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ERISA Spendthrift Rules - It Just Shouldn't Be This Hard

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Kirschbaum: ERISA Spendthrift Rules - It Just Shouldn't Be This Hard

ERISA SPENDTHRIFT RULES — IT JUST SHOULDN'T BE THIS HARD

RONALD I. KIRSCHBAUM*

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I. INTRODUCTION

On August 9, 1984, Congress passed the Retirement Equity Act (REA). Signed into law on August 23, 1984, this Act had, as one of its purposes, the clarification of the confusion concerning the anti-alienation rules originally adopted ten years earlier. Unfortunately, this most laudable endeavor, carried out with very limited objectives, was without a view towards the creation of a

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comprehensive and workable statutory framework.

As will be seen, the creation of the Qualified Domestic Relations Order (QDRO) by the REA, establishes an island of relative certainty. This island sits, however, in a sea of assumption and supposition leaving plan administrators, participants, and the courts with little congressional guidance on the spendthrift standards to be applied.

II. REASONS FOR AN ANTI-ALIENATION RULE

The ability to create a beneficial interest in a trust which cannot be reached by the beneficiary’s creditors has long been recognized in English common law.¹ Such “spendthrift” provisions are also recognized by many American jurisdictions, either in the form of a prohibition against alienation contained in the trust itself, or as in England, in the form of a cessor clause causing the termination of the interest of a beneficiary whose share is about to be alienated.²

The funding vehicle for most retirement plans is a trust. Prior to 1974, such trusts were construed in accordance with the laws of the applicable state or other jurisdiction. Some plans were drawn with a spendthrift provision and some were not. Of those plans with spendthrift provisions, some contained one type of clause and some another, depending upon the requirements of the local jurisdiction. Congress, obviously not satisfied with this patchwork quilt of spendthrift protection adopted as part of the Employee Retirement Income Security Act of 1974 (ERISA), its own anti-alienation rules.³ An ERISA spendthrift requirement is contained in both Title I and Title II of the Act and has been codified in section 401(a)(13) of the Internal Revenue Code.⁴ In its legislative history,

2. Id.
4. Act, § 206.(d)(1). Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated. “(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed ten percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph, a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the partici-
Congress stated that the reason for the adoption of the spendthrift rule was to prevent the assignment or alienation of benefits in order to insure that "... the employee's accrued benefits are actually available for retirement plan purposes, ..."

Prior to modifications that will be discussed later, the statute itself was quite simple and, with a few stated exceptions, provided that "[a] trust shall not constitute a qualified trust under this section unless the plan, of which said trust is a part, provides that benefits provided under the plan may not be assigned or alienated." This superficial simplicity is, however, actually the principal reason for the unacceptable and unnecessary complexity. As can be seen from the statutory language, the spendthrift rule was

participant's accrued nonforfeitable benefit and is exempt from the Revenue Code of 1954 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of such Code." Act, § 1021 (c) provides that retirement benefits may not be assigned or alienated. Section 401(a) is amended by inserting after paragraph (12) the following new paragraph: "(13) A trust shall not constitute a qualified trust under this section unless the plan of which said trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed ten percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on the date of the enactment of the Employment Retirement Income Security Act of 1974."

5. H.R. 12855, 32nd Cong., 2nd Sess., P.H. Committee Reports, Paragraph 93141.

6. The prohibition does not bar arrangements on plan termination for the recovery under 4045(b) of ERISA of sums otherwise distributed to retired or former participants. It does not bar arrangements for withholding local, state or federal taxes on overpayments nor does it bar the Federal Government from enforcing a federal tax levy. (Treasury Reg 1.401 (a)-13(b)(2). This prohibition also does not bar arrangements for the transfer of funds from one plan to another or to an account for the benefit of the participant or the participant and his spouse. It also does not bar the pledging of the account as collateral security for a plan loan. In the case of U.S. v. Southwestern Life Insurance Company, 81-2 USTC 9697 (N.D. Tex. 1981) the court seemed to say that a Keogh plan, created by the debtor for his own benefit, was not allowed to avail itself of the spendthrift rules under Texas law and therefore, a levy for unpaid federal taxes, could be made. No mention of the pre-emption rule was made by the court.

directive at the preparer of the plan and required inclusion of qualifying language in the plan itself. Unfortunately, Congress did not give any guidance as to what language would suffice to meet this requirement. Was it the intent of the drafters to merely insure that each plan would contain a spendthrift clause to be interpreted in accordance with local law or did Congress desire to create its own spendthrift rules eliminating local interpretation?

As previously stated, many jurisdictions, such as North Carolina, have spendthrift rules which are virtually self-executing. A trust beneficiary simply forfeits the right to his benefits upon an attempted voluntary or involuntary alienation. The trustee can then be given discretionary authority to distribute the benefits to the plan participant or their dependents, thus preserving the fund for its intended purposes.

Immediately, after the passage of ERISA, drafters of qualified retirement plans were faced with the question of whether they could still utilize such a cessor clause, thus again making the spendthrift rule self-executing. The answer to this question was a categorical "no." The Internal Revenue Service (IRS) offices, upon reviewing the qualified plans, were virtually unanimous in their determination that the federal anti-alienation rules preempted state law. Furthermore, the IRS, determined that a cessor clause would

8. N.C. GEN. STAT. § 36A-115 (1979) provides in reference to the alienability of a beneficiary's interest and spendthrift trusts that: "(a) Except as provided in subsection (b) hereof, all estates or interests of trust beneficiaries are alienable either voluntarily or involuntarily to the same extent as are legal estates or interests or a similar nature. (b) Subsection (a) hereof shall not apply to a beneficiary's estate or interest in any one or any combination of one or more of the trusts described below, in which the beneficiary's estate or interest shall not be alienable either voluntarily or involuntarily. (1) Discretionary Trust. - A trust wherein the amount to be received by the beneficiary, including whether or not the beneficiary is to receive anything at all, is within the discretion of the trustee. (2) Support Trust. - A trust wherein the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or to apply on behalf of the beneficiary such sums as the trustee shall, in his discretion, determine are appropriate for the support, education or maintenance of the beneficiary. (3) Protective Trust. - A trust wherein the creating instrument provides that the interest of the beneficiary shall cease if a. The beneficiary alienates or attempts to alienate that interest; or b. Any creditor attempts to reach the beneficiary's interest by attachment, levy or otherwise; or c. The beneficiary becomes insolvent or bankrupt." (1979, c. 180, s. 1.)

9. Id.

10. Id.

11. The Internal Revenue Service did not have a published position on this
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violate ERISA provisions, preventing divestiture of a participant’s vested interest.\(^\text{12}\) In summary, Congress had eliminated the self-executing aspects of most spendthrift laws by adopting very general language directed only to the drafter of the plan. Since ERISA expressly preempts state laws applicable to retirement plan benefits,\(^\text{13}\) drafters of plans could no longer resort to the prior state interpretations of spendthrift provisions and were, therefore, left with the unanswered question of what Congress intended as the guidelines for the application of its spendthrift rule. Did Congress intend to create its own invisible shield over plan benefits, protecting these resources by the force of federal law or did Congress intend for the Department of Labor and the Internal Revenue Service to adopt regulations setting forth precise guidelines on what a qualifying plan spendthrift provision would say? With little legislative history for guidance, practitioners were left with only one resort; to the ephemeral and often elusive judicially determined intent of Congress.

Unfortunately, nearly fourteen years after the passage of ERISA, little progress has been made in determining precisely what Congress desired section 401(a)(13) to accomplish.\(^\text{14}\) If the drafters merely intended to require some form of state qualified spendthrift clause in each plan, they missed their mark by a very wide margin. If, however, it was the intention of the legislature to spark a storm of protest and a plethora of both federal and state litigation, their success is unqualified. Only by the introduction of the Qualified Domestic Relations Order (QDRO) in 1984, has Congress given any element of certainty to this area of the law.\(^\text{15}\) The purpose of this article will be to describe the current status of the anti-alienation rules, including the areas that are relatively certain, such as the QDRO and other areas where enormous uncertainty still exists.

\(^{12}\) Id.

\(^{13}\) Act, supra note 3, § 514, at 897.

\(^{14}\) IRC § 401(a)(13)(1986).

III. DISCOVERY OF THE IMPLIED EXCEPTION

Perhaps an early hint that an invisible shield over plan benefits would not be provided came when the Treasury Department began to consider its own regulations. These regulations interpreted the statutory language and attempted to define the terms "assignment" and "alienation" as follows:

(i) Any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan; and
(ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.16

Few would take umbrage with the foregoing definition of two commonly used words. Before reaching this point, however, the Treasury regulations take poetic license and protect the fisc first. Notwithstanding the foregoing definitions, the regulations state that the prohibited alienation of plan benefits does not occur in the case of a seizure of plan assets pursuant to a federal tax levy or pursuant to a judgment resulting from any unpaid tax assessment.17 All creditors are created equally except that some creditors are more equal than others. Finding justification for the exemption of federal tax levies and liens in either the statute or the legislative history will be very difficult to say the least.

Notwithstanding the obvious directive nature of the statutory language, it should be carefully noted that the regulations do not attempt to define what language must or may be included in the plan's anti-alienation sections. The regulations attempt to define the terms "assignment" and "alienation" as if the statute itself prohibited these events and was self-executing. Once the quantum leap is made from a spendthrift provision requirement in the plan, to a statutory prohibition against assignment, the need for a federal doctrine of spendthrift law becomes apparent.

IV. EARLY COURT DECISIONS

The ink was barely dry on ERISA when litigants first began to raise the possibility of an unspoken but implied exception to the

anti-alienation rules. Many cases began to wind their way through the various courts and their conclusions literally covered the spectrum of possible interpretations. The conclusions ranged from assertive determinations that no involuntary seizure of plan assets to enforce money judgments was permitted, to an equally forceful conclusion that ERISA allows the garnishment or attachment of pension benefits to satisfy virtually any liabilities of the plan participant.

The former conclusion was reached on December 16, 1976, less than two years after the effective date of the applicable ERISA language, in a decision by the United States District Court for the Eastern District of Michigan. In *General Motors Corporation v. Townsend*, the district court held that involuntary seizures of plan assets to satisfy judgments was prohibited. The ruling arose from a fairly simple proceeding to enforce a domestic relations order requiring payment of plan benefits. General Motors Corporation, as plan administrator, attempted to enjoin such a garnishment.

All facts involved in the case, other than the actual garnishment, occurred prior to the passage ERISA. The case concerned a 1974 divorce decree ordering the payment of one-half of the plan assets from a General Motors Stock Savings Plan to the participant's former spouse. The plan administrator had transferred the stock directly to the participant who, for no apparent reason, disobeyed the court order and gave his ex-wife nothing. A writ of garnishment was then obtained which directed the National Bank of Detroit, trustee of another General Motors plan (the General Motors Retirement Plan for Salaried Employees), to pay an equivalent amount to the plaintiff-spouse.

It was the position of the plan administrator that such a garnishment was not permitted by ERISA and that state law was preempted in this regard. The district court agreed, concluding that Congress had clearly intended to prohibit involuntary assignments;

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18. See Notes 20 and 28.
19. *Id.*
21. *Id.* at 470.
22. *Id.* at 466.
23. *Id.* at 467.
24. *Id.* at 469.
25. *Id.* at 470.
26. *Id.* at 469.
that the plan had been properly amended to comply with the ERISA requirements; and that the garnishment in question was a prohibited involuntary assignment.\footnote{27} The court further concluded that the preemption provision of ERISA controlled this case and preempted the state’s right to garnish retirement benefits to enforce the money judgment.\footnote{28}

This case clearly represented a high water mark for proponents of the “invisible shield doctrine” and for their interpretation of the spendthrift provisions of ERISA. Under the doctrine described in \textit{General Motors Corporation v. Townsend}, it was as if Congress had exempted plan benefits from the reach of state court orders since, according to the Michigan court, this is clearly what Congress had intended.\footnote{29}

Perhaps the other end of the spectrum for interpretation of the anti-alienation provisions of ERISA was reached in a decision of the New York Court of Appeals in 1979. The case, \textit{National Bank of North America v. The International Brotherhood of Electrical Workers Local No. 3 Pension and Vacation Funds},\footnote{30} affirmed a lower court decision allowing the plaintiff bank to levy on vested pension benefits in order to collect a $1,478.10 judgment previously obtained against the retired plan participant.\footnote{31} The judgment bore no relation to the pension plan and did not involve a question of family support. In fact, the question of the judgment was in effect rendered moot since it was paid from other funds prior to the decision of the court.\footnote{32} The court went on to render its opinion, however, because of the importance of the question presented.

In its decision, the highest court of the State of New York carefully analyzed the preemption provisions of ERISA and concluded that the provisions did not apply since the case did not involve anything relating to retirement plans per se.\footnote{33} The instant

\footnote{27. \textit{Id.} at 470.}  
\footnote{28. \textit{Id.}}  
\footnote{29. \textit{Id.} at 469.}  
\footnote{30. 419 N.Y.S.2d 127 (1979). This case no longer represents the view of the New York Courts. In light of subsequent decisions and legislation, the New York Courts now recognize that ERISA preempts state law even in the case of attachment of assets pursuant to a New York Criminal Statute. \textit{Morgenthau v. Citisource, Inc.} 513 N.Y.S. 2d 429 (1987).}  
\footnote{31. \textit{Nat’l Bank} at 129.}  
\footnote{32. \textit{Id.}}  
\footnote{33. \textit{Id.} at 129.}
case was determined to concern the "... fundamental problems of enforcing money judgments," an area not intended to be preempted by the adoption of federal pension legislation.

The New York court was well aware of the decision in General Motors, but concluded that the State of New York had a vital interest in enforcing its own money judgments and this interest was unrelated to the purposes of ERISA. The court went on to say something by using the words that appeared to be of the utmost significance in interpreting the statute. Apparently these words never reached the ears of Congress. The New York court simply concluded that if Congress had intended to bar execution, levies, attachments, and garnishments, Congress knew perfectly well how to do so and what language to use. In fact, Congress had used specific language to that effect as part of the Social Security Act, the Railroad Retirement Act, and statutes dealing with the payment of veterans' benefits. In other words, it was the view of the New York Court of Appeals that the statutory language contained in ERISA prohibited voluntary assignments. Under this view, however, ERISA allowed the seizure of benefits pursuant to proper judicial proceedings unrelated to the administration of retirement plans.

V. DEVELOPMENT OF THE FAMILY SUPPORT EXCEPTION

In the analysis of National Bank of North America, the New York court cited as authority a growing body of case law which did not come to the far-reaching conclusions of the New York case. Instead the cases cited held that Congress intended to create an exception to the anti-assignment rule where payment of marital and dependent's support obligations were involved. The court cited American Telephone and Telegraph Company v. Merry for the specific proposition, that the anti-alienation provision does not

34. Id.
35. 468 F. Supp. 466.
37. Id. at 131.
41. 419 N.Y.S. 2d at 134 (1979).
42. Id. at 130-31.
43. Id. at 132.
44. 592 F.2d 118 (2nd Cir. 1979).
American Telephone and Telegraph Company v. Merry was handed down by the Second Circuit Court of Appeals in January of 1979. The case involved a retired employee of AT&T who had apparently avoided a New York support order by taking up residence in the Bahamas. The court began its analysis by reversing the emphasis of IRC section 401(a)(13). As previously noted, 401(a)(13) requires a certain type of language to be included in the plan. The court of appeals cited the statute for the proposition, however, that "... assignment or alienation of benefits is also prohibited if a pension plan is to be considered a tax qualified plan."

The court of appeals went on to conclude that, notwithstanding the clear language of the statute, and the lack of any contrary legislative history, there was not sufficient grounds to "... infer that Congress meant to preclude the ancient family law right of maintenance and support and the issuance of process to enforce that right." The court criticized the district court in General Motors Corporation v. Townsend which had, according to the Second Circuit, erroneously relied upon the explicit language of the statute.

The AT&T case exemplifies the multiplicity of decisions that preceded the passage of the Retirement Equity Act of 1984. It is not the purpose of this article to reiterate the positions set forth in those decisions since most of these questions have been rendered moot by the Retirement Equity Act. It is sufficient to say, however, that these cases indicated a clear steadfastness by the various federal and state courts in refusing to consider whether garnishment for family support obligations is to be precluded by ERISA. The following quote from Cogollos v. Cogollos decided by the Supreme Court of New York, indicated in no uncertain terms the attitude of the Courts in this regard:

"Until and unless Congress had made it plain that it intended the absurd, unfair and unconscionable result contended for by the

45. Id. at 119.
46. IRC § 401(a)(13) (1986).
47. 592 F.2d at 121.
48. Id. at 122.
49. Id. at 123.
50. 468 F. Supp. 466.
51. Id. at 123.
movant upon reargument, the Court will not leave the field, and will permit the normal and routine enforcement machinery with respect to outstanding support orders to function.\textsuperscript{54}

In the case of \textit{Stone v. Stone},\textsuperscript{55} the Ninth Circuit Court of Appeals in 1980, concluded that the entire matter had been put to rest by the United States Supreme Court in the case of \textit{In Re Marriage of Campa}.\textsuperscript{56} In \textit{Campa}, the Supreme Court declined to hear a case which allowed state court action against pension benefits, for want of a substantial federal question.\textsuperscript{57} The Ninth Circuit view indicated preemption of state court orders was not the intent of Congress and state court action was still a distinct possibility.\textsuperscript{58}

Both the Internal Revenue Service and the Department of Labor have long since abandoned their initial position with regard to preemption of the broadly encompassing anti-alienation provisions application.\textsuperscript{59} In the appellate decision of \textit{AT&T v. Merry},\textsuperscript{60} the Department of Justice had filed, on behalf of both the Secretary of Revenue and the Secretary of Labor, \textit{amicus curiae} briefs and participated in an oral argument in support of the implied exception for family support obligations. In 1980, the Internal Revenue Service issued Revenue Ruling 80-27,\textsuperscript{61} which concluded that a qualified retirement plan would not lose its qualified status if the benefits for a participant in pay status were ordered to be paid to the spouse or children of the participant pursuant to state court order.\textsuperscript{62} Citing several of the cases that had been handed down at that point, the ruling concluded that the anti-assignment rule "... was not intended to defeat the enforcement of the obligation of a plan participant to support the spouse or children of the par-

\textsuperscript{54} \textit{Id.} at 930.
\textsuperscript{55} 632 F.2d 740 (9th Cir., 1980). In \textit{Stone}, the Department of Labor took the position that state community property laws were superceded by ERISA. The same brief acknowledged, however, that an attachment could be made of benefits in pay status under state community property laws. The brief is reprinted in BNA Pension Reporter \#221, January 8, 1979.
\textsuperscript{56} 444 U.S. 1028 (1980).
\textsuperscript{57} \textit{Id.} at
\textsuperscript{58} \textit{Stone}, 632 F.2d at 742.
\textsuperscript{59} In the \textit{Stone} case, the Internal Revenue Service and Department of Labor supported the idea of an implied exception. They also supported this concept in \textit{AT&T v. Merry}, Note 59, and the Revenue Ruling cited at Note 60.
\textsuperscript{60} 592 F.2d 118.
\textsuperscript{62} \textit{Id.}
ticipant through alimony or support payments.”

VI. INTRODUCTION OF THE QDRO

With this background, Congress, in 1983, began to consider what eventually became the Retirement Equity Act of 1984 (REA). The initial legislative history, ignored such rough spots as the decision of the New York Court of Appeals described above, and stated that under the present law, benefits are subject to a spendthrift provision required by ERISA and, furthermore, ERISA superceded state laws relating to retirement plans. The legislative history cited various court decisions which concluded that the anti-assignment provision was not intended to apply to support obligations. The history further stated that the intent of the applicable provisions of REA was to clarify that spendthrift provisions by allowing only certain domestic relations orders under the statute being developed. A Qualified Domestic Relations Order (QDRO) would not be considered an assignment or alienation of benefits prohibited by ERISA.

Section 401(a)(13)(B), enacted as part of REA, appears to have at least settled one highly disputed matter. It specifically states that subparagraph (A), the General Anti-Assignment and Alienation Provision applies “to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order...” An exception to this rule is made for a Qualified Domestic Relations Order as defined in the statute.

Obviously, from the foregoing language, it appears that an order of a domestic relations court, not meeting the statutory definition of QDRO and made incident to a marital dispute, would be one of the prohibited assignments. Unfortunately, the statute does not clearly define what court ordered assignment of benefits will be considered as being made pursuant to a domestic relations order. Practitioners are still left with the dichotomy of thought as exemplified in National Bank of North America v. International Broth-

63. Id.
65. 5 REP. No. 98-57, 98th Cong., 2d Sess.
66. Id.
67. Id.
69. Id.
erhood of Electrical Workers. In that case, the majority view was that a simple execution to enforce an otherwise valid judgment was not relevant to the administration or regulation of employee benefit plans. Therefore, the judgment was not within the ambit of the preemption rules of ERISA. The question of whether 401(a)(13)(B) would apply in the case of a simple contract action based upon a separation agreement or on a promissory note issued incident to an otherwise valid domestic relations order is left unanswered.

Nevertheless, the Retirement Equity Act creates a haven of relative certainty by specifically exempting the QDRO from the anti-alienation provisions. First of all, it should be noted that the QDRO, by definition, is an exception to the anti-alienation rules of section 401(a)(13). Since it is a part of section 401 of the Code, it relates only to qualified plans and plans subject to the vesting requirements of section 411 of the Code. Since the anti-assignment rules do not apply to individual retirement accounts, government and church plans, or other ERISA exempt plans, the QDRO does not apply to such plans. The QDRO is defined in section 414(p) of the Internal Revenue Code. The following is a brief description of the requirements that an order must meet in order to constitute a QDRO.

A. What Orders Are Covered

A Qualified Domestic Relations Order is the order of a court made pursuant to a state domestic relations law relating to the provision of child support, alimony, or marital property rights to a spouse, former spouse, child or dependent of a participant. As may be inferred from the definition, the QDRO must constitute a court order. It may not take the form of an agreement between the parties, though it may be, pursuant to a consent order or similar agreement, reduced to a judgment. Under the statute, the QDRO must create or recognize the right of an alternate payee to benefits otherwise payable to the participant. A QDRO must follow a prescribed procedural format in order to meet the requirements of the statute. The order must clearly state the following:

70. 419 N.Y.S. 2d 127.
71. Id. at 129.
74. Id.
1. Name and last know mailing address of the participant and the mailing address of each alternate payee. The committee reports indicate that a QDRO will still qualify notwithstanding the fact that it does not designate the alternate payee's current mailing address if the plan administrator has reason to know the address independently of the order.

2. The amount or percentage of the participant's benefit required to be paid to the alternate payee or the manner in which such amount is to be determined, the number of payments and the period involved, as well as each plan to which the order applies.

The QDRO provision of REA was effective on January 1, 1985. Under the statute, if an order was entered before that date and benefits were being paid on January 1, 1985, the plan administrator is obligated to treat the order as qualified. A plan administrator is permitted to treat any other order as qualified if it was entered into January 1, 1985 even though benefits were not yet being paid.\(^\text{75}\)

**B. Form of Benefit**

One of the principal questions that was left unanswered by the plethora of cases decided prior to REA was whether a court could order the benefit paid in a form not otherwise available under the plan. Revenue Ruling 80-27\(^\text{76}\) attempted to deal with this question by stating that the implied exception for marital and support rights can be recognized only in the case of benefits in pay status since there was no right under the plan to benefits not in pay status.\(^\text{77}\)

Section 414(p)(3) specifically deals with this issue. It states that a QDRO may not require payment in a form not otherwise provided for under the plan or require increased benefits.\(^\text{78}\) In addition, the QDRO may not require payment of benefits to an alternate payee once such benefits are required to be paid to another alternate payee under a prior order.\(^\text{79}\)

Section 414(p)(4) contains a major exception to the foregoing

\(^{75}\) I.R.C. § 414 (p) (1986).
\(^{77}\) Id.
\(^{78}\) I.R.C. § 414 (p) (3) (1986).
\(^{79}\) Id.
description on modification of benefits. Under that provision, a QDRO may require payment of benefits to the alternate payee before the participant has separated from service on or after the date on which the participant attains (or would have attained) the earliest retirement age under the plan. In such a case, benefits which may be assigned pursuant to the QDRO, are actuarially determined based upon accruals to that date and based on the interest rate assumptions under the plan or, if there is no interest rate assumption, five percent. Many plans lack an early retirement date. Section 414(p)(4)(B), nevertheless, may impute an early retirement date by providing that, for purposes of the QDRO statute, earliest retirement date means the earlier of the date the participant is entitled to a distribution under the plan or the later date when the participant attains the age of fifty or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service. If the plan does not provide for payment of benefits until attainment of normal retirement age, regardless of separation from service, the QDRO cannot commence payment to the alternate payee until the participant attains or would have attained normal retirement age.

C. Required Plan Procedures

Each plan administrator is required to promptly notify the participant and each alternate payee upon receipt of a domestic relations order. The plan administrator is also required to adopt reasonable procedures in order to enable it to determine whether a domestic relations order is a Qualified Domestic Relations Order. During the period of such determination, the plan administrator is required to separately account for the amounts which would have otherwise been payable to the alternate payee had the order been determined to be a QDRO. The plan administrator has a maximum period of eighteen months from the date the first payment would have been made to the alternate payee to determine

whether the order is a QDRO.\textsuperscript{87} If the plan administrator does not resolve that question within the eighteen month period, or determines that the order is not a QDRO, the separately accounted for funds must be paid to the plan participant or the other person who would have been entitled to payment had there been no Domestic Relations Order.\textsuperscript{88} If there is a determination, made after the eighteen month period, that an order is a QDRO, the payments may be made prospectively only.\textsuperscript{89} As clarified by the 1986 Act, if, during the eighteen month period, the order is determined not to be a QDRO and the administrator receives notice that either party is attempting to rectify the deficiency, the plan administrator may hold the benefits until expiration of the eighteen month period or rectification of the deficiency, whichever occurs first.\textsuperscript{90}

\textbf{D. Taxation of Benefits}

One of the truly frightening aspects of the pre-REA cases is that they never fully addressed the question of taxability of benefits. Before REA, it was possible that a court ordered award of benefits to a spouse could result in taxation to the plan participant. These benefits could not be rolled over to an Individual Retirement Account.\textsuperscript{91} Such a distribution could have resulted in a penalty tax for early distributions and could have prevented the participant from otherwise being entitled to lump sum distribution preferential tax treatment. IRC section 402(a)(9) now provides that the alternate payee, assuming that the payee is the spouse or former spouse of the participant, be treated as the distributee for tax purposes.\textsuperscript{92} This rule does not apply if the alternate payee is a child of the participant. Any distribution and discharge of the support obligation to the child will result in taxation to the participant.\textsuperscript{93}

Pursuant to the provisions of section 402(a)(7)(F), the alternate payee under QDRO will be eligible to rollover the amount received to an eligible retirement plan as defined in the statute.\textsuperscript{94} In

\begin{itemize}
\item \textsuperscript{87} I.R.C. § 414(p)(7)(B) (1986).
\item \textsuperscript{88} I.R.C. § 414(p)(7)(C) (1986).
\item \textsuperscript{89} I.R.C. § 414(p)(7)(D) (1986).
\item \textsuperscript{91} No Provisions for QDRO rollovers were made in I.R.C. § 402.
\item \textsuperscript{92} I.R.C. § 402(a)(9) (1986).
\item \textsuperscript{93} Id.
\item \textsuperscript{94} I.R.C. § 402(a)(6) (1986).
\end{itemize}
addition, once a QDRO has been entered, the amount payable to the alternate payee will not be taken into account in determining whether the participant is eligible for any favorable tax treatment applicable to lump sum distributions.96 The alternate payee will not, however, be eligible for such special tax treatment.96 The committee reports indicate that an alternate payee will not be required to meet the sixty day rollover period otherwise applicable to participants.97 Many commentators, however, caution alternative payees to make the rollover within the sixty day period to insure tax deferral.98

In addition, the penalty tax on distributions prior to age fifty nine and one-half, does not apply to distributions received pursuant to a QDRO.99 Prior to passage of REA there was concern as to who would be taxed upon distribution of retirement benefits to the alternate payee.100 In Letter Ruling 7952045, dated September 25, 1979, it was held that an employee spouse was treated as the taxpayer and instructions were given that Form 1099-R be issued in his or her name. This was changed by Letter Ruling 8309144 issued on December 6, 1982. It held that the employee spouse would not be taxed on the distribution to the nonemployee spouse. The private ruling declined to rule on whether the employer must issue Form 1099-R to the nonemployee spouse. This was all corrected by the changes in section 402(a) and section 72 of the Code by REA.101

Distributions to an alternate payee are not otherwise exempted from the minimum distribution requirements, though distributions to the alternate payee are deemed distributed for such purposes.102 Section 402(a)(5)(D)(I) provides that property transferred to an alternate payee may be transferred or rolled over to an eligible retirement plan within the same tax year, thereby defer-

97. Id.
98. 240 Pens. & Profit Sharing (P-H) Paragraph 11.
100. None of the early court cases dealt with this issue and practitioners were, therefore, afraid that the plan participant would be taxed on benefits ordered paid to a spouse.
102. Proposed Treasury Regulations 1-401(a)(9)-1H.
ring the tax.\textsuperscript{103}

VII. THE IMPLIED EXCEPTION - WHAT IS LEFT AFTER REA?

With the obvious recognition by Congress of the problem that existed and the concomitant passage of REA, it would not be unreasonable to expect the controversy regarding the anti-alienation provisions of ERISA to have been finalized. After all, had not Congress, in its committee reports, clearly identified the preemption concept as it relates to the anti-alienation provision, thereby carving out one precisely defined and narrow exception? Moreover, one of the initial drafts of REA contained language specifically rendering null and void any attempted assignments, alienations, levies, etc., of plan benefits.\textsuperscript{104} Unfortunately, this language was not adopted as a part of the final statute and the torturous hunt for the unidentified but wistfully sought legislative exceptions continue.

A. Only Congress Can Create Exceptions?

In 1985, the Second Circuit Court of Appeals was asked to continue its logic of the \textit{AT&T v. Merry}\textsuperscript{105} case and again find an implied exception where a contrary holding would lead to clear injustice. The case, \textit{Ellis National Bank of Jacksonville v. Irving Trust Company},\textsuperscript{106} involved a former employee of Bache & Company who had pled \textit{nolo contendere} to numerous counts of grand theft and securities fraud while he was a broker.\textsuperscript{107} The defendant, Mr. Kalil, executed a voluntary assignment to Ellis National Bank in satisfaction of judgments that the bank had against Kalil.\textsuperscript{108} That voluntary assignment qualified under the original ERISA anti-alienation exceptions.\textsuperscript{109} Bache, however, claimed a right to proceed against Ellis' retirement funds on the theory that these funds were deposited to the retirement account from funds derived from fraudulent practices which Bache was obligated to restore to

\begin{itemize}
  \item \textsuperscript{103} I.R.C. § 402(a)(5)(D)(i) (1986).
  \item \textsuperscript{104} 3 S. YOUNG & M. BENDER, PENSION AND PROFIT SHARING PLANS, at 12-13 (1985).
  \item \textsuperscript{105} 592 F.2d 118 (2nd Cir. 1979).
  \item \textsuperscript{106} 786 F.2d 466 (2nd Cir. 1986).
  \item \textsuperscript{107} \textit{Id.} at 467.
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} \textit{Id.} at 468.
\end{itemize}
its customers. Specifically, Bache argued for another implied exception; this one in the case of traceable stolen funds.

In its denial of Bache's plea, the Second Circuit, affirming the lower court, cited four reasons for its decision, some of which would seem to be mere invitations to reargument of the same issues in subsequent cases. First, the court referenced a Florida State Court proceeding which had ordered Kalil to make restitution to customers who had lost funds. The court felt that it was important that the order of restitution was for the benefit of defrauded customers alone and not merely for Bache. From this, the court assumed that the state's interest in restoring losses of crime victims may be as significant as the state's interest in regulating domestic matters, but was not involved in this case. It would not seem unrealistic, however, for the state court to have concluded that the brokerage house was a victim of the same crime and ordered restitution of funds that it lost as a result of the fraud.

The second reason for the decision of the Second Circuit was that the fundamental purposes of ERISA were furthered by providing an implied exception in the case of domestic relations matters. The purpose set forth in ERISA, of protecting employees and their beneficiaries, was concluded to be served by reducing the number of public charges that would result were the beneficiaries denied access to retirement funds. Could not the same argument be made to prevent persons guilty of fraud from benefiting from their acts?

The third reason for denying the existence of the implied exception was that the arguments of Bache did not come recommended by the Department of Labor or the Department of the Treasury. As previously pointed out, the government did not initially support the exception for domestic relations orders. In addition, these two branches of government are responsible for enforcing ERISA and do so primarily by promulgation of their own regulations. No authority for giving much weight to the government's mere failure to speak out is cited.

The fourth and final argument set forth by the court of appeals is that there are few cases supporting the theft or fraud ex-

110. Id.
111. Id. at 470.
112. Id.
113. Id.
114. Ellis Nat'l Bank, 786 F.2d at 471.
115. Id.
ception.\textsuperscript{116} If a plebiscite were the appropriate method for deciding cases of this nature, the entire implied exception doctrine should have died with \textit{General Motors v. Townsend}.\textsuperscript{117}

The summation of the Second Circuit, however, goes to the heart of the problem in recognizing implied exceptions. Once this starts, where does it stop? As the \textit{Ellis} court states "[w]ould the exception be available to only employers or pension plans, or also to third parties allegedly victimized, such as creditors, the government or even other employees?"\textsuperscript{118} The court then goes on to conclude that the burden is upon Congress to make exceptions if exceptions are going to be made.\textsuperscript{119}

A result similar to that in \textit{Ellis National Bank} was reached by the United States District Court for the Southern District of New York in the case of \textit{Vink v. SHV North American Holding Corp.}\textsuperscript{120} That case involved a particularly heinous situation where the former employee had, over a period of years, taken many thousands of dollars in illegal kickbacks and diverted more than three million dollars of company business to dummy corporations that the employee had set up. After pleading guilty to several criminal counts and being sentenced to fourteen months in prison, Mr. Vink applied for his pension benefits.\textsuperscript{121} The company argued for an implied exception saying that Congress could not have intended to require a company to make payments under circumstances such as these, especially since the result of the payments would be to reduce the retirement benefits of other faithful and honest employees.\textsuperscript{122}

The principal arguments in the \textit{Vink} case against creation of the implied exception related not to the anti-assignment provisions of ERISA but to the so-called anti-"bad boy" clause of section 203.\textsuperscript{123} This section requires non-forfeitable rights except under very narrow circumstances.\textsuperscript{124} The court stated that it was not entirely clear which of these ERISA sections was involved but that it really made no difference and that it could not create a fraud ex-

\textsuperscript{116} Id.
\textsuperscript{117} 468 F. Supp. 466.
\textsuperscript{118} \textit{Ellis Nat'l Bank}, 786 F.2d at 471.
\textsuperscript{119} Id. at 472.
\textsuperscript{120} 549 F. Supp. 268 (S.D.N.Y. 1982).
\textsuperscript{121} Id. at 269.
\textsuperscript{122} Id. at 273.
\textsuperscript{123} Id. at 270.
\textsuperscript{124} Id.
ception in the case of disloyal employees. According to the court, this was a decision that Congress would have to make. The Vink case cited a similar conclusion reached in Winer v. Edison Brothers Stores Pension Plan which was decided in 1978 by the Court of Appeals for the Eighth Circuit.

The contributions by the foregoing decisions to the cause of certainty in the application of the anti-alienation provisions, is however, muted by the fact that they represent merely one of two grossly divergent points of view. Other courts have dealt with this issue and have chosen to recognize an implied exception under similar circumstances.

B. Implied Exception for Dishonesty Found

In the case of Saint Paul Fire and Marine Insurance Company v. Cox, the insurance company, as surety for a bank that the defendant had defrauded, attempted to garnish the pension benefits of the defendant, Mr. Cox. The lower court allowed the garnishment stating that the wrongdoer should not profit by his own misdeeds. The court of appeals affirmed. In doing so, the court cited the general principles used to establish ERISA and concluded as follows:

These standards are intended to protect the employee against mismanagement or the provision of misinformation by the employer. The legislation provides no indication whatsoever that it is intended to protect the employee against the consequences of his own misdeeds.

125. Id. at 273.
126. Id.
127. 593 F.2d 307 (8th Cir., 1979). See also United Metal Products Corp. v. National Bank of Detroit, 811 F.2d 297 (6th Cir., 1987). Petition for Certiorari has been filed in this case. The Solicitor General has been invited to file a brief setting forth the position of the United States, 97 L.Ed.2d 760 (1987).
129. 752 F.2d 550 (11th Cir. 1985).
130. Id at 551.
131. Id.
132. Id. at 552.
133. Id.
C. Implied Exception to Protect Other Federal Statutes Found

The United States District Court for Colorado dealt with a similar situation in the case of Guidry v. National Sheet Metal Workers National Pension Fund.134 The case involved Mr. Guidry, the chief executive officer of the union and a trustee of the pension fund, who had been found guilty of embezzlement.135 He applied for retirement benefits. He was denied on the theory that a constructive trust was imposed until the embezzled funds had been repaid.136 Mr. Guidry argued that, in adopting REA, Congress had created only one exception. Implying another exception would fly in the face of the clearly expressed intent of Congress.137

The court cited both the Ellis National Bank138 case and the Saint Paul Fire and Marine139 case and concluded that the problem at hand involved interpreting the effect of ERISA upon other labor laws; and, more particularly, the Labor Management Relations Act of 1947140 as well as the Labor Management Reporting and Disclosure Act of 1959.141 In enacting these two statutes, the court concluded, that Congress has attempted to protect employees from improper practices of employers and their own unions and that this purpose would not be served by permitting other employees of the union to be damaged by the "knavery" of Mr. Guidry.142

D. Implied Exception Found Where the Offense is Against the Plan

Perhaps the most egregious circumstance occurs in the case of plan participants who serve as fiduciaries and who divert plan assets for their own benefit. If these participants are then permitted to hide behind the anti-alienation provisions of ERISA and collect their plan benefits as if nothing had happened, the old adage that crime does not pay would be disproven. Nevertheless, no exception is stated for this situation in either the statute or the regulations.
Therefore, it is left, for the courts to find yet another implied exception to prevent unjust enrichment of the criminal.

Such was the case in the Seventh Circuit Decision of *Fremont v. McGraw-Edison Company.*

Application of the effective date of ERISA was at issue and two of the employees were determined to be protected by section 203 of ERISA. The third employee was, however, a plan fiduciary and the company contended that the failure of the plan fiduciary to disclose the thefts prior to the effective date of ERISA so as to allow for a forfeiture and reallocation of plan assets was a breach of fiduciary duty. The court held that causing a forfeiture of the plan fiduciary’s account would not be a divestiture, but would only be a restoration of the plan to the position it would have been in were it not for that breach.

Perhaps the ultimate extension of this logic is found in the case of *Crawford v. La Boucherie Bernard Ltd.* Crawford involved a plan fiduciary who diverted several hundred thousand dollars of plan assets to a partnership and corporation he owned. Judgments aggregating nearly one million dollars were entered against the plan fiduciary and were not paid. On motion of the plaintiffs, the court ordered the plan fiduciary’s own plan account forfeited in partial satisfaction of the judgment. The Court of Appeals for the D.C. Circuit affirmed the lower court decision using broad-sweeping language that opened the door for another implied exception anytime a court sees injustice being done.

143. 606 F.2d 752 (7th Cir. 1979).
144. *Id.* at 754.
145. *Id.* at 757.
146. *Id.* at 758.
147. *Id.* at 759.
149. *Id.* at 118.
150. *Id.* at 119.
151. *Id.*
152. The court, quoting Senator Harrison Williams, Chairman of the Committee, indicated that they were obligated to draw upon “... principles of traditional trust law. ...” and that “[t]rust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the
The court cited other cases acknowledging the existence of implied exceptions. 153 It focused, however, upon language contained in the 1974 Committee Reports indicating that it was the intent of Congress to draw on traditional principles of trust law to protect plan beneficiaries. 154 The court went on to conclude that “the contrary interpretation would permit trustee wrongdoers to benefit from their misdeeds at the expense of those whom ERISA was designed to protect.” 155 The court of appeals concluded that the plan fiduciaries were really not being deprived of their plan benefits. In other words, the effect of the offset would be the same as if they received the distribution they would have received had not the plan benefits been decreased by their wrongdoing. 156

Obviously, the court’s intent is to prevent manifest injustice. Nevertheless, the application of general equitable trust rules would seem to open the door to a plethora of implied exceptions. Clearly, the intent of ERISA was to protect plan participants. Could it not be just as easily argued that this intent is fostered by the seizure of a fiduciary’s plan benefits in an account where the fiduciary has been guilty of misappropriation of funds or dereliction of duty to another plan entirely?

VIII. THE FUTURE OF ERISA SPENDTHRIFT LANGUAGE

And now, fourteen years after the passage of ERISA, the circle of uncertainty has been virtually completed. Both Congress and the courts have admitted, by their subsequent actions, that the language adopted in 1974 was, at best, unclear. Instead of jumping in and clearly rectifying the problem, however, Congress invented the QDRO. It did nothing whatsoever to clarify what it meant when it adopted the original anti-alienation provision.

After all the litigation and all the subsequent legislative history and legislation, the courts are still making value judgments on what they think Congress should have done, or would have done, had they addressed the specific issues in question. In other words, the courts are legislating and, as questioned by the Second Circuit, where will they stop? 157 The New York Court of Appeals has found

trust.” Id. at 120.
153. Id. at 121.
154. Id. at 120.
155. Id. at 121.
156. Id. at 122.
157. Ellis, 786 F.2d 466.
an overriding public policy need to insure the enforceability of judgments. Will other states, as well as the Federal Courts of Appeals, agree with that conclusion and will they continue to carve out other "implied exceptions"?

Clearly, by the passage of ERISA and subsequent legislation, Congress intended that retirement benefits be given a special status in the eyes of the law. These benefits are to provide for the employee and the employee's beneficiaries when they can no longer care for their own needs. They are protected and preserved from the onslaught of both the employer and outsiders seeking to reach the funds before they come to rest in the hands of the beneficiaries. With this objective in mind, it is suggested that Congress give serious thought to the following course of action:

1. **CHANGE THE DIRECTION OF SECTION 401(A)(13).** As previously discussed, the statute, in its current form is merely directive to the drafters of qualified plans. The lack of self-executing language has, by and large, been ignored by the courts. Since Congress itself apparently never considered an all-encompassing statute, the lack of affirmative direction is what created the existing massive problems. If Congress wants specific spendthrift language to be contained in each plan, they should give some guidelines to the Treasury Department in the statute and direct that regulations spell out the precise plan language that will create the appropriate exemptions. If Congress wants the protective umbrella to be created by the federal statute itself, there is ample precedent, as previously alluded to, for doing this in clear and precise language.

2. **BROADEN THE SCOPE OF SECTION 401(A)(13).** The anti-assignment provisions of ERISA apply only to qualified plans subject to the vesting rules of section 411. Individual Retirement Accounts are not covered by their provisions. If the objective of the provisions are to insure that retirement benefits are available when needed, this format does not make a lot of sense. For many years, Individual Retirement Accounts were only available to persons not covered under an employer sponsored plan. Under current law, with some exceptions, deductible contributions may only be made by persons not covered by an employer sponsored plan. Persons contributing to an Individual Retirement Account look to

158. *See supra* note at 28.
160. *Id.*
these funds to protect them in their declining years no less than persons covered by an employer sponsored plan.

3. DEFINE CLEARLY THE PREEMPTION OF STATE STATUTES. REA assumed that there is a federal preemption and has gone on to provide a very narrow exception for state action. Nevertheless, the courts are obviously confused when it comes to a determination of precisely what state action is preempted. The New York Court of Appeals, as indicated above, has concluded that enforcement of judgments is merely collaterally related to retirement plans and therefore not precluded by state action.\textsuperscript{161} Congress should amend the appropriate legislation to provide that retirement benefits may not be the subject of execution, levy, or seizure unless specifically provided for by federal legislation. This ban should include seizure for payment of federal taxes. Widows and orphans are no less hungry when benefits they have relied upon are seized to pay taxes, than they would be if the same benefits were seized pursuant to a judgment on an installment sales contract.

4. LIMIT THE PARAMETERS OF THE UMBRELLA. The spendthrift provisions of ERISA, much like the exemptions afforded under the bankruptcy laws or other statutes, are clearly intended to insure sustenance to the protected individuals. They are not designed to give those attempting to defraud their creditors a shield to hide behind. Under present law, up to $30,000 per year may be added to a participant’s defined contribution plan account.\textsuperscript{162} This amount, set aside per year, may be multiplied in the case of maximum funding under a defined benefit plan within the limitation of section 415.\textsuperscript{163} An individual should not be permitted to shield unlimited amounts of money by causing the adoption of a qualified retirement plan. A simple alternative to this would be to provide that only an amount sufficient to provide normal retirement benefits, of “a certain number of dollars,”\textsuperscript{164} could be shielded behind the anti-alienation statute.

\textsuperscript{161} Morgenthau, 513 N.Y.S.2d 429.
\textsuperscript{162} I.R.C. § 415 (1986).
\textsuperscript{163} Id.
\textsuperscript{164} An alternative may be to use the limits imposed by Internal Revenue Code § 4981A. This section has obviously been designed with the idea in mind of ascertaining what a reasonable retirement benefit is. Currently benefits in excess of $117,200.00 per year are deemed “excess benefits” subject to a 15% excise tax. This figure will be increased annually to reflect cost of living increases.
5. **OVERRULE THE CASES WITH REGARD TO OFFENSES AGAINST THE PLAN AND FRAUD AGAINST THE EMPLOYER.** The cases clearly state that they are preferring one creditor over another. A plan sponsor that has been defrauded may be entitled to take action against plan benefits whereas an entirely unrelated party, who has nonetheless been defrauded, will be left without remedy. If the objective is to prevent seizure of plan assets needed for sustenance after retirement, then the objective should be made consistent.

6. **MOST IMPORTANT OF ALL, KEEP IT SIMPLE.** The magnitude of the funds expended for plan administrators, attorneys, accountants, courts and the maintenance of government bureaucracy, to accommodate the surrealistic ramblings of Congress in the area of qualified retirement benefits is beyond comprehension. There is no need for it and clearly Congress will be forced to adopt the Employee Retirement Simplification Act of 19_____. The adoption of a clear and workable anti-alienation provision may be the first step in this legislative catharsis. Congress could simply state its objectives, the quantity of the exemption granted, and the fact that its remedies, such as the QDRO, are absolutely exclusive and offer the only means by which access to funds in the hands of a pension administrator can be reached.

**IX. CONCLUSION**

In 1974, the drafters of ERISA had an idea in mind. Fourteen years later we still are not quite sure what that idea was. Few will dispute the fact that the Internal Revenue Code has, over the years, become outrageously complex and difficult to administer. This situation is not alleviated when Congress enacts obscure legislation, and then, knowing full well that the courts are literally taking a poll as to its meaning, they fail to step in and rectify the situation.

The various court decisions discussed above clearly acknowledge the fact that they have no language to turn to, in order to derive the implied exceptions that have been created. Apparently, the courts felt that they must step in to interpret this legislation, in order to avoid what they have perceived as a monstrous injustice. When the courts admittedly engage in the restructuring of a statute out of whole cloth, the time has long passed for Congress to act in a decisive manner. The creation of the QDRO, while helpful, does not constitute this decisive action.
Many commentators have, over these fourteen years, written scholarly articles about the various court decisions discussed herein. These articles, in an erudite fashion, try to define legislative intent in judicial direction but few call it what it really is, "chaos".

Granted, the English language is not all that precise an instrument. Nevertheless, the lack of clarity in the anti-alienation statutes' legislation clauses are unnecessary. The cases cited in this article are but the tip of the iceberg in a multitude of litigation involving anti-assignment clauses of ERISA. Literally dozens of state and federal court decisions have been handed down involving what is assumed to be thousands of hours of lawyers' and judges' time and millions of dollars of taxpayers' money.

Many of these problems could have been solved by the drafting of precise statutory language in the first place. The obvious problems which still exist may be rectified if Congress recognizes the problem and acts to make its intention clear.