ERISA Preemption of "Direct" and "Indirect" Community Property Interests in Pension Plans upon the Non-Participant Spouse's Death

Grant Summers
ERISA Preemption of "Direct" and "Indirect" Community Property Interests in Pension Plans upon the Non-Participant Spouse's Death

I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 (hereinafter ERISA) put into place the federal government's comprehensive scheme for the regulation of private employee benefit plans. ERISA protects the interests of employee participants in such plans and provides a uniform, national system of law governing plan administration. While ERISA is a complex statute, containing many rules for the management of employee benefits, this comment focuses on two provisions in particular: The anti-alienation, or spendthrift, clause, which decrees "pension plan[s] shall provide that benefits under the plan may not be assigned or alienated," serves to protect the interests of employees in benefit plans; and the preemption clause, which displaces "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," seeks to promote national uniformity.

ERISA's preemptive power under these clauses is a cause of concern for states with a community property system governing marital property rights. In these states, the spouse of a participant in a pension plan may own a portion of the contract right to receive benefits payable under the plan. Some community property states' laws provide for the transmission of the non-employee spouse's share in the plan to heirs or legatees of that spouse. This transfer, however, may be preempted by either the spendthrift or express preemption clauses of ERISA.

Copyright 1994, by LOUISIANA LAW REVIEW.

2. Id. § 1001(b) (1988).
5. Id. § 1144(a).
6. Currently, eight states employ community property principles in determining spousal rights to the property of a marriage: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington. W.S. McClanahan, Community Property Law in the United States § 1:1 (1982). For insight into how community property systems were established in each of these jurisdictions, see William Q. deFuniak & Michael J. Vaughn, Principles of Community Property §§ 37-52 (2d ed. 1971).
Therefore, this comment will address these issues: (1) Would state recognition of the rights of the heirs, legatees, or estate of a non-participant spouse to receive benefits payable under a plan conflict with the language of ERISA’s spendthrift clause, and thus be preempted? (2) Would such state recognition “relate to” an employee benefit plan within the meaning of ERISA, and thus be expressly preempted by the preemption clause? and (3) Even if either of these two federal provisions prevent community property states from giving a “direct” right to the employee’s benefits under ERISA, are states similarly precluded from using other property of the marriage to compensate for the preempted rights of the heirs or legatees?

In addressing these questions, Part II of this comment will look first at the history, provisions, and purpose of ERISA, particularly the spendthrift and preemption clauses. Part III will discuss federal preemption doctrine, both generally and as that doctrine is applied in cases involving state domestic relations laws. Part IV turns to the only three reported cases that have addressed the questions of preemption of the non-participant’s community share. Finally, Part V will analyze the question of federal preemption and the non-employee’s

California Civ. Code § 4800.8 abrogated California’s judicially-created terminable interest rule, which had barred the non-employee spouse’s community interest from continuing past her death. See also Allard v. Frech, 754 S.W.2d 111, 114 (Tex. 1988) (concluding community interest in pension plan attributable to husband’s service “was property included in the wife’s estate”).

In Louisiana, the transmissibility of the non-employee spouse’s community interest in pension plans is clearly contemplated under Louisiana Civil Code article 890.1, which states:

If a recurring payment is being made from a public or private pension or retirement plan ... to one partner or to both partners of a marriage, and the payment constitutes community property, and one spouse dies, the surviving spouse shall enjoy a legal usufruct over any portion of the continuing recurring payment which was the deceased spouse’s share of their community property, provided the source of the benefit is due to payments made by or on behalf of the survivor.

This usufruct shall exist despite any provision to the contrary contained in a testament of the deceased spouse.

The usufruct granted by this Article shall be treated as a legal usufruct and is not an impingement upon the legitime and a naked owner shall not have a right to demand security.

This article apparently only applies when the retirement plan is in pay status at the time of the non-employee spouse’s death. It makes the participant spouse, in effect, the forced heir of a usufruct over the non-employee’s community share of a retirement plan sponsored by the employee spouse’s employer. See generally Laura J. Carman, Louisiana Successions § 5:4, at 161-65 (1994).

Louisiana law on the subject is further complicated by uncertainty about the way in which disbursements of the community interest in retirement plans are to be made, and the more general concern of how the deceased non-employee spouse’s share of the community is to be administered. In any case, because of Article 890.1, the issue of the inclusion of a community interest in the employee spouse’s retirement plan in the non-employee spouse’s estate will probably not be raised until the remarriage of the employee spouse.

community share, and speculate how community property states might achieve the
division of pension plans without running afoul of ERISA.

The conclusion of this comment is that states are precluded by ERISA from
ordering plans to pay benefits to the non-employee spouse’s heirs, legatees or
estate. While such “direct” rights to employee benefits do not “relate to” ERISA
plans under Section 514(a), they are “transfers” of benefits that conflict with the
spendthrift clause. Nothing in ERISA, however, indicates states may not recognize
the deceased non-employee spouse’s community property rights in pension plans
in ways that have no impact upon the plan itself. “Indirect” recognition of a
deceased non-participant’s community share, through the distribution of property
of equal value to that interest, does not “relate to” the ERISA plan nor constitute
a “transfer” in violation of the spendthrift clause.

II. ERISA’S HISTORY, PURPOSES, AND PROVISIONS

A. ERISA’s Minimum Standards for Employee Benefit Plans

Before 1974, a number of problems plagued workers participating in employee
benefit plans. Retired employees frequently suffered reductions or terminations of
benefits because their plan had been inadequately funded or depleted through poor
management. Strict and elaborate eligibility requirements often barred life-long
employees from receiving benefits upon their retirement.10 Through ERISA’s
enactment, Congress sought to protect employees and their beneficiaries from such
abuses by making benefit plan regulation an exclusively federal concern.

ERISA covers almost every aspect of plan administration. It does not mandate
that employers maintain plans; it allows the decision by each employer to provide
a benefit plan to be a private matter.11 ERISA does, however, impose duties upon
employers when plans are provided.12 These minimum standards are set forth in
labor provisions, which are enforceable by participants, their beneficiaries, or the
Department of Labor.13 In these provisions, ERISA establishes minimum funding
standards,14 participation and vesting standards,15 fiduciary duties for plan
administrators,16 and stringent reporting and disclosure guidelines.17

10. James O. Castagnera & David A. Littell, Federal Regulation of Employee Benefits § 3.1
(1992). For a brief history and description of ERISA, see Jack E. Morris, Comment, Small
4639-43.
12. Castagnera & Littell, supra note 10, § 3.1.
14. Id. §§ 1081-1086.
15. Id. §§ 1051-1061.
16. Id. §§ 1101-1114. ERISA requires plans to designate at least one named fiduciary to serve
as administrator of the plan. Id. § 1102(a) (1988). A fiduciary can be a sponsoring corporation, a
plan committee, or another entity that is not a natural person. Id. § 1102(a)(1).
The minimum standards of ERISA cover employee benefit plans established or maintained by either employers or unions representing employees "engaged in commerce or in any industry or activity affecting commerce." There are few exceptions to this coverage. "Employee benefit plans" covered by ERISA include pension benefit plans, which are designed to allow employees to accumulate savings for retirement during their work life; and welfare benefit plans, which are more short-term in their perspective, do not accumulate over time, and are designed for contingencies other than retirement. The distinction between the two plans is important because ERISA does not regulate them in the same way. In particular, the spendthrift clause, which prohibits to employee benefit plans. The approach is designed to accomplish the sometimes contradictory goals of placing increased standards on plans and promoting their adoption. See Castagnera & Littell, supra note 10, § 3.1. ERISA contains four titles: Titles I, III, and IV enacted labor provisions into Title 29, Chapter 18 of the United States Code, while Title II brought changes to the Internal Revenue Code. Practicing Law Institute, Introduction to Qualified Pension and Profit-Sharing Plans 19-23 (1979).

Title I of ERISA, 29 U.S.C. §§ 1051-1145 (1988 & Supp. V 1993), sets forth minimum standards and provides for their enforcement. See supra notes 13-17 and accompanying text. This is the "stick" of ERISA, and contains the provisions that are the focal point of this comment. These provisions are mandatory for the plans they cover. See infra notes 18-23 and accompanying text for ERISA's minimum standard coverage.

Title II of ERISA, I.R.C. §§ 401-405 (1988 & Supp. V 1993), contains the "carrot" of ERISA—the enactment of standards for funds which will enable plans to attain "qualified" status, which entitles employers and employees to favorable tax treatment. If a plan is qualified, employers can accelerate deductions and employees can defer taxation of their benefits. See Henry H. Perritt, Jr., Employee Benefits Claims Law and Practice § 2.4 (1990). See also Perritt, supra, §§ 2.6-2.9 for an explanation of the advantages in taxation to employers and employees stemming from qualification and qualification procedures. Many of the Internal Revenue Code and labor provisions parallel each other. Castagnera & Littell, supra note 10, § 3.23. See Perritt, supra, § 2.3 for a brief explanation of the relationship between the labor provisions and tax provisions of ERISA.


19. The exceptions are governmental plans, church plans, plans maintained solely for the purpose of complying with applicable workmen's compensation laws, unemployment compensation laws, or disability insurance laws, plans maintained outside the United States primarily for the benefit of nonresident aliens, and excess benefits plans that are unfunded. Id. § 1003(b).

20. Id. § 1002(3).

21. Id. § 1002(2)(A).

22. Id. § 1002(1). Welfare benefit plans include those established for health, disability, death, unemployment, and vacation benefits. Id.

the assignment of the right to receive plan benefits, applies only to pension plans.

B. The Basic Rule of Benefit Entitlement Under ERISA Plans

The basic premise of benefit entitlement under ERISA is that only participants and their beneficiaries are entitled to receive benefits under an employee benefit plan. Plan fiduciaries are required to discharge their duties concerning a plan “solely in the interest of the participants and beneficiaries” and for the exclusive purpose of “providing benefits to participants and their beneficiaries.” A “participant” is defined by ERISA as “any employee or former employee of an employer . . . who is or may become eligible to receive a benefit” under the plan. A “beneficiary” is a person “designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.”

Nevertheless, when the employee benefit plan is a welfare benefit plan, creditors of a participant may seize the employee’s benefits under state law garnishment mechanisms in satisfaction of a participant’s debts. Such a route is not, however, available to creditors regarding pension plans. Pension plans are covered by ERISA’s spendthrift clause, which prohibits assignment or alienation of the right to receive pension plan benefits.

C. The Spendthrift Clause of ERISA

The right to receive benefits under an ERISA pension plan may not be transferred to another party. Section 206(d)(1) of ERISA mandates that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” State laws permitting such alienations are generally preempted. Section 206(d)(1) is part of ERISA’s minimum standards on participation and vesting, and thus applies to pension benefit plans, but not to

24. See 29 U.S.C. § 1001(b) (1988) (“It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries.”).
25. Id. § 1104(a)(1)(A)(i).
26. Id. § 1002(7).
27. Id. § 1002(8).
29. See infra notes 30-40 and accompanying text.
welfare benefit plans. This provision precludes both voluntary transfers and involuntary transfers, such as garnishment and attachment.

The purpose of Section 206(d)(1) is to protect employees and their dependents from the participant’s financial improvidence and to ensure benefits are available upon retirement. This policy is strong. In *Patterson v. Schumate*, for example, the United States Supreme Court held the spendthrift clause permitted a debtor to exclude $250,000 in pension assets from his bankruptcy estate. In *Guidry v. Sheet Metal Workers National Pension Fund*, a union member embezzled $377,000 from a union-sponsored pension plan. The Court found the spendthrift clause protected his pension benefits from offsets to compensate for the stolen funds. Thus, Section 206(d)(1) protects benefits even if that protection “prevents others from securing relief for the wrongs done to them.”

The spendthrift clause has only two explicit exceptions. First, it allows any voluntary and revocable alienation of up to ten percent of any benefit payment. Second, it allows transfers of benefits when such transfers are made pursuant to a Qualified Domestic Relations Order (QDRO). The QDRO is designed, in part, to allow states to recognize non-participant spouses’ community property rights in pension plans when their marriage to the participant ends in divorce. The QDRO exception is discussed in greater detail later in this comment.

D. The Preemption Clause of ERISA

Section 514(a) of ERISA states that its provisions “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit

---

32. *See Mackey*, 486 U.S. at 836, 108 S. Ct. at 2189 (illustrating the different treatment given to welfare plans and pension plans regarding alienation and assignment).
33. *Id. See also* Travelers Ins. Cos. v. Fountain City Fed. Credit Union, 889 F.2d 264 (11th Cir. 1989) (holding judgment creditor precluded from attaching or garnishing proceeds of ERISA-qualified pension plan).
37. *Id. at* 376, 110 S. Ct. at 687.
40. The QDRO exception, it should be noted, is not solely designed to deal with state community property divisions upon divorce. It also serves to exempt state domestic support laws from preemption and allows for property transfers in compliance with equitable distribution principles.
The words "relate to" are an empty legislative vessel into which the courts have poured a great deal of content. The tendency has been to interpret the clause as broadly as it sounds, finding preemption of state laws with even a tangential effect upon employee benefit plans. This expansive interpretation is linked not only to the expansive language of the clause, but also to the legislative purpose behind the clause.

The bill that later became ERISA originally contained a more limited clause that preempted only state laws in the areas which ERISA addressed (participation, vesting, funding, disclosure, and fiduciary duties). This "relationship to the Act" standard was abandoned in favor of the "relationship to the plan" test enacted in 1974. The broader version of Section 514(a) was designed to make the regulation of pension plan providers an exclusively federal concern by expressly occupying that field for congressional law-making.

It advanced the purpose of ensuring that employers who chose to adopt plans would face a uniform body of law, rather than a "patchwork scheme" of conflicting state regulation. Assuring employers a single, uniform body of pension plan administration law was, in all likelihood, better for the economy.

42. 29 U.S.C. § 1144(a) (1988). A "State" is defined as a "State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." Id. § 1144(c)(2). "State law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." Id. § 1144(c)(1).

There are restrictions on the preemption clause. There is an exception from the clause for state laws that regulate insurance, banking, and securities. 29 U.S.C. § 1144(b)(2)(A) (1988) states: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S. Ct. 2380 (1985) (holding state law requiring health insurance carriers to provide minimum coverage for mental health care "related to" employee benefit plans insofar as it applied to employee health care plans, but was saved from preemption as a law regulating insurance). The phrase "subparagraph (B)" in § 1144(b)(2)(A) refers to the "deemer clause," which states:

Neither an employee benefit plan... nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

29 U.S.C. § 1144(b)(2)(B) (1988). See FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403 (1990) (holding state antisubrogation law "regulated insurance," but application of that law to the plan at issue was preempted because, as a self-funded plan, it is excepted from the savings clause by the deemer clause); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549 (1987) (holding state common-law action of tortious breach of contract for failure to pay benefits was preempted because general nature of the action made it one not regulating insurance). ERISA also directs the preemption clause "shall not apply to qualified domestic relations orders" as defined under the spendthrift clause.


43. See Pilot Life Ins. Co., 481 U.S. at 45-46, 107 S. Ct. at 1552 (holding state common-law tort and contract actions for improper processing of a benefits claim were preempted).

designed to be an incentive for employers to make the voluntary decision to provide pension plans for their employees.45

Drawing generalities about preemption under Section 514(a) is dangerous. The area, like most questions of federal preemption, is fact-specific. Nevertheless, the courts have developed guideposts for interpreting Section 514(a)'s preemptive power. The Supreme Court has stated that state laws "relate to" employee benefit plans, "in the normal sense of the phrase," when they have a "connection with or reference to" an ERISA plan.46 However, the Court has also added the qualification 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."47

What standards, then, are used to distinguish between those state laws which "relate to" employee benefit plans, and those that do not?

First, it appears some impact or effect on an ERISA plan, or on the employer in his role as a pension provider, is a predicate for preemption.48 The impact or effect need not be direct.49

In *Ingersoll-Rand Co. v. McClendon*,50 the United States Supreme Court addressed the issue of preemption of a state common-law wrongful discharge action under Section 514(a). The employee participant claimed his employer had terminated him to avoid payment of benefits to which he would be entitled had his employment continued. The Court found the state law's potential impact upon the plan impermissible under ERISA's preemption clause. The Court explained that a state law could "relate to" an employee benefit plan, even if the "effect is only indirect."51 Here, the state law at issue would potentially have required the employer to modify his pension-providing conduct. On a national basis, this could require the employer to comply with different standards from state to state, imposing a significant burden upon those employers who chose to provide pension plans. As the Court stated: "It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct

46. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97, 103 S. Ct. 2890, 2900 (1983) (holding state laws which required payment of benefits for pregnancy and forbade discrimination in administration of employee benefit plan were preempted by ERISA). *But see Fort Halifax Packing Co.,* 482 U.S. at 12, 107 S. Ct. at 2217 (holding a state requirement that employers who close a plant pay a one-time, lump-sum benefit not preempted because it did not require the ongoing maintenance of a benefit plan, and thus did not "relate to" employee benefit plans under § 514(a) of ERISA).
47. Shaw, 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21.
48. See Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829, 108 S. Ct. 2182, 2185 (1988) (stating law may be preempted because it is "specifically designed to affect employee benefits") (emphasis added).
49. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 483 (1990) (stating "a state law may 'relate to' a benefit plan . . . even if the law is not specifically designed to affect such plans, or the effect is only indirect") (emphasis added).
51. *Id.* at 139, 111 S. Ct. at 483 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47, 107 S. Ct. 1549, 1552-53 (1987)).
to the peculiarities of the law of each jurisdiction." This burdensome impact on the plan was the very result which ERISA sought to avoid in imposing national uniformity.

Second, state laws which "refer to" or which are "specifically designed to affect" ERISA employee benefit plans are almost automatically preempted. For example, state laws specifying the types of benefits that plans must pay have been held preempted. Even when such state laws are not designed to regulate plan administration per se, they may be preempted for singling out ERISA plans for special treatment. Thus, a state statute that specifically forbade garnishment of ERISA welfare benefits was preempted by Section 514(a).

Third, harder questions are presented when the state law is of general application, but has a "connection with" or impact on the plan. Section 514(a)'s preemptive power is not limited to state laws specifically directed at pension plans. State laws of general application may fall within the preemption clause's power, or may survive the scope of ERISA's preemption clause even when they burden plan administration. In fixing the point at which preemption ends, some courts have observed that preemption varies based upon the "plan relationships" the state law impacts. In *Sommers Drug Stores v. Corrigan Enterprises*, the Fifth Circuit stated:

[T]he courts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries—than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.

This criterion for preemption has been recognized in other courts.

---

52. Id. at 142, 111 S. Ct. at 484.
53. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829, 108 S. Ct. 2182, 2185 (1988) (stating the Court has "virtually taken it for granted" that state laws which are designed specifically to affect employee benefit plans are preempted under § 514(a)).
54. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S. Ct. 2890 (1983) (holding state laws which required payment of benefits for pregnancy were preempted); Insurance Bd. v. Muir, 819 F.2d 408 (3d Cir. 1987) (holding state law requiring specific types of health care benefits were preempted).
55. *Mackey*, 486 U.S. at 830, 108 S. Ct. at 2186.
56. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140, 111 S. Ct. 478, 483 (1990) (stating a generally applicable state statute was not necessarily preempted, even though it might "burden the administration of a plan"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48, 107 S. Ct. 1549, 1553 (1987) (stating § 514(a)'s preemptive scope is not limited to state laws specifically designed to affect employee benefit plans).
58. Id. at 1467.
59. See *Van Camp v. AT&T Info. Sys.*, 963 F.2d 119, 123 (6th Cir. 1992) (stating whether the invocation of state law will affect relations among the principal ERISA entities is a factor to consider under § 514(a) analysis); *Arkansas Blue Cross and Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341, 1346 (8th Cir. 1991) (stating whether state law affects relations between primary ERISA entities is a factor to be considered in deciding whether a state law of general application "relates to"
Thus, generally applicable state laws that affect the principal plan relationships are usually held preempted. These laws are typically ones that allow claims by participants for recovery of benefits.\textsuperscript{60} For example, common-law contract suits by participants against plans for conduct in plan management are precluded.\textsuperscript{61} Tort claims by beneficiaries or participants for improper processing of claims or other administrative wrongdoing are also preempted,\textsuperscript{62} as are suits for fraud or breaches of implied covenants of good faith and fair dealing.\textsuperscript{63}

On the other hand, state laws of general application that do not affect the relationships between the principal plan entities are often not preempted, even though they may impact on the plan. Thus, lawsuits involving plans that claim rights against management as corporate shareholders are not preempted,\textsuperscript{64} nor are state laws regulating the amount hospitals can charge private payors for certain patients, even though those payors may happen to be benefit plans.\textsuperscript{65} General state tax laws which tax plan benefits as a participant's income have been held not to be superseded.\textsuperscript{65} Also, lessors of property to the plan may sue for unpaid rent, and creditors of the plan may sue for debts owed by the plan.\textsuperscript{67}

\textsuperscript{60} Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146 (2d Cir. 1989) ("[L]aws that have been ruled preempted [include] those that provide an alternative cause of action to employees to collect benefits protected by ERISA.").

\textsuperscript{61} Holland v. National Steel Corp., 791 F.2d 1132, 1136 (4th Cir. 1986) (holding state breach of contract claim for vacation benefits was preempted because ERISA was designed to establish standards of conduct for fiduciaries in their administration of plans and provide appropriate remedies to participants); Gilbert v. Burlington Indus., Inc., 765 F.2d 320, 326-28 (2d Cir. 1985), aff'd, 407 U.S. 901, 106 S. Ct. 3267 (1988) (holding state breach of contract claim for denial of severance pay provided under ERISA plan was preempted because it would undermine the congressional purpose of uniformity of remedies participants have against employers for plan benefits).

\textsuperscript{62} Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549 (1987) (holding general state common-law tortious breach of contract action for failure to pay benefits was preempted); Howard v. Parisian, Inc., 807 F.2d 1560, 1564 (11th Cir. 1987) (holding state claim for intentional infliction of emotional distress was preempted; courts have uniformly held state law challenges for denial of benefits under a plan are preempted).

\textsuperscript{63} Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 421-22 (4th Cir. 1985), cert. denied, 476 U.S. 1170, 106 S. Ct. 2892 (1986) (holding state claims for breach of covenant of good faith and fair dealing, and unfair trade practices arising from refusal to pay benefits, were preempted because general state laws, insofar as they are invoked by beneficiaries claiming relief for injuries arising out of the administration of employee benefit plans, "relate to" such plans).


\textsuperscript{65} Rebaldo v. Cuomo, 749 F.2d 133, 138-39 (2d Cir. 1984), cert. denied, 472 U.S. 1008, 105 S. Ct. 2702 (1985) (stating state laws of general application which do not affect the structure or administration of benefits are not preempted, even though they might increase cost of operating a plan).

\textsuperscript{66} Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 556 (6th Cir. 1987) (holding where a municipality enacted a neutral income tax of general application which applies to employees without regard to their status as ERISA participants, the tax is not preempted).

An example of the difference in the application of Section 514(a) between state laws that "refer to" employee benefit plans and those that merely have a "connection" with them is found in the United States Supreme Court case of Mackey v. Lanier Collection Agency and Service, Inc. In Mackey, a creditor of a plan participant sought to garnish funds owed to the participant in an ERISA welfare benefit plan. Georgia law generally provided for garnishment proceedings by creditors to satisfy debts with the debtor's property. Welfare benefit plans, unlike pension benefit plans, are not covered by ERISA's spendthrift clause. However, a Georgia statute specifically provided that funds or benefits in a plan subject to the provisions of ERISA, including a welfare benefit plan, are not to be subject to garnishment.

The Court first addressed the issue whether Georgia's anti-garnishment statute was preempted by ERISA. Drawing upon the "reference to" standard of Shaw, the Court found the Georgia law, which was "specifically designed to affect employee benefit plans," was preempted. Although the statute was enacted to promote ERISA's purposes, it was still superseded since Section 514(a) was designed to "displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." The Court then turned to the issue whether Georgia's general garnishment law was preempted by the "relation to" standard. The statute did not single out ERISA plans for treatment; however, this alone did not preclude preemption. The Court examined other provisions in ERISA.

The welfare benefit plan, the appellee, argued that in placing the Qualified Domestic Relations Order exception as a modification to the preemption clause (in addition to the spendthrift provision), Congress had implicitly ascertained that garnishment and other alienations of benefits would otherwise be preempted by Section 514(a). Seizures of benefits, the plan asserted, must "relate to" employee benefit plans since Congress felt the need to except such state actions from Section 514(a). The Court rejected this argument, finding that Congress thought some courts had "erroneously construed" Section 514(a) and that the modification of the preemption clause by the QDRO exception was intended to "clarify" that QDROs were not preempted by the "relation to" standard.

Furthermore, the Court recognized that where Congress wanted to forbid garnishment, it did so specifically in the spendthrift provision which is applicable.

---

69. Id. at 828, 108 S. Ct. at 2184-85.
70. Id. at 829, 108 S. Ct. at 2185 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98, 103 S. Ct. 2890, 2900 (1983)).
71. Id. (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389 (1985)).
72. Id. at 831, 108 S. Ct. at 2186.
73. Id. at 839, 108 S. Ct. at 2190.
only to pension benefits. Accordingly, Georgia's general garnishment statute was found not to be preempted by Section 514(a) of ERISA.

In Mackey, the Supreme Court recognized a distinction between state laws that "target" employee benefit plans and state laws which are not designed specifically to apply to such plans but nevertheless have an effect on them. The former type of state law will be almost automatically preempted, while the latter type will require further scrutiny. Furthermore, while the Court in Mackey did not expressly employ the "plan relationship" standard set forth in Sommers to determine whether a generally applicable state law was preempted by ERISA, Mackey does not refute that standard. Indeed, the facts and the result of Mackey are entirely consistent with the approach espoused by the Fifth Circuit in Sommers. The state law in question in Mackey was concerned primarily with the relationship between the plan participant and a third party, with only a tenuous impact upon the plan itself. The Sommers standard predicted the law in Mackey would be spared from federal preemption, as it was.

E. ERISA Preemption and State Domestic Relations and Marital Property Laws

1. Origins of the QDRO Exception: Dealing with the Entitlement of Spouses and Dependents to Receive Benefits Payable Under an ERISA Plan

a. The Problem Generally and the Judicial Response

The entitlement of spouses and dependents of participants to receive pension benefits under an ERISA pension plan as a matter of right, and not only as a designated beneficiary, is a subject that was left open in ERISA's original enactment. Congress seemed initially to assume that protecting the participant's pension benefits would automatically result in the preservation of those benefits for the participant's spouse or children. It became apparent, however, that this assumption was not always justified.

Before 1984, there was a conflict among courts concerning whether ERISA's spendthrift clause preempted state community property laws that gave a non-participant spouse the right to receive pension benefits directly from the plan upon divorce. Courts also disagreed about whether ERISA precluded

---

74. Id. at 836, 108 S. Ct. at 2189.
75. Id. at 832, 108 S. Ct. at 2186 ("[W]e join the virtually unanimous view of federal and state courts which have faced this question, and hold that federal law does not bar a garnishment action like respondent's.").
76. See supra text accompanying note 58.
77. Compare Stone v. Stone, 632 F.2d 740, 742 (9th Cir. 1980) (holding against preemption of spousal community property rights on divorce) with Francis v. United Technologies Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978) (holding for preemption of spousal community property rights on
garnishment of plan benefits to satisfy family support obligations. Although ERISA gave no clear indication on these subjects, its broad preemption provision and spendthrift clause led some courts to conclude that such claims were preempted.

Other courts, however, found the application of state domestic relations laws to ERISA plan benefits was not inconsistent with Congress' goals. In addressing ERISA preemption of family support obligations, some courts carved out an "implied exception" to the spendthrift clause. Such an approach comported with ERISA's stated purpose—the protection of benefits for employees and their dependents. As one court said: "It would be ironic indeed if a provision designed in part to insure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce."

Similarly, a number of courts declined to find preemption through the spendthrift clause in the case of state community property laws. A significant case was In re Marriage of Campa. In Campa, the former wife of a participant in an ERISA pension plan sought to join the plan in a California suit for community property division. She wished to compel the administrator to pay her community share in the plan directly to her. The plan resisted payment. It argued ERISA preempted any state actions to seize benefits in satisfaction of community property divisions.

The court in Campa held against ERISA preemption of the "direct" route to dividing pension benefits. It concluded that community property divisions did not conflict with the anti-alienation clause. The conclusion was based on the fact

---

79. See Francis, 458 F. Supp. at 85-86.
80. See Bowen v. Bowen, 715 F.2d 559, 560 (11th Cir. 1983) (per curiam) (holding that a state court order garnishing benefits to satisfy an alimony judgment was impliedly excepted from preemption under the spendthrift clause); A.T.&T. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (holding against preemption of state garnishment for satisfaction of alimony and child support award); Ball v. Revised Retirement Plan, 522 F. Supp. 718, 721 (D. Colo. 1981) (holding transfers of benefits to satisfy domestic support obligations were not preempted under ERISA's spendthrift clause).
81. Merry, 592 F.2d at 122 (quoting Stone v. Stone, 450 F. Supp. 919, 926 (N.D. Cal. 1978), aff'd, 632 F.2d 740 (9th Cir. 1980)).
82. See United Ass'n of Journeymen v. Myers, 488 F. Supp. 704 (M.D. La. 1980) (holding community property rights, which are not transfers under state law, are not intended to be a prohibited transfer of benefits under the spendthrift clause); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978) (holding state community property laws are not excepted from spendthrift provision), aff'd, 632 F.2d 740 (9th Cir. 1980); In re Marriage of Campa, 152 Cal. Rptr. 362 (Cal. Ct. App. 1979) (holding non-participant spouse's community property rights in pension benefits are not a "transfer," and thus are not barred under the spendthrift clause), appeal dismissed sub nom. Carpenters Pension Trust Fund v. Campa, 444 U.S. 1028, 100 S. Ct. 696 (1980).
the community property right under California law was an ownership right, not a credit-right.\textsuperscript{84} Because of this distinction, state recognition of community property rights was not a transfer, and therefore was not preempted by the spendthrift clause, which barred alienations of pension benefits.\textsuperscript{85}

Campa, as a state court decision interpreting federal law, might have remained relatively unimportant persuasive authority for the proposition that ERISA does not preempt divorce divisions of pension plans. However, the decision gained significance in its subsequent history. On appeal to the United States Supreme Court, Campa was dismissed for lack of a substantial federal question.\textsuperscript{86} This dismissal of Campa was subsequently interpreted as a decision on the merits of the case against preemption, binding upon the lower courts.\textsuperscript{87}

\textsuperscript{84} See id. at 368 (stating "[h]er rights are those of an owner, not a creditor").

\textsuperscript{85} Id. Compare United Ass'n of Journeymen v. Myers, 488 F. Supp. 704 (1980), a case decided prior to enactment of the Retirement Equity Act of 1984, in which the court held against preemption of Louisiana's community property laws. The court in Myers recognized state law classification of the community interest was not dispositive; the question of preemption is an interpretation of federal law. Nevertheless, state classifications were relevant to discerning congressional intent. Absent any other expression by Congress, the court declined to construe the words "assign" and "alienate" as barring the community property interest which traditionally has been defined as ownership. Since Congress had not rejected state definitions of community property rights, the court assumed Congress intended for them to apply to employee pension plans unhindered. Id. at 713. But see Stone v. Stone, 450 F. Supp. 919, 925-26 (N.D. Cal. 1978) (finding community property divisions of pension benefits are "transfers" under ERISA, but nevertheless holding such divisions are not preempted because of an "implied exception" to the spendthrift clause), aff'd, 632 F.2d 740 (9th Cir. 1980).

\textsuperscript{86} Carpenters Pension Trust Fund v. Campa, 444 U.S. 1028, 100 S. Ct. 696 (1980). See also Supreme Court Rule 16.1(b).

\textsuperscript{87} See Carpenters Pension Trust v. Kronschnabel, 632 F.2d 745, 747-48 (9th Cir. 1980), which held ERISA did not preempt a California judgment ordering payment of plan benefits to the ex-wife of a participant. The court relied upon Hicks v. Miranda, 422 U.S. 332, 344, 95 S. Ct. 2281, 2289 (1975), to hold a summary dismissal from the Supreme Court of an appeal from a state court for want of a substantial federal question, when the federal question is properly presented and within the Supreme Court's appellate jurisdiction, operates as a decision on the merits. The Kronschnabel court examined the jurisdictional statement filed by the appellant in Carpenters Pension Trust Fund v. Campa, 444 U.S. 1028, 100 S. Ct. 696 (1980), which read as follows:

1. Do the provisions of Title I of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee benefit plan covered by that Act?

2. Does a state court have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefits payments in violation of the provisions of the documents and instruments governing the plan?

Kronschnabel, 632 F.2d at 747-48. The court concluded the jurisdictional statement was accurate. Therefore the court concluded the summary dismissal of Campa was binding upon the lower courts. Id. See also Mandel v. Bradley, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240 (1977) (per curiam) (stating summary dismissals for want of substantial federal question "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided in those actions"); Stone v. Stone, 632 F.2d 740, 742 (9th Cir. 1980) (holding the Supreme Court dismissal in Campa bound the federal district and circuit courts to the view ERISA does not preempt state court orders requiring
b. The Congressional Solution: The REA and the Qualified Domestic Relations Order Exception

Partially in response to the problem of ERISA preemption of state community property rights on divorce, Congress enacted the Retirement Equity Act of 1984 (REA). The REA was intended to revamp the framework of ERISA and provide better protection for women, who were most often cast in the role of the non-participant spouse. The REA addressed the problem of preemption in the context of state divorce and family law proceedings by attaching to the spendthrift clause and the preemption clause an exception for state-law “domestic relations orders” that meet certain minimum criteria. Through this mechanism, states may allow garnishment of benefits to satisfy family support judgments, or realize a spouse’s community property interest with disbursements directly from the plan.

ERISA now specifies that the spendthrift clause applies to “the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order.” A “domestic relations order” is defined as:

[any judgment, decree, or order (including approval of a property settlement agreement) which—

---

91. The Retirement Equity Act also added protections for the non-participant spouse after the participant’s death in the form of mandatory survivor annuities. Before the REA, pension plans with annuity features were required to offer an optional joint and survivor annuity to benefit the employee’s widow or widower as well as the employee. This option, however, could be dispensed with by the participant alone. 29 U.S.C. § 1055 (Supp. V 1993). The REA added requirements for two forms of annuity: the Qualified and Joint Survivor Annuity (QISA) and the Qualified Preretirement Survivor Annuity (QPSA). The QISA requires payment of an annuity for the life of the participant, 29 U.S.C. § 1055(d) (1988). Upon the participant’s death following retirement, the surviving non-participant spouse is entitled to receive at least 50% of the benefits the participant was receiving under the plan prior to his death. Id. § 1055(a)(1), (d). If the participant dies prior to retirement, the surviving non-participant spouse is entitled to a QPSA, which is to be no less than the amount that would have been paid under the QISA. Id. § 1055(a)(2), (e). These annuities are available unless the participant elects to waive them. Id. § 1055(c)(1)(A)(i). In contrast to the waiver requirements of the pre-REA law, such an election requires the consent of the participant’s spouse. Id. § 1055(c)(2)(A)(i).
(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).93

Thus, the general rule under the REA is state courts may not affect community property divisions of plan assets on divorce by ordering payment of benefits directly to the non-participant spouse. Such a “direct” recognition of community property rights will be considered a “transfer of benefits,” in conflict with the spendthrift clause and therefore preempted.

However, the domestic relations order will not be preempted by the spendthrift clause if it is a Qualified Domestic Relations Order (QDRO).94 In order for a domestic relations order to be “qualified,” it must recognize payment in favor of an “alternate payee.”95 An “alternate payee” is defined as “any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.”96

The REA lays out a number of other requirements regarding the form and the substance of the state court order which must be satisfied before the order can be considered “qualified.” A QDRO must disclose certain information to aid in processing by the plan.97 The order cannot direct the plan to provide any form of benefit or option not otherwise provided under the plan; nor can it require payment of increased benefits.98 Thus, the state court order may require the plan to pay the divorced spouse any type or form of benefit offered by the plan regardless of that chosen by the participant.99 The order may also require the

93. Id. § 1056(d)(3)(B)(ii).
94. Id. § 1056(d)(3).
95. Id. § 1056(d)(3)(B)(i)(I).
96. Id. § 1056(d)(3)(K).
97. A domestic relations order is qualified only if the order clearly specifies:
   (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
   (ii) the amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
   (iii) the number of payments or period to which such order applies, and
   (iv) each plan to which such order applies.
98. 29 U.S.C. § 1056(d)(3)(D)(i), (ii) (1988). Nor can the order require payment of benefits to an alternate payee which are required to be paid to another alternate payee under a previous QDRO. Id. § 1056 (d)(3)(D)(iii). The requirements of § 1056(d)(3)(D)(i)-(iii) are not violated merely because the order requires payment prior to the participant’s separation from service, if that payment is to begin on or after the date the participant attains or would have attained “earliest retirement age.” Id. § 1056(d)(3)(E).
former spouse to be treated as a surviving spouse for purposes of the REA’s survivor annuities, to the detriment of the actual surviving spouse of the participant. 100

2. Effect of the QDRO

a. Effect on the Spendthrift Clause

Before 1984, it was arguable that, with the Supreme Court’s dismissal of Campa for want of substantial federal question, the exception of state community property law from spendthrift clause preemption through the “owner versus creditor” distinction was a decision on the merits which bound the state and lower federal courts. Since ERISA contained no statement on how community property laws were to be treated, it was reasonable to assume community property laws were not to be preempted as transfers by the spendthrift clause—Congress had not “redefined” state community property laws as they applied to ERISA plans.

The REA, however, declares that the recognition of spousal community property rights in ERISA plans is to be considered an “alienation” prohibited by the spendthrift clause. Thus, a community property partition of a pension plan, although considered merely a recognition of a preexisting ownership right by state law, will nevertheless be preempted if it does not satisfy the federal statutory requirements of a QDRO. The REA therefore undercuts the “owner versus creditor” rationale and renders the position of Campa untenable after 1984.

b. Section 514(a), the QDRO, and Domestic Relations Laws

In the pre-REA cases, several courts that addressed the effect of ERISA on direct community property claims by spouses against pension plans found such state actions were not preempted. 101 This comment has already focused upon the reasoning of those courts in holding against preemption under the spendthrift clause of ERISA. 102 But to reach their conclusions, the pre-REA courts also had

---

See Elizabeth A. Beskins, Comment, Retirement Equity Inaction: Division of Pension Benefits Upon Divorce in Louisiana, 48 La. L. Rev. 677, 695-96 (1988) (stating QDROs can effect an “immediate transfer” of benefits not only by separating the non-participant’s share into a separate account, but also by requiring a tax-free rollover to the non-participant’s individual retirement account or individual retirement annuity, when such an option is available under the plan). See also I.R.C. § 402(a)(6)(F) (1988).


101. See, e.g., United Ass’n of Journeymen v. Myers, 488 F. Supp. 704, 712 (M.D. La. 1980) (holding § 514(a) of ERISA did not preempt state community property laws); Stone v. Stone, 450 F. Supp. 919, 933 (N.D. Cal. 1978), aff’d, 632 F.2d 740 (9th Cir. 1980) (holding § 514(a) of ERISA did not preempt community property laws).

102. See supra notes 30-40 and accompanying text.
to find that the preemption clause of ERISA did not preempt spousal rights in plan benefits.

In In re Marriage of Campa,\(^{103}\) for example, the court concluded that requiring a plan to write "two checks instead of one" was not a significant enough burden upon a plan to require preemption.\(^{104}\) Campa, as noted earlier, was appealed to the United States Supreme Court, which dismissed it for want of a substantial federal question. This dismissal was interpreted as binding upon lower courts and suggests that, prior to the REA, Section 514(a) did not preempt seizures of benefits pursuant to domestic relations orders.\(^{105}\) Furthermore, the Court in Shaw v. Delta Air Lines, Inc.,\(^{106}\) noted in dicta 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."\(^{107}\) As the sole example of this proposition, the Court cited the pre-REA case of A.T.&T. v. Merry,\(^{108}\) which held against preemption of state garnishment of plan benefits to satisfy domestic support obligations. These two "hints" dropped by the Supreme Court suggest that, in the case of the spendthrift clause, non-preemption was the rule for domestic relations laws under Section 514(a) before the REA.

What then was the effect of the REA and the addition of the QDRO exception to this prior law? The Supreme Court in Mackey v. Lanier Collection Agency and Service, Inc.,\(^{109}\) addressed this question in reaching its holding that seizures of welfare plan benefits pursuant to general state garnishment laws are not preempted. The Court found that Section 514(a) was not intended by Congress before the REA to preempt seizures of employee benefits, and that the addition of the QDRO qualification to Section 514(a) was in response to an erroneous construction placed upon that clause by courts holding for preemption. Thus, under Mackey, the amendment adding the QDRO exception to Section 514(a) was meant only to "clarify" that such orders were not preempted, not to carve out an exception to a general rule of preemption.

III. PREEMPTION

A. Generally

Under the Supremacy Clause of the United States Constitution,\(^{110}\) federal action may supersede state law when Congress acts within its constitutional

---


\(^{104}\) Id. at 368.

\(^{105}\) See supra note 87.


\(^{107}\) Id. at 100 n.21, 103 S. Ct. at 2901 n.21.

\(^{108}\) 592 F.2d 118 (2d Cir. 1979).


\(^{110}\) U.S. Const. art. VI, cl. 2.
powers.\textsuperscript{111} When Congress validly acts within one of these plenary powers, there are no internal limits under the Supremacy Clause upon Congress' ability to delineate state and federal authority.\textsuperscript{112} State authority must yield when Congress requires it; thus, the question whether federal law preempts state law turns upon the intent of Congress, the "ultimate touchstone" of the preemption analysis.\textsuperscript{113}

The intent of Congress to preempt state law is generally discerned by courts in three ways. First, Congress may state its intent to preempt state law in express terms.\textsuperscript{114} Second, legislative intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is so comprehensive that Congress "left no room" for concurrent state regulation.\textsuperscript{115} This "occupation notes, the question of preemption under this standard may turn upon which field Congress has "occupied." See Pacific Gas & Elec. Co. v. State Energy Resources Conservation Comm'n, 461 U.S. 190, 212-16,
of the field" often results from a congressional desire for national uniformity in a particular area.\textsuperscript{116} Finally, state law may actually conflict with federal law in such a way as to compel preemption. This conflict may occur when compliance with state and federal regulation is a "physical impossibility," or when state law frustrates the "accomplishment and execution of the full purposes and objectives" intended to be met by Congress.\textsuperscript{117}

Absent these persuasive reasons demonstrating a congressional intent to preempt, courts will not find the state law superseded. The invalidity of state regulations is not lightly presumed.\textsuperscript{118} Concurrent regulation in an area may be acceptable, even when it leads to dual standards.\textsuperscript{119}

B. Preemption of State Domestic Relations Law

1. Generally

Although the Supreme Court has stated that "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,"\textsuperscript{120} the Court begins its analysis under the Supremacy Clause with the assumption that preemption of laws in areas of traditional state concern is not intended unless Congress makes a clear expression to the contrary.\textsuperscript{121} This

\begin{itemize}
  \item 103 S. Ct. 1713, 1726-28 (1983) (holding although the federal government occupied the field of the safety and "nuclear" aspects of energy generation, the states were still entitled to exercise their traditional authority over the need for additional generating capacity).
  \item 116. See Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399 (1941) (holding congressional enactment of uniform national immigration laws occupied the field, and thus preempted any state regulation in the area).
  \item 117. Guerra, 479 U.S. at 281, 107 S. Ct. at 689 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143, 83 S. Ct. 1210, 1217 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)). See McDermott v. Wisconsin, 228 U.S. 115, 33 S. Ct. 431 (1913) (holding state law which prohibited sales of mislabeled syrup preempted where any compliance with federal regulations would be considered mislabeled under the state law so that compliance with both was impossible). See Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239, 88 S. Ct. 362, 366 (1967) (holding state law disqualifying otherwise eligible applicants from receiving unemployment benefits solely because they had filed a complaint with the National Labor Relations Board preempted because of the damage it inflicted upon the achievement of congressional purposes).
  \item 118. See New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413, 93 S. Ct. 2507, 2513 (1973) ("If Congress is authorized to act in a field it should manifest its intention clearly. . . . The exercise of federal supremacy is not lightly to be presumed.") (quoting Schwartz v. Texas, 344 U.S. 199, 202-03, 73 S. Ct. 232, 235 (1952); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217 (1963) (stating "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.").
  \item 119. Rotunda & Nowak, supra note 111, § 12.4(b)(1).
  \item 121. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947) (stating "we start with the assumption that the historic police powers of the States were not to be
assumption is designed to ensure "the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." Particularly, the Court has expressed a reluctance to find preemption when the law being challenged concerns domestic relations, a matter of traditional state concern.

2. Hisquierdo v. Hisquierdo—Preemption of Community Property Rights

In Hisquierdo v. Hisquierdo, the United States Supreme Court addressed the issue whether the Railroad Retirement Act's non-alienation provision preempted the application of California's community property laws. Under California law, a spouse who was not a participant in a pension plan had a community ownership right in the plan. The plan was therefore subject to division upon divorce. The non-employee spouse asserted claims for distribution of her interest in two alternative forms: (1) by requiring the employee spouse to pay a fixed percentage to her of each payment he received in the future, or (2) by making a lump sum distribution of other property of the marriage to offset her interest in the plan. The Court held the California law was preempted because it conflicted with the federal purposes behind the Railroad Retirement Act and because of Congress' positive expressions of preemptive intent.

The Court recognized "'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" When state family property law comes into superseded by the Federal Act unless that was the clear and manifest purpose of Congress").


125. 45 U.S.C. § 231m (1988) states "notwithstanding any other [federal or state law], no annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." See Hisquierdo, 439 U.S. at 576, 99 S. Ct. at 805.

126. Id. at 583, 99 S. Ct. at 809.

127. Id. at 588, 99 S. Ct. at 811. Note the question of the wife being entitled to assert rights directly against the federal government was not an issue. State court decrees ordering payment of benefits directly to the non-employee spouse could not be effective where the federal government had not waived its sovereign immunity. Id.

128. Id. at 581, 99 S. Ct. at 808 (quoting In re Burrus, 136 U.S. 586, 593-94, 10 S. Ct. 850, 853
conflict with federal law, the review is limited to asking "whether Congress has 'positively required by direct enactment' that state law be pre-empted." To result in preemption, the state domestic relations law "must do 'major damage' to 'clear and substantial' federal interests.'"

The Court found a substantial federal interest existed in encouraging railroad employees to retire early to assure promotions and job availability for younger workers. Exempting the benefits from involuntary alienation was in furtherance of this purpose. A fixed percentage award would encourage the employee to continue to work to offset his loss of assets. Allowing such an award would therefore do major damage to the federal interest in early retirement.

The Court also found a lump sum award of other property of the marriage was precluded by federal law. The anti-alienation clause specifically precluded "anticipation" of benefits, or making them subject to any "legal process whatsoever." Through this clause, Congress had spoken with the clarity that demanded preemption of state domestic relations laws. Also, the awarding of a lump sum offset did as much damage to the federal interest in early retirement as the fixed percentage theory by providing an incentive for the worker to retire later in order to make up for lost benefits.

Furthermore, Railroad Retirement Act benefits, rather than being a type of property, were found to be a mere expectancy, in which not even the railroad employee had any rights until such benefits were paid. Notably, the Court distinguished, in dicta, between plans that involve federal programs funded by federal money and plans funded by private sources, which are governed by ERISA. This decision, the Court said, did not reach the question of preemption for ERISA qualified plans; that issue might well be decided differently.

The standard for preemption of state domestic relations laws set forth by the Court in Hisquierdo clearly does not place any judicial limits upon the ability of

(1890)).

129. Id. (quoting Wetmore v. Markoe, 196 U.S. 68, 77, 25 S. Ct. 172, 176 (1904)).
130. Id.
131. Id. at 573-74, 99 S. Ct. at 804.
132. Id. at 585, 99 S. Ct. at 810.
133. Id. at 588, 99 S. Ct. at 811-12.
134. Id. at 590 n.24, 99 S. Ct. at 813 n.24. Footnote 24 states:
   In [the Railroad Retirement Act], Congress has granted a separate spouse's benefit, and
   has terminated that benefit upon absolute divorce. Different considerations might well
   apply where Congress has remained silent on the subject of benefits for spouses,
   particularly when the pension program is a private one which federal law merely
   regulates. Our holding intimates no view concerning the application of community
   property principles to benefits payable under programs that possess these distinctive
   characteristics.
Id. (citation omitted).
Congress to preempt state family property laws. In *Hisquierdo* itself, the question of preemption turned solely upon discerning congressional intent.\(^{135}\)

### IV. Federal Decisions

#### A. Generally

Three federal decisions have addressed the preemption of state community property laws as applied to ERISA plan benefits upon the death of the non-participant spouse. The United States Ninth Circuit Court of Appeals, in the case of *Ablamis v. Roper*,\(^{136}\) held the legatees or the estate of a deceased non-participant could not assert her community interest in a pension plan subject to ERISA directly against the plan itself. *Ablamis* was followed by the Federal District Court for the Western District of Louisiana in the case of *Meek v. Tullis*.\(^{137}\) More recently, in the case of *Boggs v. Boggs*,\(^{138}\) the Federal District Court for the Eastern District of Louisiana ruled against preemption, finding a deceased non-participant’s heirs could assert rights to her former community interest in the participant’s retirement plan.

#### B. The Ninth Circuit’s Rule: Preemption

In *Ablamis v. Roper*,\(^{139}\) a California participant, Mr. Ablamis, had a one-hundred percent vested interest in two retirement plans. The bulk of his interest in the plans was attributable to service during his fifteen-year marriage to his

\(^{135}\) The *Hisquierdo* test has been recently reaffirmed by the Supreme Court in *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029 (1987). In that case, the Court held a state statute which required a veteran to pay child support from his veteran’s disability benefits as he received them was not preempted by federal law. *Id.* at 624, 107 S. Ct. at 2033. A federal statute precluded attachment or seizure of benefits either before or after they were paid to the beneficiary. The Court found the seizure in question did not do damage to the purposes behind the statute because (1) it did not “turn the Administrator into a collection agency,” because the Administrator was not involved with the seizure, which occurred after payment to the beneficiary, and (2) it did not deprive the veteran of his means of subsistence contrary to congressional intent, since part of the statutory benefits paid to him were intended to be for the sake of dependents. *Id.* at 630, 107 S. Ct. at 2036.

\(^{136}\) 937 F.2d 1450 (9th Cir. 1991).


The marriage ended when Mrs. Ablamis passed away. In her will, she left most of her estate to two trusts—one for her children of a previous marriage and the other for the maintenance of her husband. She devised to these trusts "all property subject to [her] testamentary power including [her] one-half (1/2) community property interest in all community assets."\footnote{140}

Mrs. Ablamis' estate claimed a community property interest in Mr. Ablamis' rights to the retirement plans. The trustee of the plans responded by filing an action in the federal district court seeking a declaratory judgment that ERISA preempts any state law that grants a non-participant spouse the right to dispose of assets in a pension plan by testament. The district court granted summary judgment in favor of the trustee; the executrix of Mrs. Ablamis' estate appealed.\footnote{141}

The court of appeals found the community interest of an employee spouse was preempted by the spendthrift clause unless the state order recognizing that interest was a Qualified Domestic Relations Order as defined by ERISA.\footnote{142} The estate largely conceded this matter. Instead, the estate focused on arguing that a probate order instructing the pension plan to pay benefits to two trusts established for her children of a prior marriage would be a QDRO.\footnote{143}

The court held a state order recognizing a non-participant spouse's disposition of an interest in a retirement plan was not a QDRO. It found support for this holding in ERISA's language and legislative history: the definition of an "alternate payee" who may receive benefits under a QDRO and the drafting of the QDRO exception to include only "domestic relations orders" and not "probate orders."\footnote{144}

First, the Ablamis court noted the limited nature of the QDRO exception: "Only 'qualified' domestic relations orders are exempt from ERISA's spendthrift provisions; other domestic relations orders are expressly made subject to the anti-assignment provision and are, as a result, pre-empted."\footnote{145} The court took particular notice of a Senate Report explaining the addition of the QDRO that stated:

There is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc., plan. [¶] The committee believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension, etc., plan to be divided under certain circumstances. . . . [T]he committee believes that conforming changes to the ERISA preemption provision

\footnote{140}{Ablamis, 937 F.2d at 1452.}
\footnote{141}{Id.}
\footnote{142}{The Ablamis decision did not address preemption under § 514(a); its analysis was limited to preemption under the spendthrift clause, § 206(d).}
\footnote{143}{Ablamis, 937 F.2d at 1455.}
\footnote{144}{Id. at 1456.}
\footnote{145}{Id. at 1454.}
are necessary to ensure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA.\textsuperscript{146}

Among the "circumstances" required for a domestic relations order to be "qualified" is that it must assign or recognize an "alternate payee's" right to receive all or a portion of the benefits payable under a plan. An "alternate payee" is defined by ERISA as a "spouse, former spouse, child, or other dependent of a participant."\textsuperscript{147} The Ablamis court found an estate does not fall within even the most liberal construction of the phrase defining alternate payees.\textsuperscript{148} "Former spouse" could not refer to a "deceased spouse," under established legal usage. Plus, the death of Mrs. Ablamis divested her of the title of "spouse or other dependent" of the participant.\textsuperscript{149} Since neither the estate nor the legatees of Mrs. Ablamis were alternate payees under the QDRO's statutory regime, any interest they had in the plan as a result of state community property law was preempted by ERISA's spendthrift clause.

The Ablamis court found more support for its conclusion in the phrase "domestic relations" used to define the orders exempted from ERISA's preemption. Relying on common legal usage, the state decree sought in the case at hand was a "probate order." Probate orders, the court reasoned, are designed to distribute property at death, while domestic relations orders concern matters between the living, and are not contemplated as being exempted under the QDRO exception.\textsuperscript{150} The court distinguished between domestic relations laws and domestic relations orders. Congress could have exempted all orders made pursuant to a domestic relations law from preemption. Instead, Congress did not exempt probate orders, even when they are made pursuant to a domestic relations law. Congress limited the exemption to transfers between the living.\textsuperscript{151} Thus, the community property claims of the estate of Mrs. Ablamis could not be Qualified Domestic Relations Orders, since they were not "domestic relations orders."

The court explained the policy behind the REA as a legislative determination that "[p]ensions are designed for the benefit of the living."\textsuperscript{152} Congress was interested in securing a fair pension for workers during their lifetimes. But with the REA, Congress also sought to satisfy its interest in giving a reasonable degree of security to the participant's spouse. To fulfill this second purpose, it was necessary to allow the division of pension proceeds, so that the non-participant spouse could enjoy the share to which she would have been entitled.

\textsuperscript{148} Ablamis v. Roper, 937 F.2d 1450, 1455-56 (9th Cir. 1991).
\textsuperscript{149} Id. at 1456.
\textsuperscript{150} Id. (quoting Black's Law Dictionary 1082 (5th ed. 1979)).
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 1457.
had the marriage continued. However, the accomplishment of this goal could not be read to allow a predeceasing non-employee spouse to leave part of the pension to anyone she chose. Thus, the court found the provisions of ERISA, as amended by the REA, preempted state law allowing testamentary bequests by the non-participant spouse.

C. The Fifth Circuit: Two District Courts Reach Opposite Conclusions

1. Meek v. Tullis—A Rule of Preemption

In *Meek v. Tullis*, the court addressed the recognition of a spouse’s community interest in a pension plan “indirectly” upon death. The non-participant spouse, Mrs. Meek, had died intestate. One of her children sought to have a community property interest in the pension plan included on the descriptive list of assets of Mrs. Meek’s estate. In the alternative, she sought to have included the value of the non-participant spouse’s preempted community interest in the plan. This alternative theory’s effect would be solely to allocate property of the marriage that might otherwise have gone to the surviving participant to the deceased non-participant’s heirs. In response, the participant sought a declaratory judgment that the claims were preempted.

The court relied upon *Ablamis v. Roper* to conclude ERISA preempted any direct interest the heirs might have in the plan. Except for the absence of a will, a difference of no legal significance, *Ablamis* was indistinguishable from *Meek*. Absent any indication by the Fifth Circuit that *Ablamis* was incorrectly decided, the court said it would accept the reasoning in that Ninth Circuit case.

The court then turned to the subject of the offsetting claim, by examining earlier Supreme Court decisions interpreting the “relation to” standard of Section 514(a). *Ingersoll-Rand*, in particular, established that “a state law may relate to a benefit plan and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.” The court then said of the alternative approach: “Although such a jurisprudential rule would not directly affect the plan assets, the indirect effect is nonetheless prohibited.”

---

153. *Id.*
154. *Id.* at 1457-58.
156. *Id.* at 155.
157. *Id.*
159. 937 F.2d 1450 (9th Cir. 1991).
161. *Id.* at 156 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 483 (1990)).
162. *Id.* at 157.
The court did not address the impact of the anti-alienation clause, except that allowing the alternative claim would still deprive the participant of one-half the value of his pension and would "erode ERISA's role as a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." This decision thus extended ERISA's preemptive scope beyond direct community property claims against pension plans to include "indirect" claims against plan participants.

2. Boggs v. Boggs—No Preemption

In Boggs v. Boggs, the court reached a conclusion opposite to that of Meek. Isaac Boggs, Jr., was an employee at South Central Bell from 1949 until 1985 when he retired. Mr. Boggs was married to Dorothy Boggs, his first wife, from the date of his employment until her death in 1979. During their marriage, Issac and Dorothy had three sons. Under Dorothy's will, Mr. Boggs received one-third of her estate, while the three sons received the remaining two-thirds subject to a lifetime usufruct granted to their father. The descriptive list of assets in Dorothy Boggs' succession included a Bell System Savings Plan for Salaried Employees in which Mr. Boggs was a participant. At the time of Dorothy's death, Mr. Boggs' interest was valued at $42,388.57, in which she held a one-half interest ($21,194.29).

Isaac Boggs, Jr., remarried in 1980 to Sandra Boggs. No children were born of this marriage. Mr. Boggs retired from South Central Bell in 1985 after thirty-six years of service. Upon his retirement, he received a distribution of over $150,000 from the Savings Plan, which he "rolled over" into an IRA account. In addition to the Savings Plan disbursement, Mr. Boggs also received monthly retirement benefits of $1,777.67 per month. These payments continued until Mr. Boggs' death in 1989. Thereafter, a survivor's lifetime annuity pension was paid to Sandra Boggs. Sandra Boggs was also named as the beneficiary of the IRA, which was valued at $180,778.05 at the time of Mr. Boggs' death.

Two of the three sons filed an action in state court against Sandra Boggs and claimed they were entitled to: (1) an accounting of the usufruct enjoyed by Mr. Boggs over the two-thirds portion of the retirement payments attributable to Dorothy Boggs' community interest in the retirement plan and payment of their share of the plan payments made from 1985 until 1989; (2) a percentage of the survivor's annuity payable in the future to Sandra Boggs until her death; and (3) a percentage of the IRA account created when Mr. Boggs "rolled over" the distribution from the Savings Plan.

163.  Id.
165.  Id. at 463-64.
166.  Id.
167.  Id. at 464.
Sandra Boggs responded by filing an action for declaratory judgment in federal district court, seeking a ruling that ERISA preempted the application of Louisiana's community property and succession laws to the payments made under the plan. Sandra Boggs argued those laws, insofar as they operated to give Dorothy Boggs' legatees an interest in the retirement plan proceeds, "relate to" the plan and thus are superseded by Section 514(a) of ERISA. The court held against preemption.

The analysis in Boggs began by relying upon the Supreme Court's statement of Section 514(a)'s girth in Mackey. The court stated that because Louisiana's community property laws are laws of general application, and are not specifically targeted toward ERISA benefit plans, they do not "relate to" such plans and do not fall under Section 514(a)'s express preemptive mandate.

The court went on to apply the Hisquierdo standard of preemption for state family property laws. Louisiana's community property laws would be preempted by ERISA only if "(1) Congress has positively expressed its intent to preempt the state law and (2) the state law does major damage to a clear and substantial federal interest." ERISA was designed to protect participants against the wrongful conduct of employers in administering pension plans, and not to replace state law allocating spousal property rights.

The court compared the case to two Supreme Court cases, Hisquierdo and McCarty v. McCarty, where federally-funded statutory pensions had been held to preempt state community property laws. These federal pension cases were found distinguishable from the present case, since in both McCarty and Hisquierdo Congress had targeted pensioners with very specific levels of benefits. The court found the Boggs case fundamentally different in that ERISA merely imposed regulation upon private pensions, and did not express any particular concern with ensuring that participants received specific amounts. Also persuasive was the United States Supreme Court's caveat in Hisquierdo that the disposition of that case did not necessarily decide the issue of ERISA's possible preemptive effect on state community property laws. Finally, the court found the United States Supreme Court's dismissal of In re Marriage of Campa, which addressed the issue of preemption by ERISA of state community property laws in the context of divorce, as binding to hold against preemption.

168. Id.
169. Id. at 466-67.
170. Id. at 465.
171. Id. at 465. The court stated: "Although the Act provides a method for the participant to designate a beneficiary, this procedure appears to be another provision for the protection of the employee in his relations with his employer and not a federal decision to upset the balance of spousal rights protected by state law." Id. (citing Employee Sav. Plan of Mobil Oil Corp. v. Greer, 535 F. Supp. 1052, 1055 (S.D.N.Y. 1982)).
Although the issue was not raised by the plaintiff in her action for declaratory judgment, the court addressed the question whether ERISA's spendthrift clause, Section 206(d)(1), conflicted with Louisiana community property law in such a way as to supersede the latter. The court found it did not for two reasons. First, the proscription on alienation and assignment of benefits was intended to protect employees from their "own financial improvidence in dealing with third parties." In accomplishing this purpose, Congress did not intend to alter the familial and support obligations traditionally governed by state law. Second, the word "alienate" meant a conveyance of title to another. The non-participant's community property rights, which attach to property from the moment it is acquired, are not "transfers" and are therefore not prohibited by the spendthrift clause.

V. DISCUSSION

A. ERISA Preemption and Direct Interest Awards—Asserting Rights Against the Plan

1. The Preemption Clause and Direct Awards

A "direct" recognition of spousal community property rights in favor of the non-participant's heirs would require the plan to pay over a certain amount of benefits to them. Do direct awards "relate to" an employee benefit plan under Section 514(a)? There certainly is some impact upon the plan and its administration. It must pay two checks instead of one and may be joined in a suit for division of community property.

But, community property laws are state laws of "general application." They apply to all forms of property acquired during a marriage and are not specifically designed to affect employee benefit plans. Furthermore, community property laws primarily impact upon the relationship between the participant and third parties. The only impact upon the plan is the payment of the participant's benefits to another party under state domestic relations law. Such payment, as the United States Supreme Court has suggested, is too "tenuous or remote" to justify preemption under Section 514(a).

Further, the logic of Mackey seems inescapable—if seizures of plan benefits directly from a plan do not "relate to" employee welfare benefit plans, then they do not "relate to" employee pension plans either. There is no difference between the way the preemption clause applies to welfare benefit plans and the

174. Id. at 464 n.1.
175. Id.
way it applies to pension plans. Payments in compliance with state community property and probate proceedings are no more burdensome to a plan than payment of benefits under a garnishment order. And, as Mackey said, where Congress sought to foreclose garnishment, it did so specifically with the spendthrift clause.\footnote{178}

2. The Spendthrift Clause and Direct Awards

\hspace{1em}a. Are Direct Disbursements to the Non-Participant’s Heirs “Alienations” Under the Spendthrift Clause?

The first question that must be asked is whether requiring a plan to pay benefits to the heirs of the non-participant spouse is an “alienation” within the meaning of the spendthrift clause of ERISA. Arguably, before 1984, the Supreme Court’s summary dismissal of \textit{In re Marriage of Campa} indicated that community property interests in general were not preempted by Section 206(d). This is true since in \textit{Campa}, the exemption of community property divisions of pension benefits was based upon the assumption that Congress had not intended to include community property rights, which under state law are rights of ownership attaching to property from the moment of its acquisition, within the definition of an “alienation” under Section 206(d).\footnote{179} Under the rationale of \textit{Campa}, the non-participant spouse in \textit{Ablamis} would have community ownership in the contractual right to receive benefits payable under the plan, which she could devise by testament to whomever she chose.\footnote{180}

With the passage of the REA in 1984, however, Congress specifically declared its intent that the recognition of community property rights made pursuant to domestic relations orders are “transfers” for purposes of ERISA’s spendthrift clause.\footnote{181} This declaration has been made with force and clarity. By stating explicitly that divorce divisions of pension plans are transfers of rights to benefits, Congress has foreclosed community ownership of the right to receive benefits by non-participant spouses unless that right is transferred to the spouse by a QDRO. The REA thus rejects the \textit{Campa} rationale; community property

\begin{footnotes}
\item[178] Id. at 836, 108 S. Ct. at 2189.
\item[179] See supra notes 83-85 and accompanying text.
\item[180] Ablamis v. Roper, 937 F.2d 1450, 1463-64 (9th Cir. 1991) (Fletcher, J., dissenting). If the non-participant spouse has the right to devise the right to receive benefits, however, a significant problem arises over how such a devisement should be achieved. Nothing in ERISA provides for beneficiary designations by non-participant spouses who have not received a QDRO. The emerging rule is ERISA’s methods of after-death transfer through beneficiary designations supersedes state testamentary law. See Moore v. Philip Morris Cos., 8 F.3d 335, 341 (6th Cir. 1993) (holding ERISA beneficiary designations preempt state law on forfeiture of rights in deceased spouse’s property); Krishna v. Colgate Palmolive Co., 7 F.3d 11, 16 (2d Cir. 1993) (holding ERISA preempted state testamentary law); Maclean v. Ford Motor Co., 831 F.2d 723, 728 (7th Cir. 1987) (holding ERISA plan beneficiary designation prevailed over state testamentary law).
\end{footnotes}
divisions are now exempted from the spendthrift clause based upon their compliance with the federal statutory criteria set forth in the QDRO exception, not on the basis of their state law characterization. The non-participant has no right to benefits in life without a QDRO, and thus none in death.

b. Can Such Awards Fall into an Explicit (the QDRO) or Implied Exception to the Spendthrift Clause?

Since direct awards of rights to benefits payable under an ERISA plan are "alienations," can they nonetheless be excepted? Arguably, the REA could be interpreted so that a state court order requiring a pension plan to pay benefits to heirs of the non-participant would be a QDRO. However, Ablamis seems to be correct on this matter. The QDRO is drafted in a way that does not lend itself to liberal interpretation. The sheer narrowness of the exception counsels against the inclusion of probate orders recognizing a non-participant’s community interest in favor of the non-participant’s heirs. The QDRO is designed to favor the spouse, children, or "other dependents" of the participant as recipients of payments under a plan. The estate of a non-participant spouse cannot qualify as a "spouse" or "other dependent" of a participant.

Nor can an implied exception to the spendthrift clause be found for transfers of the right to receive benefits to the non-participant spouse’s heirs. Since Congress has preempted the community property spouse’s full ownership right, the non-participant’s heirs are not entitled “of right” to receive benefits. There must, therefore, be a good reason for assuming that Congress would allow a transfer of the right to receive benefits from the participant to the non-participant’s heirs as an exception to the alienation clause. The question can be phrased, as it was in one pre-REA case, as "whether the interest of the [non-participant spouse’s heirs] in a fair division of community property . . . is greater than [the participant’s] interest in keeping pension benefits for himself.”Absent justifications compelling an exception, the overriding rule is non-alienation.

No justifications like those prompting the QDRO legislation exist here. Allowing involuntary transfers of benefits from the participant to the participant’s

---

182. See Mansur, supra note 139, at 1725-27. But see Ablamis v. Roper, 937 F.2d 1450, 1463-64 (9th Cir. 1991) (Fletcher, J., dissenting) (arguing the pre-REA jurisprudence, including Campa, should be persuasive authority for exempting community property claims by the deceased non-participant’s heirs from spendthrift clause preemption); Barbo, supra note 139, at 1106-08 (arguing non-participant should be considered as a "participant and owner" of community interest in ERISA pension plan).

183. See Ablamis, 937 F.2d at 1456.

184. See Guidry v. Sheet Metal Workers Nat’l Pension Fund, 493 U.S. 365, 376, 110 S. Ct. 680, 687 (1990) (holding the spendthrift clause precludes transfers even when it “prevents others from securing relief for the wrongs done to them,” and exceptions are for Congress to make).

spouse under the REA is a recognition of the non-participant's contributions to
the marriage and to the accumulation of the benefits. On the basis of these
contributions, Congress in the REA concluded that non-participant spouses had
a legitimate expectation of sharing in future benefits. This expectation was very
real when the marriage remained intact into retirement, since it is rational to
assume that benefits received from a pension plan would benefit the marriage
and thus the non-participant spouse.

However, the spouse's expectation was in danger of being cut off upon
divorce—some courts had held the spendthrift clause prevented the non-employee
spouse from sharing in the benefits to be provided under the plan. To remedy
this, the REA allowed a transfer of benefits to the non-participant spouse through
state marital property laws in recognition of that spouse's contributions to the
marriage.

To justify such a transfer of the benefit property from the participant to the
non-participant's heirs, one would have to find that those heirs had made a
similar contribution to the marriage, and to the accumulation of benefits, as had
the non-participant spouse. That, of course, is rarely the case. In fact, children
of the marriage are more often economic beneficiaries during the years in which
they are dependents of the spouses. Retirement plans are designed, in part, to
allow the spouses to put aside an amount for the future during those years when
a great deal of the income of the marriage may be applied to the maintenance of
children of the household. Therefore, no justifications for an exception to the
non-alienability of pension plans exist in favor of the non-participant's heirs.

Additionally, the QDRO scheme represents a balance of the interests of the
non-participant spouse, the participant spouse, and future non-participant spouses
and dependents of the employee spouse. In enacting the REA, Congress still has
its original purpose of protecting benefits for participants and their dependents.
When the spendthrift clause hampered rather than promoted that purpose,
Congress made changes (the QDRO exception). This does not mean, however,
that Congress has simply abandoned its original purpose. Benefits must still be
protected in favor of the participant and other spouses or dependents of the
participant that may at the time of the QDRO exist or come into existence in the
future. The QDRO is a balance of those interests. 186

The QDRO exception is designed to maintain federal control over state
community property awards in ERISA-governed plans. Non-participants may
make inter vivos claims against benefit plans only in compliance with the
QDRO's detailed federal criteria. These criteria are designed to provide clarity
and consistency for the plan administrator, so that he may act with the assurance
that payment to the alternate payee will not be a violation of the administrator's
fiduciary duties to participants. The QDRO standards also shield the plan from
paying benefits in excess of that allotted for the debtor participant, and in forms
or under terms different from those ordinarily provided under the plan. It would

186. See Ablamis, 937 F.2d at 1457.
be unreasonable to assume Congress would impose such control in the context of divorce, while allowing states unfettered discretion on the non-participant's death. Furthermore, the mere fact that Congress has spoken on the matter of state community claims to ERISA plan benefits suggests the courts should not carve out "implied exceptions" for claims to benefits following the non-participant's death.187

B. Indirect Awards—Asserting Rights Against the Participant Alone

States are barred by the spendthrift clause from transferring the right to receive benefits payable under a pension plan to the heirs, legatees, or estate of a non-participant spouse. Nevertheless, are states not allowed to grant increased ownership of other property to the estate of the non-participant to offset the preempted interest? Again, the state law must be subjected to both the preemption clause and the spendthrift clause.

1. The Preemption Clause and Indirect Awards

The indirect award argued for in *Meek* under Section 514(a) is troublesome. It is not exactly a "state law of general application" under *Mackey*, since such an award is "premised on" the non-participant's heirs being denied a direct interest in an ERISA plan because of federal preemption.188 However, it is not preempted because there is no effect on the plan.

Some impact upon the employee benefit plan itself is a predicate for preemption in every case the United States Supreme Court has addressed. Under *Mackey*, the state law may be preempted because it is "specifically designed to affect employee benefit plans."189 Similarly, the Court in *Shaw v. Delta Air Lines, Inc.*, noted 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."190 *Ingersoll-Rand Co. v. McClendon* stated, in language relied upon in *Meek*, that "a state law may 'relate to' a benefit plan . . . even if

---

187. Mansur, *supra* note 139, at 1725-26 (stating since Congress has specifically legislated upon the subject of community property rights through the REA, federal courts are barred from resorting to "federal common law," which should be employed only when courts are confronted with federal questions not answered by statute).
188. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 140, 111 S. Ct. 478, 483 (1990) (holding because state common-law action for wrongful discharge to avoid payment of pension benefits was "premised on" the existence of an employee benefit plan, it was analogous to a state law specifically targeting such plans and preempted by § 514(a) of ERISA).
the law is not specifically designed to affect such plans, or the effect is only indirect.”

Section 514(a) clearly cannot preempt the indirect approach to recognizing the non-participant’s community interest in an ERISA plan because the indirect approach has absolutely no effect upon the plan. It does not impact upon the plan assets. It does not have the possibility of facing the plan administrator with a patchwork of conflicting regulation. Nor does it require the tailoring of employer conduct to suit the laws of an individual jurisdiction. In fact, the plan administrator may never even know that any interest has been recognized. It is strictly a matter between the participant and the non-participant’s heirs. Therefore, it is not “foreseeable that state courts [or state legislatures] . . . might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.” Only an impact on the plan of some type will require employers and fiduciaries to change their actions to comply with varying state laws.

Perhaps some impact upon the plan or the employer providing it could be articulated. For example, awarding the non-participant’s heirs other property of the marriage may encourage the employee to work longer to make up for lost benefits. But such an impact seems to be the very effect the court in Shaw referred to as “tenuous or remote.” If direct receipt of plan benefits is not precluded under Section 514(a), there is no doubt that the far less burdensome impact hypothesized above would be allowed. Under these circumstances, Congress cannot really be said to have “positively required by direct enactment” that state [family property] law[s]” such as the one at issue here are preempted.

2. The Spendthrift Clause and Indirect Awards

“Indirect” recognition of a deceased non-employee spouse’s community interest in a pension plan is not an “alienation” under Section 206(d) of ERISA. Neither does it conflict with that clause’s purposes. It is useful to compare the spendthrift clause of ERISA with the one at issue in Hisquierdo. In Hisquierdo, the United States Supreme Court found the Railroad Retirement Act’s spendthrift clause preempted not only state laws requiring direct payment of plan benefits to the non-employee spouse, but those that allowed the non-employee to receive her community interest “indirectly” as well.


192.  Ingersoll-Rand Co., 498 U.S. at 142, 111 S. Ct. at 484.

193.  Shaw, 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21.


The clause in the Railroad Retirement Act precluded not only alienation, but also the “anticipation” of benefits and “subject[ing] them to any legal process whatsoever.” The Court found Congress had intended that the indirect approach be preempted. In sharp contrast, the spendthrift clause of ERISA states only that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” It does not prevent courts from anticipating the benefits or subjecting them to legal process. Through this clause, Congress cannot be said to have spoken with “force and clarity” to preempt indirect recognition of community property rights in pension benefits.

A comparison of the purposes behind the anti-alienation clauses in *Hisquierdo* and in ERISA yields a similar result. The Court in *Hisquierdo* found Congress had a substantial federal purpose in the enactment of the Railroad Retirement Act (“RRA”) in encouraging the early retirement of railroad employees. The RRA’s spendthrift clause was designed to advance that purpose. Awarding the non-employee spouse a share of the husband’s benefits did “major damage” to that purpose by encouraging the husband to stay on the job longer to compensate for the loss in his net worth.

No such federal purpose, however, exists in ERISA or its spendthrift clause. Section 206(d) is designed solely to preserve pension benefits for the employee spouse and his dependents and beneficiaries. If a state court makes an “indirect” award of other property of the marriage in recognition of a non-employee spouse’s community property rights, the pension plan benefits payable in the future are entirely unaffected. It might, perhaps, impact upon benefits previously received, but the spendthrift clause does not prohibit the seizure of benefits once they are “money in the bank.” It prohibits only the alienation of the right to receive payments from the plan.

---

198. Compare Free v. Bland, 369 U.S. 663, 667, 82 S. Ct. 1089, 1092 (1962), where Federal regulations stated a surviving co-owner of a U.S. savings bond issued in “joint tenancy” form “will be recognized as the sole and absolute owner” of the bond. The regulations also provided “[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by [federal regulation].” Id. at 667, 82 S. Ct. at 1092-93. The court in that case held “indirect” rights in the bonds under state community property laws were preempted. Id. at 670, 82 S. Ct. at 1094.
200. See supra note 34.
201. Compare the motivating purpose in ERISA’s spendthrift clause to the purposes behind the Treasury regulations governing ownership of U.S. Treasury Bonds in Free v. Bland, 369 U.S. 633, 82 S. Ct. 1089 (1962). In Free, the Court viewed the regulations governing the disposition of a co-owner’s interest in the savings bonds upon his death as a device intentionally designed to avoid subjecting the bonds to normal state rules of inheritance and testamentary transfer. Providing for a simple method of transfer was thus an incentive for buyers to purchase the bonds. Allowing state probate and family property law to function even indirectly (through offsetting claims to other property of the marriage) frustrated this incentive and rendered it ineffective. Id. at 669, 82 S. Ct. 1093. See also McCarty v. McCarty, 453 U.S. 210, 233, 101 S. Ct. 2728, 2741 (1981) (holding
Furthermore, the plain language of the spendthrift clause suggests it is a contractual device between the participant and the plan sponsor, not meant to affect rights under state law in other forms of property. Congress could have easily said benefits may not be “anticipated.” Or, at least, it could have simply mandated that “the right to receive benefits payable under a pension plan may not be assigned or alienated.” Instead, it commands that pension plans shall provide that the right to benefits not be assigned or alienated. From this federal imposition of a contractual device upon pension plans, it is very difficult to infer a congressional intent to mandate the way in which state courts are to define and divide non-pension property.

VI. CONCLUSION

Among the forms of property which states distribute upon death, pension plans are in some ways unusual. They are, unlike many other forms of property, designed solely to provide income at a time when a person is likely to have few other means of support. A difficult question, then, is raised when the adult children of a non-employee spouse attempt to assert their deceased mother or father’s community property interests in plan benefits against a possibly aging participant. The issue presents a conflict of two powerful principles for community property states: the spouse’s full ownership of, and resulting right to devise, community property; and the need for pension plan participants to have retirement income in their later years. As one Texas pension participant facing the assertion of an interest in his benefits by his deceased wife’s heirs asked: Why should “able-bodied young adults capable of supporting themselves” be permitted to share in his retirement benefits? The response might come from the California court that, in criticizing California’s repealed terminable interest rule, asked: “Why should [the non-participant spouse] be deprived of... any single stick in the bundle?”

application of state laws of community property division, even indirectly, frustrates the federal purpose of promoting a young military by encouraging members to stay in the service to make up for loss of assets). ERISA, in contrast, is not designed to give participants “breaks” from general state probate laws.

Note states should be able to use the “indirect” means of recognizing the deceased non-participants share only insofar as that method attempts to treat ERISA plan participants like others, such as participants in non-ERISA benefit plans or owners of other forms of property. State laws that “single out” ERISA participants for special treatment should be preempted. See Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 556 (6th Cir. 1987) (holding where a municipality enacts a neutral income tax of general application which applies to employees without regard to their status as ERISA participants, the tax is not preempted).

Free, in comparison, might well be regarded as a case in which the state was trying to treat the savings bond owner like other property owners in its jurisdiction, but was precluded because the federal government had singled the bond owner out for special treatment.

The question posed here, however, is not how this problem is to be resolved, but who will get to resolve it. The problem of "who gets what when someone dies" has always been a concern primarily of states. Where Congress has demonstrated its intent to control direct access to pension plan benefits, state law must yield under the Supremacy Clause. But where Congress has not made its intent clear, state law may continue to function. The "occupation of the field" of pension plan regulation does not occupy the field of distributing non-pension assets at death. Awarding non-plan assets to the non-employee's heirs does not conflict with ERISA's language or purpose. Nor has Congress positively expressed its intention to preempt state indirect awards. Absent these indicators of congressional intent, the assumption must be that states may continue to apportion the non-pension property of the marriage in recognition of the deceased non-employee's preempted rights.

Grant Summers