North Dakota Law Review

Volume 74 | Number 1 Article 6

1998

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Recommended Citation
Dahl, Amy Elizabeth (1998) "Bankruptcy - The Estate: The District Court for North Dakota Determines the Requisite Elements in Order for an Employee Benefits Plan to Be ERISA-Qualified and Excluded from the Bankruptcy Estate," *North Dakota Law Review*: Vol. 74: No. 1, Article 6.
Available at: https://commons.und.edu/ndlr/vol74/iss1/6

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BANKRUPTCY—THE ESTATE: THE DISTRICT COURT FOR NORTH DAKOTA DETERMINES THE REQUISITE ELEMENTS IN ORDER FOR AN EMPLOYEE BENEFITS PLAN TO BE ERISA-QUALIFIED AND EXCLUDED FROM THE BANKRUPTCY ESTATE

In re Craig, 204 B.R. 756 (D.N.D. 1997)

I. FACTS

In 1976, James M. Craig, doing business as a Montana professional corporation, executed both pension and profit-sharing plans (Plans) and accompanying trust agreements.[1] Craig signed the agreements as president of the employer corporation and trustee of the Plans.[2] From the time the Plans were created until 1986, there were other employee-participants in the Plans, including Craig's ex-wife.[3] Sometime after 1986, the professional corporation ceased business and was involuntarily dissolved.[4] At the time the professional corporation ceased business, the participants' interests in the Plans vested and Craig, as trustee, paid out the assets of all participants, with the exception of his own and his ex-wife's.[5] No further contributions were made to the Plans and the Plans have since become "wasting" or "frozen" plans.[6]

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1. *See In re* Craig, 204 B.R. 750, 752 (D.N.D. 1996) [hereinafter Craig I] (illustrating that Craig was the sole shareholder of the professional corporation, James M. Craig, M.D., P.C.).

2. *Id.*

3. *See id.* (stating that the other employee participants included in the plan were bookkeepers and nurses).

4. *See id.* (stating that a certificate of fact from the Montana Secretary of State indicates that James M. Craig, M.D., P.C. was involuntarily dissolved on December 12, 1988; Craig has since done business as a sole proprietor). Jon Strinden, an attorney hired by Kip Kaler to assist with the appeal, stated that "the dissolution of [Craig's] corporation is an important fact because at [that] point there was no longer a plan sponsor for the retirement plan, [and] in the absence of a plan sponsor, you can no longer have an ERISA-qualified plan." Letter from Jon E. Strinden, Attorney, Gunhus, Grinell, Klinger, Swenson & Guy, Ltd., to Amy Dahl, Staff Member, *North Dakota Law Review* (Nov. 7, 1997) (on file with author).

5. *See Craig I*, 204 B.R. at 752 (citing Craig's testimony at trial); *see also id.* at 752 n.1 (confirming this testimony by citing to § 8.03 of both plan documents which provides that "[i]n the event of permanent discontinuance of Contributions to the Plan by the Employer, the accounts of all vested and nonforfeitable to such Members to the extent funded"). Subsequently, in 1991, Craig and his wife were divorced and the divorce decree awarded Craig's ex-wife one-half of his interest in the Plans. *See id.* (citing again to Craig's testimony). This interest awarded to Craig's ex-wife by the divorce decree was distinct from her own interest as an employee-participant in the plan, and was never paid out. *Id.* at 752 n.2.

6. *Id.* A plan becomes a "wasting" or "frozen" plan when, due to inability to satisfy all of the benefit commitments of the plan, an employer (or plan sponsor) amends the plan and ceases the "crediting of future service for benefit accruals." 51 Fed. Reg. 12492 (1986). It is important to note that with regard to ERISA plans, ERISA requires notification to the participants and beneficiaries of the plan by the plan administrator before any significant reduction in the benefit accruals (including the freezing of such accruals) is made. 29 U.S.C. § 1054(h) (1994).

The Plans were not promptly amended to comply with the 1984 Internal Revenue Code (IRC) amendments, and Internal Revenue Service 5500 forms were not filed for the Plans for a number of years.[7] Craig executed amendments to the Plan documents in 1995, but never withdrew or altered the status of the Plan assets.[8]

Craig filed for Chapter Seven bankruptcy in the District of North Dakota on May 1, 1995.[9] Craig's "Schedule of Property Claimed as Exempt" initially sought to exempt the Plans from the bankruptcy estate under North Dakota Century Code section 28-22-19(1).[10] The bankruptcy trustee objected to this claim of exemption and the schedules were subsequently amended.[11] The amendment asserts that the Plans are "qualified plans not property of the estate" under the United States Supreme Court's holding in *Patterson v. Shumate*.[12] It is the assertion of this amendment, the claim the Plans are not property of the estate, which has been the focus of the appealed orders.[13]

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7. *In re* Craig, 204 B.R. 756, 757 (D.N.D. 1997) [hereinafter Craig II].

8. *Id.*; *see also Craig I*, 204 B.R. at 752 (stating that Craig had executed the 1995 amendments to the Plans in preparation for filing bankruptcy). The Plans were amended by documents titled "Pension Plan and Profit Sharing Plan," dated January 31, 1995. Appellants Brief on Appeal at 5, Craig II, 204 B.R. 756 (D.N.D. 1997) (No. 95-30415). Jon Strinden stated that "in the absence of a plan sponsor," due to the dissolution of Craig's professional corporation, "no one had the authority to amend the retirement plan." Letter from Jon E. Strinden, *supra* note 4. Although Craig's plan "was amended and signed on behalf of [his] professional corporation and submitted to the Internal Revenue Service," Strinden states that "[c]learly a corporation which had been dissolved approximately 10 years prior to the amendment cannot enter into an amendment." *Id.*

9. Appellant's Brief on Appeal at 2, *Craig II* (No. 95-30415); Debtor's Reply to Appellant's Brief on Appeal at 3, *Craig II*, (No. 95-30415).

10. Appellant's Brief on Appeal at 2, *Craig II* (No. 95-30415). The Plans were listed on the schedule as being worth $73,236.83. *Id.* The relevant portion of North Dakota Century Code section 28-22-19 states:

> The following amounts are exempt from liability for debts of the person to or on account of whom the amounts are paid, and are not subject to seizure upon execution or other process:
>
> > (1) All pensions or annuities or retirement, disability, death, or other benefits paid or payable by, or amounts received as a return of contributions and interest from, a retirement system established pursuant to state law by the state.

N.D. CENT. CODE § 28-22-19(1) (Supp. 1995).

It seems peculiar that the Debtor would originally try to exempt the Plans under this exception since the attorney for the debtor, knowing that ERISA-qualified plans were exempt from the bankruptcy estate, asserted in his brief that before filing the case he had advised the debtor to contact the person who had drafted the documents to make sure that the Plans were ERISA-qualified. Debtor's Reply to Appellant's Brief on Appeal at 3, *Craig II* (No. 95-30415).

11. Appellant's Brief on Appeal at 2, *Craig II* (No. 95-30415); Debtor's Reply to Appellant's Brief on Appeal at 3, *Craig II* (No. 95-30415).

12. Appellant's Brief on Appeal at 2, *Craig II* (No. 95-30415); Debtor's Reply to Appellant's Brief on Appeal at 3-4, *Craig II* (No. 95-30415). *See* Patterson v. Shumate, 504 U.S. 753, 760 (1992) (holding that ERISA qualified plans are excluded from the bankruptcy estate).

13. *Craig I*, 204 B.R. at 753 (addressing whether the Plans are subject to ERISA in order to be ERISA-qualified and excluded from the bankruptcy estate under *Shumate*); *Craig II*, 204 B.R. at 757 (addressing the issue of whether the Plans are ERISA-qualified under *Shumate*).

The first appealed order dealt generally with the issue of whether Craig's interests in the Plans were excluded from the bankruptcy estate.[14] The Plans would be excluded from the estate only if they were subject to a transfer restriction enforceable under "applicable non-bankruptcy law."[15] The Employee Retirement Income Security Act (ERISA) qualifies as "applicable non-bankruptcy law," and therefore, if an ERISA-qualified plan contains the requisite enforceable anti-alienation or transfer restriction provision, the property is excluded from the bankruptcy estate.[16]

The bankruptcy court determined that Craig's Plans were not ERISA-qualified because they were not subject to ERISA.[17] The federal district court for the District of North Dakota reversed that decision, holding that Craig's Plans were subject to ERISA, and sent the case back to the bankruptcy court to determine the issue of whether the Plans were ERISA-qualified.[18]

On remand, the bankruptcy court concluded that Craig's Plans were ERISA-qualified, and therefore, excluded from the bankruptcy estate.[19] The district court *held* that in order for such plans to be ERISA-qualified they need only contain anti-alienation provisions and be "subject to ERISA," thus affirming the bankruptcy court's determination that Craig's Plans were ERISA-qualified.[20]

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14. *Craig II*, 204 B.R. at 757. The District Court has the authority to act as an appellate court in reviewing bankruptcy court decisions. *In re* Muncrief, 900 F.2d 1220, 1224 (8th Cir. 1990).

15. 11 U.S.C. § 541(c)(2) (1993).

16. Patterson v. Shumate, 504 U.S. 753, 758 (1992).

17. *Craig I*, 204 B.R. at 752. In its treatment of the case, the bankruptcy court discussed the "1995 Plans" as distinct from the original "1976 Plans," and thus determined that the "1995 Plans" were not subject to ERISA. *Id.*

18. *Id.* at 755. On appeal, the district court recognized that a distinction must be made between the plan documents, which may have changed due to the 1995 amendments, and the Plans themselves (in other words, the assets accumulating under the Plans), which have not changed despite the 1995 amendments. *Id.* at 752. The court illustrated that if the 1995 amendments had any effect on the Plans, they did so by amending or restating the Plans, not terminating the original Plans and creating new Plans, as the bankruptcy court seemed to erroneously assume. *Id.* at 752-53. The result being, as the district court acknowledged, that if the assets accumulated under the original Plans were excludable from the bankruptcy estate before the 1995 amendments, they did not come into the estate merely as a result of the amendments having been executed. *Id.* at 753. Thus, the district court addressed the issue of whether the Plans are subject to ERISA with no distinction between the original (1976) and amended (1995) Plans. *Id.*

19. *Craig II*, 204 B.R. at 757.

20. *Id.* at 757, 760. The court stated that although it affirmed the decision of the bankruptcy court, it did so on a separate legal basis. *Id.* at 757. The attorney for the Debtor stated that before filing the bankruptcy case, he advised Craig to check with the drafter of the Plans to "make sure" that the Plans were ERISA-qualified prior to the filing. Debtor's Reply to Appellant's Brief on Appeal at 3, *Craig II* (No. 95-30415). The attorney stated he knew that ERISA-qualified plans were not property of the bankruptcy estate, and he believed that it would constitute malpractice to file a bankruptcy case without checking to see if a debtor's Plans were "qualified" as such. *Id.*

II. LEGAL BACKGROUND

The Bankruptcy Code provides the rules and regulations to be used in conjunction with the filing of bankruptcy.[21] Specifically, section 541 of the Bankruptcy Code defines the property of the bankruptcy estate and specifies that which becomes property of the estate.[22]

The commencement of a bankruptcy case creates an estate.[23] This estate is comprised of all legal or equitable interests of the debtor in property, wherever located.[24] The scope of this definition is broad and all embracing, and the policy position behind this all-encompassing determination of the estate is to ensure a broad inclusion of the assets in the bankruptcy estate.[25]

"Notwithstanding its broad scope," however, the Bankruptcy Code does exclude certain interests in property from the bankruptcy estate.[26] The exclusion applicable to Craig's Plans is contained in section 541(c)(2).[27] This section states that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title."[28] Thus, a debtor's beneficial interest in a trust is excluded from the bankruptcy estate so long as it is "subject to a transfer restriction enforceable under 'applicable non-bankruptcy law.'"[29] The policy behind preserving such restrictions, and therefore, keeping the property out of the bankruptcy estate, is that such property is seen as "income reasonably necessary for the support of a debtor and his dependents."[30]

The elements required for property to be excluded from the bankruptcy estate under the above stated statute are that it must first contain an anti-alienation clause so as to restrict the "debtor's beneficial interest;" and additionally, it must be enforceable under "applicable

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21. *See generally* 11 U.S.C. §§ 101-541(1997) (articulating the rules and regulations governing bankruptcy filings).

22. 11 U.S.C. § 541 Historical and Statutory Notes (1993).

23. *Id.*

24. *Id.* (citing 11 U.S.C. § 541(1)(a) (1993)). *See also* Whetzal v. Alderson, 32 F.3d 1302, 1303 (8th Cir. 1994) (stating that the scope of § 541 is very broad and includes property of all descriptions, tangible and intangible, as well as causes of action).

25. *Id., see also In re* Miller, 16 B.R. 790, 791 (Bankr. D. Md. 1982).

26. *In re* Hanes, 162 B.R. 733, 738 (Bankr. E.D. Va. 1994).

27. *Craig II*, 204 B.R. 756, 757 (D.N.D. 1997).

28. 11 U.S.C. § 541(c)(2) (1993).

29. *Craig II*, 204 B.R. at 757 (citing 11 U.S.C. § 541(c)(2)).

30. 11 U.S.C. § 541(c)(2) Historical and Statutory Notes (1993). *But see id.* (noting that subsection (c) generally, without the exception (c)(2), invalidates restrictions on the transfer of property of the debtor, so that all of the interests of the debtor in property will become property of the estate; additionally, the provisions invalidated are those that restrict or condition transfer of the debtor's interest and those that are conditioned on the insolvency or financial condition of the debtor, on the commencement of a bankruptcy case, or on the appointment of a custodian of the debtor's property).

non-bankruptcy law."[31] It has been determined that ERISA plans can potentially fulfill such requirements.[32]

The Employee Retirement Income Security Act of 1974, generally known and referred to as ERISA, was enacted by Congress in response to the growth of private employee benefit plans in the United States.[33] The purpose of this act was to "correct the perceived inadequacies of many benefits plans, prevent employer abuses, and assure stability of benefits."[34] Simply and practically speaking, the goal of Congress was to protect pension benefits in order to ensure that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it."[35]

The scope of ERISA is tremendously broad and extends to all "employee benefit plans" established or maintained by employers or employee organizations which affect commerce.[36] An "employee benefit plan" is synonymous with an "employee pension benefit plan," which includes any plan "established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances . . . provides retirement income to employees" or "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond."[37] A plan is subject to ERISA so long as it can be classified as an "employee benefit plan."[38]

ERISA imposes various requirements in order to protect the employees participating in such pension plans.[39] Of these requirements,

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31. Patterson v. Shumate, 504 U.S. 753, 759 (1992). It is not enough, under section 541 of the Bankruptcy Code, to merely require that pension plans include anti-alienation provisions, as section 541(c)(2) will only shield a beneficial interest in a trust when the anti-alienation provision is *enforceable* under applicable non-bankruptcy law. *In re* Hanes, 162 B.R. 733, 739 (Bankr. E.D. Va. 1994).

32. *Shumate*, 504 U.S. at 760.

33. *In re* Conroy, 110 B.R. 492, 494-95 (Bankr. D. Mont. 1990).

34. *Id.*

35. *See Shumate*, 504 U.S. at 764-65 (citing Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980)). In furtherance of this principle, the Supreme Court declined, notwithstanding strong equitable considerations to the contrary, to recognize an implied exception to ERISA's anti-alienation provision. Guidry v. Sheet Metal Workers' Nat'l Pension Fund, 493 U.S. 365, 376 (1990). In reaching this decision, the Court reasoned:

> Section 206(d) reflects a congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependent, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress [and not the Court] to undertake that task.

Id.

36. 29 U.S.C. § 1003(a) (1985).

37. 29 U.S.C. § 1002(2)(a) (1985).

38. *In re* Hall, 151 B.R. 412, 417 (Bankr. W.D. Mich. 1993).

39. *See generally* 29 U.S.C. §§ 1021-1309 (1985).

two are particularly important with regard to Craig's Plans.[40] First, ERISA states that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan . . . ."[41] This requires that the assets of a plan be used for the exclusive benefit of the employees.[42] Ascertaining precisely who qualifies as an employee under this requirement necessitates a comprehensive review of the defining concepts.[43]

Under this requirement, a "participant" is "any employee or former employee . . . who is or may become eligible to receive a benefit . . . from an employee benefit plan."[44] Additionally, an "employee," as simply defined by ERISA, is "any individual employed by an employer."[45] The Secretary of Labor has, however, pursuant to the authority vested in that office to institute regulations necessary to the implementation of ERISA provisions, narrowed the definition of "employee benefit plan" so that it must be used in accordance with the definition of a "participant" in an ERISA plan.[46] An "employee benefit plan," has come to be defined, therefore, as not including any plan where none of the employees can be classified as "participants" under the plan.[47] Further, the Secretary of Labor's regulation directs that the term "employees" does not include an individual or spouse if the business is wholly owned by that individual or spouse or both.[48] In conclusion, it is mandatory that the plans in question have the appropriate eligible "participants" and "employees" in order to be "employee benefit plans" subject to ERISA.[49]

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40. *See* Craig I, 204 B.R. 750, 753 (D.N.D. 1996) (discussing who is eligible to be a "participant" in the plan); *see also* Craig II, 204 B.R. 756, 759 (D.N.D. 1997) (discussing the tax benefits derived if the plan is qualified under the IRC, and thus, articulating a purpose for such compliance).

41. 29 U.S.C. § 1103(c)(1) (1985).

42. *See Hall*, 151 B.R. at 421 (citing 29 U.S.C. §§ 1002(7) and 1103(c)(1) (1985)).

43. *See id.* at 420, 421; *see also Craig I*, 204 B.R. at 753 (defining who qualifies as an employee under this requirement).

44. 29 U.S.C. § 1002(7) (1985). *See Hall*, 151 B.R. at 420 (suggesting that "[r]eading these two sections together establishes that for a plan to be subject to ERISA, it must exclusively provide benefits to employees and former employees").

45. 29 U.S.C. § 1002(6) (1985).

46. *Hall*, 151 B.R. at 420. *See* 29 U.S.C. § 1135 (1974) (granting the Secretary of Labor the authority to promulgate such necessary regulations).

47. 29 C.F.R. § 2510.3-3(b) (1975).

48. 29 C.F.R. § 2510.3-3(c)(1) (1975). It has been determined, however, "that so long as there are other 'employees' to bring the plan within the definition of an employee benefit plan, so as to be covered by ERISA, then a sole shareholder and spouse . . . can be participants in the plan." *Craig I*, 204 B.R. at 753 (citing Madonia v. Blue Cross & Blue Shield of Va., 11 F.3d 444, 449-50 (4th Cir. 1993)). In Craig's case, therefore, "[i]f Craig and his ex-wife were eligible to participate when there were other employees, they should still be eligible to participate even though the other employees' interests have been paid out." *Id.* at 755.

49. *See Craig I*, 204 B.R. at 755 (stating that a plan is "not subject to ERISA" if it does not have the proper employee participants).

The second requirement imposed by ERISA, with particular importance to the case at hand, is the condition that the plan must include a restriction on the assignment or alienation of the plan, otherwise known as an anti-alienation provision.[50] This anti-alienation provision is not only essential in order to comply with ERISA requirements, but also enables employers and employees alike to qualify for tax benefits under the plan.[51] Most importantly, however, it is this anti-alienation provision, as required by ERISA, which facilitates the union of ERISA and the Bankruptcy Code.[52]

The issue that effectively incorporates ERISA and the Bankruptcy Code is whether "non-applicable bankruptcy law," as stated under section 541(c)(2) of the Bankruptcy Code, applies only to state spendthrift law or whether it also includes federal law.[53] More specifically, the issue is whether ERISA-qualified plans could satisfy the literal terms of the Bankruptcy Code.[54] These issues were resolved by the Supreme Court in *Patterson v. Shumate*.[55]

The Court determined that the natural language of the Bankruptcy Code provision allows a debtor to exclude from the estate any interest in a plan, so long as it contains a transfer restriction enforceable under *any* relevant non-bankruptcy law.[56] The Court found nothing in the strict reading of the provision that placed a limitation on the source of law included in the provision.[57] Based on the notion that the Court must enforce a statute according to its terms, plainly read, the Court found that section 541(c)(2) of the Bankruptcy Code "encompasses any relevant non-bankruptcy law," including ERISA.[58]

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50. 29 U.S.C. § 1056(d)(1) (1974).

51. *See In re* Conroy, 110 B.R. 492, 495 (Bankr. D. Mont. 1990) (stating that in order to encourage compliance, ERISA amended the Internal Revenue Code (IRC) to provide tax benefits to both employers and employees). Qualifying for those benefits requires much more than the mere inclusion of an anti-alienation provision, however, as such qualification requirements have been described as scaling a "legal mountain" of numerous IRC provisions. *Hall*, 151 B.R. at 418 n.15.

52. Patterson v. Shumate, 504 U.S. 753, 759-60 (1992).

53. *See id.* at 757-59 (discussing whether "non-applicable bankruptcy law" includes federal as well as state law).

54. *Id.* at 759.

55. *Id.* at 759-60. Prior to the Supreme Court's decision in this case, the courts of appeal were divided on this question. *See id.* at 757 n.1. The Court determined in addressing this issue that the requisite basis for their decision should be the plain language of the Bankruptcy Code and ERISA. *Id.* at 757 (citing Toibb v. Radloff, 501 U.S. 157, 160 (1991)). The Court recognized that while it could "appropriately . . . refer to a statute's legislative history to resolve statutory ambiguity," the statutory language at issue in this case "obviates the need for any such inquiry." *Id.* at 761 (citing *Toibb*, 501 U.S. at 162). This decision was rendered by the Court despite attempts by Petitioner to introduce statutory history to get to the intent of the statute. *Id.* at 761-62.

56. *Id.* at 758.

57. *Id.*

58. *Id.* at 759. The Court justified this decision, beyond the plain language interpretation, by identifying that Congress has frequently, when such meaning was desired, restricted the scope of applicable law to state law. *Id.* at 758. It follows, therefore, "[that] Congress' decision to use the

After making the determination that ERISA was included under "applicable bankruptcy law," the Court further addressed whether the anti-alienation provisions of ERISA plans would satisfy the "literal terms" of section 541(c)(2) of the Bankruptcy Code.[59] Again deferring to the plain language of the statute in order to decide the issue, the Court first looked to section 206(d)(1) of ERISA.[60] This section states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[61] The Court determined, therefore, that this language proves to literally satisfy the terms of section 541 (c)(2) of the Bankruptcy Code because it clearly imposes a "restriction on the transfer" of a debtor's "beneficial interest" in the trust.[62]

Additionally, the language of ERISA prohibiting a plan from being assigned or alienated is "enforceable," as required by section 541(c)(2) of the Bankruptcy Code, and therefore, satisfies the literal language of this section.[63] Such restrictions on alienability are enforced because plan trustees are required under ERISA to discharge their duties "in accordance with the documents and instruments governing the plan."[64] In addition, "a plan participant, beneficiary, fiduciary, or the Secretary of Labor may file a civil action to enjoin any act or practice which violates either ERISA, or the specific terms of the plan," thus serving as a mechanism of enforcement.[65] The Court concluded, therefore, that the anti-alienation provision required for ERISA-qualification "constitutes an enforceable transfer restriction for purposes of section 541(c)(2)'s exclusion of property from the bankruptcy estate."[66]

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broader phrase 'applicable nonbankruptcy law' [in this provision] strongly suggests that it did not intend to restrict [this] provision . . ." *Id.* Thus, "[r]eading the term 'applicable nonbankruptcy law' in 541(c)(2) to include federal as well as state law comports with other references in the Bankruptcy Code to sources of law." *Id.* It had previously been decided by the Court that "a word is presumed to have the same meaning in all subsections of the same statute," and thus it would follow that this reference should not be limited to state law, but extended to include federal law. Morrison-Knudsen Constr. Co. v. Office of Workers' Compensation Programs, 461 U.S. 624, 633 (1983).

59. *Shumate*, 504 U.S. at 759.

60. *Id.*

61. *Id.* (citing 29 U.S.C. § 1056(d)(1) (1974)).

62. *Shumate*, 504 U.S. at 759 (quoting 11 U.S.C. § 541(c)(2) (1978)). Additionally, the Court points out in this part of the opinion that the "coordinate section" of the IRC, 26 U.S.C. section 401(a)(13) "contains similar restrictions [on alienability]." *Id.* (citing 26 U.S.C. § 401(a)(13) (1974)). This is the language that comes to be referred to as "seemingly cryptic language" which the *Hall* court uses to support the conclusion that "ERISA-qualified plans are tax qualified under the IRC, subject to ERISA, and contain anti-alienation provisions." *In re* Hall, 151 B.R. 412, 419 (Bankr. W.D. Mich. 1993).

63. *Shumate*, 504 U.S. at 760.

64. *Id.* (citing to 29 U.S.C. § 1104(a)(1)(d) (1974)).

65. *Id.* (citing to 29 U.S.C. § 1132(a)(3) and (5) (1974)). Additionally, the Court points out that it, in itself, has vigorously enforced ERISA's prohibition on the assignment or alienation of pension benefits by declining to recognize any exceptions to the broad statutory bar. *Id.* (citing to Guidry v. Sheet Metal Workers' Nat'l Pension Fund, 493 U.S. 364, 376 (1990)).

66. *Id.*

Shumate definitively linked the Bankruptcy Code and ERISA by holding that because "applicable non-bankruptcy law" includes ERISA, so long as there is an enforceable anti-alienation clause in an ERISA-qualified plan, the property is excluded from the bankruptcy estate.[67] In articulating this holding, the Court used, but failed to define, the term ERISA-qualified, leaving lower courts to struggle with the interpretation of what was intended by this term.[68]

The first cases to apply the decision reached in *Shumate* avoided the necessity of interpreting what the Court intended by the term ERISA-qualified by seemingly "assuming the existence of an ERISA-qualified plan without discussion."[69] Judge Goodman, a justice presiding over the Bankruptcy Court in Massachusetts, however, in analyzing *Shumate* with respect to two cases he was hearing, "acknowledged [that] a determination may be necessary [to decide] whether a plan is ERISA-qualified before excluding it from property of the estate."[70] Despite this acknowledgment, neither of these cases reached the merits of ERISA-qualification because the required evidentiary hearings had not been held.[71] Following this recognition, however, decisions began focusing on the meaning of ERISA-qualified, and whether a plan can be qualified as such to bring it under the *Shumate* decision, rather than just assuming the existence of ERISA-qualification without discussion.[72]

Prior to discussing the two lines of cases, each establishing their own interpretation of and test for the term of ERISA-qualified plans, it is important to recognize a journal article written by J. Gordon Christy and Sabrina Skeldon.[73] This article, cited by many post-*Shumate* cases, asserts that the term ERISA-qualified plan is a construction of the Supreme Court, because a definitive source for the term is non-existent.[74] The authors of the article explore various sources that could potentially provide a definition of what the Court intended by the term

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67. *Id.* at 758-60. Additionally, this holding furthers the policy under ERISA of the uniform national treatment of pension benefits. *Id.* at 765 (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987)).

68. Craig II, 204 B.R. 756, 757-58 (D.N.D. 1997). *See In re* Hall, 151 B.R. 412, 417 (Bankr. W.D. Mich. 1993) (struggling to interpret "what is an ERISA-qualified plan"); *see also In re* Hanes, 162 B.R. 733, 739 (Bankr. E.D. Va.) (seeking to interpret the meaning of ERISA-qualified).

69. *See Hall*, 151 B.R. at 418 (citing to numerous cases which find that a plan is ERISA-qualified without disputing or discussing this fact).

70. *Id.* at 418-19 (citing *In re* Sirois, 144 B.R. 12,14 (Bankr. D. Mass. 1992) and *In re* Greif, 144 B.R. 206, 208 (Bankr. D. Mass. 1992)).

71. *Id.* Despite the fact that Judge Goodman did not reach this question on the merits, *Hall* suggests that *Sirois* implies that an ERISA-qualified plan must be subject to ERISA, qualified under the IRC, and contain an anti-alienation provision. *Id.* at 419 (citing *Sirois*, 144 B.R. at 14).

72. *Id.* at 418.

73. J. Gordon Christy and Sabrina Skeldon, *Shumate and Pension Benefits in Bankruptcy*, 2 J. BANKR. L. & PRAC. 719 (1992) [hereinafter Christy & Skeldon].

74. *Id.* at 724-25.

ERISA-qualified, only to find that this term is "[n]ot a term of art and is not defined in the Bankruptcy Code, the IRC, or ERISA."[75] Furthermore, "it is not even a term used by employee benefit practitioners."[76] This article, by stating that a definition for the term ERISA-qualified plan is unavailable, has been utilized as a source to assure the lower courts that they must interpret what the Court intended when using the term ERISA-qualified plan.[77]

Further, this article articulates suggestions as to what "the Supreme Court may have intended by using the term ERISA-qualified plan."[78] The article suggests that the Court may have intended any of three interpretations for the term. First, simply a plan "subject to ERISA."[79] Second, a plan both subject to ERISA and containing an anti-alienation clause.[80] Finally, a plan subject to ERISA, containing an anti-alienation clause, and qualified under the IRC.[81] It is exactly the second and third possible interpretations of the Supreme Court, as suggested by this article, that the two lines of cases addressing this issue adopt.[82]

In re Hall[83] is the leading case in the first line of cases to offer an interpretation as to what is required in order for a plan to be classified as ERISA-qualified.[84] The case establishes a three-part test, requiring that a plan be subject to ERISA, contain an anti-alienation clause, and qualify under IRC section 401(a) in order to be ERISA-qualified.[85]

The *Hall* court, in rationalizing its interpretation, stated that the "seemingly cryptic" language used by the Supreme Court in *Shumate* supports this conclusion.[86] The court illustrated that the Supreme Court in *Shumate*, when determining whether an anti-alienation provision of an ERISA-qualified plan satisfied the literal terms of section 541(c)(2) of the Bankruptcy Code, discussed that both ERISA and the IRC require restrictions on transfer or anti-alienation provisions.[87] Additionally, the

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *See In re* Hall, 151 B.R. 412, 419 (Bankr. W.D. Mich. 1993) (adopting the third interpretation suggested by Christy and Skeldon); *see also In re* Hanes, 162 B.R. 733, 740 (Bankr. E.D. Va. 1994) (adopting the second interpretation suggested by Christy and Skeldon).
83. 151 B.R. 412 (Bankr. W.D. Mich. 1993).
84. *Hall*, 151 B.R. at 419 (articulating the elements the court determined necessary for a plan to be classified as ERISA-qualified).
85. *Id.*
86. *Id.*
87. *Id.* (citing Patterson v. Shumate, 504 U.S. 753, 759 (1992)).

Supreme Court stated that the plan at issue in *Shumate* "complied with *these requirements*."[88]

The *Hall* court concluded, therefore, that a reasonable reading of this language requires that a plan "satisfy both the [IRC] and ERISA" in order to be ERISA-qualified.[89] The court reasoned that had the Supreme Court not believed that the term ERISA-qualified include qualifying for benefits under the tax code, the Court would not have cited to the tax code and tax regulations.[90] From this analysis, therefore, the *Hall* court adopted the three-part test with which a plan must comply in order to be determined ERISA-qualified.[91]

A second line of cases, led by *In re Hanes*,[92] declined to adopt the decision and test of *Hall*.[93] In rejecting the *Hall* test, the *Hanes* court recognized that "different interpretations of [ERISA-qualified] may lead to different consequences."[94] The *Hanes* court suggested that if ERISA-qualified is interpreted to mean that a plan must satisfy both ERISA and the IRC, then "creditors could reach the plan benefits if the employer failed to amend to the plan to comply with a change in the tax law."[95] Such an interpretation is not only contrary to the goals of ERISA,[96] but additionally, as the *Hanes* court pointed out, places too much emphasis on the requirements of the IRC "while failing to place sufficient emphasis on the Bankruptcy Code."[97] For these reasons, the *Hanes* court declined to adopt the IRC prong of the *Hall* test and instead adopted a two-part test requiring that plans to be subject to ERISA and

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88. *Id.* (citing to *Shumate*, 504 U.S. at 760) (emphasis added). It is important to note that *Hall* has quoted the Supreme Court in *Shumate* as stating that "[the pension plan] complied with these requirements." *Hall*, 151 B.R. at 419 (citing *Shumate*, 504 U.S. at 760). The actual language from the Court in *Shumate*, however, states "[m]oreover, these transfer restrictions are 'enforceable,' as required by section 541(c)(2)." *Shumate*, 504 U.S. at 760.

89. *Hall*, 151 B.R. at 419.

90. *Id.* It is important to note that the *Hall* case was decided in Michigan, and therefore, the "Sixth Circuit authority regarding this issue must be carefully reviewed" in reaching a conclusion. *Id.* The *Hall* court notes that one Sixth Circuit case had been decided regarding this issue, and that case gave a "strong indication that the Sixth Circuit requires an ERISA-qualified plan" to be tax qualified under the IRC, subject to ERISA, and include an anti-alienation provision. *Id.* (citing *In re* Lucas, 924 F.2d 597, 603 (6th Cir. 1991)). Given this information, the *Hall* court had incentive to reconcile *Shumate* with the Sixth Circuit decision, and thus, was probably unable to look at *Shumate* objectively. Additionally, although the *Hall* court adopts this three-part test to determine ERISA-qualification, it was unable to apply all parts of the test, as the plan in that case was determined not to be "subject to ERISA" because it was without employees. *Id.* at 421.

91. *Id.* at 419.

92. 162 B.R. 733 (Bankr. E.D. Va. 1994).

93. *In re* Hanes, 162 B.R. 733, 740 (Bankr. E.D. Va. 1994).

94. *Id.* at 739.

95. *Id.*

96. *See* Patterson v. Shumate, 504 U.S. 753, 764-65 (1992) (citing 29 U.S.C. §§ 1001(b) and (c) (1974)). The goal of ERISA is to protect pension benefits, so that "if a worker has been promised a defined pension benefit upon retirement . . . he actually will receive it." *Id.* at 765 (citing Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980)).

97. *Hanes*, 162 B.R. at 740.

contain an enforceable anti-alienation provision in order to be ERISA-qualified.[98]

The *Hanes* court justified the rejection of the IRC prong of the *Hall* test by revisiting the language in *Shumate* relied upon by the *Hall* court.[99] The *Hanes* court indicated that "the references in *Shumate* to the tax code simply acknowledge that [both] the tax code [and ERISA] . . . contain non-alienation provisions."[100] Further, the court articulated that it is "the presence of a non-alienation provision that is important under section 541(c)(2) [of the Bankruptcy Code], and [only] ERISA requires . . . and enforces [such provisions]."[101] Thus, by illustrating that the Supreme Court's reference in *Shumate* to the IRC was insignificant as to the interpretation of ERISA-qualified, the *Hanes* court justified its rejection of the *Hall* test and the adoption of its own two-part test.[102]

The federal district court for the District of North Dakota "was not squarely faced" with a decision between the three-part *Hall* test and the two-part *Hanes* test in the first appeal of Craig's case.[103] The first appeal dealt generally with the issue of whether Craig's Plans were subject to ERISA.[104] The bankruptcy court had determined that the Plans were not subject to ERISA.[105] The district court reversed that decision, however, and remanded it to the bankruptcy court to determine whether the Plans were ERISA-qualified.[106]

Despite the fact that the district court was not faced with the specific issue of ERISA-qualification in the first appeal, statements made in that decision go directly to this issue.[107] Particularly, the court determined that the Plans were subject to ERISA and further stated that this determination alone did not mean that the Plans were ERISA qualified.[108] Moreover, the court expressly stated that in order to be ERISA-qualified a plan must, in addition to being subject to ERISA, "be subject

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *See* Craig II, 204 B.R. 756, 760 (D.N.D. 1997).
104. Craig I, 204 B.R. 750, 753 (D.N.D. 1996).
105. *Id.* at 752. The bankruptcy court determined that Craig's Plans were not subject to ERISA due to a lack of eligible employee participants to bring the Plans into ERISA. *Id.* at 754.
106. *Id.* at 755. The court determined that if there are not presently eligible employee participants, so long as there were formerly eligible employee participants to bring the Plans into ERISA, the Plans should remain subject to ERISA. *Id.*
107. *See id.*
108. *Id.* This statement by the court is important as it eliminates the first interpretation suggested by Christy and Skeldon, that ERISA-qualified could mean, simply, a plan subject to ERISA. *See* Christy & Skeldon, *supra* note 73, at 725.

to an enforceable anti-alienation provision in the plan itself, and . . . must be qualified under the [IRC]."[109] This test, as articulated by the court, is the *Hall* test, and thus, the court implied that it would adopt this interpretation of ERISA-qualified.[110] It was not until the second appeal, however, that the court actually examined this test and determined the interpretation of ERISA-qualified it would ultimately adopt.[111]

III. ANALYSIS

In order to determine whether the bankruptcy court was correct in its holding that Craig's Plans were ERISA-qualified, and excluded from the bankruptcy estate, the district court for the District of North Dakota first had to establish the elements a pension or profit sharing plan is required to include in order to be classified as an ERISA-qualified plan.[112] The court began with a brief review of the manner by which ERISA plans were originally established as property that could be excluded from the bankruptcy estate.[113]

The court first looked to the Bankruptcy Code provision which states that a debtor's beneficial interest in a trust is excluded from the bankruptcy estate if it is subject to a transfer restriction enforceable under "applicable non-bankruptcy law."[114] The court then recognized that the Supreme Court in *Shumate* established the link between ERISA and the Bankruptcy Code by determining that "applicable non-bankruptcy law" includes ERISA.[115]

In articulating this holding, the Supreme Court utilized the term "ERISA-qualified plan."[116] The district court found it difficult, however, to ascertain the specific meaning of the term "ERISA-qualified plan" as intended by the Supreme Court.[117] First, the term "ERISA-qualified plan" is unique, as it had not previously been used in conjunction with the exclusion of ERISA plans from the bankruptcy

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109. *Craig I*, 204 B.R. at 755.

110. *See In re* Hall, 151 B.R. 412, 419 (Bankr. W.D. Mich. 1993) (setting out the three-part test to determine ERISA-qualification).

111. Craig II, 204 B.R. 756, 760 (D.N.D. 1997).

112. *See id.* at 757 (illustrating that the dispute in this appeal has centered on the meaning of the term ERISA-qualified).

113. *Id.*

114. *Id.* (citing 11 U.S.C. § 541(c)(2) (1993)).

115. *Id.* (citing Patterson v. Shumate, 504 U.S. 753, 758 (1992)).

116. *Shumate*, 504 U.S. at 758.

117. *See Craig II*, 204 B.R. at 758 (citing Christy & Skeldon, *supra* note 73, at 724-25, which states that the definition of ERISA-qualified is far from obvious); *see also In re* Hall, 151 B.R. 412, 418 (Bankr. W.D. Mich. 1993) (citing Christy & Skeldon, *supra* note 73, at 725, where it is suggested that the Supreme Court may have intended any one of three interpretations for the term ERISA-qualified plan).

estate.[118] Additionally, the Supreme Court itself, although using the term, did not and has not addressed what is required in order for a plan to be ERISA qualified.[119] Thus, the district court was forced to determine the meaning of "ERISA-qualified plan" in order to properly resolve whether Craig's Plans should be excluded from his bankruptcy estate.[120]

The court looked to two main sources for guidance in properly interpreting what the Supreme Court intended by the term "ERISA-qualified plan."[121] First, the court followed the lead of numerous other post-*Shumate* courts by looking to a bankruptcy journal article which discusses the fact that there is no mention of the term "ERISA-qualified plan" in the Bankruptcy Code, ERISA itself, or the Internal Revenue Code.[122] Further, the court looked to existing case law, specifically two distinct lines of cases that have emerged with different interpretations of the term "ERISA-qualified plan."[123]

A. CHRISTY AND SKELDON JOURNAL ARTICLE

In trying to determine the meaning of the term ERISA-qualified plan, the court first looked to the journal article written by J. Gordon Christy and Sabrina Skeldon.[124] This article has been cited in many post-*Shumate* court opinions because it illustrates that the meaning of the term cannot be ascertained from any of the conventional sources utilized in dealing with ERISA plans.[125]

The article emphasizes that the meaning of the term ERISA-qualified plan is far from obvious because "[it] is not a term of art and is not defined in the Bankruptcy Code, the IRC, or ERISA."[126] Generally, when employee benefits practitioners speak of a "qualified plan," they are referring to a "tax qualified plan" under the rules of the IRC.[127]

Additionally, the article demonstrates the incongruities of using the term "qualified" in conjunction with ERISA, as plans do not "qualify"

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118. *Craig II*, 204 B.R. at 758.
119. *Id.* at 757.
120. *Id.*
121. *Id.* at 758-60.
122. *Id.* at 758.
123. *Id.* at 758-60.
124. *Id.* at 758 (citing Christy & Skeldon, *supra* note 73, at 719).
125. *Id.*
126. *Id.* (citing Christy & Skeldon, *supra* note 73, at 724-25).
127. *Id.* (citing Christy & Skeldon, *supra* note 73, at 724-25). The reason that "qualified plan" is usually synonymous with "tax qualified plan" is because the phrase usually refers to a plan (profit-sharing, stock bonus, or similar plan) that complies with the requirements of the IRC section 401(a). Christy & Skeldon, *supra* note 73, at 724. A plan that complies with section 401(a) of the IRC is referred to as a "qualified trust" because the satisfaction of that section's requirements "qualifies" the trust under such plan as "tax-exempt." *Id.* at 725.

under ERISA.[128] Rather, they are subject to ERISA on the basis of the type of benefit that they provide, and therefore, employee benefits practitioners refer to plans as "subject to ERISA," "governed by ERISA," or simply "ERISA plans," rather than ERISA-qualified plans.[129]

The court used this article to establish not only that there is no plain meaning attached to the term ERISA-qualified plan, but additionally that there is no mention whatsoever of this term in any of the conventional sources usually visited when dealing with an ERISA plan.[130] The court was thereby assured that it was not missing a statutory established meaning for the term ERISA-qualified plan and it could therefore move on to considering case law to aid in its determination of the meaning of this term.[131]

B. CASE LAW INTERPRETATION OF ERISA-QUALIFIED PLAN

The court acknowledged that the Supreme Court in *Shumate* may have intended any one of three interpretations for the term ERISA-qualified plan.[132] First, the Court may have intended the term to mean a plan that was simply "subject to ERISA."[133] Second, the Court may have intended the plan be subject to ERISA and also contain an enforceable anti-alienation clause.[134] Finally, the Court may have intended not only that the plan be subject to ERISA and contain an enforceable anti-alienation clause, but additionally, that the plan be tax-qualified under the IRC section 401(a).[135]

In determining which interpretation was intended by the Supreme Court, the court looked to the two lines of cases which have emerged as a result of similar attempts to ascertain a meaning of the term "ERISA-qualified plan."[136] The first line of cases, led by *Hall*, adopted a three-prong test in determining the meaning of ERISA-qualified plan and included the requirement that the plan be tax-qualified under the

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128. *Craig II*, 204 B.R. at 758. Christy and Skeldon suggest that a qualified plan must fulfill certain tax requirements in order to be deemed as "qualified," and therefore, because ERISA does not have requirements like those under the IRC, it is inconsistent to refer to a plan as "qualified" under ERISA. *Id.* (citing Christy & Skeldon, *supra* note 73, at 724-25).

129. *Id.* (citing Christy & Skeldon, *supra* note 73, at 724-25).

130. *Id.* (citing Christy & Skeldon, *supra* note 73, at 724-25).

131. *See id.* at 758-60 (considering the two lines of cases that have established different tests for the meaning of "ERISA-qualified plan").

132. *Id.* at 758 (citing *In re* Hall, 151 B.R. 412, 418 (Bankr. W.D. Mich. 1993)). The court only discussed the second and third interpretations for the term "ERISA-qualified plan" because the first interpretation is an element in both the second and third interpretations, and additionally, the court had already determined in the first appeal that Craig's Plans are "subject to ERISA." *Id.* at 760-61.

133. *Id.* at 758 (citing *Hall*, 151 B.R. at 418).

134. *Id.* (citing *Hall*, 151 B.R. at 418). The enforceable anti-alienation clause is required by ERISA. 29 U.S.C. § 1056(d)(1) (1997).

135. *Craig II*, 204 B.R. at 758. (citing *Hall*, 151 B.R. at 418).

136. *Id.* at 758-60.

IRC.[137] The second line of cases, led by *Hanes*, rejected the test adopted in *Hall* by rejecting the IRC prong of the ERISA-qualification test.[138]

1. The Hall Interpretation of ERISA-Qualified

The district court first looked at the rationale used in the *Hall* case, where the bankruptcy court for the Western District of Michigan held that an ERISA-qualified plan must be subject to ERISA, contain an anti-alienation provision, and be tax qualified under the IRC.[139] The court identified that in order to conclude that this was the intended meaning by the Supreme Court, the *Hall* court had to emphasize some "seemingly cryptic language" from the *Shumate* opinion, which recognized that both ERISA and the coordinate section of the IRC contain similar restrictions on the transfer of the benefits in the plans.[140] Further, the court recognized that it was precisely this language that the *Hall* court relied upon in order to conclude that the Supreme Court must have intended that ERISA-qualified plans satisfy both the IRC and ERISA or they would not have cited to both the IRC and tax regulations.[141]

Although the court cited many subsequent cases which adopted *Hall*'s three-part test for determining whether a plan is ERISA-qualified, the court pointed to the fact that in none of the cases adopting the *Hall* test was the IRC qualification prong a determinative factor in the outcome of the case; meaning that in these cases a different result would not have been rendered if the IRC qualification prong had been deleted from the test.[142] The court emphasized this fact by illustrating that none

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137. *Id.* at 758.

138. *Id.* at 759.

139. *Id.* at 758.

140. *Id.* The "seemingly cryptic" language from *Shumate* reads:

> Section 206(d)(1) of ERISA, which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated," . . . clearly imposes "a restriction on the transfer" of a debtor's "beneficial interest" in the trust. The coordinate section of the IRC, 26 U.S.C. section 401(a)(13), states as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated," and thus contains similar restrictions.

Patterson v. Shumate, 504 U.S. 753, 758 (1992). This same section is quoted in part by *Hall*, 151 B.R. at 419.

141. *Craig II*, 204 B.R. at 758 (citing *Hall*, 151 B.R. at 419).

142. *Id.* at 758-59. Cases cited by the court that have adopted the *Hall* three-part test: *In re* Orkin, 170 B.R. 751, 754 (Bankr. D. Mass. 1994) (adopting the *Hall* test but not reaching the IRC prong because the plans were not subject to ERISA); *In re* Nolen, 175 B.R. 214, 218 (Bankr. N.D. Ohio 1994) (adopting the *Hall* test and concluding that all three requirements were met); *In re* Foy, 164 B.R. 595, 597 (Bankr. S.D. Ohio 1994) (adopting the *Hall* test but only addressing the anti-alienation requirement); *In re* Lane, 149 B.R. 760, 763-66 (Bankr. E.D. N.Y. 1993) (not expressly adopting the *Hall* test but finding that the debtor's plans were neither tax qualified nor subject to ERISA).

of these courts, when adopting the *Hall* test, were faced with the scenario that the plan may not pass the IRC qualification prong of the test, and thus, would not be ERISA-qualified.[143] Further, the court suggested that this could be a potential problem in Craig's case, making this case one of first impression.[144]

2. *The Hanes Interpretation of ERISA-Qualified*

Second, the court analyzed the rationale used by the *Hanes* court in rejecting the three-part *Hall* test, and instead adopting a two-part test which requires only that a plan be subject to ERISA and contain an enforceable anti-alienation provision in order to be ERISA-qualified.[145] Christy and Skeldon, in their aforementioned article, argue that because section 206(d) of ERISA operates completely independently of the IRC qualification requirements, and since the IRC does not in itself confer substantive rights on the participants, a debtor could argue that a plan is still qualified under ERISA even if it fails to qualify under the IRC.[146] This reasoning emphasizes the rationale used by the *Hanes* court in adopting their two-part test.[147]

The court recognized that subsequent courts have followed the holding in *Hanes* and have rejected the IRC prong of the three-part *Hall* test for three main reasons. First, the *Hanes* court articulated that "too much emphasis [was] placed on the technical requirements of the [Internal Revenue Code], while failing to place sufficient emphasis on the Bankruptcy Code," when reaching the conclusion that a plan needed to be qualified under the IRC in order to be termed ERISA-qualified.[148] The court explained this by illustrating:

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143. *Craig II*, 204 B.R. at 759. The court states that this "is the scenario this court now faces." *Id.*

144. *Id.* Tax qualification for Craig's Plans under IRC section 401(a) is in some doubt because the Plans were not promptly amended to comply with the 1984 amendments and certain tax forms were not filed. *Id.* At the time of oral argument, the Plans had been submitted to the Internal Revenue Service (IRS) Closing Agreement Program (CAP) to determine whether the Plans were tax qualified, but a decision had not been issued on the application. *Id.* at 759 n.2. Thus, because the IRS has never determined that the plans were "not qualified," it could be argued that they are still "qualified" under the IRC. *See In re* Baker, 195 B.R. 386, 393 (Bankr. N.D. Ill. 1996) (holding a plan was tax qualified because the IRS has never found that the plan failed to be tax qualified). The court was careful to point out, however, that no matter what the IRS decides with regard to tax qualification, that decision would not bind this court in a bankruptcy context. *Craig II*, 204 B.R. at 759 n.2.

The court had not determined whether Craig's Plans were IRC qualified. *Id.* at 759. The bankruptcy court determined on remand that the Plans were IRC qualified, but the district court did not address that determination, instead raising the issue of whether IRC qualification is a necessary requirement of ERISA-qualification. *Id.*

145. *Craig II*, 204 B.R. at 759 (citing *In re Hanes*, 162 B.R. 733, 740 (Bankr. E.D.Va. 1994)).

146. *Id.* (citing Christy and Skeldon, *supra* note 73, at 725).

147. *Id.*

148. *Id.* (citing *Hanes*, 162 B.R. at 740).

> The Bankruptcy Code excludes a beneficial interest in a trust only when that trust contains an enforceable restriction on transfer. Thus, the references in *Shumate* to the IRC simply acknowledge that the IRC requires, in conjunction with ERISA, that plans contain non-alienation provisions. It is, however, the presence of an anti-alienation provision alone that is important under the Bankruptcy Code, and ERISA independently requires such provisions and enforces them.[149]

Thus, many courts have recognized that because ERISA requires anti-alienation provisions, it is unnecessary to require that a plan be qualified under the IRC in order to be ERISA-qualified.[150] Moreover, the court found that courts adopting the *Hanes* test emphasized that qualification under the IRC is required for the purpose of maintaining tax-exempt status and gaining tax relief, rather than as a necessary factor in determining the meaning of ERISA-qualified plan.[151]

Finally, a couple of courts have adopted the *Hanes* test and rejected the *Hall* test by reasoning that ERISA, not the IRC, provides for the enforcement of the required anti-alienation provision, and therefore, the Supreme Court could not have intended tax qualification under the IRC to be a determinative factor in ERISA-qualification.[152] Using this argument, the court revisited the "cryptic" language of *Shumate* and suggested that the analysis of the *Hall* court completely ignored the above facts.[153] The court agreed with the *Hall* court that indeed the *Shumate* Court noted that ERISA imposes transfer restrictions and acknowledged that the coordinate section of the IRC contained similar restrictions.[154] The Supreme Court went on to articulate, however, that

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149. *Id.* (citing *Hanes*, 162 B.R. at 740).

150. *Id.* Courts adopting the *Hanes* test because of this line of reasoning include: *In re* Bennett, 185 B.R. 4, 6 (Bankr. E.D. N.Y. 1995) (declining the *Hall* test and instead adopting the *Hanes* test); and *In re* Kaplan, 162 B.R. 684, 691 (Bankr. E.D. Pa. 1993) (determining that it was not necessary to ascertain whether the plan was tax qualified in order to determine if the plan was ERISA qualified).

151. *Craig II*, 204 B.R. at 760. Two courts have adopted the *Hanes* test due to this line of reasoning. First, *S.E.C. v. Johnston* cited to numerous decisions which treat "qualification" differently under ERISA and the IRC. S.E.C. v. Johnson, 922 F. Supp. 1220, 1225-26 (Bankr. E.D. Mich. 1996). Second, *In re Watson* articulated that "the reason for [an] ERISA-qualified plan is the tax relief which is the usual inducement. *In re* Watson, 192 B.R. 238, 242 (Bankr. D. Nev. 1996). Tax deferral approved by the IRS, as stated by *Hall*, is necessary to the definition, but the provisions of the IRC section 401 are solely for tax qualification under the [Internal Revenue Code]." *Id.*

152. *Craig II*, 204 B.R. at 760. Anti-alienation plans under ERISA are enforceable because "ERISA allows a plan participant, beneficiary, fiduciary, or the Secretary of Labor to file a civil action to 'enjoin any act or practice' which violates ERISA or the terms of the plan." *Id.* (citing 29 U.S.C. §§ 1132(a)(3), (5) (1995)). Violations of the anti-alienation clause under the IRC, though possibly resulting in tax consequences, cannot be enforced because it does not appear that IRC section 401(a) creates any substantive rights for beneficiaries or participants. *Id.*

153. *Id.*

154. *Id.*

"these transfer restrictions are 'enforceable' as required by [the Bankruptcy Code]."[155] The court acknowledged that language, which the *Hall* court failed to recognize, and suggested that the Supreme Court's reference to "'[*t*]*hese*' transfer restrictions" could only be referring to ERISA because only ERISA contains enforcement remedies.[156]

Before articulating its holding, the court briefly noted that in the first appeal it was not faced with the decision of applying the *Hall* test or the *Hanes* test because the issue was whether the plans were "subject to ERISA," a requirement of both tests.[157] In that appeal, the court reversed the bankruptcy court's decision, determining that Craig's Plans were "subject to ERISA," and remanded that decision to the bankruptcy court to determine whether the Plans were ERISA-qualified.[158] In remanding this case to the bankruptcy court, the court relied on *Hall* by specifying that both the IRC qualification and the existence of an anti-alienation clause were still at issue.[159]

Upon further analysis, the court concluded that the *Hanes* test reflects the better reasoned approach, and therefore, as IRC qualification is not necessary for a plan to be ERISA-qualified, the plans need only be subject to ERISA and contain an anti-alienation clause.[160] In applying this holding to Craig's Plans, the court acknowledged that the trustee conceded that the Plans contain the requisite anti-alienation language and additionally that the first appeal established that the Plans are "subject to ERISA."[161] Therefore, under the court's determination of

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155. *Id.* (citing Patterson v. Shumate, 504 U.S. 753, 758 (1992)).

156. *Id.* (citing *Shumate*, 504 U.S. at 758) (emphasis added).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id. See also* Christy & Skeldon, *supra* note 73, at 725-26 n.25 (stating that it would not seem reasonable to conclude that the word "qualified" referred to any IRC requirement because the decision seems to be based on the Bankruptcy Code and ERISA alone). *But see* Anthony Michael Sabino and Professor John P. Clarke, *The Last Line of Defense: The New Test for Protecting Retirement Plans from Creditors in Bankruptcy Cases*, 48 ALA. L. REV. 613 n.217 (1997) (stating erroneously that "Chief District Court Judge Webb explicitly followed *Hall* . . . and just as explicitly rejected the contrary view of *Hanes*").

161. *Craig II*, 204 B.R. at 760-61. The necessary anti-alienation language can be found at page 58 of Craig's pension plan and at page 56 of his profit-sharing plan. Debtor's Reply to Appellant's Brief on Appeal at 7, *Craig II, (No. 95-30415)*. As the trustee conceded, there is "no dispute about the presence of this [anti-alienation] language or that it is sufficient." *Id.* at 19. *See also* Appellant's Brief in Reply to Debtor's Reply to Appellant's Brief on Appeal at 1, *Craig II*, (No. 95-30415) (stating that, as the debtor points out, the requisite anti-alienation language is contained in the plan).

ERISA-qualified, Craig's Plans qualify and are excluded from the bankruptcy estate.[162]

V. IMPACT

The impact of this case, both within North Dakota and across the nation, has yet to be determined. The attorneys on either side of this case have different ideas with regard to the potential impact of this decision.[163] Kip Kaler, the attorney for the Appellant, believes that the impact of the case will be minimal.[164] He anticipates that when this issue is again addressed, it will likely be appealed to the Eighth Circuit Court of Appeals, as that court has not yet considered this issue.[165] If that is the case, the impact of this case would prove to be minimal as this "decision would have no binding effect [on that court]."[166]

Roger Minch, the attorney for the debtor, articulates that the practical result of this decision is that ERISA-qualified pension plans are "made more safe from the claims of creditors if there is a bankruptcy case."[167] The impact of this result on a nationwide basis, as suggested by Mr. Minch, is that the public is greatly served by this ruling.[168] This ruling "allow[s] individuals to provide for their own retirements, given adversities that might arise along the way," and additionally, could help to relieve "everyone's concern that Social Security and other entitlement programs will not be sufficient."[169]

Although the impact of this case has yet to be seen, it is possible that the decision reached is in the best interests of all involved. Despite the fact that the definition serves to exempt property from the bankruptcy

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162. *Craig II*, 204 B.R. at 760-61. Additionally, the bankruptcy trustee made one last attempt to keep the Plans from being excluded from the bankruptcy estate by making equitable arguments against such exemption. *Id.* at 761. The court, however, rejected all of those arguments, and Craig's Plans were excluded from the bankruptcy estate. *Id.* A letter from the bankruptcy trustee stated that he continues to believe that their position (keeping the Plans in the bankruptcy estate) is correct. However, for practical reasons, no appeal was taken beyond the district court. Letter from Kip Kaler, Attorney, Kaler Law Office, to Amy Dahl, Staff Member, *North Dakota Law Review* (Oct. 2, 1997) (on file with author).

163. *Compare* Letter from Kip Kaler, *supra* note 162, *with* Letter from Roger Minch, Attorney, Serkland, Lundberg, Erickson, Marcil & McLean, Ltd., to Amy Dahl, Staff Member, *North Dakota Law Review* (Oct. 2, 1997) (on file with author).

164. Letter from Kip Kaler, *supra* note 162.

165. *Id.* (stating that the district court describes that this issue is one of first impression for the Eighth Circuit). Additionally, Jon Strinden, an attorney hired by Kip Kaler to assist in this appeal, "expect[s] that in the near future this issue will be clarified by other courts with a determination that a qualified retirement plan excluded under the provisions of the Bankruptcy Code" must fulfill the *Hall* test in order to be ERISA-qualified. Letter from Jon E. Strinden, *supra* note 4.

166. Letter from Kip Kaler, *supra* note 162.

167. Letter from Roger Minch, *supra* note 163.

168. *Id.*

169. *Id.* Mr. Minch believes that the above articulated impact or significance of this case will be the same in North Dakota as nationwide. *Id.*

estate, this decision enables people, despite some financial hardships, to provide for their own retirement and thus avoid becoming a social liability to state and federal governments.

The federal district court for the District of North Dakota determined that in order for a plan to be ERISA-qualified it must be subject to ERISA and contain an enforceable anti-alienation clause. If these two requirements are fulfilled, a plan is ERISA-qualified and will be excluded from the bankruptcy estate. It will be interesting to watch as additional courts adopt their own interpretations of ERISA-qualified. More importantly, however, it is probable that the Eighth Circuit, and ultimately the Supreme Court, will have to address this issue so that meaning of ERISA-qualified will be uniformly applied throughout the country.

Amy Elizabeth Dahl[170]

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170. I want to thank my parents, Kirby and Peggy, and my "little brother," Gabe, for all of their love and support in everything I do. Dad, for as long as I can remember I wanted to grow up to be just like you. Also, I want to thank my "special friend," Monte, for without his encouragement I never would have started, not to mention completed, this article. I love you all!