# IV. Bankruptcy & Creditors' Rights

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### A. *ERISA and* Tenneco: *A One-Two Punch on Judgment Creditors Garnisheeing Pension Accounts*

In 1974, Congress enacted the Employee Retirement Income Security Act[1] (ERISA) to alleviate the problems previously associated with private pension plans.[2] A pension plan is an arrangement between an employer and his employees for the establishment and maintenance of a fund to provide retirement income for the employees.[3] To protect the monies in a pension fund account until a beneficiary's retirement,[4] ERISA prohibited the alienation or assignment of the beneficiary's interest in the pension plan.[5] Many courts have considered whether ERISA's alienation and assignment provisions prohibit garnishment of a beneficiary's interest in a qualified pension plan because

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1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001 *et seq.* (1976)). In general, ERISA defines the minimum requirements for participating in a pension plan and receiving benefits. *See* Jennings, Preminger, & Alexander, *What Do You Get With the Gold Watch? An Analysis of the Employee Retirement Income Security Act of 1974*, 17 Ariz. L. Rev. 426, 427 (1975); 29 U.S.C. §§ 1051-1061 (standards for participation and vesting of benefits). ERISA also has provisions that prevent the mismanagement of pension plans, require sufficient funding of pension plans, and prevent the failure of pension plans. Jennings, Preminger & Alexander, *supra*, at 427. ERISA's provisions establish standards for reporting to the government and disclosure to plan beneficiaries, claims procedures and judicial review, and standards of fiduciary responsibility. *Id.; see* 29 U.S.C. §§ 1021-1031 (statutory reporting and disclosure requirement); *id.* §§ 1132-1133 (claims procedures and judicial review); *id.* §§ 1101-1114 (standards of fiduciary responsibility). *See generally* Jennings, Preminger, & Alexander, *supra*, at 427-461 (overview of ERISA's statutory requirements and provisions).

2. *See* H. R. Rep. No. 807, 93d Cong., 2d Sess. 3-4 *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4672-73. Prior to Congress' enactment of ERISA, many problems plagued pension plans. *Id.* The problem areas included insufficient coverage for workers in small businesses and in agriculture, discrimination under the law against the self-employed and those not covered by retirement plans, insufficient requirements for vesting and funding of benefits, loss of pension benefits due to plan termination, misuse of pension funds, and inadequate disclosure to pension beneficiaries. *Id.* at 4678-81; *see* Snyder, *Employee Retirement Income Security Act of 1974*, 11 Wake Forest L. Rev. 219, 223-26 (1975) (problems of pension trusts from 1942 to 1973).

3. *See* Note, *The Pension Reform Act of 1974: Brave New World of Retirement Security*, 27 U. Fla. L. Rev. 1044, 1046-50 (1975) (description of pension plan).

4. *See* H. R. Rep No. 807, 93d Cong., 2d Sess. 1 *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4670 (purpose of ERISA is to provide retirement income for working people); *see also* 29 U.S.C. § 1001(a) (1976) (purpose of ERISA is to provide retirement income for beneficiary and his family).

5. *See* 29 U.S.C. § 1056(d) (1976). To qualify as an ERISA trust, § 1056(d)(1) requires a retirement plan to include a provision prohibiting the pensioner from assigning or alienating the pension plan's benefits. *Id.* § 1056(d)(1). Subsection 1056(d)(2), however, permits a beneficiary to voluntarily and revocably assign up to ten percent of any benefit payment. *Id.* § 1056(d)(2). In addition to ERISA's anti-alienation provision, IRC § 401(a) requires that a pension plan include anti-assignment and alienation clauses to qualify for the beneficial tax treatment granted to ERISA qualified trusts. *See* I.R.C. § 401(a)(13) (1976). Section 401(a) also prohibits a plan from discriminating in favor of highly compensated corporate officers or employee-shareholders.

ERISA does not mention garnishment.[6] The Fourth Circuit, in *Tenneco, Inc. v. First Virginia Bank of Tidewater*,[7] recently examined whether a judgment creditor could garnishee a beneficiary's interest while the benefits remained in the hands of an ERISA trustee and whether a judgment creditor could garnishee the proceeds of an ERISA pension after the trustee distributed the funds to the beneficiary.[8]

In *Tenneco*, Donald Sweeney's employment was terminated before Sweeney's retirement from the Tenneco subsidiary, Newport News Shipbuilding & Dry Dock Company.[9] Sweeney had participated in Tenneco's ERISA-qualified pension plan until Sweeney quit working with the shipbuilding company.[10] The Tenneco pension plan required Tenneco to pay a beneficiary all accrued benefits if the beneficiary quit working before retirement.[11] Ten-

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*See id.* § 401(a)(4). Furthermore, section 401(a) states that a qualified plan must include provisions prohibiting the use of the trust for any purposes other than for the exclusive benefit of the employees and the employees' beneficiaries. *See id.* § 401(a)(2).

Three significant tax advantages accrue to those benefitting from and contributing to a qualified employee retirement plan. *See* Comment, *ERISA: Does It Prohibit a State Court from Attaching Plan Benefits?*, 40 U. PITT. L. REV. 47, 48 (1978) [hereinafter cited as *Plan Benefits*]. First, employers may deduct from gross income employee contributions to a qualified plan. I.R.C. § 404(a) (1976). Second, the Internal Revenue Service may not tax the employee on employer contributions to a qualified plan until the beneficiary actually receives the monies in the form of benefit payments. *Id.* § 402(a)(1). Third, neither the qualified pension plan, the beneficiary, nor the employer currently pays tax on the income from the plan assets. *Id.* § 501(a). *See generally*, Comment, *Plan Benefits, supra*, at 48 (tax benefits for qualified ERISA pension plans).

6. *See, e.g.*, Operating Eng'rs' Local No. 428 Pension Trust Fund v. Zamborsky, 650 F.2d 196, 199 (9th Cir. 1981) (ERISA does not preclude garnisheeing pension benefits to satisfy court ordered spousal maintenance); General Motors Corp. v. Buha, 623 F.2d 455, 463 (6th Cir. 1980) (ERISA account not subject to garnishment by creditor of plan beneficiary); Cody v. Riecker, 594 F.2d 314, 315 (2d Cir. 1979) (garnishment of benefits not in conflict with ERISA when sought in support of judgment for arrearages in wife and child support); American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (garnishment order used to satisfy court-ordered family support payments impliedly excepted from alienation and assignment proscription of ERISA); Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank of Dallas, 526 F. Supp. 510, 516 (N.D. Tex. 1981) (ERISA exempts pension benefits from creditor's claims); Seneco of Fla., Inc. v. Clark, 473 F. Supp. 902, 907-08 (M.D. Fla. 1979) (wife's post judgment garnishment of husband's pension benefits pursuant to court support order not precluded by ERISA); General Motors Corp. v. Townsend, 468 F. Supp. 466, 468 (E.D. Mich. 1976) (ERISA precludes creditor's garnishment of pension plan benefits). Many courts have considered whether ERISA allows the garnishment of pension benefits to satisfy obligations under family support decrees. *See infra* note 31 (discussion of judicially-created exception for support payments due to children and former wives). Other courts have specifically considered the garnishment of pension benefits in the more general debtor-creditor relationship. *See infra* text accompanying notes 50-87 (discussion of garnishment of pension benefits by judgment creditor).

7. 698 F.2d 688 (4th Cir. 1983).

8. *Id.* at 689-90.

9. *Id.* at 689.

10. *Id.*

11. *Id.* The Tenneco plan's terms required both the employer and the employee to make contributions to the pension fund. *Id.* at 690. The pension plan provided that after two years participation, an employee could withdraw up to 75% of the employee's own contributions credited toward the employee's account. *Id.*

neco's pension plan also required Tenneco to pay the accrued benefits within a reasonable time after a beneficiary requested payment.[12] Pursuant to the Tenneco pension plan's terms, Sweeney withdrew 37,000 dollars of benefits that Sweeney had accrued under the Tenneco plan.[13] Sweeney, however, left 5,000 dollars of accrued benefits in the Tenneco pension plan.[14]

After Sweeney's 37,000 dollars withdrawal from the Tenneco pension plan, First Virginia Bank of Tidewater (First Virginia) obtained a judgment against Sweeney and his wife for 137,000 dollars.[15] Using a writ of garnishment, First Virginia attempted to compel Tenneco to pay to the bank the 5,000 dollars remaining in Sweeney's ERISA pension account.[16] First Virginia also garnisheed the 37,000 dollars in ERISA fund proceeds that Sweeney had transferred to Sweeney's broker.[17] Tenneco and Sweeney petitioned the United States District Court for the Eastern District of Virginia to enjoin First Virginia's garnishment of Sweeney's ERISA account.[18] Moreover, Sweeney asked the court to require First Virginia to return to Sweeney the ERISA fund proceeds that First Virginia had garnisheed from Sweeney's broker.[19]

The district court denied Tenneco's and Sweeney's motions to enjoin First Virginia's garnishment of Sweeney's ERISA account, holding that First Virginia properly garnisheed both the 5,000 dollars remaining in the pension account[20] and the monies in Sweeney's broker's possession.[21] As to the amounts remaining in the pension account, the district court distinguished between paying the account balance in a preretirement lump sum and paying the amount only upon retirement.[22] The district court held that ERISA prohibited garnishments only when a trustee might pay the account balance on retirement.[23] Further-

12. *Id.* at 689.

13. *Id.* In addition to the danger of garnishment of monies withdrawn from a pension fund, the Internal Revenue Code (IRC) subjects a pension plan distribution to taxation in the year the trustee distributes the monies to the beneficiary. *See* I.R.C. § 402(a)(1), (2) (1976).

14. *See* 698 F.2d at 689.

15. *Id.*

16. *Id.* First Virginia sued Tenneco pursuant to Virginia's garnishment statute. *See* VA. CODE § 8.01-511 *et seq.* (Cum. Supp. 1983). Virginia's garnishment statute grants a judgment creditor the power to require the clerk of the court which rendered the judgment to serve summons on both the judgment debtor and on the garnishee holding any amounts owing to the judgment debtor. *Id.; see id.* § 8.01-512.3 (form of garnishment summons). The statute requires a summoned garnishee to appear in court or file a verified affidavit or statement showing the amount the garnishee owes to the judgment debtor or what property or effects the garnishee holds for the judgment debtor. *See id.* § 8.01-515. Furthermore, the Virginia garnishment statute grants the court the discretion to order the judgment debtor or the garnishee to pay to the court the amounts or property owed. *See id.* § 8.01-516.

17. 698 F.2d at 690.

18. *Id.* at 689-90.

19. *Id.* at 690.

20. *Id.*

21. *Id.* at 691.

22. *Id.* at 690.

23. *Id.; see also infra* text accompanying notes 33-34 (Fourth Circuit's analysis of district court's decision to treat plans providing for lump sum distributions different than plans providing for periodic distributions).

more, the district court held that Sweeney controlled and constructively received the 5,000 dollars still in the Tenneco pension account because the pension plan required Tenneco to pay the 5,000 dollars at Sweeney's request.[24] The district court also held that ERISA did not exempt from garnishment the 37,000 dollars Sweeney transferred to the broker after Sweeney withdrew the money from Tenneco's retirement plan.[25] The district court reasoned that merely because the funds originated in an ERISA plan did not exempt the monies from garnishment after distribution.[26]

On appeal from the district court's decision, the Fourth Circuit concluded that a judgment creditor could not garnishee pension benefits remaining in the hands of an ERISA fiduciary.[27] The court noted that ERISA and the Internal Revenue Code require each qualified pension plan to contain provisions against an assignment or alienation of benefits.[28] The Fourth Circuit observed that the Treasury Regulations further clarified the tax code's section on alienation and assignment.[29] The regulations specifically prohibit the anticipation, assignment, or alienation of pension benefits and preclude subjecting the pension benefits to attachment, garnishment, levy, execution, or other legal or equitable process.[30] Moreover, the Fourth Circuit noted that the sole judicial exception to the absolute prohibition against alienation and assignment only applies when the debt is for support of a beneficiary's children or former spouse.[31] The *Tenneco* court noted ERISA's broad statutory pur-

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24. 698 F.2d at 690.
25. *Id.* at 691.
26. *Id.*
27. *Id.* at 689.
28. *Id.; see* 29 U.S.C. § 1056(d) (1976) (qualified pension plan must prohibit alienations and assignments); I.R.C. § 401(a)(13) (1976) (qualified plan must include clause prohibiting alienation and assignment of pension benefits). The amendments to the Internal Revenue Code in ERISA set forth certain criteria as prerequisites for qualifying as a pension plan. I.R.C. § 401(a). The Code states as one of the criteria that a qualified plan must contain a clause prohibiting alienation or assignment of pension benefits. *Id.* § 401(a)(13); *see supra* note 5 (other tax code criteria for qualified pension plans). ERISA and the IRC do not completely prohibit alienation and assignment of pension benefits because the statutes permit a voluntary and revocable assignment of 10% or less of any benefit payment. *See* I.R.C. § 401(a)(13) (beneficiary may voluntarily and revocably assign 10% or less of any benefit payment); 29 U.S.C. § 1056(d)(2) (beneficiary may make voluntary and revocable assignment of 10% or less of any benefit payment).
29. 698 F.2d at 689; *see* Treas. Reg. § 1.401(a)-13(b)(1) (1978) (ERISA prohibits garnishment of pension benefits); *see also infra* text accompanying notes 66-73 (Sixth Circuit's analysis of Treas. Reg. § 1.401(a)-13(b)(1)).
30. Treas. Reg. § 1.401(1)-13(b)(1) (1978); *see infra* text accompanying notes 66-73 (Sixth Circuit's analysis of Treas. Reg. § 1.401(a)-13(b)(1)).
31. 698 F.2d at 689-90. Public policy grounds justify the judicially-created implied exception allowing garnishment of a pension plan in the case of overdue wife and child support payments. *See* American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 125 (2d Cir. 1979) (any increase in plan administration costs must give way to social benefits of allowing garnishment for family support obligations). Courts refuse to impose on the public the costly burden that would result if dependent spouses and children resorted to welfare assistance because the spouse and children could not enforce support order against an interest in a former spouse's pension plan. *See id.* One court distinguished the claims of family members from the claims of other creditors in two ways. *See* Seneco of Fla., Inc. v. Clark, 473 F. Supp. 902, 907 (M.D. Fla. 1979). First, the *Clark* court

pose of providing for the beneficiary and his family as the reason for distinguishing familial support payments from attachments for the benefit of other creditors.[32] Finally, the appellate court found no basis for the district court's decision to treat plans providing for lump sum distributions differently from plans providing for periodic distributions.[33] The Fourth Circuit stated that ERISA and the Treasury Regulations made no distinction between fully vested funds subject to lump sum withdrawal and funds subject to periodic disbursement as an annuity.[34] The *Tenneco* court reasoned that ERISA's statutory scheme intended to protect the amounts in an employee's pension plan until retirement regardless of whether the employee obtained another job, quit work entirely, or otherwise received the right to a lump sum distribution.[35] The Fourth Circuit, therefore, held that First Virginia's writ of garnishment could not reach the balance of Sweeney's ERISA account.[36]

Even though the Fourth Circuit held that the judgment creditor could not garnishee funds remaining in the ERISA trustee's possession, the Fourth Circuit agreed with the district court's ruling that First Virginia could garnishee funds Sweeney had collected previously from the ERISA account.[37] The Fourth Circuit found that no ERISA provision supported Sweeney's claim that funds traceable to a qualified ERISA account remained forever immune from garnishment.[38] The court suggested that a beneficiary could prevent at-

stated that Congress intended ERISA to protect pension beneficiaries and their families but did not intend ERISA to protect business creditors. *Id.; see* 29 U.S.C. § 1001(a) (1976) (purpose of ERISA is to provide retirement income for beneficiary and his family). Second, the *Clark* court noted that creditors do not have to extend credit to a person whose main assets consist of an interest in a pension plan, while the former spouse and children do not have a similar choice. *See* Clark, 473 F. Supp. at 907. The implied exception allowing garnishment of pensions for family support obligations also permits garnishment of pension plans to collect the former spouse's share of community property. *See* Stone v. Stone, 632 F.2d 740, 742 (9th Cir. 1980) (garnishment for collection of share of community property not precluded by ERISA's preemption provisions), *cert. denied*, 453 U.S. 922 (1981). *But see* Francis v. United Technologies Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978) (ERISA preempts operation of California's community property law that purported to give nonemployee spouse interest in plan benefits).

32. 698 F.2d at 690. The Congressional findings and declarations of policy in enacting ERISA state that Congress found it desirable and in the interest of employees and the employees' beneficiaries to pass a pension reform act. *See* 29 U.S.C. § 1001(a) (1976). Congress found that the pension plans directly affected millions of employees and employees' dependents. *Id.* Congress also stated that the termination of plans before the requisite retirement funds accumulate deprived employees and employees' families of anticipated benefits. *Id.* Congress thus declared that ERISA's policy should include protecting both the interests of participants in employee benefit plans and the interests of the participants' beneficiaries. *Id.* § 1001(b), (c).

33. 698 F.2d at 690.

34. *Id.; see* 29 U.S.C. § 1056(d)(1) (1976) (beneficiary may not assign or alienate pension benefits); I.R.C. § 401(a)(13) (pension plan must include prohibition on alienation or assignment of benefits); Treas. Reg. § 1.401(a)-13(b)(1) (1978) (ERISA prohibits garnishment of pension benefits).

35. 698 F.2d at 690; *see supra* note 1 (discussion of general statutory scheme of ERISA).

36. 698 F.2d at 690.

37. *Id.* at 691.

38. *Id.* Although the *Tenneco* court found that a qualified ERISA trust could not prevent the garnishment of funds after distribution of the funds from the ERISA trust, in reaching the

tachment of benefits after distribution solely by reinvesting the benefits in a new ERISA account within sixty days of distribution as provided in ERISA.[39] The *Tenneco* court, however, noted that Sweeney did not reinvest the proceeds in another ERISA account and therefore held that First Virginia could garnishee the money Sweeney left in the broker's possession.[40]

In reaching the *Tenneco* decision, the Fourth Circuit analyzed the relevant ERISA sections, the provisions of the tax code, and the corresponding treasury regulations,[41] but failed to discuss the ERISA preemption provision.[42] The ERISA preemption provision states that ERISA supersedes any and all state laws insofar as they relate to any employee benefit plan.[43] Some courts have found that Congress intended to preempt all state laws relating to employee benefit plans and not merely the laws purporting to regulate an area expressly covered by ERISA.[44] For example, in *Hewlett-Packard Co. v.*

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decision the court did not discuss an analagous trust law rule. *See id.* Under the general rule regarding spendthrift trusts, creditors of the beneficiary of a spendthrift or protective trust may not reach the assets of the trust to satisfy debts of the beneficiary until the beneficiary actually receives such property from the trustee. *See* First Northwestern Trust Co. of S. Dak. v. I.R.S., 622 F.d 387, 391 (8th Cir. 1980) (general rule protects funds held in spendthrift trust from creditors of beneficiary even in bankruptcy proceedings); Roy v. Edgar, 11 Bankr. 853, 858 (Bankr. N.D. Fla. 1981) (spendthrift trust does not restrain creditors from taking income or principal after distribution); Kirk v. Kirk, 254 Or. 44, ____, 456 P.2d 1009, 1010 (1969) (creditors may not reach corpus of spendthrift trust unless creditor seeks amounts to satisfy child support or alimony obligations).

39. 698 F.2d at 690-91. The IRC subjects an ERISA trust payout to taxation in the year of distribution to the beneficiary. *See* I.R.C. § 402(a)(1), (2) (1976). Under IRC § 403(a)(4), however, the IRS may not tax funds distributed from an ERISA account if within sixty days of the distribution the beneficiary reinvests the distributed funds into another ERISA-qualified plan. *Id.* at § 403(a)(4). Sweeney had argued that if funds had once composed part of an ERISA trust, a creditor could never garnishee the funds even after distribution. *See* 698 F.2d at 690-91. The *Tenneco* court did not explicitly state that the court would have adopted Sweeney's view if Sweeney had reinvested the proceeds in another ERISA account within sixty days. *See id.* The court, however, did imply that Sweeney's argument would have been more persuasive if Sweeney had reinvested the proceeds within the sixty day period. *Id.*

40. 698 F. 2d at 691.

41. *See supra* text accompanying notes 27-36 (Fourth Circuit's discussion of ERISA, tax code, and tax regulations).

42. *See* 29 U.S.C. § 1144(a) (1976). Section 1144(a) states that the provisions of ERISA supersede any and all state laws insofar as the state law relate to any employee benefit plan described in 29 U.S.C § 1003(a). *Id.; see id.* § 1003(a). Section 1003(a) provides that ERISA covers any employee benefit plan established or maintained by an employer engaged in commerce or in any industry or actively affecting commerce or by an organization representing the employees engaged in such activities. *Id.* § 1003(a). Section 1003(b), however, exempts from the operation of § 1003(a) such benefit plans as governmental plans, church plans, plans maintained solely to comply with workmen's compensation or unemployment compensation or disability insurance laws, plans maintained outside of the United States for the benefit of alien persons, and unfunded excess benefit plans. *Id.* § 1003(b).

43. *See* 29 U.S.C. § 1144(a) (1976) (ERISA preempts state laws regulating pension plans); *supra note* 42 (discussion of ERISA's preemption provisions).

44. *See* Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir.) (Congress intended to preempt no only state laws regulating areas expressly covered by ERISA but also any state laws relating to employee benefit plans), *cert. denied* 435 U.S. 980 (1977); Francis v. United Technologies

*Barnes*,[45] the United States District Court for the Northern District of California held that ERISA preempted a California act regulating employee health benefit plans.[46] The district court noted that Congress rejected early ERISA drafts containing language limiting preemption in favor of more extensive preemption language.[47] The court further found that the congressional debates revealed that Congress intended to preempt all state action that interfered with the federal regulation of private pension plans.[48] The *Hewlett-Packard* court concluded that ERISA's legislative history and statutory language indicated that Congress intended to preempt all state laws affecting employee benefit plans.[49]

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Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978) (Congress intended to effect broadest possible preemption of state law); *see also supra* note 2 (Congress outlined several areas of concern existing before ERISA); *supra* note 4 (purpose of ERISA is to provide retirement income for working people); *supra* note 32 (passage of ERISA was in interest of beneficiaries and their dependents); *infra* note 48 (remarks made on floor of House and Senate concerning ERISA's preemption provisions).

45. 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

46. *Id.* at 1297.

47. *Id.* at 1298-99. *See* Boyle, *Garnishment of Pension Benefits After ERISA*, 34 Bus. Law. 501, 510 (1979) (Congress rejected language limiting preemption in favor of present statute). An early ERISA draft in the House of Representatives would have preempted only those state laws relating to fiduciary duties, reporting standards, and disclosure requirements for persons acting as plan trustees. *See* H.R. 2, 93d Cong., 1st Sess. § 114 (1973). Furthermore, an early Senate draft of ERISA contained language that would have preempted only state laws relating to the subject matters that the Act would regulate. *See* S.4, 93d Cong., 1st Sess. § 60 (1973). Congress eventually passed a provision stating that ERISA supersedes any and all state laws insofar as the state law relates to any employee benefit plan. *See* 29 U.S.C. § 1144(a) (1976). *But see infra* note 49 (some commentators do not interpret ERISA's preemption provisions as preempting all state laws relating to employee benefit plans).

48. 425 F. Supp. at 1299-1300; *see* 120 Cong. Rec. 29933 (1974) (remarks of Senator Harrison Williams, Jr.) (ERISA's provisions preempt all actions and laws of state governments in use of pension benefits); *id.* at 29942 (remarks of Senator Jacob Javits) (ERISA preemption provisions bar state action in area of employee benefit plans); *id.* at 29197 (remarks of Congressman John Dent) (ERISA reserves to federal government sole power to regulate private employee benefit plans).

49. 425 F. Supp. 1300. *See* Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 38-43 (1978) (statutory language and legislative history make clear that Congress intended that the federal government alone should regulate employee benefit plans); Semo, *ERISA Preemption: A Comparison of* Wayne Chemical, Inc. v. Columbus Agency Services Corp. *and* Dawson v. Whaland, 3 J. of Pension Plan. & Comp. 368, 369 (1977) (legislative history and language of ERISA indicate Congress exercised full measure of constitutional power under commerce clause); *see also* Boyle, *supra* note 47, at 509 (ERISA's assignment prohibition requirement creates general federal exemption of pension benefits from creditor's claims and preempts relevant state law).

At least one commentator interprets ERISA's preemption provision language as refuting the idea that Congress intended to preempt the entire field of pension plans for federal regulation. *See* Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After* Marriage of Brown *and ERISA*, 25 U.C.L.A. L. Rev. 417, 515-16 (1978); *see also* 29 U.S.C. § 1144 (1976) (ERISA's preemption provision). Section 1144(a) states that ERISA shall supersede all state laws insofar as the laws relate to an employee benefit plan. *See* 29 U.S.C. § 1144(a). Section 1144(c)(2) of ERISA defines "state" to include only those governmental instrumentalities which regulate employee benefit plans. *Id.* § 1144(c)(2). Reppy interprets "regulate" to mean that Congress intended the preemption provisions of § 1144(a) to have a limited effect because

Although the Fourth Circuit did not make an explicit declaration of the court's understanding of ERISA's preemption provision, the *Tenneco* court implicitly decided that ERISA preempted certain state laws because the court ruled that ERISA prohibits a judgment creditor from garnisheeing amounts remaining in a pension plan.[50] Like the *Tenneco* court, a majority of courts have concluded that ERISA protects amounts remaining in the pension trustee's possession.[51] For example, in the Sixth Circuit case of *General Motors Corp. v. Buha*,[52] the defendant Buha sued a married couple in a tort action and obtained a state court judgment against the couple.[53] After the couple failed to pay the judgment, Buha instituted post-judgment garnishment proceedings against the couple's interest in an ERISA-qualified General Motors pension

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a state law could have a possible effect on a pension plan but yet not attempt to regulate the plan. Reppy, *supra*, at 515-16. One other commentator argues that despite the literal language of ERISA's preemption provisions and the Congressional debates on preemption, Congress did not intend to preempt all state and local laws that in any way apply to employee plans. *See* Boyle, *supra* note 47, at 512. For an extreme example, Boyle cites that local building codes presumably do not cease to apply to buildings owned by pension plans. *Id.*

Many courts, however, have held that ERISA preempts a wide range of state regulation of employee benefit plans. *See* Standard Oil Co. of Cal. v. Agsalud, 442 F. Supp. 695, 711 (N.D. Cal. 1977) (ERISA preempts state regulation of health plans), *aff'd*, 633 F.2d 760 (9th Cir. 1980) *aff'd* 454 U.S. 801 (1981); Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316, 321 (N.D. Ind.) (ERISA preempts state insurance law regulation of provisions of insurance-like benefit plan), *aff'd on other grounds*, 567 F.2d 692 (7th Cir. 1977); Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1297 (N.D. Cal. 1977) (ERISA preempts state regulation of health care service plans), *aff'd*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978); Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Indus. of S. Cal., 424 F. Supp. 80, 82 (C.D. Cal. 1976) (ERISA's federally created cause of action preempts plan participant's state law tort action); Azzaro v. Harnett, 414 F. Supp. 473, 474 (S.D.N.Y. 1976) (state insurance superintendent enjoined from supervising ERISA plans), *aff'd mem.*, 553 F.2d 93 (2d Cir.), *cert. denied*, 434 U.S .824 (1977). *But see supra* note 31 (implied exception for marital support payments rests on public policy grounds).

50. *See* 698 F.2d at 690 (judgment creditor may not use writ of garnishment to reach amounts in pension plan); *see also infra* text accompanying note 94 (*Tenneco* decision provides guidance to Fourth Circuit practitioners and courts). *But see supra* note 31 (ERISA does not preempt garnishment for family support payments).

51. *See* Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank of Dallas, 526 F. Supp. 510, 516 (N.D. Tex 1981) (ERISA preempts state laws on garnishment); Goddard v. Boozer, 160 Ga. App. 303, 305, 287 S.E.2d 308, 309 (Ga. Ct. App. 1981) (ERISA precludes judgment creditors from garnisheeing pension accounts); Christ Hosp. v. Greenwald, 82 Ill. App. 3d 1024, 1028, 403 N.E.2d 700, 704 (1980) (ERISA preempts state garnishment laws). Although some courts have ruled that ERISA prohibits garnishment of pension benefits, many jurisdictions have explicitly or impliedly assumed the existence of an ERISA prohibition on garnishment of pension benefits. *See* Operating Eng'rs' Local No. 428 Pension Trust Fund v. Zamborsky, 650 F.2d 196, 198 n. 2 (9th Cir. 1981) (assumed ERISA precludes garnishment); Cody v. Riecker, 594 F.2d 314, 315 (2d Cir. 1979) (garnishment of pension benefits for arrearages in wife and child support impliedly excepted from general anti-alienation clause of ERISA); American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (former spouse seeking support payments may garnishee amounts in ERISA pension fund); Seneco of Fla., Inc. v. Clark, 473 F. Supp. 902, 908 (M.D. Fla. 1979) (ERISA does not preclude garnishment for family support obligations).

52. 623 F.2d 455 (6th Cir. 1980).

53. *Id.* at 457.

plan and served a writ of garnishment on the pension trustee.[54] General Motors filed an action in the United States District Court for the Eastern District of Michigan to block enforcement of Buha's writ of garnishment.[55] The district court permanently enjoined Buha from garnisheeing the couple's interest in the pension fund.[56] On appeal, the Sixth Circuit held that ERISA precludes a judgment creditor from garnisheeing a beneficiary's interest in a qualified pension plan.[57]

The Sixth Circuit examined the language of ERISA's assignment and alienation provision which prohibits all assignment and alienation of plan benefits prior to distribution.[58] The court noted that under a statutory exception to ERISA's assignment and alienation provision, a beneficiary may voluntarily and revocably assign up to ten percent of any benefit distribution plan.[59] Buha contended that the use of the words "alienation and assignment" to describe acts prohibited under ERISA indicated that Congress intended to prohibit only voluntary acts on the part of pension beneficiaries.[60] Buha argued that Congress clearly had prohibited garnishments and attachments when Congress intended to prevent involuntary assignments.[61] The defendant Buha argued that in many statutes Congress has distinguished between voluntary assignments and involuntary invasions of benefits by way of garnishment, execution, or attachment.[62] The *Buha* court recognized that Congress understood the difference between voluntary and involuntary encroachments of pension benefits and that Congress had stated specifically that Congress intended to prohibit both voluntary and involuntary encroachments on a pension fund.[63] The Sixth Circuit, however, noted that Congress used the word "voluntary" in specifying the assignments that qualified for the ten percent exception.[64] The court stated that the use of the word "voluntary" to describe the ten percent exception indicated that ERISA's language generally prohibiting alienations and

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 463. Although the Sixth Circuit in *Buha* did not decide whether ERISA prohibited garnishments of pension trusts to enforce family support obligations, the *Buha* court did cite cases in which other courts found an implied exception allowing garnishment for marital and child support payments. *See id.* at 460-61; *see also supra* note 31 (cases holding that ERISA does not prohibit garnishment of pension benefits to enforce family support obligations).

58. 623 F.2d at 460; *see* 29 U.S.C. § 1056(d)(1) (1976) (ERISA prohibits alienation and assignment of pension benefits); *see supra* note 5 (ERISA's anti-assignment of alienation provision).

59. 623 F.2d at 460; *see* 29 U.S.C. § 1056(d)(2) (1976) (pensioner may voluntarily and revocably assign 10% or less of any benefit payment); *see supra* notes 5, 28 (discussion of ERISA exception allowing voluntary and revocable assignment of 10% or less of any benefit payment).

60. *See* 623 F.2d at 460.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.; see* 29 U.S.C. § 1056(d)(2) (1976) (beneficiary may voluntarily and revocably assign 10% or less of any benefit payment); *supra* notes 5, 28 (discussion of ERISA exception allowing voluntary and revocable assignment of 10% or less of any benefit payment).

assignments included all encroachments, both voluntary and involuntary.[65]

After examining the language of ERISA's assignment and alienation provisions, the Sixth Circuit analyzed both the Treasury Department regulations

65. *See* 623 F.2d at 460. In addition to analyzing the ERISA statute and the Treasury Regulations interpreting ERISA, the *Buha* court also examined a Joint Conference Committee Report concerning ERISA but found the language too ambiguous to help the court reach any conclusion on pension plan garnishments. *See id.;* H. R. REP No. 1280, 93d Cong., 2d Sess. 280, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5061. The Joint Conference Report referred to a general requirement of non-assignability. *Id.* The report noted the exception to non-assignability contained in 29 U.S.C. § 1056(d)(2) under which a beneficiary might voluntarily and revocably assign 10% or less of any benefit payment. *Id.* The report then stated that the Committee did not consider a garnishment or levy a voluntary assignment for purposes of "this rule." *Id.* In *Buha,* General Motors argued that "this rule" referred to the statutory exception to the general rule of non-assignability. 623 F.2d at 460. General Motors further asserted that since the Joint Committee did not wish to allow garnishments within the 10% exception, ERISA also impliedly disallowed garnishment above the 10% exception. *Id.* Buha, however, argued that "this rule" referred to the general requirement of a provision against assignment, thus eliminating garnishments from the category of assignments. *Id.* The *Buha* court held the language of the Joint Conference Report too ambiguous to support either interpretation. *Id.; see infra* text accompanying notes 79-87 (*IBEW* court's discussion of legislative history).

In *Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank of Dallas,* the United States District Court for the Northern District of Texas found unambiguous the Joint Conference Committee Report language that for purposes of "this rule" a garnishment does not constitute a voluntary assignment. 526 F. Supp. 510, 518 (N.D. Tex. 1981). The *Commercial Mortgage* court held that the report only served to make clear that at no time could garnishments or levies constitute voluntary revocable assignments to qualify for the 10% exception to the general rule against assignments. *Id.*

In addition to rejecting either interpretation given to the Joint Conference Report, the *Buha* court chose not to rely on prior case law because previous decisions had reached different conclusions on the question of pension plan garnishment. 623 F.2d at 460-61. The federal case decided prior to *Buha* had construed ERISA to prohibit garnishments generally but found an exception for wife and child support obligations. *See, e.g.,* American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (garnishment order used to satisfy court-ordered family support payments impliedly excepted from alienation and assignment proscription of ERISA); Seneco of Fla., Inc. v. Clark, 473 F. Supp. 902, 908 (M.D. Fla. 1979) (wife's post judgment garnishment of husband's pension benefits pursuant to court support order not precluded by ERISA); Cody v. Riecker, 454 F. Supp. 22, 24-25 (E.D.N.Y. 1978) (ERISA does not prevent enforcement of spousal support order against ERISA trust), *aff'd,* 594 F.2d 314 (2d Cir. 1979); *see supra* note 5 (anti-assignment and alienation provisions); *supra* note 31 (implied exception allowing garnishment for wife and child support obligations). The state courts split on the question of whether ERISA prohibited garnishment of pension benefits. *Compare* National Bank of N. Am. v. IBEW Local No. 3 Pension and Vacation Funds, 69 A.D.2d 679, 685-86, 419 N.Y.S. 2d 127, 131 (1979) (ERISA does not prohibit garnishments), *appeal dismissed,* 48 N.Y.2d 752, 397 N.E.2d 1333, 422 N.Y.S.2d 666 (1979), *with* Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund, 583 S.W.2d 154, 161-62 (Mo. 1979) (ERISA preempts rights of creditors to garnishee pension benefits). State courts recognize the validity of garnishments for family support obligations without deciding whether a general prohibition on garnishment existed. *See* Western Elec. Co. v. Traphagen, 166 N.J. Super. 418, 427, 400 A.2d 66, 69-70 (N.J. Super. Ct. App. Div. 1979) (ERISA's general prohibition on garnishment does not apply when creditor attempts to collect overdue family support obligations); Biles v. Biles, 163 N.J. Super. 49, 57, 394 A.2d 153, 156-57 (N.J. Super. Ct. Ch. Div. 1978) (creditor collecting for past due family support may garnishee pension fund in spite of ERISA's general prohibition on garnishment of benefit plans).

concerning trusts qualified for special treatment under ERISA and the Internal Revenue Code.[66] The Treasury Regulations state that to qualify as an ERISA trust, the terms of the trust must prohibit a creditor from garnisheeing, attaching, or alienating the pension funds or in any way subjecting the funds to legal process to satisfy debts of a beneficiary.[67] The Sixth Circuit held the regulation legislative in nature rather than interpretive[68] because ERISA delegated to the Secretary of the Treasury the authority to issue regulations concerning ERISA's participation, vesting, and funding standards.[69] When Congress grants to the secretary of an executive department the primary responsibility for clarifying a statutory term, the secretary promulgates regulations with legislative effect.[70] The court also noted that Congress stated that the Treasury's regulations concerning participation, vesting, and funding standards of pension trusts would apply to the analagous portions of ERISA.[71] The Sixth Circuit determined that the Treasury Regulation was not arbitrary or capricious, an abuse of discretion, or otherwise unlawful[72] and thus held in accordance with the regulation that ERISA required a general prohibition on garnishment of pension benefits.[73]

A minority of courts have not reached the same result as the Fourth Circuit in *Tenneco* and the Sixth Circuit in *Buha*.[74] Courts adhering to the minority view interpret the Joint Conference Committee Report on ERISA to indicate

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66. *See* 623 F.2d at 462.

67. *See* Treas. Reg. § 1.401(a)-13(b)(1) (1978) (interpreting the anti-assignment and alienation requirement of I.R.C. § 401(a)(13) (1976)); I.R.C. § 401(a)(13) (1976) (qualified trust must contain provision prohibiting alienation or assignment of pension benefits).

68. 623 F.2d at 462. Ordinarily, the courts will not defer to an administrative interpretation of the terms of a statute. *See* Batterton v. Francis, 432 U.S. 416, 424 (1977) (discussing judicial deference given to administrative interpretations and regulations). In some situations, however, Congress grants to the secretary of an executive department the primary responsibility for clarifying a statutory term. *See id.* at 425. Under such authority, the secretary promulgates regulations with legislative effect. *See id.* Reviewing courts may not freely set aside such regulations simply because the court would have interpreted the statute in another manner. *See id.* The court must follow the regulation unless the secretary exceeded his authority under the statute or the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See id.* at 426; 5 U.S.C. § 706(2)(A), (C) (1976) (standard of review under Administrative Procedure Act). No general rule, however, requires a court to follow an interpretive regulation that an agency issues without an express delegation of authority under the act to promulgate such regulations. *See* 432 U.S. at 425 n.9. The courts defer to administrative interpretations in varying degrees based upon such factors as the timing and nature of the position of the agency and the nature of the agency's expertise. *See id.*

69. 623 F.2d at 462; *see* 29 U.S.C. § 1202(c) (1976) (Treasury Secretary has authority to issue regulations concerning qualifying standards of ERISA).

70. *See* Batterton v. Francis, 432 U.S. 416, 425 (1977) (regulations promulgated under specific statutory grant have legislative effect).

71. 623 F.2d at 462; *see* 29 U.S.C. § 1202(c) (1976) (Treasury Regulations apply to ERISA provisions).

72. 623 F.2d at 462-63 (citing Baker v. Otis Elevator Co., 609 F.2d 686, 691 (3d Cir. 1979) (standard for following or rejecting quasi-legislative regulations)); *see* 5 U.S.C. § 706(2)(A), (C) (1976) (standard of review in Administrative Procedure Act); *see also supra* note 68 (standard for determining whether to follow legislative regulation).

73. 623 F.2d at 463.

74. *See* National Bank of N. Am. v. IBEW Local No. 3 Pension and Vacation Funds,

that Congress intended only to prevent voluntary assignments of more than ten percent of the employee's benefits.[75] The Joint Conference Committee Report first states ERISA's general rule of non-assignability which requires a plan to provide that a beneficiary may not assign or alienate any benefits under the plan.[76] The report next states an exception to the general rule of non-assignability under which a beneficiary may voluntarily and revocably assign ten percent or less of any benefit payment.[77] Furthermore, the report states that a garnishment or levy is not a voluntary assignment for purposes of "this rule."[78]

Like the minority of courts, the New York Supreme Court in *National Bank of North America v. IBEW Local No. 3 Pension and Vacation Funds*[79] has interpreted the Joint Conference Committee Report to express a Congressional intent only to prevent voluntary assignments of more than ten percent of pension distributions.[80] In the *IBEW* case, the bank obtained a judgment against Martin Conlon, a retired pensioner, and sought to have the judgment satisfied out of Conlon's ERISA pension account with the International Brotherhood of Electrical Workers.[81] The bank applied to the New York Supreme Court for an order directing the pension trustee to satisfy the judgment out of the monthly benefits the ERISA pension account paid to Conlon.[82] The New York Supreme Court analyzed the Joint Conference Report interpreting ERISA's anti-alienation and assignment provisions to determine whether ERISA allowed a judgment creditor to garnishee amounts remaining in a pension trust.[83] Unlike the *Buha* court, the New York Supreme Court stated that the report indicated that Congress only intended to prevent a voluntary disposition of more than ten percent of an employee's pension benefits.[84] The *IBEW* court held that Congress did not place any restrictions on involuntary disposi-

69 A.D.2d 679, 686, 419 N.Y.S. 2d 127, 131 (1979) (ERISA's preemption provisions have no effect on state garnishment law), *appeal dismissed*, 48 N.Y.S.2d 752, 397 N.E.2d 1333, 422 N.Y.S.2d 666 (1979); Plymouth Rock Fuel Corp. v. Bank of N.Y., 102 Misc. 2d 235, 236, 425 N.Y.S. 2d 908, 908 (N.Y. App. Term. 1979) (state law on garnishment still effective as to pension funds after ERISA); *see also* Lowery v. Spector, 77 A.D.2d 813, 813, 430 N.Y.S. 2d 767, 767-68 (1980) (ERISA does not preclude levy on pension funds once trust has terminated).

75. *See* Note, *Attachment of Pension Benefits Under ERISA*, 74 Nw. U. L. Rev. 255, 263 (1979) (one view reads Joint Conference Report's definition of voluntary assignment to mean that ERISA only prevents voluntary assignments of more than 10%) [hereinafter cited as *Attachment*]; *see also* H.R. Rep. No. 1280, 93d Cong., 2d Sess. 280, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5061.

76. See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 280, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5061.

77. *See id.*

78. *See id.*

79. 93 Misc. 2d 590, 400 N.Y.S.2d 482 (N.Y. Sup. Ct. 1977), *aff'd*, 69 A.D. 2d 679, 419 N.Y.S.2d 127 (1979), *appeal dismissed*, 48 N.Y. 2d 752, 397 N.E.2d 1333, 422 N.Y.S.2d 666 (1979).

80. *See id.* at 597, 400 N.Y.S.2d at 487.

81. *See id.* at 591, 400 N.Y.S.2d at 483.

82. *See id.*, 400 N.Y.S.2d at 483.

83. *See id.* at 596-97, 400 N.Y.S.2d at 486-87; H.R. Rep. No. 1280, 93d Cong., 2d Sess. 280, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5061 (committee's interpretation of ERISA's anti-assignment and alienation provisions).

84. *See* 93 Misc. 2d at 598, 400 N.Y.S.2d at 487.

tions of pension benefits.[85] The *IBEW* court reasoned that since the Joint Conference Report recognized that garnishment is not a voluntary assignment, Congress did not intend the voluntary assignment exception's limitation of ten percent to apply to garnishments.[86] The court, therefore, concluded that although ERISA prohibited voluntary assignments above ten percent, ERISA placed no limitations whatsoever on involuntary assignments effected under the New York garnishment law.[87]

Several reasons exist for rejecting the *IBEW* court's conclusion that ERISA does not prohibit garnishment of pension accounts.[88] Unlike the *IBEW* court, a majority of the courts construe the Joint Conference Report to mean that ERISA prohibits all assignments and alienations, both voluntary and involuntary, with but one exception for voluntary and revocable assignments of up to ten percent.[89] The majority approach appears more reasonable from a literal reading of the Joint Conference Report, even though the reference to garnishments and levies as not being voluntary assignments seems superfluous.[90] The majority view prohibiting all garnishments also appears consistent with the stated Congressional goal of ensuring that the employee's accrued benefits actually would be available for retirement purposes.[91] Moreover, the Treasury Regulation's extension of the prohibition on alienation and assignment to all encroachments on a pension fund whether voluntary or compulsory supports the majority interpretation of the ERISA anti-assignment provision.[92] The United States Supreme Court repeatedly has stated that a court should follow Treasury Regulations unless the court finds the regulations unreasonable and plainly inconsistent with the statute.[93]

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85. *See id.*, 400 N.Y.S.2d at 487.

86. *See id.* at 597, 400 N.Y.S.2d at 487.

87. *See id.*, 400 N.Y.S.2d at 487.

88. *See* Boyle, *supra* note 47, at 506 (criticizing *IBEW* decision and stating that cases which hold that assignment-prohibition requirement applies to involuntary assignments reach better result); Note, *Attachment, supra* note 75, at 264 (ERISA prohibits all assignments and alienations except for 10% voluntary assignment exception).

89. *See* Note, *Attachment, supra* note 75, at 264 (majority of courts have concluded that ERISA prohibits all assignments whether voluntary or involuntary).

90. *See id.* (literal reading of Joint Conference Committee Report supports view that ERISA prohibits all alienations and assignments whether voluntary or compulsory); H.R. Rep. No. 1280, 93d Cong., 2d Sess. 280, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5061 (ERISA prohibits alienation and assignment of pension benefits); *cf. supra* text accompanying notes 79-87 (*IBEW* court's analysis of Joint Conference Committee Report).

91. *See* Note, *Attachment, supra* note 75, at 264 (prohibiting all garnishments appears consistent with Congressional intent and purposes); H.R. Rep. No. 807, 93d Cong., 2d Sess. 68, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4734 (anti-assignment provision ensures that pension benefits remain available for retirement).

92. *See* Boyle, *supra* note 47, at 505 (Treasury Regulations support view that ERISA prohibits all garnishments); Treas. Reg. § 1.401(a)-13(b)(1) (1978) (ERISA prohibits garnishments of pension benefits); *supra* text accompanying notes 66-73 (Sixth Circuit's analysis in *Buha* of Treasury Regulations on ERISA).

93. *See* Boyle, *supra* note 47, at 505 (courts should follow Treasury Regulations unless

The *Tenneco* decision provides guidance to the Fourth Circuit practitioners and courts because the holding clearly precludes judgment creditors from garnisheeing pension benefits that remain in the control of a pension trustee.[94] The majority of courts support the result reached by the *Tenneco* court.[95] Examination of the preemption provisions of ERISA compels the conclusion that the Fourth Circuit reached the correct result in *Tenneco* because Congress intended to establish a uniform body of pension law throughout the United States.[96] A logical interpretation of the Joint Conference Report on ERISA[97] and a literal reading of the Treasury Regulations explaining the anti-assignment provisions also support the Fourth Circuit's decision.[98] *Tenneco* upholds the Congressional purpose behind ERISA of ensuring that an employee's pension benefits remain undisturbed and available for an employee's retirement years.[99]

THOMAS BANKS SHEPHERD III

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unreasonable); *see also* Commissioner v. South Tex. Lumber Co., 333 U.S. 496, 501 (courts should not invalidate Treasury Regulations except for weighty reasons), *reh'g denied*, 334 U.S. 813 (1948); Brewster v. Gage, 280 U.S. 327, 336 (1930) (interpretation given to statute by those charged with statute's administration will not be overruled except for weighty reasons).

94. 698 F.2d at 690. Although the Fourth Circuit in *Tenneco* did establish a clear rule that precluded garnishment of pension accounts, the court did not decide whether the Fourth Circuit would recognize a judicially created exception allowing garnishment for family support payments. *Id.* The court, however, did cite approvingly to the cases finding an implied exception to the prohibition on garnishment for family support obligations. *Id.; see supra* note 31 (discussion of judicially implied exception allowing garnishment of pension benefits to satisfy marital support obligations).

95. *See supra* text accompanying notes 51-73 (discussion of cases reaching same result as Fourth Circuit in *Tenneco*).

96. *See* Note, *Attachment, supra* note 75, at 275 (guiding purpose of preemption clause was to provide uniform regulation of pension plans); H.R. REP. No. 533, 93d Cong., 2d Sess. 17, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4655 (purpose of ERISA's preemption clause is to eliminate inconsistent local regulation); *see also supra* text accompanying notes 41-49 (Congress intended to preempt area of employee pension plans for federal regulation).

97. *See supra* text accompanying notes 89-90 (logical reading of Joint Conference Report supports majority view that ERISA prohibits all garnishments); H.R. REP. No. 1280, 93d CONG., 2d SESS. 280, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5061 (ERISA prohibits alienation and assignment of pension benefits); *see also* Tenneco, Inc. v. First Va. Bank of Tidewater, 698 F.2d 688, 690 (4th Cir. 1983) (legislative history shows that Congress precluded garnishments); Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank of Dallas, 526 F. Supp. 510, 518 (N.D. Tex. 1981) (Joint Conference Report indicates ERISA prohibits garnishments). The *Commercial Mortgage* court stated that the only reasonable reading of both ERISA and the Internal Revenue Code and all the legislative history indicates that the assignment-alienation prohibition extends to involuntary assignments such as garnishments. 526 F. Supp. at 518; *cf. supra* note 65 (Sixth Circuit in *Buha* found legislative history ambiguous).

98. *See supra* text accompanying notes 66-73 (Treasury Regulations support view that ERISA precludes garnishment of pension funds).

99. *See supra* text accompanying note 2 (congressional purposes behind ERISA); *supra* text accompanying note 4 (ERISA intended to protect pension fund until pensioner's retirement).

### B. *Interpreting the Good Faith Clause in Chapter 13 Bankruptcy Proceedings: A Middle Road Approach*

In 1978 Congress passed the Bankruptcy Reform Act[1] (Act) pursuant to Article I of the United States Constitution.[2] Chapter 13[3] of the Act addresses financial problems of persons with a regular income who voluntarily initiate bankruptcy proceedings.[4] Congress designed chapter 13 to assist both debtors and creditors in financial dealings.[5] Chapter 13 benefits debtors by providing a mechanism which allows individuals with a regular income[6] to pay off their debts so that these individuals achieve a fresh start with no financial obligations.[7] At the same time, chapter 13 protects creditors' rights by providing a system of debt repayment designed to ensure that courts treat creditors fairly.[8]

Chapter 13 established a particular procedure that a debtor must follow when filing for bankruptcy.[9] First, the debtor must file a proposal for a debt repayment plan with the Bankruptcy Court.[10] If the plan satisfies the six re-

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1. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-1330 (Supp. V 1981)).

2. U.S. CONST. art. I, § 8, cl. 4. Article I of the Constitution states that Congress can establish uniform laws on bankruptcies. *Id.* The drafters of the Constitution granted Congress the power to eliminate the inconsistencies that plagued debtor-creditor relationships in the colonies during the middle of the eighteenth century. *See* P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA (1974), 16-17. Inconsistencies existed in debt collection because some states had bankruptcy laws while others did not, and the way each state administered their bankruptcy laws affected the business success of anyone engaged in interstate business. *Id.*

3. 11 U.S.C. §§ 1301-1330 (Supp. V 1981).

4. 11 U.S.C. § 1321 (Supp. V 1981); *see* H.R. REP. No. 595, 95th Cong., 1st Sess. 120 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6068. The legislative history states that Congress intended chapter 13 proceedings to be completely voluntary. *Id.*

5. *See infra* notes 84-85 and accompanying text (legislative history of chapter 13 shows congressional intent of assisting both debtors and creditors).

6. 11 U.S.C. § 101 (24) (Supp. V 1981). Section 101 (24) defines "individual with regular income" as a person who has a stable and regular income such that the individual can make payments under a chapter 13 repayment plan. *Id.*

7. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079. The legislative history states that Congress established a policy goal of having debtors become contributing members in society once their financial debts are repaid. *Id.; see infra* note 87 and accompanying text (discussion of congressional purpose of designing chapter 13 to provide debtors with a fresh start).

8. H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079; *see infra* note 85 and accompanying text (discussion of congressional intent to protect creditors' rights).

9. 11 U.S.C. §§ 1301-1325 (Supp. V 1981); *see infra* text accompanying notes 10-12 (procedure that debtor must follow in chapter 13 bankruptcy proceedings).

10. 11 U.S.C. §§ 301 & 1322 (Supp. V 1981). The debtor must have less than $100,000 in unsecured debts, and less than $350,000 in secured debts to qualify for chapter 13 relief. *Id.* § 109(e). The debtor's plan does not have to provide for immediate repayment of debts. *Id.* § 1322(c). Rather, the debtor's repayment plan can provide for payments to a trustee over a three to five year period. *Id.*

quirements in section 1325 of chapter 13,[11] the Bankruptcy Court must confirm the proposed plan.[12] One requirement of section 1325 is that the debtor must propose the plan in "good faith."[13] Generally, courts have not agreed on how to interpret good faith.[14] In *Deans v. O'Donnell*,[15] the Fourth Circuit examined the good faith requirement of section 1325(a)(3), and held that good faith did not require that a proposed payment plan provide for a meaningful or substantial repayment to unsecured creditors.[16]

In *Deans*, Margaret Ann Deans submitted a proposed repayment plan to the Bankruptcy Court which called for thirty-six monthly payments of 120.42 dollars to a trustee.[17] Deans' plan provided for full payment to secured creditors, but the plan specifically stated that Deans' unsecured creditors would not receive any payments.[18] The Bankruptcy Court rejected the repayment

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11. 11 U.S.C. § 1325 (Supp. V 1981):

(a) The court shall confirm a plan if—

(1) The plan complies with the provisions of this chapter and with other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for the plan—

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(iii) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and comply with the plan.

12. *See* 11 U.S.C. § 1325(a) (Supp. V 1981). The Act clearly states that a court must confirm a debtor's plan if the plan meets all six requirements of § 1325. *Id.; see, e.g., In re* Ruiz, 4 COLLIER BANKR. CAS. 2D (MB) 1359, 1360 (Bankr. S.D. Fla. 1981) (confirmation of plan that meets minimum standards specified in § 1325 is responsibility of court); *In re* Melroy, 3 COLLIER BANKR. CAS. 2D (MB) 864, 866 (Bankr. E.D. Cal. 1980) (repayment plan must meet all six requirements of § 1325 before court can confirm plan); *In re* Webb, 1 COLLIER BANKR. CAS. 2D (MB) 465, 466 (Bankr. N.D. Cal. 1980) (court properly confirmed plan that satisfied confirmation criteria of § 1325).

13. 11 U.S.C. § 1325(a)(3) (Supp. V 1981); *see supra* note 11 (text of § 1325(a)(3)).

14. *See In re* Heard, 6 Bankr. 876, 878 (W.D. Ky. 1980) (courts have inconsistently interpreted good faith clause); Hughes, *Chapter 13's Potential for Abuse*, 58 N.C.L. REV. 831, 849 (1980) (good faith interpretation has created more disagreement among courts than any issue in Bankruptcy Code); *see infra* notes 39-70 and accompanying text (discussion of different approaches courts use in interpreting good faith).

15. 692 F.2d 968 (4th Cir. 1982).

16. *Id.* at 969-70.

17. 14 Bankr. 997 (Bankr. E.D. Va. 1981). The petitioner Deans indicated she had a take home pay of $862 per month. *Id.* Deans listed her expenses as $733 per month which left her with a surplus of $129. *Id.* at 998.

18. *Id.* at 997; 692 F.2d at 969. Deans owed $6,913 to a secured creditor. *Id.* An automobile

plan on the grounds that Deans did not propose the plan in good faith.[19] The Bankruptcy Court ruled that a repayment plan which does not provide substantial and meaningful repayments to unsecured creditors cannot qualify under the good faith test as a matter of law.[20] Deans appealed, and the district court affirmed the Bankruptcy Court ruling.[21] The district court agreed with the Bankruptcy Court that Deans had not proposed the plan in good faith since the plan provided no repayment to unsecured creditors.[22] In evaluating good faith, neither the Bankruptcy Court nor the district court looked beyond the fact that the plan contained no arrangement for payments to unsecured creditors.[23]

On appeal to the Fourth Circuit, Deans contended that the method of interpreting good faith advocated by the district court was arbitrary since the only factor the district court examined when determining good faith was the amount of the payment to unsecured creditors.[24] The trustee opposing the repayment plan contended that a plan proposing no payment to unsecured creditors was per se "bad faith" since failure to provide payment would not benefit creditors and would ignore the chapter 13 goal of protecting creditors' rights.[25] The Fourth Circuit, however, rejected the per se argument that a good

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secured $3,625 of the $6,913 debt. *Id.* Deans owned $4,013 to her unsecured creditors. *Id.* Deans repayment plan proposed that none of the debts owed to the unsecured creditors would be repaid. *Id.*

19. 14 Bankr. at 998.

20. *Id.* at 1000.

21. *Id.* The district court stated that since Deans could not use chapter 13 because she had proposed a per se bad faith plan, Deans must file for bankruptcy under chapter 7 liquidation. *Id.* A major difference between chapter 7 and chapter 13 is the broad discharge granted by chapter 13 cancelling the debtor's financial obligations. *See* Note, *Chapter 13 De Minimus Plans: Toward a Consensus on "Good Faith,"* 9 HOFSTRA L. REV. 593, 606 (1981) [hereinafter cited as *Consensus*] (broad scope of discharge under chapter 13 as compared to narrower discharge under chapter 7 is one of most attractive features of chapter 13 relief). The court can deny a discharge under chapter 7 for several reasons including either the fact that the debtor received a prior discharge or the debtor acted dishonestly in the proceedings. 11 U.S.C. § 727 (Supp. V 1981). Conversely, chapter 13 only denies the debtor a discharge for a limited number of reasons such as the fact that the debtor fraudulently obtained the discharge. *Id.* § 1328. Another major difference between chapter 13 and chapter 7 is that chapter 7 requires a debtor to liquidate his assets in an effort to repay debts. *Id.* §§ 701-728. Chapter 13, however, provides that a debtor repay his creditors out of future income. *Id.* §§ 1301-1330.

22. 14 Bankr. at 998-1000. In *Deans*, the district and bankruptcy courts' method of interpreting good faith precludes the debtor from using chapter 13 unless the debtor can propose a plan which provides for substantial repayment. *Id.* at 999-1000. Other courts also have held that a plan must propose substantial payments. *See, e.g., In re* Weissinger, 5 COLLIER BANKR. CAS. 2D (MB) 328, 330 (Bankr. E.D. Pa. 1981) (chapter 13 plan proposing no payments to unsecured creditors is per se bad faith); In the Matter of Hurd, 3 COLLIER BANKR. CAS. 2D (MB) 303, 305 (Bankr. N.D. Ind. 1980) (chapter 13 plan not providing payment for creditors not good faith); *In re* Campbell, 1 COLLIER BANKR. CAS. 2D (MB) 653, 654 (Bankr. S.D. Cal. 1980) (payment must be substantial to satisfy chapter 13 good faith); *see also infra* notes 55-65 (discussion of courts' reasoning underlying substantial repayment approach); *infra* notes 66-70 (recent trend rejects substantial repayment requirement).

23. 692 F.2d at 972.

24. *Id.* at 968; 14 Bankr. at 998.

25. 692 F.2d at 969-70.

faith plan must provide substantial and meaningful repayment to unsecured creditors.[26] Instead, the Fourth Circuit held that courts must determine good faith in chapter 13 bankruptcy cases on a case by case basis.[27]

The *Deans* court began the analysis of whether Deans proposed the repayment plan in good faith by examining the legislative history of chapter 13.[28] The Fourth Circuit discovered no clear definition of good faith in the legislative history.[29] The court noted that although the legislative history suggests that plans should propose full repayment of debts whenever possible, the legislative history does not indicate that good faith requires a particular level of payment to every unsecured creditor.[30]

In examining the legislative history, the *Deans* court also noted that Congress could have created a statutory requirement that a repayment plan provide substantial payments to unsecured creditors.[31] The Fourth Circuit, however, found that Congress did not include substantial repayment as one of the chapter 13 confirmation requirements in section 1325.[32] The *Deans* court subsequently refused to insert the requirement of substantial repayment into the statute.[33] The Fourth Circuit reasoned that the function of the court is to interpret and construe statutes, not to write statutes.[34] The Fourth Circuit

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26. *Id.* at 970.

27. *Id.* at 972.

28. *Id.* at 969-71; *see infra* notes 29-35 & 80-86 (discussion of legislative history of chapter 13).

29. 692 F.2d at 971; *see* H.R. REP. No. 595, 95th Cong., 1st Sess. 123-25 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6084-86. The legislative history of chapter 13 concerning the confirmation of a debtor's proposed repayment plan does not expressly define good faith. *Id.* The legislative history shows that Congress intended that debtors and creditors be treated equally under chapter 13. *Id.* at 124; *see infra* notes 89-96 (congressional attempts to amend good faith section of chapter 13 demonstrate congressional interpretation of good faith).

30. 692 F.2d at 971. Although Congress discussed the amount of repayment to creditors, Congress did not discuss good faith in the context of the amount of repayment. H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079. Congress recognized that some plans will call for full payment while other plans may only offer the creditor a percentage of their claims. *Id.* No reference is made to any requirement of a specific percentage of repayment to creditors. *Id.; see infra* note 83 and accompanying text (examination of legislative history shows no indication that good faith meant substantial repayment).

31. 692 F.2d at 970.

32. *Id.* at 970. H.R. REP. No. 595, 95th Cong., 1st Sess. 118-25 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079-86.

33. 692 F.2d at 971. The Fourth Circuit in *Deans* noted that injecting a requirement of substantial repayment into every proposed plan did not coincide with the congressional intent of expanding the scope of chapter 13. *Id.;* S. REP. No. 989, 95th Cong., 2d Sess. 141, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5927.

34. 692 F.2d at 971-72. The Fourth Circuit reasoned that Congress, rather than the courts, has the authority to amend chapter 13 requirements. *Id.; see* Hanover Bank v. Commissioner, 369 U.S. 672, 678-88 (1961). The *Hanover* Court held that the Supreme Court cannot interpret the meaning of statutory language so as to effect a purpose that does not appear on the face of the statute. *Id.* at 687. The Supreme Court noted that the legislature has the authority to change the statute. *Id.* at 688; *see* Malat v. Riddell, 383 U.S. 569, 571 (1966) (courts should use ordinary and usual meaning of words when interpreting statutory language); United States v. Freeman, 473 F.2d 7, 9 (8th Cir. 1973) (intent of Congress should be gleaned from plain and ordinary meaning of language in statute); Manufacturers Hanover Trust Co. v. Commissioner, 431 F.2d 664, 668 (2d Cir. 1970) (court would be exceeding judicial function by impinging on

further noted that a definition of good faith that would apply to every situation is not practical because no one factor is always determinative of good faith.[35]

Although no single factor is determinative of good faith, the Fourth Circuit stated that a debtor's failure to provide substantial repayment to unsecured creditors is a factor courts may consider in making the good faith determination.[36] The *Deans* court stated that a plan proposing no payments to unsecured creditors can be evidence that a debtor is attempting to manipulate the statute so that the debtor will not have to repay debts.[37] The Fourth Circuit concluded, however, that a court must consider all the circumstances of each proposed repayment plan on a case by case basis in determining whether the debtor proposed the plan in good faith.[38]

In interpreting good faith, the Fourth Court in *Deans* applied one of the three basic methods that exist for determining the meaning of good faith under section 1325(a)(3).[39] Under the first method, characterized as the "low road" approach, courts determine that a plan is proposed in good faith when the plan meets the substantive requirement of section 1325(a)(4).[40] The substantive requirement in section 1325(a)(4) requires that the creditor receive more under the debtor's proposed chapter 13 plan than he would receive if the debtor used chapter 7 liquidation.[41] The low road approach therefore requires confirmation of repayment plans if the creditor receives more under the debtor's plan than the creditor would receive if the debtor had filed under chapter 7.[42] A second method courts use in determining good faith is the "high road"

legislative authority if court rewrote statute); *see also infra* notes 77-79 (explanation of historically accepted meaning of good faith).

35. 692 F.2d at 972; *see infra* notes 105-111 and accompanying text (no one factor is determinative of good faith).

36. 692 F.2d at 972; *see infra* notes 98-103 and accompanying text and text accompanying notes 107-111 (amount of repayment to unsecured creditors is only one factor courts should consider in determining whether debtor proposed plan in good faith).

37. 692 F.2d at 972.

38. *Id.*

39. *See infra* notes 40-58 (discussion of three basic approaches courts use to determine good faith).

40. *See infra* note 42 (examples of courts that use low road approach). The "low road" test for determining good faith requires courts to confirm a plan if the road demonstrates that the creditor will get more under the proposed chapter 13 plan than the creditor would receive under a chapter 7 liquidation plan. *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983). A congressional commission investigating the bankruptcy laws noted that since the typical consumer debtor has no assets that are not exempt from being liquidated and sold to repay creditors under chapter 7 rules, the creditor would not receive any payment in the typical chapter 7 liquidation proceeding. *See* REPORT ON THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 197, 93rd Cong. 1st Sess., pt. I, 65 (1973), *reprinted in* App. 2 COLLIER ON BANKR. (15th ed. 1980). Thus, if the creditor receives anything under the proposed chapter 13 plan, that amount would always be more than the creditor would receive under chapter 7. *Id.*

41. 11 U.S.C. § 1325(a)(4) (Supp. V 1981).

42. *See, e.g., In re* Erwin, 4 COLLIER BANKR. CAS. 2D (MB) 174, 177 (Bankr. D. Colo. 1981) (court can confirm plan if plan satisfies § 1325(a)(4)); *In re* Harland, 3 Bankr. 597, 598-99 (Bankr. D. Neb. 1980) (plan providing no payments is not per se bad faith if plan passes § 1325(a)(4)

approach.[43] The high road approach, rejected by the Fourth Circuit in *Deans*, holds that good faith is satisfied only if the repayment plan proposes substantial or meaningful repayments to unsecured creditors.[44] A third method, which the Fourth Circuit adopted in *Deans*, is the "middle road" approach.[45] The middle road approach requires courts to examine all of the factors of a proposed repayment plan when determining good faith.[46] Thus, the middle road approach calls for a case by case examination in order to determine good faith.[47]

In contrast to the middle road approach which determines good faith on a case by case basis, the low road approach renders the good faith requirement of section 1325(a)(3) meaningless.[48] The good faith clause is meaningless under the low road approach because a low road court will always find that the debtor has satisfied the good faith requirement of section 1325(a)(3) if the plan meets the substantive requirement of section 1325(a)(4).[49] The legislative history, however, demonstrates that a proposed repayment plan must pass both the section (a)(4) requirement and an independent determination that the debtor proposed the plan in good faith.[50] Thus, the low road ap-

test); *In re* Powell, 1 COLLIER BANKR. CAS. 2D. (MB) 371, 373 (Bankr. E.D. Va. 1980) (court can confirm chapter 13 repayment plan once debtor meets § 1325(a)(4) substantive requirement).

43. *See In re* Kitchens, 702 F.2d 885, 888 (11th Cir. 1983) (court termed method of interpreting good faith that emphasizes substantial repayment to unsecured creditors "high road" approach); *infra* text accompanying notes 44, 53-58 (discussion of high road or substantial repayment approach of good faith).

44. *See, e.g., In re* Koerperich, 3 COLLIER BANKR. CAS. 2D (MB) 923, 924 (Bankr. D. Neb. 1981) (chapter 13 plan providing no payments to unsecured creditors is not proposed in good faith); *In re* Melroy, 3 COLLIER BANKR. CAS. 2D (MB) 864, 867 (Bankr. E.D. Cal. 1980) (chapter 13 plan must provide meaningful payment to unsecured creditors before court can confirm); *In re* Seman, 2 COLLIER BANKR. CAS. 2D (MB) 394, 398 (Bankr. S.D. N.Y. 1980) (court cannot confirm plan providing no substantial payments to unsecured creditors).

45. *See In re* Kitchens, 702 F.2d at 888. The *Kitchens* court noted that there are three methods for determining good faith. *Id.* The Eleventh Circuit in *Kitchens* referred to the totality of the circumstances approach that *Deans* advocated as the "middle road" approach. *Id.; see also infra* notes 66-70 (discussion of other circuits' adoption of middle road approach to determine good faith).

46. *See infra* note 68 (courts using middle road approach examine all circumstances of plan before deciding whether to confirm or deny plan).

47. *See infra* notes 66-70 (middle road approach uses case by case examination to determine good faith).

48. *See In re* Rimgale, 669 F.2d 426, 431 (7th Cir. 1981). The *Rimgale* court held that courts may not confirm a proposed plan simply because the plan meets the requirements of § 1325(a)(4). *Id.* at 431. The *Rimgale* court stated that to confirm a plan simply because the plan satisfies the requirement of § 1325(a)(4) ignores the good faith requirement of § 1325(a)(3). *Id.; see also Consensus, supra* note 21, at 610. The *Consensus* article stated that a court misinterprets the good faith requirement when that court ratifies a plan based solely on the fact that the proposed repayment plan would pay the creditor more than he would receive under chapter 7 liquidation. *Id.*

49. *See supra* note 42 and accompanying text (low road courts will confirm plan if plan satisfies § 1325(a)(4)); *supra* note 48 (*Rimgale* court noted low road courts ignore good faith requirement by allowing § 1325(a)(4) to be determinative of confirmation); *supra* notes 11-12 (statute clearly states that plan must meet both § 1325(a)(3) and § 1325(a)(4) requirements before confirmation can occur); *infra* note 50 and accompanying text (legislative history states that repayment plans must meet both § 1325(a)(3) and § 1325(a)(4) requirements).

50. *See* S. REP. No. 989, 95th Cong., 2d Sess. 142, *reprinted in* 1978 U.S. CODE CONG.

proach is unsound because the low road approach fails to determine whether a proposed repayment plan satisfies the independent requirement of section 1325(a)(3).[51]

In contrast to the low road approach, the high road approach holds that a proposed plan must provide for substantial repayment to unsecured creditors to satisfy the good faith requirement.[52] The leading case in the high road approach is *In re Iacovoni.*[53] In *Iacovoni,* the district court for the District of Utah held that a failure to provide substantial repayments to unsecured creditors was per se bad faith.[54] The *Iacovoni* court based its holding on an examination of the legislative history of chapter 13.[55] The *Iacovoni* court found that the congressional intent underlying the enactment of chapter 13 was to provide a mechanism enabling debtors to repay their debts and to protect creditors' rights.[56] The *Iacovoni* court, therefore, held that plans providing no substantial repayments to unsecured creditors were contrary to congressional intent and consequently failed to meet chapter 13 confirmation requirements.[57] Other courts have cited and followed the reasoning of *Iacovoni* in holding that a substantial repayment to unsecured creditors is a prerequisite to a good faith finding.[58]

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& AD. NEWS 5787, 5928. The legislative history clearly indicates that courts must determine that repayment plans satisfy both the good faith clause and the § 1324(a)(4) test before confirming a repayment plan. *Id.; see also* 126 CONG. REC. H9305 (daily ed. Sept. 22, 1980) (remarks of Rep. Hyde) (Rep. Hyde stated that Congress did not intend courts to confirm plan which only meets minimum requirements of § 1325(a)(4)).

51. *See supra* notes 48-50 (demonstration that low road approach is not correct).

52. *See supra* text accompanying notes 22 & 44 (courts that use high road approach require substantial repayment to unsecured creditors before court can confirm plan); *see also In re* Kitchens, 702 F.2d 885, 888 (11th Cir. 1983) (discussion of high road approach).

53. 2 Bankr. 256 (Bankr. D. Utah 1980); *see* Note, *"Good Faith" and Confirmation of Chapter 13 Composition Plans: Analysis and a Proposal,* 65 MINN. L. REV. 659, 665 (1981) [hereinafter cited as *Composition*] (*In re Iacovoni* is leading case using high road approach to deny confirmation of plans that do not provide substantial debt repayment to unsecured creditors); *but see also infra* notes 59-61 and accompanying text (Tenth Circuit in *Flygare* overruled *Iacovoni*).

54. 2 Bankr. at 258-59. In *Iacovoni,* the district court considered eight separate plans that proposed no repayment to unsecured creditors. *Id.*

55. *Id.* at 263; *see* REPORT ON THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 197, 93rd Cong. 1st Sess., pt. I, 157-59 (1973), *reprinted in* App. 2 COLLIER ON BANKRUPTCY (15th ed. 1980) (one major purpose of consumer bankruptcy system is to assist individual debtors in repaying debts).

56. 2 Bankr. at 263; *see* REPORT ON THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 197, 93rd Cong. 1st Sess., pt. I, 157-59 (1973), *reprinted in* App. 2 COLLIER ON BANKRUPTCY (15th ed. 1980). The commission report states that debtors should be encouraged to repay debts. *Id.* at 157. The report states, however, that there is no requirement that a debtor pay all of his debts. *Id.* at 159-60. Conversely, the commission report also notes that consumer bankruptcy provisions should protect creditors rights. *Id.* at 163. The report made no specific recommendations on how to protect creditors' rights. *Id.*

57. 2 Bankr. at 262. The *Iacovoni* court stated that a plan providing no repayment to unsecured creditors renders chapter 13 meaningless because confirming such a plan violated the concept in chapter 13 of protecting creditors. *Id.*

58. *See, e.g., In re* Levine, 10 Bankr. 168, 170 (Bankr. D. Mass. 1981) (chapter 13 benefits

Three years after the district court decided *Iacovoni*, the Tenth Circuit in *Flygare v. Boulden* considered the issue of how to interpret the good faith clause of section 1325(a)(3).[59] The *Flygare* court held that the high road approach is not the proper test to apply when determining good faith.[60] The *Flygare* court therefore overruled *Iacovoni* and the high road test.[61] The *Flygare* court also rejected the low road approach[62] and decided instead to adopt the middle road approach.[63] The *Flygare* court cited the *Deans'* court analysis as the correct method for determining good faith.[64] The *Flygare* court emphasized that the middle road approach advocated by *Deans* requires courts to consider all the factors and circumstances of a particular proposed plan before determining whether the debtor proposed the plan in good faith.[65]

The middle road approach advocated by *Flygare* and *Deans* has received wide approval from other circuits.[66] Of the twelve circuits, eight have ruled on the question of how to determine good faith in a chapter 13 proceeding.[67] All eight circuits, while using different language, have adopted the middle road approach.[68] Two of the eight circuits expressly cited the Fourth Circuit's

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require debtor to make more than nominal payments to unsecured creditors); *In re* Smith, 8 Bankr. 543, 548 (Bankr. D. Utah 1981) (proposal of relatively small repayment demonstrated that debtor did not offer plan in good faith); *In re* Johnson, 5 Bankr. 40, 42 (Bankr. S.D. Ohio 1980) (legislative purpose underlying chapter 13 was that all repayment plans should provide substantial or meaningful repayment of unsecured claims); *In re* Bloom, 3 Bankr. 467, 470 (Bankr. C.D. Cal. 1980) (confirming chapter 13 plans that called for no repayments to unsecured creditors destroyed purpose of having debtors repay debts).

59. 709 F.2d 1344 (10th Cir. 1983).

60. *Id.* at 1347-48. The *Flygare* court expressly adopted the middle road approach advocated by *Deans*. *Id.* at 1347. The *Flygare* court also expressly stated that courts should follow the Fourth Circuit's analysis in *Deans* to determine if the proposed repayment plan constitutes an abuse of the "spirit" of chapter 13. *Id.*

61. *Id.* at 1347-48. The *Iacovoni* court held that good faith, as a matter of law, meant substantial and meaningful repayment to unsecured creditors. 2 Bankr. at 262. The Tenth Circuit in *Flygare*, which controls the district court that decided *Iacovoni*, expressly rejected *Iacovoni's* per se requirement of substantial repayment. 709 F.2d at 1347. Instead, the Tenth Circuit adopted the middle road approach. *Id.* Though the Tenth Circuit in *Flygare* did not expressly overrule *Iacovoni*, *Flygare's* rejection of *Iacovoni's* per se requirement implicitly overrules *Iacovoni*. *Id.* Since *Iacovoni* was the central case that courts using the high road approach followed, the implicit overruling of *Iacovoni* weakens the validity of the high road approach. *See supra* note 59 (cases following reasoning of *Iacovoni*).

62. 709 F.2d at 1347. The *Flygare* court rejected the low road approach, reasoning that the low road approach ignored the good faith requirement. *Id.*

63. *Id.*

64. *Id.* The *Flygare* court found the reasoning of the Fourth Circuit in *Deans* persuasive in reaching the conclusion that a court must determine good faith based on the totality of the circumstances surrounding a proposed repayment plan. *Id.*

65. 709 F.2d at 1347; *see infra* notes 107-110 (discussion of factors courts should consider when making good faith determination).

66. *See infra* note 68 (list of circuits that have adopted middle road approach).

67. *See infra* note 68 (list of eight circuits that have adopted middle road approach). All circuits except the First, Third, Fifth, and Sixth have ruled on good faith.

68. *See infra* text accompanying note 97 (uniformity currently exists among circuits regarding interpretation of good faith). The eight circuit courts that have addressed the question of

reasoning in *Deans* as persuasive when deciding to adopt the middle road approach.[69] This uniform adoption of the middle road approach represents a change in the previous inconsistent methods courts used in interpreting good faith.[70]

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how to interpret good faith have adopted the middle road approach. The Second Circuit addressed the good faith issue in *In re Johnson* and ruled that the per se good faith requirement of substantial repayment is incorrect. 708 F.2d 865, 868 (2d Cir. 1983). The *Johnson* court cited *Deans* with approval and noted that a court must examine all the factors of a particular plan in making the good faith determination. *Id.* The *Johnson* court also noted that good faith requires the debtor to be honest in presenting the circumstances of his plan. *Id.*

The Seventh Circuit examined the good faith issue in *In re Rimgale* and rejected the low road approach in holding that a court should not confirm a plan simply because the plan meets the requirement of § 1325(a)(4). 669 F.2d 426, 431 (7th Cir. 1982). In addition, the *Rimgale* court rejected the high road approach of a per se minimum repayment requirement. *Id.* at 432. The *Rimgale* court adopted the middle road approach, holding that courts must examine the factors of each particular case to ascertain good faith. *Id.* The *Rimgale* court noted that one factor middle road courts should consider is whether a proposed plan "abuses the spirit" of chapter 13. *Id.*

The Eighth Circuit addressed the issue of good faith in *In re Estus* and noted that the underlying purpose of chapter 13 was to establish a flexible system providing effective relief for consumer debtors and encouraging consumer debtors to pay off their debts. 695 F.2d 311, 313 (8th Cir. 1982). The *Estus* court held that a per se minimum payment requirement would infringe on the desired flexibility of chapter 13. *Id.* at 316. The *Estus* court concluded that a court must examine all the circumstances of a particular plan. *Id.* at 316-17.

The Ninth Circuit confronted the good faith issue in *In re Goeb* and refused to insert a strict substantive requirement demanding a certain level of repayment to unsecured creditors into the good faith clause of § 1325(a)(3). 675 F.2d 1386, 1388 (9th Cir. 1982). The *Goeb* court ruled that the proper approach is to determine good faith on a case by case basis by examining the particular features of each proposed repayment plan. *Id.* at 1390. The *Goeb* court noted that nominal repayment is only one factor to consider in determining good faith. *Id.* The Ninth Circuit also addressed the good faith issue in *In the Matter of Gregory*, and again held that courts should determine good faith by examining all of the factors in a particular case. 705 F.2d 1118, 1120 (9th Cir. 1983). The *Gregory* case stated that after examining all of the relevant factors, courts could confirm a plan that proposes only nominal payments to unsecured creditors. *Id.* at 1121. The *Gregory* court noted that courts evaluating good faith should consider whether the debtor acted honestly and fairly in proposing his plan. *Id.*

The Eleventh Circuit confronted the good faith issue in *In re Kitchens* and refused to adopt the per se substantial repayment requirement. 702 F.2d 885, 888 (11th Cir. 1983). Instead, the Eleventh Circuit held that courts must examine all the factors of a particular repayment plan. *Id.* The *Kitchens* court noted several factors relevant to a determination of good faith. *Id.* at 888-89. Two particularly relevant factors include the available financial resources of the debtor and whether the debtor was honest in presenting the circumstances of the plan. *Id.; see infra* notes 107-108 (factors listed by *Deans* court as relevant in good faith determination).

The District of Columbia Circuit addressed the good faith issue in *Barnes v. Whelan* and refused to adopt the per se substantial repayment requirement. 689 F.2d 193, 198 (D.C. Cir. 1982). The *Barnes* court noted that traditionally, good faith has not required a particular level of repayment to unsecured creditors. *Id.* at 198-99. The *Barnes* court held that courts should determine good faith based on all the circumstances of a particular plan. *Id.*

69. *See Flygare*, 709 F.2d at 1347 (court cited and followed *Deans'* reasoning in adopting middle road approach); *Johnson*, 708 F.2d at 868 (court cited *Deans* reasoning with approval in adopting middle road approach).

70. *See supra* note 68 (discussion of circuits that use middle road approach to determine good faith). Decisions interpreting and applying chapter 13 often resulted in inconsistent decisions concerning the interpretation of good faith. *Compare In re* Manning, 5 Bankr. 387, 388

The *Deans* approach to interpreting and applying the good faith requirement of chapter 13 is sound.[71] While previous bankruptcy codes contained good faith clauses,[72] no court ever expressly interpreted the meaning of good faith in these provisions.[73] Courts implied, however, that good faith generally required honesty in dealings, a sense of fair play,[74] and no abuse of the provisions or purposes of the Bankruptcy Code.[75] The middle road approach, which

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(Bankr. W.D. N.Y. 1980) (no specific percentage of repayment will insure confirmation of plan when courts determine good faith on case by case method) *with In re* Brown, 7 Bankr. 529, 530 (Bankr. S.D. N.Y. 1980) (plan proposing no payment to creditors violates good faith) *and In re* Bloom, 3 Bankr. 467, 470-71 (Bankr. C.D. Cal. 1980) (chapter 13 plan must represent debtor's best financial effort to repay debts for court to find good faith). Additionally, early interpretations of good faith by courts within the same circuit, such as three district courts within the Eighth Circuit, yielded conflicting interpretations of good faith. *See In re* Koerperich, 3 COLLIER BANKR. CAS. 2D (MB) 923, 924 (Bankr. D. Neb. 1981) (debtor did not propose plan in good faith when plan proposed no payments to unsecured creditors); *In re* Thorson, 6 Bankr. 678, 681-82 (Bankr. D. S.D. 1980) (only requirement imposed by Congress regarding amount of repayment is that chapter 13 debtor must pay unsecured creditors more than creditors would receive under chapter 7 liquidation); *In re* Harland, 3 Bankr. 597, 599-600 (Bankr. D. Neb. 1980) (debtor's plan providing no payments to creditors does not necessarily violate good faith requirement). When the Eighth Circuit finally addressed the issue of good faith interpretation, the court in *In re Estus* adopted the middle road approach of examining all the circumstances surrounding a plan. 695 F.2d 311, 316 (8th Cir. 1982).

71. *See infra* notes 72-97 (discussion of *Deans* court's proper interpretation of good faith clause); *see also Composition, supra* note 53, at 661. Courts should interpret good faith to require the debtor to pay unsecured creditors to the best of the debtor's financial ability rather than requiring a specific amount of repayment. *Id.* at 661-62.

72. *See* Bankruptcy Act § 361, 52 Stat. 911 (1938) (court required good faith by both creditors and debtors before confirming arrangement between debtor and creditors); Bankruptcy Act § 472, 52 Stat. 923 (1938) (section 472 dictated that court must confirm arrangement between debtor and creditor if both debtor's proposal and creditor's acceptance of plan are in good faith).

Section 651 of the Bankruptcy Act of 1938 is similar to § 1325(a)(3). *See* Bankruptcy Act § 651, 52 Stat. 934 (1938). Section 651 stated that the court must be "satisfied that the plan and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by this title." *Id. See* 11 U.S.C. § 1325(a)(3) (Supp. V 1981) (similarities between § 1325(a)(3) and § 651).

73. *See* Ordin, *The Good Faith Principle in the Bankruptcy Code, a Case Study*, 38 BUS. LAW. 1795, 1795 (1983) (courts infrequently rendered good faith decisions under previous bankruptcy codes); 5 COLLIER ON BANKRUPTCY ¶ 1325.01[2][c], at 8 (15th ed. 1983) (no case law exists specifically discussing good faith requirement of § 651 of Bankruptcy Act of 1938); *see also* Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 276 (1981). (cases decided under Bankruptcy Act do not indicate that good faith required the establishment of certain quantity of payments).

74. *See* Barnes v. Whelan, 689 F.2d 193, 200 (D.C. 1982) In *Barnes*, the District of Columbia Circuit noted that historically courts construed good faith to mean debtor misconduct involving such factors as dishonesty or unfairness in the proposal of the bankruptcy plan. *Id.* at 198; *see also* American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138, 145 (1940) (court construed good faith provision in prior bankruptcy provision to mean fairness and honesty in bankruptcy proposals); Gonzalez Hernandez v. Borgos, 343 F.2d 802, 805-06 (1st Cir. 1965) (institution of bankruptcy proceeding to avoid paying child support constituted bad faith); Cyr, *supra*, note 73, at 275-76 (discussing general idea that good faith meant fairness).

75. *See* Ordin, *supra* note 73, at 1796. Under previous bankruptcy codes, courts decided several cases involving the interpretation of good faith. *Id.* These cases demonstrate that courts

does not place a substantive requirement on good faith, is consistent with the traditional construction given by the commentators and courts to the good faith clauses in previous bankruptcy codes.[76]

The Fourth Circuit correctly recognized that the high road method of interpreting good faith, which requires substantial repayment to unsecured creditors, renders the section 1325(a)(4) substantive requirement useless.[77] Section 1325(a)(4) of the Act expressly requires the Bankruptcy Court to confirm a plan only if the plan provides for a creditor to receive more than he would receive if the debtor was proceeding under chapter 7 liquidation.[78] Interpreting the good faith requirement of section 1325(a)(3) to mean substantial repayment to unsecured creditors would render the section 1325(a)(4) substantive requirement useless because substantial repayment is more than creditors would receive under chapter 7 liquidation.[79] Additionally, the legislative history indicates that Congress did not intend the good faith clause in chapter 13 to require that a debtor propose substantial repayments to unsecured creditors in order to have the plan confirmed.[80] The legislative history specifically states

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interpreted good faith to mean whether someone using the bankruptcy provisions abused the purposes of bankruptcy process. *Id.; see, e.g., In re* Metropolitan Realty Corp., 433 F.2d 676, 678 (5th Cir. 1970) (court noted that debtor filed plan under Chapter X of Bankruptcy Act of 1938 in bad faith since debtor was using bankruptcy provisions to accomplish purpose not intended by bankruptcy code), *cert. denied*, 401 U.S. 1008 (1971); Platt v. Schmitt, 87 F.2d 437, 440 (8th Cir. 1937) (court interpreted good faith provision in Bankruptcy Act of 1898 to require that participants in bankruptcy proceeding not abuse purpose and spirit of Bankruptcy Act of 1898); *In re* Village Men's Shops, Inc., 186 F. Supp. 125, 129 (S.D. Ind. 1960) (court interpreted good faith provision in chapter XI of Bankruptcy Act of 1938 to require that all participants in chapter XI proceeding not abuse provisions, purposes, or spirit of chapter XI); *In re* Paul, 13 F. Supp. 645, 647 (S.D. Iowa 1936) (court noted debtor violated good faith clause because the debtor proposed to use bankruptcy code for ulterior purpose not contemplated by bankruptcy code).

76. *See supra* notes 72-75 (traditional meaning of good faith did not require examination of plan's substantive facts, only evaluation of behavior of participants). Bankruptcy Court Judge Ordin argues that modern bankruptcy courts should continue to use the traditional meaning of good faith. Ordin, *supra* note 73, at 1795. The middle road approach is consistent with the traditional meaning of good faith because one factor middle road courts consider is whether consumer debtors are abusing the congressional intent underlying chapter 13. *See Deans*, 692 F.2d at 972.

77. 692 F.2d at 971-72; *see infra* text accompanying note 79 (high road test requiring substantial repayment disregards § 1325(a)(4) requirement because substantial repayment to unsecured creditors will always be more than § 1325(a)(4) requires creditors to receive).

78. 11 U.S.C. § 1325(a)(4) (Supp. V 1981); *see* 5 COLLIER ON BANKRUPTCY ¶1325.01[D], at 9-14 (15th ed. 1983) (discussion of § 1325(a)(4) requirement); *supra* note 21 (comparison of chapter 7 and chapter 13 requirements).

79. *See supra* note 40 (requiring good faith to mean substantial repayments renders § 1325(a)(4) useless since substantial repayment is usually more than creditor would receive if debtor had chosen chapter 7 liquidation); *see also supra* note 50 (legislative history indicates plan must pass both § 1325(a)(3) and § 1325(a)(4) requirements).

80. *See* H.R. REP. No. 595, 95th Cong., 1st Sess. 118 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6079. In the House Report, Congress did not discuss good faith in the context of the amount of repayment. *Id.* at 118, 1978 U.S. CODE CONG. & AD. NEWS at 6079. While Congress noted that repayment plans should offer payment to creditors, no reference is made to any specific percentage of repayment. *Id.* at 118, 1978 U.S. CODE CONG. & AD. NEWS at 6079; *infra* note 92 (discussion of congressional intent underlying inclusion of good faith requirement in § 1325(a)(4)).

that the only substantive confirmation requirement is that creditors receive more under the debtor's plan than the creditor would receive if the debtor had chosen chapter 7 liquidation.[81]

In addition to stating that chapter 13 contains only one substantive confirmation requirement, the legislative history of chapter 13 also discusses the conflicting goals of protecting creditors and allowing debtors to obtain a fresh financial start.[82] Although Congress established two basic goals when enacting chapter 13, the two goals do not yield a clear definition of good faith.[83] The first goal is to allow debtors to repay their debts so that debtors can obtain a fresh start with no oppressive financial obligations.[84] The second goal is to protect the rights of creditors, and to ensure that debtors make an effort

81. H.R. Rep. No. 595, 95th Cong., 1st Sess. 123-124 (1977), *reprinted* in 1978 U.S. Code Cong. & Ad. News 5963, 6084-85. Congress stated that only one substantive confirmation requirement exists under chapter 13. *Id.* at 123-24, 1978 U.S. Code Cong. & Ad. News at 6084-85. Courts, therefore, may infer that good faith was not meant to include a second substantive requirement requiring substantial repayment to unsecured creditors.

82. *See infra* notes 86-92 (discussion of conflicting goals of chapter 13). By adopting the middle road approach, the Fourth Circuit in *Deans* correctly balanced the two conflicting goals of treating both the consumer debtors and creditors fairly since determining good faith on a case by case basis favors neither debtors nor creditors. *See infra* notes 95-107 (language and legislative history of amendment to § 1325(a)(3) demonstrates that *Deans* court correctly analyzed good faith). Commentators also advocate and support the *Deans* method for determining good faith. *See* Cyr, *supra* note 73, at 276-77; 5 Collier on Bankruptcy ¶ 1325.01[2][C], at 8.13 (15th ed. 1983); *Composition, supra* note 53, at 684. Cyr, a Bankruptcy Court judge, reasons that requiring substantial repayment as a part of good faith radically changes the historical meaning of good faith. Cyr, *supra* note 73, at 276-77. Cyr suggests that in light of conflicting and unclear legislative goals, the correct method for interpreting good faith is to examine all the circumstances of the proposed plan including the debtor's financial ability to repay his debts. *Id.* at 276-77, 287. Collier examines the good faith controversy and concludes that the substantial repayment method is not the correct way to determine good faith. 5 Collier on Bankruptcy ¶ 1325.01[2][C], at 8.13 (15th ed. 1983). Collier states that the proper interpretation of good faith is to examine all the particular circumstances surrounding repayment plans on a case by case basis. *Id.* The *Composition* article suggests that courts should find that a debtor proposed a plan in good faith when the debtor's plan represents the debtor's best financial effort to satisfy the claims of unsecured creditors. *Composition, supra* note 53, at 684. The reasoning underlying the best efforts approach is that the Bankruptcy Code has other provisions to protect creditors, and courts should not interpret good faith to mean substantial repayment to creditors in an effort to further protect creditors. *Id.; see infra* text accompanying note 96 (amendment to § 1325(a)(3) would require debtor's best effort).

83. *See supra* notes 29-30 (examination of general goals of chapter 13 reveals no clear meaning of good faith); *infra* note 86 (different readings of legislative history by various courts yielded inconsistent interpretations of good faith).

84. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 125 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6086. Congress intended Chapter 13 to assist debtors in becoming contributing members of society. *Id.* The legislative history noted that consumer bankruptcies had risen 2000 percent in 30 years as numerous consumers became overburdened with debt. *Id.* at 116, 1978 U.S. Code Cong. & Ad. News at 6076-77. The legislative history also indicated that the Bankruptcy Act of 1938 did not adequately protect the consumer debtor. *Id.* at 116, 1978 U.S. Code Cong. & Ad. News at 6076-77. Congress therefore enacted the Bankruptcy Act of 1978 to provide adequate assistance to overburdened consumer debtors. *Id.* at 117-18, 1978 U.S. Code Cong. & Ad. News at 6078; *see* Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-1130 (Supp. V 1981)).

to repay creditors.[85] These two separate goals have resulted in conflicting judicial interpretations of good faith.[86]

Congress has been aware that judicial attempts to accommodate the two basic goals of chapter 13 have resulted in difficulties in interpreting the good faith requirement.[87] In 1980, Congress attempted to enact amendments to the Bankruptcy Act that would correct the problem of interpreting the good faith requirement of section 1325(a)(3).[88] The legislation failed to pass because of reasons unrelated to the proposed change in the good faith clause.[89] The proposed amendment would have forced courts to determine good faith by examining whether a particular debtor's proposed repayment plan was a "legitimate attempt" by the debtor to repay debts.[90] According to the propos-

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85. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 124 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News at 6085. The House Report stated that creditors should receive at least as much under chapter 13 as they would receive under chapter 7. *Id.* The House Report further stated that courts should favor plans which propose repaying creditors over plans which do not propose repaying creditors. *Id.; see also* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess., pt. I, 76 (1973), *reprinted in* App. 2 Collier on Bankruptcy (15th ed. 1983). The Bankruptcy Commission stated that any bankruptcy provision should treat creditors fairly. *Id.* Since a working system of consumer credit is essential to a growing and functioning economy, the Commission stated that the bankruptcy system must treat creditors fairly so that creditors will extend credit to consumers, and keep the consumer credit system working efficiently. *Id.* The Commission stated that another goal of the bankruptcy system is to ascertain efficiently how much the debtor owes the creditor and how much the creditor will receive. *Id.* at 79. The Commission report concluded that the bankruptcy system should not be so costly, slow, or inconvenient that the system does not protect creditor's rights. *Id.*

86. *See Iacovoni*, 2 Bankr. at 262. The *Iacovoni* court examined the legislative history and concluded that Congress enacted chapter 13 to enable consumers to repay debts and to protect creditors' rights. *Id.* at 263-64. To assure debt repayment and protect creditors' rights, the *Iacovoni* court therefore concluded that good faith means substantial repayment. *Id.* at 266-67. *But see In re* Estus, 695 F.2d at 315-16. The *Estus* court noted chapter 13's goal was to relieve debtors from overburdensome financial responsibilities. 695 F.2d at 315-16. In order to assist debtors, the *Estus* court therefore concluded that the middle road totality approach provides the proper method of determining whether a debtor proposed a plan in good faith. *Id.*

87. *See* Cyr, *supra* note 73, at 281 (Congress attempted to amend § 1325(a)(3) in response to conflicting interpretations of § 1325(a)(3)); *see also supra* note 70 (conflicting interpretations of good faith clause).

88. S. 658, 96th Cong., 2d Sess. § 128(b) (1980). The proposed amendment to § 1325(a)(3) states:

(a) "The court shall confirm a plan if —

(3) the plan has been proposed in good faith and not by any means forbidden by law, *and represents the debtor's good faith effort;*" (new material in italics)

*See infra* notes 96-100 and accompanying text (discussion how proposed amendment would have changed good faith determination).

89. Cyr, *supra* note 73, at 281.

90. *Id.* at 280-82. The amended § 1325(a)(3) would require courts to decide whether the debtor's plan constituted a legitimate good faith effort by the debtor to repay his debts. *Id.* Congress intended courts to measure this good faith effort by comparing the debtor's proposed future payments with the financial ability of the debtor to make such payments. *See* H.R. Rep. No. 1195, 96th Cong., 2d Sess. 24-25 (1980); *see also infra* note 100 (Congress intended proposed amendment to require debtors to make legitimate effort to repay debts).

ed amendment, courts would examine all the circumstances of a particular plan in determining whether that plan was a legitimate attempt.[91]

Although the proposed amendments did not become law, the legislative history of the proposed amendments is useful in ascertaining Congress' original intent regarding the correct interpretation of the good faith requirement of chapter 13.[92] The legislative reports concerning the proposed amendments solidly support the Fourth Circuit's method of ascertaining good faith on a case by case basis.[93] Congress expressly stated that courts interpreting the amended section 1325(a)(3) could not impose a confirmation requirement that chapter 13 repayment plans must propose an arbitrary minimum percentage of repayment to creditors.[94] The congressional report further noted that proper interpretation courts interpreting the amended section 1325(a)(3) could not impose a confirmation that chapter 13 repayment plans must propose an arbitrary minimum percentage of repayment to creditors.[94] The congressional report further noted that proper interpretation of the good faith clause could result

91. H.R. Rep. No. 1195, 96th Cong., 2d Sess. 24-26 (1980).

92. *See* Barnes V. Whelan, 689 F.2d 193, 200 (D.C. Cir. 1982). The *Barnes* court stated that courts must use caution when examining the legislative history of a bill that did not become law. *Id.* The *Barnes* court noted that a cautious examination of the legislative history of the proposed amendment indicated that Congress realized the interpretative difficulties regarding the good faith clause of § 1325(a)(3). *Id.* The District of Columbia Circuit concluded that the legislative history of the proposed amendment indicated the method Congress wanted courts to use when interpreting the good faith clause. *Id.; see* Cyr, *supra* note 73, at 281. Judge Cyr notes that even though Congress did not enact the amendment to § 1325(a)(3), the legislative history of the amendment is reflective of the legislative intent of § 1325(a)(3). *Id.*

93. H.R. Rep. No. 1195, 96th Cong., 2d Sess. 24-26 (1980). The House Report states that Congress designed chapter 13 to help debtors repay obligations while avoiding the economic disruptions that usually attend bankruptcy proceedings. *Id.* at 25. The House Report also addressed the problem of interpreting good faith, and concluded that the good faith requirement should not force debtors to pay more than they are financially capable of paying. *Id.* at 25; *see also* 126 Cong. Rec. S15, 174-75 (daily ed. Dec. 1, 1980) (statement of Sen. DeConcini). Sen. Deconcini stated that courts and litigants have abused chapter 13 more than any other Bankruptcy Code provision. 126 Cong. Rec. at S15, 175. Sen. DeConcini stated that courts have misconstrued the good faith requirement because they have misinterpreted the legislative intent underlying the good faith clause. *Id.* Sen. DeConcini noted that the good faith test is separate and independent of the best interests test which requires the creditor to receive at least as much in a chapter 13 proceeding as he would have received in a chapter 17 liquidation. *Id.* He specifically pointed out that judges should not require any arbitrary level of repayment to confirm a plan. *Id.* After stating that the purpose of chapter 13 plans is for debtors to repay creditors, Sen. DeConcini stated that courts should examine all the circumstances of the proposed repayment plan before deciding whether to confirm that particular plan. *Id.* Sen. DeConcini stated that Congress designed chapter 13 for those debtors who want to pay their debts and get a fresh start. *Id.* Sen. DeConcini concluded that there are some cases in which nominal repayments would be valid. *Id.* Another representative who discussed how courts should determine whether a particular debtor proposed a plan in good faith was Congressman Hyde of Illinois. 126 Cong. Rec. H9305 (daily ed. Sept. 22, 1980) (remarks of Rep. Hyde). Rep. Hyde stated that Congress clearly intended courts to examine all factors of a particular debtor's ability to repay before deciding whether to approve the repayment plan. *Id.*

94. H.R. Rep. No. 1195, 96th Cong., 2d Sess. 25 (1980); *see supra* note 93 (courts should not require any arbitrary level of repayment before confirming repayment plan).

in confirmation of a plan that provides no repayment to unsecured creditors or disapproval of a plan that almost completely repays unsecured creditors.[95] Thus, by not requiring a particular amount of repayment, the legislative history of the proposed amendments shows that the *Deans* court used the correct method in interpreting good faith.[96] The current uniformity among circuit courts is further evidence that the *Deans* court correctly interpreted good faith.[97]

Policy considerations also support the *Deans* court's approach to interpreting good faith.[98] The public policy inherent in allowing individual debtors to obtain a new economic start in society dictates that a court should approve a zero payment plan if the debtor has no other alternative.[99] The *Deans* court recognized that in some cases a debtor may propose a plan which represents a debtor's maximum financial ability to repay debts but proposes no repayment to unsecured creditors.[100] The Fourth Circuit in *Deans* implied that such zero payment plans may satisfy the good faith requirement depending on the circumstances of the particular case.[101] The substantial repayment requirement, rejected by the *Deans* court, automatically precludes debtors who are incapable of making any payments to unsecured creditors from using chapter 13.[102] This

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95. H.R. REP. No. 1195, 96th Cong., 2d Sess. 25-26 (1980). Congress noted that courts could confirm a plan that provided no repayments to unsecured creditors if the debtor's financial situation prevented the debtor from making any payment to an unsecured creditor. *Id.* Courts also could deny confirmation of a plan proposing substantial repayment if the debtor was actually capable of full repayment. *Id.; see infra* notes 110-111 and accompanying text (hypothetical examples of confirming plan proposing minimal repayment or denying plan proposing substantial repayment).

96. *See infra* notes 98-100 and accompanying text (both policy reasons and legislative history of proposed amendment support middle road approach).

97. *See supra* note 68 (all circuits that have addressed good faith question have adopted middle road approach).

98. *See infra* text accompanying notes 99-103 (public policy supports middle road approach as opposed to per se requirement of substantial repayment).

99. *See infra* notes 100-103 and accompanying text (discussing policy reasons underlying middle road approach to interpreting good faith).

100. *See* 692 F.2d at 972; 126 CONG. REC. S15,175 (daily ed. Dec. 1, 1980) (statement of Sen DeConcini). Sen. DeConcini stated that public policy dictates that certain situations exist when a debtor can legitimately use chapter 13 and still be unable to repay his unsecured creditors. 126 CONG. REC. at S15,175. Sen. DeConcini also mentioned that chapter 13 should provide bankruptcy relief for the consumer debtor receiving welfare or old age assistance who can repay creditors only a nominal amount. *Id.* Sen. DeConcini explained that Congress intended chapter 13 to be a legitimate alternative for debtors in financial difficulty who honestly want to repay debts. *Id.*

Sen. DeConcini also stated that debtors should not use chapter 13 as a means to escape their legitimate financial obligations. *Id.* Sen. DeConcini noted that Congress intended that plans proposed by debtors should be real efforts, as opposed to "half-hearted" efforts, to repay creditors. *Id.* Explaining the real effort concept, Sen. DeConcini stated that debtors using chapter 13 may have to make some sacrifices in their standard of living. *Id.* Sen. DeConcini concluded that after courts examine all the circumstances of the debtor, courts in some cases should require that the debtor pursue a more modest lifestyle. *Id.*

101. 692 F.2d at 972.

102. *See* 126 CONG. REC. S15,175 (daily ed. Dec. 1, 1980) (statement of Sen. DeConcini).

per se preclusion of certain debtors from using chapter 13 is contrary to one of the basic purposes of chapter 13 which is to help consumer debtors repay debts and obtain a fresh start.[103]

In addition to the two basic goals of protecting creditors' rights and helping debtors obtain a fresh start, another intended purpose of chapter 13 was to provide debtors with a flexible method to repay debts.[104] As the *Deans* court noted, the middle road approach is flexible since a court using the middle road approach examines each plan on that plan's merits, and does not confirm or deny the plan based on some inflexible standard such as always requiring substantial repayment to unsecured creditors.[105] When the *Deans* court adopted the flexible middle road approach, the Fourth Circuit noted several factors which a court should consider when evaluating a proposer's good faith.[106] The factors listed by the Fourth Circuit for determining whether

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Sen. DeConcini noted that Congress intended that certain debtors who are unable to propose even nominal repayments nevertheless should be allowed to use chapter 13. *Id.* Debtors unable to propose even nominal repayments would be unable to meet an arbitrary requirement of substantial repayment. *Id.* Debtors unable to meet an arbitrary requirement would be unable to take advantage of chapter 13 proceedings when filing for bankruptcy if courts interpreted good faith to require substantial repayment. *Id.*

103. H.R. REP. No. 595, 95th Cong., 1st Sess. 116-17 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6076-77. Public policy favors any approach to confirming repayment plans that allow debtors to repay debts and obtain a fresh start. *See id.* at 116-17, 1978 U.S. CODE CONG. & AD. NEWS at 6076-77. The legislative history of chapter 13 suggests that a fresh start for debtors is an admirable goal consistent with public policy in that a fresh start allows debtors to once again become economically functioning members of society. *Id.* at 116-17, 1978 U.S. CODE CONG. & AD. NEWS at 6076-77.

104. *See* S. REP. No. 989, 95th Cong., 2d Sess. 141, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5927. The Senate Committee on the Judiciary stated that chapter 13 emphasizes flexibility by fixing a minimum of mandatory plan provisions. *Id.* Mandatory provisions inhibit flexibility because they require a debtor to meet certain requirements in every case before a decision can be made on the merits of the case. *See id.*

105. 692 F.2d at 971; *see infra* text accompanying notes 109-111 (discussion of flexibility of middle road approach); *supra* note 68 (circuit courts have adopted totality of circumstances approach which rejects any per se arbitrary requirement); *supra* text accompanying notes 98-100 (public policy dictates that courts should allow some debtors to propose plans that do not provide substantial repayment to unsecured creditors).

106. *See infra* text accompanying notes 107-108 (Fourth Circuit's list of factors courts should consider when making good faith determination). In *In re Estus*, the Eighth Circuit compiled the most comprehensive list of possible factors courts should consider when determining good faith. 695 F.2d at 317. The factors included: "(1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the debtor's employment history, ability to earn and likelihood of future increases in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of the debtor in seeking chapter 13 relief; and (11) the burden which the plan's administration would place upon the trustee." *Id.*

a particular debtor proposes a plan in good faith included the percentage of the proposed repayment to unsecured creditors and the available and future financial resources of the debtor.[107] Other factors listed by the Fourth Circuit included the honesty of the debtor in presenting the circumstances of the plan, and any unusual problems or expenses that the debtor may have.[108] The Fourth Circuit's recognition that courts should consider more than one factor will allow bankruptcy courts more flexibility in confirming or denying proposed repayment plans.[109] For example, a court could confirm a plan calling for little repayment to unsecured creditors if the debtor is forthright and open in his presentation and commits nearly all available financial resources to the repayment of debts.[110] On the other hand, a court could deny confirmation of a plan that proposed an acceptable percentage of repayment to unsecured

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107. 692 F.2d at 972. In addition to the Fourth Circuit, other circuit courts have suggested that courts should consider the percentage of the proposed repayment as a factor in determining good faith. *See, e.g.*, Flygare v. Boulden, 709 F.2d 1344, 1347 (10th Cir. 1983) (amount of proposed payment to creditors is factor in good faith determination); *In re* Kitchens, 702 F.2d 885, 888 (11th Cir. 1983) (same); *In re* Estus, 695 F.2d 311, 316 (8th Cir. 1982) (same); *In re* Rimgale, 669 F.2d 426, 432 (7th Cir. 1982) (substantiality of payment to creditors is element of good faith). Other circuit courts also have noted that the available and future financial resources of the debtor are factors to consider in determining good faith. *See, e.g.*, *Flygare*, 709 F.2d at 1347 (available financial resources of debtor is factor in good faith determination); *Kitchens*, 702 F.2d at 888 (same); *Estus*, 695 F.2d at 317 (same).

108. 692 F.2d at 972. In addition to the Fourth Circuit, other courts have examined the debtor's honesty in presenting the circumstances as a factor relevant to a determination of good faith. *See, e.g.*, *Flygare*, 709 F.2d at 1347 (debtor's honesty and accuracy in presenting plan is factor in good faith determination); *Kitchens*, 702 F.2d at 888 (same); *Estus*, 695 F.2d at 317 (same); *Goeb*, 675 F.2d at 1390 (factor in determining good faith is whether debtor correctly and honestly represented the facts of his plan); *Rimgale*, 669 F.2d at 432 (factor in determining good faith is whether debtor accurately stated expense items and amount of creditor claims). Other circuit courts have noted that the debtor's unique or unusual expenses are also a factor courts should consider when determining good faith. *See, e.g.*, *Flygare*, 709 F.2d at 1348 (existence of special circumstances such as major medical expenses is factor in good faith determination); *Kitchens*, 702 F.2d at 889 (same); *Estus*, 695 F.2d at 317 (same).

109. *See infra* notes 110-111 and accompanying text (examples of how Fourth Circuit's guidelines will allow courts to take more flexible approach to determining good faith); *supra* notes 102-104 and accompanying text (requirement that plans must provide some arbitrary level of repayment is too restrictive).

110. *See* H.R. Rep. No. 1195, 96th Cong., 2d Sess. 25-26 (1980) (legislative history of proposed amendment clearly indicates that courts can confirm plan proposing little repayment to unsecured creditors). A hypothetical example in which a court could confirm a minimal repayment plan involves consumer debtor X, who proposes a plan providing little repayment to unsecured creditors. Debtor X has a secured debt of $2,000, secured by an automobile, and unsecured debts of $6,000. Debtor X proposes a chapter 13 repayment plan in which he states his income as $700 per month and living expenses as $675 per month. Debtor X proposes to sell the automobile responsible for the secured debt for $1500 to reduce the secured debt to $500. Debtor X proposes to pay $25 per month for four years to a trustee for the benefit of his creditors. Debtor X's proposal will pay off the secured debt and will pay ten percent of the unsecured debts. Debtor X is open and honest in presenting the facts in his proposal to the Bankruptcy Court. Since debtor X is using all his excess income to pay debts and is not trying to conceal facts from the court, the Bankruptcy Court could find that debtor X proposed the plan in good faith.

creditors in which the debtor claimed extravagant or luxurious expenses.[111]

The Fourth Circuit's decision in *Deans* is in accord with the widely accepted judicial trend of determining good faith by using a case by case approach.[112] Under this widely accepted judicial trend, the Bankruptcy Court will have more responsibility in evaluating whether to confirm a particular repayment plan because neither substantial repayment nor any other single factor is determinative of good faith. Since no one factor is determinative, the Bankruptcy Court will have to examine all the circumstances of a proposed plan rather than only determining the percentage of proposed repayment.[113] The Bankruptcy Court also will have to make thorough investigations and factual findings concerning the factors that determine whether a debtor proposed his plan in good faith.

The Fourth Circuit in *Deans v. O'Donnell* interpreted the good faith clause of chapter 13 and held that courts must determine good faith on a case by case basis instead of relying solely on whether the plan provides substantial or meaningful repayment to unsecured creditors.[114] The *Deans* approach will permit Fourth Circuit practitioners more flexibility in preparing and filing individual bankruptcy actions under chapter 13 since no single factor will have to be present in every case. This added flexibility inherent in the middle road approach will enable attorneys to help individuals that are heavily in debt because attorneys can propose a repayment plan satisfying the section 1325 confirmation requirements that will not be financially crippling to the debtor. In addition, courts using the flexible middle road approach for determining good faith will allow chapter 13 to achieve its goal of fairly and equitably solving the debt problem of consumers and creditors.

S. PERRY THOMAS, JR.

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111. *See* 126 CONG. REC. S15,175 (daily ed. Dec. 1, 1980) (statement of Sen. DeConcini). Sen. DeConcini expressly noted that courts could require debtors to live more modestly, by giving up certain extravagant expenses, before confirming a repayment plan. *Id.* A hypothetical example of a court requiring a consumer debtor to give up luxurious expenses in order to obtain confirmation involves debtor Z, who proposes a plan that provides 80% repayment to unsecured creditors. The 80% repayment uses all of debtor Z's excess income. Debtor Z lists an income of $2000 per month and expenses of $1,700 per month. Included in debtor Z's expenses are payments on a new expensive car and expensive yacht. The Bankruptcy Court could find that debtor Z is capable of paying back more than 80% of the unsecured debts since the boat and care are not necessities. The Bankruptcy Court therefore could find that debtor Z proposed his plan in bad faith because debtor Z is capable of paying more than 80 percent of his unsecured claims.

112. *See supra* note 68 (discussion of circuit courts' adoption of middle road approach for determining good faith).

113. *See* 692 F.2d at 972; *see also supra* note 107 (some circuit courts recognize that debtor's proposed percentage of repayment to unsecured creditors is factor for courts to consider when making good faith determination); *supra* text accompanying notes 35-36 (no one factor is determinative of good faith).

114. 692 F.2d at 972; *see supra* notes 63-105 (middle road approach does not emphasize any particular factor in determining whether debtor proposed plan in good faith).