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Are Qualified Plans Exempt in Bankruptcy? *Patterson* and Its Aftermath

Michael S. Singer

***Here is a comprehensive look at ERISA-qualified plans, and the ability of creditors to attach interest in retirement plans in general after* Patterson v. Shumate.**

Approximately five years ago, the US Supreme Court in *Patterson v. Shumate*[1] held that a bankrupt debtor's interest in a "qualified retirement plan" is exempt under Bankruptcy Code Section 541(c)(2) as property that is subject to a valid restriction under applicable nonbankruptcy law under the required anti-alienation provision set forth in Section 206(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA).[2] In fact, the decision of the Court in *Patterson* was unanimous.

The clarity of the *Patterson* decision as to the exempt nature of a qualified plan appeared absolute. In fact, the clarity of *Patterson* seemed to override the many years of incredibly inconsistent decisions prior to *Patterson*. Five years after *Patterson*, the issue of whether *all* retirement plans are exempt in bankruptcy that the Supreme Court seemed to answer *unanimously* and in the opinion of many, without a degree of vagueness, once again is unclear.

This two-part article analyzes the thinking behind *Patterson* and what it means for those designing (or maintaining) retirement plans in the future. In order to understand and comprehend *Patterson* and its aftermath, it is necessary to understand the history of the exemption of participant retirement balances in bankruptcy. This first part of this series will examine the structure of the laws encompassing retirement plans and prior trends in case law that played a vital role in the thinking of the Court in its ruling in *Patterson*. The second part of this series, which will appear in the September/October issue of the *Journal*, will analyze the opinion in *Patterson* and provide guidance for plans in the post-*Patterson* era.

Structure of Retirement Plan Law

Four different bodies of law relate to this exemption of participant retirement balances in bankruptcy:

- ERISA,
- the Internal Revenue Code of 1986 (IRC),
- the Bankruptcy Code (hereinafter the "Code"), and
- state law.

Even though this article will survey laws of numerous states, "state" law will focus on the laws of the State of Florida.[3]

Tax and Labor Law. When ERISA was enacted, it established a number of tax qualification requirements for retirement

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plans by amending the IRC under Section 401. IRC Section 401 dictates whether a plan is qualified, thus allowing an employer to deduct the value of a given plan contribution for federal income tax purposes. ERISA, however, went further and superimposed essentially identical substantive requirements on all plans established or maintained by any employer engaged in interstate commerce or in any industry or activity affecting interstate commerce. The aforementioned requirements under ERISA generally apply to all plans regardless of whether the plan sponsors actively seek tax qualification. Much overlap exists between ERISA and the IRC, and generally speaking, all overlapping provisions, except those that relate to prohibited transactions, are the province of the Internal Revenue Service (IRS).

Through the years, ERISA has come to be known as the labor law governing employee retirement plans. The provisions of ERISA (specifically the non-tax provisions, established by Title I of ERISA) are administered by the Department of Labor (DOL) and enforceable primarily through civil actions that may be brought in federal district courts by the Secretary of Labor, plan participants, beneficiaries, or fiduciaries.

"The IRC requires spousal consent to waive a spousal right to a joint-and-survivor annuity."

ERISA additionally imposes a number of substantive requirements relating to reporting, disclosure, and fiduciary duties that are not, technically, requirements for tax qualification. However, noncompliance with these requirements will result in civil enforcement and criminal penalties. Section 9343 of the Revenue Act of 1987 (REA) stated that except to the extent provided in the IRC or as determined by the Secretary of Treasury, Title I and Title IV are not applicable in interpreting the provisions of the IRC. Title I of ERISA relates to the protection of employee benefit rights and includes provisions that overlap in the IRC and ERISA, including the anti-assignment or anti-alienation provision contained under IRC Section 401(a)(13) and ERISA Section 206(d). Title IV of ERISA relates to fiduciary duties and includes provisions relating to prohibited transactions.

When an employer requests IRS approval for an advance determination of the qualified status of a retirement plan, ERISA requires that the employer give employees notice of such application to the IRS. Further, for all plans, the IRS notifies the DOL and the Pension Benefit Guarantee Corporation (PBGC) of such application. The PBGC plays a large role in meeting certain insurance requirements relating to some (generally larger defined benefit) plans.

The anti-alienation provision specifically requires that plan benefits cannot be assigned or alienated by its participants either voluntarily or involuntarily. Accordingly, under the guise of the anti-alienation provision, a judgment creditor "hypothetically" should not be able to reach a participant's plan balance in satisfaction of a judgment against a plan debtor. Similarly, a plan participant under the anti-alienation provision may not assign his plan benefits away to satisfy a debt or otherwise. This theme is even more clear in the requirement under IRC Section 401(a)(17) requiring plan benefits for married participants be paid in the form of a joint-and-survivor annuity. Thus, the IRC loosely characterizes a plan asset as a "marital" asset and requires spousal consent to waive a spousal right to a joint-and-survivor annuity.

Bankruptcy Law. The Bankruptcy Act of 1978 significantly changed the entire bankruptcy system set forth under prior Bankruptcy acts. Generally, bankruptcy is the forum where an insolvent debtor abides by a plan of bankruptcy to relieve all dischargeable debts. The overall objective of bankruptcy is to include all of the debtor's property except for "exempt" property in the bankrupt estate to pay creditors. Certain debts listed under Code Section 523(a) are not dischargeable in bankruptcy such as certain taxes, debts incurred by fraud, alimony or child support, willful and malicious injury, student

loans, and others. These excepted debts survive bankruptcy and follow the debtor after the bankruptcy discharge is granted.

Code Section 522 prescribes certain federal exemptions. However, Section 522(b)(1) allows states to "opt out" of the federal exemptions. Over half of the states, including Florida, have opted out of the federal bankruptcy exemptions. An election to opt out of the federal exemptions entitles the debtor to utilize his own state's exemptions. A common state exemption is for retirement plan balances.[4]

For purposes of this article, the Bankruptcy Code provides at least one significant exemption. This exemption is found under Section 541(c)(2) which basically allows the debtor to exempt property that would be exempt under applicable nonbankruptcy law.[5]

The Bankruptcy Discharge Process

A debtor in bankruptcy files at least two important schedules. The first schedule lists the debtor's exempt property, and the second schedule lists non-exempt property that will be made available through the trustee to the debtor's creditors. Inevitably, the trustee and the debtor often "disagree" as to the exempt nature of property. Arguments about such issues as fraudulent transfers, preferences, or form are often advanced by the trustee whose duty it is to gather as many assets for the estate as possible. The trustee often receives his compensation as a percentage of the value of assets gathered. Similarly, creditors may formally "object" to any of the debtor's claimed exemptions.

Florida, which has opted out of the federal exemptions, allows the debtor to utilize those exemptions prescribed under Florida law. With respect to the exemption of a debtor's retirement plan balance, Florida Statute Section 222.21 reads in relevant parts as follows:

> *Exemption of pension money and retirement or profit-sharing benefits from legal process:*
>
> (2)(a) Except as provided in subparagraph (b), any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit-sharing plan that is qualified under s.401(a), s.403(a), s. 403(b), s.408 or s. 409 of the Internal Revenue Code of 1986, as amended, is exempt from all claims of creditors of the beneficiary or participant.

Florida's statute is not atypical. The most interesting aspect of the Florida statute, and those like it, is that the exemption is tied to tax qualification under the IRC. Given the seemingly absolute nature of *Patterson* and the language of the Florida statute as written, it would appear that any debtor's retirement plan balance would be exempt in bankruptcy. However, if the answer were that simple, numerous volumes of bankruptcy cases would not exist.

The Law Prior to the *Mackey* Decision

The law relating to exemption of retirement plans in bankruptcy evolved over many years. The Bankruptcy Act of 1978, as amended, allows states to opt out of the federal exemptions. Florida did not have a state statute addressing the exemption of qualified plans balances until Section 222.21 was passed in 1987. Thus, between 1978 and 1987, bankruptcy courts in Florida and other states where statutes purporting to exempt qualified plan balances did not exist, were continually asked whether the Bankruptcy Act itself or some other law provided an exemption for retirement plans in bankruptcy.

"The trustee often receives his compensation as a percentage of the value of assets gathered."

EXHIBIT 1
Selected Pre-*Patterson* Cases Holding the Plan Balances Were Not Exempt

In re Bernot, 34 BR 515 (Bkrtcy. Ind. 1983)
In re DiPiazza, 29 BR 916 (Bkrtcy. MD Illinois 1983)
In re Goff, 706 F.2d. 574 (5th CCA. 1983)
In re Kelley, 31 BR 786 (Bkrtcy. ND Ohio 1983)
In re Werner, 31 BR 418 (Bkrtcy. D. Minn. 1983)
Warren v. GM Scott and Sons, 34 BR 543 (Bkrtcy. SD Ohio 1983)
In re Cook, 43 BR 996 (Bkrtcy. ND Ind 1984)
In re Graham, 726 F.2d 1268 (8th CCA. 1984)
In re Ridenour 45 BR 72 (Bkrtcy. ED Tenn. 1984)
In re Daniel, 771 F.2d 1352 (9th CCA. 1985)
In re DeWeese, 47 BR 251 (Bkrtcy. WD NC 1985)
In re Elsea, 47 BR 142 (Bkrtcy. ED Tenn. 1985)
In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985)
In re Mumm, 52 BR 140 (Bkrtcy. SD Fla 1985)
In re Matteson, 58 BR 909 (Bkrtcy. Colo. 1986)
In re Slezak, 63 BR 625 (Bkrtcy. WD Ky. 1986)
In re Sundeen, 62 BR 619 (Bkrtcy. CD Ill. 1986)
In re Bowen, 80 BR 1012 (Bkrtcy. S.Dakota 1987)
In re Cates 73 BR 874 (Bkrtcy. D. Oregon 1987)
In re Dagnall, 78 BR 531 (Bkrtcy. CD Ill. 1987)
In re Ewald, 73 BR 792 (Bkrtcy. WD Tex 1987)
In re Faulkner, 79 BR 362 (Bkrtcy. ED Tenn. 1987)
In re Rodriguez 82 BR 74 (Bkrtcy. WD Ark. 1987)
In re Swanson, 79 BR 422 (Bkrtcy. D.Minn. 1987)
In re Gribben, 84 BR 494 (Bkrtcy. SD Ohio 1988)
In re Loe, 83 BR 641 (Bkrtcy. Minn. 1988)
In re Leimbach, 99 BR 796 (Bkrtcy. SD Ohio 1989)
In re McDonald, 100 BR 598 (Bkrtcy. SD Fla. 1989)
Perry v. PIE, 872 F.2d 157 (6th Cir. 1989)
(generally acknowledging ERISA's broad preemptive effect)
In re Silldorf, 96 BR 859 (Bkrtcy. CD Ill. 1989)
In re Walker, 108 BR 769 (Bkrtcy. ND Okl. 1989)
In re Kallas, 113 BR 673 (Bkrtcy. D. Oregon. 1990)
In re Mead, 110 BR 434 (Bkrtcy. WD Missouri 1990)
In re Smith, 115 BR 144 (Bkrtcy. CD Ill. 1990)
In re Smith, 124 BR 787 (Bkrtcy. WD Mo. 1991)
In re Watson, 13 BR 391 (Bkrtcy. SD Fla. 1991)

The landmark case in the Eleventh Circuit Court of Appeals was *In re Lichstrahl*.[6] The *Lichstrahl* decision, along with the vast majority of cases across the country, held that plan balances were not exempt (see Exhibits 1 and 2). Often, these cases closely examined the legislative history of the Bankruptcy Act. Debtors would typically argue, to little success, that a debtor's particular retirement plan balance was exempt under Section 541(c)(2) because the underlying pension trust qualified as a spendthrift trust under the anti-alienation provision imposed by the IRC and ERISA.

In *Lichstrahl*, the debtor was a physician who set up a pension plan in which he was the trustee, plan administrator, and sole participant in the plan. Because of these facts, the Court held that a valid spendthrift trust could not exist for a "self-settled" trust despite the existence of valid anti-alienation provisions.

Lichstrahl went one step further than other cases and examined the legislative history of the Bankruptcy Act of 1978. The Court relied on language in the Committee Reports to the Bankruptcy Act that discussed creating a federal bankruptcy exemption under the Bankruptcy Act for ERISA-qualified plans. Ultimately, the Bankruptcy Act did not create such an exemption. Accordingly, the vast majority of courts, held that the Bankruptcy Code considered ERISA, and that ERISA plans were specifically *not* included in a bankrupt estate's exempt asset column. Debtors argued that under Code Section 541(c)(2) the plan and trust were exempt under "applicable nonbankruptcy law"—in this case, ERISA. The courts in examining the legislative history held that mention of ERISA in the Committee Reports was evidence that the drafters considered ERISA, and under the federal law of preemption consumed ERISA.

Generally, the federal law of preemption dictates that to the extent that a federal rule exists on a specific issue, state law is preempted. Where federal laws are in conflict with each other, generally the latter law is held to consume the first law, especially if the latter law addresses (in any way) the prior law. Accordingly, because of the legislative history and the fact that the Bankruptcy Act came after ERISA, the courts held, in essence, that the Committee Reports through the Bankruptcy Act consumed any possibility of ERISA creating a separate exemption in bankruptcy.

Generally, in Florida, until 1987 when Florida passed Section 222.21, retirement plan balances were not exempt in bankruptcy. Again, this conclusion was reached because courts held that the plan

usually did not qualify as a spendthrift trust (for the shareholders) and that ERISA itself did not create a separate bankruptcy law exemption under "applicable nonbankruptcy law."

Mackey and the Preemption of State Law

In 1987, Section 222.21 was passed and Florida practitioners thought the entire question of whether plan balances were exempt was moot. Similarly, practitioners in other states with state statutes exempting plan balances and opting out of the federal bankruptcy exemptions, also believed that plan balances were exempt. During the summer of 1988, the Supreme Court authored a controversial opinion in the case of *Mackey v. Lanier Collection Agency and Service, Inc.*.[7]

The Facts of the Case. *Mackey* made its way through the Georgia State court system before it was granted certiorari by the US Supreme Court. *Mackey* was not a bankruptcy case. Lanier was a collections agency that was trying to garnish various longshoremen's vacation and holiday pay plans. *Mackey* actually was a decision based on the garnishment laws, not on the issue of preemption. Mackey contended that the Georgia state statute,[8] which provided in part that ERISA plans shall not be subject to garnishment action (except for child support or alimony), protected his vacation and holiday pay plan (which qualifies as an "ERISA" plan). The Georgia Supreme Court, reversing the lower district court of appeals, stated that the Georgia statute was preempted by ERISA because the state statute "purports to regulate garnishment of ERISA funds and benefits specifically provided for in the federal scheme."[9]

The Supreme Court Decision. The US Supreme Court, in a five-to-four decision authored by Justice White, affirmed the Georgia Supreme Court as to the garnishment issue before the Court. However, in dicta the Court stated that Section 514 of ERISA "preempts any and all state laws insofar as they may now or hereafter relate to any employee benefit plan"[10] covered by the statute. The Court further stated 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."[11] This author seriously doubts that the majority had any idea of how analyzed, overanalyzed, and perhaps misanalyzed these words would be.[12]

The dissent, authored by Justice Kennedy, forecasted the fallout of *Mackey*, in writing the deliberate, expansive reach of § 514 necessarily encompasses many state laws that would be pre-empted

EXHIBIT 2
Selected Pre-*Patterson* Cases Holding the Plan Balances Were Exempt

Pension Plan Exempt Because the State Statute was Tied to IRC
In re Everhart, 11 BR 726 (Bkrtcy. ND Ohio 1981)
In re Flygstad, 56 BR 884 (Bkrtcy. ND Iowa 1986)
In re Griggs, 101 BR 393 (Bkrtcy. MD Ga. 1989)

Elective Deferrals Not Exempt/Employer Contributions Exempt
In re Monahan, 68 BR 997 (Bkrtcy. SD Fla. 1987)
In re Tisdale, 112 BR 61 (Bkrtcy. D. Conn. 1990)

Plan Exempt Under Section 522(d)(10)(E)
In re Pruitt, 30 BR 330 (Bkrtcy. Col. 1983)
In re Pettit, 55 BR 394 (Bkrtcy. SD Iowa. 1985)

Other Cases
In re Threewitt, 24 BR 927 (Bkrtcy. D. Kansas 1982)
In re Hinshaw 23 BR 233 (Bkrtcy. D.Kansas. 1983)
In re Holt, 32 BR 767 (Bkrtcy. ED Tenn. 1983)
In re Mosley, 42 BR 181 (Bkrtcy. NJ 1984)
In re Lawson 67 BR 94 (Bkrtcy. MD Fla. 1986)
(very fact specific relating to an employee stock ownership plan)
In re Wallace, 66 BR 834 (Bkrtcy. ED Mo. 1986)
In re Wiggins, 60 BR 89 (Bkrtcy. ND Ohio. 1986)
In re Hohl, 81 BR 459 (Bkrtcy. ND Ill. 1987)
In re West, 81 BR 22 (9th Cir. BAP 1987)
In re Hysick, 90 BR 770 (Bkrtcy. ED Pa. 1988)
In re Ralstin, 61 BR 502 (Bkrtcy. Kansas 1988)
In re Stansberry, 101 BR 508 (Bkrtcy. ED Tenn. 1989)
In re Toner, 105 BR 978 (Bkrtcy. D. Col. 1989)
Kincaid v. Watson, 917 F.2d 1162 (9th CCA. 1990)
Morter v. Farm Credit Services, 937 F.2d 354 (7th Cir. 1991)

EXHIBIT 3
Selected Cases Holding that ERISA Preempted State Statutes Governing Qualified Plans

In re Boon, 90 BR 988 (Bkrtcy. WD Missouri. 1987)
In re Hirsch, 98 BR 1 (Bkrtcy. D. Az. 1988)
In re O'Brien, 94 BR 583 (Bkrtcy. WD Mo. 1988)
In re Brown, 95 BR 216 (Bkrtcy. ND Okl 1989)
In re Bryant, 106 BR 727 (Bkrtcy. MD Fla 1989)
In re Ewell, 104 BR 458 (Bkrtcy. MD Fla 1989)
In re Flindall, 105 BR 32 (Bkrtcy. Arizona 1989)
In re McLeod, III, 102 BR 60 (Bkrtcy. SD Miss. 1989)
In re Sellers, 107 BR 152 (Bkrtcy. ED Tenn. 1989)
In re Sheppard, 106 BR 724 (Bkrtcy. MD Fla. 1989)
In re Siegel, 105 BR 556 (Bkrtcy. D. Az. 1989)
In re Weeks, 106 BR 257 (Bkrtcy. ED Okl. 1989)
In re Carver, 116 BR 985 (Bkrtcy. SD Iowa 1990)
In re Conroy, 110 BR 452 (Bkrtcy. Montana 1990)
In re Fritzvold 115 BR 192 (Bkrtcy. Minnesota 1990)
In re Gaines, 121 BR 1015 (Bkrtcy. WD Missouri 1990), affirming 106 BR 1008 (Bkrtcy. WD Missouri. 1989)
In re Gardner, 118 BR 860 (Bkrtcy. MD Fla 1990)
In re Green, 123 BR 327 (Bkrtcy. WD Missouri 1990)
In re Lee, 119 BR 833 (Bkrtcy. MD Fla 1990)
In re Martin, 119 BR 297 (Bkrtcy. MD Fla 1990)
In re McIntosh, 116 BR 277 (Bkrtcy. ND Okl. 1990)
In re Messing, 114 BR 541 (Bkrtcy. ED Tenn. 1990)
In re Morrow, 122 BR 151 (Bkrtcy. MD Fla 1990)
In re Pruner, 122 BR 459 (Bkrtcy. MD Fla. 1990)
In re Ree, 114 BR 286 (Bkrtcy. ND Okl. 1990)
In re Rosenquist, 122 BR 775 (Bkrtcy. MDFla. 1990)
In re Schmitt, 113 BR 1007 (Bkrtcy. WD Mo. 1990)
In re Smith, 123 BR 423 (Bkrtcy. MD Fla. 1990)
In re Arcement, 136 BR 425 (Bkrtcy. EDLa 1991)
In re Davis, 125 BR 242 (Bkrtcy. WD Missouri. 1991)
In re Fullmer, 127 BR 55 (Bkrtcy. CD Utah. 1991)
In re Kazi, 125 BR 981 (Bkrtcy. SD Ill 1991)
In re Knowles, 123 BR 428 (Bkrtcy. MD Fla 1991)
Pitrat v. Garlikov, 947 F.2d 419 (9th Cir. 1991)
In re Smith, 129 BR 262 (Bkrtcy. MD Fla. 1991)
In re Velis, 123 BR 497 (Bkrtcy. D. NJ 1991), affirming 109 BR 64 (Bkrtcy. D. NJ 1989)
In re Wimmer, 129 BR 563 (Bkrtcy. CD Ill. 1991)
In re Hadnot, 138 BR 637 (Bkrtcy. MD Fla 1992)
In re Sawyers, 135 BR 371 (Bkrtcy. WD Mo. 1992)
In re Seolas, 140 BR 266 (Bkrtcy. ED Cal. 1992)
In re Vanmeter, 137 BR 908 (Bkrtcy. MD Ind. 1992)

even in the absence of its broad mandate, solely on the basis of their conflict with ERISA's substantive requirements...To suggest this type of overlap is sufficient to call into question the applicability of §514 is to defeat the very purpose for which it was enacted.[13]

Practitioners in Florida posed the seemingly impossible rhetorical question: Could dicta from a Supreme Court decision stating that ERISA preempted a state garnishment statute involving a longshoreman's vacation and holiday pay plan "undo" Florida's newly enacted statute and all of the underlying work needed to get such a statute passed? Across the bankruptcy courts, the snowballing effect of the *Mackey* dicta was astounding.

The Fallout. In between the *Mackey* decision and *Patterson*, the Supreme Court decided *Guidry v. Sheet Metal Workers Pension Fund.*[14] The Court held that a labor union could not impose a constructive trust on a beneficiary who embezzled funds from his employer. Thus, the Court attempted to demonstrate its belief that pension benefits are sacred. However, the bankruptcy courts did not seem to "get it."

As mentioned, *Mackey* was not a bankruptcy case. Prior to *Patterson*, the legal community was in disagreement as to the issue of whether a qualified plan was exempt in bankruptcy. As seen in Exhibit 3, in fact, the great majority of bankruptcy courts held that pension plans were not exempt in bankruptcy, as ERISA preempted state statutes that purported to govern qualified retirement plans. As noted previously, the number of reported cases was very substantial. Numerous courts concluded that because the Bankruptcy Code Committee Reports discussed, but did not specifically create an exemption for qualified plans, such plans were not exempt and became part of the bankruptcy estate.

Further, trustees went so far as to argue that the preemptive effect of *Mackey* was so pervasive that it acted to obliterate state statutes where the exemptions for Individual Retirement Accounts (IRAs) were contained in the same statute as that for qualified plans. This argument generally did not work, and IRAs were deemed exempt. Exhibit 4 provides a survey of cases focusing on this argument.

Numerous states do not exempt IRAs by statute and in those states some of the results were quite "peculiar" as to the applicability of the federal bankruptcy exemptions. For example, *In re Chick*,[15]

and *In re Heisy*,[16] decided that Section 522(d)(10)(E) did not protect IRAs, as did *In re Moss*[17] and *In re Orlebeke.*[18] However, contrast these cases with *In re Chiz*,[19] which exempted the IRA under the exact same provision.[20]

A few courts, at least in the opinion of the Supreme Court in *Patterson* had the sense not to over-analyze *Mackey* and held that qualified plans were exempt from the bankrupt estate. The Southern District of Florida, for example, under opinions written by every judge sitting at the time led the charge of "common sense" holding that qualified plans were exempt in bankruptcy, under Florida Statute Section 222.21. Further, the Southern District held that the Florida Statute was not preempted by ERISA and enjoyed its own autonomous exemption, despite the fact that both the Middle and Northern Districts of Florida joined the majority of courts in their reading of *Mackey*.[21]

As the cases continued to come down, with the vast majority holding that plan balances were not exempt, several Circuit Courts of Appeal and some bankruptcy courts[22] held that plan balances were in fact exempt.[23] Some states themselves attempted to pass legislation and "invent" other mechanisms to protect participant balances. These attempts had little success.[24] Even after *Patterson*, states have occasionally "stretched" to achieve favorable results.[25]

The Eleventh Circuit Court of Appeals affirmed the Southern District's result (and overruled the Middle and Northern District) in the case of *In re Schlein*[26] in stating that the Florida Statute was not preempted by ERISA and did in fact create an independent and separate exemption under Florida law that carried over into bankruptcy because Florida opted out of the federal exemptions. However, *Schlein* only went so far as to preserve the Florida exemption, not to comment as to whether ERISA established its own exemption under Section 541(c)(2).

Thus, prior to *Patterson*, the Circuits were split as to what was "applicable non-bankruptcy law" for purposes of Section 541(c)(2). Several Circuits believed that Section 541(c)(2) was limited to those instruments that qualified as spendthrift trusts under their respective state statutes, and those Circuits usually held that qualified plans did not qualify as spendthrift trusts. Other Circuits held that Section 541(c)(2) was not restricted to spendthrift trusts and found that pension trusts could qualify for Section 541(c)(2) protection.

EXHIBIT 4
Selected Cases Where Trustees Argued *Mackey* Obliterated IRA Exemptions

Court Holds IRAs are Exempt
In re Herrscher 121 BR 29 (Bkrtcy. D. Az. 1989)
In re Kazi 125 BR 981 (Bkrtcy. SD Ill. 1991)
In re Barlage 121 BR 352 (Bkrtcy. D. Minn 1990)
In re Chadwick 113 BR 540 (Bkrtcy. WD Missouri 1990)
In re Martin 102 BR 639 (Bkrtcy. ED Tenn. 1989)
In re Nelson 180 BR 584 (Bkrtcy. 9th Cir. BAP 1995)
In re Printy 171 BR 448 (Bkrtcy. D. Mass. 1994)
In re Pryor 134 BR 28 (Bkrtcy. ED Okl. 1991)
In re Ridgway 108 BR 294 (Bkrtcy. ND Okl. 1989)
In re Schwartz 185 BR 479 (Bkrtcy. D. NJ 1995)
In re Solomon 166 BR 832 (Bkrtcy. D. Md. 1994)
In re Mann 134 BR 710 (Bkrtcy. ED NY 1991)
In re Laxson 102 BR 85 (Bkrtcy. ND Tex. 1989)

But Contrast With
In re Bharucha 115 BR 671 (Bkrtcy. D. Ariz 1990)
(IRA is tested at time contribution was made, irrespective of funds' present status as IRA rollover)

A Preview of the *Patterson* Decision

The US Supreme Court's June 15, 1992 unanimous ruling in *Patterson v. Shumate* held that ERISA's anti-alienation provision was, in fact, a restriction on transfer enforceable under "applicable non-bankruptcy law" and that the debtor's plan balance was exempt from the bankrupt estate. One of the trustee's central arguments in this case was the same argument that had been advanced prior to

Mackey, relating to the Committee Reports for the Bankruptcy Act of 1978.

The second article of this two-part series, which will appear in the following issue of the *Journal*, will analyze the decision of the Court and the legal implications on *all* retirement plans. ■

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[1]Patterson v. Shumate, 112 S.Ct. 2242, 504 US 753, 119 L.Ed.2d 519 (1992).
[2]Patterson, 112 S.Ct. 2248.
[3]Although each of these laws has been amended numerous times since their last major revision, the key provisions relative to the scope of this paper have not changed.
[4]For an example of such a statute, see Florida Statute § 222.21.
[5]Code § 541(c)(2) exempts interests held in certain instruments and states that "a restriction on the transfer of the beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."
[6]In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985).
[7]Mackey v. Lanier Collection Agency and Service, Inc., 486 US 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988).
[8]Ga. Code Ann. § 18-4-22.1 (1982).
[9]Mackey, 108 S.Ct. 2184.
[10]Id. at 2191.
[11]Id.
[12]Justice Scalia's concurrence in *Patterson* at 108 S.Ct. 2250 - 2251 provides interesting reading in this regard and is discussed further in the second article in this two-part series.
[13]Mackey, 108 S.Ct. 2194.
[14]Guidry v. Sheet Metal Workers Pension Fund, 493 US 365, 100 S.Ct. 680, 107 L.Ed.2d 782 (1990)
[15]In re Chick, 135 BR 201 (Bkrtcy. Conn. 1990).
[16]In re Heisy, 88 BR 47 (Bkrtcy. D. NJ 1988).
[17]In re Moss, 143 BR 465 (Bkrtcy. WD Mich. 1992).
[18]In re Orlebeke,141 BR 569 (Bkrtcy. SD NY 1992).
[19]In re Chiz, 142 BR 592 (Mass. 1992).
[20]Code § 522(d)(10)(e) exempts "a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of serve, 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), or 408 of the [IRC.]"
[21]See, e.g., In re Martinez, 107 BR 378 (1989); In re Rosenblum, 132 BR 970 (1991); In re Kimmel, 131 BR 223 (1991); In re Bryan, 106 BR 749 (1989); In re Suarez, 127 BR 73 (1991); In re Seslowsky 135 BR 692 (1991); In re Seilkop, 107 BR 776 (SD Fla. 1989); In re Wines, 113 BR 787 (SD Fla. 1990); and In re Gurvich, 132 B.R. 976 (1990). But compare with In re Bryant, 106 BR 727 (Bkrtcy. MD Fla 1989); In re Ewell, 104 BR 458 (Bkrtcy. MD Fla. 1989); In re Gardner 118 BR 860 (Bkrtcy. MD Fla 1990); In re Hadnot, 138 BR 637 (Bkrtcy. MD Fla. 1992); In re Knowles, 123 BR 428 (Bkrtcy. MD Fla. 1991); In re Lee, 119 BR 833 (Bkrtcy. MD Fla. 1990); In re Martin, 119 BR 297 (Bkrtcy. MD Fla 1990); In re Morrow 122 BR 151 (Bkrtcy. MD Fla 1990); and In re Pruner, 122 BR 459 (Bkrtcy. MD Fla. 1990)
[22]More bankruptcy courts leaned this way towards the time that *Patterson* was actually decided.
[23]See, e.g., Moore v. Raine, 907 F.2d 1476 (4th Cir. 1990); In re Harline, 950 F.2d 669 (10th Cir. 1991); Velis v. Kardanis, 949 F.2d 78 (3rd Cir. 1991); In re Lucas, 924 F.2d. 597 (6th Cir. 1991); In re Vickers, 954 F.2d. 1426 (8th Cir. 1992); In re Wittwer 163 BR 614 (9th BAP 1994), affirming without opinion 148 BR 930 (Bkrtcy. ED Cal. 1992); In re Hentzen 126 BR 600 (Bkrtcy. D. Kan. 1991); In re Hennessey, 135 BR 711 (Bkrtcy. D. Mass 1992); and In re White, 131 BR 526 (Bkrtcy. D. Mass 1991). In re Wyles 123 BR 733 (Bkrtcy ED Va. 1991) and In re Shaker 137 BR 930 (Bkrtcy. WD Wisc. 1990) held that even though *Mackey* might cause preemption, ERISA created a separate exemption under the "other applicable nonbankruptcy law" exception through ERISA's required anti-alienation provision.
[24]See, e.g., In re Balay, 113 BR 429 (Bkrtcy. ND Ill. 1990); In re Lyons, 114 BR 572 (Bkrtcy. Ill. 1990); and In re Summers, 108 BR 200 (Bkrtcy. SD Ill. 1989), where Illinois attempted to make all qualified plans "spendthrift trusts" by state statute. But see In re Babo, 97 BR 827 (Bkrtcy. WD Pa. 1989). See also In re Garrison, 108 BR 760 (Bkrtcy. ND Okl 1989) and In re Garvin, 129 BR 598 (Bkrtcy. SD Indiana 1991), where states passed laws during the period between *Mackey* and *Patterson*, but those state's bankruptcy courts ruled, for example, that such legislation overstepped the state's permitted constitutional authority. See also, e.g., In re Kleist 114 BR 366 (Bkrtcy. ND NY 1990), which upheld the exemption after New York passed 1989 legislation declaring that all pension plan trusts are "spendthrift."
[25]See, e.g., In re Johnson, 191 BR 75 (Bkrtcy. MD Pa. 1995), which held that although tax-deferred retirement annuity did not qualify under ERISA, it did qualify as a spendthrift trust under state law.
[26]In re Schlein, 8 F.3d 745 (11th Cir. 1993).