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THE FRAUD EXCEPTION TO ERISA'S ANTI-ALIENATION PROVISION: A PERMISSIBLE EXERCISE OF THE CHANCELLOR'S POWERS?

INTRODUCTION

In response to the proliferation of private pension plans1 and the lack of effective regulatory legislation,2 Congress enacted the Employee Retirement Income Security Act of 19743 ("ERISA"). ERISA was hailed for establishing uniformity in the law and providing protective measures4 to ensure that workers receive their promised retirement benefits.5

One such safeguard, section 206(d)(1), provides that funds may not be "assigned or alienated."6 Courts have differed over whether an individual's own pension funds may be alienated when it has been determined that the individual has been responsible for directly or indirectly depleting pension plan7 assets through fraudulent activities.8

1. The number of employees participating in private pension plans increased from 4 million in 1940 to over 30 million in 1974. H.R. Rep. No. 533, 93d Cong., 2d Sess. 3, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4641. It is estimated that 42 million employees will be participating by 1980. Id. at 4672. “This phenomenal expansion of coverage has been matched by an even more startling accumulation of assets . . . .” Id. at 4641. The assets of private pension plans were estimated at over $407 billion in 1980. See Munnell, The Economics of Private Pensions 11 (1982).


7. ERISA defines the term "pension plan" as "any plan, fund, or program" which "provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A) (1982). A "welfare plan" is any plan that provides medical, surgical or hospital care or benefits, benefits in the event of sickness, accident, disability, death or unemployment, vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds or prepaid legal services. See 29 U.S.C. § 1002(1) (1982). The participation and vesting section of ERISA, which includes section 206, does not apply to all benefit plans described in section 1002. See 29 U.S.C. § 1051 (1982). Specifically, participation and vesting standards do not apply to employee welfare benefit plans and individual retirement accounts. See id.; Mackey v. Lanier Collections Agency & Serv., Inc., 108 S. Ct. 2182, 2188-89 (1988) (welfare plan benefits are not protected from assignment and alienation); Rowland v. Strickland, 362 S.E.2d 892, 893 (S.C. Ct. App. 1987) (IRA's are excluded from ERISA's anti-alienation protection).

8. Compare Guidry v. Sheet Metal Workers Nat'l Pension Fund, 856 F.2d 1457,
Recently, the Court of Appeals for the Tenth Circuit found an implied exception to the anti-alienation provision in cases where an individual directly or indirectly damages a pension plan through fraud. Accordingly, the court imposed a constructive trust on the pension benefits of an individual found guilty of embezzling pension funds. This result is consistent with prior decisions of the District of Columbia and Eleventh Circuits. In contrast, the Second and Sixth Circuits have declined to find such an exception in cases of fraud or criminal wrongdoing, based on a literal reading of the provision.

This dichotomy in views results from a failure to differentiate the underlying factual circumstances of each case. The courts fail to distinguish between cases in which an employee indirectly damages a plan through fraudulent activities and cases in which a fiduciary directly defrauds a pension plan. Recognizing such a distinction is necessary


11. See Guidry, 856 F.2d at 1460.

12. See Crawford, 815 F.2d at 119-22; St. Paul, 752 F.2d at 551-52.

13. See United Metal Prods., 811 F.2d at 300; Ellis Nat'1 Bank, 786 F.2d at 470-72.

14. See infra note 85.

15. An employee misappropriating funds from the employer may negatively impact on the financial stability of the employer and indirectly on the pension plan. See St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550, 552 (11th Cir. 1985). Similarly, where the employer provides a profit sharing plan, a misappropriation of funds by the employee would reduce profits and thus indirectly damage the plan.

16. A fiduciary is defined as one who: (1) "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets"; (2) "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so"; (3) "has any discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A) (1982).

ERISA’s Anti-Alienation Provision

for a proper resolution of the issue. In cases of fiduciary fraud, two substantive provisions of ERISA are implicated—section 206, which prohibits alienation of funds, and section 409, which expressly grants courts the power to use equitable remedies in cases involving a breach of fiduciary duties. These provisions conflict where an individual breaches her fiduciary duty causing damage to the pension plan. Accordingly, courts must read one provision as being subject to an implied exception. This conflict does not occur in cases of employee fraud, however, because only the anti-alienation provision is at issue. Grounding the analysis in factual distinctions and applying established rules of statutory construction will produce results consonant with ERISA’s design.

This Note attempts to resolve the confusion in the courts over the proper interpretation of the anti-alienation provision in cases of employee and fiduciary fraud. Part I of the Note examines the background of ERISA and the specific provisions implicated by recent decisions. Part II focuses on the court decisions contemplating a fraud exception to the anti-alienation clause. Part III scrutinizes the differences between cases involving employee fraud and fiduciary fraud and suggests a different analysis in each case. This Note concludes that rules of statutory construction and strong policy reasons support an exception to the anti-alienation provision in cases where a fiduciary defrauds a pension plan. Where employee fraud is concerned, however, the Note advocates a literal reading of the anti-alienation provision.

I. Background and Legislative History

A. ERISA

Prior to the enactment of ERISA, many persons who had toiled all their lives found themselves deprived of pensions in their retirement years because of inadequate pension plan supervision and a lack of minimum standards to protect plan funds. The existing legislation was woefully inadequate in providing safeguards for employees. The existing legislation was woefully inadequate in providing safeguards for employees. Therefore, Congress passed ERISA to establish minimum standards for pension plans and to protect the interests of plan participants and beneficiaries. ERISA establishes a comprehensive framework for pension plan administration, including the explicit provision of an anti-alienation clause to prevent the unauthorized transfer of plan assets.


20. See infra note 88.
22. Employees are not fiduciaries under section 409 and therefore are subject neither to statutorily imposed duties nor to the equitable remedies conferred by section 409. See Fremont v. McGraw-Edison Co., 606 F.2d 752, 759 (7th Cir. 1979), cert. granted, 445 U.S. 951 (1980).
23. President Nixon’s message to Congress on December 8, 1971, symbolized na-
fully inadequate in the areas of plan vesting, fiduciary standards, administration, minimum disclosure and reporting provisions, and minimum funding requirements.ERISA remedied the inadequacies inherent in the existing legislation through specific reporting and disclosure requirements, including a provision for the publishing of annual reports. In addition, ERISA established minimum vesting standards, thereby assuring employees nonforfeitable rights after serving a specified number of years. The statute also strengthened management standards by defining fiduciary duties and establishing liability for breaching parties. Furthermore, minimum funding requirements were imposed to prevent funding deficiencies.

B. The Anti-Alienation Provision

Further protection is provided by ERISA's anti-alienation provision. Congressed enacted the Welfare and Pensions Plan Disclosure Act, 29 U.S.C. §§ 301-309 (repealed 1976) ("WPPDA"), in response to abuses in the administration and investment of pension funds. Although the act provided that an annual plan report be sent to the beneficiaries and participants upon request, it provided no administrative body to police the plans. Consequently, employees were responsible for ensuring the soundness of their own plans. The WPPDA was later repealed by ERISA. The Labor-Management Relations Act ("LMRA") established guidelines whereby pension plans were administered jointly by management and labor. The LMRA, however, lacked minimum standards for vesting, funding or fiduciary conduct. The relevant sections of the Internal Revenue Code provided little additional protection and were basically enacted to raise revenue and to enforce the payment of tax obligations.

24. See supra note 2. Congress enacted the Welfare and Pensions Plan Disclosure Act, 29 U.S.C. §§ 301-309 (repealed 1976) ("WPPDA"), in response to abuses in the administration and investment of pension funds. See H.R. Rep. No. 533, 93d Cong., 2d Sess. 3, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4643. Although the act provided that an annual plan report be sent to the beneficiaries and participants upon request, it provided no administrative body to police the plans. See id. at 4641-43. Consequently, employees were responsible for ensuring the soundness of their own plans. See id. In addition, the legislation was devoid of fiduciary standards. See id. at 4641-43. The WPPDA was later repealed by ERISA. See 29 U.S.C. § 1031 (1982).


The relevant sections of the Internal Revenue Code provided little additional protection and were basically enacted to raise revenue and to enforce the payment of tax obligations. See I.R.C. §§ 401-404, 501-503 (1982).


26. See id. § 1026.

27. See id. § 1053. Minimum participation requirements were also provided. See id. § 1052. No pension plan may deny an employee who has remained in service beyond the later of his twenty-fifth birthday or one year in service participation in the plan. Id. § 1052(a)(1)(A).

28. See id. § 1053(a). A plan will generally satisfy the minimum vesting requirements "if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions." Id. § 1053(a)(2)(A).

29. See id. § 1104.

30. See id. § 1109(a).

31. See id. §§ 1081-1086.

32. See id. § 1056(d)(1). Anti-alienation provisions are common to other statutory
This provision requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Although there is very little legislative history concerning the purpose of this provision, courts generally agree that anti-alienation provisions have been enacted to exempt specified sums from the reach of creditors to enable the recipient to care for himself and his family.

Pursuant to the anti-alienation provision, the Treasury Department promulgated a regulation which explicitly provides "that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." The anti-alienation provision has been interpreted to preclude both voluntary and involuntary transfers of pension funds. In compelling circumstances, however, courts have implied exceptions to the anti-alienation provision. One such exception, the implied domestic relations exception, was later codified and remains the only exception provided for by Congress.

C. Fiduciary Safeguards

Congress enacted ERISA's Fiduciary Responsibility section to prevent schemes and have interchangeably been called exemption clauses or spendthrift provisions. See infra notes 69-70 and accompanying text.


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

Id. at 5061.
35. In American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979), the court found that the purpose of the anti-alienation provision was to protect a spendthrift employee "from his own financial improvidence in dealing with third parties." Id. at 124. The Merry court went on to emphasize that "[t]he provision . . . assure[s] that the employee and his beneficiaries reap the ultimate benefits due upon retirement." Id. Similarly, in Cartledge v. Miller, 457 F. Supp. 1146, 1149-50 (S.D.N.Y. 1978), the court concluded that the anti-alienation provision was designed "to protect a person and those dependent upon him from the claim of creditors." Id. at 1156 (quoting Brown v. Brown, 32 Ohio App. 2d 139, 288 N.E.2d 852 (1972) (court's syllabus)).
38. See In re Graham, 726 F.2d 1268 (8th Cir. 1984) (bankruptcy exception); Cody v. Riecker, 594 F.2d 314 (2d Cir. 1979) (domestic relations exception).
the "misuse of plan assets, and [to provide participants] with remedies that would protect the entire plan."40 A pension plan fiduciary occupies a position of trust which, if violated, would be detrimental to a plan's financial stability.41 Section 409 provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties [to the plan] . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."42 It further subjects the breaching fiduciary to such "equitable or remedial relief as the court may deem appropriate."43 Section 409 attempts to keep plans solvent by compelling dishonest fiduciaries to replace plan assets that have been dissipated as a result of a breach of duty.44 Accordingly, common law trust principles have been employed to redress fiduciary breaches.45

II. INHARMONIOUS APPLICATION

In some areas, application of the anti-alienation provision has been less than uniform. Specifically, disagreement has arisen over whether there is a fraud exception to ERISA's anti-alienation provision. One viewpoint advocates an exception based on other ERISA provisions, the legislative history, trust law analogies and prior case law in the area of domestic relations.46 The opposing view suggests that it is inappropriate to rely on domestic relations cases as support for a fraud exception.47 Moreover, a literal reading of the statute is consistent with legislative intent and is necessary to protect the corpus of the pension fund from a multitude of lawsuits.48

A. Judicially Implied Exception

1. Statutory Language

ERISA's policy declaration, which was explicitly incorporated into the

42. 29 U.S.C. § 1109(a) (1982).
43. Id.
44. See Donovan v. Bierwirth, 754 F.2d 1049, 1055-56 (2d Cir. 1985).
45. See id. at 1055; Leigh v. Engle, 727 F.2d 113, 122-23 & n.19 (7th Cir. 1984); infra notes 56-61 and accompanying text.
48. See United Metal Prods., 811 F.2d at 300; Ellis Nat'l Bank, 786 F.2d at 471; Vink, 549 F. Supp. at 271-73.
text of the statute, supports a fraud exception. In enacting ERISA, Congress intended to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 59

Section 409(a) provides additional support for a fraud exception. 50 This provision, construed together with ERISA's policy declaration, provides courts with broad authority to fashion remedies where there has been a breach of fiduciary duty. 51 Accordingly, courts have found a fraud exception to ERISA's anti-alienation provision. 52 In the seminal case finding a fraud exception to ERISA's anti-alienation provision, the Court of Appeals for the Eleventh Circuit reasoned that protecting a wrongdoer from the consequences of his own misconduct frustrates the policy goals expressed in ERISA. 53 However, courts finding such an exception have not distinguished between cases of employee and fiduciary fraud. 54 Although the policy goals apply equally in both cases, section 409 is explicitly limited to fiduciaries.

2. Legislative History

ERISA's legislative history emphasizes the broad equitable authority courts have to fashion remedies. 55 Committee reports reveal that Congress intended that the federal courts use the law of trusts and all available equitable remedies when confronted with a breach of ERISA's fiduciary standards. 56 Trust law envisions using the panoply of equitable

50. See supra notes 40-45 and accompanying text.
51. See Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978); Marshall v. Snyder, 572 F.2d 894, 901 (2d Cir. 1978).
53. See St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550, 552 (11th Cir. 1985). "The legislation provides no indication whatsoever that it is intended to protect the employee against the consequences of his own misdeeds." Id.
54. See, e.g., Guidry, 856 F.2d at 1460; Crawford, 815 F.2d at 119-20.
55. See Guidry, 856 F.2d at 1461; Crawford, 815 F.2d at 119-20.
56. See S. Rep. No. 127, 93d Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4871. The Report of the Senate Committee on Labor and Public Welfare emphasized that "[t]he enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations . . . . The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts." Id. The comments of Senator Harrison Williams further illustrate congressional intent regarding the applicability of the law of trusts. See 120 Cong. Rec. 29932 (1974) ("The objectives of these provisions are to make applicable the law of trusts; . . . and to provide effective remedies for breaches of trust.").
remedies in cases involving breaches of fiduciary duty. Accordingly, courts are obliged to enforce the remedy that is the most beneficial to the participants.

In cases where the dishonest trustee or fiduciary is insolvent, courts must choose between accessing the fiduciary's pension funds to satisfy the civil judgment, or leaving the judgment creditor without a remedy. To avoid leaving a party without a remedy, trust law would compel the forfeiture of the dishonest trustee's pension funds. Thus, traditional trust principles have been applied to ERISA cases involving fiduciary fraud.

3. Domestic Relations Analogy

Before Congress codified the domestic relations exception, courts used their inherent equitable authority to imply a domestic relations ex-

57. See Guidry v. Sheet Metal Workers Nat'l Pension Fund, 856 F.2d 1457, 1461 (10th Cir. 1988), cert. granted, 109 S. Ct. 3212 (1989); Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978).
58. See Eaves, 587 F.2d at 462; Restatement (Second) of Trusts § 214 (1959).
60. See Guidry, 856 F.2d at 1461; Crawford, 815 F.2d at 120. This interpretation of trust law has been supported by commentators. As Professor Scott emphasized:

[i]f the trustee is also one of the beneficiaries... the other beneficiaries can compel him to make good the breach of trust out of his beneficial interest in the trust property. The defaulting trustee-beneficiary is not entitled to receive his share of the trust property until he has made good the loss which resulted from his breach of trust. The other beneficiaries can insist that his interest be impounded to make good the loss; they are entitled to a charge upon his interest to indemnify them for the loss.

3 A. Scott on Trusts § 257, at 2201 (3d ed. 1967) (footnote omitted). Similarly, Professor Bogert stated:

If a beneficiary is also a trustee of his own trust, acting for himself and others, it is elementary that as trustee he owes the beneficiaries a duty to perform the trust and not violate it, and that if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust... will be taken by the court in order to make good the loss.

G. Bogert, Trusts and Trustees § 191, at 484 (2d ed. 1979).
62. The family support exceptions were later codified by Congress in its 1984 amendment to ERISA, which allows exemptions for “qualified domestic relations orders.” 29 U.S.C. § 1056(d)(3)(b)(i) (Supp. IV 1986). A qualified domestic relations order includes any judgment, decree, or order (including approval of a property settlement agreement) which-
(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
(II) is made pursuant to a State domestic relations law (including a community property law).
ception to ERISA's anti-alienation provision. In American Telephone & Telegraph Co. v. Merry, the Second Circuit found that court-ordered alimony and child support obligations were implicitly exempted from alienation and assignment proscriptions. Similarly, in Stone v. Stone, a district court concluded that an award of a wife's community property interest in her husband's pension fund did not contravene the anti-alienation provision.

Courts that implied an exception to ERISA's anti-alienation provision in cases involving domestic relations orders relied on four rationales as the basis for the exception. First, the area of domestic relations has been traditionally left to the province of the states. Second, other statutes containing anti-alienation provisions have been interpreted to allow ex-

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64. 592 F.2d 118 (2d Cir. 1979).
65. See id. at 121.
67. See id. at 931.
68. Id. at 925 (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978)). The basic police powers of a state, especially the regulation of domestic relations, are not supplanted by federal legislation "unless that was the clear and manifest purpose of Congress." Id.; see Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930); American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121-22 (2d Cir. 1979); Cartledge v. Miller, 457 F. Supp. 1146, 1154-55 (S.D.N.Y. 1978).

Section 207 of the Social Security Act provides:
The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.


Section 3101(a) of the Veterans Benefits Act provides:
Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.
ceptions for domestic relations orders. Third, Congress has shown a general intent to stem the rising tide of public assistance payments. ERISA, in particular, repeatedly refers to protecting beneficiaries and dependents. Last, amicus briefs filed for the Departments of Labor and Treasury support an implied exception in domestic relations cases. Courts finding a fraud exception have relied on the domestic relations


Section 12 of the Railroad Retirement Act provides:

[N]otwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . .


71. In 1974, Congress passed amendments to the Social Security Act that were “designed to combat increases in welfare payments resulting from an inability to compel payment of support obligations from solvent but unwilling parents.” Hisquierdo v. Hisquierdo, 439 U.S. 572, 587 n.20 (1979) (citing S. Rep. No. 1356, 93d Cong., 2d Sess., 42-43 (1974). The amendments require that the welfare applicant assign to the state any rights to support from another person. See 42 U.S.C. § 602(a)(26)(A) (1982). In addition, the United States, in its role as employer, has subjected itself to legal process in order to collect alimony and child support payments from its delinquent employees. See id. § 659(a). The courts have encouraged the enforcement of domestic relations orders, notwithstanding anti-alienation provisions, because of congressional concern with rising welfare charges resulting from those defaulting on support payments. See Hisquierdo, 439 U.S. at 587 n.20; Merry, 592 F.2d at 124-25; Cartledge, 457 F. Supp. at 1157-58; Social Security Act §§ 451-462, 42 U.S.C. §§ 651-662 (1982). Rejecting an exception to the anti-alienation provision for domestic relation orders would thwart the congressional aim in enacting the amendments. See Merry, 592 F.2d at 124-25; Cartledge, 457 F. Supp. at 1157-58.

72. Throughout ERISA’s declaration of policy, references are made to either “employees and their beneficiaries” or “employees and their dependents.” See 29 U.S.C. § 1001(a) (1982). It was evident that Congress was concerned with protecting both employees and their families. See id. § 1001. A domestic relations exception is consistent with congressional intent to safeguard the future security of an employee’s family. See Merry, 592 F.2d at 124; Cartledge, 457 F. Supp. at 1156.

ERISA's anti-alienation provision is not "immutable". These courts have failed, however, to reconcile the fundamental distinctions between fraud and domestic relations cases.

B. Literal Statutory Interpretation

Courts refusing to find an implied fraud exception to ERISA's anti-alienation provision have focused on the underlying rationale of the domestic relations exception. For example, the court in Vink v. SHV North America Holding Corp. recognized that although there were strong reasons for implying an exception to the anti-alienation provision in domestic relations cases, the same rationale was unpersuasive when considering cases of employee fraud.

The first part of the Vink analysis recognizes that, in the absence of clear congressional intent to the contrary, areas traditionally regulated under state police powers are not affected by ERISA. The court found, however, that refusing to allow pension funds to be alienated in cases of employee fraud does not supersede fundamental state police powers. Second, while recognizing that a family support exception would further congressional objectives of providing for the well-being and security of employees and their families, the court found that a fraud exception would negatively impact on the dependents of "faithless employees" and may result in their becoming charges of the state. Finally, the court noted that the Labor and Treasury Departments filed briefs in support of the domestic relations exception. In comparison, the Department of Labor urged the court to prohibit a plan from withholding pension funds


In both Merry and Cartledge, the Justice Department filed amicus briefs on behalf of the Departments of Labor and Treasury. See Merry, 592 F.2d at 125; Cartledge, 457 F. Supp. at 1156 & n.57. The government's posture was that "family support decrees were not intended to be within the scope of the anti-alienation provisions of ERISA." Cartledge, 457 F. Supp. at 1156 (quoting Brief for the United States as Amicus Curiae, at 10); see Merry, 592 F.2d at 125.


75. 549 F. Supp. 268 (S.D.N.Y. 1982).

76. See id. at 271-72; supra notes 68-73 and accompanying text.

77. See id.

78. See id.

79. See id; United Metal Prods. Corp. v. National Bank, 811 F.2d 297, 299 (6th Cir. 1987), cert. dismissed, 108 S. Ct. 1494 (1988); Ellis Nat'l Bank v. Irving Trust, 786 F.2d 466, 470 (2d Cir. 1986). But see Guidry v. Sheet Metal Workers Nat'l Pension Fund, 856 F.2d 1457, 1460 n.3 (10th Cir. 1988) ("the public interest in seeing that theft victims recover their stolen property is no less fundamental and firmly embedded within the realm of state police power [than domestic relations law]"); cert. granted, 109 S. Ct. 3212 (1989).


81. See id. at 271-72; supra note 73 and accompanying text.
from a dishonest employee.\textsuperscript{82}

In addition to recognizing the distinction between fraud and domestic relations cases, these courts focus on two additional arguments to buttress their position. First, they argue that the decision to create a fraud exception should be made by Congress.\textsuperscript{83} Second, uncertainty over the scope of the fraud exception would undermine the stability of pension plans.\textsuperscript{84} Based on the \textit{Vink} analysis, rules of statutory construction and policy grounds, the Second and Sixth Circuits have refused to find an exception to ERISA's anti-alienation provision.

III. Dual Analysis

Factual\textsuperscript{85} and statutory\textsuperscript{86} differences between cases involving the fraud

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\textsuperscript{82} See \textit{id.} at 271 (citing Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307, 310 (8th Cir. 1979)).

\textsuperscript{83} See \textit{United Metal Prods.}, 811 F.2d at 300; \textit{Ellis Nat'l Bank}, 786 F.2d at 471-72. "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." United States v. Rutherford, 442 U.S. 544, 559 (1979) ("Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied."). Courts are not responsible for fashioning statutes to achieve equitable results, but must interpret statutes as they are written. See \textit{Anderson} v. Wilson, 289 U.S. 20, 27 (1932).

In \textit{United Metal Products}, the court found that Congress may have concluded that stability and security of all pension funds are fundamental goals of ERISA. See \textit{United Metal Prods.}, 811 F.2d at 300. Similarly, in \textit{Vink}, the court emphasized that, although a literal interpretation of the anti-alienation provision may lead to inequitable results, Congress made it clear that "the pension benefits of both faithless employees... and faithful ones are to be protected." \textit{Vink}, 549 F. Supp. at 273.

\textsuperscript{84} See \textit{Ellis Nat'l Bank}, 786 F.2d at 471; \textit{Vink}, 549 F. Supp. at 273.

In \textit{Vink}, the court found that allowing an exception in cases of employee fraud would expose a plan to a "boundless stream of suits and disputes in which companies refuse to pay pension benefits to allegedly disloyal employees." \textit{Id.} Courts would then have numerous questions to consider, such as whether the exception would be available to employers and pension plans, whether the exception should apply to felonies, misdemeanors and acts of negligence, and whether other exceptions for noncriminal fraud and conversion would be extended. See \textit{Ellis Nat'l Bank}, 786 F.2d at 471; \textit{Vink}, 549 F. Supp. at 273. The uncertainty engendered by an employee fraud exception would result in multiple suits against pension plans. See \textit{Vink}, 549 F. Supp. at 273. Defending the resultant lawsuits would exhaust plan assets. See \textit{Ellis Nat'l Bank}, 786 F.2d at 471; \textit{Vink}, 549 F. Supp. at 273. This would contravene the express purpose of ERISA: to safeguard the funds of employees and their beneficiaries and to ensure their availability upon retirement. See 29 U.S.C. \textsection 1001(a) (1982).

\textsuperscript{85} The disagreement over the implied exception to ERISA's anti-alienation provision has generally arisen in one of two factual circumstances:


b. Where a \textit{fiduciary} of the pension plan embezzles directly from the \textit{pension fund} and
exception militate against the identical application of the statute in all cases. A proper analysis requires distinguishing between cases involving *fiduciary* fraud and those involving *employee* fraud.

### A. Fiduciary Fraud

Cases involving fiduciary fraud implicate two different and conflicting provisions of ERISA. According to rules of statutory construction, where two provisions of a statute are at odds, courts are left to reconcile them in a manner that best achieves legislative goals. If they cannot be reconciled, the last in point of arrangement within the statute must control.

Legislative history suggests that an exception to the anti-alienation provision in cases of fiduciary fraud would best further congressional goals. ERISA was enacted, in part, to protect employees from administrative abuses. It would be contrary to the congressional scheme to prevent the employer/union attempts to utilize the fiduciary's pension funds to satisfy the deficiency.

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86. See supra note 88 and accompanying text.
91. See Guidry, 856 F.2d at 1463.
92. See 120 Cong. Rec. 29,934 (1974) ("The absence of any supervision over these funds and the lack of minimum standards to safeguard the interests of plan participants and beneficiaries has over the years led to widespread complaints signaling the need for remedial legislation." (statement of Sen. Javits)).
allow a dishonest fiduciary, who has directly defrauded plan funds, to benefit at the expense of an honest employee.93

In addition, according to accepted principles of statutory interpretation, the fiduciary responsibility section must control because it occurs later in the statutory scheme than the anti-alienation provision.94 Therefore, under either theory of statutory interpretation, equitable remedies allowed under the fiduciary section of ERISA should be utilized to satisfy a judgment obtained against a dishonest fiduciary. The use of such equitable remedies would necessarily invoke an exception to the anti-alienation provision.95

Judicial precedent supports this interpretation.96 The two cases addressing fiduciary fraud, Guidry v. Sheet Metal Workers National Pension Fund and Crawford v. La Boucherie Bernard Ltd., found an implied exception to the anti-alienation provision.97 Neither court, however, recognized the doctrinal differences between cases involving employee fraud and those involving fiduciary fraud.98

Although muddying the doctrinal basis for the exception, courts consistently find such an exception in cases of fiduciary fraud.99 The circuits, however, disagree whether an implied exception should apply in cases exclusively involving employee fraud.100

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93. See Guidry, 856 F.2d at 1463.
94. See supra note 90 and accompanying text.
95. See Guidry, 856 F.2d at 1460 n.3. The court found that "a narrow exception applicable only to a trustee-beneficiary who has directly or indirectly damaged the fund through his fraudulent actions could be relatively easily defined and applied." Id.
97. See Guidry, 856 F.2d at 1459-60; Crawford, 815 F.2d at 121-22.
98. See Guidry, 856 F.2d at 1460 & n.3; Crawford, 815 F.2d at 121-22. The courts appear bogged down in the doctrinal morass. First, they rely on the equitable authority expressly conferred by section 409 of the statute to grant an implied exception to the anti-alienation provision. See Guidry, 856 F.2d at 1459; Crawford, 815 F.2d at 119-22. Next, they cite St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550 (11th Cir. 1985), with approval even though that case involves employee fraud, not fiduciary conduct, and would seemingly not trigger the equitable remedies prescribed by section 409 for cases involving breaches of fiduciary duties. See Guidry, 856 F.2d at 1459-60; Crawford, 815 F.2d at 121.

Finally, the language of the fraud exception suggested in Guidry, see supra note 95, would indicate that the court contemplated exceptions not grounded in the equitable authority granted by section 409. See Guidry, 856 F.2d at 1460 n.3. Suggesting fiduciary liability for indirectly damaging a pension fund exceeds the liability envisioned by the statute. See 29 U.S.C. §§ 1104, 1109(a) (1982). Section 409, read in conjunction with section 404, provides equitable remedies only when a person has violated her fiduciary duties with respect to the plan. See id. Providing liability for indirect damage to the plan would imply a broader exception whereby a "trustee-beneficiary" could be held liable for breaching her duties in the course of employment, which could be wholly unrelated to her fiduciary duties with respect to the plan. The scope of this exception is not supported by a reading of the statute. See id.

99. See Guidry, 856 F.2d at 1457; Crawford, 815 F.2d at 117.
B. Employee Fraud

Based on rules of statutory interpretation, ERISA’s broad preemption provision, agency interpretation and recent Supreme Court dictum, courts should prohibit an implied exception in cases of employee fraud.

An analysis of the anti-alienation provision in cases solely involving employee fraud does not implicate the clashing of statutory provisions found when the fraudulent party is a fiduciary. Where Congress makes it clear that pension funds should not be assigned or alienated and no other terms of the statutory scheme conflict with that reading, courts should not be free to imply exceptions.

While ERISA’s preemption provision would not bar the use of equitable principles in cases of fiduciary fraud, the provision would foreclose the use of equitable remedies in cases of employee fraud. Courts have found that a state law must yield if it has some impact on a pen-


101. See 29 U.S.C. § 1056(d)(1) (1982); id. § 1109(a); supra note 88 and accompanying text.


103. ERISA section 514(a) provides that “the provisions of this subchapter . . . 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) and not exempt under section 1003(b).” 29 U.S.C. § 1144(a) (1982). “The term ‘State law’ includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.” 29 U.S.C. § 1144(c) (1982).


104. Only state laws are preempted under section 1144. Because section 409 provides for the use of equitable remedies, state equitable remedies would not be preempted when redressing breaches of fiduciary duties. See 29 U.S.C. § 1144(a) (1982).

105. Generally, preemption of state law by federal regulation is disfavored unless “there is . . . actual conflict between the two schemes of regulation that both cannot stand in the same area” or there is “evidence of a congressional design to preempt the field.” Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1962); see Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981); Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977); see also Schwartz v. Texas, 344 U.S. 199, 203 (1952) (the “exercise of federal supremacy is not to be lightly presumed”). While there may be “actual conflict” between ERISA and recent decisions implying exceptions to its
tion plan, even if it is consistent with the congressional purpose. In the anti-alienation provision, Congress, through the adoption of section 514(a), has evinced an intent to preempt state regulation in the field of employee benefit plans. See 29 U.S.C. § 1144(a) (1982).

106. "[W]hen Congress has 'unmistakenly . . . ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citation omitted).

107. Courts interpreting ERISA's preemption provision have generally focused on the statute's "relate to" language and have disagreed as to whether some state regulations "relate to" employee benefit plans as defined in section 1002 of ERISA. See Mackey v. Lanier Collections Agency & Serv., Inc., 108 S. Ct. 2182, 2185 (1988) (Georgia statute that provided for protective treatment of employee welfare plans was preempted); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983) (New York anti-discrimination ordinance was preempted); Ellis Nat'l Bank v. Irving Trust Co., 786 F.2d 466, 469 (2d Cir. 1986) (state common law principles of equity were preempted). But see St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550, 552 n.3 (11th Cir. 1985) (state equitable principles were not preempted); Rebald v. Cuomo, 749 F.2d 133, 138-40 (2d Cir. 1984) (section of state public health law not preempted), cert. denied, 472 U.S. 1008 (1985); American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 123-26 (2d Cir. 1979) (garnishment order to collect alimony and child support not preempted). For the language of § 1002, see supra note 7.

In Shaw v. Delta Airlines Inc., the Supreme Court held that a New York anti-discrimination ordinance was preempted under § 514(a). See Shaw, 463 U.S. at 96-97. The Court found that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Id. The Court found, however, that "[s]ome 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." Id. at 100 n.21.

In Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 739 (1985), the Court found that "[t]he pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." Id. at 739.

The consistent theme running through Supreme Court decisions is that section 514(a) was meant to be a broad provision. As such it should preempt all state laws except those which are only tangentially related to employee benefit plans. See Shaw, 463 U.S. at 95-100. In addition, the fact that a state law may be consistent with ERISA's general purpose will not save that law from preemption. See Metropolitan Life, 471 U.S. at 739. 108. See Shaw, 463 U.S. at 95-100; Metropolitan Life, 471 U.S. at 739.


Initially, the House and Senate versions of the preemption provision differed. Compare 120 Cong. Rec. 4717, 4742 (1974) with id. at 4977, 5002. The House version limited the scope of preemption to those areas of state regulation that relate to reporting, disclosure and fiduciary duties. See 120 Cong. Rec. at 4742. The Senate version provided that state law is preempted if it relates to "subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act." 120 Cong. Rec. at 5002.

The final version of the preemption provision was developed in conference committee. See S. Rep. No. 1090, 93d Cong., 2d Sess. 383 (1974). The conference report points to the breadth of the preemption provision as envisioned by committee: "Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." Id.

Similarly, debate in both houses prior to the enactment of the committee version revealed that Congress was cognizant of the scope of the preemption provision. Senator Harrison Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, commented on the breadth of section 514:
the context of employee fraud, not only is there a nexus between state equitable principles and ERISA pension plans, but the possible litigation and administrative costs engendered by allowing civil attachment of pension funds would detrimentally impact on the congressional design of ERISA. Thus, unless Congress expressly implements an exception for employee fraud, equitable remedies must yield to the anti-alienation provision.

It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to 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, or any instrumentality thereof, which have the force or effect of law.

120 Cong. Rec. 29,933 (1974). Additionally, Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, emphasized:

Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

120 Cong. Rec. 29,197 (1974); see also id. at 29,942 (comments of Senator Javits).

109. Three circuit courts have considered the impact of the preemption clause on the fraud exception. See Guidry v. Sheet Metal Workers Nat'l Pension Fund, 856 F.2d 1457 (10th Cir. 1988), cert. granted, 109 S. Ct. 3212 (1989); Ellis Nat'l Bank v. Irving Trust Co., 786 F.2d 466, 469 (2d Cir. 1986); St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550, 552 n.3 (11th Cir. 1985). The Ellis court, in dictum, asserted that common law principles of equity are apparently preempted by ERISA. See Ellis Nat'l Bank, 786 F.2d at 469.

In Guidry and St. Paul, however, the courts dismissed the preemption issue in a footnote, finding that ERISA does not preempt equitable principles. See Guidry, 856 F.2d at 1463 n.7; St. Paul, 752 F.2d at 552 n.3. The courts relied on American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979) and Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978) for the proposition that state laws relating to garnishment orders are not preempted by ERISA. See Guidry, 856 F.2d at 1463-64 n.7; St. Paul, 752 F.2d at 552 n.3.

St. Paul overstates the holdings in the domestic relations decisions. See St. Paul, 752 F.2d at 552 n.3. Merry and Stone did not find that ERISA preempts state laws concerning garnishment. See Merry, 592 F.2d at 121; Stone, 450 F. Supp. at 932. Merry and Stone actually held that ERISA does not preempt state law orders pertaining to domestic relations. See Merry, 592 F.2d at 121 (state court-ordered family support payments are impliedly excepted from ERISA's preemption provision); Stone, 450 F. Supp. at 932 (state community property laws are not preempted). This interpretation is consistent with the principle that domestic relations law is an area traditionally governed by state law. Labine v. Vincent, 401 U.S. 532, 538-39 (1971). The reading urged by the court in St. Paul would undermine the financial stability of pension plans by exposing pension plans to garnishment from all judgment creditors and seriously detract from the congressional scheme. See Vink v. SHV N. Am. Holding Corp., 549 F. Supp. 268, 271 (S.D.N.Y. 1982); 29 U.S.C. § 1001 (1982).

110. See Ellis Nat'l Bank, 786 F.2d at 471-72; Vink, 549 F. Supp. at 273; see also Mackey v. Lanier Collections Agency & Serv., Inc., 108 S. Ct. 2182, 2192 (1988) (Kennedy, J., dissenting) ("Compliance with the state garnishment procedures subjects the plan to significant administrative burdens and costs . . . . [S]uch laws are accordingly preempted.").

111. See Ellis Nat'l Bank, 786 F.2d at 471-72; Vink, 549 F. Supp. at 273. The 98th Congress and commentators have advocated this result. See Hutchinson & Ifshin, supra
Similarly, Treasury regulations and agency recommendations support precluding the use of any equitable means to alienate funds from an ERISA qualified plan.\textsuperscript{112} A recent Supreme Court decision\textsuperscript{113} may foreshadow future judicial treatment of this issue. In \textit{Mackey v. Lanier Collections Agency & Service, Inc.},\textsuperscript{114} a collection agency sought to garnish an employee welfare fund\textsuperscript{115} after money judgments were obtained against fund beneficiaries. In a 5-4 decision, the Court held that ERISA did not preempt state law garnishment claims against welfare benefit plans.\textsuperscript{116} Since welfare benefit plans are not protected by ERISA's anti-alienation provision, the Court's holding does not extend to alienation of pension plans.

In dictum, however, the majority concluded that state court garnishment of ERISA pension plans is precluded by the anti-alienation provision.\textsuperscript{117} Moreover, the dissent found that where the plan must act as garnishee, state law garnishment orders are preempted.\textsuperscript{118} An analysis of the majority dictum along with the dissent indicates that the full Court would likely find against the garnishment of pension plans.\textsuperscript{119} Accordingly, an implied fraud exception to ERISA's anti-alienation provision would be prohibited as against an employee.\textsuperscript{120}

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\bibitem{footnote} note 108, at 38-44; S. Rep. No. 575, 98th Cong., 2d Sess. 19, \textit{reprinted in} 1984 U.S. Code Cong. & Admin. News 2547, 2565. Congress passed the Retirement Equity Act partially in response to judicial confusion concerning the family support exception. \textit{See id.} When amending the anti-alienation provision for qualified domestic relations orders, the committee acknowledged the need for a corresponding change in the preemption clause. \textit{See id.} The committee stressed "that conforming changes to the ERISA preemption provision are necessary to ensure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA." \textit{Id.}
\bibitem{footnote} \textit{See supra} notes 36, 73 and accompanying text.
\bibitem{footnote} \textit{Id.}
\bibitem{footnote} \textit{See supra} note 7.
\bibitem{footnote} \textit{See Mackey}, 108 S. Ct. at 2186; \textit{see supra} note 7. The court also found that a Georgia statute that protected welfare benefits from state garnishment procedures was preempted by ERISA. \textit{Mackey}, 108 S. Ct. at 2185.
\bibitem{footnote} In reaching this conclusion, the Court focused on the language of the anti-alienation provision and emphasized that
\begin{quote}
\textit{where Congress intended in ERISA to preclude a particular method of state-law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute. Specifically, ERISA § 206(d)(1) bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA pension benefit plans.}
\end{quote}
\textit{Mackey}, 108 S. Ct. at 2188 (emphasis in original).
\bibitem{footnote} The court went on to state 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 \textit{not} ERISA welfare benefit plans." \textit{Id.} at 2189 (emphasis in original).
\bibitem{footnote} Id. at 2192 (Kennedy, J., dissenting).
\bibitem{footnote} \textit{See id.} at 2188, (1988) (dictum); \textit{id.} at 2192 (Kennedy, J., dissenting).
\bibitem{footnote} \textit{See id.} at 2188 (dictum); \textit{id.} at 2192 (Kennedy, J., dissenting).
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CONCLUSION

Congress has ordained that courts may subject a fiduciary to all equitable relief appropriate to remedy a breach of fiduciary duty. Based on rules of statutory construction, a narrow implied exception to the anti-alienation provision is a necessary corollary of ERISA's fiduciary provisions. Such an exception would not inflict significant damage on the goals of the anti-alienation provision and would further promote the fiduciary conduct envisioned by the drafters of the legislation. In addition, this conclusion is supported by both courts that have considered the question.

In cases of employee fraud, however, the ancient equitable principle that a wrongdoer should not benefit from his misdeeds will have to take a back seat to statutory proscriptions dictated by Congress. Although abounding in equitable appeal, an employee fraud exception to ERISA's anti-alienation provision is contrary to the rules of statutory construction. Moreover, such an exception would be inconsistent with ERISA's preemption provision and agency interpretations. Where the court's inherent equitable powers will do significant damage to the congressional scheme, a strict reading of the statute must prevail.

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