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## REVISITING THE SCOPE AND IMPLICATIONS OF *PATTERSON v. SHUMATE* IN LIGHT OF *IN RE LYONS*

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Pursuant to section 541(a)(1) of the Bankruptcy Code, the estate created by the filing of a bankruptcy petition is comprised of, *inter alia*, "all legal or equitable interests of the debtor in property as of the commencement of the case." [1] Section 541(c)(1) provides that restrictions on transfer generally will not prevent an interest of the debtor in property from becoming property of the estate. [2] Section 541(c)(2), however, provides the following exception to this general rule: "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." [3] Therefore, property interests subject to such enforceable nonbankruptcy transfer restrictions (traditionally spendthrift trusts created under state law) are excluded from the bankruptcy estate. [4]

Under the Employment Retirement Income Security Act ("ERISA"), and also the Internal Revenue Code ("IRC"), a beneficiary of an ERISA−qualified pension plan cannot assign or alienate his or her plan benefits. [5] Until the recent Supreme Court decision in *Patterson v. Shumate*, [6] however, it was unclear whether the restrictions against assignment and alienation imposed by ERISA and the IRC constituted enforceable restrictions under "applicable nonbankruptcy law" within the meaning of section 541(c)(2).

In *Patterson v. Shumate*, the Court held that "applicable nonbankruptcy law" is not limited to state law and that an ERISA−mandated anti−alienation provision satisfies the literal terms of section 541(c)(2). [7] The debtor in that case, therefore, could exclude his interest in his ERISA−qualified retirement plan from his bankruptcy estate. [8]

While the issue resolved by the Supreme Court in *Patterson v. Shumate* was an important one, in retrospect, the decision in that case may prove to be narrower than it initially appeared to be.

### I. The Pre−*Patterson v. Shumate* Split Among the Circuits

#### A. Spendthrift Trust View

On the issue of what constitutes "applicable nonbankruptcy law" for purposes of section 541(c)(2), the Second, [9] Fifth, [10] Ninth, [11] and Eleventh Circuits [12] took the position that Congress, by enacting the provision, intended a limited exception for traditional state spendthrift trusts. [13] That conclusion was based primarily on the legislative history of section 541(c)(2). The courts adopting the "spendthrift trust view" interpreted the legislative history as having been focused on the "exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law." [14]

Additional support for the spendthrift trust view was derived from section 522(d)(10)(E) of the Bankruptcy Code, which permits a debtor, who elects the federal exemptions set forth in section 522(d), to exempt from the bankruptcy estate his or her right to receive "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract . . . to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." [15] The argument is that, "[i]f a debtor's interest in a pension plan could be *excluded* in full from the bankruptcy estate, . . . then there would have been no reason for Congress to create a limited *exemption* for such interests elsewhere in the statute." [16]

Finally, the courts embracing the spendthrift trust view noted that the provisions of ERISA do not affect other federal statutes, such as the Bankruptcy Code. [17] The courts, therefore, were disinclined to interpret ERISA's anti−alienation and anti−assignment provisions broadly, because to do so would frustrate the intent of the Bankruptcy Code to (1) broaden the property of the estate available to creditors and (2) provide only a limited exemption (in section 522) for pension plan interests. [18]

B. Plain Meaning View

In contrast, the Third, [19] Fourth, [20] Sixth, [21] and Tenth [22] Circuits adopted a "plain meaning" approach to the question of what constituted "applicable nonbankruptcy law" within the meaning of section 541(c)(2). In *Anderson v. Raine (In re Moore)*, [23] a case representative of the "plain meaning view," the Fourth Circuit rejected the trustee's argument that the scope of section 541(c)(2) was limited to state spendthrift trusts. [24] The court stated:

> The trustee in bankruptcy's narrow interpretation of [section] 541(c)(2) cannot be squared with the section's broad language. "Applicable nonbankruptcy law" means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "applicable nonbankruptcy law" or in the remainder of [section] 541(c)(2) suggests that the phrase refers exclusively to state law, much less state spendthrift trust law. [25]

The court further stated that "if Congress had intended [section] 541(c)(2) to only apply to state spendthrift trusts, the term `spendthrift trust' would have appeared in the statute, rather than the phrase `applicable nonbankruptcy law.'" [26]

The court noted that a narrow reading would also be inconsistent with other provisions of the Bankruptcy Code, wherein the phrase "applicable nonbankruptcy law" is used to refer to both federal and state law. [27] Finally, given the clarity of the language of the statute, the Fourth Circuit found section 541(c)(2)'s legislative history to be irrelevant, and in any event inconclusive. [28]

After the *Moore* court reviewed the restrictions imposed by ERISA and the IRC on the assignment and alienation of a participant's beneficial interest in a qualified retirement plan, the court concluded that the restrictions were enforceable under applicable nonbankruptcy law within the meaning of section 541(c)(2). [29] Accordingly, the Fourth Circuit held that the debtors' interests in the pension plan at issue was not property of their respective estates and, therefore, was not subject to turnover to the bankruptcy trustee. [30]

It is worth noting that nearly all of the circuit court decisions taking the spendthrift trust view pre−dated [31] the Fourth and Sixth Circuit decisions adopting the plain meaning view. [32] Therefore, although the circuits were in conflict, they were not firing broadsides at one another. Instead, the conflict was the by−product of the trend towards interpreting the Bankruptcy Code by focusing on its plain language. The one exception is *Reed v. Drummond (In re Reed)*, [33] a 1991 decision in which the Ninth Circuit continued to hold, as it had in its 1985 opinion in *Daniel v. Security Pacific National Bank (In re Daniel)*, [34] that the phrase "applicable nonbankruptcy law" did not encompass ERISA. [35]

C. The Eighth Circuit's Approach

On the issue of what constitutes "applicable nonbankruptcy law" for purposes of section 541(c)(2), the Eighth Circuit took yet a third approach. In *Samore v. Graham (In re Graham)*, [36] the court was convinced that Congress did not intend "applicable nonbankruptcy law" to include ERISA. The court reached this conclusion after looking at (1) the expanded view of property of the estate adopted in the new Bankruptcy Code, (2) the legislative history of section 541(c)(2), (3) the Bankruptcy Code's exemption provisions, and (4) the inapplicability of ERISA's pre−emption provision to other federal law. [37] Therefore, in the Eighth Circuit, a debtor's interest in ERISA−qualified pension funds comes into his or her bankruptcy estate. [38] However, to the extent such funds are needed for the debtor's fresh start, they may theoretically be exempted out of the estate under section 522. [39]

Pursuant to section 522(b) of the Bankruptcy Code, a debtor may choose either the federal exemptions listed in section 522(d) or the exemptions provided under state and other federal nonbankruptcy law. [40] Such an election, however, is available only to debtors in states which have not "opted out" of the federal exemption scheme. [41] Debtors in

"opt−out" states may not elect the federal exemptions. [42]

Because the amount of the exemption under section 522(d)(10)(E) is limited to payments which are "reasonably necessary for the support of the debtor and [any dependent of the debtor]," [43] debtors wishing to exempt the full value of their retirement plans generally sought to do so by electing the exemptions provided under state and other federal nonbankruptcy law under Bankruptcy Code section 522(b)(2)(A). [44] That section permits a debtor to exempt "any property that is exempt under Federal law, [other than subsection (d) of this section], or State or local law." [45]

In *Graham*, however, the Eighth Circuit held that the debtor was not entitled to exempt his pension plan interest under section 522(b)(2)(A) of the Bankruptcy Code. [46] Relying primarily on section 522's legislative history, the court found that Congress did not regard ERISA as a "federal law" upon which a section 522(b)(2)(A) exemption could be based. [47] A clear majority of the courts, including three other circuit courts of appeals, [48] have also held that ERISA does not constitute "other Federal law" within the meaning of section 522(b)(2)(A). [49]

II. Federal Pre−emption of State Laws Exempting Pension Benefits

In response to those decisions where it was held that ERISA was not "other Federal (nonbankruptcy) law" for purposes of section 522(b)(2)(A), state legislatures actively amended their exemption provisions to include generous allowances for pension plan benefits. [50] However, based on several Supreme Court cases, [51] most notably *Mackey v. Lanier Collections Agency & Service, Inc.*, [52] many courts have held that state laws exempting pension benefits are preempted by ERISA. [53]

Under the current state of the law, a debtor whose pension plan interest is held to be property of the bankruptcy estate may be unable to exempt the full value of such interest. It should be noted, however, that the minority view, that ERISA does not preempt state−created exemptions for pension plans *which are consistent with ERISA's overall scheme*, has been bolstered by the recent decisions of the Fifth Circuit in *Heitkamp v. Dyke (In re Dyke)* [54] and *NCNB Texas National Bank v. Volpe (In re Volpe)*. [55]

III. *Patterson v. Shumate*

Joseph B. Shumate, Jr. was the president and chairman of the board of directors of Coleman Furniture Corporation. [56] Along with approximately 400 other Coleman employees, Shumate was a participant in the corporation's pension plan. [57] The plan satisfied all applicable ERISA requirements, including the requirement that the plan contain an anti−alienation provision. [58] The value of Shumate's interest in the plan was $250,000. [59]

Coleman Furniture Corporation and Shumate filed petitions for bankruptcy in 1982 and 1984, respectively. [60] Both cases ultimately were converted to Chapter 7 proceedings. [61] John R. Patterson, the trustee of Shumate's bankruptcy estate, brought an adversary proceeding in the Bankruptcy Court against the trustee of the corporation's estate to recover Shumate's interest in the pension plan. [62] Shumate brought an action in the district court to have his interest in the plan paid directly to him. [63] The adversary proceeding was subsequently consolidated with the district court action. [64]

The district court, in *Creasy v. Coleman Furniture Corp.*, [65] held that (1) the reference in section 541(c)(2) to "nonbankruptcy law" encompassed only state law, not federal law such as ERISA and, (2) Shumate's interest in the pension plan did not qualify for protection from creditors as a spendthrift trust under Virginia law. [66] Accordingly, the district court ordered the trustee of the corporation's bankruptcy estate to pay Shumate's interest in the plan to Shumate's bankruptcy estate. [67]

Relying on its earlier decision in *Anderson v. Raine (In re Moore)*, [68] and the plain meaning analysis set forth therein, the Fourth Circuit reversed the district court's holding. [69] The Supreme Court granted certiorari [70] to resolve the conflict among the courts of appeals "as to whether an anti−alienation provision in an ERISA−qualified pension plan constitutes a restriction on transfer, enforceable under `applicable nonbankruptcy law', for purposes of the [section] 541(c)(2) exclusion of property from the debtor's bankruptcy estate." [71]

The Supreme Court began its analysis by looking at the plain language [72] of the Bankruptcy Code. [73] The Court held that the natural reading of section 541(c)(2) "entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under *any relevant nonbankruptcy law*," [74] and that nothing in section 541 suggests that the phrase "applicable nonbankruptcy law" refers exclusively to state law. [75] Furthermore, the Court remarked that such broad interpretation comports with other sections of the Bankruptcy Code and noted that when Congress desired to do so, "it knew how to restrict the scope of applicable law to `state law' and did so with some frequency." [76] After enumerating specific references in the Bankruptcy Code to "state law," the Court concluded that Congress's decision to use the broader term "applicable nonbankruptcy law" in section 541(c)(2) suggested no congressional intent to restrict the provision in the manner contended in *Patterson*. [77]

Having determined that section 541(c)(2) was not limited to state law, the Court next addressed whether the anti−alienation provision contained in Coleman Furniture Corporation's ERISA−qualified pension plan constituted an enforceable transfer restriction. [78] The Court held that the plan could be excluded from the bankruptcy estate since (1) the anti−alienation language contained in Coleman's pension plan complied with the provisions in ERISA section 206(d)(1) [79] and the coordinate IRC section 401(a)(13), [80] and (2) the transfer restrictions were enforceable. [81]

The Court rejected the various challenges to the plain language interpretation, [82] because the clarity of the statutory language at issue obviated the need for an examination of section 541(c)(2)'s legislative history. [83] Moreover, even if such an examination were appropriate, the Court was satisfied that the limited legislative materials discussing section 541(c)(2) would "reflect at best congressional intent to *include* state spendthrift trust law within the meaning of `applicable nonbankruptcy law'" [84] and would by no means evidence a "clearly expressed legislative intention" contrary to the Court's holding. [85]

Patterson had also argued that to construe section 541(c)(2) in such a way as to allow a debtor to exclude his or her interest in an ERISA−qualified pension plan would render Bankruptcy Code section 522(d)(10)(E) superfluous. [86] The Court disposed of that argument, pointing out that "[section] 522(d)(10)(E) exempts from the bankruptcy estate a much broader category of interests than [section] 541(c)(2) excludes." [87] It appears that the Court's conclusion that section 522(d)(10)(E)'s exemption applied to more than ERISA−qualified plans containing anti−alienation provisions was fatal to Patterson's argument that the Court's reading of section 541(c)(2) rendered the exemption provision superfluous.

Finally, the Court intimated that Patterson had mistaken an admittedly broad definition of "property of the estate" [88] for a Bankruptcy Code policy of ensuring a broad inclusion of assets in the estate, [89] and expressed doubt that "policy considerations are even relevant where the language of the statute is so clear . . . ." [90] The Court, therefore, concluded that its construction of section 541(c)(2) was preferable to the one urged by Patterson. [91] According to the Court, its decision ensures that (1) the treatment of pension benefits will not vary based on whether or not the beneficiary files bankruptcy, [92] (2) ERISA's goal of protecting pension benefits will be given appropriate effect, [93] and (3) that ERISA's underlying policy of uniform national treatment of pension benefits will be furthered. [94]

IV. Federal Tax Liens − An Overview

Pursuant to IRC section 6321, if a taxpayer neglects or refuses to pay any federal tax after receiving notice and demand, a lien is created in favor of the United States on "all property and rights to property, whether real or personal, belonging to such person." [95] The Supreme Court has given this section a liberal interpretation, stating that "[t]he statutory language, all `property and rights to property', . . . is broad and reveals on its face that Congress meant to reach *every* interest in property that a taxpayer might have." [96]

The federal tax lien, provided for in IRC section 6322, attaches not only to the taxpayer's property interests at the time the lien arises, but also attaches to all property rights acquired by the taxpayer during the life of the lien. [97] The lien continues until the liabilities which it secures are paid, or the statute of limitations on the collection of such liabilities expires. [98]

Where the federal government asserts a tax lien, the threshold question is "whether and to what extent the taxpayer has `property' or `rights to property' to which the tax lien could attach." [99] The courts must look to state law to determine

the nature of the taxpayer's legal interest in specific property. [100] Federal tax law does not create a property right, it "merely attaches consequences . . . to rights created under state law." [101] However, once it is determined under state law that an interest is "property," federal law controls as to whether the federal tax lien attaches and how it is enforced. [102] State law is then powerless to exempt property from the federal tax lien. [103]

Section 6331 of the IRC authorizes the collection of delinquent taxes by levy upon all property and rights to property belonging to the taxpayer, or to which the federal tax lien has attached. [104] However, pursuant to IRC section 6334(a), certain property is exempt from levy, including certain types of pension plans. [105] The exemptions are few and section 6334(c) specifically limits them to those described in subsection (a). [106] This rule is amplified in Treasury Regulation section 301.6334−(1)(c), which states that:

> No other property or rights to property are exempt from levy except the property specifically exempted by Section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes. [107]

Accordingly, a taxpayer's interest in a pension plan other than the types specified in section 6334(a)(6) is not exempt from levy. [108] Even if IRC section 6334 did exempt a taxpayer's pension plan interest from levy, the federal tax lien would nevertheless attach to such interest. [109]

Finally, it should be noted that pursuant to Treasury Regulation section 1.401(a)−13(b)(2), a provision in an ERISA−qualified plan which satisfies IRC section 401(a)(13)'s anti−assignment and anti−alienation requirements shall not preclude either the enforcement of a federal tax levy made pursuant to section 6331 or the collection by the United States on a judgment resulting from an unpaid tax assessment. [110]

Clearly, then, to the extent a debtor owes federal taxes, the resulting lien extends to his or her pension interest and the IRS, outside of bankruptcy, can reach that interest by suit or levy.

V. *In re Lyons* [111]

Emmitt H. and Gloria Lyons filed a joint petition in Chapter 13 bankruptcy on December 18, 1987. [112] The IRS asserted secured claims totalling $14,740.40 against Mr. Lyons, a retired college professor, for income taxes, penalties, and interest for the taxable years 1980 through 1982 based on filed notices of tax liens. [113]

In December, 1972, the Teachers Insurance and Annuity Association ("TIAA") issued a retirement annuity contract to Mr. Lyons. [114] At the same time, Mr. Lyons was issued a retirement unit annuity certificate by the College Retirement Equities Fund ("CREF") [115] (these two contracts are hereinafter sometimes referred to as "the deferred annuity contracts."). On the date his bankruptcy petition was filed, Mr. Lyons also had a guaranteed right to receive and had been receiving future payments from four payout annuity contracts that he had purchased with the accumulated premiums paid into the TIAA/CREF retirement program by his employer. [116] In their Chapter 13 statement, the debtors valued the retirement accounts at $18,681.42 as of the petition date. [117]

Each of the deferred annuity contracts expressly provided that it "makes no provisions for cash surrender or loans and cannot be assigned." [118] Each contract also contained both an anti−alienation and anti−attachment provision. [119]

The debtors claimed that the pension fund and the income derived from it were exempt under section 522(d)(10) of the Bankruptcy Code and further argued that neither was property of the estate pursuant to section 541(c)(2). [120] The debtors objected to the secured claim asserted by the IRS against Mr. Lyons on the ground that the claim was not fully secured. [121] In relevant part, the debtors argued that Mr. Lyons' annuity contracts were not property of the bankruptcy estate and therefore could not constitute security for the IRS's tax claim. [122]

The IRS, however, argued that because it had filed notices of federal tax liens against the debtor, the Government had a secured claim with respect to the amount of the retirement income stream. [123]

The court interpreted the Government's argument "to be that the IRS has a secured claim on Mr. Lyons [sic] retirement fund to the extent of the `present value' of the debtor's future TIAA/CREF retirement benefits." [124] Since no evidence had been presented regarding the present value of those benefits, the court stated that it would hold a valuation hearing on the issue of valuation if it determined that the present value of the future payments was property of the estate. [125]

The court began its analysis by noting the broad definition of the term "property of the estate" in section 541(a)(1), [126] and that pursuant to section 541(c)(1), "restrictions on transfer will generally be inoperative to prevent inclusion of property in the estate." [127] The court acknowledged, however, that under section 541(c)(2), the debtor's beneficial interest in a trust, subject to enforceable transfer restrictions under applicable nonbankruptcy law, is enforceable in bankruptcy and the interest from the trust is not property of the bankruptcy estate. [128]

The *Lyons* court imposed a "two−fold burden" on the debtors, in light of the Supreme Court's holding in *Patterson v. Shumate*, [129] that section 541(c)(2)'s reference to "applicable nonbankruptcy law" encompasses *any* relevant law, including federal law. The debtors must show, (1) that under New York law [130] "the pensions' provisions immunizing the pensions from the reach of ordinary creditors are effective," [131] and (2) that "such provisions are effective under Federal law against a Federal tax lien." [132]

The court found that the debtors had met the first burden, since the anti−assignment and anti−attachment provisions in both the deferred annuity contracts and the payout annuity contracts protected Mr. Lyons' pensions from the reach of ordinary creditors. [133] Section 541(c)(2), therefore, barred the pensions from becoming property of the estate for the benefit of ordinary creditors. [134] Moreover, the court noted that virtually all of the courts which had considered the issue had concluded that TIAA/CREF retirement plans constitute spendthrift trusts under New York law, [135] and thus were excluded from the debtors' bankruptcy estates (again presumably for the benefit of ordinary creditors) pursuant to section 541(c)(2). [136]

In the court's view the anti−assignment and anti−attachment provisions at issue applied to both the corpus and the income stream of Mr. Lyons' retirement plans, and so both were protected from ordinary creditors. [137] The court therefore rejected the Government's argument that Mr. Lyons' unqualified right to receive future periodic payments under the TIAA/CREF plan remained property of the estate even if section 541(c)(2) operated to exclude the corpus of the pension plan from the estate. [138]

The court, however, found that Mr. and Mrs. Lyons had failed to meet their second burden, as they had failed to demonstrate that the anti−assignment and anti−attachment provisions rendered the Government's tax lien ineffective against their rights in the annuity contracts. [139] Relying on *Patterson v. Shumate* for the proposition that the term "applicable nonbankruptcy law" in section 541(c)(2) embraces more than state spendthrift trust law, the *Lyons* court found that "Federal tax lien law is also an applicable nonbankruptcy law," [140] in the same way that ERISA was held to be a source of applicable nonbankruptcy law in *Patterson v. Shumate*. [141]

The court demonstrated, in three short steps, the ineffectiveness of the anti−alienation and anti−assignment restrictions as against the Government's tax lien. First, "[o]utside bankruptcy, a federal tax lien may attach to a taxpayer's vested right, under a trust or contract, to receive periodic payments or distributions of property then due or that will become due in the future." [142] Second, "[t]he courts of New York have long recognized that spendthrift trusts, although effective against ordinary creditors, are ineffective against Federal tax liens." [143] Finally, the debtors had failed to point to any specific provision of federal law that would exempt Mr. Lyons' pension rights from the Government's tax lien. [144]

As a result, the court concluded that the anti−alienation and anti−assignment provisions in both the deferred annuity contracts and the four payout annuity contracts were not "enforceable under applicable nonbankruptcy law" against the IRS within the meaning of section 541(c)(2). [145] Therefore, under section 541(c)(1), Mr. Lyons' pension rights were the property of the debtor's bankruptcy estate, and pursuant to section 506(a), the IRS had a secured claim against the pension rights to the extent of their value. [146]

VI. Was *In re Lyons* Correctly Decided?

A. Enforceability of ERISA's Anti−alienation and Assignment Provisions

It is clear that in order for a debtor to exclude property from his or her bankruptcy estate under section 541(c)(2), the transfer restrictions at issue must be enforceable. The plain language of the statute dictates that result, and *Patterson v. Shumate* supports it. [147] However, the question remains as to against whom the transfer restrictions must be enforceable. If the restrictions need only be enforceable against a debtor's ordinary creditors, regardless of the existence of any "extraordinary" creditor seeking to include the debtor's pension plan interest in the estate, then the decision reached by the bankruptcy court in *Lyons* is incorrect. On the other hand, if a proper determination of the enforceability of a pension plan's transfer restrictions can only be made in reference to the particular creditor seeking inclusion of the pension plan interest in the debtor's estate, then *Lyons* was correctly decided, since the restrictions at issue in that case clearly were not enforceable against the IRS.

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sheds little light on this issue, since in that case it was the trustee [148] of the debtor's Chapter 7 estate who was seeking access to the debtor's ERISA−qualified pension plan. [149]

Some insight, however, may be gained from examining the interplay between sections 506 and 541 of the Bankruptcy Code. Pursuant to section 506(a), the determination of a creditor's secured status is made by reference to "the extent of the value of such creditor's interest in the estate's interest in such property." [150] Assuming, therefore, that a creditor's status as a secured claimant is dependent upon having an interest in property of the debtor's bankruptcy estate, [151] it would seem appropriate to also make a creditor−specific determination of whether property in which that creditor asserts a security interest is included in the estate. When the property in question is a debtor's beneficial interest in a pension plan, it follows that the enforceability of the plan's restrictions on transfer−which can be dispositive of the includibility of the plan interest in the estate−should also be determined by reference to the particular creditor at issue. Moreover, there is nothing in section 541(c)(2) which on its face would deprive a creditor of an individualized enforceability determination.

On the other hand, the determination of what constitutes property of a debtor's estate may be so fundamental to the scheme of the Bankruptcy Code that a section 541(c)(2) enforceability determination must be made by reference to the trustee in his or her role as representative of the estate under section 323(a) [152] or as creditor under section 544(a). [153] Indeed, the most troubling aspect of the *Lyons*' approach may be the fact that debtor X and debtor Y could each have identical rights in the very same pension plan, and X's interest would be property of his estate, while Y's interest would not be property of her estate, solely because the IRS had asserted a secured claim against X and had no such claim to assert against Y. [154] It could be argued, of course, that such a disparity is not dissimilar from that which would result if X and Y lived in different states and the pension plan at issue qualified as a spendthrift trust under the laws of one state, but not the other. In that example, however, at least the determination of the includibility of the pension plan would be uniform within each state. [155]

B. Other Bankruptcy Court Cases.

In determining whether *Lyons* was correctly decided it is helpful to look at other bankruptcy court decisions that have addressed whether a debtor's pension plan interest is included in the debtor's bankruptcy estate. Of particular relevance are cases which also involved the IRS. In such cases, as in *Lyons*, the includibility of a pension plan interest in a debtor's estate has generally arisen in the context of a dispute as to the secured status of a claim made by the IRS. However, what appears to be a relatively straight−forward issue has received what can best be described as uneven treatment.

For example, in *Jacobs v. IRS (In re Jacobs)*, [156] the Chapter 13 debtors filed a complaint to declare their unpaid federal income tax liabilities for the taxable years 1985 and 1986 as general unsecured claims. [157] The debtor−husband ("debtor") conceded that his pension plan interest was includible in his bankruptcy estate. [158] The debtor argued, however, that IRC section 401(a)(13) precluded the IRS's tax lien from attaching to the pension plan. [159] Interestingly, the debtor cited *Patterson v. Shumate* in support of that proposition. [160] The IRS contended that under Treasury Regulation 1.401(a)−13(b)(2), an anti−alienation provision which satisfies the requirements of section 401 does not

preclude the attachment of a federal tax lien to a qualified pension plan. [161] The bankruptcy court, however, deemed it unnecessary to consider the validity of that regulation and looked instead to "the (relevant) statutes and the U.S. Supreme Court." [162] The court held that the IRS had a valid lien on all of the debtor's assets, including his pension plan. [163]

The court stated that the spendthrift clause in the debtor's pension plan would, under Pennsylvania law, presumably insulate the plan from the claims of ordinary creditors. [164] However, for federal tax liens, state law is only relevant in determining the nature of the taxpayer's legal interest in property. [165] Federal law then attaches consequences to whatever rights are created under state law. [166] Accordingly, the debtor's pension plan was not shielded from the IRS, since such plans are not included in the specific and exclusive exemptions from levy set forth in IRC section 6334. [167]

It seems likely that if the court had to decide whether the pension plan was included in the debtor's estate, the court in *Jacobs* would have employed the same line of reasoning, and reached the same result, as the bankruptcy court in *Lyons*. The *Jacobs* court stressed that *Patterson v. Shumate* did not involve the IRS, but rather the ability of the bankruptcy trustee to gain access to a debtor's ERISA−qualified pension plan. [168] Therefore, the Supreme Court's decision to deny the trustee such access "does not have a significant bearing on the rights of the IRS to reach the same assets under the [IRC]." [169]

In *Anderson v. United States* (*In re Anderson*), [170] the Chapter 13 debtor filed a complaint to determine the nature and extent of the IRS federal tax lien against his property. [171] Relying on *Patterson v. Shumate*, the Bankruptcy Appellate Panel ("BAP") held that the debtor's interest in an ERISA−qualified pension plan was not property of his bankruptcy estate pursuant to section 541(c)(2) of the Bankruptcy Code. [172] It seems the possibility that *Patterson v. Shumate* might not be dispositive of that issue in a case involving the IRS never occurred to the BAP.

Nevertheless, the BAP held that the federal tax lien attached to the debtor's pension plan, agreeing with the bankruptcy court that Anderson's beneficial interest in the plan constituted property, or a right to property, within the meaning of IRC section 6321. [173] The opinion is silent on the question of whether the attachment of the federal tax lien to Mr. Anderson's pension gave the IRS a secured claim in his bankruptcy proceeding, in spite of the exclusion of the pension from the estate. As a result, the bankruptcy consequences of the BAP's determination of the nature and extent of the federal tax lien on the debtor's property are unclear.

In *In re Perkins*, [174] the debtors objected to the proof of claim filed by the IRS on the ground that the debtor−husband's pension rights should not be considered in determining the extent to which the IRS's claim was secured. [175] The debtors, however, did not dispute the validity of the tax lien, or its attachment to Mr. Perkins' interest in his pension plan. [176] Instead, the debtors argued that since that interest was subject to the plan's spendthrift provisions, Mr. Perkins' pension was not part of his bankruptcy estate and therefore did not constitute security for the IRS's claim. [177] In other words, since the estate had no interest in the pension, "the extent and value" of the IRS's interest in the estate's interest in the pension was, within the meaning of section 506(a), zero. [178]

Like the bankruptcy court in *Lyons*, the court in *Perkins* held that the "applicable nonbankruptcy law," that is, the law applied for attachment and levy of federal tax liens, does not restrict the transfer of a beneficial interest of the debtor in a trust, thus rejecting the debtors' "property of the estate" argument. [179] Accordingly, the court denied the debtors' objection to the secured status of the IRS's claim and the court held that the claim would be measured according to the present value of the stream of pension payments. [180]

Less convincing, it seems, was the court's analysis of the relationship between sections 541 [181] and 506 [182] of the Bankruptcy Code. [183] The court stated that under section 506, bankruptcy courts are to value a secured party's interest by reference to the "`interest of the estate in the property', and not according to whether the property meets the precise definition of `property of the estate' as set forth in section 541." [184] The court, at least insofar as the IRS was concerned, made it clear that it was willing to look beyond what was property of the estate in determining the value of the Government's secured claim pursuant to section 506. [185] The weak link in the court's analysis is the inference that it is the bankruptcy estate's interest in the pension plan at issue which "allow[s] attachment [of the federal tax lien] and levy on Mr. Perkins' pension rights by the IRS." [186] That is not the case. While the classification of the IRS's claim as a secured claim *is* dependent upon the *estate* having an interest in the debtor's pension plan, [187] the IRS's status as a

secured creditor, *i.e.*, as a creditor with a lien on the *debtor's interest* in the pension plan, *is not*. [188]

C. Is Lyons in conflict with Patterson v. Shumate?

While the correctness of the bankruptcy court's holding in *In re Lyons* is not beyond dispute, it is certainly both reasonable and defensible. It offers the only comprehensive analysis of the narrow issue of whether a debtor's interest in an ERISA−qualified plan that is not shielded from the IRS is included in the bankruptcy estate. *Lyons* is not in direct conflict with the Supreme Court's decision in *Patterson v. Shumate*, since that case involved the ability of the bankruptcy trustee, rather than the IRS, to gain access to a debtor's ERISA−qualified pension plan. [189]

Moreover, the result reached in *Lyons* does not appear to contravene the policy considerations discussed by the Court in *Patterson*. [190] First, the treatment of Mr. Lyons' pension benefits would not have been any different outside of bankruptcy, since the federal tax lien would have attached to them in any event. [191] Second, the holding in *Lyons* does not undercut ERISA's goal of protecting pension benefits, since *Lyons* does not create, but rather merely acknowledges the vulnerability of pension benefits to attachment and levy with respect to the collection of federal tax liabilities. [192] Third, *Lyons* will not result in disparate national treatment of pension benefits. [193] Although a debtor's pension rights may or may not come into his or her estate depending upon whether the IRS is treated as a secured creditor, the treatment of such pension rights will not vary state−by−state. Treatment would vary if the characterization of a plan under state spendthrift trust law determined whether the plan was property of the estate. [194]

VII. Potential Consequences of the Holding in *In re Lyons*

A. Plan Disqualification

As *Lyons* demonstrates, the IRS's presence in a bankruptcy case as a secured creditor may cause a debtor's pension plan interest to be included in the property of the estate. Due to the unenforceability of the plan's transfer restrictions against the IRS, [195] a bankruptcy court could order a pension plan administrator to distribute a debtor's interest in a qualified plan to the bankruptcy trustee. This order is not one of the listed exceptions to ERISA's anti−alienation requirement. [196] Such a distribution, therefore, might result in the disqualification of the entire ERISA plan, with disastrous consequences for both the employer settlor and all plan participants. [197] A number of courts have recognized this possibility, [198] and the IRS advocated that position in *McLean v. Central States, Southeast and Southwest Areas Pension Fund*. [199]

B. Complications in Chapter 7 Cases

In a Chapter 7 case, the inclusion of pension plan interests in bankruptcy estates could lead to strange and arguably inequitable results due to the operation of Bankruptcy Code section 724(b). [200] Because section 724(b) subordinates tax liens, the proceeds of the debtor's pension plan interest will be distributed to certain priority creditors as well as the IRS. This may occur despite the fact that such creditors would be unable to reach the debtor's pension plan interest outside of bankruptcy, and that absent the presence of the IRS in the case, section 541(c)(2) would bar the pension from becoming property of the estate for the benefit of either priority or ordinary creditors. [201]

C. Chapter 11 and 13 Problems

Significant problems may also arise in Chapter 11 and Chapter 13 cases. In these cases debtors, in order to get a plan confirmed, may find themselves in the unenviable position of having to fully pay the IRS's secured claim without access to the asset securing the claim since such monies are locked up in the debtor's pension plan. [202]

D. Trustee's Inability to Compel the Immediate Turnover of Assets from an ERISA−Qualified Plan Where Debtor's Right to Reach Such Funds is Dependent Upon Occurrence of Some Future Event

In light of the well−established principle that a trustee's claim to estate property is no greater than the debtor's claim as of the petition date, [203] it is unclear whether a trustee can compel the immediate turnover of the debtor's interest in a pension plan when the debtor has no access to his or her interest. [204] The cases which have dealt directly with this

issue have reached conflicting results. [205] The majority of courts prohibit turnover [206] which may also create problems in accurately valuing the debtor's pension plan interest.

VIII. Exemption of Pension Plan Interests Under Section 522 in Light of *Patterson v. Shumate*

The consequences flowing from the debtor's inability to *exclude* his or her interest in an ERISA−qualified plan from the bankruptcy estate pursuant to section 541(c)(2) would be moderated if the debtor could nonetheless *exempt* such interest under section 522 of the Bankruptcy Code. [207] As previously discussed, section 522(b)(2)(A) permits a debtor to exempt "any property that is exempt under Federal law, (other than section 522(d)), or State or local law . . . ." [208] In so doing, section 522(b)(2)(A) presents a question of statutory interpretation similar to the one resolved by the Supreme Court in *Patterson v. Shumate, i.e.*, whether ERISA constitutes "other federal nonbankruptcy law" so as to exempt ERISA−qualified plan benefits from the property of the estate. [209]

As noted earlier, a clear majority of courts which have addressed this issue, including four circuit courts of appeals, have held that ERISA is not "other Federal law" for purposes of section 522(b)(2)(A). [210] However, "[a] small but growing minority of courts have held that ERISA's anti−alienation provision does constitute `other federal law' under [Bankruptcy Code section] 522(b)(2)(A), thus making those benefits exempt from creditors' claims." [211]

This conflict was seemingly put to rest by the Supreme Court's holding in *Patterson v. Shumate* that a debtor's interest in an ERISA−qualified plan was excluded from his or her bankruptcy estate. Since the interest is excluded it is unnecessary to see if section 522 exemptions are applicable. The issue, of course, raises its head if *Lyons* was correctly decided and ERISA−qualified plan benefits are, in certain circumstances, included in the property of the estate. [212] Arguably, the Supreme Court's reliance on the plain language of section 541(c)(2) in *Patterson v. Shumate* impels both a similar analysis and a consistent interpretation of the language of section 522(b)(2)(A), [213] *i.e.*, that the term "other Federal (nonbankruptcy) law" embraces ERISA.

A more relevant question may be whether, in a case like *Lyons*, the inclusion of ERISA within "other Federal (nonbankruptcy) law" would permit a debtor, who elects the state law exemptions, to exempt his or her pension plan interest from the estate pursuant to section 522(b)(2)(A). The answer to that question appears to depend upon whether ERISA's anti−alienation and assignment provisions constitute an *exemption* within the meaning of section 522(b)(2)(A), [214] and if so, whether the debtor's ability to exempt his or her interest in an ERISA−qualified plan is dependent upon the enforceability of the plan's transfer restrictions against the IRS. These issues are addressed in inverse order.

First, the effectiveness of an ERISA−qualified plan's anti−assignment and anti−alienation provisions against the IRS does not seem to be, a prerequisite to the debtor's ability to exempt a pension plan interest by invoking ERISA as "other Federal law" within the meaning of section 522(b)(2)(A). This position is supported by section 522(c)(2), which provides that a debtor remains liable for debts secured by a tax lien if notice has been properly filed. [215] Simply put, if the IRS's ability to levy upon property precluded the exemption of such property, section 522(c)(2) would be superfluous.

Second, but more fundamentally, it must be determined whether an ERISA−qualified pension plan's prohibition on alienation and assignment constitutes a section 522(b)(2)(A) federal exemption in a bankruptcy proceeding. [216] The legislative history of section 522(b)(2)(A) provides an illustrative list of property which might be exempted under federal laws other than the Bankruptcy Code. [217] In *Goff*, [218] "the seminal case among the majority position," [219] the Fifth Circuit concluded that ERISA does not constitute "other Federal law" for purposes of section 522(b)(2)(A) by primarily relying on the failure of Congress to include ERISA in its list of illustrative federal exemption statutes. [220]

It is doubtful that the reasoning employed by the Fifth Circuit in *Goff*, *i.e.*, that courts should resort to section 522(b)(2)(A)'s legislative history to determine what the term "other Federal law" means, remains viable in light of *Patterson v. Shumate* and other Supreme Court decisions which look to the plain language of the statutory provision(s) in questions of statutory interpretation. [221] In *Goff*, however, the Fifth Circuit also found ERISA's anti−assignment and alienation provisions to be "different in kind from those contained in the statutes listed in the Code's legislative history." [222] The court reasoned that while ERISA's restraints on alienation are contingent in nature,

the restraints in the statutes listed in section 522(b)(2)(A)'s legislative history are absolute prohibitions. [223] The court stated:

> ERISA merely provides that *as a condition of obtaining qualified status*−with its attendant tax and other benefits−a pension plan must preclude alienation or assignment of its benefits. It does not prohibit pension funds from permitting alienation or assignment; rather, while it encourages and favors qualified plans, it envisions that "disqualified" plans may be formed which are still subject to ERISA's regulatory scheme but which do not restrict alienation or assignment. By contrast, the listed statutes which establish or guarantee certain benefits *directly preclude all* such benefits from alienation or assignment. [224]

However, in *In re Komet,* [225] the seminal case among the minority view that ERISA plans are eligible for exemption under the "other Federal law" scheme of section 522(b)(2)(A), [226] the bankruptcy court challenged the reasoning of *Goff* and its progeny. The court convincingly argued that Congress did not require ERISA plans to contain anti−alienation provisions merely to secure favorable tax treatment, but rather established favorable tax status for qualifying plans as an inducement for voluntary compliance with ERISA's anti−alienation mandate. [227] Under the *Komet* view, "the anti−alienability provision is the end and the tax benefits part of the means, rather than the other way around." [228]

In light of *Lyons*, the issue of whether an ERISA−qualified pension plan's prohibition on alienation and assignment constitutes a section 522(b)(2)(A) federal exemption in a bankruptcy proceeding may receive further attention. To date, however, except for the *Goff* court's somewhat lukewarm attack on that front, it does not appear that the characterization of ERISA's anti−alienation and assignment requirements as an exemption has been seriously challenged.

IX. Consequences of Allowing ERISA−Qualified Plan Interests to be Exempted

In a *Lyons* situation, where the debtor's interest in an ERISA−qualified plan is included as property of the estate pursuant to section 541(c)(1), allowing the debtor to exempt the pension plan interest under section 522(b)(2)(A), [229] has a number of advantages. First, the fact that the plan's transfer restrictions are unenforceable against the IRS is not ignored. Second, because the debtor's interest in the plan is property of the estate the IRS is not deprived of the status of secured creditor under section 506(a). Third, a Chapter 7 debtor's ordinary creditors will not unfairly benefit from the inclusion in the estate of a pension plan interest against which they would otherwise be unable to collect. Finally, the exemption of the pension plan interest will eliminate the risk that a distribution of such interest to the bankruptcy trustee will result in plan disqualification. [230]

Of course, the exemption for a pension plan interest available to a debtor electing the federal exemptions set out in section 522(d) would be limited to payments which are reasonably necessary for the support of the debtor and his or her dependent(s). [231]

Conclusion

In *Patterson v. Shumate*, the Supreme Court recognized that the "uniform national treatment of pension benefits" was an important policy underlying ERISA. The Court furthered that policy when it relied on the Bankruptcy Code's plain language to conclude that ERISA constituted "applicable nonbankruptcy law" for purposes of section 541(c)(2).

However, the plain language of section 541(c)(2) also dictates that in order for a debtor to exclude property from his or her bankruptcy estate under section 541(c)(2), the transfer restrictions at issue must be enforceable. *In re Lyons* has shown that ERISA's restrictions on alienation and assignment may not be enforceable against the IRS.

The inclusion of a debtor's ERISA−qualified pension plan interest in his or her bankruptcy estate in a *Lyons* situation resurrects a number of legal, procedural and practical problems. Employing the "plain language view" to interpret the phrase "other Federal law" for purposes of section 522(b)(2)(A) may ultimately ameliorate those problems by permitting the exemption of pension plan interests which cannot be excluded from property of the estate.

Only time will tell whether that partial solution will prove to be viable. Meanwhile, debtors and the courts face a rematch with problems and issues many thought had been definitively resolved by *Patterson v. Shumate*.

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**FOOTNOTES:**

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[1] 11 U.S.C. § 541(a)(1) (1994).Back To Text

[2] Id. § 541(c)(1).Back To Text

[3] Id. § 541(c)(2). Back To Text

[4] Id.; *see* Morter v. Farm Credit Servs., 937 F.2d 354, 357 (7th Cir. 1991) (stating that § 541(c)(2) not limited to "traditional" spendthrift trusts), cert. denied, 505 U.S. 1204 (1992); John Hancock Mut. Life Ins. Co. v. Watson (In re Kincaid), 917 F.2d 1162, 1169 (9th Cir. 1990) (concluding that debtor's interest in employer−funded ERISA plan excluded from bankruptcy estate). Back To Text

[5] 29 U.S.C. § 1056(d)(1) (1988). Pursuant to § 206 of ERISA, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Id. IRC § 401(a)(13) provides 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." I.R.C. § 401(a)(13) (1988). *See* Treas. Reg. § 1.401(a)−13(b)(1) (as amended in 1988) (stating that "[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"). Back To Text

[6] 504 U.S. 753 (1992) (discussing whether trustee can recover interest in ERISA plan for inclusion in estate).Back To Text

[7] Id. at 758.Back To Text

[8] Id. at 765. For a discussion of *Patterson v. Shumate* and its effect, see generally Jeffrey R. Houle, *Patterson and Its Progeny: ERISA−Qualified Pension Plans as Property of the Bankruptcy Estate after* Patterson v. Shumate, 8 Me. B.J. 298 (1993); Jack E. Karns, *Can the Internal Revenue Service Levy and Collect Against ERISA Qualified Pension Plan Benefits in Bankruptcy Proceedings?*, 27 Wake Forest L. Rev. 657, 660 (1992); Hon. Sidney M. Weaver & Robin J. Baikovitz, *The Status of ERISA Plan Benefits in* Bankruptcy After Patterson v. Shumate, 17 Nova L. Rev. 427, 427−28 (1992).Back To Text

[9] *See* Regan v. Ross, 691 F.2d 81, 86 (2d Cir. 1982) (holding § 541(c)(2) inapplicable to pension benefits).Back To Text

[10] *See* Brooks v. Interfirst Bank (In re Brooks), 844 F.2d 258, 261 (5th Cir. 1988) (reaffirming *Goff*); Goff v. Taylor (In re Goff), 706 F.2d 574, 582 (5th Cir. 1983) (holding reference to "applicable nonbankruptcy law" limited to state "spendthrift trusts").Back To Text

[11] *See* Reed v. Drummond (In re Reed), 951 F.2d 1046, 1049−50 (9th Cir. 1991) (*reaffirming Daniel*); Daniel v. Security Pac. Nat'l Bank (In re Daniel), 771 F.2d 1352, 1360 (9th Cir. 1985) (holding that "applicable nonbankruptcy law" in § 541(c)(2) was intended to reference state "spend thrift trust" law), cert. denied, 475 U.S. 1016 (1986). Back To Text

[12] *See* Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488, 1490−91 (11th Cir. 1985) (noting that pension not excluded under § 541(c)(2) unless it is spendthrift trust) *superseded by statute as stated in,* In re Gherman, 101 B.R. 369, 371 n.4 (Bankr. S.D. Fla. 1989) (providing for exemption of ERISA retirement plans qualified under applicable provisions of IRC from claims of creditors of beneficiary).Back To Text

[13] *See* Goff, 706 F.2d at 582. The court defined a spendthrift trust as,

> a trust created to provide a fund for the maintenance of a beneficiary, with only a certain portion of the total amount to be distributed at any one time. The settlor places `spendthrift' restrictions on the trust, which operate in most states to place the fund beyond the reach of the beneficiary's creditors, as well as to secure the fund against the beneficiary's own improvidence.

Id. at 580.Back To Text

[14] Id. at 581 (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 176 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6325).Back To Text

[15] Patterson v. Shumate, 504 U.S. 753, 762 (1992) (quoting 11 U.S.C. § 522(d)(10)(E)).Back To Text

[16] Id.Back To Text

[17] 29 U.S.C. § 1144(d) (1988). This section provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except [pre−existing federal pension law]) or any rule or regulation issued under any such law." Id.Back To Text

[18] Goff, 706 F.2d at 586−87; *see* Daniel v. Security Pac. Nat'l Bank (In re Daniel), 771 F.2d 1352, 1359 (9th Cir. 1985); Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Samore v. Graham (In re Graham), 726 F.2d 1268, 1271 (8th Cir. 1984).Back To Text

[19] *See* Velis v. Kardanis, 949 F.2d 78, 83 (3d Cir. 1991) (holding that "applicable nonbankruptcy law" is unambiguous language that embraces federal law as well as spendthrift trust law).Back To Text

[20] *See* Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.") (citation omitted); Rubin v. United States, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete . . . ."); Anderson v. Raine (In re Moore), 907 F.2d 1476, 1477 (4th Cir. 1990) (holding "nonbankruptcy law is not limited to state spendthrift trust law"). Back To Text

[21] *See* Forbes v. Lucas (In re Lucas), 924 F.2d 597, 601 (6th Cir.) (finding applicable nonbankruptcy law includes "all nonbankruptcy laws, state and federal, under which transfer restriction is enforceable, rather than being limited to state law or state spendthrift trust law"), cert. denied, 500 U.S. 959 (1991); *see also* In re Ralstin, 61 B.R. 502, 503 (Bankr. D. Kan. 1986) ("[I]f Congress had intended § 541(c)(2) to only apply to state spendthrift trusts, the term `spendthrift trust' would have appeared in the statute, rather than the phrase `applicable nonbankruptcy law.'").Back To Text

[22] *See* Gladwell v. Harline (In re Harline), 950 F.2d 669, 674 (10th Cir.) (interpreting "applicable nonbankruptcy law" to include both federal and state law as consistent with Congress's use of that same term in other sections of Bankruptcy Code) (citing 11 U.S.C. § 108(a),(b),(c)), cert. denied, 504 U.S. 1204 (1991).Back To Text

[23] 907 F.2d 1476 (4th Cir. 1990).Back To Text

[24] Id. at 1478.Back To Text

[25] Id. at 1477.Back To Text

[26] Id. at 1478 (citing with approval In re Ralstin, 61 B.R. 502, 503 (Bankr. D. Kan. 1986)).Back To Text

[27] Id. at 1477−78 (citing 11 U.S.C. §§ 1125(d), 108(a)); *see* Velis v. Kardanis, 949 F.2d 78, 81 (3d Cir. 1991) (citing 11 U.S.C. § 365(h)(1)(B)). Back To Text

[28] Moore, 907 F.2d at 1478 (declining to follow cases that had reached conclusion based on legislative history).Back To Text

[29] Id. at 1479−80 (holding that ERISA constitutes "applicable nonbankruptcy law"); *see* Smith v. Mirman (In re Mirman), 749 F.2d 181, 183 (4th Cir. 1984) (stating that "an employee's accrued benefits under a qualified plan may not be reached by judicial process in aid of a third−party creditor").Back To Text

[30] Moore, 907 F.2d at 1480. In addition, the court stated that "our holding avoids the specter of a bankruptcy trustee disqualifying an entire plan from tax exempt status by seeking turnover of a single bankrupt's interest in the plan." Id.Back To Text

[31] *See* Regan v. Ross, 691 F.2d 81, 85 (2d Cir. 1982) (finding "legislative history pertaining to

§ 541(c)(2) refers only to spendthrift trusts"); Goff v. Taylor (In re Goff), 706 F.2d 574, 582 (5th Cir. 1983) (stating "applicable nonbankruptcy law" exempts only spendthrift trusts); Daniel v. Security Pac. Nat'l Bank (In re Daniel), 771 F.2d 1352, 1360 (9th Cir. 1985) (holding "`applicable nonbankruptcy law' refers only to state spendthrift trust law"); Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488, 1490 (11th Cir. 1985) (concluding legislative history dictates "applicable nonbankruptcy law" applies solely to spendthrift trusts).Back To Text

[32] *See* Forbes v. Lucas (In re Lucas), 924 F.2d 597, 602 (6th Cir. 1991) (following *Moore*, concluding plain meaning of § 541(c)(2) forces finding that "applicable nonbankruptcy law" not limited to spendthrift trusts); Moore, 907 F.2d at 1477 (holding "`applicable nonbankruptcy law' not limited to state spendthrift trust law").Back To Text

[33] 951 F.2d 1046, 1049 (9th Cir. 1991). Back To Text

[34] 771 F.2d 1352, 1360 (9th Cir. 1985) (holding "applicable nonbankruptcy law" refers only to state spendthrift trust law), cert. denied, 475 U.S. 1016 (1986).Back To Text

[35] *See* Reed, 951 F.2d at 1049−50.Back To Text

[36] 726 F.2d 1268 (8th Cir. 1984). Back To Text

[37] Id. at 1271−72. The court in *Graham* held that ERISA does not preclude the inclusion of pension plan benefits in the debtor's bankruptcy estate. Id. at 1273.Back To Text

[38] Id. at 1272−73.Back To Text

[39] Id. at 1273−74 (citing 11 U.S.C. § 522); *see* supra note 16 and accompanying text.Back To Text

[40] 11 U.S.C. § 522(b) (1994).Back To Text

[41] The following states have enacted opt−out legislation which prohibits residents from electing the federal exemptions found in § 522(d) of the Bankruptcy Code: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.Back To Text

[42] 11 U.S.C. § 522(b)(1).Back To Text

[43] Id. § 522(d)(10).Back To Text

[44] Id. § 522(b)(2)(A).Back To Text

[45] Id.Back To Text

[46] Samore v. Graham (In re Graham), 726 F.2d 1268, 1274 (8th Cir. 1984).Back To Text

[47] Id.Back To Text

[48] Daniel v. Security Pac. Nat'l Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985); Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985); Goff v. Taylor (In re Goff), 706 F.2d 574 (5th Cir. 1983).Back To Text

[49] *See* In re Shaker, 137 B.R. 930, 946 (Bankr. W.D. Wisc. 1992). The court in *Shaker* stated that a majority of courts have held that ERISA does not constitute "other federal law" for purposes of 11 U.S.C. § 522(b)(2)(A), but held, to the contrary, that ERISA does constitute "other federal law." Id. Back To Text

[50] *See* Karns, supra note 9, at 680; *see also* Marvin Krasny & Bruce Grohsgal, *Whose Pension Is It Anyway? − −* ERISA and the Bankruptcy Code, 97 Com. L.J. 12, 26 (1992) ("Perhaps in response to the rulings of the U.S. Courts of Appeals which exposed ERISA qualified pension plans to the claims of creditors, a number of states enacted state exemption schemes in accordance with Section 522(b)(2)(A) . . . .").

The following are examples of state statutes enacted to preclude ERISA−qualified pension plans from the bankruptcy estate: Ariz. Rev. Stat. Ann. § 33−1126(C) (1987) (exempting qualified retirement plans from "any and all claims" of creditors); Ga. Code Ann. § 18−4−22.1 (1982) (stating funds of pension subject to ERISA not subject to process of garnishment); Mass. Gen. ch. 235, § 34a (1990) (protecting ERISA plans and qualified IRA's from creditors); Tex. Prop. Code Ann. § 42.00−1 (West 1990) (exempting pension plans from attachment).Back To Text

[51] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (state law regarding ERISA is preempted); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1985) (ERISA broadly preempts state laws); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108 (1983) (holding New York's Human Rights Law partially preempted by ERISA).Back To Text

[52] 486 U.S. 825 (1988) (interpreting ERISA's peremptory provision, specifically "relate to" language).Back To Text

[53] *See* 29 U.S.C. § 1144(a) (1988) (stating "[e]xcept as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); *see also* Gaines v. Nelson (In re Gaines), 121 B.R. 1015, 1023−24 (W.D. Mo. 1990) (finding Missouri statute preempted by ERISA); In re McIntosh, 116 B.R. 277, 280 (Bankr. N.D. Okla. 1990) (holding ERISA preempts Oklahoma statute); In re Starkey, 116 B.R. 259, 263−64 (Bankr. D. Colo. 1990) (concluding Colorado statute does not avoid ERISA pre−emption).Back To Text

[54] 943 F.2d 1435 (5th Cir. 1991). In *Dyke*, the court held that ERISA does not preempt the state exemption scheme of Texas Property Law. Id. at 1450. The court reasoned that ERISA cannot be construed to affect policies of other federal laws. Id. Specifically, the ERISA pre−emption clause would impact the ability of the Bankruptcy Code to ensure a debtor's fresh start after bankruptcy. Id.Back To Text

[55] 943 F.2d 1451, 1452−53 (5th Cir. 1991) In *Volpe*, the court relied on the decision in *Dyke*, and held that ERISA does not preempt a state exemption scheme. Id. at 1452−53. The court reasoned that such a pre−emption would "modify" and "impair" the enforcement scheme of the Bankruptcy Code. Id.Back To Text

[56] Patterson v. Shumate, 504 U.S. 753, 755 (1992).Back To Text

[57] Id.Back To Text

[58] Id.Back To Text

[59] Id.Back To Text

[60] Id.Back To Text

[61] Patterson, 504 U.S. at 755.Back To Text

[62] Id. at 755−56.Back To Text

[63] Id. at 756.Back To Text

[64] Id.Back To Text

[65] 83 B.R. 404 (W.D. Va. 1988).Back To Text

[66] Id. at 406−09.Back To Text

[67] Id. at 410.Back To Text

[68] 907 F.2d 1476, 1481 (4th Cir. 1990) (holding "applicable nonbankruptcy law" includes ERISA).Back To Text

[69] Shumate v. Patterson, 943 F.2d 362, 366 (4th Cir. 1991).Back To Text

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

[71] Id. at 757.Back To Text

[72] Id. (finding plain language of ERISA and Bankruptcy Code determinative). Back To Text

[73] *See, e.g.,* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (stating that Bankruptcy Code's plain meaning should be conclusive except where application is clearly contrary to legislative intent) (citations omitted).Back To Text

[74] Patterson, 504 U.S. at 758 (emphasis added).Back To Text

[75] Id.Back To Text

[76] Id.Back To Text

[77] Id.Back To Text

[78] Id. at 759.Back To Text

[79] Patterson, 504 U.S. at 759; *see* 29 U.S.C. § 1056(d)(1) (1988) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.").Back To Text

[80] Patterson, 504 U.S. at 759 (stating that qualified trust must contain an anti−alienation provision protecting plan benefits under IRC) (citing I.R.C. § 401(a)(13)).Back To Text

[81] Id. at 760 (citing 29 U.S.C. § 1132(a)(3), (5), which authorizes civil action to enjoin acts which violate ERISA or terms of any qualified plan).Back To Text

[82] Id.Back To Text

[83] Id. at 761.Back To Text

[84] Id. at 762.Back To Text

[85] Patterson, 504 U.S. at 761−62.Back To Text

[86] Id. at 762.Back To Text

[87] Id. at 762−63 (giving examples of pension plan interests which need not comply with ERISA's anti−alienation requirement). Back To Text

[88] Id. at 763−64 (defining estate to include "all legal [or] equitable interests of the debtor in property as of the commencement of the case") (quoting 11 U.S.C. § 541(a)(1)).Back To Text

[89] Patterson, 504 U.S. at 764.Back To Text

[90] Id. Back To Text

[91] Id. Back To Text

[92] Id. (indicating that uniform treatment minimizes manipulation of bankruptcy laws "in order to gain access to otherwise inaccessible funds") (citing Butner v. United States, 440 U.S. 48, 55 (1979) (commenting that "uniform treatment of property interests" prevents windfall recovery "merely by reason of the happenstance of bankruptcy") (quoting Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 609 (1961)).Back To Text

[93] Id. (noting this will ensure that promised benefit will be received upon retirement if requisite conditions have been fulfilled) (citations omitted); *see* Jeanne Cullinan Ray, *Protecting Pension Assets in* Personal Bankruptcy, 68 St. John's L. Rev. 409, 409 n.3 (1994) (noting that "well−being and security of millions of employees . . . are directly affected by these [ERISA−governed] plans," and therefore, safeguards are warranted for protection of pension interests) (quoting 29 U.S.C. § 1001(a)).Back To Text

[94] Patterson, 504 U.S. at 765 (stating that broad construction which includes federal law will ensure that pension benefits will be governed by ERISA and not left to "vagaries of state spendthrift trust law") (citations omitted).Back To Text

[95] I.R.C. § 6321 (1988).Back To Text

[96] United States v. National Bank of Commerce, 472 U.S. 713, 719−20 (1985) (emphasis added).Back To Text

[97] *See* Glass City Bank v. United States, 326 U.S. 265, 268 (1945) (concluding that tax lien applied "to property owned by the delinquent at any time during the life of the lien").Back To Text

[98] I.R.C. § 6322 (1988).Back To Text

[99] Aquilino v. United States, 363 U.S. 509, 512 (1960). Back To Text

[100] *See* id. at 512−13; *see also* Morgan v. Commissioner, 309 U.S. 78, 82 (1940) (holding state law controls in determining nature of legal interest taxpayer has in property); In re Tyler, 166 B.R. 21, 26 (Bankr. W.D.N.Y. 1994) ("State law determines the validity and legality of claims.").Back To Text

[101] Aquilino, 363 U.S. at 513 (quoting United States v. Bess, 357 U.S. 51, 55 (1958)).Back To Text

[102] *See* id. at 513−14 (citations omitted); *see also* United States v. Rodgers, 461 U.S. 677, 683 (1983) (commenting that "it has long been an axiom of our tax collection scheme that, although the definition of underlying property

interests is left to state law, the consequences that attach to those interests is a matter left to federal law").Back To Text

[103] Rodgers, 461 U.S. at 683 (citations omitted).Back To Text

[104] I.R.C. § 6331(a) (1988).Back To Text

[105] *See* id. § 6334(a)(6) (1988) (exempting annuity and pension payments under Railroad Retirement Act, benefits under Railroad Unemployment Insurance Act, and various military pensions).Back To Text

[106] Id. § 6334(c). Back To Text

[107] Treas. Reg. § 301.6334−1(c) (1967) (amended 1994).Back To Text

[108] *See* Jacobs v. IRS (In re Jacobs), 147 B.R. 106, 108−9 (Bankr. W.D. Pa. 1992) The court observed that because § 6334 provides specific exemptions, but excludes others, "if Congress intended all ERISA qualified plans to be exempt from IRS levy . . . it knew how to do so and would have done so as a simple amendment to [IRC] § 6334". Id. It should be noted, however, that as a matter of policy the IRS has extended the type of protection afforded by IRC § 6334 to virtually all pension assets. Back To Text

[109] *See* United States v. Barbier, 896 F.2d 377, 379−80 (9th Cir. 1990) (stating Congress did not intend exemptions from levy under IRC §§ 6334 or 6321 to frustrate status of IRS as secured creditor by virtue of its lien). In *Barbier*, the court distinguished between a levy and a lien and suggested that a lien should still attach to property exempt from levy because a levy forces debtors to relinquish their property. Id. at 379. On the other hand, a lien is "merely a security interest and does not involve the immediate seizure of property." Id.Back To Text

[110] Treas. Reg. § 1.401(a)−(13)(b)(2) (1978) (amended 1988).Back To Text

[111] 148 B.R. 88 (Bankr. D.D.C. 1992)Back To Text

[112] Id. at 89.Back To Text

[113] Id. A secured claim asserted by the IRS against Mrs. Lyons in the amount of $1,009.53 was not disputed by the debtors. Id. Back To Text

[114] Id.Back To Text

[115] Id.Back To Text

[116] Lyons, 148 B.R. at 89−90.Back To Text

[117] Id. at 90Back To Text

[118] Id.Back To Text

[119] Id. The contracts stated in part:

> No assignment. Any assignment or pledge of this certificate or of any benefits hereunder will be void and of no effect.
>
> . . .
>
> Protection Against Claims of Creditors. The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commutation or anticipation, except as may be

> otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditors of any Beneficiary or to execution or to legal process.

Id. The payout annuity contracts also prohibited any assignment, pledge, or transfer of ownership or benefits, and provided that "the benefits and rights accruing to you or any other person under this contract are exempt from the claims of creditors or legal process to the fullest extent permitted by law." Id. Back To Text

[120] Id.Back To Text

[121] Lyons, 148 B.R. at 90.Back To Text

[122] Id.Back To Text

[123] Id. at 90−91. The IRS "conceded that the *corpus* of the pension fund [was] not property of the estate and that its lien therefore [did] not attach to those funds." Id. at 91.Back To Text

[124] Id.Back To Text

[125] Id. at 91.Back To Text

[126] Lyons, 148 B.R. at 92. Back To Text

[127] Id.Back To Text

[128] Id.Back To Text

[129] Patterson v. Shumate, 504 U.S. 753 (1992) (holding "applicable nonbankruptcy law" includes ERISA).Back To Text

[130] Lyons, 148 B.R. at 93. The IRS and the debtors agreed that the pension plans at issue were organized in New York and that New York law was applicable for purposes of § 541(c)(2). Id. Back To Text

[131] Id.Back To Text

[132] Id.Back To Text

[133] Id.Back To Text

[134] Id. (finding that benefits of pension plan must be nonassignable and nonalienable to qualify for coverage under ERISA) (citing 29 U.S.C. § 1056(d)(1)). Back To Text

[135] Lyons, 148 B.R. at 93. *See, e.g.*, Morter v. Farm Credit Servs., 937 F.2d 354, 357−58 (7th Cir. 1991) (concluding that under New York law both TIAA and CREF components were excluded from bankruptcy estate under 11 U.S.C. § 541(c)(2) because they had characteristics of spendthrift trust) (citations omitted), cert. denied, 505 U.S. 1204 (1992); In re Montgomery, 104 B.R. 112, 116 (Bankr. N.D. Iowa 1989) (finding that New York State law fully supports TIAA/CREF annuity plan as spendthrift trust applicable under nonbankruptcy law); *see also* Aurora G. v. Harold Aaron G. (In re Aurora), 414 N.Y.S.2d 632 (Fam. Ct. 1979); Alexandre v. Chase Manhattan Bank, 403 N.Y.S.2d 21 (App. Div. 1978). Back To Text

[136] Lyons, 148 B.R. at 93 (citing Morter v. Farm Credit Servs., 937 F.2d 354 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992)); *see* Dowden v. Teachers Ins. and Annuity Ass'n (In re Baxter), 135 B.R. 353 (Bankr. E.D. Ark. 1992); In re Montgomery, 104 B.R. 112 (Bankr. N.D. Iowa 1989); Simon v. Braden (In re Braden), 69 B.R. 93 (Bankr. E.D. Mich. 1987).Back To Text

[137] Lyons, 148 B.R. at 94. The court, in dicta, stated that these funds are not part of the estate until they are received by the debtor. Id. (citation omitted). Back To Text

[138] Id.; *see* Aurora, 414 N.Y.S.2d 632, 635 (holding that funds are sequestrable to enforce parent's obligation to support child even though they are not subject to creditor's claims or legal process) (citations omitted); Alexandre, 403 N.Y.S.2d at 23−24 (holding anti−assignment clause in TIAA/CREFF plan valid against claims by ex−wife for half payments, as payments are "beyond the reach of the petitioner").Back To Text

[139] Lyons, 148 B.R. at 94. Back To Text

[140] Id. at 93. Back To Text

[141] Id. The critical difference between the two cases is that in *Patterson*, the anti−alienation requirements imposed by ERISA restricted the pension plan involved therein from Shumate's creditors, and thus from his bankruptcy estate. Id. In *Lyons*, however, the federal tax lien law was held to override any state law restriction on the IRS reaching the debtors' rights to Mr. Lyons' pension plans, thus rendering § 541(c)(2) ineffective, and rendering the inclusion of the pension plan rights in the bankruptcy estate. Id. Back To Text

[142] Id. at 94 (citing Robinson v. United States (In re Robinson), 39 B.R. 47 (Bankr. E.D. Va. 1984)).Back To Text

[143] Id. (citing In re Rosenberg's Will, 199 N.E. 206, 206 (1935) (stating that "it is certain that no policy of this state may interfere with the power of Congress to levy and collect taxes on income"); *see* United States v. City of New York, 82 F.2d 242, 243 (2d Cir. 1936) (finding that "the immunity from the reach of creditors accorded by the local law to a spendthrift trust did not defeat a federal tax lien") (citing *In re* Rosenberg's Will, 199 N.E. 206, 206 (1935)). Back To Text

[144] Lyons, 148 B.R. at 94Back To Text

[145] Id.Back To Text

[146] Id.Back To Text

[147] *See* Patterson v. Shumate, 504 U.S. 753, 758 (1992). The court stated that nothing in the "natural reading" of § 541 suggested that "applicable nonbankruptcy law" referred "exclusively to state law." Id.Back To Text

[148] *See* 11 U.S.C. §§ 323(a), 544(a) (1994); *see also* Henderson v. Buchanan (In re Western World Funding, Inc.), 52 B.R. 743, 772−74 (Bankr. D. Nev. 1985) (stating that trustee is representative of estate according to § 323(a), and according to § 544(a) has status of creditor).Back To Text

[149] Patterson, 504 U.S. at 753.Back To Text

[150] 11 U.S.C. § 506(a) (1994); *see* Dewsnup v. Timm, 502 U.S. 410, 418 (1992) (holding debtor would have "allowed secured claim" only to extent of judicially determined value of property according to § 506(a)); In re Hemisphere Int'l Ctr., Inc., 59 B.R. 289, 293 (Bankr. S.D. Fla. 1986) (court determines value of subject collateral).Back To Text

[151] *See* infra notes 174 to 188 and accompanying text (discussing *In re* Perkins).Back To Text

[152] 11 U.S.C. § 323(a) (1994).Back To Text

[153] Id. § 544(a) (1994).Back To Text

[154] Under *Lyons*, debtor X's pension plan is considered property of the estate, while under *Patterson*, debtor's Y interest would not be included in the estate.Back To Text

[155] Some states have codified rules that would eliminate this problem. *See* Ky. Rev. Stat. Ann. § 381.180 (Baldwin 1994) (spendthrift trust may be subject to claims by state, the Federal government, etc.); Nev. Rev. Stat. § 21.080 (1993) (spendthrift trust only inalienable if created by someone other than the debtor); Tenn. Code Ann. § 264.101 (1994) (spendthrift trust is susceptible to claims by state as creditor).Back To Text

[156] 147 B.R. 106 (Bankr. W.D. Pa. 1992).Back To Text

[157] Id. at 107.Back To Text

[158] Id.Back To Text

[159] Id.; *see* supra note 5. As previously discussed, IRC § 401(a)(13) provides essentially the same anti−alienation requirements as § 206(d) of ERISA. Back To Text

[160] Jacobs, 147 B.R. at 109.Back To Text

[161] Id. at 107.Back To Text

[162] Id. at 109.Back To Text

[163] Id.Back To Text

[164] Id. at 108.Back To Text

[165] United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985) (stating that "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property") (citation omitted).Back To Text

[166] Jacobs, 147 B.R. at 108 (discussing how state law defines taxpayer's proprietary interest and yields to federal revenue statute); *see* United States v. Rodgers, 461 U.S. 677, 683 (1983) (concluding that "although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law.") (citations omitted).Back To Text

[167] I.R.C. § 6332(a)(6) (1988 & Supp. V 1993) (enumerating property exemptions from levy).Back To Text

[168] Jacobs, 147 B.R. at 109.Back To Text

[169] Id. (acknowledging validity of IRS's lien on all debtor's assets including pension plan).Back To Text

[170] 149 B.R. 591 (Bankr. 9th Cir. 1992).Back To Text

[171] Id. at 593.Back To Text

[172] Id. at 593−94.Back To Text

[173] Id. at 595.Back To Text

[174] 134 B.R. 408 (Bankr. E.D. Cal. 1991).Back To Text

[175] Id. at 410.Back To Text

[176] Id.Back To Text

[177] Id.Back To Text

[178] Id. at 410.Back To Text

[179] Perkins, 134 B.R. 411.Back To Text

[180] Id. at 411−12. Back To Text

[181] 11 U.S.C. § 541 (1994) (defining property of estate).Back To Text

[182] Id. § 506 (proscribing methods of determining secured status).Back To Text

[183] Perkins, 134 B.R. at 411−12.Back To Text

[184] Id. at 411.Back To Text

[185] Id. (evaluating IRS's interest in pension as sufficient to allow attachment and levy).Back To Text

[186] Id. Back To Text

[187] 11 U.S.C. § 541(c)(1) (1994) (interest of debtor in property becomes property of estate).Back To Text

[188] Perkins, 134 B.R. at 411.Back To Text

[189] *See* Patterson v. Schumate, 504 U.S. 753, 756 (1992). *See generally* Ray, supra note 95, at 414−17 (analyzing *Patterson's* effect on pension plans).Back To Text

[190] It should also be remembered that the Court expressed doubt as to the relevancy of policy considerations, given the clear and unambiguous language of § 541(c)(2). Patterson, 504 U.S. at 756. Back To Text

[191] *See* In re Lyons, 148 B.R. 88, 91 (Bankr. D. D.C. 1992) (pinpointing federal tax lien attachment to all taxpayer's property); *see also* 11 U.S.C. § 522(c)(2) (1994) (codifying well−established rule stating security of creditor is preserved despite claim of exemption by debtor); I.R.C. § 6322 (1988) (imposing lien when assessment made which continues until liability satisfied or statute of limitation on collections expires); Glass City Bank v. United States, 326 U.S. 265, 267 (1945) (attaching lien to taxpayer's property and rights to property at assessment). Back To Text

[192] Lyons, 148 B.R. at 93−94.Back To Text

[193] Id.Back To Text

[194] *See* supra note 155 and accompanying text.Back To Text

[195] *See* discussion supra part IV. *See generally* In re New England Carpet Co., Inc., 26 B.R. 934, 941 (Bankr. D. Vt. 1983) (stating that taxing authorities given preferential treatment because they are involuntary creditors who cannot take security before taxes become due) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 189 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6150).Back To Text

[196] *See* Karns, supra note 9, at 682 n.187 (citing I.R.C. § 401(a)(13) (1988)).Back To Text

[197] Id. at 683. The author states that:

> [A]ll plan benefits subsequently distributed under a disqualified plan would be taxable to individual participants as ordinary income, and the employer's deduction for plan contributions would be denied. When a plan is disqualified, employer contributions remain deductible only in cases where employee funds are maintained in separate accounts. This permits selective disqualification of individual accounts rather than disqualification of the entire plan. Employer contributions for unvested participants are not deductible, while

> substantially vested employees are required to declare as income any employer contribution made under a disqualified plan. Finally, subsequent benefits can no longer be accrued tax−free, and the courts have ruled that distributions from unqualified plans are not eligible for rollover into another investment plan, such as a Keogh account or an individual retirement account.

Id. (citations omitted).Back To Text

[198] *See* Forbes v. Lucas (In re Lucas) 924 F.2d 597, 603 (6th Cir.) (stating that excluding pension plan benefits from bankruptcy estate "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") (citation omitted), *cert. denied*, 500 U.S. 959 (1991); John Hancock Mut. Life Ins., Co. v. Watson (In re Kincaid), 917 F.2d 1162, 1170 (9th Cir. 1990) (Fletcher, J., concurring) (stating that Congress did not intend to destroy protection granted benefit plans under ERISA which would result from failure to exclude ERISA−qualified plans from bankruptcy estate); Anderson v. Raine (In re Moore), 907 F.2d 1476, 1480−81 (4th Cir. 1990) (stating that not enforcing anti−alienation provision against trustee will allow trustee to disqualify entire plan from tax exempt status) (citations omitted).Back To Text

[199] 762 F.2d 1204, 1206 (4th Cir. 1985) (position supported by the Commissioner of the IRS as amicus).Back To Text

[200] 11 U.S.C. § 724(b) (1994) (listing priority treatment of certain liens, including holder of tax lien). *See generally* 4 Collier on Bankruptcy § 724.03 (Lawrence P. King, ed., 15th ed. 1995) (noting § 724(b) grants certain creditors priority over tax liens).Back To Text

[201] Debtors may be unable to reach money in these pension plans, but may still be required to pay the secured tax claim before the plan can be confirmed. Back To Text

[202] *See* Jacobs v. IRS (In re Jacobs), 147 B.R. 106, 108−09 (Bankr. W.D. Pa. 1992) (holding that IRS had lien in amount of its claim on all assets of debtor including rights in pension plan even though trustee had no right to plan).Back To Text

[203] Schechter v. Balay (In re Balay), 113 B.R. 429, 443 (Bankr. N.D. Ill. 1990) (citations omitted).Back To Text

[204] *See* id. at 445 (stating events which trigger access to pension plan funds are death, retirement, or termination). Back To Text

[205] *See* id. In *Balay*, the court denied turnover because "[t]o hold that the Trustee is entitled to receive funds which the Debtor himself is unable to presently access would be to grant the Trustee greater rights than those of the Debtor." Id; *see also* Magill v. Lyons (In re Lyons), 118 B.R. 634, 642 (C.D. Ill. 1990) (denying turnover because . . . debtor has no present right of distribution and consequently, neither does the Trustee"), aff'd, 957 F.2d 444 (7th Cir. 1992); Christison v. Slane (In re Silldorff), 96 B.R. 859, 867 (C.D. Ill. 1989) (stating that debtor has no "present absolute right to compel distribution" and neither does trustee); Gray v. Ingles Mkts., Inc. Employees' Stock Bonus Plan & Trust (In re DeWeese), 47 B.R. 251, 256 (Bankr. W.D. N.C. 1985) (concluding that although debtor's pension plan interest "became property of the estate by operation of law, . . . there is nothing further available for turnover, . . . [since] the full extent of [the debtor's] interest was a right to share in a future distribution of company stock . . . and this alone, is the interest to which the trustee succeeds"). *But see* Morrison v. Roulston (In re Smith), 103 B.R. 882, 885 (Bankr. N.D. Ohio 1989) (ordering immediate turnover where debtor was not only vested, but also had reached retirement age).Back To Text

[206] In re Lyons, 957 F.2d 444, 445 (7th Cir. 1992) (stating that majority of lower courts prohibit turnover because trustee's claim to estate property is no greater than debtor's claim at time of filing).Back To Text

[207] 11 U.S.C. § 522 (1994).Back To Text

[208] Id. *See* supra notes 40−49 and accompanying text.Back To Text

[209] *See* supra part III. (discussing Patterson v. Shumate).Back To Text

[210] *See* supra notes 46 to 49 and accompanying text. Back To Text

[211] In re Shaker, 137 B.R. 930, 946 (W.D. Wis. 1992) (citations omitted).Back To Text

[212] *See* supra notes 111 to 146 and accompanying text (discussing *Lyons*). The Court held that when the IRS has a tax lien on the debtor's pension plan, it becomes property of the estate. In re Lyons, 148 B.R. 88, 92 (Bankr. D. D.C. 1992).Back To Text

[213] 11 U.S.C. § 522(b)(2)(A) (1994).Back To Text

[214] *See, e.g.*, Goff v. Taylor (In re Goff), 706 F.2d 574, 579 (5th Cir. 1983) (stating that whether ERISA's anti−alienation requirements constitute an exemption under § 522(b) of Bankruptcy Code is necessary to determine if debtor can exempt pension plan interest from property of estate).Back To Text

[215] 11 U.S.C. § 522(c)(2) (1994).Back To Text

[216] Id. § 522(b)(2)(A).Back To Text

[217] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5861; H. R. Rep. No. 595, 95th Cong., 2d Sess. 360 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963, 6316. Under the Bankruptcy Reform Act of 1978, the legislature stated:

> some of the items that may be exempted under other Federal laws include:
>
> − Foreign Service Retirement and Disability payments, 22 U.S.C. [§] 1104;
>
> − Social Security payments, 42 U.S.C. [§] 407;
>
> − Injury or death compensation payments from war risk hazards, 42 U.S.C. [§] 1717;
>
> − Wages of fishermen, seamen, and apprentices, 46 U.S.C. [§] 601;
>
> − Civil service retirement benefits, 5 U.S.C. [§§] 729, 2265;
>
> − Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. [§] 916;
>
> − Railroad Retirement Act annuities and pensions, 45 U.S.C. [§] 228(L);
>
> − Veterans benefits, 45 U.S.C. [§] 352(E);
>
> − Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. [§] 3101; and
>
> − Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. [§] 175.

Id. Back To Text

[218] 706 F.2d 574 (5th Cir. 1983).Back To Text

[219] In re Shaker, 137 B.R. 930, 946 (W.D. Wis. 1992).Back To Text

[220] Goff, 706 F.2d at 585 (stating that there is distinction between ERISA anti−assignment provisions and provisions listed by Congress as examples of statutes to which § 522 would apply).Back To Text

[221] *See* Patterson v. Shumate, 504 U.S. 753, 758 (1992) (stating that "the natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law"); Toibb v. Radloff, 501 U.S. 157, 160 (1991) (stating plain language of Bankruptcy Code and ERISA should be used to determine outcome).Back To Text

[222] Goff, 706 F.2d at 585.Back To Text

[223] Id.Back To Text

[224] Id. (citations omitted).Back To Text

[225] 104 B.R. 799 (Bankr. W.D. Tex. 1989).Back To Text

[226] In re Shaker, 137 B.R. 930, 948 (W.D. Wis. 1992). Back To Text

[227] Komet, 104 B.R. at 809.Back To Text

[228] Shaker, 137 B.R. at 948.Back To Text

[229] 11 U.S.C. § 522(b)(2)(A) (1994) (allowing debtor to exempt certain property from estate even though it should be included under § 541).Back To Text

[230] *See* Forbes v. Lucas (In re Lucas), 924 F.2d 597, 603 (6th Cir. 1991) (stating that beneficial effect of finding ERISA anti−alienation requirement adequate to support exclusion from bankruptcy estate is that "it prevents a plan from being subject to disqualification and loss of tax−exempt status"); Karns supra note 9, at 683 (stating that in situations where court orders plan administrator to violate ERISA's non−transferability restrictions "if a plan administrator complied with such an order in direct contravention of [ERISA] anti−alienation requirement, the IRS might rule that the entire plan was disqualified"). *See generally* Nachman Corp. v. Pension Benefit Guaranty Corp. 446 U.S. 359, 375 (1980). In *Nachman*, the Supreme Court stated that Congress wanted 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." Id. (citations omitted).Back To Text

[231] 11 U.S.C. § 522(d) (1994); *see* In re Dipalma, 24 B.R. 385, 392 (Bankr. D. Mass. 1982) (stating primary purpose of § 522 of Bankruptcy Code is to ensure "health, safety and welfare of the debtor" and his or her dependents); In re Hahn, 5 B.R. 242, 244 (Bankr. S.D. Iowa 1980) (commenting that among primary purposes of § 522 is prevention of impoverishment of debtor's family and to allow debtor enough money to survive).Back To Text