No More Bananas in the Oklahoma Split: Exempting ERISA-Qualified Pension Plans under Section 522(b)(2)(A) of the Bankruptcy Code

Betsy Grabel

NOTES AND COMMENTS

NO MORE BANANAS IN THE OKLAHOMA SPLIT: EXEMPTING ERISA-QUALIFIED PENSION PLANS UNDER SECTION 522(b)(2)(A) OF THE BANKRUPTCY CODE

I. INTRODUCTION

Section 522 of the United States Bankruptcy Code allows a debtor in bankruptcy to exempt from the estate certain property.[1] However, the state in which the debtor resides may choose to opt out of this scheme by providing the debtor with legislatively mandated exemptions.[2] Debtors residing in opt-out states cannot take advantage of section 522's exemptions, but must use the exemptions provided under state law.

States, such as Oklahoma, that opt out of the Bankruptcy Code's scheme of federal exemptions[3] leave debtors in the possible position of having their Employment Retirement Income Security Act (ERISA) qualified[4] pension plan interests disencumbered from any restrictions on their transferability. The United States Supreme Court decision of *Mackey v. Lanier Collections Agency & Service, Inc.*,[5] exemplifies this

1. 11 U.S.C. § 522(b) (1988).

2. *Id. See also* S. REP. NO. 989, 95th Cong., 2d Sess. 823, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5868; H.R. REP. No. 595, 95th Cong., 1st Sess. 367-68 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6322-24.

3. States which opt out do not apply the scheme afforded in the Bankruptcy Code. Instead, such states provide their own exemption statutes. The opt-out provision in Oklahoma states: "No natural person residing in this state may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of Section 522 of the Bankruptcy Reform Act of 1978 . . . ." OKLA. STAT. tit. 31, § 1(B) (1981 & Supp. 1988).

4. Employee benefit plans are of two types: (1) welfare benefit plans that provide health, legal, vacation, or training benefits, and (2) pension benefit plans that provide retirement income. Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1002(1) & (2) (1988) [hereinafter ERISA].

5. 486 U.S. 825 (1988). Although *Mackey* dealt with a welfare benefit plan, it affects debtors possessing pension benefit plans.

point. This decision, which has greatly affected debtors in opt-out jurisdictions, went one step further in demonstrating that pension plan interests are not protected either under the Bankruptcy Code or other federal law. The result is unseemly and outrageous—debtors in bankruptcy should be afforded some type of protection for these interests. Despite *Mackey*, debtors in opt-out jurisdictions still are afforded protection under other federal laws. Therefore, although a debtor cannot use state exemptions in light of *Mackey*, the debtor can seek protection under other federal exemptions not included in the Bankruptcy Code.

The majority of the courts, however, have held ERISA-qualified plans to be not exempt under other federal law.[6] Although the Oklahoma bankruptcy courts are split on the issue,[7] the United States Court of Appeals for the Tenth Circuit has yet to face the matter.[8] If this issue were to reach the Tenth Circuit, the court should follow the reasoning of Kansas[9] and some Texas courts[10] by allowing debtors in opt-out jurisdictions to seek protection of their pension plans under other federal exemptions than those in the Bankruptcy Code.

II. THE BANKRUPTCY ESTATE

A. *What the Estate Contains*

To understand *Mackey* and its possible effects on debtors in opt-out jurisdictions, it is important to determine what the bankruptcy estate

6. *See, e.g.*, Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1361 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1274 (8th Cir. 1984); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585-86 (5th Cir. 1983). These opinions are referred to as the majority viewpoint.

7. *See In re* Brown, 95 Bankr. 216, 219 (Bankr. N.D. Okla. 1989) (plans are not exempt under other federal law); *In re* Weeks, 106 Bankr. 257, 262-63 (Bankr. E.D. Okla. 1989) (although the court found the plans not to be exempt property, the debtor's argument was based on a state's rights theory that the Oklahoma exemption statute be given the same effect as federal law and not be preempted); *In re* Goldberg, 59 Bankr. 201, 205 (Bankr. N.D. Okla. 1986) (plans are not exempt under other federal law; however, this case was decided *before Mackey*). *But see In re* Burns, 108 Bankr. 308, 315 (Bankr. W.D. Okla. 1989) (en banc) (plans are exempt under other federal law).

8. *See* FDIC v. Farha, No. 87-1530, slip op. (10th Cir. June 13, 1989), *withdrawn*, Order and Judgment (filed Oct. 10, 1989). In *Farha*, the Tenth Circuit held ERISA-qualified plans could not be garnished by judgment creditors. Although the court withdrew its first opinion because the plan in question was not ERISA-qualified, the court still found for Mr. Farha and stated any retirement pension or profit sharing plan that qualified for a federal tax exemption would be exempt from creditors if it contained a spendthrift provision. The court based this new decision on OKLA. STAT. tit. 60, §§ 326-328 (1981).

9. *See, e.g.*, *In re* Hinshaw, 23 Bankr. 233, 235 (Bankr. D. Kan. 1982).

10. *See, e.g.*, *In re* Komet, 104 Bankr. 799, 805 (Bankr. W.D. Tex. 1989). *But cf. In re* Volpe, 100 Bankr. 840, 841 (Bankr. W.D. Tex. 1989) (holding ERISA did not preempt Texas statute creating exemption for ERISA-qualified plans).

contains. Under section 541 of the Bankruptcy Code, the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[11] The scope of this broad statute is intended to include all types of property, tangible or intangible, and to include property of the debtor needed for a fresh start.[12] The issues raised are whether benefit plans that qualify under ERISA are included in the bankruptcy estate, and, if so, whether they are then exempt.[13]

B. *Exemptions from the Estate*

1. Generally

Exempt property is property that initially enters the bankruptcy estate, but is *later* excluded.[14] A debtor lists this property on schedules, but claims the property as exempt. Being exempt property, it is restricted from the Trustee in Bankruptcy. Section 522(d) of the Bankruptcy Code lists exemptions.[15] However, when state law where the

---

11. 11 U.S.C. § 541(a)(1) (1988).

12. S. REP. No. 989, 95th Cong., 2d Sess. 823, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5868; H.R. REP. No. 595, 95th Cong., 1st Sess. 367-68 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6322-24.

13. Although there has been a debate about whether such plans are excluded from the bankruptcy estate, this Comment focuses on whether they are exempt in light of the *Mackey* decision.

14. S. REP. No. 989, 95th Cong., 2d Sess. 823, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5868; H.R. REP. No. 595, 95th Cong., 1st Sess. 367-68 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6322-24.

15. 11 U.S.C. § 522(d) (1988) states, in pertinent part:

(d) The following property may be exempted under subsection (b)(1) of this section:

. . . .

(10) The debtor's right to receive—
- (A) a social security benefit, unemployment compensation, or a local public assistance benefit;
- (B) a veterans' benefit;
- (C) a disability, illness, or unemployment benefit;
- (D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
- (E) a payment under a stock bonus, pension, profitsharing, 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—
  - (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
  - (ii) such payment is on account of age or length of service; and
  - (iii) 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).

Id.

debtor resides specifically does not authorize the exemptions in subsection (d), section 522(b)(1)[16] allows the debtor to then follow the state exemptions provided by its domicile or exemptions under other federal laws than those in subsection (d).[17]

2. Exemption Scheme in Oklahoma

Oklahoma does not allow the debtor to choose the federal exemptions of 11 U.S.C. § 522(d), and has therefore "opted out." Instead, Oklahoma has its own exemption statutes that must be followed by the Oklahoma debtor. Under title 31, section 1(A) of the Oklahoma Statutes, the property listed "shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts . . . ."[18] Subsection (A)(20) of the statute specifically applies to ERISA benefit plans by referring to them as retirement plans under "present or future Acts of Congress."[19] Therefore, the statute clearly states that such plans are exempt from attachment or execution, allowing them to be protected from the Trustee in

16. *See* 11 U.S.C. § 522(b)(1) (1988).
17. *See* 11 U.S.C. § 522(b)(2)(A) (1988).
18. OKLA. STAT. tit. 31, § 1(A) (Supp. 1989).
19. OKLA. STAT. tit. 31, § 1(A)(20) (Supp. 1989) provides:

(A) Except as otherwise provided in this title and notwithstanding subsection B of this section, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided:

. . . .

(20) Subject to the Uniform Fraudulent Transfer Act, Section 112 et seq. of Title 24 of the Oklahoma Statutes, any interest in a retirement plan or arrangement qualified for tax exemption purposes under present or future Acts of Congress; provided, such interest shall be exempt only to the extent that contributions by or on behalf of a participant were not subject to federal income taxation to such participant at the time of such contributions, plus earnings and other additions thereon; provided further, any transfer or rollover contributions between retirement plans or arrangements which avoids current federal income taxation shall not be deemed a transfer which is fraudulent as to a creditor under the Uniform Fraudulent Transfer Act. 'Retirement plan or arrangement qualified for tax exemption purposes' shall include without limitation, trusts, custodial accounts, insurance, annuity contracts and other properties and rights constituting a part thereof. By way of example and not by limitation, retirement plans or arrangements qualified for tax exemption purposes permitted under present Acts of Congress include defined contribution plans and defined benefit plans as defined under the Internal Revenue Code ("IRC"), individual retirement accounts, individual retirement annuities, simplified employee pension plans, Keogh plans, IRC Section 403(a) annuities, IRC Section 403(b) annuities, and eligible state deferred compensation plans governed under IRC Section 457. This provision shall be in addition to and not a limitation of any other provision of the Oklahoma Statutes which grants an exemption from attachment or execution and every other species of forced sale for the payment of debts. This provision shall be effective for retirement plans and arrangements in existence on, or created after the effective date of this act . . . .

Bankruptcy. Because of this decision to opt out, debtors in Oklahoma may be greatly affected by the *Mackey* decision.

III. *Mackey v. Lanier Collections Agency & Service, Inc.*

A. *Statement of the Case*

The petitioners in *Mackey* were trustees of an employee welfare benefit plan that provided vacation and holiday benefits to eligible employees.[20] The respondent was a collection agency which sought and obtained money judgments from the plan participants who owed money to the respondent's clients.[21] To collect the judgments, the respondent brought an action in a Georgia trial court to garnish the plan benefits.[22] Although the trial court allowed the garnishment, the Georgia Court of Appeals reversed, holding a Georgia statute restricted the garnishment of such plans or programs subject to ERISA, thereby exempting them.[23]

The Supreme Court of Georgia reversed and held that although the Georgia statute exempted the plan from garnishment, the statute was preempted by ERISA, which purported to regulate garnishment of ERISA funds and benefits.[24] The court further reasoned, through the analysis of the ERISA preemption provision, that Congress had not barred the garnishment of *welfare* benefits, although *pension* benefits were protected.[25] Because there existed a conflict between the statutes, the federal statute overrode the state statute, and the plan was subject to garnishment.[26]

The United States Supreme Court granted certiorari because of the conflicting decisions among the courts on the question presented in the case.[27] The issue before the Court was whether, and to what extent, the

Id. See also OKLA. STAT. tit. 60, §§ 326-328 (1981).

20. Mackey v. Lanier Collections Agency & Serv., Inc., 486 U.S. 825, 827 (1988).

21. *Id.*

22. *Id.* at 828.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Because the Georgia Court of Appeals and the Georgia Supreme Court were in conflict, the United States Supreme Court granted certiorari. In Mackey v. Lanier Collection Agency & Service, Inc., 178 Ga. App. 467, 343 S.E. 2d 492 (1986), the court relied on Shaw v. Delta Air Lines, 463 U.S. 85 (1983), which stated the state law involved would be preempted by ERISA only if the state law prohibited lawful practices under federal law. *Mackey*, 178 Ga. App. at 469, 343 S.E.2d at 494. Because the Georgia statute did not prohibit practices lawful under federal law, the court reasoned that the statute would not be preempted by ERISA. On appeal, however, the Georgia Supreme Court reversed, Lanier Collection Agency & Service, Inc. v. Mackey, 256 Ga. 499, 350 S.E.2d 439 (1986), and stated that the court of appeals' reliance on *Shaw* was incorrect. The court

Georgia statutes controlling restrictions on garnishment of ERISA employee benefit plans were preempted by the federal statute that governs the plans.[28]

The Court first addressed whether the Georgia statute referred to an ERISA employee benefit plan. If so, section 514(a) of ERISA would preempt " 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by the statute."[29] The Court relied on *Shaw v. Delta Air Lines, Inc.*,[30] which held that a law relates to an employee benefit plan so long as it has a connection or refers to such a plan.[31] The court held that because the Georgia statute at issue in the case expressly referred to ERISA employee benefit plans, section 514(a) of ERISA would apply, thus preempting the state statute.[32] If the state law was consistent with ERISA's substantive requirements, the preemption of section 514(a) would still displace the state law.[33] Further, if a legislature enacts the state law to help effectuate ERISA's underlying purposes, the state law still will not be saved because of the broad scope of section 514(a).[34]

B. *The Effect of* Mackey *on Debtors in Bankruptcy in Oklahoma*

After *Mackey*, it is important to determine the implications for debtors in Oklahoma. Oklahoma opts out of the exemption scheme afforded in the Bankruptcy Code by providing its own exemptions.[35] Therefore, by applying the rationale of the Supreme Court in *Mackey*, one must determine if Oklahoma's exemption statutes "refer to" ERISA plan benefits and thus are preempted.

Since *Mackey*, few cases have been decided on this issue in the Oklahoma bankruptcy courts. In one decision, *In re Brown*,[36] the court

stated that the United States Supreme Court's conclusion in *Shaw* "referred to the interplay of state and federal enforcement of Title VII," which was not relevant to *Mackey*. Further, if it were relevant, the Georgia statute was prohibiting a lawful federal practice: garnishment of vacation funds. Therefore, the Georgia statute was preempted by ERISA. *Lanier*, 256 Ga. at 501-02 n.5, 350 S.E.2d at 442 n.5.

28. *Mackey*, 486 U.S. at 829.

29. *Id.* (citing 29 U.S.C. § 1144(a)).

30. 463 U.S. 85 (1983).

31. *Id.* at 96-97. *See also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724 (1985).

32. *Mackey*, 486 U.S. at 829-30.

33. *Id.* (citing *Metropolitan Life*, 471 U.S. at 739).

34. *Id.* at 830.

35. *See supra* note 19.

36. 95 Bankr. 216 (Bankr. N.D. Okla. 1989). *See also In re* Burns, 108 Bankr. 308, 311 (Bankr. W.D. Okla. 1989) (en banc); *In re* Weeks, 106 Bankr. 257, 262 (Bankr. E.D. Okla. 1989).

stated that the Oklahoma exemption statute in title 31, section 1(A)(20) of the Oklahoma Statutes "relates to and has connection with types of *pension* plans that are ERISA qualified plans."[37] Therefore, this statute would be preempted by section 514(a) of ERISA, as was the state statute in *Mackey*, and the plans would not be exempt under the Oklahoma statute.[38]

However, the concern in *Mackey* was with ERISA-qualified *welfare* benefit plans, not *pension* plans as in *In re Brown*.[39] Nevertheless, the court stated that the language in *Mackey* "is so broad and the intent so clear that it is apparent that the rule laid down applies to ERISA qualified *pension* benefit plans as well."[40] Further, the court stated "§ 514(a) of the ERISA code applies to *any* employee benefit plan whether *pension* benefits or *welfare* benefits."[41]

Because of the *Mackey* decision, it appears if states opt out of the exemption scheme provided in the Bankruptcy Code, those state exemptions referring to ERISA-qualified employee benefit plans will be preempted by section 514(a), and thus, the plans will not be exempt in bankruptcy. If states cannot make a debtor's interest in these plans exempt, Congress must do so.

IV. Nonbankruptcy Code Federal Exemptions

Although *Mackey* stated that section 514(a) of ERISA preempts state exemption statutes referring to ERISA-qualified employee benefit plans, the debtor is able to choose federal exemptions other than those found in section 522(d) of the Bankruptcy Code.[42] Debtors argue that ERISA is one of those *other* federal exemptions.[43] The majority of the courts in opt-out jurisdictions hold that ERISA is not included in the

37. *Brown*, 95 Bankr. at 218 (emphasis in original). The court also dealt with the exemption statutes in Title 60 and stated that they also refer to and are connected with ERISA-qualified pension plans. *Id.* at 218-19.

38. *Id.* at 218.

39. *See supra* note 25 and accompanying text.

40. *Brown*, 95 Bankr. at 218 (emphasis in original).

41. *Id.* (emphasis in original).

42. *See* 11 U.S.C. § 522(b)(2)(A) (1988).

43. *See, e.g.*, Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1358-59 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1489 (11th Cir. 1985) (although the debtor claimed his plans were excluded property under 11 U.S.C. § 541(c)(2), the court nevertheless addressed the issue of whether the plans were exempt under "other federal law"); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1273 (8th Cir. 1984) (although the debtors did not attempt to claim their plans exempt under "other federal law," the court nevertheless addressed the issue).

other federal exemptions.[44]

A. *The Argument Made by Debtors*

For a plan to be qualified under ERISA, it must meet the requirements set out in certain statutes. For example, ERISA requires that the pension plan contain a provision stating "benefits provided under the plan may not be assigned or alienated."[45] In addition, for such a plan to be qualified for tax exempt status, the Internal Revenue Code (IRC) states it must contain the same provisions of anti-alienation and assignment.[46] Thus, debtors argue that the anti-alienation provisions of ERISA and the IRC create federal nonbankruptcy exemptions for ERISA-qualified plans under 11 U.S.C. § 522(b)(2)(A).

B. *The Majority Viewpoint*

The majority of courts that have decided whether debtors can claim employee benefit plans exempt under other federal exemptions have analyzed the legislative history of section 522 of the Bankruptcy Code.[47] The House and Senate Reports, in explaining what "other federal law" is, list property which may be exempted under federal laws other than the Bankruptcy Code as follows:

> Foreign Service Retirement and Disability payments, 22 U.S.C. 1104;
> Social security payments, 42 U.S.C. 407;
> Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;
> Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601;
> Civil service retirement benefits, 5 U.S.C. 729, 2265;
> Longshoremen's and Harbor Workers' Compensation Act death disability benefits, 33 U.S.C. 916;
> Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(L);
> Veterans benefits, 45 U.S.C. 352(E);
> Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101; and
> Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.[48]

---

44. *See supra* note 6.
45. 29 U.S.C. § 1056(d)(1) (1988).
46. 26 U.S.C. § 401(a)(13) (1988).
47. *See, e.g.*, Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1360-61, (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1273-74 (8th Cir. 1984); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 582-86 (5th Cir. 1983).
48. S. REP. NO. 989, 95th Cong., 2d Sess. 75, *reprinted in* 1978 U.S. CODE CONG. & ADMIN.

The majority reasoned that because ERISA was not included in this list, there is no exemption of these plans under other federal law in section 522(b)(2)(A) of the Bankruptcy Code.[49] For example, in *Samore v. Graham (In re Graham)*,[50] the United States Court of Appeals for the Eighth Circuit held that although the list was not meant to be exclusive, the failure of Congress to include ERISA plan benefits proved that Congress intended ERISA would not be a "federal law" upon which a section 522(b)(2)(A) exemption could be founded.[51] The court further reasoned that although the provisions in the statutes on the list creating a federal exemption are similar to the anti-alienation provisions in ERISA, there still exists a distinction between the statutes. This distinction is that the items on the list are federal in nature, created by federal law or related to industries usually protected by federal government, while ERISA regulates "private employer pension systems."[52]

Further, the Eleventh Circuit stated in *Lichstrahl v. Bankers Trust (In re Lichstrahl)*[53] that because ERISA was already referred to in the exemptions provided in section 522(d) of the Bankruptcy Code, Congress intended to leave ERISA out of section 522(b).[54] Therefore, the Fifth,[55] Eighth,[56] Ninth,[57] and Eleventh[58] Circuits have generally concluded the anti-alienation provisions of ERISA and the IRC do not create federal nonbankruptcy exemptions for ERISA-qualified plans under section 522(b)(2)(A) of the Bankruptcy Code.

C. *The Minority Viewpoint*

Courts following the minority view use the same process as the majority: analyzing the legislative history of section 522 of the Bankruptcy

---

NEWS 5787, 5861; H.R. REP. No. 595, 95th Cong., 2d Sess. 360 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6316.

49. *See, e.g.*, Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985); Samore v. Graham (*In re* Graham), 726 F.2d 1268, 1274 (8th Cir. 1984); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1983).

50. 726 F.2d 1268 (8th Cir. 1984).

51. *Id.* at 1274.

52. *Id. See also* Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352, 1361 (9th Cir. 1985); Goff v. Taylor (*In re* Goff), 706 F.2d 574, 585 (5th Cir. 1983).

53. 750 F.2d 1488, 1491 (11th Cir. 1985).

54. *Id.* (citing *Goff*, 706 F.2d at 585). *See also In re* La Fata, 41 Bankr. 842 (Bankr. E.D. Mich. 1984); *In re* Kelley, 31 Bankr. 786 (Bankr. N.D. Ohio 1983).

55. Goff v. Taylor (*In re* Goff), 706 F.2d 574 (5th Cir. 1983).

56. Samore v. Graham (*In re* Graham), 726 F.2d 1268 (8th Cir. 1984).

57. Daniel v. Security Pacific Nat'l Bank (*In re* Daniel), 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

58. Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488 (11th Cir. 1985).

Code. However, they have reached the opposite conclusion. In the decision of *In re Hinshaw*,[59] the debtors argued that 29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401 (a)(13) constitute a federal exemption as referred to in section 522(b)(2)(A) of the Bankruptcy Code.[60] Because these statutes specify that the plans must contain anti-alienation provisions, the statutes constitute federal exemptions other than those provided in the Bankruptcy Code.[61] The debtors' plans in question contained anti-alienation clauses complying with these statutes.[62]

The court then reviewed the "list"[63] contained in the legislative history of what *may* constitute federal exemptions other than those in the Bankruptcy Code.[64] Many of the statutes in this list that give rise to a federal exemption could "be characterized as nothing more than prohibitions against assignment or alienation."[65] Therefore, the statutes on the "list" are similar to the anti-alienation provisions of 29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401(a)(13). Although ERISA plans are not specifically mentioned in this list, the court stated that the similarity between ERISA and those on the list supports the conclusion that a federal exemption for ERISA plans was intended.[66]

The court in *Hinshaw* relied on *Commercial Mortgage Insurance, Inc. v. Citizens National Bank of Dallas*.[67] In *Commercial Mortgage*, the issue was whether 29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401(a)(13) constituted a bar to garnishment of pension fund benefits.[68] The court recognized that the legislative intent was to ensure that benefits would be available for retirement purposes; consequently, a creditor's ability to garnish the plans would defeat the intended protection.[69] Although *Commercial Mortgage* did not address the nature of a federal exemption in bankruptcy, the court in *Hinshaw* stated that its reasoning had close relevance, and concluded that a federal exemption for an ERISA-qualified plan could be claimed under section 522(b)(2)(A) of the Bankruptcy

59. 23 Bankr. 233 (Bankr. D. Kan. 1983).
60. *Id.* at 234.
61. *Id.* at 234-35.
62. *Id.* at 235.
63. *See supra* text accompanying note 48.
64. *Hinshaw*, 23 Bankr. at 235.
65. *Id.* For example, the Foreign Service Act of 1946, 22 U.S.C. § 1104 (repealed 1980) provided: "None of the moneys mentioned in this title shall be assignable either in law or equity, or be subject to execution, levy, attachment, garnishment, or other legal process . . . ." *Id.* (citations omitted).
66. *Hinshaw*, 23 Bankr. at 235.
67. 526 F. Supp. 510 (N.D. Tex. 1981).
68. *Id.* at 512.
69. *Id.* at 518.

Code.[70]

This same position was followed by a Texas Bankruptcy Court in *In re Komet.*[71] The court disagreed with the majority viewpoint exemplified in the Fifth Circuit case of *Goff v. Taylor (In re Goff)*,[72] which did not permit an exemption of ERISA plans under section 522(b)(2)(A).[73] Describing the conclusions in *Goff* as "strong dicta," the *Komet* court supported its decision with a well-reasoned explanation.[74]

First, the *Komet* court disagreed with *Goff* because the *Goff* court mistakenly believed the function of the anti-alienation language was to qualify the plans for favorable tax treatment.[75] Although the anti-alienation language is a condition for tax qualification, the court reasoned that 29 U.S.C. § 1056(d) required the language to be included in *any* plan, whether or not it is tax qualified.[76]

Second, the *Komet* court stated that the *Goff* court misunderstood the structure and purpose of the Bankruptcy Code.[77] The court reasoned that Congress intended the overall structure of section 522(b) to favor generally the retention of retirement benefits by debtors.[78] Further, the legislative history shows little intent to penalize debtors for choosing one exemption scheme over another.[79] In other words, if a state opts out of the scheme provided in the Bankruptcy Code, debtors in such jurisdictions should not be penalized and should be able to claim their plans as exempt under other federal law.

Third, the *Komet* court examined *Goff*'s conclusions concerning the illustrative "list" of other federal exemptions.[80] The court stated that the *Goff* court was incorrect when it relied heavily on the list in the legislative history to support its conclusion that Congress did not intend ERISA to be "other federal law."[81] Therefore, when a statute is clear on its face, as is section 522(b)(2)(A), it is against the rules of construction to resort to its legislative history.[82] The *Komet* court concluded, as did the

70. *Hinshaw*, 23 Bankr. at 236.
71. 104 Bankr. 799 (Bankr. W.D. Tex. 1989).
72. 706 F.2d 574 (5th Cir. 1983).
73. *Komet*, 104 Bankr. at 808.
74. *Id.*
75. *Id.* at 809.
76. *Id.*
77. *Id.*
78. *Id.* at 813.
79. *Id.*
80. *Id.* at 814.
81. *Id.*
82. *Id.*

court in *Hinshaw*, that section 522(b)(2)(A) allows a debtor in an opt-out jurisdiction to claim ERISA pension benefit plans as exempt under "other federal law."[83]

D. *The Oklahoma Split*

Presently, the Oklahoma bankruptcy courts are split on whether a federal exemption exists under ERISA. In the case of *In re Goldberg*,[84] the United States Bankruptcy Court for the Northern District of Oklahoma held ERISA-qualified plans not exempt under section 522(b)(2)(A) as "other federal law."[85] The court, following the reasoning of the majority viewpoint, determined that the intent was not to list ERISA as an exemption, and that the exemptions on the list were significantly distinguishable from ERISA because ERISA regulates private employer pension systems.[86]

In another decision in the United States Bankruptcy Court for the Northern District of Oklahoma, the reasoning of the majority viewpoint was again followed. The court in *In re Brown*[87] simply mentioned the names of the opinions of the majority viewpoint and stated "[a]ll of these cases contain a thorough analysis of the issue and this court adopts without further discussion the rationale of these decisions."[88] Thus, the court concluded that ERISA-qualified plans were not exempt under section 522(b)(2)(A) as "other federal law."[89]

The Bankruptcy Court for the Western District of Oklahoma generally disagrees with the decisions from the Northern District. In *In re Burns*,[90] the court stated that the analysis of the Texas bankruptcy court in *Komet* was correct in its interpretation of section 522(b)(2)(A) of the Bankruptcy Code and should be followed.[91] The court reasoned that because Congress failed to list ERISA in a non-exclusive list did not mean that the anti-alienation provisions in ERISA were ineffective;[92] to hold so

83. *Id.* at 816.
84. 59 Bankr. 201 (Bankr. N.D. Okla. 1986).
85. *Id.* at 205.
86. *Id.*
87. 95 Bankr. 216 (Bankr. N.D. Okla. 1989).
88. *Id.* at 219.
89. *Id.*
90. 108 Bankr. 308 (Bankr. W.D. Okla. 1989) The court held an *en banc* hearing wherein all three bankruptcy court judges sitting in the Western District of Oklahoma heard the case. The court stated that "[i]n the interests of judicial economy, and in order to encourage a uniform approach to and decision upon such issues, the judges of this district, in the exercise of the inherent power of courts to control their dockets, determined that the issue should be heard *en banc*." *Id.* at 309.
91. *Id.* at 315.
92. *Id.*

would contravene ERISA's principal purpose.[93] Because of this, the court held ERISA plans exempt under section 522(b)(2)(A) as property exempt under federal law other than section 522(d) of the Bankruptcy Code.[94]

V. Analysis of the Viewpoints

Although the majority viewpoint is from Circuit Courts of Appeals, the reasoning used to reach the conclusion that a federal exemption does not exist in ERISA is not well-supported and should not be followed by the Tenth Circuit. Not only were the opinions not well-supported,[95] they were decided *before* the Supreme Court in *Mackey* stated that ERISA would preempt any state statute referring to ERISA-qualified benefit plans. Therefore, the decision in *Mackey* will have an effect on these majority circuit opinions concerning opt-out jurisdictions.

The majority focuses on a list set out in the Senate and House Reports that was intended to include other federal exemptions. The majority knew the list was not meant to be exhaustive; but they concluded that because ERISA plans failed to make the list, Congress intended to leave them out. The majority fails to recognize the clear meaning of section 522(b)(2)(A) of the Bankruptcy Code. This statute states a debtor can claim as exempt any property exempt under "federal law" other than section 522(d) of the Bankruptcy Code; ERISA *is* other federal law. If the statute's meaning is clear on its face, there is no need to resort to legislative history;[96] thus, the majority's reliance on the list is unfounded.

However, assuming the legislative history is relied upon, the majority still does not make a persuasive argument. The majority argues that ERISA was intentionally left off the list; however, it is clear from the Senate and House Reports the list was not complete. The reports state: "*Some* of the items that *may* be exempted under Federal laws other than title 11 *include* . . . ."[97] Use of the words such as "some" and "may"

93. *Id.*

94. *Id.*

95. The court in *In re* Komet, 104 Bankr. 799 (Bankr. W.D. Tex. 1989) noted that courts following the dicta of *Goff* have done so without providing any significant additional arguments or support for their conclusion. *Id.* at 808 n.21.

96. *See, e.g.*, Diamond v. Chakrabary, 447 U.S. 303, 315 (1980); United Air Lines v. McMann, 434 U.S. 192, 199 (1977).

97. S. Rep. No. 989, 95th Cong., 2d Sess. 75, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5861; H.R. Rep. No. 595, 95th Cong., 2d Sess. 360 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6316 (emphasis added).

show the list is not complete or exact. In *American Surety Co. v. Marotta*,[98] the Supreme Court stated "[i]n definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration."[99] Therefore, ERISA, being a federally created act, is a part of the list even though it may have been enacted after most of those included.[100]

The majority also tried to distinguish ERISA-qualified plans from the types of plans on the list. The majority argued the provisions in the statutes on the list may be similar to the anti-alienation provisions in ERISA. The statutes on the list, however, regulate the federal government, while ERISA regulates private employer pension systems. Although ERISA regulates private employer pension systems, it *is* a federally created statute and is nonetheless similar to these statutes on the list.

The decision in *Mackey* is another reason why the majority viewpoint should not be given consideration by the Tenth Circuit. Opt-out jurisdictions are no longer allowed to use state exemptions that refer to ERISA-qualified plans because ERISA preempts them; therefore, debtors in bankruptcy cannot exempt their plans under section 522(d) of the Bankruptcy Code. If debtors in opt-out jurisdictions are unable to claim their plans as exempt under other federal law, they are then left in a no-way-out situation. It does not seem reasonable that debtors in jurisdictions which do not opt out can claim their plans as exempt under section 522(d)(10)(E) of the Bankruptcy Code, and debtors in opt-out jurisdictions cannot under section 522(b)(2)(A). Thus, logic dictates that Congress intended the plans to be exempt because the exemption is provided for in section 522(d)(10)(E). This effect supports the conclusion that in opt-out jurisdictions, where a state exemption is preempted by ERISA because of *Mackey*, a debtor can *still* successfully claim an exemption under other federal law in which ERISA-qualified plans are included.

98. 287 U.S. 513 (1933).

99. *Id.* at 517.

100. The majority also fails to recognize that two of the statutes on the list have been repealed, and in the case of two others, the citation given was not the specified provision. The civil service retirement benefit statute was repealed in 1966 while the foreign service retirement and disability statute was repealed in 1974. Although both were replaced with similar statutes, they were not included in the legislative history. The citation given for "[s]pecial pensions to winners of the Congressional Medal of Honor" is to a veterans' benefit statute, including winners of the Congressional Medal of Honor. The citation given for "veterans benefits" is to a railroad unemployment insurance statute. Note, *Exemption of ERISA Benefits Under Section 522(b)(2)(A) of the Bankruptcy Code*, 83 MICH. L. REV. 214, 223 (1984).

VI. CONCLUSION

The Tenth Circuit should follow the minority viewpoint when faced with the issue of whether debtors may claim their ERISA-qualified plans as exempt under other federal law in section 522(b)(2)(A) of the Bankruptcy Code. Clearly, debtors would suffer a great injustice in opt-out jurisdictions if they were not able to claim their plans as exempt, while debtors in other jurisdictions could. Because of *Mackey*, debtors in opt-out jurisdictions, such as Oklahoma, should receive the same treatment, and should be able to claim their plans as exempt under *other* federal law.

Betsy Grabel