Rock, Scissors, Paper: ERISA, the Bankruptcy Code and State Exemption Laws for Individual Retirement Accounts

by

C. Scott Pryor*

Three important bodies of law (ERISA, the Bankruptcy Code and state laws exempting specified property from execution by judgment creditors) have on occasion collided in bankruptcy courts. Given the wide but uncertain preemptive reach of ERISA, the results of such a collision have not always been predictable. Following is a case study arising out of three recent federal decisions in Virginia attempting to resolve the conflicts created at the intersection of these strands of law. Each case faced the question of whether ERISA preempted Virginia's exemption law as it applied to IRAs. While Virginia's exemption of IRAs is distinctively intertwined with its exemption of pension plans subject to ERISA, conflict over preemption is not unique to Virginia. Many other states in some fashion combine exemptions for IRAs with exemptions for pension plans. Thus lawyers dealing with this legal intersection must command a sophisticated understanding of the highly nuanced doctrine of ERISA preemption.

In 1974 Congress passed the Employee Retirement Income Security Act ("ERISA"),1 to protect employees who participate in employer-sponsored benefit plans. The new statute required increased disclosure and reporting to plan participants, mandated a level of fiduciary care by those entrusted with retirement assets and created remedies for participants whose protected expectations were defeated.2 Among its myriad provisions, ERISA had two of particular importance to employees whose financial condition might take a

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*Associate Professor of Law, Regent University School of Law. J.D. University of Wisconsin Law School. I wish to thank Dean Jeffrey Brauch and Regent University for the research grant that helped make this article possible. Thanks also to William Magee for his expert research assistance and Matthew Wilkins for his editorial help. Any remaining errors, omissions or oversights are mine.

1"ERISA" refers to the Employee Retirement Income Security Act of 1974, as amended. Most of ERISA was codified in Title 29 of the United States Code. A significant part of ERISA was also codified in Title 26 of the United States Code (the Internal Revenue Code).

serious turn for the worse: a broadly worded anti-alienation provision (§ 206(d)(1))\textsuperscript{3} and an even more broadly worded express preemption section (§ 514(a)).\textsuperscript{4}

A few years later comprehensive bankruptcy reform legislation was enacted. One purpose of the Bankruptcy Reform Act of 1978\textsuperscript{5} was to make it easier for individuals to discharge their debts and obtain the proverbial “fresh start.”\textsuperscript{6} A corollary to the Bankruptcy Code’s fresh start principle was the creation of an optional system of federal exemptions.\textsuperscript{7} Hopes for a truly uniform set of exemptions proved chimerical when all but sixteen states exercised their power to opt out of the federal exemptions.\textsuperscript{8} Individual debtors in the opt-out states still retained the right in bankruptcy to claim whatever exemptions state law allowed.\textsuperscript{9}

In 1979 Virginia, like thirty-three other states, opted out of the federal exemptions\textsuperscript{10} but continued to offer its residents a limited range of personal exemptions.\textsuperscript{11} In 1990 the Virginia legislature provided a limited exemption for Individual Retirement Accounts.\textsuperscript{12} Two factors limited Virginia’s initial exemption for IRAs. First, the exemption was limited to the amount necessary to provide the debtor an annual income of $17,500 at age 65.\textsuperscript{13} Second, the statute reduced a debtor’s exemption for assets held in an IRA by the amount of assets held for the debtor’s benefit in other retirement plans.\textsuperscript{14} In 1999 the Virginia legislature added an unlimited exemption for IRAs except where an individual also had a pension subject to ERISA.\textsuperscript{15} The unlimited

\textsuperscript{4}ERISA § 514(a), 29 U.S.C. § 1144(a).
\textsuperscript{7}11 U.S.C. § 522.
\textsuperscript{8}11 U.S.C. § 522(b)(1). As of the end of 2002, thirty-four states have opted out of the federal exemptions. 4 Colliers on Bankruptcy ¶ 522.02(1) n.3 (15th ed. 2002).
\textsuperscript{10}See VA. CODE ANN. § 34-3.1 (Michie 1996); see also Epperley v. Woodyard (In re Epperley), 4 B.R. 124, 125 (Bankr. E.D. Va. 1980) (“Virginia, by virtue of § 34-3.1, enacted in 1979, is one of a few states in the nation that has excluded itself from the exemptions provided in 11 U.S.C. § 522 of the Bankruptcy Reform Act and consequently, the exemption statutes contained in the Code of Virginia prevail.”).
\textsuperscript{11}See, e.g., VA. CODE ANN. §§ 34-4, -4.1, -7, -8, -9, -13, -17, -18, -19 (Michie 1996 & Supp. 2002). Title 34 specifically identifies what assets are exempt from the property of the estate in bankruptcy and the extent of those personal exemptions.
\textsuperscript{12}VA. CODE ANN. § 34-34 (Michie Supp. 2002).
\textsuperscript{13}VA. CODE ANN. § 34-34(C) (Michie Supp. 2002). Calculation of this limitation is based on an actuarial table incorporated into the statute.
\textsuperscript{14}VA. CODE ANN. § 34-34(F) (Michie Supp. 2002).
\textsuperscript{15}VA. CODE ANN. § 34-34(H) (Michie Supp. 2002).
IRA exemption did not entirely supplant the previous limited exemption. In cases where an individual had both an IRA and a pension, the limited 1990 version of the IRA exemption continued to apply. Depending on which of these provisions applied, debtors in Virginia could exempt all, some or none of their IRAs.

In three recent Virginia cases these three bodies of law - ERISA, the Bankruptcy Code and Virginia’s exemption laws - collided. In the first case, Stephen and Susan Gurry joined other family members in a real estate partnership in Massachusetts.16 Subsequently, the property went into foreclosure and left the Gurrys facing a deficiency judgment of over $267,000.17 Unable to work out an arrangement with the foreclosing creditor, they filed a joint petition for relief under Chapter 7 of the Bankruptcy Code. Their assets included retirement benefits in a 401(k) plan18 as well as two IRAs. The debtors’ account balance in the 401(k) plan was $61,000; the value of the IRAs was about $65,000.

The Supreme Court’s 1992 decision in Patterson v. Shumate19 excluded the Gurrys’ 401(k) plan assets from their bankruptcy estate. The Gurrys also claimed an unlimited exemption in the IRAs under the 1999 amendment to the Virginia exemption statute. The holder of the deficiency judgment seasonably objected and the Bankruptcy Court sustained the objection, forcing the Gurrys to integrate their retirement assets and surrender all but $7,500 of their IRAs to the creditors.20

Barely three months later another bankruptcy court in the same district construed the Virginia exemption statute not to require integration of excluded pension assets with IRAs. The debtor, Richard Bissell, thus retained virtually all of his IRA accounts (about $53,000) even though Bankruptcy Code § 541(c) allowed him to exclude over $500,000 of pension assets from his estate.21

This significant difference in result can be attributed to the preemptive effect of ERISA. The Gurry court had held that ERISA did not preempt the requirement of the Virginia exemption law to integrate IRAs and pension

16 Telephone Interview with Tina M. McMillan, counsel for the Gurrys (September 16, 2002).
18 I.R.C. § 401(k). 26 U.S.C. § 401(k). All references to the Internal Revenue Code (I.R.C.) shall be to the Internal Revenue Code in effect on September 1, 2002 unless otherwise noted.
19 504 U.S. 753, 765 (1992) ("[A] debtor's interest in an ERISA-qualified pension plan may be excluded from the property of the bankruptcy estate pursuant to § 541(c)(2) . . .")
20 Gurry, 253 B.R. at 412.
21 In re Bissell, 255 B.R. 402 (Bankr. E.D. Va. 2000). Integration under § 34-34(C) would have required Richard Bissell to surrender all of his IRA accounts to the bankruptcy trustee. While the Bissell opinion does not disclose the debtor's age, the most that anyone would be able to exempt under the Virginia formula is $143,426.50 ($17,500 times 8.1958, the statutory cost per $1 of benefit at age 65).
assets.\(^{22}\) The *Bissell* court disagreed. In *Bissell* the court concluded that integration was preempted by ERISA and construed the exemption statute not to require it.\(^{23}\) Thus Richard Bissell could take advantage of the 1999 unlimited IRA exemption.

Between *Gurry* and *Bissell*, the District Court in *Phillips v. Bottoms*\(^{24}\) decided that the savings clause in § 514(d) of ERISA\(^{25}\) preserved the Virginia exemption statute from preemption. The court noted that Bankruptcy Code § 522(b) incorporates state exemption statutes into the federal bankruptcy scheme. Relying on early Supreme Court ERISA precedent, the court concluded that Virginia's exemption was saved from preemption even if Virginia's integration formula intruded into the field occupied by ERISA.\(^{26}\)

Although the integration formula in Virginia's IRA exemption statute is unique, many states have IRA exemption provisions that raise the possibility of ERISA preemption.\(^{27}\) Most states blend the exemption of both IRAs and retirement plans subject to ERISA into a single statute. Courts at the bankruptcy level have construed the issue of ERISA preemption in these jurisdictions with varying results.\(^{28}\) Other courts have addressed whether the savings clause in ERISA § 514(d) protects such a blended statute from preemption.\(^{29}\)

The following questions will be analyzed in the course of this article:

1. Would ERISA § 514(a) preempt a stand-alone state statute exempting IRAs from creditor process and thus the bankruptcy estate?
2. In the absence of a state statute exempting IRAs, is there any means by which an IRA can be preserved for the debtor in bankruptcy?
3. Would ERISA § 514(a) preempt a blended state statute exempting both IRAs and retirement plans subject to ERISA?

\(^{22}\) *Gurry*, 253 B.R. at 412 ("While the statute cannot limit or burden the protections afforded by ERISA, it can protect, to what ever extent the state deems appropriate, retirement plans that do not come within ERISA's scope, such as individual retirement accounts.").

\(^{23}\) *Bissell*, 255 B.R. at 420-21 ("[T]he creditor's first proposition, that ERISA-qualified plans are retirement plans within the statutory definition in § 34-34(A), cannot be accepted. To hold otherwise would necessarily void § 34-34 by virtue of federal pre-emption.").


\(^{25}\) ERISA § 514(d), 29 U.S.C. § 1144(d). Section 514(d) is commonly known as the ERISA "savings clause." See infra text accompanying notes 70 and 254-62 for further discussion of ERISA's savings clause.


\(^{27}\) See infra Appendix for a tabulation and analysis of the relevant exemption laws of other states.

\(^{28}\) See infra text accompanying notes 285-88 for discussion of ERISA preemption of exemptions.

\(^{29}\) See infra text accompanying notes 254-56.
4. Would ERISA § 514(a) preempt a state statute integrating the amount of the exemption for IRAs with the amount of assets in retirement plans subject to ERISA?

5. If the answer to any of these questions were yes, would § 514(d) save such a state statute from preemption?

Part I of this article briefly reviews the history of ERISA, its structure, certain important provisions and the related sections of the Internal Revenue Code affecting pension trusts and IRAs. Part II addresses the history of bankruptcy law and ERISA with particular attention to the impact of the Bankruptcy Code on retirement benefits subject to ERISA. Part II also explores the property of the estate as defined by § 541(c) and the Bankruptcy Code’s reinforcement of federalism in the context of exemptions. Part III examines alternatives to the Bankruptcy Code as a means by which to exclude IRAs from a debtor’s estate, especially state spendthrift trust law. In Part IV the variegated history of the Supreme Court’s handling of ERISA preemption comes in for sustained scrutiny. This part challenges the conventional wisdom (and vestigial Supreme Court language) that a mere reference to ERISA in a state statute results in automatic preemption. Part V reviews in detail the competing decisions addressing Virginia’s exemption statute. Part VI concludes by summarizing the results of preemption challenges to exemption laws of states other than Virginia. Part VI also addresses the significance of the savings clause in connection with the Bankruptcy Code’s incorporation of state law exemptions that might otherwise be preempted. Finally I conclude that ERISA should not be read to preempt state laws that create or limit exemptions for IRAs, even where the extent of the exemption for IRAs is integrated with assets within the scope of ERISA - in the end, Richard Bissell’s creditors should have received his IRAs.30

I. A VERY BRIEF ERISA PRIMER

Since its enactment in 1974, ERISA has been the subject of at least 1250 journal articles and other legal publications.31 An analysis of the full range of ERISA is not necessary for the purposes of this article. Yet an understanding of its raison d’être, relevant portions of its legislative history and several specific sections are important to set the stage for whether IRA exemption statutes that also refer to ERISA should be preempted.

A. HISTORY AND PURPOSES OF ERISA

Congress wished to encourage the growth of pension plans and to protect

30 That is, as a matter of Virginia law, not necessarily as a matter of normative principle.
31 A Westlaw search under article titles using TI(erasa) or TI("employee retirement income security") in the journals and law reviews (JLR) database on May 21, 2003 produced 1288 hits.
participants in and beneficiaries of such plans when it enacted ERISA. ERISA aimed to ensure that participating employees received their benefits and were allowed to participate after fewer years of service. Congress believed it was important to mandate uniform federal treatment of employee benefit plans. The Supreme Court recognized the explicit goal of federal uniformity in *Fort Halifax Packing Co. v. Coyne*. The Court noted that employers that make commitments to provide a wide variety of benefits would find that "[t]he most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." Without federally


33In one of its earliest opinions dealing with ERISA preemption, the Supreme Court noted that Congress designed ERISA to prescribe minimum vesting standards, minimum rules for employee participation, funding standards (to increase plan solvency), fiduciary standards for plan managers, and an insurance program to safeguard the expectations of plan participants in the event of the termination of an underfunded plan. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981). See generally H.R. Rep. No. 93-533 (1973), reprinted in 1973 U.S.C.C.A.N. 4639, 4642, 4647-4648. In addition to making the benefits of current plans more certain, Congress also wanted the private sector to increase the number of employees who could participate as well as the range of benefits they could receive. See, e.g., Statement of Senator Lloyd Bentsen on introduction of S. 1179: "The Federal Government should take action to encourage broader coverage under private pension plans and insure receipt of benefits by workers and their survivors." 119 Cong. Rec. 7420 (1973).

34When drafting ERISA, its congressional authors recognized that the most efficient way to meet these responsibilities was to establish a uniform, federal, administrative scheme, providing a set of standard procedures to guide administrators of plans, processing of claims, and disbursement of benefits. This was particularly true in the case of plans covering employees or beneficiaries in many different states. . . . [T]he inefficiencies in plan operation caused by such "patchwork" regulation might lead multi-state employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.


36*Fort Halifax*, 482 U.S. at 9.
mandated uniformity, Congress feared that employers would face state-generated uniformity.\textsuperscript{37} Fear of the additional expense that uniformity would generate led Congress to preempt state laws.

B. \textbf{Basic ERISA Structure}

ERISA in its original form was divided among five lengthy titles. The first two – "Protection of Employee Benefit Rights" and "Amendments to the Internal Revenue Code" – are particularly significant to this article.\textsuperscript{38} Both Titles I and II are relevant to the question of ERISA preemption of state exemption laws because they are redundant on many matters such as funding and vesting. Congress enacted Title II separately because it amended the Internal Revenue Code for tax qualification purposes.\textsuperscript{39}

C. \textbf{ERISA Preemption and the Anti-Alienation Provision}

Two sections of ERISA stand out in connection with preemption of state law exemptions. The first is § 514(a), ERISA's express preemption provision:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.\textsuperscript{40}

The express ERISA preemption clause was a deliberate and significant change from prior law.\textsuperscript{41} The principal movers of ERISA wanted to foreclose state action in at least the areas addressed by ERISA.\textsuperscript{42} Senator Harrison

\textsuperscript{37}Id. ("Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.").

\textsuperscript{38}Title I in turn was originally divided among five parts, only two of which will come in for sustained discussion: Part 2 (Participation and Vesting) and Part 5 (Administration and Enforcement). Part 6 ("Continuation Health Coverage") was added to Title I of ERISA in 1985 as 29 U.S.C. §§ 1161-1168. Pub. L. No. 99-272, 100 Stat. 82 (1985), Title X.

\textsuperscript{39}Congress has continued to tinker with Title II to create more tax-qualified retirement devices and change limits on existing ones so references will need to be made to both Title I of ERISA and the tax code. See, e.g., the Revenue Act of 1978 (creating the SEP-IRA), Pub. L. No. 95-600, 92 Stat. 2763 (1978).

\textsuperscript{40}ERISA § 514(a), 29 U.S.C. § 1144(a). The preemption section falls within Title 1, Part 5 of ERISA.

\textsuperscript{41}Far from preempting state law, the WPPDA expressly invited additional state regulation of employee benefit plans. Pub. L. No. 83-836, 72 Stat. 997 (1958), § 10(a) ("Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan."). See Malone v. White Motor Corp., 435 U.S. 497 (1978).

\textsuperscript{42}The preemption provision in the final version of ERISA was broader than that in the earlier versions. See generally Leon E. Irish & Harrison J. Cohen, ERISA Preemption: Judicial Flexibility and Statutory
Williams, the floor manager for the bill that became ERISA commented that it should "preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments... which have the force or effect of law." The Chairman of the House General Labor Subcommittee, Representative John Dent, was just as clear, depicting the preemption clause as "the reservation to Federal authority of the sole power to regulate the field of employee benefit plans." Still it is unlikely that Congress conceived of preemption as a goal independent of the purposes of ERISA. It was the growth of pension plan assets, the increase in the number of participants in such plans and the dangers of unfair treatment of the participants that prompted ERISA.

The ERISA anti-alienation provision is also particularly significant to the issue of preemption of exemptions. ERISA § 206(d)(1) provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The limitation of ERISA's anti-alienation clause to benefits of pension plans is significant. According to the Supreme Court in Mackey v. Lanier Collection Agency & Service, Inc., Congress's disparate treatment of pension and welfare benefits evidenced an intent to

Rigidity, 19 U. Mich. J. L. Reform 109, 112 (1985) [hereinafter ERISA Preemption]. In fact, the Senate Report concerning the original bill described the original scope of preemption in much narrower terms:

Because of the interstate character of employee benefit plans, the Committee believes it is essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.


The reasons for the subsequent broadening of the scope of ERISA preemption are a matter of some debate. In any event, the final version represents "the most expansive preemption clause Congress considered while drafting ERISA." ERISA Preemption at 112.

120 Cong. Rec. 29,933 (1974). See also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 ("The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.")


David T. Shapiro, Note, The Remission of ERISA Preemption: An Examination of Blue Cross/Blue Shield v. Travelers Ins. Co., 28 Conn. L. Rev. 917, 945-46 (1996) ("[B]road preemption was not an objective itself, but rather, a mechanism to effectuate the prevailing goals of the legislation: to protect plan participants and to provide plans with national operating standards.").


According to ERISA, a "pension plan" includes profit-sharing plans, 401(k) plans, money purchase pension plans, target benefit plans, defined benefit plans, Keogh plans (of any of these types), and stock bonus plans. See generally ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

protect only the former.\textsuperscript{49} The Conference Committee Report concerning what was to become § 206(d)(1) demonstrates concern only for pension plans.\textsuperscript{50} In other words, ERISA was not intended to curb judgment creditors' rights under state law, if any, to reach welfare benefits such as vacation pay that employees could voluntarily use over the course of the next year. Conversely, employees who have very limited rights to reach their pension assets directly should not see their creditors seize the same assets indirectly.\textsuperscript{51}

The Supreme Court also relied on ERISA § 206(d)(1) to exclude pension assets from an individual's bankruptcy estate in \textit{Patterson v. Shumate}.\textsuperscript{52} But IRAs are not directly covered by ERISA.\textsuperscript{53} Individual retirement accounts were created under IRC § 408\textsuperscript{54} and do not fit the definition of "employee benefit plan." Individual retirement accounts should therefore not be protected by ERISA § 206(d)(1). On the one hand, omission of IRAs from ERISA's antialienation provision provides the impulse for the states to protect

\textsuperscript{49} [T]here is no ignoring the fact that, when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and not ERISA welfare benefit plans ... Congress' decision to remain silent concerning ERISA welfare plan benefits "acknowledged and accepted the practice [of garnishment of welfare plan benefits], rather than prohibiting it."

\textit{Id.} at 837 (emphasis in the original).

\textsuperscript{50} Under the conference substitute, a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment of levy is not to be considered a voluntary assignment. Vested benefits may be used as collateral for reasonable loans from a plan ...

\textsuperscript{120} \textbf{Cong. Rec.} 27,849, 27,920 (1974) reprinted in \textit{Legislative History}.

\textsuperscript{51} The congressional conference report on ERISA ascribes no stated purpose to the antialienation rule, doubtless on the ground that the purpose is too obvious for words. The antialienation rule is protective. It prevents the participant from doing indirectly what most plans forbid directly, namely, spending retirement savings before retirement. It would scarcely make sense to stop the participant from drawing down his or her pension account for current consumption if the participant's creditor could present the bills arising from the participant's consumption spree to the pension plan by way of assignment or in the form of a judgment debt.


\textsuperscript{52} The antialienation provision required for ERISA qualification and contained in the Plan at issue in this case thus constitutes an enforceable transfer restriction for purposes of [Bankruptcy Code] § 541(c)(2)'s exclusion of property from the bankruptcy estate." \textit{Patterson v. Shumate}, 504 U.S. at 760.

\textsuperscript{53} ERISA § 201(6) provides that Part 2 of Title I does not apply to IRAs. 29 U.S.C. § 1051(6). IRAs are simply tax-advantaged savings accounts. Conversely, ERISA § 3(2) considers 401(k) plans to be "pension benefit plans" even though such plans are also little more than tax-advantaged savings (or mutual fund) accounts.

\textsuperscript{54} 26 U.S.C. § 408.
this form of retirement savings through exemptions. On the other, IRAs are also free from ERISA's preemption provision thus permitting states to enact a stand-alone exemption for them.

1. Would ERISA § 514(a) preempt a stand-alone state statute exempting IRAs from creditor process and thus the bankruptcy estate? No.

II. ERISA AND BANKRUPTCY LAW

In 1992 a unanimous Supreme Court held in Patterson v. Shumate that Bankruptcy Code § 541(c)(2) excluded the assets of an “ERISA-qualified” pension account from a debtor’s bankruptcy estate. The Court’s reasoning was straightforward: ERISA § 206(d)(1) made certain pension assets inalienable and the Bankruptcy Code’s definition of “property of the estate” excluded assets subject to such a legal restriction. Several questions remained open even after the Court’s decision: which pension accounts could be “ERISA-qualified” and which, if any, of the Bankruptcy Code’s exemption provisions would reach pension accounts that were not “ERISA-qualified.”

A. ERISA QUALIFICATION AND IRAS

Professor Donna Litman has written the definitive piece on the lower courts’ application of Patterson v. Shumate to pension plans in bankruptcy cases. The comments that follow will largely be drawn from her work. Professor Litman notes, as have many others, that there is no statutory definition for the Supreme Court’s phrase “ERISA qualified pension plan.” The plan in

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55 See infra Table reproduced as Appendix I.
56 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.” 11 U.S.C. § 541(C)(2).
57 See infra text accompanying notes 59-63 for discussion of the “ERISA-qualified” misnomer.
58 Patterson v. Shumate, 504 U.S. at 760.
61 Bankruptcy Status, supra note 59, at 643 ("The term, ‘ERISA qualified pension plan’ is not a term that is defined by ERISA nor is it a term that is defined by the Internal Revenue Code.")
Patterson v. Shumate met all conceivable criteria for ERISA qualification: it "was subject to title I of ERISA, was qualified under section 401 of the Internal Revenue Code, and contained the antialienation provision required by the labor and tax sections of ERISA."62 Professor Litman goes on to demonstrate how courts have dealt with plans that failed to meet the various permutations of these requirements.63

Individual retirement accounts (and annuities) necessarily fail to meet the first two of the criteria for ERISA qualification. Part 2 of Title I of ERISA (which contains ERISA's anti-alienation provision) specifically excludes IRAs from its coverage.64 In fact, IRAs do not fall within the scope of Title I of ERISA generally.65 Nor are IRAs qualified under section 401 of the Internal Revenue Code. Rather, IRAs find their origin in the tax code in sections 408(a) and (b).66 While IRAs could contain an anti-alienation provision, nothing in ERISA requires that they do so.67 Numerous courts have thus

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62 Id. at 644.

63 According to Professor Litman, "a plan that is subject to title I of ERISA, and in particular, section 206 (d)(1), should be excludible under section 541(c)(2) of the Bankruptcy Code . . . regardless of whether the plan contains a trust that is qualified under the Internal Revenue Code." Id. at 698-99. Even if the plan for some reason does not contain the required anti-alienation provision, "it is arguable that an interest in such a plan still should be excludible from the bankruptcy estate . . ." Id. at 699. Patterson v. Shumate does not protect plans that are statutorily exempt from Title I of ERISA. Plans that are administratively exempt from Title I of ERISA should be excludible under § 541(c)(2) but only if "the plan contains the necessary plan restriction [i.e., an anti-alienation provision] to satisfy this qualification requirement [IRC § 401(a)(13)]." Id. at 700.

64 This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b)) other than —

(6) an individual retirement account or annuity described in section 408 of the Internal Revenue code of 1986 . . .

ERISA § 201(6), 29 U.S.C. § 1051(6).

65 Title I of ERISA applies to "employee welfare benefit plans" and "employee pension benefit plans." ERISA §§ 3(1) and 3(2)(A), 29 U.S.C. §§ 1002(1) and 1002(2)(A). The definition of "pension plan" requires that an employer or an employee organization establish it. Id. Individual retirement accounts are, as their name suggests, established by individuals.

66 26 U.S.C. § 408(a) and (b). The Eleventh Circuit has defined an IRA

[A]s a personal tax deferred, retirement account which an employed person can establish under specified deposit limits for individuals and married couples. Withdrawals may be made from an IRA prior to age 59½ but such withdrawals are subject to a ten percent penalty tax. An IRA is neither established nor maintained by an employer or employee organization. Instead, an IRA is maintained by an individual in accordance with the restrictions contained in 26 U.S.C. § 408.

Meehan v. Wallace (In re Meehan), 102 F.3d 1209, 1210 (11th Cir. 1997) (quoting In re Herbert, 140 B.R. 174, 176 (Bankr. N.D. Ohio 1992)).

67 Bankruptcy Status, supra note 59 at 700 ("An individual retirement account is not governed by section 401 of the Internal Revenue Code, and thus, it is not required by section 401(a)(13) of the Internal Revenue Code to provide that plan benefits may not be assigned or alienated."). Similar results are obtained with respect to simplified employee pensions ("SEPs") that exist by virtue of IRC § 408(k). Even though employers contribute to SEPs, the contributions are to the employee's IRA, not a trust subject to ERISA. IRC § 408(k)(1), 26 U.S.C. § 408(k)(1). Savings incentive match plans for employers ("SIMPLE
correctly held that IRAs are not excluded from the bankruptcy estate.\textsuperscript{68} Individual retirement accounts are thus disadvantaged compared to other forms of retirement assets in bankruptcy. Funds held for retirement in a trust subject to ERISA are excluded from the estate regardless of the dollar amount of debtor’s interest in such trusts. Funds held in an IRA are protected, if at all, only if covered by a federal or state exemption.

**B. Bankruptcy Code Exemptions and IRAs**

Three additional sources of law may protect IRAs in the event of the bankruptcy of the account (or annuity) owner: federal exemption laws, state exemptions or state common law. The first two sources have ERISA implications, albeit for different reasons. If applicable to an IRA, a federal exemption would certainly not run afoul of ERISA preemption.\textsuperscript{69} ERISA § 514(d) might even reinforce the validity of such an exemption.\textsuperscript{70} On the other hand, state efforts at exempting IRAs could run into a zone of preemption.\textsuperscript{71} Finally, the common law of spendthrift trusts may succeed in excluding retirement assets under Bankruptcy Code § 541(c)(2) but is unlikely to benefit owners of IRAs.\textsuperscript{72}

Two subsections of Bankruptcy Code § 522 are relevant to the exemption of retirement assets. Section 522(d)(10)(E) – applicable only in non-opt-out states – permits the exemption of a limited amount of a debtor’s right to receive retirement benefits so long as the benefits arise from tax-qualified pension plans, annuity plans sponsored by educational institutions or IRAs.\textsuperscript{73} The federal exemption for retirement assets applies broadly, including to

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\itemplans\end{itemize} created under IRC § 408(p) present a more difficult question. Employer contributions are generally made to the employee’s IRA but SIMPLE plans may also be formed as a pension plan subject to ERISA. If contributions were to an IRA, there would be no exclusion under Bankruptcy Code § 541(c)(2). If the contributions are to a trust that contains an anti-division clause, the assets might be excluded. See generally Alson R. Martin, *Creditors’ and Debtors’ Rights in Retirement Benefits: Developments in the Post-Patterson v. Shumate Era*, ALI-ABA COURSE OF STUDY MATERIALS SF69, February 2001.


\textsuperscript{69}ERISA § 514(a) is directed only to state laws. 29 U.S.C. § 1144(a).

\textsuperscript{70}ERISA § 514(d) specifically saves all federal laws from supersession. 29 U.S.C. § 1144(d). See infra note 254.

\textsuperscript{71}See supra text accompanying note 67 and infra text accompanying note 288 for analysis of this issue.

\textsuperscript{72}See infra text accompanying notes 105-06 for analysis of this issue.

\textsuperscript{73}(d) The following property may be exempted under subsection (b)(1) of this section:

The debtor’s right to receive –

(E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless –

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funds held in IRAs. 

Section 522(d)(10)(E) is, however, limited to payments “reasonably necessary” for support of the debtor and any dependent of the debtor. 

Because thirty-four states have opted out of the federal exemptions, this provision is of limited significance. 

Congressional authorization for states to opt out of the federal exemptions carries its own consequences. Congress’s express sanction of states’ elimination of federal exemptions, and its explicit permission for debtors to use state exemptions, raises the question of whether such state exemptions are saved from preemption by ERISA §514(d).

The second relevant subsection, Bankruptcy Code § 522(b)(2)(A), applies to all individual debtors, whether in states allowing the use of federal exemptions or states that have opted out. This provision permits all debtors to exempt property exempt under federal nonbankruptcy law. 

Before the Supreme Court’s decision in Patterson v. Shumate, several courts considered whether ERISA’s anti-alienation clause amounted to such an exemption and came to differing conclusions.

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.


Some courts have questioned whether IRAs must necessarily be considered sufficiently “similar” to a “stock bonus, pension, profit-sharing, [or] annuity” within the meaning of Bankruptcy Code § 522(d)(10). See, e.g., Rousey v. Jacoway (In re Rousey), 283 B.R. 265, 272 (B.A.P. 8th Cir. 2002) (“Contrary to the interpretation given by some courts, there is nothing explicit within the Bankruptcy Code, the legislative history, or 11 U.S.C. § 522(d)(10)(E) itself which manifests Congressional intent to exempt IRA retirement plans in toto.”). The weight of authority, however, has reached the contrary conclusion. Carmichael v. Osherow (In re Carmichael), 100 F.3d 375, 377-78 (5th Cir. 1996) (“An IRA is not a stock bonus, pension, profit-sharing, or annuity plan or contract; therefore, to qualify for the exemption, an IRA must be a ‘similar plan or contract.’ We hold that for purposes of § 522(d)(10)(E), an IRA is a ‘similar plan or contract.’”); Rawlinson v. Kendall (In re Rawlinson), 209 B.R. 501, 504 (B.A.P. 9th Cir. 1997) (“By analyzing the treatment of IRAs to Congress’ treatment of other retirement plans in § 522(d)(10)(E), we find it more plausible to infer that Congress intended for IRAs to be treated similarly for purposes of exemption.”). For an account of why IRAs should not automatically be treated as exempt retirement plans under Bankruptcy Code § 522(d)(10)(E), see Patricia E. Dilley, Hidden in Plain View: The Pension Shield Against Creditors, 74 Ind. L.J. 355, 367 (1999) [hereinafter The Pension Shield].

The “reasonably necessary” limitation on the Federal exemption to retirement assets will be eliminated if the bankruptcy reform legislation pending in the 107th Congress passes. See Bankruptcy Reform Act of 2001, H.R. 353, 107th Cong. § 224 (2001). If this legislation becomes law, then the exemption for property held in IRAs would become absolute in states that have not opted out of the federal system.

See infra note 8.

ERISA § 514(d). See infra text accompanying notes 41-43 for analysis of this issue.

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection . . . . Such property is - (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section . . .
rendered the question moot: ERISA’s anti-alienation provisions do not create an exemption; they operate to exclude the retirement assets from the estate.\textsuperscript{80} Because IRAs are not subject to ERISA’s anti-alienation provisions, this section of the Bankruptcy Code is of no utility for debtors who own them.

Whatever the precise parameters of the phrase “ERISA-qualified,” it should not include IRAs. ERISA qualification may include as many as three factors\textsuperscript{81} or perhaps as few as two.\textsuperscript{82} In either event, an IRA fails to qualify: it is not subject to Title I of ERISA and an IRA’s tax advantages arise under IRC § 408, not IRC § 401. If the debtor’s state has not opted out of the federal bankruptcy exemptions then a debtor’s IRA may be exempt to the extent its proceeds are reasonably necessary for support. There is no danger of ERISA preemption in non-opt-out states because the ERISA savings clause preserves other federal statutes from preemption. If the debtor’s state has opted out of the federal exemptions, however, then even the reservation of nonbankruptcy federal exemptions will be of no avail because ERISA’s anti-alienation provision does not apply to IRAs.

III. STATE SPENDTHrift TRUST LAW AND BANKRUPTCY

Qualification as a spendthrift trust under state law represents the final means by which retirement assets could be excluded from the bankruptcy estate without danger of ERISA preemption. Section 70a(5) of the Bankruptcy Act of 1898 worked to exclude the spendthrift beneficiary’s interests from the trustee’s reach.\textsuperscript{83} Congress intended Bankruptcy Code § 541(c)(2) to accomplish the same result.\textsuperscript{84} Numerous decisions have applied this rule to exclude the beneficial interests of a debtor in a spendthrift trust from the

\textsuperscript{80}See supra text accompanying notes 52-58 for discussion of this issue.

\textsuperscript{81}The three-factor test requires that (1) the plan be subject to Title I of ERISA, (2) the trust holding the retirement assets be qualified for tax purposes under IRC § 401, and (3) the trust contain an anti-alienation provision. See Bankruptcy Status, supra note 59, at 652.

\textsuperscript{82}The two-factor test omits the requirement of tax qualification. Id. See, e.g., In re Hanes, 162 B.R. 733, 740 (Bankr. E.D. Va. 1994).

\textsuperscript{83}Whether such an interest in property passes to the trustee in bankruptcy and is subject to sale by him depends upon whether it is "property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him." Bankruptcy Act § 70a(5), 11 USCA § 110(a)(5) ... We think it clear that under the law of Maryland the interest of bankrupt in the trust estate created by the will is not such as he could have transferred or as could have been subjected to sale for payment of his debts.

Sukin & Berry, Inc. v. Rumley, 37 F.2d 304 (4th Cir. 1930) (citations omitted).

\textsuperscript{84}Paragraph (2) of subsection (c) ... preserves restrictions on transfer of a spendthrift trust to the
bankruptcy estate.\textsuperscript{85}

\section*{A. IRAs, the IRC and State Trust Law}

Considering spendthrift trust law in connection with IRAs may seem absurd. After all, Bankruptcy Code § 541(c)(2) limits its application to the “beneficial interest of the debtor in a trust” and an employer or an employee organization does not maintain IRAs; they are tax-favored savings accounts owned by an individual - not trusts.\textsuperscript{86} Yet one subsection of the Internal Revenue Code describes an IRA as a trust.\textsuperscript{87} Based on this provision the Eleventh Circuit has suggested in dicta that IRC § 408(a) may effectively render IRAs as trusts, regardless of whether state law would reach the same result.\textsuperscript{88} While the Third Circuit raised the same issue in an opinion, it declined to provide an answer because the bankruptcy trustee failed to argue that IRAs could not be trusts.\textsuperscript{89}


\textsuperscript{86}See Meehan v. Wallace (In re Meehan), 102 F.3d 1209, 1210 (11th Cir. 1997). Some courts have concluded that Bankruptcy Code § 541(c)(2)'s limitation to trusts may be relaxed in the ERISA context. See, e.g., Arkison v. UPS Thrift Plan (In re Rueter), 11 F.3d 850, 852 (9th Cir. 1993).

\textsuperscript{87}(a) Individual retirement account. For purposes of this section, the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries . . . ." 26 U.S.C. § 408(a). Individual retirement annuities do not have the designation of a trust. See 26 U.S.C. § 408(b).

\textsuperscript{88}Apparently only beneficial interests in trusts qualify for the § 541(c)(2) exclusion. 11 U.S.C.A. § 541(c)(2) (referring to "[a] restriction on the transfer of a beneficial interest of the debtor in a trust"). No argument is made that Meehan's IRA is not a trust. Moreover, by definition, an IRA is a trust. 26 U.S.C.A. § 408(a) ("[T]he term 'individual retirement account' means trust . . . .").

\textsuperscript{89}Meehan, 102 F.3d at 1212 n.4. See also Lowenschuss v. Selnick, 171 F.3d 673 (9th Cir. 1999) (disagreeing with Meehan to the extent that Meehan had not required the anti-alienation provision to be in the instrument creating the IRA) and In re Zott, 225 B.R. 160, 163 n.3 (Bankr. E.D. Mich. 1998).

These requirements [of exclusion under Bankruptcy Code § 541(c)(2)] are the following: (1) the IRA must constitute a "trust" within the meaning of 11 U.S.C. § 541(c)(2); (2) the funds in the IRA must represent the debtor's "beneficial interest" in that trust; (3) the IRA must be qualified under Section 408 of the Internal Revenue Code; (4) the provision of N.J.S.A. § 25:2-1 stating that property held in a qualifying IRA is "exempt from all claims of creditors" must be a "restriction on the transfer" of the IRA funds; and (5) this restriction must be "enforceable under nonbankruptcy law." In this appeal, the trustee's arguments do not focus on any of the first three requirements, and thus we assume for present purposes that they are satisfied.

Orr v. Yuhas (In re Yuhas), 104 F.3d 612, 614 (3d Cir. 1997), cert. den. 521 U.S. 1105 (1997). The Bankruptcy Court decision explains why no analysis of IRC § 408(a) was necessary: "Under N.J.S.A. 25:2-1(b) a qualifying trust is defined as a trust created or qualified and maintained pursuant to federal law,
Courts that have squarely confronted the issue of whether IRC § 408(a) turns all IRAs into trusts for bankruptcy exclusion purposes have declined to arrive at this conclusion. The well-reasoned opinion in Pinoe v. Fulton (In re Fulton) is a leading example. The opinion begins by noting that “trust” is not defined in the Bankruptcy Code and its meaning would therefore normally be a question of state law. Looking to Pennsylvania law, the court noted that a trust does not exist unless there is a trustee, trust property, a beneficiary, separation of legal title and beneficial interest, and manifestation of intent by the settlor to create a trust. The court rejected the argument that IRC § 408(a) turned all IRAs into trusts because later in the same section IRC § 408(h) provides that IRAs held in custodial accounts shall be treated as trusts. The court concluded that “if all custodial accounts actually constituted trusts under nontax law, then Congress in I.R.C. § 408(h) . . . would not have had any need . . .” to deem custodial accounts as trusts.

including section 401, 403, 408, or 409 of the Internal Revenue Code. Since the IRA at issue was created pursuant to 26 U.S.C. § 408, it is a qualifying trust under the statute. Yuhas, 186 B.R. 381, 383 (Bankr. D.N.J. 1995). New Jersey law expressly declared that IRAs were trusts, thus the efficacy of IRC § 408(a) was not considered. See also Zott at 166.

In re Hipple, 225 B.R. 808 (Bankr. N.D. Ga. 1996) may represent an exception. Hipple dealt with a SEP-IRA that the court analyzed closely. While the court concluded the SEP/IRA was a trust, it held that there was no applicable nonbankruptcy law restricting transfer:

The federal law applicable to SEP/IRA's is 26 U.S.C. § 408 et seq. Thus, it is a trust created by statute . . . Since § 408 prohibits restriction of the beneficiary's right of withdrawal and permits the beneficiary to retain the right to direct investments, the beneficiary retains dominion and control under federal law. Therefore, the court concludes that Debtor's SEP/IRA is not excluded from property of Debtor's estate under applicable nonbankruptcy federal law.

Id. at 814.


Fulton, 240 B.R. 854. Accord, In re Hanes, 162 B.R. 733, 741 (Bankr. E.D. Va. 1994) (“To determine whether these plans are trusts, we look to state law.”).

Fulton, 240 B.R. at 863.

(b) Custodial accounts. For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection (a). For purposes of this title, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.


Fulton, 240 B.R. at 865. The court went on to note that the retirement funds at issue were annuities. Individual retirement annuities are not deemed as trusts in IRC § 408(h). Even though the court's opinion with respect to individual retirement accounts may be dicta, the quality of its analysis has proved persuasive.
The Fulton opinion has proved persuasive to other courts and it seems unlikely that IRC § 408(a) standing alone will provide even the first step toward exclusion of IRAs from the bankruptcy estate as spendthrift trusts. Tax qualification alone should not be sufficient to keep an asset out of the bankruptcy estate. A first step toward exclusion of IRAs from the reach of the trustee must be found, if at all, in state law.

B. IRAS AND STATE TRUST LAW

Can IRAs be trusts under state law? There is no prohibition on dividing the interests in an IRA between the legal and beneficial. Individual retirement accounts may be established under a trust agreement. Yet most IRAs are held in the form of custodial accounts. Custodial accounts exist by virtue of a statute and either explicitly state or are interpreted to mean that the beneficiary has full title of the custodial assets. Custodial accounts hold a position similar to that of custodianship.

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96 See, e.g., In re Barnes, 264 B.R. 415 (E.D. Mich. 2001); In re Hong, No. 01-JAB35072, 2002 WL 1465737, at *2 (Bankr. D. Utah June 4, 2002).
97 It is the qualified plan's combination of override of constructive receipt with the imposition of anti-alienation restrictions that may adequately support putting the pension trust in the category of trusts to be excluded from the bankruptcy estate - the override of constructive receipt alone does not provide a principled basis for exclusion of qualified plans from the bankruptcy estate.
98 The Pension Shield, supra note 74 at 409.
99 Of course, state law (like New Jersey) may deem all IRAs to be trusts, which may bring the matter to a clear conclusion. See Yuhas, 104 F.3d 612, 614 (3d Cir. 1997). Such state legislation raises the question of the extent to which a bankruptcy court should defer to a state's definition of "trust" when interpreting Bankruptcy Code § 541(c)(2).
100 For purposes of this section, general trust law will be analyzed in light of the Restatements (Second and Third) of Trusts.

A trust, as the term is used in this Restatement ... is a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

RESTATEMENT (THIRD) OF TRUSTS § 2 (Tentative Draft No. 1, 1996).
102 See, e.g., Walker v. Davis (In re Estate of Davis), 225 Ill. App. 3d 998, 1006, 589 N.E.2d 154, 162 (1992) ("In contrast to the custodial account IRA in Philip, the IRA at bar was established as a trust under a trust agreement.").
103 See also I.R.C. § 408(h) (treating IRAs held in custodial accounts as trusts for certain purposes).
104 See, e.g., the Uniform Transfers to Minors Act § 9 (1983).
105 This so-called "custodianship" is sometimes referred to in this Restatement [(Third) of Trusts] as a "virtual trust" and is a relationship to which the rules of this Restatement apply .... For Restatement purposes, however, trust treatment for this particular form of custodianship is appropriate because other elements of the trust relationship are present. Furthermore, the language and substance of these statutes are generally consistent with the custodian having title-based authority over the property and with the beneficiary having all of the beneficial rights and interests. Thus, although custodianships under the various versions of the Uniform Transfers to Minors Act (and of the predecessor Uniform Gifts to Minors Act) technically
counts differ from trusts in the degree of control the settlor retains over the assets: "[a] 'custody' or 'custodial' account is a type of agency account in which the custodian has the obligation to preserve and safeguard the property entrusted to him for his principal." The lack of separation of legal and beneficial interests in the IRA is inconsistent with a claim that the IRA is itself a trust. Where an IRA is held by a trust, it is the ownership of the IRA by the trustee that creates the trust, not the settlor's creation of the IRA. State courts have rejected the argument that IRAs are trusts for state law purposes based on IRC § 408(a). It is thus unlikely that a state court would conclude that IRAs as such are trusts. If an IRA is not a trust, then Bankruptcy Code § 541(c)(2) will not apply to exclude it from the debtor's estate.

Even if an IRA were deemed to be a trust under state law, very few would qualify as a spendthrift trust. According to the Restatement (Second) of Trusts, a spendthrift trust is a trust "in which by the terms of the

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are not trust entities, this Restatement treats these particular custodianships and custodians respectively as trusts and trustees. Accordingly, these relationships are subject to the rules of trust law stated in this Restatement, except as the provisions of the applicable statute expressly or by necessary implication require otherwise.

Restatement (Third) of Trusts § 5 Ill. 1 (Tentative Draft No. 1, 1996).

104 Estate of Davis, 225 Ill. App. 3d at 1006, 589 N.E.2d at 162. See also In re CRS Steam, Inc., 217 B.R. 365, 370 (Bankr. D. Mass. 1998) ("An instrument which requires a party holding funds of another to do nothing with the funds without directions from the owner creates the relationship of principal and agent rather than beneficiary and trustee."); Restatement (Second) of Trusts § 8 (1959) ("An agency is not a trust.").

105 In order to create what we shall term, for purposes of the analysis of the § 541(c)(2) exclusion in this opinion, a "true" trust, there must be a designated beneficiary, a trustee, a fund sufficiently identified to enable title to pass to the trustee, and actual delivery to the trustee with the intent of passing title. IRAs lack a trustee and delivery of title to the trustee. There is no trustee and there is no transfer of title and beneficial interest: the depositor holds title to and is the beneficiary of the account.


106 Estate of Davis, 225 Ill. App. 3d at 1007, 589 N.E.2d at 162 ("A custodial account IRA is not an express trust because there is no intent to establish a trust.").

107 See, e.g., Estate of Davis, 171 Cal. App. 3d 854, 857, 217 Cal. Rptr. 734, 736 (Cal. Ct. App. 1985) ("The court's finding that the IRAs be treated as trusts is limited to Internal Revenue Code section 408's purpose of tax deferment.").

108 See, e.g., In re Hanes, 162 B.R. 733, 741 (Bankr. E.D. Va. 1994) ("The elements for establishing a valid trust in Virginia include 'a competent settlor and trustee, an ascertainable res, and certain beneficiaries.'").

109 Without the requisite elements and intent, the Olin and Squibb plans are not trusts. Thus, they cannot come within the exclusion of § 541(c)(2) of the Bankruptcy Code. Rather, these plans are bare contractual obligations, which courts have found, in similar situations, to be part of the bankruptcy estate. Id. at 742. See also In re Riley, 91 B.R. 389, 390 (Bankr. E.D. Va. 1988) (holding that an annuity could not be a trust because "at a minimum, the intention to create a trust with the applicable spendthrift provisions must be manifest").
trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed . . . ."\textsuperscript{110} Notwithstanding the presence of an anti-alienation provision in an IRA, its creator can close the account and demand that the custodian return the funds.\textsuperscript{111} The anti-alienation clause is ineffective to turn the IRA into a spendthrift trust because it cannot prevent the voluntary alienation of assets held in the account.\textsuperscript{112}

The common law of trusts renders Bankruptcy Code § 541(c)(2) inapplicable to IRAs. Individual retirement accounts will not qualify as trusts under state common law.\textsuperscript{113} At their most protective, IRAs represent a custodial account that fails as a trust because the custodian serves merely as an agent for the principal. At their weakest, the IRA relationship is one of creditor and debtor, which certainly fails as a trust. Nor are IRAs capable of being protected against alienation by their creators. Anti-alienation provisions enforceable against only creditors of the beneficiary and not against the beneficiary’s own actions fail as a spendthrift trust. Finally, IRAs are self-settled. No state permits a person to place the legal interest in assets beyond the reach of his creditors while continuing to enjoy the benefit of the same assets. If IRAs are to be protected from the claims of the trustee in bankruptcy in the thirty-four states that have exercised their power under Bankruptcy Code § 522(b)(1), the shield can come only from a state’s exemption laws.

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2. In the absence of a state statute exempting IRAs, is there any means by which an IRA can be preserved for the debtor in bankruptcy? & Only pursuant to Bankruptcy Code § 522(d)(10)(E) in the few non-opt-out states. \\
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IV. THE SUPREME COURT AND ERISA PREEMPTION

The Supremacy Clause of the Constitution\textsuperscript{114} mandates the conclusion

\textsuperscript{110} \textit{Restatement (Second) of Trusts} § 152(2) (1959).


\textsuperscript{112} \textit{Id} ("Debtor's ability to withdraw the funds in his IRA is not restricted as it would be if the funds were held in a spendthrift trust or an ERISA qualified plan.").

\textsuperscript{113} A state's statutory law may change this result. See supra notes 88 and 97.

\textsuperscript{114} This constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\textit{U.S. Const.} art. VI, cl. 2.
that any state law inconsistent with a federal statute must be preempted. The nature of the inconsistency occasioning preemption comes in two forms: conflict preemption and field preemption. Conflict preemption is straightforward: when a federal statute says “do X” and a state law says “do not do X,” the state law is preempted. Field preemption occurs when a state law “intrudes” into a “field” of legislative activity “occupied” by the federal statute. The state law is preempted even though it does not conflict with any particular provision of the federal statute because the “federal interest” in the field that a federal statute addresses [is] . . . ‘so dominant’ that federal law ‘will be assumed to preclude enforcement of state laws on the same subject.’”

Federal statutes do not need an express preemption clause to trump state law. Yet the Supreme Court’s articulation of field preemption over the years has been ad hoc. Congress has responded occasionally by expressly providing for preemption. If Congress expressly legislates preemption then its preemption provision should be construed like any other statute: “[j]udges confronted with such a clause face a two-fold task: They must decide what the clause means, and they must decide whether the Constitution permits Congress to bar the states from exercising the powers in question.” Yet this straightforward approach is not the current approach employed by the Supreme Court. When Congress acts to preempt state law in areas such as the general health, safety, and welfare, the Court has held that express preemption clauses should be given a “narrow reading.” In other words, the Court asserts that a “presumption against preemption” should be applied when Congress legislates in the areas of traditional state powers.

Shortly before ERISA’s enactment the Supreme Court’s preemption analysis had shifted in favor of increased federalism, thus preserving more and more concurrent state regulation of areas in a field of apparent federal regula-

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116 There is a simple reason for the rarity of express preemption clauses; the Constitution expressly provides that the laws of the United States effectively repeal any state law to the contrary. U.S. Const. art. VI, cl. 2. In fact, Congress commonly includes a “savings clause” by which it expressly permits simultaneous state regulation of the same subject matter. See generally 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 12.1 (1992).

117 Preemption, supra note 115 at 232 (“[M]odern preemption jurisprudence is a muddle.”).

118 Preemption, supra note 115 at 226-27.


120 For discussion of whether exemption laws fall within the rubric of “health, safety and welfare,” see infra text accompanying notes 147-49 and 162. See also Chicago Burlington & Quincy Ry. Co. v. Ill. ex rel. Drainage Comm’rs, 200 U.S. 561, 592 (1906) (“The police power is that power of a state that ‘embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety.’”).
tion. Since ERISA’s enactment the Supreme Court has considered its pre-emptive effects many times. Most of these decisions involved the scope of preemption in connection with welfare benefit plans, particularly with regard to claims arising out of plans that provide for health care. For the purposes of this article, however, the decisions finding preemption in cases of pension plans are more relevant. It is pension plans that are excluded from a debtor’s bankruptcy estate and it is IRAs that were given tax advantages in the Internal Revenue Code for which states are providing exemptions. While the Supreme Court has subtly changed its preemption analysis for welfare benefit plans in recent years, it has not clearly stated whether this adjustment carries over to scrutiny for pension plan preemption. This article will thus consider welfare plan preemption cases to see if the trajectory of the revised paradigm of the Court’s preemption analysis will extend to exemptions of IRAs integrated with pension plans.

A. Pre-Travelers Pension Plan Preemption Analysis

It might seem that there is no basis on which to distinguish between the Court’s analysis of welfare and pension plan preemption. After all, the only express preemption provision is ERISA § 514(a), and it makes no distinction between the nature of the plan to which it applies. Yet the unstable categories of field and conflict preemption come into play even in this example of express preemption. Recall that ERISA § 514(a) states that ERISA supersedes state laws if they “relate to” a nonexempt employee benefit plan. Difficulty with applying the express language of this statute becomes apparent when we realize that the phrase “relate to” describes no more than a logical relationship; it does not specify the applicable degree of the relationship. Notwithstanding the ambiguity of ERISA’s preemption clause, during the first twenty years of ERISA’s existence the Court has persisted in trying to determine Congress’s intent in framing § 514(a) by looking solely to its words in isolation from any larger context.

In the first preemption case to reach the Court’s docket, Alessi v. Raybes-

122See, e.g., Kentucky Ass’n of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 (2003).
123“[R]elates to’ is a term that requires a modifier in order to have a concrete meaning, and the wide spectrum of possible modifiers – directly, slightly, remotely – suggests a wide spectrum of possible meanings.” Catherine L. Fisk, The Last Article About ERISA Preemption? A Case Study of the Failure of Textualism, 33 HARV. J. ON LEGIS. 35, 47 (1996) [hereinafter, The Last Article].
tos Manhattan, Inc., New Jersey had acted to prohibit employer-sponsored pension plans from offsetting a disabled retiree’s pension benefits by the amount of any workers’ compensation award he may have received. The state statute was designed to prevent reduction of pension benefits by integration with workers’ compensation. Two groups of retirees challenged their employers’ plans that provided for integration and prevailed before the District Court. The Third Circuit reversed on several grounds, including that ERISA § 514(a) preempted New Jersey’s prohibition of integration. The Supreme Court began its analysis by noting its bias against federal preemption of state laws: “[o]ur analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.” Yet in the case of pension plans Congress had acted to reverse this presumption with ERISA § 514(a). In view of this Congressional action, the Court concluded that New Jersey’s prohibition of integration related to pension plans “because it eliminates one method for calculating pension benefits – integration – that is permitted by federal law.”

Alessi presented an easy case. The Court did not need to analyze the degree of relationship necessary to cause preemption. The New Jersey statute both specifically referred to retirement pension benefits and limited the freedom of plan administrators to structure pension benefits in a way that ERISA specifically authorized. Even without ERISA § 514(a), it seems likely that the New Jersey statute would have run afield of traditional conflict preemption doctrine. If Congress “contemplated and approved the kind of pension provisions challenged here,” then a state law prohibiting integration should have fallen even if the Court had employed a presumption against preemption. State exemption laws, however, place no limitation on the ability of plan administrators to structure pension benefits. Nor is there a body of pre-ERISA practice or legislative history from which an inference of con-

126 Id. at 507-08.
127 Id. at 522.
128 “This provision [ERISA § 514(a)] demonstrates that Congress . . . meant to establish pension plan regulation as exclusively a federal concern.” Id. at 523.
129 Id. at 524.
130 Although the Court admitted that the phrase “relates to” “gives rise to some confusion where, as here, it is asserted to apply to a state law ostensibly regulating . . . the State’s workers’ compensation awards, which obviously are subject to the State’s police power.” Id. at 524.
131 The Court concluded from the legislative history that Congress expressly intended to permit integration of pension benefits with social security and railroad retirement benefits. Id. at 515 (quoting H.R. Rep. No. 93-807 at 69 (1974)). The Court expanded the range of authorized integration to include workers’ compensation because it was allowed by pre-ERISA Revenue Rulings that Congress approved. Id. at 521.
132 Id. at 526.
gressional intent to prohibit can be drawn. Of course, Alessi was not the last word on preemption.

A pair of New York laws that affected employee welfare plans reached the Court two years later in Shaw v. Delta Air Lines, Inc. Both of these statutes mandated specific benefits. New York’s Human Rights Law prohibited employment discrimination on the basis of sex. The New York state courts had determined that an employer who excluded pregnancy from covered health insurance benefits discriminated within the meaning of the statute. New York’s Disability Benefits Law required employers to pay limited benefits to employees disabled even by nonoccupational illnesses or injuries. The mandated benefits included pregnancy-related disabilities.

Several employers sought injunctive relief from the application of both New York statutes on the ground the New York laws were preempted by ERISA. Similar to the situation in Alessi, the New York laws affected the administration of employee benefit plans. Unlike Alessi, there was little in legislative history or pre-ERISA practice by which the Court could make concrete the meaning of the abstract “relate to” of ERISA § 514(a). Nonetheless, the Court labored to determine the appropriate reach of the preemption provision by determining Congress’s intent. Without any specific legislative history the Court turned to the dictionary, holding that “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the word, if it has a connection with or reference to such a plan.” Given this expansive (but equally ambiguous) reformulation of “relates to,” the Court proceeded to hold that ERISA § 514(a) preempted the New York Human Rights Law because it required plan administrators to provide benefits that are not required by ERISA or other federal law. The Court concluded that the Disability Benefits Law was not preempted but not because it fell outside the expansive range of “connection with or refer to.” Rather, this state law was saved by

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134  The Court recently considered § 514(a) in Alessi, supra . . . . The Court relied . . . on the state law’s frustration of congressional intent. That kind of tension is not present in these cases; while federal law did not prohibit pregnancy discrimination during the relevant period, Congress, in enacting ERISA, demonstrated no desire to permit it. Alessi’s recognition of the exclusive federal role in regulating benefit plans, therefore, is instructive but not dispositive.

Shaw, 463 U.S. at 96 n.15. The Court thus converted not simply congressional silence but perceived congressional inattention into intent to prohibit.

135 In deciding whether a federal law preempts a state statute, our task is to ascertain Congress’ intent in enacting the federal statute at issue.” Id. at 95.
136 Id. at 96-97 (citing Black’s Law Dictionary).
137 We hold that New York’s Human Rights Law is pre-empted with respect to ERISA benefit plans only insofar as it prohibits practices [i.e., discrimination on the basis of pregnancy] that are lawful under federal law.” Id. at 108.
ERISA § 514(d) – the preemption savings clause.\textsuperscript{138}

The Supreme Court's turn of phrase "connection with or reference to" quickly became a two-pronged rubric as lower courts applied it mechanically in preemption cases thereafter.\textsuperscript{139} Unfortunately, the "connection with" half of the test falls victim to the same ambiguity as "relates to." Just as the term "relates to" requires a modifier in order to have any concrete meaning, so too does the phrase "connection with."\textsuperscript{140} But it is the unambiguous "reference to" half of the mantra that exposes state exemption laws to the risk of preemption. Would a mere reference to ERISA in a state's exemption law, without more, trigger preemption? The Supreme Court itself expressed some concern that its reformulation of the statutory "relates to" test of preemption might sweep too broadly but failed to supply any limits in Shaw.\textsuperscript{141}

ERISA's distinction between welfare benefit plans and pension plans came to a head in 1988 in Mackey v. Lanier Collection Agency & Service, Inc.\textsuperscript{142} A collection agency filed actions against a welfare benefit plan existing under ERISA seeking to garnish the accrued but unpaid vacation and holiday benefits of twenty-three longshoremen.\textsuperscript{143} The State of Georgia, however, had acted to exempt welfare plan benefits because ERISA's anti-alienation clause protected only pension benefits.\textsuperscript{144} On appeal, the Georgia Supreme Court held that ERISA preempted the exemption statute and permitted the garnishment to proceed.\textsuperscript{145} The plan trustees sought and the Supreme Court issued a writ of certiorari. Initially relying on the "reference to" half of the Shaw gloss on ERISA's anti-alienation provision, the Supreme Court unani-

\textsuperscript{138} While the Disability Benefits Law plainly is a state law relating to employee benefit plans, it is not pre-empted if the plans to which it relates are exempt from ERISA under § 4(b). Section 4(b)(3) exempts "any employee benefit plan . . . maintained solely for the purpose of complying with applicable . . . disability insurance laws." The Disability Benefits Law is a "disability insurance law," of course.

\textsuperscript{139} Abraham v. Norcal Waste Sys., 265 F.3d 811, 820 (9th Cir. 2001) ("State law 'relates to' an ERISA benefit plan if there is a 'connection with' or 'reference to' such a plan."); Carpenters Local Union No. 26 v. United States Fid. & Guar. Co., 215 F.3d 136, 140 (1st Cir. 2000) ("The Court has devised a disjunctive test: A law relates to a covered employee benefit plan for purposes of § 514(a) if it [1] has a connection with or [2] a reference to such a plan."); McMahon v. Digital Equip. Corp., 162 F.3d 28, 38 (1st Cir. 1998) ("Ingersoll-Rand identified two tests for determining whether a state cause of action 'relates to' an ERISA plan."); Ferrer v. Banco Cent. Hispano-Puerto Rico, Inc., 142 F. Supp. 2d 190, 194 (D.P.R. 2001) (Supreme Court "identifies two tests.").

\textsuperscript{140} The Last Article, supra note 123, at 64.

\textsuperscript{141} Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan. Shaw, 463 U.S. at 100 n.21.

\textsuperscript{142} 486 U.S. 825 (1988).

\textsuperscript{143} Id. at 827.

\textsuperscript{144} Id. at 828.

\textsuperscript{145} Since [Ga.Code Ann.] § 18-4-22.1 'prohibits that which the federal statute permits,' the Georgia Supreme Court held, the state law was 'in conflict with' the federal scheme, and therefore pre-empted by it." Id. at 828.
mously held that a statute "which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedure, is pre-empted under [ERISA] § 514(a) ... [because] [t]he state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach."

The Court then went on to consider a second question: whether Georgia's entire statutory garnishment system was preempted by ERISA when the garnishee defendant was an employee welfare benefit plan. The trustees argued that garnishment of a plan obviously "relates to" the plan and is therefore preempted. A divided Court concluded that ERISA did not preempt garnishment of a plan. The Court in part relied upon ERISA § 206(d)(1) that bars alienation only of pension plan benefits. According to the majority, the statute's protection of benefits and not plans meant that actions against plans that did not affect pension benefits were not barred. In addition, the majority noted that Congress acted to prohibit alienation of pension benefits from which it inferred that "Congress did not intend to preclude state-law attachment of ERISA welfare plan benefits."

Unlike the New York statutes at issue in Shaw, the Georgia exemption law would not have forced the plan to provide certain benefits in some states and not in others. It would not have limited the design of plans by prohibiting payment formulas that federal law allowed like the New Jersey legislature had attempted in Alessi. Yet the Court held that ERISA § 514(a) preempted the state exemption statute merely because it referred to pension plans even though Georgia's protection extended only to employee welfare benefits.

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146 See The Last Article supra note 123; see generally John H. Langbein, The Supreme Court Flunks Trusts, 1990 SUP. CT. REV. 207.
147 Mackey, 486 U.S. at 830 (footnote omitted).
148 [P]etitioners assert that when an employee welfare benefit plan is garnished under Georgia law by a creditor of a participant, plan trustees are served with a garnishment summons, become parties to a suit, and must respond and deposit the demanded funds due the beneficiary-debtor ... Because garnishment will involve and affect the plan and its trustees in these ways, petitioners submit the Georgia garnishment law necessarily "relates to" such ERISA welfare benefit plans and is therefore pre-empted by § 514(a).

Id. at 831.
149 Section 206(d)(1) bars the assignment or alienation of pension plan benefits, and thus prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants. As discussed above, § 514(a), by contrast, deals with state laws as they relate to plans ... [B]y adopting § 206(d)(1), Congress demonstrated that it could, where it wished to, stay the operation of state law as it affects only benefits and not plans.

Id. at 836.
150 Id. at 838.
151 [W]e hold that Ga. Code Ann. § 18-4-22.1, which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures, is pre-empted under § 514(a). The state
What had been an unnecessary gloss on a decision that could have been justified as simple conflict preemption had assumed a life of its own when it was extended beyond the facts of Shaw. On the other hand, a majority held that ERISA did not preempt garnishment of welfare benefits even though its decision allowed the imposition of at least some administrative costs on the plan by requiring the trustees to respond to the garnishment action. The five justices who reached this decision carefully noted the congressional vacuum with respect to alienation of welfare benefits and concluded that silence meant permission: welfare plan benefits could be garnished.

The Supreme Court went on to decide several more ERISA preemption cases before it realized that its earlier efforts to apply the "relates to" test in the abstract had been misguided. Three of those cases deserve limited treatment. The first was a simple product of ERISA § 206(d)(1). In Guidry v. Sheet Metal Workers National Pension Fund the Court reversed a Tenth Circuit decision permitting the imposition of a constructive trust on a defalcating union official's pension benefits. This case represented a straightforward application of ERISA's anti-alienation provision to an equitable remedy with the same effect as garnishment.

The second case represented an extension of the "refer to" half of the Shaw reformulation of the preemption standard of ERISA § 514(a). The Supreme Court in Ingersoll-Rand Co. v. McClendon confronted a case where an employee's pension benefits were only indirectly at issue. Ingersoll-Rand fired Perry McClendon when he believed he had only four months to work before his pension benefits would be fully vested. McClendon sued in the Texas state courts for wrongful termination, alleging that he was terminated because his employer wished to avoid making contributions to his pension. The Texas Supreme Court held that public policy limited the employment-at-will doctrine in such cases. The Supreme Court held that ERISA § 514(a) preempted Texas's exception to at-will employment doctrine by holding that "refer to" reached claims that did not have an impact on the statute's express reference to ERISA plans suffices to bring it within the federal law's preemptive reach."

Id. at 830.


153 "We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case." Id. at 372.


155 The majority [of the Texas Supreme Court] reasoned that notwithstanding the traditional employment-at-will doctrine, public policy imposes certain limitations upon an employer's power to discharge at-will employees . . . . [T]he court held that under Texas law a plaintiff could recover in a wrongful discharge action if he established that "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund."

Id. at 136 (emphasis added).
pension plan, the benefits payable by the plan or even the beneficiary of the plan. All that was necessary for preemption was that the "existence of a pension plan [which] is a critical factor in establishing liability under the State's wrongful discharge law."\(^{156}\)

In addition to applying the "relate to" gloss for express preemption, the Court held in the alternative that Texas's restriction on at-will employment was unenforceable because it conflicted with ERISA's exclusive civil enforcement scheme. Citing its earlier decision in *Pilot Life Ins. Co. v. Dedeaux*,\(^{157}\) the Court found that the Texas common law engendered a case of conflict preemption. The Court reached this conclusion because on the one hand ERISA § 510 provided a remedy for the wrong McClendon complained of while on the other hand ERISA § 502 made that remedy exclusive. The Court also maintained that permitting McClendon to proceed with his action against Ingersoll-Rand would expose employers and plan sponsors to the sorts of varying state rules that the sponsors of ERISA expressly sought to avoid.\(^{158}\) Thus *Ingersoll-Rand* again demonstrated that the Court's reliance on the ambiguous "relates to" preemption provision was unnecessary to reach the correct result. Ordinary preemption doctrine would have done the job.\(^{159}\)

The third case both applied the "refer to" half of the *Shaw* interpretation of the relates to standard of ERISA preemption and foreshadowed changes to come. The District of Columbia had passed legislation requiring employers who provided health insurance for their active employees to supply it for injured employees while they were receiving workers' compensation benefits. The Court made short shrift of the District's act in *District of Columbia v. Greater Washington Bd. of Trade*.\(^{160}\) In a brief opinion eight members of the Court agreed that the act's reference to an ERISA benefit such as health insurance in the workers' compensation law mandated preemption, citing the series of "connection with or refer to" cases including *Shaw, Ingersoll-Rand, and Mackey*: "[s]ection 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted."\(^{161}\) The majority did not assert that the requirement imposed in Board of Trade could expose employers to inconsistent employee benefit standards from state to state. The Court could have made this argu-

\(^{156}\) Id. at 139-40.


\(^{158}\) Allowing state-based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a)." Id. at 142.

\(^{159}\) Subsequent to the Supreme Court's 1995 decision in *Travelers (see infra note 169)*, the Fourth Circuit has limited the effect of the holding in *Ingersoll-Rand* to conflict preemption. See *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181 (4th Cir. 2002).


\(^{161}\) Id. at 130.
ment but seemed to deliberately narrow its holding to one of simple statutory construction.\textsuperscript{162} Perhaps there was a hope that a bright line test would stem the tide of ERISA preemption litigation.

Justice Stevens dissented from the decision in \textit{Board of Trade}. Although he did not explicitly discuss the inherent ambiguity of "relates to," Justice Stevens asserted that until \textit{Board of Trade} every case that had employed the "connection with or refer to" gloss could have been decided on ordinary preemption grounds.\textsuperscript{163} Justice Stevens suggested that the Court employ something akin to simple conflict preemption\textsuperscript{164} and stop "mechanically repeating earlier dictionary definitions of the word 'relate' as its only guide to decision in an important and difficult area of statutory construction . . . ."\textsuperscript{165} The Court would answer his challenge three years later.

\textbf{B. The Travelers "Revolution"}

The roots of what would later be the Court's retreat from a purely textual analysis of ERISA § 514(a) can be found in \textit{John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank}.\textsuperscript{166} Although \textit{Harris Trust} dealt with the ERISA savings clause for state regulation of insurance, six justices sig-

\begin{footnotesize}
\textsuperscript{162}By refusing to look through its reformulation of ERISA § 514(a)'s "relates to" standard of preemption to examine the congressional purpose for preemption, the Court was forced to misconstrue its analysis in \textit{Shaw}. Justice Thomas asserted that only the New York Human Rights law was preempted by ERISA. \textit{Id.} at 132 ("[O]nly the Human Rights Law . . . fell within the pre-emption provision."). The Disability Benefits Law, he claimed, "did not relate to a welfare plan subject to ERISA regulation." \textit{Id.} at 133. This is disingenuous. As Justice Thomas admitted earlier in the same paragraph, the \textit{Shaw} Court concluded that "both New York laws at issue there related to 'employee benefit plan[s]' in general," \textit{id.} at 132, but the \textit{Shaw} opinion had nonetheless exempted the Disability Benefits Law from preemption under the savings provision of ERISA § 514(d). While it is indeed true that the latter statute "did not relate to a welfare plan subject to ERISA regulation," the reason it was not subject to ERISA regulation was not because it did not "relate to" a plan but because Congress had exempted certain laws from preemption regardless of their relationship to ERISA. The \textit{Shaw} Court held that a state could force an employer to disaggregate employee welfare benefits and maintain a separately administered workers' compensation program, a program which would be subject to state regulation: "[a] State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3)." \textit{Shaw}, 463 U.S. at 108. Acknowledging the complexity of the \textit{Shaw} analysis, however, would have undercut the Court's eagerness reduce to bare bones ERISA preemption analysis.

It is true, as the Court points out, that in \textit{Shaw} . . . we stated that a law "related to" an employee benefit plan, "in the normal sense of the phrase, if it has a connection with or reference to such a plan." It is also true that we have repeatedly quoted that language in later opinions . . . . It nevertheless is equally true that until today that broad reading of the phrase has not been necessary to support any of this Court's actual holdings.

\textit{Board of Trade}, 506 U.S. at 134-35 (Stevens, J., dissenting).

\textsuperscript{163}State laws that directly regulate ERISA plans, or that make it necessary for plan administrators to operate such plans differently, 'relate to' such plans in the sense intended by Congress." \textit{Id.} at 137 (Stevens, J., dissenting).

\textsuperscript{165}\textit{Id.} at 138 (Stevens, J., dissenting).

\textsuperscript{166}510 U.S. 86 (1993).\end{footnotesize}
naled what was to come when they joined Justice Ginsburg's opinion that concluded that "we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis." Instead of asking if a state law had "a connection with or reference to" ERISA, the Court held that preemption would occur only when state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Even the three dissenters, including Justice Thomas who had emphasized a purely textual approach in Board of Trade, did not express any disagreement with this aspect of the majority's opinion. The substance of the dispute in Harris Trust, however, concerned state regulation of insurance, an area specifically saved for the states by ERISA and further reserved for state regulation by the long-standing federal McCarran-Ferguson Act. The question remained open whether the Court's turn to traditional preemption analysis would extend to ERISA § 514(a) standing alone.

The Supreme Court's decision in New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. has generated an avalanche of legal commentary. New York had enacted a complex reimbursement system for hospital services that had the effect of reimbursing insurers and health care providers - including employee welfare plans - at different rates depending on the degree of compliance by the providers with state-authorized goals. Several commercial insurance companies sought to enjoin enforcement of the New York law on the ground that it was preempted by ERISA § 514(a) because it had a "connection with" employee benefit plans. The District Court and Second Circuit agreed with the insurers who obtained summary judgment. The Supreme Court unanimously reversed. The Court admitted that increasing medical procedure surcharges or decreasing medical

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167 Id. at 99.
168 Id. (quoting Silkwood v. Kerr-McGee Corp. 464 U.S. 238, 248 (1984)).
171 A New York statute requires hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan, and it subjects certain health maintenance organizations (HMO's) to surcharges that vary with the number of Medicaid recipients each enrolls. Travelers, 514 U.S. at 649.
173 Travelers Ins. Co. v. Cuomo, 14 F.3d 708 (2d Cir. 1993).
174 Id. at 719 ("While the challenged statutes do not refer to ERISA plans, our examination of the
procedure reimbursements, based on the operating policies of the patient's insurer would "have an indirect economic effect on choices made by insurance buyers including ERISA plans."\textsuperscript{175} It nonetheless held that the New York law did not have the "requisite 'connection with' ERISA plans to trigger pre-emption."\textsuperscript{176}

*Travelers* is remarkable not so much for its holding (which, as the Court pointed out, was consistent with the majority in *Mackey*\textsuperscript{177}) as for its reasoning. The Court finally acknowledged that its efforts to define "relate to" had been unavailing.\textsuperscript{178} The reason for its failure, the Court admitted, was that the phrase "relate to" was not one of limitation; it is a restatement of an abstract truism: that everything relates to everything else.\textsuperscript{179} Moreover, the Court concluded, if "relate to" were "taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course."\textsuperscript{180} But what of the Court's gloss on "relate to"? Is the phrase "connection with or reference to" useful in specifying the nature of the relationship that warrants preemption? At least with respect to the "connection with" half of the test the Court admitted that its efforts had been in vain: "[f]or the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections."\textsuperscript{181} Because the New York statute at issue in *Travelers* did not refer to ERISA, the Court did not stop to consider whether that half of its gloss was a workable tool by which to give ERISA § 514(a) a concrete meaning.\textsuperscript{182}

\textsuperscript{175} *Travelers*, 514 U.S. at 659.
\textsuperscript{176} Id. at 662.
\textsuperscript{177} This conclusion is confirmed by our decision in *Mackey* ... We took no issue with the argument of the *Mackey* plan's trustees that garnishment would impose administrative costs and burdens upon benefit plans ... , but concluded from the text and structure of ERISA's pre-emption and enforcement provisions that "Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans ... ." If a law authorizing an indirect source of administrative cost in not pre-empted, it should follow that a law operating as an indirect source of merely economic influence on administrative decisions, as here, should not suffice to trigger pre-emption either.

Id. (citations omitted).
\textsuperscript{178} [W]e have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here." Id. at 655. The *Travelers* decision is also noteworthy because it explicitly affirms what Justice Thomas had implicitly denied in *Board of Trade*: the Disability Benefits Law at issue in *Shaw* did "relate to" ERISA. Id. at 657 ("[New York's] Disability Benefits Law, which require[d] employers to pay employees specific benefits, clearly 'relate[d] to' benefit plans.").
\textsuperscript{179} [R]eally, universally, relations stop nowhere." Id. at 655 (quoting H. James, Roderick Hudson xli (New York ed., World's Classics 1980)).
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 656.
\textsuperscript{182} [T]he surcharge statutes cannot be said to make 'reference to' ERISA plans in any manner." Id.
Without its long-standing tool for preemption, the Court asked whether the New York statute would thwart the purposes of ERISA and reconstructed its prior holdings in light of those purposes rather than relying on the "unhelpful text" of ERISA § 514(a). It concluded that the New York statute did not undermine ERISA's purposes and was in fact consistent with other federal legislation enacted by the same Congress. The Court spent the balance of its opinion analyzing whether the indirect economic impact of the New York statute on ERISA plans was sufficient to justify preemption. It also answered that question in the negative because "the indirect influence of the surcharges [does not] preclude uniform administrative practice or the provision of a uniform interstate benefit package." By reframing preemption analysis in terms of the purpose of ERISA and economic impact of plan administration, the Court seemed to open the door for state exemption of employer-sponsored employee benefit plans together with IRAs. After all, state exemption of a particular form of savings account neither undercuts congressional goals nor imposes any burden on plan administrators. The Court's reemphasis on the presumption against preemption when confronting the states' exercise of historic police powers also augured well for the viability of state exemption of IRAs even when intertwined with pension plans subject to ERISA. Yet the Court's failure to discuss the "refer to" half of its earlier gloss meant that this issue remained open.

The Sixth Circuit had earlier suggested that the Court's application of the "refer to" test had never operated independently of traditional preemption: "when the Court strikes down a statute that 'refers to' ERISA or a covered plan, it does so not because of the reference per se, it does so because that reference has a legal effect." Thielol Corp. v. Roberts, 76 F.3d 751, 759 (6th Cir. 1996).

[183] After discussing Alessi, Ingersoll-Rand, Shau, and legislative history, the Court concluded "[i]n each of these cases, ERISA pre-empted state laws that mandated employee benefit structures or their administration. Elsewhere, we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption." Travelers, 514 U.S. at 658.


[185] Travelers, 514 U.S. at 660.

[186] We . . . have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Id. at 654-55 (citations omitted). Writing shortly after the decision in Travelers, Professor Jordan developed four criteria for evaluating preemption in the new order of things: (1) articulating a tighter standard for preemption where state law affects the benefit structure or administration of a plan, (2) increased significance of evaluating the purpose and effect of the state law, (3) discounting indirect economic impact, and (4) using standard implied preemption analysis. Karen A. Jordan, Travelers Insurance, supra note 170 at 286-92.
C. Post-Travelers Continuing Confusion

The hope that Travelers signaled the first step in a new, clear direction for ERISA preemption analysis remains unfulfilled. In the Court's next preemption case, California Div. of Labor Standards v. Dillingham Construction,187 Justice Thomas resurrected the "connection with" half of the Shaw gloss, albeit with the admission it could not be applied with "uncritical literalism."188 The Court's opinion in Dillingham also reaffirmed in passing the "reference to" half of the test.189 Of particular interest in Dillingham was the unlikely concurring opinion of Justices Scalia and Ginsburg who concluded that the Court's continued "obeisance" to all its prior ERISA cases did more harm than good. Instead of trying to elucidate the meaning of the abstract "relates to," they recommended that the Court simply acknowledge what they said it had been doing all along: "apply[ing] ordinary field pre-emption, and, of course, ordinary conflict pre-emption."190

Later that term the Court decided Boggs v. Boggs.191 The Court's opinion in Boggs has proved opaque.192 The Court in Boggs was confronted with a confluence of Louisiana community property law, three ERISA plans, and ERISA preemption. Although the majority opinion authored by Justice Kennedy seems ultimately to be grounded on simple conflict preemption,193 the facts of the case and reconcite nature of the Court's reasoning are instructive. Isaac Boggs worked for BellSouth from 1949 until his retirement in 1985.194 For the first forty years of his employment Isaac was married to Dorothy Boggs with whom he had three children. Shortly after Dorothy's death in

188 Dillingham, 519 U.S. at 325. In fact, Justice Thomas's reference to the venerable "connection with" half of the gloss might have been little more than window dressing. See, e.g., Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001) (applying "connection with" in terms of the objectives of ERISA and the nature of the effect of state law on an ERISA plan).
189 Under the latter inquiry, we have held pre-empted a law that impos[ed] requirements by reference to [ERISA] covered programs; a law that specifically exempted ERISA plans from an otherwise generally applicable garnishment provision; and a common-law cause of action premised on the existence of an ERISA plan." Dillingham, 519 U.S. at 324 (citations and internal quotation marks omitted).
190 Id. at 335 (Scalia and Ginsburg, concurring).
192 Even an ERISA professional journal admitted that it was difficult to articulate the holding in Boggs. See Boggs v. Boggs Holds That A Predeceasing Nonparticipant Spouse Has No Property Interest In An ERISA Pension Plan, ERISA Litig. Rep., at 1, [hereinafter Boggs v. Boggs Holds], ("Our first objective is to tell you what was held. This is a little harder than one might think."). Virtually the only sustained analysis of Boggs is found in a student note. See Tony Vecino, Note, Boggs v. Boggs: State Community Property and Succession Rights Wallow in ERISA's Mire, 28 Golden Gate U.L. Rev. 571 (1998) [hereinafter ERISA's Mire].
193 Conventional conflict pre-emption principles require pre-emption where compliance with both federal and state regulations is a physical impossibility, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Boggs, 520 U.S. at 844 (internal quotation marks and citation omitted).
194 Id. at 836.
1979, Isaac married Sandra Boggs to whom he remained married until his death. Isaac and Sandra had no children. During the course of his employment by BellSouth Isaac participated in three retirement plans subject to ERISA: a Savings Plan (that Isaac rolled over into an IRA at his retirement), an employee stock ownership plan (holding stock in AT&T at Isaac’s retirement) and a defined benefit plan (composed of an annuity).

Dorothy’s estate under Louisiana community property law included an undivided one-half interest in all community assets (including Isaac’s pension benefits) at her death. Dorothy’s will bequeathed outright to Isaac one-third of her interest in the community property. The will provided that the remaining two-thirds were to go to Isaac for life, and to their children upon his death. Upon his death, Isaac’s will provided for a life estate in all his property for his second wife Sandra, thus substantially delaying his children’s enjoyment of what they had expected to receive under their mother’s will.

Isaac’s children sought two forms of relief in Louisiana state court. They asked for an accounting of the value of their father’s life estate from which they planned to calculate the portion of his retirement benefits traceable to their mother’s community interest. Once calculated, this amount would represent the sum to which the children believed they were entitled at Isaac’s death. The children initially also sought a judgment from the state court awarding them the relevant portions of all of Isaac’s retirement benefits. Sandra responded with an action in federal court seeking a declaration that ERISA preempted any application of Louisiana state law that would diminish her interest in Isaac’s property. The District Court disagreed, as did

195 Upon retirement, Isaac received various benefits from his employer’s retirement plans. One was a lump-sum distribution from the Bell System Savings Plan..., which he rolled over into an Individual Retirement Account (IRA).... He also received 96 shares of AT&T stock from the Bell South Employee Stock Ownership Plan (ESOP). In addition, Isaac enjoyed a monthly annuity payment during his retirement of $1,777.67 from the Bell South Service Retirement Program.

Id. at 837.

197 Id. at 836.

199 Technically, Dorothy bequeathed Isaac a “lifetime usufruct” in the residue of her estate; the court treated Isaac’s form of ownership as a life estate and so will this article. Id.

199 Id. at 837.

200 Id.

201 ERISA’s Mire, supra note 192, at 578-79 (relying on United States Supreme Court Official Transcript at 33-34, Boggs v. Boggs, 117 S. Ct. 1754, 1774 (1997) (No. 96-79)).

202 Boggs, 520 U.S. at 837. See also Boggs v. Boggs, 849 F. Supp. 462, 464 (E.D. La. 1994). For an attempt to quantify that to which the children of Dorothy and Isaac were entitled under Louisiana law, see Boggs v. Boggs Holds, supra note 192 at 6.

the majority of the Fifth Circuit panel that heard Sandra’s appeal. For those courts, community property law did not sufficiently “relate to” ERISA to justify preemption.

The Supreme Court disagreed with the conclusions of the lower courts. The Court did not, however, reach the question of whether a community property regime “related to” a pension plan of a married participant. Instead, Justice Kennedy concluded that the children’s claims conflicted with various provisions of ERISA. The easiest case for the Court to dispose of was a claim to a share of the Annuity remaining unpaid after Isaac’s death. Any claim by the heirs of the predeceasing legatee in the Annuity arising by virtue of the legatee’s community property interest potentially conflicted with ERISA’s requirement that every qualified joint and survivor annuity must pay not less than 50% of the amount of an annuity to a surviving spouse, including a second spouse such as Sandra. Even though Sandra would in fact have received more than 50% of the Annuity after satisfaction of the children’s claims, the Court feared that to allow any reduction in the survivor’s annuity by a previous testamentary transfer could ultimately expose the subsequent surviving spouse to a greater than 50% reduction in his or her share of an annuity.

More difficult were the cases presented by the children’s claims to Isaac’s pension interests that he had received before his death. Isaac had received some payments from the Annuity and all of the Savings Plan and AT&T stock before his death. As the dissent noted, “[a]s far as ERISA is concerned,

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204 Enforcement of Louisiana’s community property law simply would not cause ‘major damage’ to any ‘clear and substantial federal interest’ served by ERISA.” Id. at 465.

205 A state community property system that affects what a plan participant does with his benefits after they are received does not impermissibly intrude on the mandates ERISA imposes on plan administrators. The controversy in this case is between successive spouses and their heirs. The focus of this case is not the relationship between the administrator of this ERISA plan and its beneficiary. ERISA’s preemptive scope may be broad but it does not reach claims that do not involve the administration of plans, even though the plan may be a party to a suit or the claim relies on the details of the plan . . . . This Court concludes that, under the facts of this case, the Louisiana community property law is not sufficiently “related to” an employee benefit plan to necessitate ERISA preemption.

Boggs v. Boggs, 82 F.3d 90, 96 (5th Cir. 1996) (internal quotation marks and citation omitted).

206 Boggs, 520 U.S. at 842 (citing ERISA § 205(a), 29 U.S.C. § 1055(a)).

207 In this case, Sandra’s annuity would be reduced by approximately 20% . . . .” Id. at 844.

208 “There is no reason why testamentary transfers could not reduce a survivor’s annuity by an even greater [than twenty percent] amount.” Id. The Court did not provide an example of how a predeceasing nonparticipant spouse could ever have a greater than fifty percent interest in the surviving participant’s annuity. In any event, a reduction in Sandra’s joint and survivor annuity by only twenty percent is permissible. ERISA § 205(d)(1) requires only that the spouse of the participant receive “not less than 50 percent of . . . the amount of the annuity which is payable during the joint lives of the participant and the spouse.” 29 U.S.C. § 1055(d)(1).
Isaac could have used the [distributed] retirement benefits to pay for a vacation, to buy a house, or to bet at the races, or he could have given the money to his children.\textsuperscript{209} So why then would any claim by the legatees of the predeceasing spouse to community property that was no longer subject to ERISA be preempted? The majority's answer was to look to the familiar anti-alienation provision of ERISA § 206(d)(1) as amended by the Retirement Equity Act of 1984 (REAct)\textsuperscript{210} with its modification of § 206(d)(3).\textsuperscript{211} First, the Court held that a nonparticipant spouse's testamentary transfer of an interest in retirement benefits acquired by virtue of community property amounts to an "alienation."\textsuperscript{212} This is the case even though such a "transfer" can have no impact on the participant spouse. Second, according to Justice Kennedy, Congress's express recognition of the community interest of a nonparticipant spouse through the entry of a qualified domestic relations order ("QDRO") entailed the exclusion of any other form of "alienation" by the nonparticipant spouse such as Dorothy's attempted testamentary transfer.\textsuperscript{213} If Dorothy's testamentary transfer were void, it ultimately would not matter that her children were seeking only an accounting. Even though Sandra might pay any claim ultimately allowed from nonretirement assets, the claim was itself preempted according to the Court.

The majority reached to find conflicts on which to base the holding of preemption. The majority was willing to extend the mandatory minimum payment of 50% of an undistributed retirement annuity to a surviving spouse to prohibit even Dorothy's testamentary transfer of less than 50% of the

\textsuperscript{209}Id. at 865 (S-4 decision) (Breyer, J., dissenting).


\textsuperscript{211}REAct greatly increased the interests of the nonemployee spouse in a participant's pension assets in two respects. First, it provided for "qualified domestic relations orders" that permitted enforcement of state-court decrees that allocated pension assets. ERISA §§ 206(d)(3) and 514(b)(7). Second, REAct required that pension plans establish survivorship interests in pension assets of the participant for the benefit of a nonemployee spouse. ERISA § 205.

\textsuperscript{212} Dorothy's 1980 testamentary transfer, which is the source of respondents' claimed ownership interest, is a prohibited "assignment or alienation." An "assignment or alienation" has been defined by regulation . . . as "[a]ny direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefits payment which is, or may become, payable to the participant or beneficiary . . . . Those requirements are met. Under Louisiana law community property interests are enforceable against a plan . . . . If respondents' claims were allowed to succeed they would have acquired, as of 1980, an interest in Isaac's pension plan at the expense of plan participants and beneficiaries.

\textsuperscript{213} The surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme." Id. at 847. The dissent took issue with the majority's implicit application of the maxim expressio unius exclusio alterius. Id. at 866-68 (S-4 decision) (Breyer, J., dissenting).
Annuity and even though Isaac himself could have diverted up to 50% of it. The majority also found an implied conflict to ban Dorothy’s testamentary transfer of subsequently distributed pension benefits. ERISA § 206(d) certainly prohibited Dorothy’s testamentary transfer of her community interest in the Savings Plan and AT&T Stock during Isaac’s lifetime; there was no mandate to extend that prohibition to the post-distribution assets after Isaac’s death. What the Court gave the states in Travelers by tightening its analysis of “relate to,” it appeared to have taken away in Boggs with its wide-ranging conflict preemption analysis.214

The Court’s preemption analysis remains confused. On the one hand, it has given up trying to find meaning in the expression “relate to.” Beginning in Travelers the Court refocused at least the “connection with” half of its preemption analysis on the objectives of ERISA, the structure of the statute (including its scope), and the nature of the effect of the state law. Now a law has a connection with ERISA only when it mandates benefit structures or affects the administration of benefits. The Court has, however, arguably left intact the “refer to” half of the test by its repeated reiterations, although in no case has “refer to” been necessary to the Court’s holding. On the other hand, the Court demonstrated a vigorous application of traditional conflict preemption in Boggs. A state statute exempting both IRAs and retirement benefits subject to ERISA presents none of the complexities of Louisiana community property law. Given the Court’s care not to find preemption in Travelers and the lack of conflict preemption with respect to IRAs that are excluded from Title I of ERISA, a state statute blending exemptions for both retirement benefits and retirement savings should not be preempted as it applies to IRAs.

| 3. Would ERISA § 514(a) preempt a blended state statute exempting both IRAs and retirement plans subject to ERISA? | No. |

214Preemption cases since Boggs have added little to the picture. In the companion case of De Buono v. NYSA-ILRA Med. and Clinical Serv. Fund, 520 U.S. 806 (1997), the Court easily applied Travelers to hold that a state tax on gross receipts of health care facilities was not preempted. In Engelhoff the Court unanimously held that a law of the State of Washington providing for automatic revocation upon divorce of beneficiary designations of a spouse in life insurance policies and for pension plans was preempted. Engelhoff, 532 U.S. 141 (2001). The Court reaffirmed its narrower application of “relate to” in UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, 378-79 (1999). See also Kentucky Ass’n, supra note 122 (dropping previous incorporation of tests of McCarran-Ferguson Act into ERISA § 514(b)(2)(A) and thus further decreasing scope of preemption of state regulation of managed care plans) and In re Weinheft, 275 F.3d 604, 605 (7th Cir. 2001) (“To the extent that this statute [Illinois’ statute blending exemptions for ERISA-qualified plans and IRAs] speaks to pensions regulated by ERISA it is preempted (but redundant); to the extent it deals with individual retirement accounts . . . and other assets outside the scope of ERISA, it is not preempted . . . .”).
V. ERISA PREEMPTION AND VIRGINIA EXEMPTION LAW

Individual retirement accounts cannot be excluded from the bankruptcy estate under Bankruptcy Code § 541(c)(2). They are protected neither by an enforceable federal anti-alienation provision nor the common law of spendthrift trusts. Any protection of IRAs from creditors must be found in an exemption provision. Virginia, like most other states, has opted out of the federal exemptions. Bankruptcy Code § 522(d)(10)(E) is thus unavailable. Like most states that have opted out of the federal exemptions, Virginia has acted to protect a variety of retirement assets. Va. Code § 34-34 provides two levels of protection for IRAs. If a Virginia resident has no pension assets subject to ERISA, then all amounts held in an IRA are exempt. For those who have an interest in an employer-sponsored retirement plan, including an ERISA-qualified pension, there is a limited IRA exemption. In such a situation, an individual's interest in a retirement plan (which is expressly defined to include IRAs) is exempt to the extent that the cumulative annual benefits from all plans at retirement will not exceed $17,500. Virginia's collation of benefits from all retirement plans for calculation of the exempt portion of IRAs is unique. Other states have exempted IRAs along with retirement assets subject to ERISA and courts have concluded in a few cases that such blended exemptions are preempted by ERISA. But

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215 "A retirement plan established pursuant to §§ 408 and 408 A of the Internal Revenue Code is exempt to the same extent as that permitted under federal law for a qualified plan established pursuant to § 401 of the Internal Revenue Code." Va. Code Ann. § 34-34(H) (Michie Supp. 2002).

216 However, an individual who claims an exemption under federal law for any retirement plan established pursuant to §§ 401, 403 (a), 403 (b), 409 or § 457 of the Internal Revenue Code shall not be entitled to claim the exemption under this subsection for a retirement plan established pursuant to § 408 or § 408 A of the Internal Revenue Code.

Id. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise." Va. Code Ann. § 34-34(B) (Michie Supp. 2002).

218 "Retirement plan' means a plan, account, or arrangement that is intended to satisfy the requirements of United States Internal Revenue Code §§ 401, 403 (a), 403 (b), 408, 408A, 409 . . . , or § 457." Va. Code Ann. § 34-34(A) (Michie Supp. 2002).

219 The exemption provided under subsection B shall not apply to the extent that the interest of the individual in the retirement plan would provide an annual benefit in excess of $17,500. If an individual has an interest in more than one retirement plan, the limitation of this subsection C shall be applied as if all such retirement plans constituted a single plan.

Va. Code Ann. § 34-34(C) (Michie Supp. 2002). Other limitations on exemption of IRAs include amounts contributed in the two years previous to the claim of exemption (other than rollovers from another exempt plan) and claims by an alternate payee or the Commonwealth of Virginia. Va. Code Ann. § 34-34(E) (Michie Supp. 2002).

220 See infra Appendix.

221 See infra Appendix.
it is Virginia's integration of the amount of a debtor's IRA exemption with the amount of the debtor's ERISA-governed retirement account that renders its exemption law particularly vulnerable to preemption. And it was this integration that the Gurry and Bissell courts considered.

A. ROUND 1 - NO PREEMPTION

Stephen Gurry was the beneficiary of an ERISA-qualified 401(k) pension plan through his employment with CMS Information Services. Gurry scheduled his 401(k) plan at $61,000 but noted that it was excluded from the property of his estate. He also individually owned an IRA worth $61,000 and jointly with his wife held a second IRA scheduled at $7,400.

Gurry asserted that both of his IRAs were entirely exempt under § 34-34(H) notwithstanding the statute’s further specification that IRAs enjoyed only a limited exemption when a debtor was also the beneficiary of a 401(k) plan. Gurry’s strongest argument went to preemption. He pointed out that Virginia’s exemption statute defined “retirement plan” explicitly to include plans governed by ERISA and that the statute incorporated ERISA-qualified plans into the IRA exemption formula. Given the historic breadth of ERISA preemption, it did not seem far-fetched to conclude that the exemption statute “related to” an employee benefit plan within the meaning of ERISA. Rather than conducting an exhaustive analysis of the Supreme Court’s ERISA jurisprudence, the bankruptcy court turned to several Circuit Court cases and a Kansas Supreme Court decision to guide its preemption analysis.

Custer v. Sweeney, a 1996 Fourth Circuit opinion that failed to cite Travelers, held that ERISA did not preempt a malpractice claim against an attorney for a pension plan. Raymond Sweeney was the nephew of the president of the Sheet Metal Workers’ International Association who also served as chairman of the union’s affiliated pension fund. Sweeney was one of the attorneys for the pension plan and, according to the complaint, committed legal malpractice by allowing the plan to fund a jet for his uncle’s private use.

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223Id. at 408-09.
224Id.
226Although § 34-34(A) defines “retirement plan” in such a way as include 401(k) plans, and although § 34-34(C) provides that “if an individual has an interest in more than one retirement plan,” the $17,500 annual benefit limitation “shall be applied as if all such retirement plans constituted a single plan,” the debtors argue that the $61,000 in Mr. Gurry's 401(k) plan cannot be considered in calculating the exempt amount of the IRAs. . . . This is so, the debtors say, for the simple reason that ERISA completely preempts state law.
22789 F.3d 1156 (4th Cir. 1996).
228Id. at 1160.
and to purchase a lavish mansion as his uncle’s home. Sweeney sought a dismissal of the action against him on the ground that the civil enforcement provisions of ERISA completely displaced the claim. The Fourth Circuit refused to order the dismissal of Custer’s case with prejudice, holding that the malpractice claim did not “relate to” ERISA. The decision made use of footnote 21 in Shaw (“[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner” to be preempted) but did not refer to Travelers. The court distinguished Ingersoll-Rand by relying on Justice O’Connor’s alternative holding, i.e., that allowing actions for wrongful termination to avoid paying pension benefits would subject plan sponsors to conflicting state requirements. A suit against the plan’s attorney, the court reasoned, would have no such impact on plan sponsors. While the Fourth Circuit may have ignored that portion of the Court’s holding in Ingersoll-Rand that stressed that impact on the plan was not necessary for preemption, its ultimate conclusion was nonetheless consistent with the Court’s Travelers decision. There was no reason to believe that permitting a malpractice claim against a plan’s attorney would undermine the purposes of ERISA or have an economic impact on plan administration, the twin perspectives of Travelers preemption analysis. The bankruptcy court in Gurry reached the same conclusion with respect to limited exemption of IRAs: the integrative Virginia statute did “not burden or infringe upon the Federal statutory scheme.”

Yet the Virginia exemption statute is more intertwined with ERISA than the situation presented in Custer v. Sweeney. VA. CODE § 34-34(H) requires a determination of the extent of an individual’s qualified pension benefits and a concomitant reduction in the exemption of the amount of his or her IRA that can be exempted. The Gurry court turned to the pre-

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229Id.
230Id. at 1164 (“For his ‘complete preemption’ argument, Sweeney contends that Custer’s malpractice claim falls ‘squarely within’ ERISA’s civil enforcement provision, § 502 . . . because, even if prosecuted against non-fiduciaries, the claim ‘purports to remedy harm arising out of breaches of ERISA fiduciary duties.’”).
231We do not believe that Congress intended ERISA to preempt state law malpractice claims involving professional services to ERISA plans. ERISA does not evince a clear legislative purpose to preempt such traditional state-based laws of general applicability, and permitting Custer’s claim would not undermine the congressional policies that underlie ERISA.
Id. at 1167.
232Id. at 1166.
233See supra text accompanying note 156.
234See supra text accompanying note 159.
235See supra text accompanying notes 177-78.
Hears Third Circuit decision in Keystone v. Foley\textsuperscript{237} for a rationale to avoid preemption even here. A Pennsylvania statute provided that all workers on a public contract must be paid “the minimum prevailing wage.”\textsuperscript{238} Second, regulations implementing the act provided that both cash and benefits must be taken into account to determine the prevailing minimum wage rate.\textsuperscript{239} Third, an administrative order interpreting the regulations distinguished between ERISA benefits (which presumptively counted toward the calculation of whether an employer was paying the prevailing wage) and other benefits that were subject to administrative review.\textsuperscript{240} The Third Circuit concluded that ERISA preempted the administrative order because it singled out ERISA plans for automatically favorable treatment.\textsuperscript{241} However, the Court of Appeals held that ERISA preempted neither the underlying statute nor the implementing regulations because they required only that wages and benefits be taken into account to determine the prevailing wage; the statute and regulations did not mandate any particular form of benefits or that the employer pay any benefits at all.\textsuperscript{242} Neither the statute nor the regulations singled out ERISA plans for special treatment: “they merely refer[ed] to employee benefits, with no distinction between ERISA and non-ERISA benefits.”\textsuperscript{243}

The Virginia exemption statute’s calculations, however, do more than “merely refer to” ERISA benefits. So for its final supporting precedent the Gurry court looked to Lawrence Paper v. Gomez,\textsuperscript{244} a decision of the Kansas Supreme Court. Kansas’s worker compensation law required employers to pay a percentage of an injured employee’s “average weekly wage.” Certain ERISA-governed benefits were mandated to be included in the calculation of

\textsuperscript{237}Keystone Chapter, Associated Builders & Contractors v. Foley, 37 F.3d 945 (3d Cir. 1994).
\textsuperscript{238}Keystone, 37 F.3d at 950 (“The purpose of the Prevailing Wage Act ‘is to protect workers employed on public projects from substandard wages by insuring that they receive the prevailing minimum wage.’”) (citation omitted).
\textsuperscript{239}Id. (“The regulations make clear that a prevailing minimum wage will state a cash wage and a level of benefits contributions as separate components.”).
\textsuperscript{240}Id. at 952 (“[T]he Declaratory Order establishes that any contribution to an ERISA plan is per se bona fide, while other benefits contributions must be certified by the Division as such.”).
\textsuperscript{241}Id. at 955 (“The District Court correctly held that ERISA preempts the Declaratory Order, because it singles out [ERISA] plans for special treatment.”).
\textsuperscript{242}[W]e hold that neither the Prevailing Wage Act nor its accompanying regulations are preempted. Under at least one reasonable interpretation of the Act and regulations, an interpretation the Agency is free to adopt, the Act and regulations merely require that the Secretary set a prevailing wage that consists of a cash component and may include a benefits component. Employers must pay the cash component of the wage in cash, but they may pay the benefits component either in benefits or cash. Any benefits they provide, regardless of type, would count toward the benefits component.
\textsuperscript{243}Id. at 956.
\textsuperscript{244}Lawrence Paper Co. v. Gomez, 897 P.2d 134 (Kan. 1995).
the average weekly wage. An employer sought a declaratory judgment that the Kansas statute was preempted under Board of Trade because "[t]he benefit levels of the Kansas Workers Compensation Act are tied directly to the monetary value of the ERISA-covered plans furnished by plaintiff." The court rejected this argument, holding that it is only the effect of the statute on an ERISA covered plan that generates preemption. If ERISA benefits could be used to increase a workers compensation award, the Gurry court reasoned, then ERISA benefits could be used to decrease the IRA exemption without risk of preemption.

B. ROUND 2 – SAVED FROM PREEMPTION

The District Court for the Eastern District of Virginia provided a second perspective on the application of § 34-34 to IRAs in bankruptcy in Phillips v. Bottoms (In re Bottoms). Although the decision in Bottoms was published three weeks after Bissell, it nowhere mentions the Bissell decision. Bottoms does, however, cite Gurry with approval. The opinion affirmed an unreported decision of the bankruptcy court that ERISA did not preempt § 34-34 because the exemption statute "did not conflict with ERISA either directly or indirectly." The court implicitly affirmed that § 34-34 did not relate to ERISA under the Travelers reformulation of the "connection with"

\[\text{Id. at 138 ("The Kansas Legislature ... elected to define an employee's compensation broadly to include fringe benefits such as employer-paid insurance, profit-sharing, and pension contributions.").}\]

\[\text{Id. at 140.}\]

\[\text{We do not read Washington Board of Trade as requiring preemption merely on the basis that a statute refers to ERISA benefits or plans. Each of the circuit courts in Guidry, Foley, Mmm, Chapter, and Combined Mgt. carefully examined the actual effect of the challenged state law on any ERISA covered plans to decide whether preemption was required.}\]

\[\text{Id. at 142.}\]

\[\text{The Virginia statute in question does not, in its application to IRAs, affect the calculation of benefits to the debtor or any other participant in the ERISA-qualified 401(k), nor does it otherwise impact the administration of that plan or impose any obligations or burdens on the employer or plan participants.}\]


\[\text{Accord Abbate, 289 B.R. 62 (E.D. Va. 2003).}\]

\[\text{Bottoms, 260 B.R. at 399 ("The treatment accorded the issue [of preemption] in Gurry, of course, amounts to the finding that section 34-34 is not preempted. And, of particular note, is the part of that thoughtful analysis which supports the unarticulated premise that nothing in section 34-34 of the Virginia Code conflicts with ERISA.").}\]

\[\text{Bottoms, 260 B.R. at 396 (E.D. Va. 2000) (quoting Phillips v. Bottoms (In re Bottoms), Ch. 7 Case No. 98-33413-T, mem. op. at 6 (Bankr. E.D. Va. March 2, 1999)). The Bankruptcy Court had buttressed its bare conclusion with the following reasoning that the District Court quoted with approval: "Virginia Code § 34-34 neither acts immediately and exclusively upon an employee benefit plan under ERISA nor is the existence of ERISA plans essential to section 34-34's operation. ERISA serves a more definitive purpose for the Virginia exemption and [§ 34-34] is thus not preempted by ERISA." Bottoms, 260 B.R. at 397.}\]
gloss. It further concluded that § 34-34 did not “refer to” ERISA by noting that the Supreme Court in Dillingham had held that it is only “[w]here a State’s law acts immediately and exclusively upon ERISA plans, as in Mackey, or where the existence of ERISA plans is essential to the [State] law’s operation, as in Greater Washington Bd. of Trade and Ingersoll-Rand, that ‘reference to’ will result in preemption.”252 “Reference to” means more than mention of ERISA in a state law: where “‘ERISA serves a mere definitional purpose . . . [it is] not preempted by ERISA.”253

Going beyond concluding there was no preemption of the exemption statute, the court in lengthy dicta laid the foundation for application of ERISA § 514(d)254 to preserve § 34-34 in any event. Any use of ERISA § 514(d)’s savings clause must recur to the Supreme Court’s decision in Shaw.255 The Court had saved that portion of New York’s Human Rights Law concerning state administrative remedies for violations of the federal Title VII when it held that preemption of the state statute “would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII’s commands.”256 Title VII directs persons who believe that an employer has violated their rights to proceed first to exhaust their state-law administrative remedies.257 If ERISA preempted the Human Rights Law in its entirety, then primary jurisdiction over employment rights violations would fall to the EEOC, which would both eliminate the EEOC’s power of reference and increase its workload.258 The Bottoms court extended this reasoning to include state exemption laws which are accorded a place in the bankruptcy system by Bankruptcy Code § 522(b).259 While the court admitted that preemption of state exemption law would not have the same impact on bankruptcy courts as would have preemption of the Human Rights Law on the EEOC, it

257Id. (quoting Dillingham, 519 U.S. 316, 324-25 (1997)).

258“Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.” 29 U.S.C. § 1144(d).

259See supra text accompanying notes 135-39.

259Id. at 101 n.23 (“Pre-emption of this sort not only would eliminate a forum for resolving disputes that, in certain situations, may be more convenient than the EEOC, but also would substantially increase the EEOC’s ‘workload.’”).

259See supra text accompanying note 78.
held that it "is clear . . . that the states play an important role in the joint federal-state [bankruptcy] scheme envisioned by Congress." Based on this argument, the court held that ERISA § 514(d) saved §34-34 from preemption.

The Bottoms court dealt only with a trustee's attack on the limited exemption of § 34-34(B); it did not deal with the implications of the later 1999 amendment codified at §34-34(H), which granted an unlimited exemption to holders of IRAs except in cases where they also had a qualified pension fund. While the court's reasoning was expansive, it did not address that aspect of §34-34 which the Bissell court was to take up.

C. Round 3 - Preemption

The Bissell court clearly had Gurry in view when it concluded that ERISA preempted that portion of §34-34(H) which limited the amount of an IRA that could be exempted where qualified pension funds were also available. The Bissell court was acutely aware that preemption of the entirety of the exemption statute would leave debtors with no exemption at all for IRAs. Yet references to ERISA pervaded the law; if ERISA preempted some of §34-34, it would be difficult to salvage any of it.

Bissell began its exemption analysis by turning first to the definition of

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261Bottoms, 260 B.R. at 403 ("[S]ection 514(d) of ERISA saves section 34-34 of the Virginia Code from the preemptive effect of section 514(a).""). The district court's opinion also included analysis of decisions of four circuit courts of appeals concerning the same issue. See infra text accompanying notes 306-25.

262The Bottoms filed their Chapter 7 case sometime prior to June 11, 1998, the date of their creditors' meeting. Bottoms, 260 B.R. at 394. Their filing was thus well in advance of the addition of §34-34(H), which mandated integration. Both the Gurrys and the Bussells filed after §34-34(H) became effective.

263The Bissell opinion gave a perfunctory citation to Gurry in a footnote after having contrasted the creditor's use of §34-34 approach unfavorably with accepted Virginia bankruptcy practice:

The creditor's interpretation of §34-34 is contrary to the commonly accepted practice. Statewide continuing legal education seminars treat ERISA-qualified pension plans and IRAs separately . . . . Debtors routinely compute the exemption under §34-34 without regard to the amount of any ERISA-qualified pension plan which is excluded from the bankruptcy estate by virtue of §541(c)(2). Historically, neither chapter 7 trustees nor creditors objected to this method of calculation.


264The definition of "retirement plan" in §34-34(A) must either include ERISA-qualified pension plans or exclude them. If they are included within the definition, the statute would "relate to" ERISA-qualified pension plans and federal preemption must be considered. The effect of preemption may be harsher than expected. Section 34-34 could be preempted in its entirety, leaving no IRA exemption. It is, therefore, necessary to construe §34-34 to determine whether ERISA-qualified pension plans are included within the statutory definition of "retirement plans" and, if so, the effect of federal preemption; or, whether ERISA-qualified pension plans are excluded from the statutory definition.
"retirement plan." The opinion acknowledged that "at first blush" §34-34(A) included on its face benefits subject to ERISA within the broad scope of retirement plans. The court quickly concluded that the entire statute would be preempted if it meant what it said. Like the opinion in Gurry, the preemption analysis in Bissell failed to take into account the Supreme Court decisions from Travelers to the present. Unlike the opinion in Gurry, the Bissell preemption analysis led to a systemic distortion of ERISA's impact on Virginia's exemption statute.

The Bissell opinion cited several Supreme Court cases including Shaw for the older "connection with or reference to" gloss on the relate to test of preemption. However, Bissell omitted any reference to the recognition by the Travelers Court that "our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here." The opinion did not use the purpose-driven exemption paradigm the Court provided in Travelers. Nor did the opinion discuss the increased deference paid to matters involving the exercise of the historic police powers by the states enunciated in Travelers. The decision overlooked the Supreme Court's careful effort to avoid preemption in Dillingham. Nor did the opinion recur to the venerable "refers to" half of the Shaw gloss, which arguably survived whatever changes Travelers and its progeny have wrought.

The opinion in Bissell instead turned to principles of statutory construction to eliminate the risk of preemption of §34-34 in its entirety caused by the breadth of the definition of "retirement plan" in §34-34(A) and to preserve the first paragraph of the unlimited IRA exemption of §34-34(H). The statutory definition does, of course, include plans intended to satisfy IRC §401 among the list of retirement plans. Reading §34-34(A) to include pension plans subject to ERISA would, according to the Bissell analysis, result in automatic preemption of the entirety of the IRA exemption statute.
Citing several cases for the proposition that “construction of a statute that renders a statute unconstitutional must be eschewed in favor of a construction that upholds the validity of a statute,” Bissell concluded that the same principle of statutory construction should be employed in the face of possible preemption.\textsuperscript{273} No Virginia case stands for the extension of this rule of statutory construction.\textsuperscript{274} And even if there were such a rule of construction, it seems unlikely that it could be applied meaningfully in the face of the unambiguous inclusion of pension plans subject to ERISA in the definition of retirement plans.\textsuperscript{275}

The Bissell opinion augments the argument for its narrowing interpretation of the definition of retirement plan by turning to the history of § 34-34. The opinion points out that in 1999 the Virginia legislature was concerned to equalize treatment of retirement benefits when it enacted § 34-34(H).\textsuperscript{276} According to the court’s understanding of § 34-34(H), IRAs should have an

\footnotesize{(quoting \textit{Earley v. Landslide}, 514 S.E.2d 153 (1999) which held that it was not absurd to interpret a statute permitting the Attorney General to seek a declaration of the constitutionality of state law to prohibit the Attorney General from challenging a state law on the ground that it was unconstitutional.)}


\textsuperscript{274}See, e.g., \textit{Metropolitan Life Ins. Co. v. Pettit}, 164 F.3d 857 (4th Cir. 1998) (holding that ERISA preempted state law constructive trust claim); \textit{Saturn Distribution Corp. v. Williams}, 905 F.2d 719 (4th Cir. 1990) (holding that portions of Virginia’s Motor Dealer Licensing Act were preempted by the Federal Arbitration Act); and \textit{WBQ P’ship v. Virginia} (In re \textit{WBQ P’ship}), 189 B.R. 97 (Bankr. E.D. Va. 1995) (holding that a statutory successor liability rule was preempted by \textit{Bankruptcy Code} § 363(f)). The only case declining to find preemption in light of statutory construction is \textit{W.M. Schlosser Co. v. School Bd. of Fairfax County}, 980 F.2d 235 (4th Cir. 1992) which held that the Federal Arbitration Act did not preempt Virginia’s rule of strict statutory construction concerning the powers of local governing bodies (the so-called Dillon Rule). The conclusion of “non-preemption” did not, however, involve any narrowing construction of state law. \textit{See also} \textit{Holland v. Holland}, 53 Va. Cir. 512, 1999 WL 262433 (1999) (holding that the Social Security Act’s anti-alienation provision does not preempt a state court from considering funds in an account derived from Social Security payments in making an equitable distribution of a marital estate).

\textsuperscript{275}The Bissell opinion seeks to avoid the argument that its construction of § 34-34 renders the statute’s references to IRC § 401 as surplusage: “[e]xcluding ERISA-qualified pension plans from the statutory definition of ‘retirement plans’ does not render the reference to 26 U.S.C. § 401 in § 34-34(H) of the Code of Virginia meaningless. There are § 401 plans that are not ERISA-qualified.” Bissell, 255 B.R. at 421 n.22. This construction seems unfounded. \textit{Va. Code Ann.} § 34-34(H) gives no hint that its reference to IRC § 401 was intended to apply to only a few rather than all plans qualified under that section. It is also inconsistent with § 34-34(A), which contains a broad reference to IRC § 401 in its definition of retirement plan. The Bissell court admits as much when it notes that “Section 34-34 is not limited to ERISA-qualified pension plans.” Id. at 420. While § 34-34 is not limited to retirement plans subject to ERISA, it certainly includes them. Moreover, nothing in the Report of the Joint Subcommittee Studying Virginia’s Exemption Statutes, H. 77 (Va. 1990) [hereinafter, the Report], supports the Bissell court’s construction (quoted in Bissell, 255 B.R. at 420).

\textsuperscript{276}Bissell, 255 B.R. at 418 (“This change [the addition of § 43-43(H)] partially corrected the disparate treatment of different beneficiaries, a disparate treatment similar to that which the Subcommittee identified in 1990.”) and at 420 (“The General Assembly sought to eliminate the inequality between 401 plans and IRAs by extending to IRAs the same exemption as a 401 plan.”).
unlimited exemption because ERISA-qualified pension plans enjoyed complete exclusion from the bankruptcy estate. Any limitation on the unlimited exemption of IRAs struck the court as contradicting the legislature’s fundamental intention to treat all retirement benefits equally:

Just as in 1990, [in 1999] there was a disparate treatment of beneficiaries. For example, two individuals, each with $100,000 in a retirement fund, could be treated very differently. A debtor who is 54 years old when he files a petition in bankruptcy is entitled to claim $52,955 in an IRA exempt. The remaining $47,045 is not exempt. Another debtor with an ERISA-qualified pension plan would retain the entire $100,000 retirement fund. . . . There was no good policy reason to favor one type of employment over another.278

The court’s policy analysis is perfectly sound.279 Unfortunately, both the Bankruptcy Code and ERISA make the very distinction that Bissell decries. Section 541(c)(2) of the Bankruptcy Code works to exclude ERISA-qualified plans from the estate in their entirety. With respect to IRAs, Bankruptcy Code § 522(d)(10)(E) limits their exemption to an amount reasonably necessary for support.280 The limitation on the amount of an IRA that can be exempted under Virginia law can best be understood simply as a formulaic adaptation of the discretionary federal exemption for IRAs under the Bankruptcy Code.281

It appears that the goal of the Virginia legislature with the pre-Patterson enactment of § 34-34 in 1990 was to create an across-the-board exemption for all retirement benefits of an amount that it believed was reasonable.282

277Bissell, 255 B.R. at 419 (“It [Va. Code Ann. § 34-34(F)] explicitly acknowledges that ERISA-qualified plans are exempt pursuant to federal law. IRAs are exempt ‘to the same extent as that permitted under federal law’ for 401(k) plans.”).
278Id. at 418.
279See The Pension Shield, supra note 74.
280See supra text accompanying notes 74-75, 281.
281The Bottoms court reached the same conclusion:

[A]lthough the federal bankruptcy provision permits exemption of a payment under a pension “to the extent reasonably necessary for the support of the debtor and any dependent of the debtor,” 11 U.S.C. § 522(d)(10)(E) (emphasis added), Virginia has enacted an alternative exemption provision, found in section 34-34 of the Virginia Code. The state provision, like the federal one it replaces, limits the exemption of retirement benefits. However, rather than limiting the exemption to “the extent reasonably necessary for the support of the debtor” and his dependents, the Virginia law provides instead that the exemption “shall not apply to the extent that the interest of the individual in the retirement plan would provide an annual benefit in excess of $17,500.”

282Nothing in the Report expressly describes the rationale for the limitation on exemption of retire-
With the decision in *Patterson v. Shumate*, creditors and bankruptcy trustees had no access at all to any qualified pension benefits. Thus in 1999, presumably from a sense of fairness, the Virginia legislature added § 34-34(H) and exempted IRAs in full. Yet the overall goal of limiting the exemption for retirement benefits to a reasonable amount remained. The 1999 amendment realized this goal in part by linking the full exemption of IRAs to the presence of employer-sponsored retirement benefits. While the legislature wanted fairness, it had not lost its desire for reasonableness and thus removed the unlimited exemption for IRAs by requiring integration when an employer-sponsored retirement benefit plan (including those subject to ERISA) was present. The debtor in such a case would be remitted to the limited exemption of § 34-34(C), which is what Virginia would provide for all debtors but for ERISA and *Patterson*.283

VI. ERISA PREEMPTION AND OTHER STATES’ EXEMPTION STATUTES

The battle over preemption of Virginia’s exemption statute has not occurred in a vacuum. Although Virginia’s exemption of IRAs is more recondite than that of any other state, judicial construction of other efforts is helpful in framing the issues surrounding Virginia’s efforts and predicting whether the Supreme Court would find preemption in any case. Beginning shortly after *Mackey*, there was a modest wave of bankruptcy court decisions holding that ERISA preempted state exemption laws applicable to retirement plans. Such decisions were questioned by other bankruptcy courts, and beginning well before *Travelers*, several Courts of Appeals found no cause for preemption. Since *Travelers*, no case other than *Bissell* has found preemption.

283 The *Bissell* court presents a scenario that it believes demonstrates the absurdity of this conclusion:

> It is not difficult to imagine a situation where a debtor has an IRA with a value of $100,000 and an ERISA-qualified pension plan with a value of $100. The [objecting] creditor's construction would inevitably lead to the conclusion that the IRA may not be claimed as exempt under § 34-34(H) because of the existence of the nominal ERISA-qualified pension plan. While the debtor would be able to avail himself of the limited exemption under § 34-34(B), the General Assembly's intent to place IRAs and ERISA-qualified pension plans on an equal footing would be frustrated.

*Bissell*, 255 B.R. at 422. The *Bissell* court presumes that the legislature's intent of equal treatment supercedes its goal of limited exemption, the very conclusion it seeks to demonstrate.
A. Conflicts Among the Bankruptcy Courts

Until the Supreme Court’s 1988 decision in Mackey striking down Georgia’s prohibition of garnishment of welfare plan benefits, no lower court had held that state law exemptions of retirement funds (ERISA-qualified or not) were preempted. Within a year after Mackey, several bankruptcy courts in Texas applied Mackey to preempt state exemption laws. The first reported bankruptcy case on this issue, In re Komet, considered the Texas statute that exempted a wide variety of retirement assets including ERISA-qualified plans. The debtors in Komet owned retirement assets subject to ERISA, which they claimed as exempt under Texas law. According to the court, this statute exempting ERISA-qualified plans “related to” and “referred to” ERISA, both of which phenomena were sufficient to preempt the statute. The bankruptcy court did not pause to consider whether Mackey’s language

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284 See supra text accompanying note 147.
285 In re Komet, 93 B.R. 498 (Bankr. W.D. Tex. 1988), modified on mot. for reconsideration by In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989). The modifications in the second Komet opinion went to whether the assets were exempt under Bankruptcy Code § 522(b)(2)(A). The court reiterated its earlier conclusion that ERISA preempted the Texas statute: “It is simply not possible to evade the clear mandate that a law which ‘makes reference to’ an ERISA plan faces pre-emption under Section 514(a).” Komet, 104 B.R. at 801.
286 Komet, 93 B.R. at 499 (“At issue here is the debtors’ asserted exemption of a $100,000 pension plan and a $140,000 profit sharing plan, both claimed under a newly adopted Texas exemption statute which renders virtually all types of qualified retirement plans exempt from execution.”).
287 In addition to the exemptions prescribed by Section 42.001, a person’s right to the assets held in or to receive payments, whether vested or not, under a stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, or under an individual retirement account or individual retirement annuity, including a simplified employee pension plan is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. A person’s right to the assets held in or to receive payments, whether vested or not, under a government or church plan or contract is also exempt unless the plan or contract does not qualify under the definition of a government or church plan under the applicable provisions of the Federal Employee Retirement Income Security Act of 1974.


288 It is manifest to this court that the language in the first sentence of the Texas statute, “unless the plan does not qualify under the applicable provisions of the Internal Revenue Code,” implicates and incorporates ERISA, and thus “relates to” ERISA plans . . . . The second sentence of the Texas statute expressly refers to and exempts all government or church plans if they qualify under ERISA. This express reference is alone enough to cause its preemption.

about “reference to” and “relate to” was broader than its actual holding.289 Although the Komet court did not address the issue, it was certainly possible that the Texas statute was vulnerable under traditional field preemption doctrine. Congress had clearly legislated in the field of creditors’ claims in ERISA’s anti-alienation provision. While exemption of pension plans did not present a case of implied conflict preemption like Georgia’s prohibition of garnishment of welfare benefits, it clearly encroached into an area regulated by ERISA. Individual retirement accounts, however, are not protected by the anti-alienation provision of ERISA and thus do not present a case for either conflict or field preemption. The Komet court recognized this point in its opinion on reconsideration and specifically noted in dicta that Texas’s exemption of IRAs would not be preempted.290

Within a year of the first decision finding preemption of Texas’s exemption law, another Texas bankruptcy court reached the opposite conclusion. The debtors in In re Volpe291 sought to exempt assets in both an ERISA-qualified pension plan and an IRA. The bankruptcy court thoroughly analyzed Mackey and concluded that the Supreme Court “[h]ad fallen] victim to the allure of a well-turned phrase” with its broad statement that “state laws which make ‘reference to’ ERISA plans are laws that ‘relate to’ those plans within the meaning of § 514(a).”292 The holding in Mackey according to the Volpe court “was that [the Georgia anti-garnishment statute], which single[d] out ERISA employee welfare benefit plans for different treatment under state garnishment procedures was in conflict with Congressional silence as to the ability to garnish ERISA welfare benefit plans.”293 Volpe anticipated the change of direction in Travelers away from uncritical literalism toward consideration of the structure and purpose of ERISA.294 While the Texas statute clearly “referred to” ERISA, it did not “have reference to’ ERISA plans” within the meaning of § 514(a).295 The Volpe court reached this con-


289 See supra text accompanying note 285.

290 The court does not have before it the question of Individual Retirement Accounts and other devices which enjoy favorable tax treatment but are not governed by ERISA. If these devices are not governed by ERISA, they are also not subject to the pre-emption scheme of Section 514(a) . . . . Whether they are otherwise protected by ERISA is not before the court. See In re Laxson, 102 B.R. 85 (Bankr. N.D. Tex. 1989) (finding the Texas statute sufficient to protect such devices).


292 Id. at 848 (quoting Mackey, 486 U.S. at 829).

293 Id.

294 See supra text accompanying notes 171-86.

295 Volpe, 100 B.R. at 848.
clusion by focusing on the majority opinion in that part of Mackey that held that ERISA did not preempt the entire Georgia garnishment system as it applied to pension plans, from which it concluded:

I believe that [the Texas exemption statute] does not purport to regulate the terms and conditions of an employee benefit plan; it does not affect the relationship between the principal ERISA entities. Any relationship to ERISA is simply too tenuous, remote or peripheral to “relate” within the intendment of [ERISA § 514(a)].

Texas’s exemption statute thus fell within that “narrow category of laws which affect employee benefit plans but which do not relate to them within the meaning of § 514(a).”

While Volpe may have been prescient with regard to the purpose-driven analysis ultimately adopted by the Supreme Court in Travelers, it failed to work through the implications of field preemption. The opinion began with a comprehensive analysis of Supreme Court preemption precedent but it ultimately framed the scope of field preemption to “any state laws that ‘relate to any employee benefit plan.’” The breadth of field preemption scope allowed the Volpe court to conflate its broad purpose-driven “relate to” analysis of § 514(a) with what should have included the narrower question of the conflict preemption effect of ERISA’s anti-alienation provision.

Even if the Texas exemption statute did not relate to an employee benefit plan within the broad purposes of ERISA, the statute duplicated a specific protection afforded by Congress for such plans. Given the unanimous holding in Mackey preempting Georgia’s garnishment exemption for welfare plan benefits, it should have seemed plausible that the Supreme Court in its pre-Travelers days would find preemption of an exemption for benefits of a pension plan subject to ERISA. The Volpe court never reached the issue of whether the exemption of IRAs presented a different question because it held that the entirety of the Texas statute survived the creditor’s assault. Doubts about Texas’s exemption for IRAs were addressed by another Texas bankruptcy court only two months later.

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296 Id. at 854-55.
297 Id. (quoting Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal., 679 F.2d 1307, 1312 (9th Cir. 1982)).
298 Volpe, 100 B.R. at 847.
299 Volpe correctly noted that “state law which does not conflict with a positive Congressional enactment in the common-sense sense ... may nevertheless conflict with Congressional silence on a subject which is within a field as to which Congress has reserved to itself the sole right to regulate ....” Id. at 848. What Volpe failed to address was the preemptive effect of § 206. ERISA’s explicit anti-alienation provision with respect to pension plans does not raise the question of the meaning of congressional silence as in Mackey; rather, it calls for consideration of the effect of express congressional action.
The bankruptcy trustee objected to Joel Laxson’s exemption of two IRAs under the blended Texas statute in In re Laxson. Relying on Mackey, the trustee asserted that ERISA preempted the exemption. The court sidestepped the preemption issue by correctly holding that Title I of ERISA as a whole and, hence, § 514(a), simply did not apply to IRAs. “Since an IRA is self-settled and not maintained by an employer or an organization, IRAs are simply not the type of accounts that fall under the ERISA legislation.” An exemption of IRAs is thus not preempted. While the Texas statute did not limit or condition an IRA exemption with the existence of ERISA-qualified plans, the bankruptcy court in Laxson addressed the issue of whether it could sever the IRA exemption from the balance of the exemption statute that pertained to qualified plans. Texas law provided a blanket direction to courts to sever valid from invalid portions of statutes under most circumstances. Without addressing preemption of the exemption for pension plans, Laxson concluded that “the portions [of the exemption statute] that apply to non-ERISA accounts can still be given effect.” Exempting IRAs, even in a statute otherwise subject to preemption, was not impaired by ERISA. Virginia, like Texas, has a severability provision.

Virginia’s exemption for IRAs cannot simply be severed from its exemption for retirement benefits subject to ERISA. Integration of the amount of benefits subject to ERISA with retirement savings in an IRA requires the

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301 Id. at 85-86. (“The trustee’s objection to the IRA’s is based on the argument that the relevant portion of the Texas Property Code is in fact preempted by the Employee Retirement Income Security Act (ERISA). In arriving at this conclusion, the trustee relies on Mackey.”).
302 Id. at 89 (citing ERISA §§ 3, 4 and 514). “[S]ince ERISA does not apply to IRAs, then ERISA does not preempt the statute, with respect to IRAs or any other accounts not covered by the ERISA statute.” Id.
303 The Texas Code Construction Act provides: (c) in a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.
304 Id.
305 The provisions of statutes in this Code or the application thereof to any person or circumstances which are held invalid shall not affect the validity of other statutes, provisions or applications of this Code which can be given effect without the invalid provisions or applications. The provisions of all statutes are severable unless (i) the statute specifically provides that its provisions are not severable; or (ii) it is apparent that two or more statutes or provisions must operate in accord with one another.

court to take notice of the ERISA benefits. Yet the process of integration has no effect on the retirement plan or on its administration. Nor does integration subject plan administrators to disparate state mandates. Finally, unlike Boggs, the result of integration does not potentially reduce the amount of benefits subject to ERISA that the debtor will receive. While integration runs a foul of the broad language in Ingersoll-Rand, it does not present an actual conflict with an exclusive ERISA enforcement provision and is not inconsistent with the holding in Ingersoll-Rand.

| 4. Would ERISA § 514(a) preempt a state statute integrating the amount of the exemption for IRAs with the amount of assets in retirement plans subject to ERISA? |
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| Although the conclusion is not free from doubt, the combination of statutory severance and the purpose-driven analysis of Travelers support an answer of no. |

B. CONSISTENCY AMONG THE COURTS OF APPEALS

Notwithstanding the divergent conclusions reached in the bankruptcy courts, the Circuit Courts of Appeals that have considered preemption of blended laws exempting ERISA-qualified pension plans and IRAs have achieved a remarkable degree of consistency. Only the Ninth Circuit in Pitrat v. Garlikov held in a 2-1 decision that ERISA preempted a state law exemption for assets held in a qualified retirement plan. But the court later withdrew its first opinion and its subsequent decision did not address the preemption issue. Patterson v. Shumate mooted the specific holdings in all these cases. Yet their reasoning remains relevant. If an exemption of IRAs in conjunction with retirement plans subject to ERISA is preempted, then only § 514(d) will save them. In Virginia, only the District Court in Bottoms has addressed this issue. Thus the following cases remain important when addressing an integrative statute like § 34-34.

At virtually the same time as the release of the Ninth Circuit’s decision in Pitrat, the Fifth Circuit in Heikamp v. Dyke (In re Dyke) held that Texas’s blended exemption statute was saved by ERISA § 514(d) – the savings clause. The Fifth Circuit was not persuaded by the reasoning in Volpe

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306 47 F.2d 419 (9th Cir. 1991). Judge Sneed based his dissent on ERISA’s savings clause and the Supreme Court’s decision in Shaw: “To my mind, A.R.S. § 33-1126(B) is the equivalent of those portions of the New York Human Rights Law that the Court saved in Shaw, not those it preempted.” Id. at 432.

307 Pitrat v. Garlikov, 981 F.2d 1021 (9th Cir. 1992).

308 Pitrat v. Garlikov, 992 F.2d 224 (9th Cir. 1993). The preemption issue had been mooted by the intervening Supreme Court decision in Patterson v. Shumate.

309 See supra text accompanying notes 249-62.

310 943 F.2d 1435 (5th Cir. 1991).
that the Supreme Court’s “make reference to” language in Mackey should be interpreted purposefully.\textsuperscript{311} It took the Court’s summary of its holding literally and concluded that the Texas exemption statute fell within the scope of ERISA preemption because of its direct references to ERISA.\textsuperscript{312} Yet the court was willing to apply Shaw’s treatment of New York’s Human Rights Law – that “under certain circumstances ERISA also does not preempt state laws which enforce federal goals”\textsuperscript{313} – to the exemption statute because the Bankruptcy Code implemented a federal policy of a “fresh start” for debtors and the statute advanced that policy.\textsuperscript{314} The court was particularly impressed that the exemption statute would achieve the same goal as Bankruptcy Code § 522(d)(10)(E) – preservation of an amount necessary for the debtor’s support in retirement.\textsuperscript{315}

The Eighth Circuit reached the same conclusion the following year in Checkett v. Vickers (In re Vickers).\textsuperscript{316} Missouri had opted out of the federal bankruptcy exemptions\textsuperscript{317} but had enacted an exemption for a variety of re-

\textsuperscript{311} The language in Mackey is different from the language in Shaw. ... Some commentators have argued that the language in Mackey expands ERISA’s preemptive effect beyond that which the Court anticipated in Shaw ... see also In re Volpe (“it appears that the Supreme Court [in Mackey] fell victim to the allure of a well-turned phrase ... I submit that there is a difference, if not a vast difference, between ‘makes reference to’ and ‘has reference to.’”). Regardless whether Mackey expanded the rule in Shaw, however, the rule in Mackey is the most recent pronouncement of the Supreme Court, and this Court is required to follow it.

\textsuperscript{312} Id. at 1448 (“The Shaw ‘exception’ – that ERISA does not preempt state laws which affect benefit plans in a tenuous or peripheral manner – applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans.”).

\textsuperscript{313} Id. at 1449.

\textsuperscript{314} The Bankruptcy Code, in particular, is a federal law that ERISA cannot disturb. The Texas legislature has created a state exemption scheme that advances the principal goal of the Bankruptcy Code. One such exemption in this state scheme, section 42.0021(a) of the Texas Property Code, permits bankrupt debtors to exempt the funds in their retirement plans. Tex. Prop. Code Ann. § 42.0021(a) (Vernon Supp. 1991). If the ERISA preemption clause is enforced against section 42.0021(a), the preemption clause would impair the ability of the Bankruptcy Code to ensure – through the Texas state exemption scheme – that Texas debtors can get a “fresh start” after bankruptcy. Accordingly, this Court concludes that ERISA section 514(d) saves the Texas state exemption scheme from preemption. ERISA does not preempt section 42.0021(a) of the Texas Property Code.

\textsuperscript{315} Id. at 1450 (citations omitted).

\textsuperscript{316} This section serves the same purpose as section 522(d)(10)(E) of the Bankruptcy Code: both provisions permit debtors to claim exemptions for their retirement benefits. ... Because the Texas statute does not permit an exemption that the Bankruptcy Code prohibits – or vice versa – we conclude that ERISA does not preempt section 42.0021(a).

\textsuperscript{317} Id. at 1429 (“The [bankruptcy] code also allows states to opt out and create their own exemptions. ... The State of Missouri has exercised this option.”) (citations omitted).
tirement benefits identical to Bankruptcy Code § 522(d)(10)(E). The opinion raised the question of whether ERISA preempted the statute in the first instance. Taking the easier road, however, the Vickers court had no difficulty in saving Missouri's exemption statute, noting that "[i]t would be incongruous to hold pension benefits exempted under the federal bankruptcy law, but to strike down identical provisions enacted by the state under the express authorization of the bankruptcy code."

A year later in Schlein v. Mills (In re Schlein) the Eleventh Circuit held that ERISA § 514(d) saved Florida's exemption statute. Florida too had opted out of the federal exemptions but in an interesting twist had saved itself the trouble of enacting anything substantive with regard to pension assets by opting back into Bankruptcy Code § 522(d)(10)(E) by incorporating it by reference. The Schlein court took Mackey at its word - any law that makes reference to ERISA relates to ERISA - and held that the Florida exemption statute "relates to ERISA benefit plans and, absent an applicable exception, is preempted by ERISA § 514(a)." The Eleventh Circuit panel conducted a thorough analysis of Shaw and looked at the precedent in Pitrat, Dyke, and Vickers and concluded that the exemption statute was saved:

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318Id. at 1428. (Missouri law allows a bankruptcy debtor to exempt
(10) Such person's right to receive:
   (e) A payment under a stock bonus, pension, profit-sharing, annuity or similar plan
or contract on account of illness, disability, death, age or length of service, to the
extent reasonably necessary for the support of such person and any dependent of
such person unless:
   Such plan or contract was established by or under the auspices of an insider
that employed such person at the time such person's rights under such plan
or contract arose;
   Such payment is on account of age or length of service; and
   Such plan or contract does not qualify under section 401(a), 403(a), 403(b),
408 or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a),
403(b), 408 or 409).

319Id. ("We do not read the congressional preemption under section 1144(a) as broadly as the
trustee.").
320Id. at 1429.
3218 F.3d 745 (11th Cir. 1993).
322Id. at 748 (" Fla. Stat. § 220.20 establishes the general nonavailability of the federal bankruptcy
exemptions under 11 U.S.C. § 522. ")
323FLA. STAT. § 222.201 then opts the state back in as far as exemptions in Bankruptcy Code § 522
(d)(10) are concerned:
   Notwithstanding § 222.20, an individual debtor under the federal Bankruptcy Re-
form Act of 1978 may exempt, in addition to any other exemptions allowed under
state law, any property listed in subsection (d)(10) of § 522 of that act.

Id. at 749.
324Id. at 750.
A holding that state exemption statutes like the one involved in this case are preempted would alter, amend, or modify the Bankruptcy Code’s provision permitting states to set exemptions and the deliberate policy choices of Congress that underlie that provision. We do not believe that Congress intended that result. Accordingly, we hold that Fla. Stat. § 222.21(2)(a) is not preempted by ERISA.325

After considerable tumult at the bankruptcy court level, three of the Courts of Appeals that have addressed the issue of ERISA and state exemption laws have concluded that ERISA § 514(d) saves them from preemption. The opinion reflecting the only exception to this trend has been withdrawn. None of the Circuit Court decisions held that ERISA did not preempt the exemption laws in the first place although Vickers left open that possibility. Nonetheless, none of the Circuit Courts confronted an exemption statute as abstruse as Virginia’s. While the weight of authority seems clearly to support the District Court’s decision in Bottoms, all of the Circuit Court opinions predate Travelers. The decision in Travelers has reduced the need to rely on ERISA § 514(d) in most cases. The purpose-driven preemption analysis of Travelers certainly bolsters the bankruptcy court’s decision in Gurry. Coupled with the application of § 514(d) in Bottoms and the conclusion of no preemption in Gurry, the integrative formula of § 34-34(H) remains applicable to debtors in Virginia.

5. If the answer to any of these questions were yes, would § 514(d) save such a state statute from preemption?

Although not free from doubt, the unanimous weight of authority suggests yes.

CONCLUSION

The Virginia legislature’s initial efforts to protect retirement assets in 1990 spoke simply: the total of protected benefits could not exceed the amount necessary to produce a modest income stream upon retirement. Prior to the 1992 decision in Patterson v. Shumate, there was every reason for lawmakers to consider all retirement plans together. As long as both ERISA-qualified plans and IRAs remained in the bankruptcy estate, there was no reason to treat separately assets whose purposes were substantially similar. Section 34-34(B) thus provided for integration of pension and IRA assets to produce a reasonable and calculable stream of retirement income. Although

325Id. at 753-54. See also Abbate, 289 B.R. at 70 (“This court finds Schlein’s reasoning persuasive and holds that § 34-34 is not preempted by ERISA.”).
the battle over ERISA preemption of state exemptions of pension plans subject to ERISA had been joined the preceding year, its ultimate results remained murky. None of the Circuit Courts of Appeals were to issue a decision until a year after Virginia's first exemption of retirement assets. The Joint Committee was aware of the potential for ERISA preemption but correctly anticipated that many courts would hold that ERISA § 514(d) is an effective tool to save such an exemption.

With the Patterson decision, much of the impetus for pension exemptions dissipated. Yet the jarring disparity between treatment of ERISA-qualified plans and IRAs occasioned by Patterson called for some legislative response. The restricted right to exempt certain retirement savings appeared unfair when contrasted with the unlimited right to keep other retirement assets. Virginia's response in 1999 created a conditional unlimited exemption for IRAs. By itself such an unlimited exemption would raise no preemption problems. The unlimited exemption for IRAs in § 34-34(H) does not, however, stand alone; it is conditioned on the debtor's failure to claim an "exemption" for retirement plans subject to ERISA.

The Bissell court concluded ERISA would preempt the entire exemption scheme for all retirement assets including IRAs unless the express language of § 34-34(A) were read not to include benefits subject to ERISA. The court strained to construe language on its face defining "retirement plans" to include ones subject to ERISA to exclude such plans. Bissell warped the construction of § 34-34(A) only because it applied Mackey mechanically; it did not consider Mackey's holding but woodenly applied the Court's statement of its conclusion. The additional failure to consider the adjustment in preemption analysis effected by Travelers further distorted Bissell's construction of the exemption statute to lead to a result clearly not intended by the Virginia legislature. The initial legislative goal in 1990 was to provide a limited exemption for all retirement benefits. The 1999 amendments recognized the effect of Patterson v. Shumate and equalized the treatment of IRAs and ERISA-qualified plans but only if the debtor did not seek to protect both sorts of retirement assets. Newly added §34-34(H) allowed for unlimited exemption of IRAs or plans subject to ERISA but not both. Bissell effectively allows a debtor to keep both and justifies its conclusion on the ground that to hold otherwise would lead to no exemption at all for IRAs.

The Bankruptcy Code certainly authorizes debtors to use state law exemptions although it nowhere requires that states provide them.326 Like

326 [N]othing in the Bankruptcy Code would prevent a state from denying its residents the benefits of the federal bankruptcy exemption, by exercising its option to opt out of the federal scheme, and simultaneously abolishing all state exemptions leaving a debtor with no exemptions whatsoever except those created under federal nonbankruptcy law.
New York's Disability Benefits Law addressed in Shaw, mere consistency with the bankruptcy policy of the fresh start is not enough to fit an otherwise preempted exemption statute into ERISA § 514(d). Unlike the New York Human Rights Law that was saved from preemption in Shaw, the existence of state exemptions does not relieve a federal administrative body of a substantial portion of its workload. Yet congruence in result between § 34-34 and the Bankruptcy Code § 522(d)(10)(E) cannot be ignored. The police power of the states includes the power to enact exemption laws and the Bankruptcy Code § 522(b) specifically authorizes debtors to use such laws. As long as exemption laws exist they are part of the Bankruptcy Code and thus are protected from preemption by § 514(d).

While Gurry's conclusion that ERISA does not preempt Virginia's exemption law is consistent with post-Mackey Supreme Court jurisprudence, the opinion fails to come to grips with Travelers and its progeny. Mackey held that ERISA preempted Georgia's prohibition of garnishment of welfare plan benefits because Congress had chosen to protect only pension plan benefits. Georgia's statute thus intruded into a field tacitly occupied by ERISA. By way of contrast, IRAs are neither welfare plans nor pension plans. Exemption of IRAs is no more within the field of ERISA than is exemption of the family Bible. Travelers clarified the "relate to" aspect of Mackey's holding and even expanded the sorts of state activities that fell outside the field of ERISA. In Mackey, a law of general application like garnishment was not preempted simply because it could be applied to plans governed by ERISA. With Travelers, schemes of reimbursement and, according to DeBuono, even taxation resulting in differential costs to plans subject to ERISA are not preempted. Exemption of IRAs even when integrated with assets not covered by ERISA does not warrant different treatment.

Nevertheless, neither Travelers nor any subsequent case has expressly overruled the "refer to" test of preemption. Three reasons militate against application of this test to the exemption of IRAs. First, the state statute intruded into the field of ERISA in each case where a state statute referring to ERISA was preempted. Second, given the holdings of the Court's deci-
sions since *Travelers*, the Court has signaled that it is engaging in traditional field preemption analysis regardless of the terminology employed. Finally, the “refer to” test is not grounded in the text of ERISA § 514(a). ERISA does not employ this term; it is simply a gloss used by the Court to explain its conclusion in a particular case – it should not be a reason for other courts to act.

Virginia’s exemption for IRAs refers to ERISA at multiple points. Its definition of retirement plans includes ones subject to ERISA as well as those not governed by ERISA. It conditions an unlimited exemption for IRAs on the absence of a plan subject to ERISA. It requires calculation of the extent of exemption for an IRA with a formula in which assets in a plan subject to ERISA play a part. Yet in all of these respects § 34-34 neither impacts on plan design or administration thwarts a goal of ERISA nor intrudes into a field governed by ERISA. Section 34-34 therefore does not relate to ERISA within the meaning of § 514(a). It thus follows that the many laws merely blending exemptions for IRAs with exemptions of pensions subject to ERISA will likewise not be preempted.

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because they have more than a tenuous, remote, or peripheral effect. What unites the "refers to" and "connection with" definitions of "relates to" then is that both were crafted to get at statutes that have an effect on ERISA plans. Consequently, statutes that refer to ERISA, but have no effect on a covered plan, are not within the scope of the definition of relates to and, as such, are not pre-empted.

*Thiscol*, 76 F.3d 751, 759 (6th Cir. 1996).
### Appendix

State Statutory Exemptions for Individual Retirement Accounts

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Statutory Reference</th>
<th>Exemption for Pension Assets and/or Benefits (+/-)</th>
<th>Reference to ERISA (+/-)</th>
<th>Reference to IRC (+/-)</th>
<th>Judicial Decisions on ERISA Preemption of IRA Exemption</th>
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</thead>
<tbody>
<tr>
<td>Alabama</td>
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<tr>
<td>Alaska</td>
<td><strong>Alaska Stat. §§ 9.38.017(a)(1), (e)(3) (Michie 2002)</strong>.</td>
<td>+</td>
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</tbody>
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**330** See In re Bharucha, 115 B.R. 671 (Bankr. D. Az. 1990) (holding that because the IRAs were established and maintained by the debtors individually, the state law exemption was not preempted by ERISA). The court also held that "whether an IRA, or any other type of pension, is within ERISA must thus be determined from application of federal law to the facts of each case. The operative test contained in [29 U.S.C.S.] section 1003(a) focuses on how the plan is established or maintained." *Id.* at 673.

**331** See, e.g., In re Groff, 234 B.R. 153 (Bankr. M.D. Fla. 1999) (holding that "Florida Statute § 222.21(2)(a) does apply to IRAs and has not been preempted by ERISA"); see also, Schlein v. Mills (In re Schlein), 8 F.3d 745 (11th Cir. 1993); In re Francisco, 204 B.R. 799 (Bankr. M.D. Fla. 1996); In re Suarez, 127 B.R. 73 (Bankr. S.D. Fla. 1991).
<table>
<thead>
<tr>
<th>State</th>
<th>Source</th>
<th>+</th>
<th>+</th>
<th>+</th>
<th>Preemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho</td>
<td>IDAHO CODE § 55-1011(1) (Michie 2001)</td>
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<tr>
<td>Illinois</td>
<td>735 ILL. COMP. STAT. ANN. 5/12-1006 (West 2002)</td>
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<tr>
<td>Indiana</td>
<td>IND. CODE ANN. § 34-55-10-2 (Michie 1998)</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>Not preempted</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. § 627.6 (West Supp. 2002)</td>
<td>+</td>
<td>+</td>
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<tr>
<td>Kansas</td>
<td>KAN. STAT. ANN. § 60-2308(b) (Supp. 2001)</td>
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<td>Kentucky</td>
<td>KY. REV. STAT. ANN. § 427.150(f) (Michie Supp. 2002)</td>
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<td>Louisiana</td>
<td>LA. REV. STAT. ANN. § 13:3881D(3) (West Supp. 2003)</td>
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<td>Maine</td>
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<td>Maryland</td>
<td>MD. CODE ANN., CTS. &amp; JUD. PROC. § 11-504(b) (2002)</td>
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<td>Massachusetts</td>
<td>MASS. ANN. LAWS ch. 235, § 34A (Law Co-op. 2000)</td>
<td>+</td>
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<td>Michigan</td>
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<td>Minnesota</td>
<td>MNN. STAT. ANN. § 550.37 subd. 24 (West Supp. 2003)</td>
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<td>Mississippi</td>
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<td>+</td>
<td>+</td>
<td>+</td>
<td>Preempted</td>
</tr>
</tbody>
</table>

332 See, e.g., In re Kazi, 125 B.R. 981 (Bankr. S.D. Ill. 1991) (holding that where a IRA is a self settled retirement account and not maintained by an employer or organization, it is outside the scope of ERISA and therefore, not preempted); see also Nat'l Bank v. Multi Nat'l Indus., 678 N.E.2d 7 (Ill. App. Ct. 1997); In re Templeton, 146 B.R. 757 (Bankr. N.D. Ill. 1992).

333 See, e.g., In re Printy, 171 B.R. 448 (Bankr. D. Mass. 1994) (ERISA preemption does not apply as an IRA is a self-settled account and therefore outside of the scope of ERISA).

334 See, e.g., In re McLeod, 102 B.R. 60, 64 (Bankr. S.D. Miss. 1989). Under Miss. Code § 85-3-1(1)(b)(iii), there is no exemption provided for any pension fund unless it is an ERISA qualified plan. Therefore, “the debtor may not claim exemptions under this section whether the pension plans are qualified under ERISA or not.” Id. Mississippi is somewhat unique as it expressly as includes IRAs as an ERISA qualified asset. Id.
<table>
<thead>
<tr>
<th>State</th>
<th>Statutory References</th>
<th>Exemptions</th>
<th>Preemption Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Missouri</td>
<td>MO. ANN. STAT. § 513.430 (West 2002)</td>
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<td>Montana</td>
<td>MONT. CODE ANN. § 31-2-106(3) (2001)</td>
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<td>Nebraska</td>
<td>NEB. REV. STAT. § 25-1563.01 (Supp. 2000)</td>
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<td>New Hampshire</td>
<td>No personal exemptions</td>
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<tr>
<td>New Mexico</td>
<td>N.M. STAT. ANN. § 42-10-10 (Michie Supp. 1999)</td>
<td>any personal prop. up to $2000 provided no homestead</td>
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<td>North Carolina</td>
<td>N.C. GEN. STAT. § 1C-1601(a)(9) (2001)</td>
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<td>North Dakota</td>
<td>N.D. CENT. CODE § 28-22-03.1 (Supp. 2001)</td>
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<td>Oregon</td>
<td>OR. REV. STAT. § 23.170 (2001)</td>
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</table>

³³⁵See, e.g., LaBarge v. Mehra (In re Mehra), 166 B.R. 393 (Bankr. E.D. Mo. 1994) (holding that because an IRA is a self settled and established account, it is outside the preemptive scope of ERISA).  
³³⁶See, e.g., Bank v. Schwartz (In re Schwartz), 185 B.R. 479 (Bankr. D. N.J. 1993) (holding that an IRA is a self settled account established under the IRC and therefore not subject to ERISA preemption).  
³³⁷See, e.g., In re Mann, 134 B.R. 710 (Bankr. E.D.N.Y. 1991) (holding that funds that had been rolled over from an ERISA plan to an IRA were not subject to ERISA as state law permitted an exemption for IRAs); see also Abrahams v. New York State Tax Comm’n, 500 N.Y.S.2d 965 (App. Div. 1986) (establishing that an IRA will also be exempt if it is created in trust of or for the benefit of another); Long Island Jewish Hillside Med. Ctr. v. Prendergast, 509 N.Y.S.2d 697 (App. Div. 1986); Joint Venture Acquisition v. Misra, 1992 U.S. Dist. LEXIS 12708 (S.D.N.Y. Aug. 24, 1992).  
³³⁸See, e.g., In re Buzza, 287 B.R. 417 (Bankr. S.D. Ohio 2002) (holding that because IRAs are self settled retirement account they are beyond the scope of ERISA and thus not preempted); In re Fixel, 286 B.R. 638 (Bankr. N.D. Ohio 2002); In re Mitchell, No. 02-13713, 2002 Bankr. LEXIS 1217 (Bankr. N.D. Ohio Oct. 31, 2002).  
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<tr>
<th>State</th>
<th>Statute Description</th>
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<tr>
<td>Tennessee</td>
<td>TENN. CODE ANN. § 26-2-105(b) (Supp. 2002)</td>
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<td>+</td>
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<tr>
<td>Texas</td>
<td>TEX. PROP. CODE ANN. § 42.0021 (Vernon 2000).</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>Not preempted(^{342})</td>
</tr>
<tr>
<td>Virginia</td>
<td>VA. CODE ANN. § 34-34 (Michie Supp. 2002).</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>Not preempted(^{343})</td>
</tr>
</tbody>
</table>

\(^{340}\)Transferred to TEX. PROP. CODE ANN. § 26-2-105 in 2000.

\(^{341}\)See, e.g., In re Martin, 102 B.R. 639 (Bankr. E.D. Tenn. 1989) (holding that IRAs are exempt under Tennessee law because they are self settled accounts that are entered into voluntarily and because no contributions are made by an employer).

\(^{342}\)See In re Dyke, 943 F.2d 1435 (5th Cir. 1991) (holding that although Texas courts have had mixed results when ruling on ERISA preemption, that § 42.0021(a) is not preempted by ERISA because it would impair the Bankruptcy Code’s purpose to provide a “fresh start” post-bankruptcy). For a survey of Texas caselaw illustrative of mixed results see, e.g., In re Felts, 114 B.R. 131 (Bankr. W.D. Tex. 1990) (ERISA does preempt § 42.0021(a)), rev’d, No. A-90-CA-364 (W.D. Tex. July 30, 1990); In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989) (ERISA preemption); In re Volpe, 100 B.R. 840 (Bankr. W.D. Tex. 1989) (ERISA does not preempt § 42.0021(a)); In re Laxson, 102 B.R. 85 (Bankr. N.D. Tex. 1989) (No ERISA preemption of IRAs).

\(^{343}\)Phillips v. Bottoms, 260 B.R. 393 (E.D. Va. 2000) (holding that while an IRA is part of the Debtors’ estate, § 34-34 of the Virginia Code, even though theoretically preempted by section 514(a) of ERISA, is saved from preemption by section 514(d) of ERISA); In re Bissell, 255 B.R. 402 (Bankr. E.D. Va. 2000); In re Gurry, 253 B.R. 406 (Bankr. E.D. Va. 2000).

\(^{344}\)See, e.g., Arkinson v. Nelson (In re Nelson), 180 B.R. 584 (B.A.P. 9th Cir. 1995) (ERISA does not preempt state law with respect to IRAs because an IRA does not fall within the definition of “employee benefit plan.”).
|-----------|----------------------------------------|------|--------|------|