable of qualification, because in order to be qualified a plan must provide that plan benefits not be assigned or alienated. If a plan provides that benefits cannot be assigned or alienated but that provision is not enforceable under federal or state law, does that unenforceable provision satisfy section 401(a)(13) of the Internal Revenue Code? The number of plans whose sole participants are owners, partners, or spouses is greater that the number of those plans with a participant who files a petition in bankruptcy. Thus, the impact of holding that such a plan is not subject to title I and that a nonalienation provision is not enforceable under title I can have a significant consequence outside of the scope of bankruptcy.

B. Interests in Plans that are Subject to Title I of ERISA but may not have Qualified Trusts

In the case of *Patterson v. Shumate*, the plan in issue was subject to title I of ERISA, was qualified [238] under the Internal Revenue Code, and contained the antialienation provision required by title I of ERISA and required for qualification under the Internal Revenue Code. Further, the Court cited both section 206(d) of title I of ERISA and section 401(a)(13) of the Internal Revenue Code as authority when determining that the plan in which Shumate was a participant contained a restriction on transfer that was enforceable under ERISA. It is possible for a plan to be subject

to title I of ERISA, contain the required antialienation provision, but not have a trust that is qualified under the Internal Revenue Code. [239] If so, the question may arise in bankruptcy as to whether this trust contains a restriction that is enforceable under nonbankruptcy law. This raises the issue as to whether the Supreme Court's decision in *Patterson v. Shumate* should be construed as requiring a plan that is subject to title I of ERISA also to contain a trust that is qualified under the Internal Revenue Code in order for the antialienation provision required by title I of ERISA and required for tax qualification to be enforceable.

In *Patterson v. Shumate*, the Supreme Court was concerned with whether the debtor's interest in the pension plan was subject to a restriction against transfer and whether that transfer was enforceable under applicable nonbankruptcy law. The Internal Revenue Code requires the trust to provide that benefits may not be assigned or alienated in order for the trust to be qualified under section 401, and exempt under section 501, of the Internal Revenue Code. Thus, the antialienation provision is a prerequisite for qualification. A trust cannot be qualified unless it contains the required antialienation provision; however, every trust that contains an antialienation provision will not be qualified. Further, qualification under the Internal Revenue Code is not required for the enforcement of the antialienation clause.

If a plan is subject to title I of ERISA and required to contain an antialienation provision, then that provision of the plan is enforceable under title I. ERISA requires the trustee, a fiduciary under ERISA, to discharge the trustee's duties in accordance with the provisions of the plan to the extent those provisions are consistent with title I and title IV of ERISA. [240] Further, ERISA authorizes civil actions in order for a participant or beneficiary to enforce his or her rights under the plan [241] or for a participant, beneficiary, or fiduciary to enforce any provision of the plan or title I of ERISA or enjoin any act that violates any provision of title I of ERISA. [242] In addition, ERISA authorizes the Secretary of Labor to bring a civil action to enjoin any act that violates any provision of title I or to enforce any provision of title I; however, the Secretary's power is limited in certain respects if a plan is qualified under the Internal Revenue Code. If a plan is not qualified under sections 401(a), 403(a) or 405(a) of the Internal Revenue Code or there is no pending application that has been filed for the plan to qualify, ERISA grants the Secretary of Labor the authority to bring a civil action to enforce any provision of title I or to enjoin any action which violates any provision of title I. [243] If a plan is qualified under section 401(a) of the Internal Revenue Code or an application to qualify has been filed and is pending, then ERISA grants the Secretary of Labor these powers "with respect to the violation or enforcement of, parts 2 and 3 of this subtitle [B](relating to participation, vesting, and funding)" only if (i) requested by the Secretary of Treasury, or (ii) requested in writing by one or more participants, beneficiaries, or fiduciaries if the Secretary of Labor determines that such violation affects claims of participants or beneficiaries to plan benefits or enforcement is necessary to protect such claims. [244] Accordingly, the Secretary of Labor may bring an action to enforce an antialienation provision in a qualified trust or enjoin a violation of such provision only under limited circumstances. Therefore, the ERISA enforcement provisions address plans that are subject to title I that have qualified trusts or pending applications and those that do not have qualified trusts and specifically authorize the Secretary of Labor to bring an action to enforce any provision of title I for a plan that is not qualified under section 401 of the Internal Revenue Code. Thus, qualification under the Internal Revenue Code is not a prerequisite for the enforcement of an antialienation provision in a plan subject to title I. [245]

Some courts have held that tax qualification is not relevant to determine whether section 541(c)(2) excludes a plan interest from the bankruptcy estate. The Fifth and Seventh Circuit have interpreted *Patterson v. Shumate* to have only two prongs. First, a plan must be subject to title I of ERISA and second, the plan's trust must contain the required antialienation provision. [246] Other courts have construed *Patterson v. Shumate* to have a third prong, requiring a plan to be qualified under the Internal Revenue Code in order for an interest in that plan to be excluded under section 541(c)(2) of the Bankruptcy Code. [247] A few courts have addressed this requirement of tax qualification with limited detail, [248] while others have considered it when tax qualification was a requirement for an exemption under state law. [249]

One bankruptcy court raised a jurisdictional issue as to whether a "trustee in bankruptcy has standing to challenge the qualified tax status of a pension plan," [250] while another granted the bankruptcy trustee an opportunity to submit evidence to substantiate objections regarding a "plan's failure to qualify under ERISA or the Internal Revenue Code." [251] One exemption case issued a temporary stay while an application for determination of qualification was pending before the Internal Revenue Service. [252] One district court remanded the case to the bankruptcy court to address issues including the issue of "IRC qualification." [253]

Another bankruptcy court made its own determination of tax qualification, stating: "This Court is not bound to accept the IRS qualification of a plan under ERISA, and is free to consider whether or not the Plan under consideration is an ERISA−qualified Plan, based upon the manner in which it was operated pursuant to 29 U.S.C. § 1056(d)(1)," [254] which requires the plan to provide that plan benefits not be assigned or alienated. The court also stated:

While the Bankruptcy Court is not competent to determine whether or not the ERISA−qualification should be revoked or terminated for non−compliance for purposes of the Internal Revenue Code, it is certainly competent to determine whether or not the Plan under consideration is within the holding of Patterson and excluded from the Debtor's estate by virtue of § 541(c)(2). [255]

That court, however, did not limit its consideration to the plan's antialienation provisions but also reviewed some plan investments and considered whether the debtor, who was a co−trustee "managed the Plan assets as an independent fiduciary charged with the management of other people's money" and concluded that it is "the general failure to administer this Plan in compliance with ERISA and the Internal Revenue Code, and the use of the Plan as a personal bank account which justifies the treatment of this Plan as property of the estate." [256] This court evaluated the tax qualification of an ERISA pension plan.

Still another bankruptcy court acknowledged that a plan governed by ERISA and containing the required antialienation provision can be excluded from a debtor's bankruptcy estate even if there is no applicable tax qualification statute; however, it also held that "a plan that is intended to be governed by ERISA and qualified under 26 U.S.C. § 401 . . . must comply with provisions of both statutes" in order for the plan benefits to be excluded from the bankruptcy estate. [257] The court determined that even though the plan was initially determined to be qualified under section 401 of the Internal Revenue Code that it "was not operated in compliance with the plan provisions as required by the applicable statutory requirements." [258] Further the court held that "a debtor's benefits in a plan are not benefits shielded from the bankruptcy estate by the anti−alienation provision of a plan that the debtor has materially disregarded in its operation." [259]

To the extent tax qualification is an issue to be decided by a court other than the Tax Court, or an appellate court reviewing the Tax Court's declaration, the issue should be confined to whether the trust contains the antialienation provision required by title I and required for tax qualification. [260] The United States Code, which includes ERISA and the Internal Revenue Code, contains numerous provisions regarding qualification of trusts that are part of retirement plans. These include provisions involving administrative and judicial jurisdiction and procedures. [261] Title III of ERISA contains procedures regarding the issuance by the Secretary of Treasury of advance determinations as to qualification and notice to interested parties. [262] In addition, title II of ERISA grants the Tax Court jurisdiction to issue declaratory judgments relating to the qualification of certain retirement plans and determinations made by the Internal Revenue Service. [263] These declaratory judgments have the same status as a Tax Court decision and are reviewable or appealable in the same manner as other Tax Court decisions. [264] In many cases, the Internal Revenue Service exercises its discretion as to whether disqualification is the correct result or whether a problem may be remediated or penalized in another manner.

For many plans, a request will be filed with the Internal Revenue Service for a determination letter; however, a trust may be qualified without applying for a determination letter. In most cases, a requested favorable determination letter will be issued. In many cases, liberal remedial amendments period have been allowed in order for a plan to comply retroactively with the complex provisions of the law and amendments, and various programs exist to accommodate such compliance. [265] Nevertheless, some trusts receive unfavorable determination letters. Further, plans receive favorable determination letters with general caveats and some plans receive letters with specific limitations or caveats. [266] A plan that receives a favorable determination letter may be disqualified for a number of reasons, including facts involving the operation of the plan [267] or failure to comply with congressional changes in the law. [268] Disqualification may be triggered because of an application for a determination of qualification or by reason of a plan audit.

Qualification of a plan affects a number of issues and parties. In general, qualification will allow an employer to deduct certain employer contributions, a trust to be exempt from tax, and a participant to defer income taxation on plan benefits until actual receipt. Procedures exist regarding notice to interested parties as well as the right to question or appeal a decision. Further, some violations of ERISA or the Internal Revenue Code may be subject to remedies

other than disqualification, such as injunctions, personal judgments against fiduciaries, or penalty or excise taxes. A decision to disqualify a plan may affect present participants as well as former participants who already have received plan distributions. Generally, the notice procedures grant interested parties an opportunity to participate in the process of whether a plan should be disqualified. Thus, it is questionable whether a court other than the Tax Court (or an appellate court reviewing a Tax Court declaration) has the jurisdiction to make such a determination in a bankruptcy context because of the impact it will have on other parties who are not parties to the bankruptcy proceeding. If a determination of qualification is required, it may be possible for a determination to be requested of the Internal Revenue Service; [269] however, it is questionable whether such determination is necessary for purposes of applying *Patterson v. Shumate*.

If a trust is subject to title I of ERISA and required by Part 2 to provide that plan benefits not be assigned or alienated, that provision is enforceable under ERISA, whether or not the trust is qualified under the Internal Revenue Code. If the trust is subject to title I and also is qualified under the Internal Revenue Code, the trust will contain the same antialienation provision for two reasons B first, because it is required to do so by title I and second, because it is required to do so in order to be qualified. Further, title I of ERISA provides for the enforcement of that antialienation provision. Thus, if a plan is subject to title I of ERISA, including Part 2 of title I, the required antialienation provision will be enforceable under title I of ERISA, whether or not the trust is qualified under the Internal Revenue Code. Therefore, qualification under the Internal Revenue Code should not be a prerequisite for a plan interest to be excluded from a bankruptcy estate under Bankruptcy Code section 541(c)(2). Nevertheless, if tax qualification is relevant, it only should be an issue with respect to whether the trust contains the antialienation provision required by section 401(a)(13) of the Internal Revenue Code. In a plan that is subject to Part 2 of title I of ERISA, such requirement seems superfluous because title I already requires the same provision.

III. Proposed Legislative Reform

The proposed Bankruptcy Reform Act of 2001 [270] and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 [271] include provisions that address retirement plans and create some new exemption provisions. These proposed reforms do not resolve the issue discussed in this article regarding whether a plan must be qualified under the Internal Revenue Code in order to be an ERISA−qualified pension plan within the meaning of *Patterson v. Shumate*. Nor do the proposed reforms answer the question of whether a plan that is administratively excluded from coverage under title I of ERISA is subject to a restriction against transfer that is enforceable under applicable nonbankruptcy law under Bankruptcy Code section 541(c).

The proposed reforms provide federal exemptions under bankruptcy and nonbankruptcy law for certain retirement funds included in the debtor's bankruptcy estate, if the retirement fund or account is qualified under certain sections of the Internal Revenue Code, including section 401 or 457. [272] Thus, a plan that is not required by ERISA or the Internal Revenue Code to contain an antialienation provision, such as a governmental or nonelecting church plan, and that is included in the debtor's bankruptcy estate could qualify for the proposed exemption if the plan is qualified under section 401 or 457 of the Internal Revenue Code. Further, if a debtor's interest in a plan is administratively excluded from title 1 of ERISA and is included in the bankruptcy estate, the retirement fund could be exempted if the plan is qualified under section 401 of the Internal Revenue Code. Thus it is possible under the proposed reforms that certain retirement plans that are not excluded from a debtor's bankruptcy estate under Bankruptcy Code section 541(c)(2) and *Patterson v. Shumate* could be exempted under the new proposed federal bankruptcy or nonbankruptcy exemption. This proposed reform appears to expand the protection of retirement plans to the extent that the exclusion under Bankruptcy Code section 541(c) is inadequate.

IV. Conclusion

In *Patterson v. Shumate*, the Supreme Court held that ERISA qualified as "applicable nonbankruptcy law" and that "a debtor's interest in an ERISA−qualified pension plan may be excluded from property of the bankruptcy estate pursuant to § 541(c)(2)." [273] The plan involved in *Patterson v. Shumate* was subject to title I of ERISA so that it was required by section 206(d)(1) of ERISA to provide that plan benefits not be assigned or alienated. Further, the plan was qualified under the Internal Revenue Code, and in order to be qualified it was required to provide that plan benefits not be assigned or alienated. In addition, the plan contained the provision required by both section 206(d)(1) of

ERISA and section 401(a)(13) of the Internal Revenue Code. Most pension, profit−sharing, and stock bonus plans adopted by employers that provide retirement income to their employees or allow employees to defer income during employment satisfy these three requirements. Some plans, however, may not satisfy all of these requirements raising the question as to whether any one or more of these three elements are required in order for a debtor's interest in a plan to be excluded under section 541(c)(2) of the Bankruptcy Code.

Based on the reasoning enunciated by the Court in *Patterson v. Shumate*, a plan that is subject to title I of ERISA, and in particular, section 206(d)(1), should be excludible under section 541(c)(2) of the Bankruptcy Code, because section 206(d)(1) requires the plan to provide that benefits not be assigned or alienated. It should be excludible regardless of whether the plan contains a trust that is qualified under the Internal Revenue Code. This is because the Supreme Court considers section 206(d)(1) to impose a restriction against transfer that is enforceable under the provisions of title I and that is all that section 541(c)(2) of the Bankruptcy Code requires. Accordingly, the plan need not be qualified under the Internal Revenue Code in order to be excluded from the bankruptcy estate. Thus, if a plan is subject to section 206(d)(1) of ERISA, it is not necessary for a bankruptcy court to determine whether the plan also is qualified under the Internal Revenue Code. Although the plan most probably will contain the required antialienation provision, if for some chance it does not, it is arguable that an interest in such plan still should be excludible from the bankruptcy estate on the basis of title I, including section 502 of ERISA, and section 541(c)(2) of the Bankruptcy Code. Thus, for purposes of applying the holding of *Patterson v. Shumate*, an ERISA qualified pension plan should include an employee benefit pension plan that is subject to section 206(d) of title I of ERISA and that contains the required antialienation provision. Further, it is arguable that an ERISA qualified pension plan should include an employee benefit pension plan that is subject to section 206(d) of title I of ERISA, even if it does not contain the required antialienation provision, because ERISA provides for the enforcement of section 206(d).

Most retirement plans are statutorily subject to title I of ERISA and Part 2 of title I. This includes Keogh plans sponsored by a sole proprietor or a partnership and corporate plans sponsored by a solely owned corporation. Nevertheless, some Keogh plans and some corporate plans are administratively exempt from title I of ERISA. The plans that are administratively excluded are those where the only participants are the sole proprietor, sole shareholder, [274] or partners of the plan sponsor (and spouses). Although these plans are administratively exempt from the reporting and disclosure requirements of title I of ERISA, such plans should be required by section 206(d)(1) of ERISA to provide that plan benefits not be assigned or alienated and should be excluded from the bankruptcy estate under the authority of ERISA. To reach this conclusion, it is necessary to determine that the labor regulations defining an employee and an employee benefit plan for purposes of title I are limited to exempting such plans from the reporting and disclosure requirements of title I and are invalid to the extent that they administratively waive compliance with section 206(d)(1). This is consistent with the bankruptcy case law that had been decided by various circuits when the Supreme Court decided *Patterson v. Shumate;* although, it may not have been the consensus of all nonbankruptcy courts at that time. Further, this is consistent with the statutory provisions of ERISA, because the legislature did not statutorily exclude any Keogh or corporate plans from title I or Part 2 of title I, as it did with governmental and nonelecting church plans and individual retirement accounts or in the case of title IV, with respect to certain plans maintained for substantial owners or by a professional service employers, and did not statutorily authorize the Secretary of Labor to exempt Keogh or corporate plans from title I or Part 2, as it did in the case of certain severance pay arrangements or supplemental retirement income payments.

On the other hand, if the labor regulations are valid, then Keogh and corporate plans whose only participants are sole owners, partners, or spouses should be excluded on the basis of the requirement in section 401(a)(13) that plan benefits not be assigned or alienated in order for the plan to have a qualified trust and on the basis of that required plan provision, if the plan contains the necessary plan restriction to satisfy this qualification requirement. This result should follow regardless of whether the plan satisfies any of the other requirements for qualification and regardless of whether the plan is qualified based on its actual operation. To hold otherwise in the bankruptcy context would create a new class of Keogh and corporate plans outside of bankruptcy that cannot qualify under section 401 of the Internal Revenue Code unless the required restriction against alienation is enforceable on the basis of the provisions of state law and all of its "vagaries." Thus, for purposes of applying the holding in *Patterson v. Shumate*, an ERISA qualified pension plan should include a plan that is required by section 401(a)(13) of the Internal Revenue Code to provide that plan benefits not be assigned in order to be qualified and that includes the required plan provision. It also is arguable that the term may include a plan that is required to comply with section 401(a)(13) even if the plan does not contain

the required plan provision, based on the Supreme Court's assertion that section 401(a)(13) imposes a restriction similar to the restrictions imposed by section 206(d) of ERISA. If case law, however, continues to include such plans in the bankruptcy estate on the basis of the labor regulations and applicable state law, it may be necessary to amend the labor or tax regulations or statutory provisions of title I of ERISA or the Internal Revenue Code in order to protect the tax qualified status of Keogh plans and corporate plans outside of bankruptcy when the only participants are owners or spouses in order to preserve the tax benefits of the plan for all participants, particularly those who are not debtors in bankruptcy.

Some accounts and plans are statutorily excluded from title I of ERISA or from Part 2 of title I. These include individual retirement accounts, governmental plans, and nonelecting church plans. An individual retirement account is not governed by section 401 of the Internal Revenue Code, and thus, it is not required by section 401(a)(13) of the Internal Revenue Code to provide that plan benefits may not be assigned or alienated. Further, while a governmental or nonelecting church plan may have a trust that qualifies under section 401 of the Internal Revenue Code, such trust is not required to comply with section 401(a)(13) to provide that plan benefits not be assigned or alienated. With respect to accounts or plans that are not required by title I of ERISA or the Internal Revenue Code to provide that plan benefits not be assigned or alienated, a debtor's interest in such plan can be excluded from the bankruptcy estate only if it contains a restriction against alienation (even though it is not required by such law to do so) that is enforceable under state law or federal law, other than ERISA or section 401 of the Internal Revenue Code. If an interest in such an account or plan is includible in the bankruptcy estate, then there may be an available federal or state exemption.

Thus, the holding in *Patterson v. Shumate* should apply to all employee benefit pension plans that are not statutorily excluded from title I in general or from Part 2 of title I in particular and should apply regardless of whether such plans contain qualified trusts under the Internal Revenue Code. With respect to plans that are statutorily excluded, such as individual retirement accounts, governmental plans, and nonelecting church plan, the holding of *Patterson v. Shumate* does not apply. Instead, interests in those accounts or plans may be excluded from the bankruptcy estate if they contain or are subject to a restriction against transfer that is enforceable under state or federal law other than title I of ERISA or section 401(a)(13) of the Internal Revenue Code.

FOOTNOTES:

[1] Donna Litman is a Professor of Law at Nova Southeastern University, Shepard Broad Law Center and a Florida Bar Certified Tax Attorney. She is a member of the American Bankruptcy Institute, with expertise in ERISA. In 1987, she authored an article, Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims?, 61 Am. Bankr. L.J. 219, 301, which was cited and quoted by the Supreme Court in Patterson v. Shumate, 504 U.S. 753, 763 n.6, 764 (1987). This article is a response to the conflicting judicial interpretations and applications of the Supreme Court's holding in Patterson v. Shumate. Back To Text

[2] "ERISA" refers to the Employee Retirement Income Security Act of 1974, Pub. L. No. 93−403, as amended. All references to ERISA or title 29 of the United States Code shall be to the 1975 edition, unless otherwise indicated. Back To Text

[3] All references to the "Internal Revenue Code" or the "I.R.C." shall be to the Internal Revenue Code in effect on September 1, 2001, unless otherwise indicated. Back To Text

[4] 504 U.S. 753 (1992). Back To Text

[5] Id. at 765. Back To Text

[6] All references to the Bankruptcy Code shall be to title 11 of the 1994 edition of the United States Code, unless otherwise indicated. Back To Text

[7] See Patterson, 504 U.S. at 765. Back To Text

[8] 11 U.S.C. § 541(a)(1), (c)(1)(A). Back To Text

[9] 11 U.S.C. § 541(c)(2). Back To Text

[10] ERISA § 2(a), 29 U.S.C. § 1001(a). Back To Text

[11] See id. Back To Text

[12] ERISA § 2, 29 U.S.C. § 1001. Back To Text

[13] The declared policy of ERISA is:

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 obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

An additional declared policy of ERISA is:

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.

ERISA § 2(c), 29 U.S.C. § 1001(c). Back To Text

[14] ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1). Back To Text

[15] ERISA § 3(2)(A), (5), (6), 29 U.S.C. § 1002(2)(A), (5), (6) (defining terms: "employee," "employer," and "employee pension benefit plan"); see also Labor Regulations § 2510.3−3(c), 29 C.F.R. § 2510.3−3(c) (1999) (establishing administrative definition of employee); infra text accompanying notes 105, 110, & 112 (listing statutory definitions). See generally infra Part II.A.2 (discussing these labor regulations). Back To Text

[16] See ERISA §§ 3(2)(A), (3), 4(a), 201(a), 29 U.S.C. §§ 1002(2)(A), (3), 1003(a), 1051(a). Back To Text

[17] ERISA § 201(b)(6), 29 U.S.C. § 1051(b)(6). Back To Text

[18] Labor Regulations § 2510.3−3(b), 29 C.F.R § 2510.3−3(b) (1999). Back To Text

[19] I.R.C. §§ 401, 404, 501; see also I.R.C. § 72. Back To Text

[20] I.R.C. § 401(a). Back To Text

[21] I.R.C. § 401(a)(13). There are limited statutory and administrative exceptions to the antialienation requirement that are beyond the scope of this article. See, e.g., ERISA § 206(d), 29 U.S.C. § 1056(d); I.R.C. § 401(a)(13); Treas. Regs. § 1.401(a)−13. Back To Text

[22] 504 U.S. 753 (1992). Back To Text

[23] Id. at 759. Back To Text

[24] Id. Back To Text

[25] Id. at 760. Back To Text

[26] Id. Back To Text

[27] Patterson, 504 U.S. at 765. Back To Text

[28] Id. at 764−65. Back To Text

[29] See, e.g., ERISA § 4(a)−(b), 29 U.S.C. § 1003(a)−(b); see also ERISA § 201, 29 U.S.C. § 1051 (stating that it "shall apply to an employee benefit plan described in section 4(a) and not exempted under section 4(b) . . . other than" plans listed in (1) − (8)). Back To Text

[30] Labor Regulations § 2530.200a−1(a), 29 C.F.R. § 2530.200a−1(a) (1999). Back To Text

[31] ERISA § 4(b), 29 U.S.C. § 1003(b). Back To Text

[32] ERISA §§ 3(2)(B), 4(a), 201, 29 U.S.C. §§ 1002(2)(B), 1003(a), 1051; Labor Regulations § 2510.3−2(g), 29 C.F.R. § 2510.3−2(g) (1999). Back To Text

[33] ERISA § 514(a), 29 U.S.C. § 1144(a); see Boggs v. Boggs, 520 U.S. 833, 841 (1997); Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 829 (1988). Back To Text

[34] ERISA § 502(a)(3)(B)(ii), 29 U.S.C. § 1132(a)(3)(B)(ii); see Varity Corp. v. Howe, 516 U.S. 489, 507−09 (1996) (discussing enforcement rights under ERISA with respect to individual cause of action for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)). Back To Text

[35] See, e.g., Lucas v. Lucas, 924 F.2d 597, 598 (6th Cir. 1991); Gladwell v. Harline (In re Harline), 950 F.2d 669 (10th Cir. 1991); Anderson v. Raine (In re Moore), 907 F.2d 1476, 1476 (4th Cir. 1990); McLean v. Central States, Southeast & Southwest Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985); Daniel v. Security Pacific Nat'l Bank (In re Daniel), 771 F.2d 1352, 1361 (9th Cir. 1985); Goff v. Taylor (In re Taylor), 706 F.2d 574, 577 (5th Cir. 1983). In addition, the author used the term in an article cited by the Supreme Court in Patterson v. Shumate, defining the term for purposes of that article to refer to a qualified plan (under I.R.C. § 401) subject to ERISA, including a Keogh plan, as contrasted with a nonqualified deferred compensation plan or a plan, such as an individual retirement account or a simplified employee plan, that is not required to contain an antialienation provision, with the issue of qualification or disqualification discussed in the context of the exemption under Bankruptcy Code section 522 (d)(10)(E) because of the conflicting case law in 1987 as to whether ERISA qualified as applicable nonbankruptcy law. See Donna Litman Seiden, Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims?, 61 Am. Bankr. L.J. 219, 219−220, 229−230, 303−304 & n.166 (1987). Back To Text

[36] ERISA § 3(2)(A), 29 U.S.C. § 1002 (2)(A); see infra text accompanying note 110 for the ERISA definition of an employer. Back To Text

[37] I.R.C. §§ 401(a), 404(a)(1), (3). Back To Text

[38] I.R.C. § 7476. Back To Text

[39] Patterson v. Schumate, 504 U.S. 753, 755 (1994). Back To Text

[40] Id. at 755. Back To Text

[41] Id. at 760. Back To Text

[42] Id. at 755−56, 759, 762, 765. Back To Text

[43] Patterson v. Shumate, 943 F.2d 362 (4th Cir. 1991) [hereinafter Shumate]. Back To Text

[44] Patterson, 504 U.S. at 756 (referencing Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990)). Back To Text

[45] Shumate, 943 F.2d at 363−65. Back To Text

[46] Id. at 363. Back To Text

[47] Id. at 363 n.2. Back To Text

[48] Id. at 364−65. Back To Text

[49] Id. at 365. Back To Text

[50] In re Moore, 907 F.2d 1476, 1477, 1479−80 (4th Cir. 1990); see id. at 1480−81 (noting that "plan's ERISA−qualification and tax exempt status depend on compliance with the anti−assignment provisions in 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1)"). Back To Text

[51] Id. at 1477. Back To Text

[52] Id. at 1480. Back To Text

[53] Id. Back To Text

[54] Id. at 1481. Back To Text

[55] In re Moore, 907 F.2d 1476, 1480−81 (4th Cir. 1990). Back To Text

[56] Id. Back To Text

[57] 83 B.R. 404 (Bankr. W.D. Va. 1988). Back To Text

[58] Id. at 407−08, 410. Back To Text

[59] Id. at 405. Back To Text

[60] Id. at 406. Back To Text

[61] 706 F.2d 574 (5th Cir. 1983). Back To Text

[62] Id. at 577, 580, 582−87, 589. Back To Text

[63] Id. at 580, 583 nn. 16−18; see id. at 580 n.16 ("Congress has committed the determination of qualification, in the first instance, to the Commissioner of the Internal Revenue Service."). Back To Text

[64] A computer search of federal cases issued prior to June 15, 1992, the date when Patterson v. Shumate was decided, generated a list, which is on file with the author, of almost 280 opinions. Back To Text

[65] McLean v. Central States, Southeast & Southwest Areas Pension Fund, 762 F.2d 1204, 1206 (4th Cir. 1985). Back To Text

[66] Brooks v. Interfirst Bank (In re Brooks), 844 F.2d 258, 261 (5th Cir. 1988) (footnoting to I.R.C. § 401(A)(13) and 29 U.S.C. § 1056(D)(1)). Back To Text

[67] Heitkamp v. Dyke (In re Dyke), 943 F.2d 1435, 1439 (5th Cir. 1991). The opinion referred to 29 U.S.C. § 1056(d)(1) and stated "[t]his antialienation provision creates a bar to the assignment or garnishment of qualified plan benefits." The court continues in footnote 11when saying: "[o]n its face, this provision merely requires that pension plans contain a notation that benefits may not be assigned or alienated. The federal courts have concluded, however, that this provision formally prohibits the assignment or alienation of pension plan benefits." id.. See, e.g., Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990) (stating that § 1056(d)(1) reflects "specific congressional directive that pension benefits not be subject to assignment or alienation."); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 836 (1988) (holding by Supreme Court that § 1056(d)(1) "bars . . . the alienation or assignment of benefits provided for by ERISA pension benefit plans.") (emphasis in original; additional citations in original omitted). Back To Text

[68] See Lucas v. Lucas, 924 F.2d 597, 602 (6th Cir. 1991), where court stated:

This conclusion has several favorable results. First, it harmonizes the Bankruptcy Code, ERISA, and the Internal Revenue Code and gives full effect to the express language of those statutes. Second, it prevents a plan from being subject to disqualification and loss of tax−exempt status when a bankruptcy trustee seeks turnover of a single debtor's interest in a plan. See Moore, 907 F.2d at 1480. Finally, it guarantees uniform treatment of benefits throughout the country.

Id. at 602.

See also Mostoller v. Messing (In re Messing), 944 F.2d 905 (6th Cir. 1991) (stating in unpublished opinion, where parties had stipulated that plan was qualified under § 401(a) and (k) of the Internal Revenue Code and that "the debtor's ERISA−qualified plan contains the anti−assignment and anti−alienation provisions required by 29 U.S.C. § 1056(d) and § 401(a)(13) of the Internal Revenue Code, 26 U.S.C. 401(a)(13)," but then only referring to labor provisions when it stated that in Lucas, "debtor argued, as he does in the instant case, that the non−transfer provision of ERISA, 26 U.S.C. § 1056(d) , was an enforceable 'applicable nonbankruptcy law' under § 542(c)(2), and therefore ERISA−qualified pension benefits met the requirement for exclusion under § 542(c)(2)."). Back To Text

[69] See, e.g., Daniel v. Security Pacific Nat'l Bank (In re Daniel), 771 F.2d 1352, 1353−54, 1358, 1359 (9th Cir. 1985) (referring to "IRC or ERISA qualified plans"); see also John Hancock Mutual Life Ins. Co. v. Watson (In re Kincaid), 917 F.2d 1162, 1166 (9th Cir. 1990) (referring to "our determination in Daniel that neither ERISA nor the Internal Revenue Code can create an exclusion under 11 U.S.C. § 541(c)(2)."). Back To Text

[70] Gladwell v. Harline (In re Harline), 950 F.2d 669, 672−73 (10th Cir. 1991) (citations and footnotes omitted from quotation), where court stated:

We can make no determination on the record before us whether or not the plan is indeed currently 'qualified' under ERISA. That is an issue to be addressed on remand. We do hold that if the plan is tax−qualified and Dr. Harline has not retired or terminated employment with the employer sponsor of the plan, his interest is excluded from the bankruptcy estate under § 541(c)(2). If the plan is not qualified then it is not protected by ERISA, nor as a spendthrift trust under state law, and no other 'nonbankruptcy' law has been cited which might apply.

Id. at 672−73. Back To Text

[71] Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488, 1490 & n.4 (11th Cir. 1985) ("The two pension plans in the instant case contain anti−alienation provisions … [w]e do not now decide whether or not those provisions qualify the pensions under ERISA for the special tax treatment of 26 U.S.C. § 401 (1982)."). Back To Text

[72] See, e.g., First Florida Nat'l Bank v. Smith (In re Smith), 129 B.R. 262, 264 (Bankr. M.D. Fla. 1991) (first, referring to a Florida exemption statute that applies to a "plan that is qualified under s. 401(a), s. 403(a), s. 403(b), s. 408, or s. 409 of the Internal Revenue Code of 1986," as a statute that "exempts ERISA qualified pension plans from creditors' claims under state law" and second, referring to "29 U.S.C. § 1056(d) (ERISA 206(d)") and stating: "The courts have held that this anti−alienation provision generally prevents garnishment of ERISA qualified pension plans by creditors .

. ."); In re Fernandes, No. 90−17450−CJK, 1991 WL 335005, at *2 n.3 (Bankr. D. Mass. Sept. 18, 1991) ("To be deemed a qualified pension plan under ERISA, a plan must, among other things, satisfy the definition of 'pension plan' set forth at 29 U.S.C. § 1002(2)(A); and it must further provide, as required by ERISA § 206(d)(1), codified at 29 U.S.C. § 1056(d)(1), that benefits provided under the plan may not be assigned or alienated"); Tatge v. Cheaver (In re Cheaver), 121 B.R. 665, 665 (Bankr. D.D.C. 1990) ("As required by 29 U.S.C. § 1056(d)(1) for this plan to be ERISA−qualified, the plan contains an anti−alienation clause prohibiting any transfer, voluntary or involuntary, of any benefit which shall be payable under the plan. Not all ERISA−qualified plans (e.g., a church plan) need include an anti−assignment clause . . . "); Morter v. Farm Credit Services, 110 B.R. 390, 392 (Bankr. N.D. Ind. 1990) (when discussing § 541(c)(2) of the Bankruptcy Code and whether it excluded other arrangements such as "ERISA−qualified plans," the court stated: "For a listing of Employee Retirement Income Security Act qualifications, see generally 29 U.S.C. § 1056 and 26 U.S.C. § 401"); In re Velis, 109 B.R. 64, 68 (Bankr. D.N.J. 1989) ("the plans that created the trusts under scrutiny were ERISA qualified, all properly contained the required anti−alienation and assignment provisions in accordance with the IRS [26 U.S.C. § 401(a)(13)] and ERISA [29 U.S.C. § 1056(d)(1)]"); In re Hysick, 90 B.R. 770, 773 (Bankr. E.D. Pa. 1988) (The court stated: "In order to qualify for the specialized treatment afforded ERISA qualified plans, a plan must contain specific restraints on assignment and alienation" and footnoted to I.R.C. § 401(a)(13)); In re Craddock, 62 B.R. 583, 585 (Bankr. N.D. Ga. 1986) ("It is an ERISA−qualified plan, subject to the anti−alienation provisions of that Act."); In re Flygstad, 56 B.R. 884, 885 (Bankr. N.D. Iowa 1986) ("ERISA qualified plans must contain anti−alienability and anti−assignability clauses pursuant to 29 U.S.C. § 1056(d)(1)"); Rodgers v. Norman (In re Crenshaw), 44 B.R. 30, 31 (Bankr. N.D. Ala. 1984), rev'd 51 B.R. 554 (N.D. Ala. 1985) ("The Plan is a qualified plan under the Employees [sic] Retirement Income Security Act of 1974 (hereinafter referred to as 'ERISA'), and as such, enjoys favorable tax treatment accordingly. As an ERISA−qualified profit−sharing plan, the Plan provides that the interest of a participating employee is generally inalienable and unleviable. See 29 U.S.C. § 1056(d)(1)"); United States v. Weintrau, No. C−1−76−032, 1990 WL 73346, at *1 (Dist. Ct. S.D. Ohio 1990) ("defendant concedes the Keough account at issue is an ERISA qualified employee pension benefit plan as defined in 29 U.S.C. § 1002(2)(A) (West. Supp. 1989) . . . Under the Internal Revenue Code and accompanying Treasury Regulation, each ERISA qualified plan must incorporate specific anti−alienation language and prohibit access to plan funds by participants' creditors. The Sixth Circuit, therefore, has prevented third−party creditors from reaching ERISA qualified plan benefits"); Halliburton Co. v. Mor, 555 A.2d 55, 56 (N.J. Superior Ct. 1988) ("ERISA−qualified pension and retirement plans are required to contain anti−alienation provisions, 29 U.S.C.A. § 1056(d)"); Citizens Bank v. Shingler, 326 S.E.2d 861, 862 (Ct. App. Ga. 1985) ("ERISA's assignment−alienation prohibition pre−empts otherwise relevant state law as it applies to claims by commercial creditors in non−bankruptcy situations against ERISA−qualified benefit plans"); Pomeranke v. Williamson, 478 N.W.2d 800, 801(Minn. Ct. App. 1991) ("Williamson's benefits are in an ERISA qualified plan pursuant to 29 U.S.C. § 1051(1) (1985). As such, federal law preempts and supersedes 'any and all State laws insofar as they may not or hereafter relate to any [qualified plan].' 29 U.S.C. § 1144(a) (1985). ERISA further provides that '[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.' 29 U.S.C. § 1056(d)(1) (Supp. 1991)"). Back To Text

[73] See, e.g., Pension Benefit Guaranty Corp. v. Anderson, 991 F.2d 1415, 1417−18 (8th Cir. 1993) (involving a plan that "was governed by the Employee Retirement Security Act [hereinafter ERISA], and was subject to ERISA's plan termination insurance provisions," noting that "[e]mployers who provide ERISA qualified pension plans for their employees pay annual premiums to PBGC" and citing 29 U.S.C.§§ 1001−1461 generally and § 1307 specifically); Plucinski v. I.A.M. Nat'l Pension Fund, 875 F.2d 1052, 1053 (3d Cir. 1989) (referring to an "ERISA qualified multiemployer pension plan" and 29 U.S.C.A. § 1002(2)(A)); Willy v. Coastal Corp., 855 F.2d 1160, 1166 (5th Cir. 1988) ("under section 514(a), section 502(a)(1)(B) completely preempts a state common law claim for improper processing of a claim submitted to an ERISA−qualified plan"); Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1522 (11th Cir. 1987) (citing "29 U.S.C.A. sec. 1001−1461" in general and determining "whether a fiduciary may invoke ERISA's liberal venue provision, 29 U.S.C.A. section 1132(e)(2), when the fiduciary files a declaratory judgment action seeking to determine its liability for benefits claimed by a former employee who was a participant in the fiduciary−employer's ERISA−qualified employee benefit plan"); Denton v. First Nat'l Bank, 765 F.2d 1295, 1301 (5th Cir. 1985) ("Also important to the court [in the case of Amato v. Bernard] was Congress' intention to grant trustees the broad managerial discretion necessary to establish and operate ERISA qualified pension plans" and citing, "ERISA §§ 401−14," generally, with specific reference to § 404 regarding a plan fiduciary's duties); Cook v. Pension Plan for Salaried Employees of Cyclops Corp., 801 F.2d 865, 867 (6th Cir. 1985) (referring to the "definition of severance contained in the Internal Revenue Service regulations governing ERISA−qualified plans" and "26 C.F.R. §

1.410(a)−7(a)(2)(ii)"); see also In re Reid, 139 B.R. 19 , 21 (Bankr. S.D. Calif. 1992) ("an ERISA qualified plan is governed by 26 U.S.C. § 401(a)"); Hurwitz v. Sher, 789 F. Supp. 134, 136−37 (S.D.N.Y. 1992) (In footnote 4, the court stated that "whether an antenuptial agreement constitutes a valid waiver of a current spouse's rights as a beneficiary under an ERISA−qualified pension plan, is an issue of first impression" and then text stated: "[t]he applicable ERISA provision, 29 U.S.C. section 1055(c), describes the nature of the consent required to waive spousal rights to employee plan benefits"); Wagner v. Continental Bank, Nos 89−1878, 90−8002, 1992 WL 52506, at * 13 (E.D. Pa. Mar. 13, 1992) ("An ERISA qualified plan may not discriminate with respect to payment of benefits in favor of highly compensated employees' as defined by Internal Revenue Code of 1986 (the Code) section 401(a)(4)"); Williams v. Williamson−Dickie Mfg. Co., 778 F. Supp. 1197, 1198 (S.D. Ala. 1991) ("defendant had an ERISA−qualified profit sharing plan having a five−year vesting requirement"); Sage v. Automation, Inc. Pension Plan & Trust, 777 F. Supp. 876, 877 (D. Kan. 1991) (Plaintiffs prevailed on the issue of defendants' failure to provide an adequate claims review procedure for "ERISA qualified pension plans"); In re Arcement, 136 B.R. 425, 428 (Bankr. E.D. La. 1991) (referring to a retirement plan that was exempt under a Louisiana exemption statute if it was "qualified under section 401 . . . of the Internal Revenue Code" as an "ERISA qualified pension, profit sharing or stock bonus plan"); Schecter v. Balay (In re Balay), 113 B.R. 429, 441 (Bankr. N.D. Ill. 1990) (citing an Illinois statute which conclusively presumes that a plan that "is intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code of 1986" is a spendthrift trust under Illinois law and which "provides a basis for excluding ERISA−qualified plans from property of the bankruptcy estate"); Coninck v. Provident Life & Accident Ins. Co., 747 F. Supp. 627, 633 (D. Kan. 1990) ("the ERISA−qualified employee group plan must be in writing"); Dodd v. Dodd, 568 So. 2d 1134, 1136 (La. Ct. App. 5th Cir. 1990) ("The 'Qualified Domestic Relations Order' mentioned in the judgment is required by federal law to distribute proceeds of an ERISA−qualified employee benefit plan to a former spouse. Employee Retirement Income Security Act of 1974 [ERISA], 26 U.S.C. § 401(a)(13) and Sec. 414 (p)"). Back To Text

[74] See, e.g., Tingey v. Pixley−Richards West, Inc., 958 F.2d 908, 909 (9th Cir. 1992) (referring to plaintiff as "individual−qualified plan."); Mertens v. Hewitt Assoc., 948 F.2d 607, 608 (9th Cir. 1991) (referring to action by former employees and participants in an "ERISA qualified pension plan"); Nobel v. Vitro Corp., 885 F.2d 1180, 1182 (4th Cir. 1989) ("[R]etirees claimed that the administrators of Vitro's ERISA−qualified retirement benefits trust miscalculated the amounts payable under the express terms of the retirement plan 'early retirees' electing to receive their benefits in a lump sum, rather than in a stream of monthly payments."); Bouchard v. Crystal Coin Shop, Inc., 843 F.2d 10, 11 (1st Cir. 1988) ("Plaintiff brought this action claiming that defendants had interpreted the terms of an ERISA−qualified pension plan in a manner that wrongfully denied him certain benefits owed under the plan."); Operating Engineers' Local 428 Pension Trust Fund v. Zamborsky, 650 F.2d 196, 198, 201 (9th Cir. 1981) (refers to an "ERISA qualified and regulated pension trust fund" and "ERISA qualified and regulated employee retirement trust"). Back To Text

[75] See, e.g., Traina v. Sewell (In re Sewell), 180 F.3d 707, 712 (5th Cir. 1999); In re Baker, 114 F.3d 636, 638−39 (7th Cir. 1997); see also Kaler v. Craig (In re Craig), 204 B.R. 756, 760 (Bankr. D. N.D. 1997) (finding that the plans were ERISA−qualified under the two−pronged test that required the plans to "contain anti−alienation provisions and be subject to ERISA"). Back To Text

[76] See, e.g., In re Hanes, 162 B.R. 733, 740 (Bankr. E.D. Va. 1994) ("for purposes of section 541(c)(2), a plan is 'qualified' under ERISA if it is (1) governed by ERISA and (2) includes a non−alienation provision that is (3) enforceable under ERISA."); see also In re Bennett, 185 B.R. 4, 6 (Bankr. E.D.N.Y. 1995) (excluding interests in TIAA and CREF plans, stating: "the Court concludes that a plan is 'ERISA−qualified' for purposes of section 541(c)(2) if it is (1) governed by ERISA and (2) includes an anti−alienation provisions that is (3) enforceable under ERISA."). Back To Text

[77] See, e.g., In re Hall, 151 B.R. 412, 419−20 (Bankr. W.D. Mich. 1993). Back To Text

[78] See, e.g., In re Harris, 188 B.R. 444, 449 (Bankr. M.D. Fla. 1995) ("This court is not bound to accept the IRS qualification of a plan under ERISA, and is free to consider whether or not the Plan under consideration is an ERISA−qualified Plan, based upon the manner in which it was operated pursuant to 29 U.S.C § 1056(d)(1) … [and] even if the plan is facially ERISA−qualified, it must be operated in full requirement of ERISA and also the Internal

Revenue Code."); In re Sirois, 144 B.R. 12, 14 (Bankr. D. Mass. 1992) (granting trustee time to submit "evidence that would substantiate any of her remaining objections to the Debtor's interest in the profit sharing plan, particularly with respect to the plan's failure to qualify under ERISA or the Internal Revenue Code."). Back To Text

[79] See In re Sirois, 144 B.R. 12, 14 (Bankr. D. Mass. 1992) ("Assuming the pension plan is qualified under ERISA and the Internal Revenue Code, the Debtor's interest in HRA's profit sharing plan is excluded from his bankruptcy estate by the 'plain language' of section 541(c)(2)."). Back To Text

[80] In re Sewell, 180 F.3d 707, 712 (5th Cir. 1999); In re Baker, 114 F.3d 636, 638−39 (7th Cir. 1997). Back To Text

[81] In re Baker, 114 F.3d at 638. Back To Text

[82] In re Sewell, 180 F.3d at 710−11. Back To Text

[83] Id. at 711. Back To Text

[84] Id. at 713; In re Baker, 114 F.3d at 638. In Sewell, the court stated it was not "creating a per se rule for this [Fifth] Circuit, making excludable under section 541(c)(2) every beneficial interest of every participant in every ERISA retirement plan and trust that purports to restrict transfer" and gave the following example:

For example, we can conceive of a provision in an ERISA trust entitling the participant to invade the principal of a defined−contribution plan for his own purposes to take a loan that can be converted to a withdrawal for failure to repay, or to accelerate disbursement directly, as many plans provide once the employee reaches a specified age.

In re Sewell, 180 F.3d at 713 n.21. Back To Text

[85] Barkley v. Conner (In re Conner), 73 F.3d 258, 260 (9th Cir. 1995). Back To Text

[86] See, e.g., Lowenschuss v. Selnick (In re Lowenschuss), 171 F.3d 673, 680 (9th Cir. 1999); Watson v. Proctor (In re Watson), 161 F.3d 593, 594 (9th Cir. 1998); In re Branch, 16 F.3d 1225 (7th Cir. 1994); see also Reed v. Drummond (In re Reed), 985 F.2d 1026, 1026 (9th Cir. 1993) (citing holding in Patterson v. Shumate and anti−alienation requirement in 29 U.S.C. § 1056(d)(1) in labor provisions of ERISA). Back To Text

[87] See, e.g., Harshbarger v. Pees (In re Harshbarger), 66 F.3d 775, 777 (6th Cir. 1995) (citing Patterson v. Shumate to support statement that § 541(c)(2) "exempts a debtor's beneficial interest in an ERISA−qualified account from the bankruptcy estate"); Barkley v. Conner (In re Conner), 73 F.3d 258, 259 (9th Cir. 1995) (citing Patterson v. Shumate and its holding regarding "ERISA qualified pension plan"); Whetzal v. Alderson, 32 F.3d 1302, 1303 (8th Cir. 1994) (involving federal Civil Service Retirement System plus citing Patterson v. Shumate and its holding regarding "ERISA−qualified plan"); Schlein v. Mills (In re Schlein), 8 F.3d 745, 751 n.5 (11th Cir. 1993) (involving IRA/SEP, but citing Patterson v. Shumate and its holding regarding "ERISA−qualified pension plan"); Iannacone v. Northern States Power Co., 974 F.2d 88, 89 (8th Cir. 1992) (stating that debtor was "participant in certain ERISA−qualified pension plans" which contained "anti−alienation provision restriction prohibiting alienation and assignment of plan benefits" in addition to citing 29 U.S.C. § 1056(d)(1) labor provisions of ERISA); see also U.S. v. Sawaf, 73 F.3d 119, 120 (6th Cir. 1996) (involving garnishment of a taxpayer's vested interest in an "ERISA−qualified pension fund" for satisfaction of federal tax lien); Gorham v. Winkler (In re Winkler), No. 94−1475, 1995 WL 5876, at **1 (6th Cir. 1995) (citing Patterson v. Shumate and its holding for an "ERISA−qualified pension plan" and finding that plan was ERISA qualified, also noting that plan was tax qualified, subject to the labor provision of ERISA requiring that plan benefits not be assigned, and contained an anti−alienation provision); McGraw v. Society Bank & Trust (In re Bell & Beckwith), 5 F.3d 150, 152−53 (6th Cir. 1993) (involving invalid contributions to profit sharing plan, citing Patterson v. Shumate). Back To Text

[88] See, e.g., Arkinson v. UPS Thrift Plan (In re Rueter), 11 F.3d 850, 853 (9th Cir. 1993) (referring to plan in which debtor had an interest in an "ERISA−qualified retirement plan"); Spirtos v. Moreno (In re Spirtos), 992 F.2d 1004, 1007 (9th Cir. 1993) (citing Patterson v. Shumate and its holding regarding "ERISA−qualified plan" and remanding

"the case to the bankruptcy court for a determination of whether Debtor's interest in the plans is property of the estate"); Pitrat v. Garlikov, 992 F.2d 224, 226 (9th Cir. 1993) (citing Patterson v. Shumate and its holding; in one of consolidated cases, court assumed plan was ERISA−qualified and thus not property of the estate; while, other consolidated case was remanded to bankruptcy court for determination of whether plan was ERISA−qualified). Back To Text

[89] Patterson v. Shumate, 504 U.S. 753, 759 (1992); see also Boggs v. Boggs, 520 U.S. 833, 851 (1997) (stating that "ERISA's pension plan anti−alienation provision is mandatory"); Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 371 (1990) (referring to ERISA's "statutory restrictions on assignment or alienation of pension benefits."). Back To Text

[90] ERISA § 502(a)(3)(ii), (5)(ii), 29 U.S.C. § 1132(a)(3)(ii). Back To Text

[91] Patterson, 504 U.S. at 759. Back To Text

[92] ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1). Back To Text

[93] ERISA § 3(32), 29 U.S.C. § 1002(32); see also I.R.C. § 414(d). Back To Text

[94] See, e.g., I.R.C. §§ 401(a) (stating "[p]aragraphs (11), (12), (13), (14), (15), (19), and (20) shall apply only in the case of a plan to which section 411 (relating to minimum vesting standards) applies without regard to subsection (e)(2) of such section."); 401(a)(11)−(15), (19)−(20); 410(c)(1)(A); 411(e)(1)(A); 412(h)(3); 414(d); 415(b)(10); (11), (k)(3). Back To Text

[95] I.R.C. § 401(a) (specifically last sentence). Back To Text

[96] ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2). See, e.g., I.R.C. §§ 401(a) (specifically last sentence regarding §§ 401(a)(11)−(15), (19)−(20)); 410(c)(1)(B); 411(e)(1)(B); 412(h)(4), 414(e). Back To Text

[97] See, e.g., I.R.C. §§ 410(c)(1)(B); 411(e)(1)(B); 412(h)(4); 414(e); 415(c)(7), (11); see also ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2). Back To Text

[98] ERISA § 3(33), 29 U.S.C. § 1002(33); see also I.R.C. § 414(e). Back To Text

[99] Patterson v. Shumate, 504 U.S. 753, 762 (1992). Back To Text

[100] I.R.C. § 401(a) (specifically last sentence); see also Internal Revenue Manual Policy Statement, G.C.M. 39267, 1984 WL 265026 (I.R.S. Aug. 2, 1984). Back To Text

[101] See, e.g., Taunt v. Gen. Ret. Sys. of City of Detroit (In re Wilcox), 233 F.3d 899, 902 (6th Cir. 2000) (stating that debtor's interest in cities' defined contribution plan, which was funded by voluntary employee contributions, was subject to enforceable anti−alienation provision of Detroit City Charter); In re Atwood, 259 B.R. 158, 162−63 (B.A.P. 9th Cir. 2001) (holding that debtor's interest in § 457 deferred compensation plan was excluded from bankruptcy estate because it was subject to anti−alienation clause that was enforceable under California law); In re Mueller, 256 B.R. 445, 462 (Bankr. D. Md. 2000) (finding debtor−wife's interest in Maryland's State Employees Deferred Compensation Plan and Trust, a governmental plan qualified under I.R.C. § 457, was excluded from property of bankruptcy estate because of antialienation provisions in plan and state statutory law); In re Seddon, 255 B.R. 815, 818 (Bankr. W.D.N.C. 2000) (debtor's interest in federal civil service retirement plan which was subject to enforceable anti−alienation provision in Civil Service Retirement Act System); In re Layton, 116 B.R. 995, 1000−01 (Bankr. S.D. Iowa 1990) (debtor's interest in Omaha Employee Retirement System was excluded as valid spendthrift trust under Nebraska law); In re Gouker, 116 B.R. 1005, 1011 (Bankr. S.D. Iowa 1990) (debtor's interest in Nebraska Public Employees Retirement System was excluded as valid spendthrift trust under Nebraska law); Swanson v. Buckley, 873 F.2d 1121, 1123 (8th Cir. 1989) (debtor's interest in Teachers Retirement Association created by State of Minnesota was included in bankruptcy estate because it was not valid spendthrift trust under state law); see also In re

Dunn, 215 B.R. 121, 128 (Bankr. E.D. Mich. 1997) (trustee conceded that debtor's interest in city's defined benefit pension plan, which was funded solely by employer contributions was excluded from bankruptcy estate, but debtor's interest in city's defined contribution plan, which was funded exclusively by voluntary employee contributions, was included in bankruptcy estate because it was "self−settled spendthrift trust" that was not enforceable under Michigan law); Taunt v. Gen. Ret. Sys. of City of Detroit (In re Wilcox), 225 B.R. 151, 157 (Bankr. E.D. Mich. 1997) (trustee conceded that debtor's interest in city's defined benefit pension plan was not property of bankruptcy estate). But see In re Leamon, 121 B.R. 974, 979−82 (Bankr. E.D. Tenn. 1990) (excluding debtor's interest under governmental plan on basis of I.R.C. § 401(a)(13)). Back To Text

[102] I.R.C. § 457(b)(6), (g)(a)(1). See Sicherman v. Ohio Public Employees Deferred Comp. Program (In re Leadbetter), 992 F.2d 1216 (6th Cir. 1993) (plan was not excluded from bankruptcy estate because plan interest was not held in trust as required by I.R.C. § 456(g) and Bankruptcy Code § 541(c)(2); see also In re Wheat, 149 B.R. 1003, 1007 (Bankr. S.D. Fla. 1992) (excluding § 457 eligible deferred compensation plan on basis of I.R.C. § 457(b)(6), prior to adoption of § 456(g)). Back To Text

[103] For cases that were included in the bankruptcy estate but exempt under state law, see, e.g., In re Carver, 116 B.R. 985, 995 (Bankr. S.D. Iowa 1990) (stating that Iowa Public Employees' Retirement System was spendthrift trust under Iowa law; however, debtor was able to reach all of her contributions and accumulated interest which were property of bankruptcy estate but exempt under Iowa law); In re Dickson, 114 B.R. 740, 744 (Bankr. N.D. Okla. 1990) (debtor's interest in Bartlesville Oklahoma Employee Retirement System included but exempt under Oklahoma law); Gilbert v. Osburn (In re Osburn), 56 B.R. 867, 875−76 (Bankr. S.D. Ohio 1986) (debtor's interest in Ohio Public Employees Deferred Compensation Program was property of estate not excluded under Bankruptcy Code § 522(d)(10)(E) but excluded under state exemption statute).

For cases that were included in the bankruptcy estate, but were or might be exempt under Bankruptcy Code § 522(d)(10)(E), see, e.g., In re Benton, 237 B.R. 353, 355 (Bankr. E.D. Mich. 1999) (further hearing required for determination of whether the plan interest qualified for the federal exemption).

For cases that were included in bankruptcy estate but not exempt under federal or state law, see, e.g., In re Dunn, 215 B.R. 121, 128 (Bankr. E.D. Mich. 1997) (debtor's interest in city's defined contribution plan, which was funded exclusively by voluntary employee contributions, was "self−settled spendthrift trust" that was not enforceable under Michigan law, included in bankruptcy estate, and not exempt under § 511(d)(10)(E) because it was not reasonably necessary for support); Hollis v. State Employees' Ret. Sys. of Illinois (In re Groves), 120 B.R. 956, 962 (Bankr. N.D. Ill. 1990) (plan did not qualify as spendthrift trust under Illinois law, notwithstanding statutory prohibition against attachment or assignment, and was not claimed as exempt by debtor); Humphrey v. Buckley (In re Swanson), 873 F.2d 1121, 1125−35 (8th Cir. 1989) (debtor's interest in State of Minnesota Teachers Retirement Fund was included, not valid spendthrift trust under Minnesota law, and not exempt under federal exemptions selected by debtor); In re Dagnall, 78 B.R. 531, 534 (Bankr. C.D. Ill. 1987) (debtor's interest in State Employees' Retirement System of Illinois was included in bankruptcy estate because of debtor's dominion and control and not exempt under Illinois state exemption statute). Back To Text

[104] ERISA §§ 4(b)(1), (2), 514(a), 29 U.S.C. §§ 1003(b)(1), (2), 1144(a). Back To Text

[105] Patterson v. Shumate, 504 U.S. 753, 765 (1992). Back To Text

[106] ERISA § 3(6), 29 U.S.C. § 1002(6). Compare this definition with the definition of an employee for employment tax purposes under I.R.C. § 3121(d) and the definition of a self−employed individual as an employee under I.R.C. § 401(c)(1)(A). See also Treas. Regs. § 31.3121(d)−1. Back To Text

[107] S. Rep. No. 93−127 (1974), reprinted in 1974 U.S.C.C.A.N. 4838; H.R. Rep. No. 93−533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639. Back To Text

[108] Nationwide Mutual Ins. Co., v. Darden, 503 U.S. 318, 323−24 (1992). See Glass v. IDS Fin. Services, Inc., 778 F. Supp. 1029, 1067 (D. Minn. 1991) (retirement plan for independent contractors was not an employee pension benefit

plan under ERISA); HCA Health Services v. Brown, No. 87C−4029, 1988 WL 71219, at *2 (N.D. Ohio June 24, 1988) (requiring evidentiary hearing to determine whether individuals covered by health insurance policy were independent contractors or employees of partnership). Back To Text

[109] See, e.g., I.R.C. § 401(c)(1)(A) (stating that "term 'employee' includes, for any taxable year, an individual who is self−employed for such taxable year"); I.R.C. § 401(c)(3)−(4) (defining owner−employee and providing that "individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer" and that a "partnership shall be treated as the employer of each partner" who is self−employed within meaning of I.R.C. § 401(c)(1)); ERISA §§ 601(b), 607(2), 29 U.S.C. §§ 1161(b), 1167(2) (stating that Part 6 of title I of ERISA applies to group health plans that cover at least twenty employees and that covered employee includes "employee defined in § 401(c)(1) of the Internal Revenue Code of 1986"); ERISA § 732(d)(3), 29 U.S.C. § 1191a(d)(3) (stating that Part 7 of title I of ERISA applies to plans with at least two participants who are current employees and defines participant in group health plan to include partner and self−employed individual if one or more employees are participants). Back To Text

[110] ERISA § 408(d), 29 U.S.C. § 1108(d) (1990). Back To Text

[111] ERISA § 3(5), 29 U.S.C. § 1002(5). Back To Text

[112] An owner−employee is the sole owner of an unincorporated business or a more than ten percent partner in a partnership's capital or profits. See, e.g., I.R.C. § 401(c)(3) ("An individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer . . . [a] partnership shall be treated as the employer of each partner who is an employee within the meaning of paragraph (1)."); I.R.C. § 401(c)(4). Part 7 of title I of ERISA applies to plans with at least two participants who are current employees and provides: "In the case of a health plan, the term "employer" also includes the partnership in relation to any partner." ERISA § 732(d)(2), 29 U.S.C. § 1191a(d)(2). Back To Text

[113] The definition concludes with the following phrase: "[r]egardless 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." ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Back To Text

[114] See Williams v. Wright, 927 F.2d 1540, 1545 (11th Cir. 1991) ("We find nothing in the ERISA legislation pointing to the exclusion of plans covering only a single employee . . . It is also significant that Department of Labor regulations refer to a plan covering one or more employees as within ERISA."); see also Cvelbar v. CBA Illinois Inc., 106 F.3d 1368, 1376 (7th Cir. 1996) ("We have no difficulty in holding that it is possible for a one−person arrangement to qualify as an ERISA plan . . . Moreover, the Department of Labor, although apparently taking a different position in the early days of its administration of the statute, has concluded, and, indeed, reasserts as amicus curiae in this case, that a contract between one employee and an employer can be an employee benefit plan."); Biggers v. Wittek Indus., Inc., 4 F.3d 291, 297−98 (4th Cir. 1993) ("We are not aware of any requirement that a plan must cover more than one employee in order to be controlled by ERISA . . . [a]n opinion letter from the Department of Labor reinforces our interpretation that ERISA allows for the possibility of a single−employee plan."). Both Cvelbar and Biggers involved severance pay plans. See generally Potts v. Transit Mgmt. of Southeast La., Inc., No. CIV.A.98−447, 1998 WL 334850, at *3 (E.D. La. June 23, 1998) ("There is nothing in ERISA legislation pointing to the exclusion of plans covering only a single employee … the Department of Labor regulations refer to a plan covering one or more employees as within ERISA."); Wolyn v. Livingston, No. 93 Civ. 0618 (TPG), 1995 WL 865971, at *1 (S.D.N.Y. Nov. 16, 1995) ("[U]nder the case law participation of only one employee is sufficient to bring a plan within the ambit of ERISA."). Back To Text

[115] ERISA § 3(7), 29 U.S.C. § 1002(7). Back To Text

[116] ERISA § 3(8), 29 U.S.C. § 1002(8). Back To Text

[117] ERISA §§ 4(b), 201, 29 U.S.C. §§ 1003(b), 1051 (1989). Back To Text

[118] ERISA §§ 201(2), (5), 401(a)(1)−(2), 29 U.S.C. §§ 1051(2), (5) (1989), 1101(a)(1)−(2). Back To Text

[119] ERISA § 201, 29 U.S.C. § 1051 (1989); see also ERISA § 3(2), 29 U.S.C. § 1002(2); Labor Regs. § 2510.3−2(g); 29 C.F.R. § 2510.3−2(g) (1999). Back To Text

[120] ERISA § 3(2)(A), (6), 29 U.S.C. § 1002(2)(A). Back To Text

[121] Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85−836, § 4 (b)(4), 72 Stat. 997, 999 (1958). Back To Text

[122] See S. 2167, 91st Cong. § 101(b) (1969); see also S. 2, 92d Cong. § 101(b) (1971) (providing that title would "not apply to a pension or profit−sharing retirement plan if. . . (4) such plan covers not more than twenty−five participants"); H.R. 1269, 92d Cong. § 101(b) (1971) (providing that title would "not apply to an employee benefit if . . . (3) such plan covers not more than eight participants, except that participants and beneficiaries of such a plan shall be entitled to maintain an action to recover benefits or to clarify their rights to future benefits as provided in § 106(e)(1)(B)."); H.R. 1045, 91st Cong. § 4(b)(3) (1969) (explaining that this act would not apply to pension plans if "such plan provides contributions or benefits for a sole proprietor or in the case of a partnership, a partner who owns more than 10 per centum of either the capital interest or the profits interest in such partnership"); S. 2167, 91st Cong. § 101(b) (1969); S. 2, 92d Cong. § 101(b) (1971) (providing that title would "not apply to a pension or profit−sharing retirement plan if . . . (3) such plan is established by a self−employed individual for his own benefit or for the benefit of his survivors or established by one or more owner−employers exclusively for his or their benefit or for the benefit of his or their survivors"); S. 2, 92d Cong. § 101(b) (1971) (stating that title would "not apply to a pension or profit−sharing retirement plan if . . . (3) such plan is established by a self−employed individual for his own benefit or for the benefit of his survivors or established by one or more owner−employers exclusively for his or their benefit or for the benefit of his or their survivors"). Back To Text

[123] ERISA § 104(a)(2), 29 U.S.C. § 1024(a)(2); see also ERISA § 104(a)(3), 29 U.S.C. § 1024(a)(3) (exempting welfare benefit plans or simplified reporting and disclosure requirements). Back To Text

[124] ERISA § 403(b)(3)(A), 29 U.S.C. § 1103(b)(3)(A). Back To Text

[125] ERISA § 403(a), (b)(3)(A), 29 U.S.C. § 1103(a), (b)(3)(A); see also I.R.C. § 401(c)(1). Back To Text

[126] ERISA §§ 4021(b)(9), (13), 4022(b)(5), 29 U.S.C. §§ 1321(b)(9), (13), 1322(b)(5). Note that ERISA § 4021(b)(9), 29 U.S.C. § 1321(b)(9) refers to § 4022(b)(6), 29 U.S.C. § 1322(b)(6) which has been renumbered as § 4022 (b)(5), 29 U.S.C. § 1322(b)(5). Back To Text

[127] ERISA § 505, 29 U.S.C. § 1135, which provides in full:

[s]ubject to title III and section 109, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records [subject to section 504(a) and (b)].

Id. Back To Text

[128] Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). Back To Text

[129] Id. at 843−44 (quoting Morton v. Ruiz, 415 U.S. 199 (1974)). Back To Text

[130] Id. at 843. Back To Text

[131] This reference to "chapter" is obtuse. Back To Text

[132] See In re Lowenschuss, 202 B.R. 305, 307 (Bankr. D. Nev. 1996) (involving debtor who was sole shareholder of professional corporation that engaged in practice of law and sole participant in plan), aff'd, Lowenschuss v. Selnick (In re Lowenschuss), 171 F.3d 673 (9th Cir. 1999); In re Rich, 197 B.R. 692, 694 (Bankr. N.D. Okla. 1996) (involving debtor who was sole shareholder and sole employee of corporation engaged in financial planning business); In re Feldman, 171 B.R. 731, 733 (Bankr. E.D. N.Y. 1994) (involving debtor who was account executive for Dean Witter Reynolds, Inc. and was "self−employed" and sole employee of his self−owned corporation); In re Hall, 151 B.R. 412, 414 (Bankr. W.D. Mich. 1993) (involving debtor who was sole shareholder of corporation engaged in printing business and plan with debtor and spouse sole participants). Back To Text

[133] I.R.C. § 414(m); see In re Witwer, 148 B.R. 930, 941 (Bankr. C.D. Calif. 1992). Back To Text

[134] See, e.g., In re Acosta, 182 B.R. 561, 564 (N.D. Calif. 1994) (sole shareholder of medical corporation was sole remaining participant of plans that "did not retain any benefits due to the former employee"). Back To Text

[135] Patterson, 943 F.2d 362, 365 (4th Cir. 1991) (it is unclear whether Shumate was sole participant when he filed his petition in bankruptcy or became sole participant thereafter). Back To Text

[136] 40 Fed. Reg. § 24,643 (1975). Back To Text

[137] 40 Fed. Reg. § 34,528 (1975). Back To Text

[138] I.R.C. § 401(c)(3)(B). Back To Text

[139] See, e.g., Peckham v. Board of Trustees of Int'l Brotherhood of Painters & Allied Trades Union, 653 F.2d 424, 427 (10th Cir. 1981). Back To Text

[140] In re Lowenschuss, 171 F.3d 673, 679 (9th Cir. 1998). Back To Text

[141] Id. at 681. Back To Text

[142] Schwartz v. Gordon, 761 F.2d 864, 865 (2d Cir. 1985). Back To Text

[143] For bankruptcy cases, see In re Orkin, 170 B.R. 751, 754 (Bankr. D. Mass. 1994) (applying regulation to retirement plan in which debtor was sole proprietor and sole participant and holding that debtor was not employee within meaning of ERISA and plan was not ERISA qualified); Bernstein v. Greenpoint (In re Lane), 149 B.R. 760, 765 (Bankr. E.D.N.Y. 1993) (reasoning that ERISA was not applicable to Keogh plans sponsored by sole proprietor who was sole participant in plan, and plan was not "exempt property subject to a restriction on transfer that is enforceable under non−bankruptcy law as is provided for by section 541(c)(2) of the Bankruptcy Code"); In re Pruner, 140 B.R. 1, 3−4 (Bankr. N.D. Fla. 1992) (holding that debtor's pension plan was not subject to ERISA because he was self−employed and sole plan participant).

For nonbankruptcy cases, see Meredith v. Time Ins. Co., 980 F.2d 352, 357 (5th Cir. 1993) (finding that health insurance for sole proprietor and spouse was not employee welfare plan under ERISA, because "[t]he regulations clearly prevent Meredith [the sole proprietor] from being simultaneously an employer and an employee"); McNeilly v. Bankers United Life Assurance Co., No. 90 C 1087, 1992 WL 57193, at *2 (N.D. Ill. Mar. 17, 1992) (opining that health insurance plan was employee benefit plan under ERISA and regulation because it covered sole proprietor and another employee); Suburban Tire Co v. Zoghlin, No. 84 C 10432, 1985 WL 1445, at *3−4 (N.D. Ill. May 20, 1985) (holding that company pension plans were not subject to ERISA because company's sole owner and his wife were only plan participants; thus, there was no cause of action under ERISA for breach of fiduciary duty). Back To Text

[144] Labor Regs. § 2510.3−3(b), 29 C.F.R. § 2510.3−3 (1999). Back To Text

[145] 40 Fed. Reg. § 34,528 (1975) (to be codified at 29 C.F.R. pt. 2510.3−6(a)). Back To Text

[146] 40 Fed. Reg. 34,528 (1975) (to be codified at 29 C.F.R. pt. 2510.3−6(a)). Back To Text

[147] ERISA § 408(d)(1), 29 U.S.C. § 1108(d)(1) (1997), (prohibiting certain transactions with owner−employees, by providing that certain exceptions from prohibited transaction rules do not apply to transactions with "any person who is with respect to the plan an owner−employee (as defined in section 401(c)(3) of the Internal Revenue Code of 1986)"). Back To Text

[148] ERISA § 408(d)(1), 29 U.S.C. § 1108(d)(1) (1997) incorporates the definition of an owner−employee in I.R.C. § 401(c)(3), and ERISA § 408(d)(2), 29 U.S.C. § 1108(d)(1) expands that definition. Back To Text

[149] See, e.g., H.R. 1045, 91st Cong., 1st Sess. § 4(b)(3) (1969); S. 4326, 92d Cong. 1st Sess. § 4(b) (1970); S. 2167, 91st Cong., 1st Sess. § 101(b) (1969); S. 2, 92d Cong., 1st Sess. § 101(b) (1971). Back To Text

[150] ERISA § 404(a), 29 U.S.C. § 1104(a) (1990). Back To Text

[151] ERISA § 3(7), (8), 29 U.S.C. § 1002(7), (8). Back To Text

[152] See, e.g., Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 185 (6th Cir. 1992) (involving insurance policy that covered sole proprietor and three other employees, with court holding that neither sole proprietor nor his wife can qualify as participants in plan because sole proprietors or sole shareholders of businesses must be considered employers and not employees for purposes of ERISA); see also Giardono v. Jones, 867 F.2d 409, 412 (7th Cir. 1989) (stating "the fact that an employer may have standing as a fiduciary has nothing [to] advance the argument that an employee may similarly have standing as a participant."). Back To Text

[153] Peckham v. Board of Trustees of Int'l Brotherhood of Painters & Allied Trades Union, 653 F.2d 424, 427 (10th Cir. 1981). Back To Text

[154] Id. at 427 (citing 29 U.S.C. § 1103(c)(1)). Back To Text

[155] ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) (1989). Back To Text

[156] In the case of a welfare plan, some courts have treated benefits provided for the sole proprietor as a separate plan from benefits provided to the sole proprietor's employees. See, e.g., Brech v. Prudential Ins. Co., 845 F. Supp. 829, 835 (M.D. Ala. 1993) (holding health insurance purchased by sole proprietor was not part of employee benefit plan that provided health insurance for his sons in their capacities as employees of sole proprietorship). Back To Text

[157] See supra text accompanying notes 114 & 115, respectively, for a discussion of the definitions of a participant and a beneficiary. Back To Text

[158] Notice of Proposed Rulemaking, 40 Fed. Reg. 24,643 (1975). Back To Text

[159] See, e.g., Goff v. Taylor (In re Goff), 706 F.2d 574, 577 (5th Cir. 1983) (detailing situation where 'self−employed retirement trusts (Keogh Plan)' covering only debtors husband and his wife were administered pursuant to an 'ERISA−qualified pension plan'). Back To Text

[160] See, e.g., Robertson v. Alexander Grant & Co., 798 F.2d 868, 871−72 (5th Cir. 1986) (partnership had plan for partners and separate plan for principals who could not be partners under state law because they were not C.P.A.'s); see also Southern California Permanente Med. Group v. Ehrenberg (In re Moses), 215 B.R. 27, 28 (B.A.P. 9th Cir. 1997) (partnership offered Keogh plan to over 2,400 participating self−employed physicians and comparable coverage under other qualified plan for nonphysician employees). Back To Text

[161] Labor Regs § 2510.3−3(b), 29 C.F.R. § 2510.3−3(b) (1999). Back To Text

[162] I.R.C. § 401(c)(3)(B). Back To Text

[163] H.R. 1045, 91st Cong., 1st Sess. § 4(b)(3) (1969); S. 4326, 92d Cong., 1st Sess. § 4(b) (1970); S. 2167, 91st Cong., 1st Sess. § 101(b) (1969). Back To Text

[164] ERISA § 201(5), 29 U.S.C. § 1051(5). For the federal income tax consequences of the payments, see I.R.C. § 736. With respect to other parts of title I, see ERISA §§ 301(a)(6), 401(a)(2), 607(2), 732(d)(3), 29 U.S.C. §§ 1081(a)(6) (1989), 1101(a)(2), 1161(2), 1191(d)(3). Back To Text

[165] See, e.g., Bane v. Ferguson, 890 F.2d 11, 12 (7th Cir. 1989) (holding claim for negligence resulting in dissolution of law partnership and in termination of retirement benefits was not governed by ERISA); Robertson v. Alexander Grant & Co., 798 F.2d 868, 868 (5th Cir. 1986) (finding failure to pay retirement benefits to withdrawing partner was not governed by ERISA); Tenney & Bentley v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., No. 96 C 6663, 1997 WL 80919 at *1 (N.D. Ill. 1997) (holding claim for recovery of excess contributions to Keogh plan covering only partners was not governed by ERISA). Back To Text

[166] See, e.g., In re Moses, 215 B.R. 27, 35 (B.A.P. 9th Cir. 1997) (holding Keogh plan with more than 2,400 self−employed physicians participants was not ERISA−qualified plan but was excluded under state law) aff'd,167 F.3d 470 (9th Cir. 1999). Back To Text

[167] See, e.g., Simpson v. Ernst &Young, 850 F. Supp. 648, 652 (S.D. Ohio 1994) (reviewing rights of individual partner under agreement, such as right to examine books and records, access to legal opinions, and authority to sign promissory notes, compensation, performance review, share of profits and losses, indicia of ownership interest, management authority, ability to share in profits and scope and requirement of annual performance review); see also Simpson v. Ernst &Young, 879 F. Supp 802, 815 (S.D. Ohio 1994); Ehrlich v. Howe, No. 92 Civ. 1079 (PNL), 1992 WL 373266 (S.D.N.Y. Dec. 1, 1992) (denying motion to dismiss ERISA claim regarding deferred compensation because plaintiff might be able to prove that he was only nominal partner and that "his relationship with the firm was essentially that of an employee" so that plan covered at least one employee). Back To Text

[168] Robertson v. Alexander Grant & Co., 798 F.2d 868, 870 (5th Cir. 1986). Back To Text

[169] Simpson v. Ernst &Young, 879 F. Supp. 802, 815 (S.D. Ohio 1994). Back To Text

[170] In some cases, an issue may arise as to whether a person covered by the plan is a partner, an employee, or an independent contractor. See, e.g., HCA Health Services v. Brown, No. 87 C 4029, 1988 WL 71219 (N.D. Ohio June 24, 1988) (evidentiary hearing required to determine if individuals covered by health insurance policy were independent contractors or employees of partnership). Back To Text

[171] See, e.g., Salameh v. Provident Life & Acc. Ins. Co., 23 F. Supp. 2d 704, 714 (S.D. Tex. 1998) (finding ERISA preemption of state law claim with respect to disability policy that covered employee who was not partner at time of injury but became partner thereafter); Bourg v. NN Investors Life Ins. Co., No. 90−4043, 1991 WL 211568 (E.D. La. Oct. 2, 1991) (finding ERISA preemption of state law claim with respect to health insurance policy covering employees who were not partners or family members). Back To Text

[172] See, e.g., Madden v. Country Life Ins. Co., 835 F. Supp. 1081, 1087 (N.D. Ill. 1993) (finding state law governed medical coverage of partner under policy that covered two partners); Pitre v. Louisiana Health Serv. & Indem. Co., 122 F.R.D. 497, 500−01 (W.D. La. 1988) (finding partner's claim was governed by state law not ERISA because partner could not be participant in health plan within meaning of ERISA, even though plan covered employees who were not partners). Back To Text

[173] See, e.g., Peterson v. American Life & Health Ins. Co., 48 F.3d 404, 410 (9th Cir. 1995) (deciding partner was beneficiary under ERISA health plan that provided insurance for two partners and one employee, even though partner was not participant under ERISA); Eichhorn, Eichhorn & Link v. Travelers Ins. Co., 896 F. Supp. 812 (N.D. Ind. 1995); Lain v. Unum Life Ins. Co., 27 F. Supp. 926 (S.D. Tex. 1998); see also Harper v. Am. Chambers Life Ins. Co., 898 F.2d 1432 (9th Cir. 1988). Back To Text

[174] Labor Regs. § 2510.3−3(b), 29 C.F.R. § 2510.3−3(b) (1999). Back To Text

[175] Notice of Proposed Rulemaking, 40 Fed. Reg. 24,643 (1975). Back To Text

[176] See, e.g., Watson v. Proctor (In re Watson), 214 B.R. 597, 599 (B.A.P. 9th Cir. 1997) (professional corporation adopted profit sharing plan with sole shareholder, sole participant, and partnership of this professional corporation and another professional corporation adopted pension plan for its four employed nurses). Back To Text

[177] See, e.g., Zeiger v. Zeiger, No.96−56206, 1997 WL 737659 at * 1 (9th Cir. 1997) (profit sharing plan whose sole participants were husband and wife, sole shareholder(s), was not ERISA plan while 401(k) plan for other employees was ERISA plan). Back To Text

[178] 40 Fed. Reg. § 24,643 (1975). Back To Text

[179] 40 Fed. Reg. § 34,528 (1975). Back To Text

[180] If state law permits a limited liability company to be owned by a sole member, then the regulations also would apply to a plan sponsored by such a limited liability company. Back To Text

[181] 40 Fed. Reg. § 34,528 (1975). Back To Text

[182] Watson v. Proctor (In re Watson), 161 F.3d 593, 597 (9th Cir. 1998). Back To Text

[183] See, e.g., In re Witwer, 148 B.R. 930, 936 (Bankr. C.D. Calif. 1992) (finding that plan in which sole shareholder was sole participant was not ERISA qualified but was exempt under California law); In re Hall, 151 B.R. 412, 421 (Bankr. W.D. Mich. 1993) (concluding pension plan in which sole shareholder and wife were sole participants was not subject to ERISA and was included in bankruptcy estate); see also In re Gaudette, 240 B.R. 649, 656 (Bankr. D. N.H. 1999) (applying definition of an employer in ERISA § 3(5), 29 U.S.C. § 1002(5), quoted in text accompanying note 110, and holding that sole shareholder's spouse was employer and thus could not be employee participating in plan, so that plan that covered spouse was not subject to ERISA and was included in that spouse's bankruptcy estate). Back To Text

[184] Securities and Exchange Comm. v. Johnston, 143 F.3d 260, 263 (6th Cir. 1998). Back To Text

[185] See, e.g., Merchant v. Kelly, 874 F. Supp. 300, 305 (D. Colo. 1995) (finding that plan in which sole shareholder was sole participant was not subject to ERISA but was subject to Internal Revenue Code for purposes of determining whether firm committed legal malpractice by dividing assets between sole participant and his wife without using a qualified domestic relations order (QUADRO); Heineman v. Bright, 906 F. Supp. 306, 308−09 (D. Md. 1995) (concluding ERISA did not apply to claim for breach of fiduciary duties filed by surviving spouse of sole shareholder of corporate plan sponsor because sole shareholder was sole participant in plan). Back To Text

[186] Compare Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957, 963 (1st Cir. 1989) (stating "language of Part I, its legislative history, and appurtenant regulations all reflect the conclusion that sole shareholders are 'employers' and therefore cannot be 'employees' for purposes of plan participation"), with Tr. of Int'l Bh'd. v. O'Donnell, Bartz, Schultz Funeral Home, Ltd., No. 91C0573, 1995 WL 583991, at *9 (N.D. Ill. Oct. 3, 1995) (concluding plans providing health and pension benefits did not exclude sole shareholder from participating in plan solely because of his ownership, absent sufficient facts to pierce corporate veil). Back To Text

[187] Kwatcher, 879 F.2d at 967−68. The reference to Part I should be to Title I. Back To Text

[188] Tr. of Int'l Bhd. v. O'Donnell−Bartz−Schultz Funeral Home, Ltd., No. 91 C 0573, 1995 WL 583991, at *9 (N.D. Ill. Oct. 3, 1995). Back To Text

[189] See, e.g., In re Acosta, 182 B.R. 561, 565 (N.D. Calif. 1994) (stating that "bankruptcy court also noted that while Walnut Lake did employ an individual at one time, the Plans did not retain any benefits due to the former employee; therefore, the Plans were not subject to ERISA"); In re Lawrence, 235 B.R. 498, 501 (Bankr. S.D. Fla. 1999) (stating debtor was sole participant in plan for virtually entire time, with one former participant who did not have any vested interest or receive any plan distributions). But see Gladwell v. Harline (In re Harline), 950 F.2d 669, 672 (10th Cir. 1991) (noting sole shareholder was sole remaining participant in "ERISA−qualified plan"). The Seventh Circuit held that plan with one remaining participant was subject to ERISA, when there had been significant number of other participants in prior years; however, in that case, the participant was not the sole shareholder and only owned a majority of the outstanding shares. In re Baker, 114 F.3d 636, 639 (7th Cir. 1997). See also Shumate v. Patterson, 943 F.2d 362, 365−66 (4th Cir. 1991) (involving plan where Shumate was sole remaining participant of nearly 400 participants, although it is unclear from opinion whether he was sole participant at commencement of his case or became sole participant thereafter, and he was not sole shareholder, controlling only 96 percent of outstanding stock). Back To Text

[190] See, e.g., McDonald v. Metz (In re Metz), 225 B.R. 173, 177 (B.A.P. 9th Cir. 1998) (former husband and wife each owned 50 percent of the corporation and former husband received employee treated under ERISA so that plan was subject to ERISA; former wife conceded that she was not participant in plan but alternate payee of plan because of dissolution order granting her community property interest in plan); see also McConocha v. Blue Cross & Blue Shield of Ohio, 898 F. Supp. 545, 548 (N.D. Ohio 1995) (holding 80 percent shareholder had standing under ERISA as participant in plan providing health insurance). Back To Text

[191] In re Baker, 114 F.3d 636, 639 (7th Cir. 1997) (concluding plan was subject to ERISA and excluded from bankruptcy estate where sole participant owned only 50.9 percent of stock of corporate sponsor and plan had 18 other participants in prior years). Back To Text

[192] Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 265 (9th Cir. 1991) (remanding case to determine whether an affidavit alleging existence of vested participant who was non−owner employee was sham contradiction). Back To Text

[193] See also supra text accompanying note 136. Back To Text

[194] For employment tax purposes, a shareholder−employee does not have earned income from self−employment. See I.R.C. § 1402(a) (regarding "gross income derived by individual from any trade or business carried on by such individual" or "by a partnership of which he is a member."). Back To Text

[195] See I.R.C. §§ 1372, 4975(d), (f)(6) (detailing for special rules regarding shareholder−employees of S corporation with respect to prohibited transactions). Back To Text

[196] 40 Fed. Reg. § 34,528 (1975). Back To Text

[197] See, e.g., In re Harline, 950 F.2d 669, 674 (10th Cir. 1991) (involving tax−qualified ERISA pension or profit sharing plan excluded under § 541(c)(2) of Bankruptcy Code, including plan sponsored by debtor's solely owned corporation in which debtor was sole remaining participant if plan were qualified and suggesting that qualification requires plan documents that comply with ERISA); In re Lichstrahl, 750 F.2d 1488, 1491 (11th Cir. 1985) (involving two corporate pension plans which court referred to as "ERISA−qualifying pension plans . . . created . . . pursuant to 29 U.S.C. § 1001, et seq. (1982) and 26 U.S.C. §§ 401, et seq. (1982)," with sole shareholder as sole participant). Back To Text

[198] With respect to pension plans, see, e.g., In re Lowenschuss, 171 F.3d 673, 680 (9th Cir. 1999); In re Baker, 114 F.3d 636, 639 (7th Cir. 1997); Kwatcher v. Massachusetts Serv. Employees Pension, 879 F.2d 957, 961−62 (1st Cir. 1989); Bane v. Ferguson, 890 F.2d 11, 13−14 (7th Cir. 1989); Robertson v. Alexander Grant & Co., 798 F.2d 868, 869−870 (5th Cir. 1986); Schwartz v. Gordon, 761 F.2d 864, 869 (2d Cir. 1985).

With respect to welfare plans, see, e.g., Matincheck v. John Alden Life Ins. Co., 93 F.3d 96, 100 (3d Cir. 1996); Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404, 411 (9th Cir. 1995); Meredith v. Time Ins. Co., 980 F.2d 352, 358 (5th Cir. 1993); Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 184 (6th Cir. 1992); Giardono v. Jones, 867 F.2d 409, 412 (7th Cir. 1989). Back To Text

[199] See, e.g., In re Baker, 114 F.3d at 639; In re Lowenschuss, 171 F.3d at 680; Watson v. Proctor (In re Watson); 161 F.3d 593, 596 (9th Cir. 1998). Back To Text

[200] See, e.g., Securities & Exchange Comm. v. Johnson, 143 F.3d 260 (6th Cir. 1998) (covering anti−alienation and disgorgement); In re Baker, 114 F.3d 636 (7th Cir. 1997); Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262 (9th Cir. 1991) (bonding requirement); Kwatcher v. Massachusetts Service Employees Pension, 879 F.2d 957 (1st Cir. 1989) (involving eligibility to participate); Bane v. Ferguson, 890 F.2d 11 (7th Cir. 1989) (breach of fiduciary duty and termination of retirement benefits); Robertson v. Alexander Grant & Co., 798 F.2d 868 (5th Cir. 1986) (right to payment of retirement benefits); Schwartz v. Gordon, 761 F.2d 864 (2d Cir. 1985) (involving breach of fiduciary duty). Back To Text

[201] See, e.g., Matincheck v. John Alden Life Ins. Co., 93 F.3d 96 (3d Cir. 1996); Peterson v. Am. Life & Health Ins. Co., 48 F.3d 404 (9th Cir. 1995); Meredith v. Time Ins. Co., 980 F.2d 352 (5th Cir. 1993); Fugarino v. Hartford Life & Acc. Ins. Co., 969 F.2d 178 (6th Cir. 1992); Giardono v. Jones, 867 F.2d 409 (7th Cir. 1989). Back To Text

[202] In re Lowenschuss, 171 F.3d 673, 680 (9th Cir. 1999); In re Watson, 161 F.3d 593, 598 (9th Cir. 1998), aff'd 214 B.R. 597 (B.A.P. 9th Cir. 1997). Back To Text

[203] In re Watson, 161 F.3d at 598. Back To Text

[204] Id. at 599. Back To Text

[205] See, e.g., ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3); I.R.C. §§ 401(a)(13)(B), 414(p); see also In re Lowenschuss, 170 F.3d at 932 (9th Cir. 1999) (where bankruptcy court granted former spouse leave to petition state court for qualified domestic relations order and court's order was upheld by district court and Ninth Circuit). Back To Text

[206] In re Baker, 114 F.3d 636, 639 (7th Cir. 1997). Back To Text

[207] Id. at 639. Back To Text

[208] Securities & Exchange Comm. v. Johnston, 143 F.3d 260, 263 (6th Cir. 1998). Back To Text

[209] Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 366 (1990). Back To Text

[210] Kwatcher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957, 960 (1st Cir. 1989). Back To Text

[211] Id. at 958 n.2, 959 n.3, 963 n.5. Back To Text

[212] Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 264 (9th Cir. 1991). Back To Text

[213] See, e.g., ERISA §§ 408(d), 403(b)(3)(A), 29 U.S.C. §§ 1108(d) (1986), 1103(b)(3)(A) (1989). ERISA § 403(b)(3)(A) provides that the trust requirement in § 403(a) does not apply to a plan if all of the participants are employees described in I.R.C. § 401(c)(1) if the plan's assets are held in a custodial account that qualifies under I.R.C. § 401(f). Thus, the trust requirement of § 403(a) applies to a plan if all of the participants are § 401(c)(1) employees and the plans assets are not held in a qualified custodial account. Back To Text

[214] If the sole trustee is the sole participant, an issue may arise as to whether the trust exists under state law or has been terminated by reason of the merger doctrine. See, e.g., In re Lichstrahl, 750 F.2d 1488, 1491 n.5 (11th Cir. 1985)

(where court did not apply merger doctrine because of possibility future employee could participate). Back To Text

[215] See, e.g., In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985). Back To Text

[216] See, e.g., 11 U.S.C. § 522(d)(10)(E). Back To Text

[217] See Patterson v. Shumate, 504 U.S. 753, 759 (1992) (stating "[I]n light of our conclusion that a debtor's interest in an ERISA−qualified pension plan may be excluded from the property of the bankruptcy estate pursuant to § 541(c)(2)(A), we need not reach respondent's alternative argument that his interest in the Plan qualifies for exemption under § 522(b)(2)(A)."); see In re Damast, 136 B.R. 11, 18 (Bankr. D. N.H. 1991) ("This court concludes that even if the ERISA qualified pension plan assets in question were property of the estate, the anti−alienation and anti−assignment requirements of 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1) create a federal exemption under § 522(b)(2)(A)."); see also Arkison v. UPS Thrift Plan (In re Rueter), 11 F.3d 850, 853 (9th Cir. 1993) ("Because this Plan qualifies for § 541(c)(2)'s exclusion as an ERISA−qualified pension plan, we need . . . not discuss whether the Plan is exempt from the bankruptcy estate under § 522(b)(2)(A)"). But see Goff v. Taylor (In re Goff), 706 F.2d 574, 585 (5th Cir. 1983); In re Kerr, 65 B.R. 739, 745−46 (Bankr. D. Utah 1986). Back To Text

[218] I.R.C. § 401(a)(13). Back To Text

[219] Patterson, 504 U.S. at 759; see also Boggs v. Boggs, 520 U.S. 833 (1997) (citing title I restriction on alienation and stating that "[s]tatutory anti−alienation provisions are potent mechanisms to prevent the dissipation of funds."); Smith v. Mirman, 749 F.2d 181 (4th Cir. 1984); Tenneco Inc. v. First Virginia Bank, 698 F.2d 688 (4th Cir. 1983); Gen. Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980). Back To Text

[220] Patterson, 504 U.S. at 760 (citing Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) and McLean v. Central States, Southeast & Southwest Areas Pension Fund, 762 F.2d 1204, 1206 (4th Cir. 1985) and referencing In re Moore, 907 F.2d at 1481 (4th Cir. 1990)). Back To Text

[221] ERISA § 3002(c), 29 U.S.C. § 1202(c) (1989). See generally ERISA title III. Back To Text

[222] I.R.C. § 4975(a)(1)(B), (C); see also id. at § 4975(f) (citing certain exemptions and § 4975(f)(6) regarding which exemptions are not available for an owner−employee, including shareholder−employee of an S corporation). Back To Text

[223] Id. at § 4975(e)(2)(E), (H), (I). Back To Text

[224] Id. at § 4975. Back To Text

[225] Id. at § 4975(a), (b). Back To Text

[226] See, e.g., Reklau v. Merchants Nat'l Corp., 808 F.2d 628, 631 (7th Cir. 1986) (holding ERISA does not require plan to qualify under Internal Revenue Code and participant did not have private cause of action under ERISA for alleged discrimination); see also Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888, 895 (1st Cir. 1978) (respecting causes of action arising before effective date of ERISA); Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir. 1975). Back To Text

[227] Patterson, 504 U.S. at 759−60. Back To Text

[228] Id. at 760 n.3. Back To Text

[229] 504 U.S. at 755 regarding "the conflict among the Courts of Appeals as to whether an antialienation provision in an ERISA−qualified pension plan constitutes a restriction on transfer enforceable under 'applicable nonbankruptcy law'" & n.1 citing the conflicting opinions involving plans including corporate and Keogh plans with the only participant being the sole owner (or owner and spouse). Back To Text

[230] See, e.g., In re Lowenschuss, 171 F.3d 673, 685 (9th Cir. 1999) (concluding sole owner's interest in plan in which he was sole participant was not excluded under federal or state law, with Nevada law applying to determine if plan interest qualified for exemption); Ehrenberg v. Moses (In re Moses), 167 F.3d 470, 474 (9th Cir. 1999) (holding partner's interest in Keogh plan was excluded under California state spendthrift law); Watson v. Proctor (In re Proctor), 161 F.3d 593, 595 (9th Cir. 1998) (deciding sole shareholder's interest in plan in which he was sole participant was not excluded under ERISA but was partially exempt under Nevada law); see also Kaler v. Craig (In re Craig), 204 B.R. 756, 760 (D. N.D. 1997) (stating in dicta that "I.R.C. does not provide for enforcement of anti−alienation provisions, which is crucial under § 541(c)(2) of Bankruptcy Code"). Back To Text

[231] See, e.g., In re Moses, 167 F.3d at 474 (holding partner's interest in Keogh plan was excluded under California state spendthrift law); In re Kuraishi, 237 B.R. 172, 174−75 (Bankr. C.D. Calif. 1999) (concluding debtor's interest in plan was included in bankruptcy estate because debtor was sole employer, employee, and participant in Keogh plan, which was self−settled trust that was not enforceable under California law); Taunt v. General Retirement System of City of Detroit (In re Wilcox), 225 B.R. 151, 157 (Bankr. E.D. Mich. 1998) (deciding debtor's interest in city's defined benefit pension plan was exempted, without issue, and debtor's interest in city's defined contribution plan was included in bankruptcy estate and subject to turnover); First Indemnity of Am. Ins. Co. v. Copulos, No. Civ. 97−4283 (GEB), 1998 WL 231224 at *4−5 (D. N.J. Feb. 24, 1998) (applying New Jersey statute that property held in qualifying trust, including trust qualified under I.R.C. § 401, is excluded from bankruptcy estate, and deferring to I.R.S. determination regarding qualification); Kaplan v. First Options of Chicago, Inc., 189 B.R. 882, 887−88 (Bankr. E.D. Pa. 1995) (holding that debtor was sole remaining shareholder and participant in defined benefit pension plan that was included as property of his bankruptcy estate but exempt under Pennsylvania law). Back To Text

[232] In re Witwer, 148 B.R. 930 (Bankr. C.D. Calif. 1992). Back To Text

[233] Id. at 938, 941. Back To Text

[234] In re Acosta, 182 B.R. 561 (Bankr. N.D. Calif. 1994). Back To Text

[235] In re Leamon, 121 B.R. 974 at 979−80. Back To Text

[236] In re Wheat, 149 B.R. 1003, 1007 (Bankr. S.D. Fla. 1992) ("I.R.C. § 401(a)(13) which is expressly enforceable through ERISA, 29 U.S.C. §§ 1104(a)(1)(D) & 1132(a)(3) & (5)"). Wheat involved a § 457 plan, prior to imposition of the trust requirement in I.R.C. § 457(b) & (h) for certain governmental plans. Back To Text

[237] In re Dunn, 215 B.R. at 127. In Dunn, the trustee conceded that debtor's interest in city's defined benefit pension plan which was funded solely by employer contributions was excluded from bankruptcy estate. Further, in Dunn, city's defined contribution plan was funded exclusively by voluntary employee contributions and was a "self−settled spendthrift trust" that was not enforceable under Michigan law, so that it was included in bankruptcy estate and not exempt under § 511(d)(10)(E) because it was not reasonably necessary for support. See id. at 123 n.1, 128. Back To Text

[238] Neither the Supreme Court nor the circuit or districts courts involved addressed the qualification of the plan in operation. Back To Text

[239] This generally refers to plans that are of the type that could qualify under I.R.C. § 401 but do not qualify because of provisions or omissions in the plan and trust documents or because of facts outside of the documents, including disqualified and nonqualified plans. Most nonqualified plans are not subject to Part 2 of title I. Some nonqualified plans, such as a funded excess benefit plans, are subject to title I, including ERISA § 502, 29 U.S.C. § 1132, but are not subject to Part 2. Further, a supplemental retirement income payment plan may be treated as a welfare plan pursuant to ERISA § 3(2)(B), 29 U.S.C. § 1002(2)(B), and Labor Regs. § 2510.3(g), 29 U.S.C. § 2510.3(g). Nevertheless, nonqualified plans that are subject to title I but not Part 2 may contain a trust with an anti−alienation provision that would be enforceable under ERISA § 502, 29 U.S.C. § 1132. Back To Text

[240] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (1990). Back To Text

[241] ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Back To Text

[242] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Back To Text

[243] ERISA § 502(a)(5), (b)(1), 29 U.S.C. § 1132(a)(5), (b)(1). Back To Text

[244] ERISA § 502(a)(5), (b)(1), 29 U.S.C. § 1132(a)(5), (b)(1). Subtitle B of title I covers Parts 2 − 7 of title I. Further, Part 2 is entitled Participation and Vesting and § 206, 29 U.S.C. § 1056, which contains the anti−alienation requirement is entitled: "Other provisions relating to form and payment of benefits." Id. at § 1056. Back To Text

[245] See Donovan v. Shaw, 668 F.2d 985, 990 (9th Cir. 1982) ("Noticeably absent from both the language and legislative history of § 504 is any limitation predicated on a distinction between tax qualified and non−qualified pension plan."). Back To Text

[246] In re Sewell, 180 F.3d 707, 711 (5th Cir. 1999); In re Baker, 114 F.3d 636, 639 (7th Cir. 1997). Back To Text

[247] See, e.g., Gilbert v. Foy (In re Foy), 164 B.R. 595, 597 (Bankr. S.D. Ohio 1994) (stating "pension plan is 'ERISA qualified' if it is (1) tax qualified under § 401(a) of the Internal Revenue Code, 2) subject to ERISA, and 3) includes an anti−alienation provision"); In re Hall, 151 B.R. 412, 419 (Bankr. W.D. Mich. 1993) ("some seemingly cryptic language in Shumate itself supports the conclusion that 'ERISA qualified' plans are tax qualified under I.R.C. § 401(a), subject to ERISA, and contain an anti−alienation provision"). Back To Text

[248] See, e.g., In re Foy, 164 B.R. at 598 n.12; Kaler v. Craig (In re Craig), 204 B.R. 750, 755 (D. N.D. 1996); In re Sirois, 144 B.R. 12, 14 (Bankr. D. Mass. 1992); see also In re Hall, 151 B.R. at 421 n.23 (holding that plan interest was included in estate because plan was not subject to ERISA, and "[b]ecause the ERISA qualification requirements are stated in the conjunctive, the court need not analyze I.R.C. § 401(a) to determine whether the Pension Plan is property of the estate under section 541(c)(2)."). Back To Text

[249] In re Feldman, 171 B.R. 731, 732 (Bankr. E.D.N.Y. 1994) (Holding New York state exemption applied to plans qualified under I.R.C. § 401, and court granted temporary stay for I.R.S. determination on pending application regarding qualification). Back To Text

[250] In re Foy, 164 B.R. at 598 n.12. Back To Text

[251] In re Sirois, 144 B.R. at 14. Back To Text

[252] In re Feldman, 171 B.R. at 732. Back To Text

[253] In re Craig, 204 B.R. at 755. Back To Text

[254] In re Harris, 188 B.R. 444, 449 (Bankr. MD. Fla. 1995). Back To Text

[255] Id. at 449−50. Back To Text

[256] Id. at 449−51(debtor and wife were trustees when plan distributions to other participants were made based on "guesstimates" plan authorized life insurance on participants but only purchased insurance on debtor, loans were made to debtor in excess of amount authorized by plan and "[t]hey invested in properties not for the exclusive benefit of any participant, and none of the investments had even a faint resemblance to a prudent investment" and "generally failed to manage the Plan assets as an independent fiduciary charged with the management of other people's money"). Back To Text

[257] In re Goldschein, 244 B.R. 595, 601 (Bankr. D. Md. 2000). Back To Text

[258] Id. Back To Text

[259] Id. at 602. Back To Text

[260] This article does not address the jurisdiction of the bankruptcy court under the Bankruptcy Code but rather reviews it from the perspective of ERISA. Back To Text

[261] ERISA § 3001(d), 29 U.S.C. § 1201(d) (providing "[t]he Secretary of Labor shall accept the determination of the Secretary of the Treasury as prima facie evidence of initial compliance by the plan with the standards of parts 2, 3, and 4 of Subtitle B of title I of this Act."). Back To Text

[262] ERISA §§ 3001, 3002, 29 U.S.C. §§ 1201 (1989), 1202 (1989). Back To Text

[263] I.R.C. § 7476. See Thompson v. Comm'r, 71 T.C. 32 (1978) (discussing Tax Court's jurisdiction under § 7476). Back To Text

[264] I.R.C. § 7476(a). Back To Text

[265] See, e.g., Internal Revenue Service Employee Plans Closing Agreements Pilot Program ("CAP"or "EPCAPP") under which certain key district I.R.S. offices have discretion to enter into a closing agreement with a plan sponsor in order to retroactively or prospectively amend a plan as an alternative to revocation of a plan's qualification; see also Weddel and Comm'r, 71 T.C.M. (CCH) 1950 (1996) (discussing CAP and its discretionary aspect). Back To Text

[266] See I.R.S. Publication 794 (Rev. Dec. 1998) (discussing determination letters in general and their scope and limitations). For an example of a general caveat, see Olmo v. Comm'r, 38 T.C.M. (CCH) 1112 (1979) ("Continued qualification of the plan will depend on its effect in operation as well as its present form"). For an example of a specific caveat, see TCS Manufacturing, Inc. Employees Pension Trust v. Comm'r, 60 T.C.M. (CCH) 1312 (1990) (where favorable determination letter was conditioned on president/sole shareholder including income amount of certain previous plan contributions). Back To Text

[267] For plans retroactively disqualified for discrimination in operation, see, e.g., Myron v. U.S., 550 F.2d 1145, 1145−46 (9th Cir. 1977); Wisconsin Nipple & Fabricating Corp. v. Comm'r, 581 F.2d 1235, 1241 (7th Cir. 1978); Olmo v. Comm'r, 38 T.C.M. (CCH) 1112 (1979); see also Oakton Distributors, Inc. v. Comm'r, 73 T.C. 182, 192 (1979) (retroactive revocation of qualification because of improper integration with Social Security where favorable determination letter was based on inaccurate statement in initial application for qualification involving rate of employee contributions). Back To Text

[268] See, e.g., Mills, Mitchell & Turner v. Comm'r. 65 T.C.M. (CCH) 2127 (1993) (plan retroactively disqualified for failure to comply timely with Tax Reform Act of 1984 ("TRA of 1984") and the Retirement Equity Act of 1984 ("REA")); Hamlin Development Co. v. Comm'r, 65 T.C.M. (CCH) 2071 (1993) (plan disqualified for failure to comply timely with Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"); Deficit Reduction Act of 1984 ("DEFRA"), and REA. Back To Text

[269] Generally, a request for a determination letter would be based on submitted plan and trust documents rather than based on the facts of the operation of the plan. Back To Text

[270] S. 200, January 30, 2001, available at http://www.abiworld.org and http://thomas.loc.gov. Back To Text

[271] H.R. 333, January 31, 2001, available at http://www.abiworld.org and http://thomas.loc.gov. Back To Text

[272] See, e.g., Bankruptcy Reform Act of 2001, S. 200, H.R. 333, § 224, amending 11 U.S.C. § 522(b) (exempting "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under sections 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986."). The proposed reform also provides presumptions and rules for determining the tax qualification of a plan for exemption purposes, depending on whether the plan has received a favorable determination letter, and would protect the qualification of plan−to−plan transfers and eligible rollovers. Back To Text

[273] 504 U.S. 753 at 760. Back To Text

[274] Or husband and wife shareholders. Back To Text