No. 02-458

In the

Supreme Court of the United States

RAYMOND B. YATES, M.D.,P.C. Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON,

Respondent.

ERTIORARI TO THE
PEALS FOR THE SIXTH CIRCUIT

PETITIONER

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QUESTIONS PRESENTED

The issue before this Court is whether a one hundred percent (100%) shareholder of a corporate employer, a partner or a sole proprietor can qualify as a "participant" in an "employee benefit plan" as those terms are defined in the Employee Retirement Income Security Act of 1974 ("ERISA") and thus be entitled to enforce the restriction against alienation contained in 29 U.S.C. § 1056(d) of ERISA and 26 U.S.C. § 401(a)(13) of the Internal Revenue Code.

PARTIES TO THE PROCEEDING

PETITIONERS - APPELLANTS

(1) Raymond B. Yates, M.D., P.C. Profit Sharing Plan
(2) Raymond B. Yates, Trustee

RESPONDENT - APPELLEE

(1) William T. Hendon, Bankruptcy Trustee

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The judgment and memorandum of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, Adversary Proceeding No. 98-3088, was issued on September 2, 1999, and is unreported. (Petition App. 36a-50a).[1] The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, was issued on June 26, 2000, and is unreported. (Petition App. 9a-35a). The April 19, 2002, opinion of the Court of Appeals for the Sixth Circuit affirming the district court opinion is published at 287 F.3d 521 (6th Cir. 2002). (Petition App. 1a-8a). The order of the Court of Appeals for the Sixth Circuit denying rehearing en banc is published at 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). (Petition App. 51a-52a).

STATEMENT OF JURISDICTION

The September 2, 1999, opinion of the United States Bankruptcy Court for the Eastern District of Tennessee, Northern Division, at Knoxville, granted the Bankruptcy Trustee's Motion for Summary Judgment and denied Raymond B. Yates ("Yates") and the Raymond B. Yates, M.D., P.C. Profit Sharing Plan's Motion for Summary Judgment. The United States District Court for the Eastern District of Tennessee affirmed this decision on June 26, 2000. On April 19, 2002, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court. Yates and the Profit Sharing Plan filed a Petition for Rehearing En Banc with the Sixth Circuit Court of Appeals, which was denied on June 20, 2002. A Petition for Writ of

[1] The Appendix to Petition for Writ of Certiorari, filed September 18, 2002, is referred hereinafter as "Petition App." followed by the page number.

Certiorari to the United States Supreme Court was filed on September 18, 2002, and was granted on June 27, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(2), 1002(3), 1002(6), 1002(7) and 1056(d) (2003), the Internal Revenue Code 26 U.S.C. § 401(a)(13) (2003), and 29 C.F.R. § 2510.3-3 (2003).

STATEMENT OF THE CASE

Raymond B. Yates, M.D., P.C. (the "Yates, P.C.") is a Tennessee professional corporation wholly owned by Yates. (JA 15a).[2] Effective as of July 1, 1989, Yates, P.C. created the Raymond B. Yates, M.D., P.C. Profit Sharing Plan (the "Profit Sharing Plan"), which is an "employee benefit plan" as defined in 29 U.S.C. § 1002(2) of ERISA and qualified for tax purposes under 26 U.S.C. § 401 of the Internal Revenue Code.[3] (JA 32a-65a). In addition to being the sole shareholder of Yates, P.C. and the administrator and trustee of the Profit Sharing Plan, Yates participated in the Profit Sharing Plan as an employee of Yates, P.C. (JA 32a-255a, 264a-267a, 268a). From the time of its inception, the Profit Sharing Plan always had at least one employee participant who was not Yates or Yates' spouse. (JA 264a-267a, 269a). As of June 30, 1996, there were three participants in the Profit Sharing Plan in addition to Yates, none of who was Yates' spouse. *Id.*

[2] The Joint Appendix is referred hereinafter as "JA" followed by the page number.

[3] Also, effective as of July 1, 1989, Yates, P.C. created the Raymond B. Yates, M.D., P.C. Money Purchase Pension Plan ("Money Purchase Plan") in which Yates also participated.

In his capacity as an employee-participant in the Money Purchase Plan, Yates borrowed against his interest in the Money Purchase Plan under the "Model Loan Program." On December 13, 1989, Yates executed a promissory note in the principal amount of $20,000.00 at an eleven percent rate of interest with a five-year repayment period, which was extended for another five years on June 12, 1992, when the loan was transferred to the Profit Sharing Plan. (JA 259a-260a, 268a). Also on December 13, 1989, Yates executed an irrevocable pledge and assignment to secure the indebtedness to be repaid under the promissory note. (JA 261a-262a). In the irrevocable pledge and assignment, Yates pledged and assigned to the trustee of the Money Purchase Plan an interest in his vested account balance. *Id*. This loan was transferred to the Profit Sharing Plan in 1992, when the Money Purchase Plan merged into the Profit Sharing Plan. The Profit Sharing Plan contains a "spendthrift clause" that protects the assets of the Profit Sharing Plan from assignment or alienation as provided in 29 U.S.C. § 1056(d) of ERISA and 26 U.S.C. § 401(a)(13) of the Internal Revenue Code.

In November 1996, Yates repaid the entire debt to the Profit Sharing Plan by making two payments. (Petition App. 39a). Together, the payments totaled $50,467.46 and represented the total amount of principal and interest due under the promissory note. (JA 269a). After these repayments, Yates' interest in the Profit Sharing Plan was approximately $87,000. (Petition App. 39a). On December 2, 1996, an involuntary petition under Chapter 7, Title XI of the United States Code was filed against Yates. (JA 31a). Yates claimed his entire interest in the Profit Sharing Plan as exempt property on Schedule B of his bankruptcy schedules under ERISA, the Internal Revenue Code and Tenn. Code Ann. § 26-2-104(b). *Id*.

On August 5, 1998, the Bankruptcy Trustee filed an adversary proceeding against the Profit Sharing Plan and Yates, as the Profit Sharing Plan's trustee, seeking to void as a preference under 11 U.S.C. § 547(b) the $50,467.46 loan repayments made by Yates to the Profit Sharing Plan in November 1996. (JA 1a-3a). However, the Profit Sharing Plan and Yates asserted that the Bankruptcy Trustee could not recover these payments because such payments represented Yates' interest in an ERISA-qualified plan and were excluded from his bankruptcy estate based on *Patterson v. Shumate*, 504 U.S. 753 (1992). (JA 6a).

The parties to the adversary proceeding filed cross motions for summary judgment. The bankruptcy court granted the Bankruptcy Trustee's Motion for Summary Judgment and denied the Profit Sharing Plan and Yates' Motion for Summary Judgment. (Petition App. 36a-50a). Specifically, the bankruptcy court ruled that the Bankruptcy Trustee could recover the November 1996 payments Yates made to the Profit Sharing Plan because Yates was not an "employee" as defined in ERISA eligible to participate in the Profit Sharing Plan. The bankruptcy court specifically stated the following:

> The Debtor in this matter is a self-employed owner of the professional corporation that sponsors the pension plan at issue. He cannot participate as an employee under ERISA and he cannot use its provisions to enforce the restriction on the transfer of his beneficial interest in the Defendant Plan.

(Petition App. 43a-44a). This holding was based on the decision of the Sixth Circuit Court of Appeals in

Fugarino v. Hartford Life and Accident Ins. Co., 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993), which held that "a sole proprietor or sole shareholder of a business must be considered a [sic] employer and not an employee of the business for purposes of ERISA." *Id.* at 186.

The United States District Court for the Eastern District of Tennessee at Knoxville affirmed the decision of the bankruptcy court and further stated that "[w]hile the Plan may be ERISA-qualified as to other participants, . . . it is not ERISA-qualified as to Dr. Yates."[4] (Petition App. 14a). On April 19, 2002, the Court of Appeals for the Sixth Circuit affirmed the decisions of the lower courts stating, "[u]nder circuit precedent by which this panel is bound, in short, it is clear that the spendthrift clause in the Yates profit sharing/pension plan is not enforceable by Dr. Yates under ERISA. Neither is the spendthrift clause enforceable under Tennessee statutory law." *Yates*, 287 F.3d at 526. The Sixth Circuit held

> [o]ur published caselaw teaches that "a sole proprietor or sole shareholder of a business must be considered an employer and not an employee of the business for purposes of ERISA." *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992). As an "employer," a sole shareholder cannot qualify as a "participant or beneficiary" in an ERISA pension plan. *Id.*; *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000).

[4] There is no basis in ERISA to conclude that an employee benefit plan can have two categories of participants (owners and non-owners) in the same plan that are subject to two different legal enforcement schemes.

> The sole shareholder "is not an ERISA entity," in other words, and "does not have standing under the ERISA enforcement mechanisms." *Agrawal*, 205 F.3d at 302.

Yates, 287 F.3d at 525.

Yates and the Profit Sharing Plan timely filed a Petition for Rehearing En Banc that was denied by the United States Court of Appeals for the Sixth Circuit on June 20, 2002. *Hendon v. Yates (In re Yates)*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002), *cert. granted*, 2003 U.S. LEXIS 5033 (U.S., June 27, 2003). (Petition App. 51a-52a). Yates and the Profit Sharing Plan filed a Petition for Writ of Certiorari to this Honorable Supreme Court that was granted on June 27, 2003.

SUMMARY OF THE ARGUMENT

Under the Bankruptcy Code, property of the debtor that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law" is excluded from the debtor's bankruptcy estate. 11 U.S.C. § 541(c)(2). This Court in *Patterson* held that ERISA is "applicable nonbankruptcy law" and that the anti-alienation provisions within ERISA-qualified pension plans are enforceable, excluding a debtor's interest in such a plan from the bankruptcy estate. The Bankruptcy Trustee in this case is attempting to alienate Yates' interest in the Profit Sharing Plan.

Yates, P.C. is an "employer" that is eligible to sponsor an "employee benefit plan" pursuant to the definition of these terms in ERISA. Yates is an "employee" as that term is defined in 29 U.S.C. § 1002(6) based on the analysis set forth by this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318

(1992) and Department of Labor ("DOL") guidance on this issue. Since Yates is an "employee," he is eligible to be a "participant" for purposes of ERISA under 29 U.S.C. § 1002(7) and is entitled to the anti-alienation protection as provided in *Patterson*.

The Sixth Circuit in *Yates* incorrectly held that the holding of *Patterson* did not apply because Yates was not an "employee" as defined in ERISA and therefore not a "participant" in an ERISA-qualified pension plan. The Sixth Circuit's ruling is based on an erroneous interpretation of 29 C.F.R. § 2510.3-3. In addition, the holding in *Yates* ignores this Court's ruling in *Darden* regarding the determination of whether an individual is an "employee" for purposes of ERISA and conflicts with the definition of "employee benefit plan" as defined in DOL Regulation 29 C.F.R. § 2510.3-3, other case law from circuit courts of appeals and DOL opinion letters.

ARGUMENT

YATES IS A PARTICIPANT IN AN EMPLOYEE BENEFIT PLAN AS DEFINED IN 29 U.S.C. § 1002(3).

A. Yates, P.C. Sponsored an Employee Benefit Plan Covered by ERISA and the Internal Revenue Code.

ERISA was enacted to

> protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial

> and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C.§ 1001(b).

ERISA shall apply to "any employee benefit plan if it is established or maintained – (1) by any employer engaged in commerce or in any industry or activity affecting commerce . . . ." 29 U.S.C. § 1003(a)(1). An "employer" is defined under ERISA as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). A "person" is defined as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9).

An "employee benefit plan" is defined as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3). The DOL regulations further define and explain the definition of an "employee benefit plan" in 29 C.F.R. § 2510.3-3. This regulation is entitled "employee benefit plan," and the numbering of this regulation corresponds to § 3(3) of ERISA, 29 U.S.C. 1002(3), which is the statutory definition of the term "employee benefit plan." DOL Regulation 29 C.F.R. §

2510.3-3(a), (b) and (c) provide the rules for determining whether an employee benefit plan exists:

> (a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of Title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I.
>
> (b) Plans without employees. For purposes of Title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.
>
> (c) Employees. For purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and
>
> (2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

29 C.F.R. § 2510.3-3(a), (b) and (c).

It is clear from a plain reading of this regulation that Yates should not be excluded from being a participant in the Profit Sharing Plan that Yates P.C. sponsored because other non-owner employees participated in the Profit Sharing Plan.[5] The regulation

[5] It is interesting to note that the district court stated "[w]hile the plan may be ERISA-qualified as to other participants, the Court found it is not ERISA qualified as to Dr. Yates. Dr. Yates may have been participating in the plan, but his participation in the plan was not under ERISA." (Petition App. 14a.) Therefore, the district court recognized that there was an employee benefit plan covered by

specifically states that where one or more common law employees participate in a plan in addition to the "self-employed individual," the plan is covered under Title I of ERISA. Furthermore, this regulation never contemplates an employee benefit plan being subject to two separate enforcement schemes – ERISA as to the "ERISA participants" and state law as to the "non-ERISA participants."[6]

An "employee pension benefit plan" is defined as

> . . . 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 by its express terms or as a result of surrounding circumstances such plan, fund, or program -
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A).

ERISA but simply held that Yates was not a participant in such plan.

[6] As discussed *supra*, such a result would lead to absurd results that this Court warned against in *Darden*.

Yates, P.C. is a professional corporation organized under the laws of the State of Tennessee and is an "employer," as defined by 29 U.S.C. § 1002(5) in that it is a "person" acting directly as the employer for at least four employees since the inception of the Profit Sharing Plan. 29 U.S.C. § 1002(9). Yates, P.C. sponsored the Profit Sharing Plan, which is an "employee benefit plan" in that it provides "retirement income to employees." 29 U.S.C. § 1002(2). Therefore, the Profit Sharing Plan established by Yates, P.C. was and is subject to the terms of ERISA and the Internal Revenue Code.[7]

B. Yates Was and Is an Employee of Yates, P.C. and a Participant in the Profit Sharing Plan

ERISA defines the term "participant" as

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

ERISA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). In *Darden*, this Court stated that this definition of

[7] 29 U.S.C. §§ 1003, 1051, 1081 and 1101 provide certain exceptions to ERISA coverage; however, none of these exceptions are applicable to Yates, P.C. and the Profit Sharing Plan.

employee in ERISA is "completely circular and explains nothing" and went on to hold that "the term 'employee' as it appears in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 834, 29 U.S.C. § 1002(6)" should be read "to incorporate traditional agency law criteria for identifying master-servant relationships." *Darden*, 503 U.S. at 319 (1992). *Darden* went on to explain the following:

> where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . . In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, e.g., *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323, 95 S.Ct. 472, 475-476, 42 L.Ed.2d 498 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228, 79 S.Ct. 664, 665, 3 L.Ed.2d 756 (1959) (*per curiam*); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94, 35 S.Ct. 491, 494, 59 L.Ed. 849 (1915).

Id. at 322-23 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)).

Based on *Darden's* common law definition of "employee," Yates is an employee of Yates, P.C. In fact, the district court found that "Yates participated in the

Plan as an employee." (Petition App. 10a). It is undisputed that Yates was a W-2 employee of Yates, P.C. since the creation of the Profit Sharing Plan. Yates' status as the sole shareholder of Yates, P.C. and an employee does not militate against his status as a participant in the Profit Sharing Plan.

Tennessee law recognizes the distinction between a corporate entity and its shareholder/employees. *Hadden v. City of Gatlinburg*, 746 S.W.2d 687, 689 (Tenn. 1988); *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 115 (Tenn. Ct. App. 1993), *perm. to appeal denied* (1994). Such separation supports Yates' argument that he can be the sole shareholder of Yates, P.C. and, at the same time, be viewed separately by law as an employee of that entity.

The Profit Sharing Plan provides that any "employee" over the age of 21 who has completed one year of service is "eligible" to participate in the Profit Sharing Plan. (JA 37a, 110a-111a). The trust financial reports of the Profit Sharing Plan indicate that Yates met the eligibility provisions of the Profit Sharing Plan and that Yates was a participant. (JA 264a-267a). Contributions were made to the Profit Sharing Plan by Yates, P.C. based on Yates' compensation, which is defined in the Profit Sharing Plan as "W-2 compensation." (JA 48a, 93a.) Therefore, Yates was an "employee" of Yates, P.C. and a "participant" in the Profit Sharing Plan.[8]

[8] There is nothing in the record to indicate that Yates was anything other than an employee of Yates, P.C. The only basis for determining that Yates was not an employee of Yates, P.C. is the Sixth Circuit's misreading of 29 C.F.R. § 2510.3-3, which will be addressed *supra*.

C. Several Provisions of ERISA and the Internal Revenue Code Provide for Working Owners, such as Yates, to Be Employees and Participants in Employee Benefit Plans

ERISA, 29 U.S.C. § 1103(a), generally requires that all assets in an employee benefit plan be held in trust. However, 29 U.S.C. § 1103(b)(3)(A) contains an exception to this requirement for a plan if some or all of the participants are employees as described in 26 U.S.C. § 401(c)(1). Internal Revenue Code § 401(c)(1) [26 U.S.C. § 401(c)(1)] defines the term "employee" as including a self-employed individual, such as Yates, that has earned income from self-employment with respect to a trade or business of which the "personal services of the individual are a material income-producing factor." 26 U.S.C. §§ 401(c)(1)(B) and (2)(A), 1402(a) and (c). By adopting the definition of "employee" found in 26 U.S.C. § 401(c), Congress made it clear that both ERISA and the Internal Revenue Code intentionally provide for working owners of a business to participate in an employee benefit plan.

1. Statutory Provisions Related to Title I of ERISA Recognize That Working Owners May Be Participants in Tax-Qualified Pension Plans.

Internal Revenue Code § 401 [26 U.S.C. § 401] sets forth the tax rules to maintain a qualified plan. An "employee" under 26 U.S.C. § 401(c), which defines self-employed individuals and owner-employees, would qualify to both participate in a qualified plan and to obtain the same tax benefits that non-owner employees receive. 26 U.S.C. § 401(a). Other examples supporting this contention include the Revenue Act of 1942, which

allowed corporate shareholders to participate in tax-qualified pension plans. Revenue Act of 1942, Pub. L. No. 77-753, 56 Stat. 862 (former 26 U.S.C. § 165(a)(4)). Further evidence is contained in the Self-Employed Individuals Tax Retirement Act of 1962, which authorized the creation of "Keogh" plans to allow partners and sole proprietors "access to retirement plans on a reasonably similar basis to that accorded corporate shareholder employees." Pub. L. No. 87-792, 76 Stat. 809; S. REP. NO. 992, 87th Cong., 1st Sess. 8 (1961). Each of these statutory provisions evidence Congress' intent that working owners may be participants in ERISA employee benefit plans. If working owners were not allowed to participate in ERISA employee benefit plans, Congress' intent to consider working owners as employees under 26 U.S.C. § 401 would be thwarted.

2. Title IV of ERISA Expressly Recognizes Participation by a Sole Shareholder of a Corporate Employer in an Employee Benefit Plan.

Title IV of ERISA generally applies to "employee pension benefit plans" as defined in 29 U.S.C. § 1002(2). 29 U.S.C. § 1321(a). The plan cannot be an individual account plan and must meet the requirements of Internal Revenue Code § 401 [26 U.S.C. § 401]. 29 U.S.C. § 1321. Title IV of ERISA generally covers plans wherein substantial owners and other employees collectively participate. *See* 29 U.S.C. 1322(b)(5)(B) (referring to substantial owners as participants in an employee benefit plan). If the plan is established and maintained *solely* for "substantial owners," it is excepted from Title IV coverage. 29 U.S.C. 1321(b)(9). "Substantial owners" of a corporation are those who own more than ten percent of the stock in a corporation, which naturally

includes sole shareholders. 29 U.S.C. 1322(b)(5)(A)(iii). This reference to "substantial owners" as participants in ERISA employee benefit plans by definition includes sole shareholders such as Yates.

3. DOL Advisory Opinions Support Yates and the Profit Sharing Plan's Interpretation of ERISA and Its Regulations

In DOL Opinion Letter 79-08A, the DOL was asked to issue an advisory opinion regarding whether a partner's wife was eligible to be a participant in an employee benefit plan sponsored by her husband's company where she was employed. In rendering its opinion that the wife was a participant in the plan, the DOL stated that 29 C.F.R. § 2510.3-3

> is not intended to construe "employee" as that term is used in section 3(6) of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of

> the Fund as properly administered according to all applicable laws and plan documents.

DOL Opinion Letter 79-08A, Jan. 30, 1979. (JA 271a-273a).

The DOL has also issued an advisory opinion recognizing that "working owners" of businesses can be participants in employee benefit plans sponsored by their business. In DOL Opinion Letter 99-04A, the DOL addressed the issue of whether individuals who own business enterprises, either as sole proprietors, partners or shareholders, and who provide personal services to those businesses may be "participants" under ERISA. In concluding that such individuals could be participants, the DOL stated as follows:

> In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include "working owners" within the definition of "participant" for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner employees" under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of

ERISA, leading to the sort of "absurd results" that the Supreme Court warned against in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).

DOL Opinion Letter 99-04A, Feb. 4, 1999. (JA 274a-283a).

Furthermore, the Internal Revenue Code recognizes plans that benefit owner/employees as participants and affords such owner/employees the same treatment as non-owner employees. Internal Revenue Code § 401(a)(10) states that in the case of any plan that provides contributions or benefits for owner/employees, the trust that forms part of the plan shall constitute a qualified trust if other sections of the Internal Revenue Code are met. 26 U.S.C. § 401(a)(10). Under Internal Revenue Code § 401(a)(13) such a trust must contain an anti-alienation provision similar to that required under ERISA. 26 U.S.C. § 401(a)(13). Therefore, a trust which comprises an employee benefit plan that provides benefits to owner/employees as participants and that contains an anti-alienation provision is considered a qualified trust and entitled to special tax treatment under the Internal Revenue Code. Obviously such a statutory scheme assumes that owner/employees can be participants in such plans despite their ownership interest in the plan sponsor.

It is evident from the text of ERISA and related statutory provisions that Congress intended working owners to be "participants" in ERISA employee benefit plans. As a sole shareholder and working owner of Yates, P.C., Yates is an "employee" and therefore a "participant" of an ERISA employee benefit plan. The Sixth Circuit's holding that a sole shareholder cannot be considered an "employee" and "cannot qualify as a

'participant' . . . in an ERISA pension plan" ignores the specific guidance provided in the statute and by this Court which "thwart[s] the congressional design" of ERISA. *Yates*, 287 F.3d at 525; *Darden*, 503 U.S. at 323.

THE DECISION OF THE SIXTH CIRCUIT IN *YATES* ERRONEOUSLY INTERPRETS ERISA AND APPLICABLE AGENCY REGULATIONS AND IGNORES THIS COURT'S HOLDING IN *DARDEN*.

A. The Sixth Circuit Decision in *Yates* Is Erroneous

In *Yates*, the Sixth Circuit Court of Appeals held that Yates could not enforce the spendthrift clause contained in the Profit Sharing Plan because he was not a participant or beneficiary under ERISA due to his status as the sole shareholder of Yates, P.C. *Yates*, 287 F.3d at 525. This holding is based solely on circuit precedent as pronounced in *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993), and *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297 (6th Cir. 2000), *reh'g. denied*, 2000 U.S. App. Lexis 6844 (6th Cir. April 6, 2000). The Sixth Circuit in *Fugarino* held that "a sole proprietor or sole shareholder of a business must be considered a [sic] employer and not an employee of the business for purposes of ERISA." *Fugarino*, 969 F.2d at 186. In *Agrawal*, the court relied on the *Fugarino* decision and went further to hold that a sole shareholder, as an "employer," cannot qualify as a participant or beneficiary in an ERISA employee benefit plan and hence does not have standing to enforce the provisions of ERISA. *Agrawal*, 205 F.3d at 302. The *Fugarino* court relied significantly on its interpretation of 29 C.F.R. § 2510.3-3(c)(1). The application by the Sixth Circuit of 29 C.F.R. § 2510.3-3(c)(1) to who may be a

"participant" under ERISA is misplaced and not supported by case law from nine other circuits.

Section 2510.3-3 is entitled "employee benefit plan" and serves only to "clarify the definition in section 3(3) of the term 'employee benefit plan' for purposes of Title I of the Act and this chapter." (Petition App. 53a). Section (b) of this regulation defines "plans without employees" and provides that "the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan . . . ." *Id.* Section (c) sets forth the definition of "employee" for purposes of determining whether the employee benefit plan is benefiting employees. An individual or his or her spouse are deemed not to be "employees" of an employer that is wholly owned by the individual or by the individual and his or her spouse for the purpose of determining if an "employee benefit plan" exists. *Id.* Therefore, if the only participants of an employee benefit plan are the owner and his or her spouse, the plan does not meet the definition of an "employee benefit plan" under ERISA. However, if the employee benefit plan benefits employees other than the sole owner (and his or her spouse), the plan meets the definition of "employee benefit plan," and all the participants in the plan, including the sole owner, are entitled to the protections of ERISA, including those contained in the anti-alienation provisions. (Petition App. 53a-55a). Section 2510.3-3 is not determinative of whether an individual is an "employee" or a "participant" in an employee benefit plan. *Darden*, 503 U.S. 318 (1992).[9]

[9] The holding of this Court in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673 (2003) is not applicable to this case. In *Clackamas*, this court endorsed the Equal Employment Opportunity Commission's guidelines for determining whether partners and shareholders are employees under the Americans with Disabilities Act of 1990 ("ADA"). *Id.* at 1680 (citing 2 Equal Employment Opportunity Commission, Compliance Manual § 605:0009). The definition of "employee" within the ADA has two purposes. The first purpose is to determine whether there are enough "employees" to meet the fifteen employee threshold thereby subjecting the employer to the rules and regulations under the ADA. Secondly, the same definition is used to determine whether an individual is an "employee" entitled to sue for protections under the ADA. There must be an "employee benefit plan" and an "employer" for ERISA to apply. DOL Regulation 29 C.F.R. § 2510.3-3 specifically provides a test to determine whether an "employee benefit plan" exists. After it is established that an "employee benefit plan" exists, the determination of who may participate in the "employee benefit plan" is based on the definition of "employee" in 29 U.S.C. § 1002(6) and the definition of "participant" in 29 U.S.C. § 1002(7). Furthermore, as argued *infra*, statutory provisions of ERISA and the Internal Revenue Code evidence a clear Congressional intent to allow shareholder-employees to participate in employee benefit plans.

The *Fugarino* court found an ERISA employee benefit plan to exist and interpreted 29 C.F.R. § 2510.3-3(c)(1) to mean that a plan whose sole beneficiaries are the company's owners cannot qualify as an employee benefit plan under ERISA. *Fugarino*, 969 F.2d at 185-86. Taken by itself, this is a correct interpretation of this regulation as to plans whose only participant is the sole owner of the business or spouses who jointly own the business. *Fugarino* stretched this interpretation to apply to a group health plan that covered not only the sole owner and his wife and son, but also other non-related employees of the business.[10] *Id.* at 186. Based on this erroneous application, the court held that the

[10] The court based its holding in part on the proposition that a sole proprietor or sole shareholder "must be considered a [sic] employer and not an employee of the business for purposes of ERISA." *Fugarino*, 969 F.2d at 186. However the Sixth Circuit had previously held that shareholder status, without more, was not enough to confer ERISA employer status. *Scarbrough v. Perez*, 870 F.2d 1079 (6th Cir. 1989); *see also Santino v. Provident Life and Accident Ins. Co.*, 276 F.3d 772, 775 (6th Cir. 2001).

group health plan was an ERISA plan only as to the non-owner employees and, at the same time, was an insurance contract governed by state law as to the owner, his wife and his son. *Id.* The result was one group health plan subject to both ERISA and state law.

Eight years later the *Agrawal* court cited *Fugarino* for the proposition that a *sole proprietor* could not be a participant in an ERISA employee benefit plan and applied this reasoning in holding that a *sole shareholder* also could not be a participant or a beneficiary under an ERISA employee benefit plan. *Agrawal*, 205 F.3d at 300, 302. At issue in *Agrawal* was whether a sole shareholder's state law claims to enforce the provisions of an individual disability policy were preempted by ERISA. The corporation purchased an individual disability policy for the sole shareholder along with a separate group disability policy covering employees of the corporation. *Id.* at 298-99. The defendant insurance company argued that these plans taken together jointly constituted an ERISA employee benefit plan. *Id.* at 299. The court determined that it did not need to decide this issue because, under the holding of *Fugarino*, the sole shareholder could not be a participant or beneficiary of an ERISA employee benefit plan. *Id.* at 302. Therefore, Agrawal had no standing to enforce his rights under ERISA, and his state law claims arising under the ERISA plan were not preempted. *Id.* While stating that this result was "preordained" by the decision in *Fugarino*, the court also stated that the reasoning in *Fugarino* was "not thoroughly consistent with the goals of ERISA." *Id.* Applying the definition of "employee" contained in 29 C.F.R. § 2510.3-3(c)(1) to exclude self-employed individuals from the statutory definition of participant and beneficiary bestowed on self-employed individuals a "unique advantage: the self-employed individual can pursue a parade of state law

claims that are withheld from his employees by preemption," a result clearly inconsistent with the purposes of ERISA. *Id.* at 303.

The Sixth Circuit's misinterpretation of 29 C.F.R. § 2510.3-3(c)(1) continued in *Santino v. Provident Life and Accident Ins. Co.*, 276 F.3d 772 (6th Cir. 2001). In *Santino*, the court utilized the *Darden* test to determine that a joint shareholder of a corporation was an "employee" for purposes of ERISA. The shareholder argued that 29 C.F.R. § 2510.3-3(c)(1) prevented him from being an employee because he owned part of the corporation. In response, the court deferred to the DOL's interpretation of this regulation in DOL Opinion Letter 76-67A, May 21, 1976, under this Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court stated "[m]oreover, the Department of Labor interprets section 2510.3-3(c)(1) as applying '**only** where the stock of the corporation is wholly owned by one shareholder.'" *Santino*, 276 F.3d at 775 (citing DOL Opinion Letter 76-67A, May 21, 1976) (emphasis in original). However, the court omitted a pertinent portion of the DOL's finding contained in the same sentence cited by the court. In fact, the DOL found that this regulation excludes a pension or profit sharing plan from ERISA where the sponsoring corporation is "wholly owned by one shareholder and his or her spouse *and the shareholder or the shareholder and his or her spouse are the only participants in the plan*."[11] DOL Opinion Letter 76-67A, May 21, 1976 (emphasis added). Applying the entire interpretation found in DOL Opinion Letter 76-67A, May

[11] It is interesting to note that four months later the Sixth Circuit in *Yates* completely ignored not only the DOL opinion letter cited in *Santino* but also two other DOL opinion letters interpreting 29 C.F.R. §2510.3-3(c)(1). *See* DOL Opinion Letter 79-08A, January 30, 1979; DOL Opinion Letter 99-04A, February 4, 1999.

21, 1976, to the facts of *Yates* supports a finding that Yates can be an employee of Yates, P.C. and a participant in the Profit Sharing Plan.

The *Santino* court further held that because the holding in *Fugarino* should be limited to sole proprietors and sole shareholders, a joint shareholder is not precluded from being a participant in an ERISA employee benefit plan. *Santino*, 276 F.3d at 776. As support for this holding, the court cited *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) for the proposition that excluding shareholders from participation in employee benefit plans would frustrate Congress' intent to ensure similar treatment for all claims relating to such plans. *Id.* However, the Fourth Circuit in *Madonia* held that a *sole* shareholder could be an employee and consequently a participant in an employee benefit plan in which other non-owner employees participated, which is contrary to holding in *Yates*. *Madonia*, 11 F.3d at 450.

B. The Sixth Circuit Decision in *Yates* Is in Conflict with Case Law in Nine Other Circuits.

The reasoning of the Sixth Circuit in *Fugarino*, *Agrawal*, and *Yates* is inconsistent with decisions rendered by the courts of appeals in nine other circuits. The circuit courts in the Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have interpreted 29 C.F.R. § 2510.3-3(c)(1) to apply *only* to the determination of whether an "employee benefit plan" exists, not to the question of whether an individual can be a "participant" in an employee benefit plan. These circuits have interpreted this regulation to mean that an employee benefit plan exists if the plan benefits "employees" other than the sole owner of the

corporation, a partner or a sole proprietor. *Schwartz v. Gordon*, 761 F.2d 864 (2d Cir. 1985) (holding that a self-employed physician who was the only participant in a Keogh plan was not a participant for purposes of ERISA); *Leckey v. Stefano*, 263 F.3d 267 (3d Cir. 2001) (ruling that one of three shareholders of a corporation was an employee of the corporation for purposes of 29 C.F.R. § 2510.3-3 because the corporation was not wholly owned by the individual or the individual and his spouse); *Wolk v. UNUM Life Ins. Co. of Am.*, 186 F.3d 352 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000) (deciding that a partner of a law firm was a beneficiary of a long-term disability plan covering other partners and employees of the firm); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) (holding that a sole shareholder of a corporation was an employee of the corporation and a participant in a health plan that also covered other employees of the corporation); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999) (providing that a husband/co-owner of a corporation was an employee of the corporation and a participant in a health plan covering non-owner employees); *In re Baker*, 114 F.3d 636 (7th Cir. 1997) (stating that a majority shareholder of a corporation was an employee of the corporation and a participant in a profit sharing plan in which 18 other employees participated); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995) (ruling that a husband and wife who were sole owners of a corporation were at least beneficiaries of a group health plan also covering one other full-time employee of the corporation); *LaVenture v. Prudential Ins. Co. of Am.*, 237 F.3d 1042 (9th Cir. 2001) (deciding that a husband and wife who were sole shareholders of a corporation were not participants in a long-term disability policy only covering themselves; the policy was not an employee benefit plan under ERISA); *Watson v. Proctor*

(In re Watson), 161 F.3d 593 (9th Cir. 1998) (determining that a sole shareholder of a corporation was not an employee of the corporation or a participant in a profit sharing plan in which he was the sole participant; therefore, the plan was not an employee benefit plan under ERISA); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942 (1995) (ruling that a partner was a beneficiary of a group health policy covering the other partner and one employee of the partnership); *Sipma v. Mass. Casualty Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001) (holding that a 49% shareholder of a corporation was an employee of the corporation and a participant in an individual disability policy; the policy was an employee benefit plan under ERISA because he was not a "sole" shareholder); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001) (stating that the sole shareholder of a corporation was a beneficiary of the group health plan that covered him, his wife and three other employees); and *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999) (holding that the sole shareholder of a professional corporation was not a participant in a disability policy that covered only him).

The First Circuit is the only circuit to join the Sixth Circuit in its reasoning regarding the application of 29 C.F.R. § 2510.3-3.[12] In *Kwatcher v. Mass. Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989),

[12] The Seventh Circuit in *Giardono v. Jones*, 867 F.2d 409 (7th Cir. 1998) stated that 29 CFR § 2510.3-3(c)(1) excludes sole owners from the definition of employee and consequently a sole proprietor did not have standing to sue under ERISA as a plan participant. However, the Seventh Circuit later limited *Giardono* to cases involving sole proprietors and stated that 29 CFR § 2510.3-3 "means only that a one-person corporation must use a Keogh plan rather than an ERISA plan for its solitary employee; a firm with multiple employees may establish an ERISA pension or welfare plan in which the investor may participate." *In re Baker*, 114 F.3d at 639.

the court held that a sole shareholder of a corporation fell within the definition of an "employer" for purposes of ERISA and could not be a participant in an ERISA pension plan. This holding was based, in part, on the Fourth Circuit's holding in *Darden v. Nationwide Mutual Ins. Co.*, 796 F.2d 701 (4th Cir. 1986) that, in an ERISA case, the common-law test regarding a master-servant relationship is inappropriate when construing the definition of "employee" under ERISA. *Id.* at 706. This holding was subsequently overruled by this Court in *Darden*, 503 U.S. 318 (1992).[13]

C. The Sixth Circuit Decision in *Yates* Ignores This Court's Holding in *Darden*.

The issue of whether Yates is an employee under ERISA and a participant entitled to enforce the spendthrift clause contained in the Profit Sharing Plan must be resolved using this Court's reasoning contained in *Darden*. In *Darden*, this Court adopted a common-law test for determining who is an "employee" under 29 U.S.C. § 1002(6) of ERISA. *Darden*, 503 U.S. at 319. The definition of "employee" is important because this term is used to determine who can be a "participant" as defined in 29 U.S.C. § 1002(7) of ERISA. (Petition App. 61a-62a). This Court held in *Darden* that the common-law definition of employee should be used to determine who could be an employee and therefore a participant in an employee benefit plan. *Darden*, 503 U.S. at 323. The Sixth Circuit in *Fugarino* and *Agrawal* ignored the *Darden* reasoning and instead erroneously applied the limited definition of "employee" found in 29 C.F.R. § 2510.3-3(c)(1), which should be used solely to determine if an employee benefit plan exists. This error was

[13] The *Fugarino* court also relied on *Kwatcher* in holding that a sole proprietor or sole shareholder cannot be considered an employee for purposes of ERISA. *Fugarino*, 969 F.2d at 186.

perpetuated by the Sixth Circuit decision in *Yates*, resulting in the decision before this Court for review.

D. The Sixth Circuit Decision in *Yates* Ignores the DOL's Interpretation of 29 C.F.R. § 2510.3-3.

In misapplying the provisions of 29 C.F.R. § 2501.3-3(c)(1) to Yates, the Sixth Circuit ignored not only the plain reading of the regulation but also the interpretation of this regulation by the agency which promulgated it. The DOL has issued advisory opinions addressing the issue of whether "working owners," either sole proprietors, partners or shareholders, who provide personal services to their business can be "participants" in an employee benefit plan sponsored by a company. The DOL concluded that working owners are not precluded from being participants under ERISA in employee benefit plans in which other non-owner employees participate. DOL Opinion Letter 79-08A, Jan. 30, 1979; DOL Opinion Letter 99-04A, Feb. 4, 1999. These opinions are entitled to deference.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 843-844.

Despite the fact that these opinion letters were cited by Yates and the Profit Sharing Plan in their brief, the Sixth Circuit opinion in *Yates* makes no reference to these opinion letters which directly addressed the issue that was before the court.

E. The Sixth Circuit Decision in *Yates* Conflicts with the Purposes of ERISA and Leads to the "Absurd Results" This Court Warned Against in *Darden*.

The decisions by the Sixth Circuit in *Fugarino*, *Agrawal*, and *Yates* produce the "absurd results" this Court warned about in *Darden*. By finding that a sole shareholder of a corporation cannot be both an employer and an employee (in blatant disregard of state common law recognizing these separate and distinct legal identities) and is ineligible to qualify as a participant with the full rights and benefits afforded by ERISA, the Sixth Circuit in essence has created two types of plan participants – ERISA participants (the non-owner employees) and non-ERISA participants (owner employees). Based on the Sixth Circuit's holdings, a "sole shareholder" can resort to more extensive state law remedies to enforce his or her rights under the same plan while participants are limited to ERISA's remedial scheme. Such a result is most certainly "absurd" in light of the purposes of ERISA and Congress' intent to formulate a nationwide standard of law to govern ERISA plans and their participants. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Madonia*, 11 F.3d at 450. For example, if the participants wish to pursue a claim

of breach of fiduciary duty against a plan fiduciary, the employee/participants are limited to the enforcement provisions found in Title I of ERISA, including "appropriate equitable remedies" as interpreted by this Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). On the other hand, a sole shareholder could resort to state law remedies for the same breach of fiduciary duty, including the possibility of money damages, treble damages and punitive damages (available under some consumer protection statutes) that are not available to the employee/participants in the same plan. The Sixth Circuit's holdings in *Fugarino*, *Agrawal* and *Yates* serve to divide ERISA benefit plans into two components: one governed by ERISA as to employees and one governed by state law as to sole shareholders such as Yates. Such a result is absurd and is inconsistent with case law in at least six other circuits.[14]

Furthermore, such inconsistent remedies fly in the face of the ERISA preemption statute contained in 29 U.S.C. § 1144, which provides that the provisions of

[14] The courts in the Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have held that where an employee benefit plan covers employees other than a sole owner or the sole owner and his or her spouse, the sole owner can be a participant; and such a plan is covered under ERISA. These courts specifically noted the importance of ensuring consistent remedies for all participants and furthering Congress' intention of a nationwide body of uniform law as support for their holdings. *See Wolk v. UNUM Life Ins. Co. of Am.*, 186 F.3d 352 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *Madonia v. Blue Cross & Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994); *Vega v. Nat'l Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999); *Robinson v. Linomaz*, 58 F.3d 365 (8th Cir. 1995); *Peterson v. Am. Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995), *cert. denied*, 516 U.S. 942 (1995); *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999), and *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001).

Title I and Title IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]." 29 U.S.C. § 1144(a). This Court has characterized this preemption language as "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The ERISA preemption statute has also been described as "one of the broadest preemption clauses ever enacted by Congress." *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990). The Sixth Circuit held that Yates was not a participant of the Profit Sharing Plan and that he could not avail himself of the protections of ERISA. It is interesting to note that the Sixth Circuit in *Yates* did not hold that the Profit Sharing Plan was not an employee benefit plan as to other employee participants. It is inconsistent for the Sixth Circuit to hold that Yates is a non-ERISA entity which may pursue state law claims in regard to an employee benefit plan given ERISA's preemption provision that any and all state laws that relate to an employee benefit plan are preempted.

CONCLUSION

This Court should reverse the decision of the Sixth Circuit Court of Appeals holding that Yates is not an employee in the Profit Sharing Plan, should overturn the grant of summary judgment in the favor of the Bankruptcy Trustee and grant summary judgment in the favor of Yates and the Profit Sharing Plan based on the fact that Yates is an employee of Yates, P.C. and a participant in the Profit Sharing Plan and is entitled to enforce the Profit Sharing Plan's anti-alienation provisions as outlined in *Patterson*.

Respectfully submitted this 11th day of August, 2003.

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