

No. 74240-0

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

Key Development Pension, Appellant

v.

Clyde E. Carlson and Priscilla A. Carlson, Respondents

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred in denying the Claim of Exemption to the garnishment of the bank account of Appellant Key Development Pension (the "Pension").

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does RCW 6.15.020 prevent the garnishment of money in the Pension bank account that represents pension benefits to plan participants?
2. Does ERISA prohibit all the assets in an ERISA qualified pension plan from being attached or garnished to pay a judgment against a pension benefit plan?
3. Does the trial court's interpretation of the last sentence RCW 6.15.020(3) conflict with ERISA's clear policy to insure pension assets are used for solely the benefit of participants or to defray reasonable expenditures for administration of the plan?

III. STATEMENT OF FACTS

This appeal is from the trial court's denial of a claim of exemption when the judgment creditors, Clyde and Priscilla Carlson ("Carlson") garnished the bank account of the Pension - the appellant and the plaintiff below. The judgment on which Carlson was executing was entered on March 18, 2015 after trial in Skagit County Superior Court. (CP 93-95)

In October 2012, the Pension sued Carlson to collect on two promissory notes in the principal amount of \$150,000.00 each executed by Carlson in 2000 and 2002. (CP 8-16). Carlson answered the complaint raising the affirmative defense of usury. (CP 1-5). After trial, the trial judge concluded that the loans from the Pension to Carlson violated Washington's usury statute and entered a judgment against the Pension for \$533,547.89 (CP 93-95). The Pension appealed that decision and the appeal is pending before this Court under Case No.73347-8-1.

On or about June 30, 2015, Carlson obtained a Writ of Garnishment from the trial court and served the writ on Washington Federal Bank, garnishing \$1539.82 from the Pension's bank account. (CP 109-112) The Pension filed a Claim of Exemption on July 28, 2015 asserting that the money in the Pension's bank account represented retirement funds due the Pension's participants and was exempt from garnishment under RCW 6.15.020. (CP 70-73). The trial court denied the exemption (CP 91-92) and entered a judgment against the garnishee defendant (CP 74-76). This appeal followed. (CP 83-90)

IV. ARGUMENT

A. **Both Washington law and ERISA exempt pension benefits from garnishment.**

The Pension is an Employee Retirement Income Security Act (“ERISA”) qualified pension plan. The Pension currently has two remaining participants, Jack Johnson and Gary Dahlby. (CP 17-18). Both Mr. Johnson and Mr. Dahlby are fully vested in the pension plan and both are now past retirement age. (CP 17-18). The only assets in the plan, excluding the promissory notes due from defendants, are two promissory notes and the money that was in the pension’s bank account that was garnished by Carlson. (CP 17-18) The two promissory notes evidence loans made with funds contributed by the Pension participants. Payments are made on these loans on a monthly basis and the proceeds immediately paid to the Pension’s participants. (CP 17-18) No other funds except payments made on the promissory notes were in the bank account. The total value of the assets in the plan at the time of the garnishment was approximately \$145,000.00. (CP 17-18)

As required by ERISA, the Pension plan documents provides that:

Subject to the exceptions provided below and as otherwise permitted by the Code and the Act, no benefit which shall be payable to any person (including a Participant or the Participant’s Beneficiaries) shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge the same shall be void; and no such benefit shall in any manner be liable for, or subject to, the debts, contracts, liabilities, engagements, or

torts of any such person, nor shall be subject to attachment or legal process for or against such person, and the same shall not be recognized except to such extent as may be required by law.

(CP 19-22).

In their initial objection to the exemption claim filed by Jack Johnson as trustee of the Pension, Carlson made two arguments as to why the exemption claim was not valid. First, the defendants argued that the ERISA preempted Washington's garnishment statute exempting pension benefits from garnishment. Secondly, Carlson argued that ERISA allows their judgment to be enforced by garnishment of assets in the plan: the \$1539.82 garnished from the Pension's bank account. (CP 50 -55)

After the Pension filed a response to the Carlson' objection, Carlson argued that Washington's exemption statute, RCW 6.15.020, did in fact apply and they relied on a clause in the statute that did not prohibit third parties from suing a pension plan: "This subsection does not prohibit actions against an employee benefit plan, or fund for valid obligations incurred by the plan or fund for the benefit of the plan or fund." (CP 56-63). More will be said about this theory in Part B below.

Not knowing what position Carlson will take in response to this appeal, the Pension will address both arguments. In their initial objection to the exemption claim, Carlson argued that ERISA section

502(d)(2) - 29 USC § 1132(d)(2) - governed enforcement of their judgment entered in this matter. Carlson quoted a portion of a portion of what they believed to be the relevant statutory provision: “[a]ny money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity.” (CP 50-55). The words of the actual statute, including the words substituted with an ellipsis in Carlson’s version is as follows: “[a]ny money judgment UNDER THIS SUBCHAPTER against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity.” 29 USC § 1132(d)(2) (Emphasis added). The subchapter referred to in the actual statute is Subchapter 1 of Chapter 18 of Title 29 of the U.S. Code. Chapter 18 of Title 29 is ERISA. Subchapter 1 of Chapter 18 is entitled “PROTECTION OF EMPLOYEE BENEFIT RIGHTS.”

29 USC § 1132(a) lists the entities and individuals who may bring a civil action under ERISA. Carlson is not one of the entities or persons empowered to bring a civil action under Subchapter 1 of Chapter 18 of Title 29 of the U.S. Code. Moreover, the action which resulted in the judgment against the pension was not brought under any subchapter of

ERISA, let alone 29 USC § 1132. The clear meaning of the words of the statutory provision which defendants rely on doesn't support their argument. *Milgram v. Orthopedic Assoc. Defined Contribution Pension Plan*, 666 F.3d 68, 72 (2d Cir. 2011), cited by Carlson in their opposition to the Pension's claim of exemption was a case brought under ERISA Subchapter 1. It involved Milgram's pension benefits that were wrongfully removed from his pension fund account and credited to his former wife. *Milgram*, 666 F.3d at 70. In that case the judgment in favor of Milgram was enforceable against plan assets as provided in 29 USC § 1132(d)(2).

In *Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825 (1988), also cited by Carlson, the issue was "whether and to what extent the Georgia statutes bearing on the garnishment of funds due to participants in ERISA employee welfare benefit plans are preempted by the federal statute which governs such plans." *Mackey*, 486 U.S. at 827. While the Supreme Court in *Mackey* did mention 29 USC § 1132(d)(2), it was clear that the case was not brought, nor the judgment rendered, under any provision of ERISA. More will be said about the *Mackey* case below.

A third federal case cited as authority by Carlson in their initial objection to the exemption claim was not a decision reported in any federal reporter. While a "Memorandum Opinion and Order" dated April

28, 2014 can be found on the internet, and apparently Westlaw, the opinion was not a final judgment, not reported as such, contemplated further action in the case, and has no precedential value.¹

Carlson's first argument in their initial objection, was that ERISA preempted Washington's garnishment scheme. Washington has a strong public policy, like ERISA, to protect its citizens' retirement income:

It is the policy of the state of Washington to ensure the well-being of its citizens by protecting retirement income to which they are or **may become** entitled. For that purpose generally and pursuant to the authority granted to the state of Washington under 11 U.S.C. Sec. 522(b)(2), the exemptions in this section relating to retirement benefits are provided.

RCW 6.15.020(1). The public policy goals of ERISA can be found at 29 USC § 1001(b) and (c) which the United States Supreme Court has described "as one insuring that, if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain vested benefit – he actually will receive it." *Patterson v. Shumate*, 504 U.S. 753, 764-765 (1992), citing *Nachman Corp. v Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980).

¹ Washington GR 14.1(b) provides:

(b) Other Jurisdictions. A party may cite as an authority an opinion designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

To further Washington's stated public policy of protecting retirement income which people either are entitled to or may become entitled to, the legislature enacted a broad exemption for certain types of benefits including pension and retirement benefits:

The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any benefit, or any other right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever.

RCW 6.15.020(3). Unless preempted by ERISA, Washington's exemption for a person's right to pension or retirement benefits to which they are or may become entitled to prevents the defendants garnishment of the pension's bank account which contains only those pension benefits.

Carlson relied on *Mackey* for the proposition that ERISA preempts "any and all" state garnishment laws when an ERISA qualified plan is involved. (CP 50-55). That is not what the *Mackey* case held. *Mackey* involved a debt collection agency that had obtained state court judgments against 29 people who were participants in an ERISA employee welfare benefit plan. An "employee welfare benefits plan" is defined under ERISA as:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by

both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,
(A) medical, surgical, or hospital care or benefits, or benefits in the event of , death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or
(B) any benefit described in section 186 (c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 USC § 1002(1)(A) and (B). A welfare benefit plan is distinguished from a pension benefit plan under ERISA. The pension plan here is a pension benefit plan. 29 USC § 1002(2)(A).

In *Mackey*, Georgia had an anti-garnishment statute that singled out and specifically mentioned only ERISA plans, including welfare benefits plans, for special treatment.² ERISA preempts “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. Because the Georgia anti-garnishment statute singled out and expressly referenced ERISA welfare benefit plans, a majority of the Supreme Court held that the statute was “related to” an ERISA employee benefit plan and therefore was preempted by ERISA. *Mackey*, 486 U.S. at 830. The Court however held that the general

² The language of the Georgia garnishment statute at issue, OCGA 18-4-22.1, is set out in full in *Lanier Collection Agency & Service, Inc.*, 256 Ga. 499, 350 S.E.2d 439 (1986). That statute was repealed in 1990 and the current Georgia statute exempts ERISA pension benefit plans, but not welfare benefit plans, from garnishment is found at OCGA 14-4-22.

Georgia garnishment statute did not apply solely to ERISA benefit plans and did not specially mention ERISA benefit plans and therefore was not preempted by ERISA. *Mackey*, 485 U.S. at 831-832.

The *Mackey* Court also noted that there are two types of civil suits that can be brought against ERISA welfare benefit plans: First, there are suits under 29 USC § 1132:

... ERISA's § 502 provides that civil enforcement actions may be brought by particular persons against ERISA plans, to secure specified relief, including the recovery of plan benefits. . . . Section 502, which provides that a plan may "sue or be sued" as an entity in § 502 actions. 29 USC § 1132(d)(1), clearly contemplates the enforcement of judgments against benefit plans. 29 USC § 1132(d)(2).

Mackey, 486 U.S. at 832-33. There is a second type of civil suits against ERISA welfare benefit plans:

ERISA plans maybe sued in a second type of civil action, as well. These cases – lawsuits against ERISA plans for run-of-the-mill state law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan – are relatively commonplace. Petitioners and the United States (appearing here as *amicus curiae*) concede that these suits, although obviously affecting and involving ERISA plans and their trustees, are not preempted by ERISA § 514(a).

Mackey, 486 U.S. at 833. The Court went on to point out that ERISA does not provide for a way to enforce a judgment against a plan in either type of case. *Mackey, Id.* The Court went on to hold that because there is no judgment enforcement mechanism under ERISA, "state law methods

for collecting money judgments must, as a general matter, remain undisturbed by ERISA” *Mackey*, 486 U.S. at 834.

Washington’s garnishment exemption for pension and retirement benefits, RCW 6.15.020(3), does not expressly mention any type of ERISA benefit plans or limit its application to only ERISA plans as did the Georgia exemption statute for ERISA benefit plans. Therefore, Because Washington’s anti-garnishment statute differs substantially from the Georgia statute that was at issue in *Mackey*, the case does not support defendants’ argument that Washington’s anti-garnishment statute is preempted by ERISA.

However, even if ERISA preempted Washington’s garnishment statute, ERISA itself prohibits garnishment of a *pension* benefit plan as opposed to a *welfare* benefit plan. In *Mackey*, the Supreme Court noted that section 206(d)(1) of ERISA, 29 USC § 1056(d)(1), prohibits any garnishment of ERISA pension benefit plans, but not ERISA welfare benefit plans.

Where Congress intended in ERISA to preclude a particular method of state law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute. Specifically, ERISA § 206(d)(1) bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA *pension* benefit plans. 29 USC § 1056(d)(1). Congress did not enact any similar provision applicable to ERISA *welfare* benefit plans,

such as the one at issue in this case.

Mackey, 486 U.S. at 836. While the Court's discussion of ERISA § 206(d)(1) is dicta in that case, the Supreme Court had the opportunity to revisit that issue in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990). In that case, Guidry, who had been an official in the union and a trustee of its pension plan, pleaded guilty of embezzling funds from the union. The union obtained a judgment against Guidry and tried to enforce the judgment against the pension plan in which Guidry was a participant. *Guidry*, 493 U.S. at 367.

The United State District Court concluded that a constructive trust could be imposed on Guidry's pension benefits despite the anti-alienation prohibition in ERISA § 206(d)(1). The Court of Appeals for the Tenth Circuit affirmed the District Court. *Guidry*, 493 U.S. at 369 – 370.

The Supreme Court, however, relying in part on the dictum in *Mackey*, concluded that ERISA § 206(d)(1) barred garnishment of pension benefit plans as opposed to welfare benefit plans.

Both the District Court and the Court of Appeals presumed that § 206(d)(1) of ERISA erects a general bar to the garnishment of pension benefits from plans covered by the Act. This Court, also, indicated as much, although in dictum in *Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825 (1988). In *Mackey*, the Court held that ERISA does *not* bar the garnishment of welfare (e.g. vacation) benefits. In reaching that conclusion,

it noted that § 206(d)(1) proscribes the assignment or alienation of *pension* plan benefits, but that no comparable provision applies to ERISA *welfare* benefit plans. *Id.* at 836. It reasoned that when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plan and *not* welfare benefit plans.

The view that the statutory restrictions on assignment or alienation of pension benefits apply to garnishment is consistent with applicable administrative regulations, with relevant legislative history, and with the views of other federal courts. It is also consonant with other statutory provisions designed to safeguard retirement income. We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case. That remedy is therefore prohibited by § 206(d)(1) unless some exception to the general statutory ban is applicable.

Guidry, 493 U.S. at 371 – 372. (Citations and footnotes omitted). Finally the Court concluded that

Section 206(d)(1) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are made, it is for Congress to undertake that task.

Guidry, 493 U.S. at 376.

B. The trial judge's interpretation of Washington law allowing the garnishment of pension benefits conflicts with the clear direction of ERISA.

It is believed that the trial court denied the claim of exemption on the ground that the last sentence of RCW 6.15.020(3)³ is an exception of the broad exemption afforded pension benefits under Washington Law and that the judgment in favor of Carlson in this action could be enforced by garnishing funds in the Pension's bank account intended for distribution to plan participants. In response to the Carlson's argument that neither ERISA or the state exemption statute would permit the Pension from bringing a lawsuit, have judgment rendered against it and be judgment proof the trial judge stated as follows: "That's really where my logic ends up falling and I have no idea whether it's right or not." (RP 8, lines 19-20). If this is the trial court's interpretation of RCW 6.15.020(3) is in direct conflict with ERISA, 29 USC § 1001 et. seq. Both the Pension and Carlson cited *Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825 (1988) to support their arguments for and against the exemption claimed by the Pension. As noted above, the U.S. Supreme court in *Mackey* held that Georgia exemption statute at issue in that case was preempted by ERISA because it specifically mentioned and singled out ERISA employee benefit plans for special treatment **AND** it was in direct conflict with ERISA. The Georgia statute prohibited that which ERISA allowed: the garnishment of employee *welfare* benefits. ERISA

³ See Appendix A.

prohibits garnishment of an employee *pension* benefit under ERISA § 206(d)(1), the so called “anti-alienation provision”. It is clear from the *Mackey* decision that if the judgment debtor in that case had attempted to garnish *pension* benefits of the judgment debtors, ERISA would have preempted the entire Georgia garnishment scheme and ERISA § 206 (d)(1) would have prevented garnishment of those pension benefits. That was the very issue in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990). There a judgment creditor of Guidry attempted to place a constructive trust on the pension benefits due Guidry from his pension plan. A majority of the Supreme Court held that ERISA § 206 (d)(1) prohibited any action that interfered with the disbursement of pension benefits to a participant and equated a constructive trust with garnishment. Here, the trial court’s ruling that the last sentence of RCW 6.15.020(3) permits a judgment creditor of the Pension to attach assets payable as pension benefits to satisfy the judgment is inconsistent with and in direct conflict with ERISA, which allows plan assets to be used **only** to pay benefits to plan participants and beneficiaries and to defray **reasonable** expenses of administrating the plan. 29 USC §§ 1104(a)1)(A)(i) and (ii).⁴ Indeed under 29 USC § 1103, plan assets are required to be held solely for those purposes. Unless the payment of a

⁴ The full text of the relevant portion of ERISA’s anti-alienation provision is set out in Appendix B.

judgment that is three times the total value of the plan assets is construed to be a “reasonable expense of administering the plan” or a “valid obligation for the benefit of the plan” then Washington’s pension exemption statute is preempted by ERISA. The Pension contends that the last sentence of RCW 6.15.020(3) should be interpreted to be consistent with ERISA and would simply allow actions to collect reasonable expenses (“valid obligations”) of administering the plan (“for the benefit of the plan”).⁵ There is no legislative history of what the Washington legislature intended when it added that last sentence of RCW 6.15.020(3), but it was enacted in 1990, not long after the U.S. Supreme Court’s decision in *Mackey* on ERISA preemption. See Washington Laws, 1990, Ch 237, Sec. 1. If RCW 6.15.020(3) is not interpreted to be consistent with ERISA then it is preempted by ERISA and garnishment of the pension benefits in Pension’s bank account due the plan participants should be held to be exempt under ERISA § 206(d)(1) from execution and returned to the Pension for distribution to the plan participants.

It was evident at the hearing on the exemption claim that the trial court was concerned with the argument that the Pension is essentially judgment proof and Carlson could not recover for what the Court ruled at

⁵ Carlson did not argue that the last sentence of RCW 6.15.020(3) allowed the execution of their judgment against the pension benefits in the plan until two days before the hearing on the exemption claim. The Pension did not have an opportunity to brief the issue before the hearing.

trial was the Pension's wrongdoing. "Well, like I say, I'm of the mind that the pension plan brought the lawsuit for the benefit of the plan, and to suggest that they can only benefit and never have detriment from their own actions just seems counter intuitive to me." (RP 9 line 22 – RP 10 line 1) That kind of result also troubled the U.S. Supreme Court in *Guidry*. Indeed, the Court there recognized that "there would be a natural distaste" of the Court's decision protecting the pension benefits of someone who embezzled several hundred thousand dollars from the union that was intended for the union members' pension plans, but the Court concluded that:

Section 206(d)(1) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are made, it is for Congress to under-take that task.

Guidry, 493 U.S. at 376.

The remaining assets - two promissory notes and the payments under those notes - in the Pension plan represent the only pension benefits that the plan participants will ever receive. To allow all the plan assets to be attached or garnished to pay the Carlson judgment would wipe out the entire stream of retirement income intended for the Pension's plan participants. Such a result is inconsistent with ERISA's policy to protect that stream of income for pensioners. If a judgment debtor who embezzled

hundreds of thousands of dollars has his pension benefits protected, surely the pension benefits of participants who are not judgment debtors would be exempt from attachment or garnishment as well.

V. CONCLUSION

Washington law, like federal law, protects the stream of income due retirees from their pension funds. Neither of the participants (retirees) of the Pension here are the judgment debtor – a status that would have prevented the garnishment of the Pension bank account. The strong public policy reflected in the Washington statute and in ERISA to protect that stream of retirement income for the Pension’s participants outweighs any sense of unfairness in protecting the assets in the Pension fund from a judgment creditor of the Pension. The Claim of Exemption should be upheld and this matter remanded to the trial court directing it to do so.

RESPECTFULLY SUBMITTED this 4th day of March, 2016.


Stephan E. Todd WSBA#12429
Attorney for Appellant Key
Development Pension

APPENDIX A

RCW 6.15.020

Pension money exempt—Exceptions—Transfer of spouse's interest in employee benefit plan.

(1) It is the policy of the state of Washington to ensure the well-being of its citizens by protecting retirement income to which they are or may become entitled. For that purpose generally and pursuant to the authority granted to the state of Washington under 11 U.S.C. Sec. 522(b)(2), the exemptions in this section relating to retirement benefits are provided.

(2) Unless otherwise provided by federal law, any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever, and when a debtor dies, or absconds, and leaves his or her family any money exempted by this subsection, the same shall be exempt to the family as provided in this subsection. This subsection shall not apply to child support collection actions issued under chapter 26.18, 26.23, or 74.20A RCW, if otherwise permitted by federal law.

(3) The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever. This subsection shall not apply to child support collection actions issued under chapter 26.18, 26.23, or 74.20A RCW if otherwise permitted by federal law. This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in such plan to the extent expressly provided for in a qualified domestic relations order that meets the requirements for such orders under the plan, or, in the

case of benefits payable under a plan described in 26 U.S.C. Sec. 403(b) or 408 of the internal revenue code of 1986, as amended, or section 409 of such code as in effect before January 1, 1984, to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support. This subsection does not prohibit actions against an employee benefit plan, or fund for valid obligations incurred by the plan or fund for the benefit of the plan or fund.

(4) For the purposes of this section, the term "employee benefit plan" means any plan or arrangement that is described in RCW 49.64.020, including any Keogh plan, whether funded by a trust or by an annuity contract, and in 26 U.S.C. Sec. 401(a) or 403(a) of the internal revenue code of 1986, as amended; or that is a tax-sheltered annuity or a custodial account described in section 403(b) of such code or an individual retirement account or an individual retirement annuity described in section 408 of such code; or a Roth individual retirement account described in section 408A of such code; or a medical savings account or a health savings account described in sections 220 and 223, respectively, of such code; or a retirement bond described in section 409 of such code as in effect before January 1, 1984. The term "employee benefit plan" shall not include any employee benefit plan that is established or maintained for its employees by the government of the United States, by the state of Washington under chapter 2.10, 2.12, 41.26, 41.32, 41.34, 41.35, 41.37, 41.40, or 43.43 RCW or RCW 41.50.770, or by any agency or instrumentality of the government of the United States.

(5) An employee benefit plan shall be deemed to be a spendthrift trust, regardless of the source of funds, the relationship between the trustee or custodian of the plan and the beneficiary, or the ability of the debtor to withdraw or borrow or otherwise become entitled to benefits from the plan before retirement. This subsection shall not apply to child support collection actions issued under chapter 26.18, 26.23, or 74.20A RCW, if otherwise permitted by federal law. This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in such plan to the extent expressly provided for in a qualified domestic relations order that meets the requirements for such orders under the plan, or, in the case of benefits payable under a plan described in 26 U.S.C. Sec. 403(b) or 408 of the internal revenue code of 1986, as amended, or section 409 of such code as in effect before January 1, 1984, to the extent provided in any order issued

by a court of competent jurisdiction that provides for maintenance or support.

(6) Unless prohibited by federal law, nothing contained in subsection (3), (4), or (5) of this section shall be construed as a termination or limitation of a spouse's community property interest in an employee benefit plan held in the name of or on account of the other spouse, who is the participant or the account holder spouse. Unless prohibited by applicable federal law, at the death of the nonparticipant, nonaccount holder spouse, the nonparticipant, nonaccount holder spouse may transfer or distribute the community property interest of the nonparticipant, nonaccount holder spouse in the participant or account holder spouse's employee benefit plan to the nonparticipant, nonaccount holder spouse's estate, testamentary trust, inter vivos trust, or other successor or successors pursuant to the last will of the nonparticipant, nonaccount holder spouse or the law of intestate succession, and that distributee may, but shall not be required to, obtain an order of a court of competent jurisdiction, including a nonjudicial binding agreement or order entered under chapter 11.96A RCW, to confirm the distribution. For purposes of subsection (3) of this section, the distributee of the nonparticipant, nonaccount holder spouse's community property interest in an employee benefit plan shall be considered a person entitled to the full protection of subsection (3) of this section. The nonparticipant, nonaccount holder spouse's consent to a beneficiary designation by the participant or account holder spouse with respect to an employee benefit plan shall not, absent clear and convincing evidence to the contrary, be deemed a release, gift, relinquishment, termination, limitation, or transfer of the nonparticipant, nonaccount holder spouse's community property interest in an employee benefit plan. For purposes of this subsection, the term "nonparticipant, nonaccount holder spouse" means the spouse of the person who is a participant in an employee benefit plan or in whose name an individual retirement account is maintained. As used in this subsection, an order of a court of competent jurisdiction entered under chapter 11.96A RCW includes an agreement, as that term is used under RCW 11.96A.220.

[2011 c 162 § 3; 2007 c 492 § 1. Prior: 1999 c 81 § 1; 1999 c 42 § 603; 1997 c 20 § 1; 1990 c 237 § 1; 1989 c 360 § 21; 1988 c 231 § 6; prior: 1987 c 64 § 1; 1890 p 88 § 1; RRS § 566. Formerly RCW 6.16.030.]

APPENDIX B

29 U.S. Code § 1104(a)(1)(A)(i) and (ii)

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;