No. _____

In The
Supreme Court of the United States

JACQUELINE HILLMAN,
Petitioner,

v.

JUDY A. MARETTA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

VA. CODE ANN. § 20-111.1(A) (2011) provides that a life insurance policy's revocable beneficiary designation naming a then spouse is deemed revoked upon the entry of a Final Decree of Divorce. 5 U.S.C. § 8705(a) provides that the proceeds from a Federal Employees Group Life Insurance (FEGLI) policy should be paid to the beneficiaries properly designated by the employee, and if none, then to the widow of the employee. If VA. CODE ANN. § 20-111.1(A) is preempted by 5 U.S.C. § 8705(a) or any other federal law, VA. CODE ANN. § 20-111.1(D) (2011), gives the widow (or whoever would otherwise be entitled to the insurance proceeds), after FEGLI insurance proceeds have been distributed to an ex-spouse, a domestic relations equitable remedy against the ex-spouse for the amount of the insurance proceeds received.

The Supreme Court of Virginia, in agreement with the Supreme Court of Alabama, the First, Seventh and Eleventh Circuits of the United States Court of Appeals and several lower federal courts, **but** in direct conflict with the Indiana Supreme Court, the Supreme Court of Mississippi, the Court of Appeals of North Carolina, the Appellate Court of Illinois, the Missouri Court of Appeals, the Court of Appeals of Texas, the Superior Court of New Jersey, Appellate Division, the Superior Court of Pennsylvania, and the Court of Appeals of Kentucky, held that 5 U.S.C. § 8705(a) preempts a state domestic relations equitable action against the beneficiary of a FEGLI policy after the insurance proceeds of such policy have been paid to such

beneficiary in accordance with the statutory order of precedence in 5 U.S.C. § 8705(a).

The question presented is whether 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 (FEGLIA) or any regulation promulgated thereunder preempts a state domestic relations equitable remedy which creates a cause of action against the recipient of FEGLI insurance proceeds after they have been distributed, like the one contained in VA. CODE ANN. § 20-111.1(D).

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The opinion of the Supreme Court of Virginia (App. 1a) is available at *Maretta v. Hillman*, 722 S.E.2d 32 (Va. 2012). The Order of the Circuit Court of Virginia granting summary judgment (App. 32a) is not reported. The letter opinion of the Circuit Court of Virginia overruling Respondent's Plea in Bar/Demurrer (App. 35a) is available at 80 Va. Cir. 439 and 2010 WL 7373701 (Va. Cir. Ct.).

JURISDICTION

The Supreme Court of Virginia entered judgment on January 13, 2012. The time for filing a petition for rehearing elapsed 30 days later on February 12, 2012. Va. Ct. R. 5:37(d). This Court has jurisdiction to review the federal preemption issues decided by the Supreme Court of Virginia under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. art. VI provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The relevant provisions of FEGLIA are as follows:

5 U.S.C. § 8705(a) provides, in relevant part:

> (a) Except as provided in subsection (e), the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> > First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title as provided by section 8706(b) of this title, in the Office of Personnel Management. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.
> >
> > Second, if there is no designated beneficiary, to the widow or widower of the employee.

5 U.S.C. § 8705(e) provides, in relevant part:

> (e)(1) Any amount which would otherwise be paid to a person determined under the order of precedence named by subsection (a) shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.
>
> (2) For purposes of this subsection, a decree, order, or agreement referred to in paragraph (1) shall not be effective unless it is received, before the date of the covered employee's death, by the employing agency or, if the employee has separated from service, by the Office.

5 U.S.C. § 8709(d)(1) provides:

> (d)(1) The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

The relevant provision of the federal regulations promulgated under FEGLIA is as follows:

5 C.F.R. § 870.802(f) provides:

> (f) An insured individual (or an assignee) may change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted.

The relevant provisions of VA. CODE ANN. § 20-111.1 (2011) are as follows:

> A. Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent.
>
> D. If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

STATEMENT OF THE CASE

This case squarely presents an important federal preemption issue which has not been, but should be settled by this Court – whether state domestic relations equitable actions may be maintained against the recipient of life insurance proceeds from a FEGLI policy after such proceeds have been paid to such beneficiary in accordance with the statutory order of precedence contained in 5 U.S.C. § 8705(a). This issue affects numerous families across the country who are already coping with the death of a loved one. Instead of being able to rely on the certainty of the law regarding who is entitled to FEGLI insurance proceeds, they find themselves embroiled in litigation, the outcome of which largely depends on which state court is ruling on the issue or whether the case is brought in federal or state court.

Moreover, VA. CODE ANN. § 20-111.1(D) is based on UNIF. PROBATE CODE § 2-804(h)(2) (amended 2008) which has already been adopted by 12 states and which the National Conference of Commissioners of Uniform State Laws is encouraging other states to adopt. Until this Court settles this matter, nationwide litigation will continue to increase as this issue now arises by statutory right instead of just under property settlement agreements and divorce decrees as it has in the past. In fact, so far in 2012, there have already been two state courts of last resort, the Supreme Court of Virginia and the Indiana Supreme Court, which have ruled in opposite of one another on this issue.

Furthermore, this Court has already recognized this is an important issue that must be settled. In *Kennedy v. Dupont Savings and Investment Plan*, when dealing with the analogous laws of the Employee Retirement Income Security Act of 1974 ("ERISA"), this Court specifically did not express any view (and some might say invited the issue to be brought before this Court) "as to whether the Estate could have brought an action in state or federal court against [Ex-Wife] to obtain the benefits after they were distributed." *Kennedy v. Dupont Savings and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 875 n. 10 (2009).

In this case, the relevant facts are not in dispute. *Maretta*, 722 S.E.2d at 33, App. 4a. Warren Hillman ("Insured") named Respondent/Defendant Judy Maretta ("Ex-Wife"), his wife at the time, as the beneficiary of his FEGLI policy in December 1996. *Id.* Insured and Ex-Wife divorced in December 1998. Insured married Petitioner/Plaintiff Jacqueline Hillman ("Widow") in October 2002. *Id.* Insured, however, never changed the beneficiary designation for his FEGLI policy. *Id.* Insured died in July 2008. *Id.* At the time of his death, Insured was still married to Widow. *Id.* After her husband's death, Widow filed a claim for benefits under Insured's FEGLI policy but was told the proceeds would be distributed to Insured's designated beneficiary, Ex-Wife. *Id.* Ex-Wife filed a claim for and received the death benefits under the FEGLI policy in the amount of $124,558.03. *Id.*

Widow filed a Complaint against Ex-Wife seeking damages under VA. CODE ANN. § 20-111.1(D)

in an amount equal to the proceeds Ex-Wife received from Insured's FEGLI policy. Complaint For Recovery of Death Benefit From Federal Employees' Group Life Insurance Policy, Paragraph B. Ex-Wife filed a Demurrer and Plea in Bar to Widow's Complaint claiming that FEGLIA preempts VA. CODE ANN. § 20-111.1(D). Demurrer and Plea In Bar, Paragraph 8. "As Section 20-111.1(D) conflicts with Section 8705(a), by providing for the distribution of the value of the proceeds of the FEGLI policy to someone other than the designated beneficiary, Section 8705(a) and 8709(d)(1) of FEGLIA preempt Section 111.1(D) . . ." *Id.* Ex-Wife argued that FEGLIA preempts VA. CODE ANN. § 20-111.1(D) in Section III(D) of her brief supporting her Demurrer and Plea In Bar, titled "FEGLIA Also Preempts Virginia Code § 20-111.1(D), Such That Ms. Maretta Is Not Liable For the Amount of the Proceeds to Plaintiff." Memorandum In Support of Demurrer and Plea In Bar, 7-15.

The Honorable Michael F. Devine of the Circuit Court of Fairfax County held "that Virginia Code § 20–111.1(D) is not preempted by FEGLIA, and thus Ms. Maretta's Plea in Bar/Demurrer is hereby overruled. Ms. Maretta's exceptions to the Court's ruling are noted for each of the reasons ably articulated by her counsel on brief and at the May 7, 2010 hearing." *Hillman v. Maretta*, 80 Va. Cir. 439, 2010 WL 7373701, 10 (Va. Cir. Ct.), *rev'd*, 722 S.E.2d 32, App. 58a. The trial court then granted Widow summary judgment on the same grounds. Order Granting Summary Judgment, 1-2, App. 32a-33a. Ex-Wife preserved her right to appeal on the

grounds that FEGLIA preempts VA. CODE ANN. § 20-111.1(D) in her objections to the trial court's order. Order Granting Summary Judgment, 3, App. 34a.

Ex-Wife appealed the trial court's award of summary judgment to the Supreme Court of Virginia. Ex-Wife's Petition for Appeal. Ex-Wife's sole Assignment of Error was that "[t]he trial court erred in determining that Jacqueline Hillman's claim under Virginia Code § 20-111.1(D) was not preempted by federal law pursuant to the Federal Group Life Insurance Act, specifically 5 U.S.C. § 8709(d)(1), and awarding the Plaintiff summary judgment." *Id*. at 1. A divided Supreme Court of Virginia "reverse[d] the judgment of the circuit court. Because we conclude that FEGLIA preempts Code § 20-111.1(D), we will enter judgment for Maretta." *Maretta*, 722 S.E.2d at 38, App. 16a.

Widow respectfully files this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case. This Court needs to address this matter to bring the various state and federal courts in line with one another. Until it does so, there will be an increasing amount of needless nationwide litigation regarding this unresolved issue causing unnecessary hardship to grieving families.

REASONS FOR ALLOWANCE OF THE WRIT

I. THERE IS A WIDELY RECOGNIZED CONFLICT REGARDING WHETHER AN ACTION MAY BE BROUGHT AGAINST THE BENEFICIARY OF A FEGLI POLICY TO OBTAIN INSURANCE PROCEEDS AFTER THEY HAVE BEEN DISTRIBUTED IN ACCORDANCE WITH 5 U.S.C. § 8705(a).

Many state and federal courts have addressed the issue of whether FEGLIA preempts state domestic relations equitable remedies. In doing so, the more recent cases have noted the drastic split between the courts. *Hardy v. Hardy*, 963 N.E.2d 470, 2012 WL 859698 (Ind.), 3 ("[W]e note that several state and federal courts have explored whether FEGLIA preempts equitable state law claims and have reached disparate results."); *McCord v. Spradling*, 830 So. 2d 1188, 1203 (Miss. 2002) ("[W]hile the federal courts have held that FEGLIA preempts state equitable actions, such is not the case with the large majority of state courts that have addressed this issue."); *Maretta*, 722 S.E.2d at 37. ("We are aware . . . that our decision today stands in contrast to a majority of state court decisions."); *Metro. Life Ins. Co. v. Zaldivar*, 337 F. Supp. 2d 343, 346 n. 2 (D. Mass. 2004), *aff'd*, 413 F.3d 119 (1st Cir. 2005) ("In contrast [to our ruling] numerous state courts have held to the contrary."); *Fagan v. Chaisson*, 179 S.W.3d 35, 41 (Tex. App. 2005) ("Although the specific preemption question before us has yet to be addressed by this court, it has been considered both by federal and state courts outside this jurisdiction.

These courts have reached disparate results on the issue."); *Sedarous v. Sedarous*, 285 N.J. Super. 316, 320 (1995) ("The specific preemption question before us, while not yet addressed in this jurisdiction, has been considered both by federal and state courts, which have reached disparate results."); *Eonda v. Affinito*, 427 Pa. Super. 317, 322 n. 2 (1993) ("We are aware that appellant's position is supported by some state and federal (district and circuit court) case law; however, we note that none of the cases on this topic is binding on this court."); *Kidd v. Pritzel*, 821 S.W.2d 566, 569 (Mo. Ct. App. 1991) ("There has been a split in the jurisdictions about whether § 8705 should preempt all state law claims or whether the statute merely provides a simple procedure for payment of the policy's benefits.").

A. The Large Majority Of State Courts, In Contrast To The Supreme Court Of Virginia, Have Held That FEGLIA Does NOT Preempt A State Domestic Relations Equitable Action Against The Recipient Of Life Insurance Proceeds From A FEGLI Policy After Such Proceeds Have Been Distributed To Such Beneficiary In Accordance With 5 U.S.C. § 8705(a).

The Indiana Supreme Court, the Supreme Court of Mississippi, the Court of Appeals of Texas, the Superior Court of New Jersey, Appellate Division, the Superior Court of Pennsylvania, the Missouri Court of Appeals, the Appellate Court of Illinois, the Court of Appeals of North Carolina, and the Court of

Appeals of Kentucky have all found that FEGLIA does NOT preempt a state domestic relations equitable action against the recipient of FEGLI life insurance proceeds after such proceeds have been distributed to such beneficiary in accordance with 5 U.S.C. § 8705(a). The following is a short summary of each of the aforementioned court's rulings on the subject:

> *The Indiana Supreme Court*: In the March 2012 opinion, *Hardy v. Hardy*, the insured was required to designate his first wife and his grandchildren as equal beneficiaries under his FEGLI policy under a divorce decree and property settlement agreement. *Hardy*, 2012 WL 859698, 1-2. After his divorce from his first wife, the insured married his second wife and designated her as the beneficiary of his FEGLI policy. *Id*. He subsequently divorced his second wife, but did not change his beneficiary designation prior to his death. *Id*.

The Indiana Supreme Court held that FEGLIA did not preempt state law equitable claims against the individual who received FEGLI policy proceeds once they have been paid. *Id*. at 9.

> The sole purpose of section 8705 has always been to provide for the speedy and economic settlement of insurance claims." The section "fulfills the congressional intention by reducing administrative and legal hassles." Thus, once proceeds are paid out to a designated beneficiary, the purpose of § 8705

> has been achieved. And state law claims asserting an equitable interest in those proceeds do not affect that purpose and thus do not conflict with the congressional intent underlying FEGLIA.

Id. at 6. (internal citations omitted).

The Supreme Court of Mississippi: In *McCord v. Spradling*, a widow contracted with her husband, the insured, in an antenuptial agreement to "waive and release any and all of his or her interest in the property of the other, either as a surviving spouse or otherwise." *McCord*, 830 So. 2d at 1190-1191. Nevertheless, the widow applied for and received the insured's FEGLI policy proceeds after his death. *Id*. at 1191. The insured's estate and his children from a prior marriage sued the widow claiming she breached the antenuptial agreement. *Id*. at 1192. The Supreme Court of Mississippi held that FEGLIA did not preempt a breach of contract claim seeking entitlement to the insurance proceeds from a FEGLI policy after they had been paid to the widow. *Id*. at 1193.

The Court of Appeals of Texas: In *Fagan v. Chaisson*, an ex-wife sued a widow for a portion of FEGLI policy proceeds the widow received following the death of the insured on the grounds that the ex-wife was entitled to the insurance proceeds under a property settlement agreement. *Fagan*, 179 S.W.3d at 38-41. The Court of Appeals of Texas stated that "we join the majority of state courts that have addressed this issue and hold that FEGLIA does not preempt the power of state courts to impose a

constructive trust on FEGLIA insurance proceeds." *Id*. at 42. *See also Roberts v. Roberts*, 560 S.W.2d 438 (Tex. Civ. App. 1977).

The Superior Court of New Jersey, Appellate Division: In *Sedarous v. Sedarous*, a married couple were in the middle of a divorce, when the husband died. *Sedarous*, 285 N.J. Super. at 319-320. The husband's sister was the designated beneficiary under husband's FEGLI policy. *Id*. at 319. Following husband's death, wife sued the sister seeking to have a constructive trust imposed over the insurance proceeds. *Id*. 320. The trial court granted sister's motion for summary judgment on the grounds that FEGLIA preempted such an equitable remedy. *Id*. The Superior Court of New Jersey, Appellate Division found that "while Congress has surely occupied the field of federal employee group insurance up to the point of payment of proceeds, FEGLIA, in our view, does not reach beyond that point." *Id*. at 327. Accordingly, the court held that "federal law does not preclude [a state court] from imposing a constructive trust on FEGLIA proceeds." *Id*.

The Superior Court of Pennsylvania: In *Eonda v. Affinito*, an insured had agreed in a Comprehensive Marriage Settlement Agreement to designate his son as the beneficiary of his life insurance policies. *Eonda*, 427 Pa. Super. at 319. However, the insured changed the beneficiary designation of his FEGLI policy to Jeannene Affinito prior to his death. *Id*. The son brought an unjust enrichment claim against Affinito based on his father's breach of the

agreement. *Id*. The Superior Court of Pennsylvania stated that

> we are confident that Congress did not intend that the vast number of federal employees in this country be permitted to enter into voluntary, state court-sanctioned agreements concerning the care and welfare of their children and then shirk completely the duties imposed by those agreements. The federal interest in doing so is far too minimal and the damaging impact to state domestic relations law far too grave.

Id. at 325-326. Accordingly, the court held that FEGLIA did not preempt a claim against insurance proceeds after the funds had been paid to the designated beneficiary. *Id*. at 321-325.

The Missouri Court of Appeals: In *Kidd v. Pritzel*, the insured agreed in a property settlement agreement to maintain his children from the marriage as the beneficiaries of his FEGLI policy. *Kidd*, 821 S.W.2d at 567. Thereafter, he designated his two sisters as the beneficiary of his policy. *Id*. He also wrote in his will that his sisters were to hold the FEGLI policy proceeds in trust for the benefit of his children. *Id*. The sisters retained the policy proceeds for their own benefit. *Id*. The children sued the sisters to recover the FEGLI proceeds. *Id*. The trial court ruled that the children's claims were barred by FEGLIA. *Id*. at 568. The Missouri Court of Appeals found that while "§ 8705 serves a valuable and worthwhile purpose of keeping the [Office of Personnel Management (OPM)] and the insurance company out of legal entanglements" it

does not bar equitable claims once the proceeds have been paid to the beneficiary. *Id*. at 572. The court then went on to hold that the children's equitable claims were not preempted by FEGLIA. *Id*. at 575.

The Appellate Court of Illinois: In *In re Estate of Anderson*, the insured and his widow entered into a prenuptial agreement in which the widow waived her rights to the proceeds from the insured's life insurance as surviving spouse. *In re Estate of Anderson*, 195 Ill. App. 3d 644, 645-647 (1990). The insured did not have a designated beneficiary for his FEGLI policy, so the widow was entitled to receive the proceeds from this policy under 5 U.S.C. § 8705(a). *Id*. at 648. The executors of the insured's estate sued the widow to recover the insurance proceeds. *Id*. Regarding the question of federal preemption, the Appellate Court of Illinois found "that Congress, when enacting the current provisions in section 8705(a), intended to alleviate the administrative difficulties previously suffered by the Civil Service Commission and the insurance companies when paying death benefits and to avoid serious delay in paying these benefits to the survivors of Federal employees." *Id*. at 653. Therefore, the court held that 5 U.S.C. § 8705(a) "does not preclude a third party from bringing an action against the payee to compel payment of the proceeds to another party properly entitled to the proceeds." *Id*.

The Court of Appeals of North Carolina: In *Barden v. Metro. Life Ins. Co.*, the insured agreed in a property settlement agreement to maintain his soon to be ex-wife as the beneficiary of his FEGLI

policy. *Barden v. Metro. Life Ins. Co.*, 41 N.C. App. 135, 136-137 (1979). The insured then remarried and designated his new wife as the beneficiary. *Id.* at 137. After his death, the ex-wife sued the insurance company and the new wife for the FEGLI proceeds. *Id.* at 136. The Court of Appeals of North Carolina found that "compliance with the procedure set out in 5 U.S.C. § 8705(a) does not as a matter of law automatically entitle the person so designated to the proceeds." *Id.* at 138. Therefore, the court ruled that the ex-wife was entitled to the FEGLI proceeds in accordance with the property settlement agreement. *Id.* at 139.

The Court of Appeals of Kentucky: In *Bell v. Bell*, the insured originally designated his ex-wife as the beneficiary of his FEGLI policy. *Bell v. Bell*, 2009 WL 350607, 1-2 (Ky. App. Unpub.). The insured remarried but never properly changed his beneficiary designation. *Id.* at 2. After the insured's death, his widow sued his ex-wife for the insured's FEGLI proceeds claiming that the insured intended to change his beneficiary designation to his widow, but mistakenly filled out the wrong form. *Id.* In addressing the issue of whether FEGLIA preempted an equitable claim against the ex-wife for the insurance proceeds, the Court of Appeals of Kentucky found that

> Congress' intent in amending the FEGLI was to prevent clogging of the federal courts for challenges to the designated beneficiary. Allowing a family member to sue in state court does not in anyway conflict with this intention, and in fact, it gives federal employees' family members the same rights

> they would have were their loved ones not employed by the federal government.

Id. at 4. Accordingly, the court held that FEGLIA did not preempt state courts from granting equitable remedies. *Id*. at 4-5.

B. The Only Other State Court To Hold That FEGLIA Preempted A State Equitable Remedy Was Alabama.

The only other state court to find that FEGLIA preempted a state equitable remedy was the Supreme Court of Alabama. *Metro. Life Ins. Co. v. Potter*, 533 So. 2d 589 (Ala. 1988). However, this case does not necessarily speak to the issue of whether or not the recipient of FEGLI proceeds could be sued after the recipient had received the funds.

In *Metro. Life Ins. Co. v. Potter*, the insured was ordered in a state court divorce proceeding to maintain his ex-wife as the beneficiary of his FEGLI policy. *Id*. at 591. However, the insured subsequently changed his beneficiary designation to his son, his brother and a friend. *Id*. The life insurance company received competing claims for the insurance proceeds. *Id*. The Supreme Court of Alabama found that "[i]f the divorce judgment is deemed to control payment of the FEGLI proceeds, then it conflicts with the federal statutory order of precedence, 5 U.S.C. § 8705(a)." *Id*. at 593. However, since this was a suit against the insurance company to direct that the proceeds be paid to the ex-wife instead of to the designated beneficiaries, it

did not necessarily address whether the ex-wife could have maintained a suit against the designated beneficiaries once the proceeds had been paid.

C. The Large Majority Of Federal Courts, In Contrast To The Large Majority Of State Courts, Have Held That FEGLIA Preempts State Domestic Relations Equitable Remedies.

Several federal courts have addressed the issue of whether FEGLIA preempts state domestic relations equitable remedies and almost all of them have found for preemption.

United States Court of Appeals, Eleventh Circuit: In *O'Neal v. Gonzalez*, the insured agreed to name his friend as the beneficiary of his FEGLI policy in exchange for consideration. *O'Neal v. Gonzalez*, 839 F.2d 1437, 1438 (11th Cir. 1988). However, the insured designated his aunt as 90% beneficiary of his FEGLI policy instead. *Id*. The friend sued the insurance company and the aunt for the proceeds. *Id*. at 1439. Even though the Eleventh Circuit was dealing with the situation where the insurance company was being sued before the proceeds were distributed, it addressed the issue of "whether a constructive trust benefitting a non-designated person may be imposed upon proceeds of the FEGLIA policy once payment has been made to the designated beneficiary." *Id*. The court ruled that such remedies were preempted. *Id*. at 1440.

United States Court of Appeals, First Circuit: In *Metro. Life Ins. Co. v. Zaldivar*, a divorce decree required the insured to maintain his children from his first marriage as the beneficiaries of his FEGLI policy. *Metro. Life Ins. Co. v. Zaldivar*, 413 F.3d 119, 120 (1st Cir. 2005). Nevertheless, the insured changed his beneficiary designation to his second wife prior to his death. *Id.* The First Circuit determined that this Court's opinion in *Ridgway v. Ridgway*, 454 U.S. 46 (1981), which dealt with the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"), controlled the case and held that the children's claim was barred. *Id.* at 120-121.

United States Court of Appeals, Seventh Circuit: In *Metro. Life Ins. Co. v. Christ*, a divorce decree ordered the insured to maintain his children as the beneficiaries of his FEGLI policy. *Metro. Life Ins. Co. v. Christ*, 979 F.2d 575, 576 (7th Cir. 1992). However, the insured never designated anyone as the beneficiary of his FEGLI policy. *Id.* At the time of his death, the insured had remarried. *Id.* Both the guardian of his children and his widow filed competing claims with the insurance company for the proceeds. *Id.* "MetLife, in turn, filed an interpleader action . . . to determine the proper beneficiary." *Id.* The Seventh Circuit found that "Congress in FEGLIA has spoken 'with force and clarity' in directing to whom insurance benefits are to be paid." *Id.* at 582. "[I]f Congress chooses to favor administrative efficiency over more equitable considerations, it is not our place to second guess or try to bypass that decision." *Id.* Therefore, the court held that FEGLIA preempted state domestic relations equitable remedies which required

insurance proceeds to be paid to someone other than in accordance with 5 U.S.C. § 8705(a). *Id.* However, since this case was dealing with FEGLI proceeds before they had been distributed, the court did not hold that an action could not be brought against the recipient of the proceeds after they had been paid out.

Federal District Courts which have ruled similarly include: *Metro. Life Ins. Co. v. Barber*, No. Civ.A.5:01-CV-025-C, 2001 WL 1683253 (N.D. Tex. 2001); *Metro. Life Ins. Co. v. Bell*, 924 F. Supp. 63 (E.D. Tex. 1995); *Metro. Life Ins. Co. v. Armstrong-Lofton*, 19 F. Supp. 2d 1134 (C.D. Cal. 1998); *Mercier v. Mercier*, 721 F. Supp. 1124 (D. N.D. 1989); *Metro. Life Ins. Co. v. Pearson*, 6 F. Supp. 2d 469 (D. Md. 1998); *But see Fernbaugh v. Metro. Life Ins. Co.*, CV-06-1361, 2006 U.S. Dist. LEXIS 67765 (M.D. Pa. Sept. 21, 2006) (FEGLIA did not preempt a state law equitable claim).

II. THIS COURT HAS EXPRESSLY RECOGNIZED THAT THE QUESTION PRESENTED IS AN IMPORTANT UNRESOLVED ISSUE.

In *Kennedy v. Dupont Savings and Investment Plan*, William Kennedy was a participant in a savings and investment plan (SIP), with power both to 'designate any beneficiary or beneficiaries to receive all or part' of the funds upon his death, and to 'replace or revoke such designation.'" *Kennedy*, 129 S. Ct. at 868. During his marriage to Liv Kennedy, William designated her as the beneficiary of his SIP. *Id.* at 869. When William and Liv

divorced, a divorce decree divested Liv of her rights in the SIP. *Id*. However, William never changed his beneficiary designation. *Id*. After William's death, the SIP plan administrator paid the SIP death benefit to Liv in accordance with William's beneficiary designation. *Id*. William's "[e]state then sued [his employer] and the SIP plan administrator . . . claiming that the divorce decree amounted to a waiver of the SIP benefits on Liv's part, and that [his employer and the SIP plan administrator] had violated ERISA by paying the benefits to William's designee." *Id*.

This Court held "that the plan administrator did its statutory ERISA duty by paying the benefits to Liv in conformity with the plan documents." *Id*. at 875. However, in doing so, this Court specifically stated that "we [do not] express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed." *Id*. at n. 10.

This Court has consistently ruled that plan benefits need to be paid in accordance with plan documents in order to alleviate the difficulties with which plan administrators, insurance companies, etc. would otherwise have to contend. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 149-150 (2001) ("Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimizing the administrative and financial burdens' on plan administrators.") (internal citations omitted). However, this Court has also recognized that the issue of whether federal law preempts state

equitable remedies after benefits have been paid, has not been, but needs to be addressed (and some would say that *Kennedy*, 129 S. Ct. at 875, n. 10 is an invitation to bring this issue before this Court).

III. THE QUESTION PRESENTED REQUIRES THIS COURT'S IMMEDIATE ATTENTION AND THIS CASE PRESENTS A HIGHLY SUITABLE VEHICLE FOR RESOLVING IT.

Until this Court addresses the question presented, litigation regarding FEGLIA preemption will expand at a rapid pace as more and more states adopt UNIF. PROBATE CODE § 2-804(h)(2). Up to now, all of the cases that have addressed whether FEGLIA preempts state equitable remedies have arisen because an insured failed to maintain someone as the beneficiary of a FEGLI policy as required by a divorce decree, property settlement agreement, etc. or an ex-spouse waived a right to be a beneficiary of FEGLI proceeds in a property settlement agreement, etc. While this alone has already created significant nationwide litigation for grieving families, the new line of statutes being adopted in accordance with UNIF. PROBATE CODE § 2-804(h)(2) significantly increases the potential for litigation.

In this case, the statute in question is VA. CODE ANN. § 20-111.1(D). This Virginia code section is based on UNIF. PROBATE CODE § 2-804(h)(2), which reads as follows:

> (2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

UNIF. PROBATE CODE § 2-804(h)(2).[1] Twelve states (Alaska, Colorado, Hawaii, Massachusetts, Michigan, Montana, New Mexico, North Dakota, South Dakota, Utah, Virginia and Wisconsin) have already enacted laws based on § 2-804(h)(2).[2]

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[1] The relevant part of UNIF. PROBATE CODE § 2-804 to which § 2-804(h)(2) speaks is § 2-804(b). § 2-804(b) revokes a beneficiary designation upon divorce. UNIF. PROBATE CODE § 2-804(b) (amended 2008).

[2] Alaska, ALASKA STAT. § 13.12.804(i) (2012); Colorado, COLO. REV. STAT. § 15-11-804(8)(b) (2011); Hawaii, HAW. REV. STAT. § 560:2-804(h)(2) (2011); Massachusetts, MASS. GEN. LAWS ch. 190B, § 2-804(h)(2) (2011); Michigan, MICH. COMP. LAWS § 700.2809 (2012); Montana, MONT. CODE ANN. § 72-2-814(8)(b) (2011); New Mexico, N.M. STAT. ANN. § 45-2-804(I) (2012); North Dakota, N.D. CENT. CODE § 30.1-10-04(8)(b) (2011); South Dakota, S.D. CODIFIED LAWS § 29A-2-804(h)(2) (2011); Utah, UTAH CODE ANN. § 75-2804(8)(b) (2012); Virginia, VA. CODE ANN. § 20-111.1(D); and Wisconsin, WIS. STAT. § 854.26 (2011).

This is the first case to come before this Court under this new line of statutes which give a widow, child or whoever would have been entitled to FEGLI insurance proceeds a cause of action against an ex-spouse when federal law preempts a state law automatic revocation of an ex-spouse as the beneficiary of insurance policies upon divorce. All that is now needed for a cause of action to raise this preemption question is the much more common occurrence of a divorced current or former federal employee who fails to change the beneficiary designation of his or her FEGLI policy away from an ex-spouse.

The National Conference of Commissioners on Uniform State Laws clearly was responding to this Court's opinions in *Egelhoff* and *Kennedy* which both held that ERISA benefits needed to be paid to designated beneficiaries for administrative convenience purposes. *Egelhoff*, 532 U.S. at 149-150; *Kennedy*, 129 S. Ct. at 875-876.

> Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate

> transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

UNIF. PROBATE CODE § 2-804 cmt. (amended 2008). While this comment speaks directly to ERISA, the same logic applies to FEGLIA. But, regardless of whether or not § 2-804(h)(2) or its comment were intended to apply to FEGLIA cases, the fact of the matter is that § 2-804(h)(2) does apply in FEGLIA cases if it is not preempted.

Undoubtedly, more states will follow the recommendation of the National Conference of Commissioners on Uniform State Laws over time. Given the high divorce rate[3] and large number of current[4] and former federal employees in this country, until this Court resolves the question presented, this type of litigation will surely grow at an accelerated pace.

This case presents a perfect vehicle for this Court to resolve the question presented. In this case, this Court can squarely address the issue of whether state equitable actions can be brought against the beneficiaries of FEGLI policies after the policy benefits have been distributed. Through this case,

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[3] 40% - 50% of marriages in the United States end in divorce. DivorceRate.org Home Page, http://www.divorcerate.org.

[4] According to the United States Census Bureau, as of March 2010, there are over 2.5 million fulltime federal employees. US Census Bureau, Federal Government Civilian Employment By Function: March 2010, http://www2.census.gov/govs/apes/10fedfun.pdf.

this Court can create a clear and concise rule which will apply whether the action arose under a divorce decree, property settlement agreement, statute or otherwise, and bring all of the state courts and federal courts in line with one another. Regardless of how this Court rules on this matter, this Court will bring clarity to grieving families across this country and put an end to this nationwide unnecessary and expansive litigation.

A ruling on the question presented would also be highly persuasive, if not binding, to similar employee benefits cases that are governed by ERISA. If this Court holds that such equitable remedies are permitted in FEGLIA cases, it would be hard to come up with a sustainable argument as to why such remedies would not be permitted in ERISA cases.

IV. THE SUPREME COURT OF VIRGINIA'S OPINION IS WRONG ON THE MERITS.

The Supreme Court of Virginia wrongly determined that FEGLIA preempts VA. CODE ANN. § 20-111.1(D).

A. Preemption Generally

Whether federal law preempts state law depends on congressional intent. *FMC Corp. v. Holliday*, 498 U.S. 52, 56 (1990). VA. CODE ANN. § 20-111.1(D) is a state domestic relations equitable remedy. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)

(quoting *In re Burrus*, 136 U.S. 586, 593-594 (1890)). "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Id.* (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)). "There is indeed a presumption against pre-emption in areas of traditional state regulation such as family law." *Egelhoff*, 532 U.S. at 151. "[C]ongressional intent to supersede state laws [in this area] must be 'clear and manifest.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). "A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo*, 439 U.S. at 581 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

B. FEGLIA Does NOT Preempt VA. CODE ANN. § 20-111.1(D).

The Supreme Court of Virginia based its holding that FEGLIA preempts VA. CODE ANN. § 20-111.1(D) on this Court's opinion in *Ridgway*, which dealt with SGLIA. In *Ridgway*, Army Sergeant Ridgway was insured by a Servicemen's Group Life Insurance ("SGLI") policy which is governed by SGLIA. *Ridgway*, 454 U.S. at 46. As part of Sergeant Ridgway's divorce, the Maine court ordered him to maintain his children as the beneficiaries of his SGLI policy. *Id.* at 48. After his divorce, Sergeant

Ridgway changed his beneficiary designation so that the proceeds from his SGLI policy would go to his new wife under the statutory order of precedence in SGLIA (which is very similar to the statutory order of precedence in FEGLIA). *Id.* Sergeant Ridgway's ex-wife sued the insurance company on behalf of her children seeking to have the proceeds of the SGLI policy placed in a constructive trust for the benefit of his children. *Id.* at 49.

In *Ridgway*, this Court determined that under SGLIA "the insured service member possesses the right freely to designate the beneficiary and to alter that choice at any time. . ." *Id.* at 56. The divorce decree purported to restrict that right. Accordingly, this Court held "that the controlling provisions of SGLIA prevail over and displace inconsistent state law" (i.e., the divorce decree). *Id.* at 60. However, the Supreme Court of Virginia erred when it applied this Court's analysis of SGLIA to FEGLIA.

1. The differing purposes behind SGLIA (to improve the morale of servicemen in the interests of national defense) and FEGLIA (to avoid administrative difficulties and delays in payment) compel a finding that *Ridgway* does not control FEGLI cases.

In *Ridgway*, this Court gave great weight to the congregational intent behind SGLIA. *Ridgway*, 454 U.S. at 56. It looked to the legislative history of

SGLIA which stated that a "serviceman may designate any person as a beneficiary." *Id.* This Court noted the strong federal purpose that

> [p]ossession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.

Id. at 56-57 (quoting *Wissner v. Wissner*, 338 U.S. 655, 660-661 (1950)). Conversely, the Congressional intent behind establishing FEGLIA was to offer life insurance to federal employees so that the federal government, in competing with private employers, was offering benefits in-line with (but not better than) "the best practices of progressive, private employers." *Kidd*, 821 S.W.2d at 568 (quoting 1954 U.S. Code Cong. & Admin.News, Volume 2 at 3056.). With regard to the specific FEGLIA provision in question, 5 U.S.C. § 8705(a), the Senate clarified that it had two reasons for establishing the order of precedence: 1) to avoid administrative difficulties; and 2) to avoid serious delays in paying insurance benefits to survivors. *See* S. Rep. No. 1064, 89th Cong.2d Sess. *reprinted in* 1966 U.S.C.C.A.N. 2070, 2071; *see also Kidd*, 821 S.W.2d at 569-570 (examining legislative history and subsequent amendments to 5 U.S.C. § 8705). "§ 8705 serves a valuable and worthwhile purpose by keeping the OPM and the insurance company out of legal

entanglements." *Kidd*, 821 S.W.2d at 572; *McCord*, 830 So. 2d at 1196 ("Congress intended to clarify beneficiary status for the benefit of insurers, not give the beneficiary a federally guaranteed title to the funds."); *Anderson*, 195 Ill.App.3d at 653 (In enacting 5 U.S.C. § 8705(a), Congress intended to alleviate difficulties experienced by the Civil Service Commission and the insurance companies. Congress did not intend to prevent suits against the payee of insurance after they have been paid the proceeds.).

The congressional intent behind FEGLIA has nothing to do with enhancing the morale of federal employees in the interests of national defense by guaranteeing that FEGLI proceeds are exempt from forfeiture or seizure in the hands of a beneficiary. *Sedarous*, 285 N.J. Super. at 325; *Kidd*, 821 S.W.2d at 568. If FEGLIA did so "the FEGLI system [would separate] federal employees from regular corporate employees, which is exactly what FEGLI was created to prevent." *Bell*, 2009 WL 350607, 4. Congressional intent is paramount to the question of preemption. *FMC Corp.*, 498 U.S. at 56. Given the clearly differing congressional intents behind the enactments of SGLIA and FEGLIA, *Ridgway* should not be used to stand for the proposition that Congress has expressed the required "clear and manifest" intent to preempt state domestic relations equitable remedies like the one contained in VA. CODE ANN. § 20-111.1(D) with regard to FEGLI benefits.

2. Congress's decision to exclude the anti-attachment provision when enacting FEGLIA, clearly shows, if not compels, a finding that Congress intended to permit enforcement of state equitable remedies after insurance proceeds have been distributed.

In *Ridgway*, this Court's first holding was that the insured must be free to designate and/or change the beneficiary of his SGLI policy at any time; and therefore, a state equitable remedy such as a divorce decree which restricted that right was preempted. *Ridgway*, 454 U.S. at 60. However, this Court also had a second holding in *Ridgway* in which this Court found grounds for preemption of the divorce decree. *Id*. at 60-63. In its analysis related to its second holding, this Court

> extensively discussed SGLIA's anti-attachment provision [38 U.S.C. § 1970(g)], which provided that SGLIA policy proceeds were exempt from creditors and "any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary.'" Id. at 61. [This] Court found that a constructive trust on the SGLIA proceeds would operate as a prohibited

> "seizure" of SGLIA proceeds, in contravention of the anti-attachment provision. Id. at 60.

Hardy, 2012 WL 859698, 7.

Courts which have relied on the *Ridgway* case to find preemption in FEGLI cases have determined that both of *Ridgway's* two holdings (i.e., (i) that the insured has an absolute right to designate the beneficiary; and (ii) that the anti-attachment provision prevents a seizure or constructive trust to be placed on the insurance proceeds) independently stand for the proposition of preemption. *Maretta*, 722 S.E.2d at 38. ("State courts distinguishing *Ridgway* also fail to acknowledge . . . that its holding based on SGLIA's antiattachment provision was a separate independent basis for the result"); *Christ*, 979 F.2d at 581 ("SGLIA unlike FEGLIA, contained an anti-attachment provision. . . . But that fact was a separate ground for holding that SGLIA preempted the divorce decree."). These courts then dismiss the lack of an anti-attachment provision in FEGLIA as irrelevant and solely focus on *Ridgway's* first holding. *Maretta*, 722 S.E.2d at 38; *Christ*, 979 F.2d at 581.

Assuming that the first holding in *Ridgway* regarding the right to designate a beneficiary stands for the proposition that one cannot bring an action against SGLI insurance proceeds after they have

been paid,[5] these courts still miss the meaning of the lack of an anti-attachment provision in FEGLIA. The importance is not that the first holding in *Ridgway* can by itself stand for the proposition that SGLIA preempts equitable remedies. The significance is that the lack of an anti-attachment provision in FEGLIA is a purposeful act by Congress to have a different rule apply to FEGLI policies.

"[B]oth FEGLIA and SGLIA contain identical 'order of precedence' provisions". *Maretta*, 722 S.E.2d at 35. However, when Congress enacted FEGLIA, it specifically excluded the anti-attachment provision which is in SGLIA. As this Court so aptly stated in *Ridgway* when discussing its second holding, "[a] result of this kind, of course, may be avoided if Congress chooses to avoid it." *Ridgway*, 454 U.S. at 63. If Congress had intended to prevent all equitable claims against beneficiaries after

[5] This is not a safe assumption. Since *Ridgway* did not deal with a claim against insurance proceeds after they had been distributed, either of *Ridgway's* two holdings was sufficient in that case to warrant preemption. However, as the trial court in this case determined, this Court's first holding in *Ridgway* regarding the right to designate a beneficiary only found that the state equitable remedy of requiring the insured to maintain his children as the beneficiary of his SGLI policy "conflicted with the express terms of SGLIA and injures federal objectives by interfering with the servicemember's 'absolute right to designate the policy beneficiary'." *Hillman*, 2010 WL 7373701, 4. Therefore, *Ridgway's* first holding only requires that benefits be paid in accordance with the statutory order of precedence and does not speak to whether an action could be brought against a beneficiary after benefits have been distributed. *Id*. Instead, only this Court's second holding regarding the anti-attachment provision prevents courts from enforcing state equitable remedies after the proceeds have been paid to the beneficiary in SGLIA cases. *Id*.

FEGLI proceeds had been distributed it would have treated FEGLI policies the same as SGLI policies by including an anti-attachment provision in FEGLIA. *See id*. However, Congress chose not to do so.

Congress's inclusion of the anti-attachment provision in SGLIA coupled with Congress's omission of a similar provision in FEGLIA should be viewed as Congress's purposeful act to make FEGLI proceeds vulnerable to state domestic relations causes of action after the proceeds have been distributed. *Hardy*, 2012 WL 859698, 8 ("Ultimately, the lack of an anti-attachment provision within the FEGLIA, the divergent purposes underscoring FEGLIA and SGLIA, and the 1998 amendment to section 8705 of FEGLIA compel us to conclude that *Ridgway* is not controlling here."); *McCord*, 830 So.2d at 1197 ("If Congress had desired to totally pre-empt all state law claims it would have included an anti-attachment provision to FEGLIA. *Ridgway* expressly stated that if Congress chose to avoid the result in that case, it could do so by enacting legislation which did not include an anti-attachment provision. That is precisely what Congress did when it enacted FEGLIA.") (quoting *Kidd*, 821 S.W.2d at 571); *Sedarous*, 285 N.J. Super. at 327 ("FEGLIA's lack of an anti-attachment provision is the critical factor justifying, if not indeed compelling, the conclusion that *Ridgway* does not govern the FEGLIA preemption issue."); *Fagan*, 179 S.W.3d at 45 ("the omission of an anti-attachment clause supports a conclusion that nothing in FEGLIA dictates the preemption of state law."); *See United States v. Bestfoods*, 524 U.S. 51, 62 (1998) ("against this venerable common-law backdrop, the

congressional silence is audible"); *Elkins v. Moreno*, 435 U.S. 647, 666 (1978) (absence of a reference to an immigrant's intent to remain a citizen of a foreign country is "pregnant" when contrasted with other provisions of a "comprehensive and complete" immigrant code); *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (congressional silence is evidence of congressional intent not to extend vicarious liability in an unusual manner under the Fair Housing Act of 1968.).

3. The 1998 amendment to FEGLIA which requires insurance proceeds to be paid in accordance with a properly filed divorce decree coupled with the exclusion of such an amendment in SGLIA clearly shows, if not compels, a finding that Congress did NOT intend to preempt all state equitable remedies in FEGLI cases.

Congress amended 5 U.S.C. § 8705 to include subsection (e) in 1998. 5 U.S.C. § 8705(e) specifically permits terms of a divorce decree, court-approved property settlement agreement, etc. to restrict an insured's right to designate and/or change a beneficiary designation. Congress has not included a similar amendment in SGLIA. *Hardy*, 2012 WL 859698, 8. Despite the undeniable fact that Congress set up a mechanism that, in certain circumstances, requires the proceeds from a FEGLI policy to be paid in accordance with a state domestic

relations equitable remedy (i.e., a divorce decree), the Supreme Court of Virginia found that in all cases Congress intended for FEGLI benefits to belong to the designated beneficiary to the exclusion of all others. *Maretta*, 722 S.E.2d at 35-37. This finding simply defies logic.

The inclusion of 5 U.S.C. § 8705(e) is in line with Congress's intent to keep the administration of FEGLI policies easy for OPM and the insurance company. It also undeniably demonstrated that Congress intended to permit state domestic relations equitable remedies which restrict the insured's right to name a beneficiary of a FEGLI policy. Finally, the lack of such a provision in SGLIA clearly shows, if not compels, a finding that Congress intended to treat FEGLI policies and SGLI policies differently in this regard. *Hardy*, 2012 WL 859698, 8.

4. 5 U.S.C. § 8709(d)(1) does not preempt VA. CODE ANN. § 20-111.1(D).

The Supreme Court of Virginia determined that 5 U.S.C. § 8709(d)(1) applied to the statutory provisions in FEGLIA. *Maretta*, 722 S.E.2d at 33, n. 1. ("The 'contractual provisions' referenced in 5 U.S.C. § 8709(d)(1) with which state law must be consistent are simply the provisions of FEGLIA."). Therefore, in interpreting the preemptive power of 5 U.S.C. § 8705(a), that court applied the express preemption language of 5 U.S.C. § 8709(d)(1) thereto. *Id.* at 1.

5 U.S.C. § 8709(d)(1) provides

> (d)(1) The provisions of ***any contract*** under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

§ 8709(d)(1) (emphasis added). § 8709(d)(1) "renders preemptive contract terms . . ., not provisions enacted by Congress." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006) (discussing the almost identical statute contained in 5 U.S.C. § 8902(m)(1) of the Federal Employees Health Benefits Act of 1959 (FEHBA)); *Fernbaugh*, 2006 U.S. Dist. LEXIS 67765 ("FEGLIA's clause preempts state laws inconsistent with the terms of a FEGLI Policy while the ERISA clause preempts state law that conflicts with any of its statutory sections."). By its express terms, 5 U.S.C. § 8709(d)(1) does not apply to 5 U.S.C. § 8705(a), any other section of FEGLIA or any federal regulations promulgated thereunder.

The Supreme Court of Virginia refused to acknowledge the 50 page contract which OPM negotiated with Metropolitan Life Insurance

Company.[6] Therefore, the Supreme Court of Virginia could not have possibly applied 5 U.S.C. § 8709(d)(1) in this case properly, since the court did not in the first place accept the existence of the contract to which 5 U.S.C. § 8709(d)(1) speaks.

This Court has already determined that a narrow and "modest reading" is in order for a provision that "declares no federal law preemptive, but instead, terms of [a] . . . negotiated contract." *McVeigh*, 547 U.S. at 698; *see Fernbaugh*, 2006 U.S. Dist. LEXIS 67765. Furthermore, this Court has already determined that virtually identical language to that contained in 5 U.S.C. § 8709(d)(1) is not sufficient in and of itself to preempt all state law relating to FEGLIA. *McVeigh*, 547 U.S. at 697-99 (An almost identical statute contained in the Federal Employees Health Benefits Act of 1959 "does not purport to render inoperative any and all state laws that in some way bear on federal employee-benefit plans."); *see also Egelhoff*, 532 U.S. at 146 ("[W]e have recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes preemption would never run its course.'") (citation omitted). Therefore, the congressional intent regarding the scope and breadth of 5 U.S.C. § 8709(d)(1) cannot be determined solely by looking at the statutory language, but should be gleaned from legislative history.

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[6] A copy of this contract is easily obtainable from OPM through a FOIA request. Counsel is happy to provide such a copy to this Court if so requested.

The House Report regarding 5 U.S.C. § 8709(d)(1) explains that this provision of FEGLIA was enacted "to eliminate all possibility of a conflict between Sections 7 and 8 of this Bill, increasing levels of optional group life insurance available to employees, and any provision of state law limiting the amount of insurance which may be provided under a group insurance contract to citizens of the state." H.R. Rep. No. 96-120, 1980 U.S.C.C.A.N. 3867. 5 U.S.C. § 8709(d)(1) "is only concerned with conflicts between state regulation of group life insurance programs and the express contractual provisions contained in FEGLIA policies. This section is not concerned with state law claims brought once the proceeds of a policy are paid out." *McCord*, 830 So. 2d at 1198 (citation omitted); *Kidd*, 821 S.W.2d at 573 ("It must be assumed that Congress was merely clarifying its intent to relieve administrative difficulties when a conflict arose between state insurance regulations pertaining to group life insurance programs and the expressed contractual provisions of FEGLIA policies."); *Sedarous*, 285 N.J. Super. at 325.

The stated congressional intent clearly shows that 5 U.S.C. § 8709(d)(1) was not directed at state domestic relations equitable remedies. Given the narrow and modest reading to be applied to 5 U.S.C. § 8709(d)(1), it should not be interpreted to expressly preempt such remedies.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully, submitted.

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April 11, 2012

APPENDIX

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Supreme Court of Virginia.
Judy A. MARETTA
v.
Jacqueline HILLMAN.

Record No. 102042.
Jan. 13, 2012.

****32** George O. Peterson (Tania M. L. Saylor; Peterson Saylor, on briefs), for appellant.

Daniel H. Ruttenberg (SmolenPlevy, on brief), Vienna, for appellee.

Present: All the Justices.

****33** OPINION BY Chief Justice CYNTHIA D. KINSER.

***37** Judy A. Maretta (Maretta), as the named beneficiary of a Federal Employees' Group Life Insurance (FEGLI) policy, received FEGLI benefits upon the death of her ex-husband. The question on appeal is whether federal law preempts Code § 20–111.1(D), which otherwise would make Maretta liable to her ex-husband's widow, Jacqueline Hillman (Hillman), for those benefits.

***38** In the event of a decree of annulment or divorce from the bond of matrimony, Code § 20–111.1(A) revokes "any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party." However, Code § 20–111.1(D), the subsection at issue, provides that

> [if Code § 20–111.1(A)] is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

In contrast to these statutory provisions, the Federal Employees' Group Life Insurance Act (FEGLIA), 5 U.S.C. § 8701 et seq. (2006 & Supp. II 2008), contains an order of precedence that directs to whom benefits under a FEGLI policy are paid:

> [T]he amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:

> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office....
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee.

5 U.S.C. § 8705(a). FEGLIA also contains a preemption provision, which states:

> The provisions of any contract under this chapter [5 U.S.C. § 8701 et seq.] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which ***39** relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

5 U.S.C. § 8709(d)(1).[1]

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[1] The "contractual provisions" referenced in 5 U.S.C. § 8709(d)(1) with which state law must be consistent are simply the provisions of FEGLIA. *See* *O'Neal v. Gonzalez*, 839 F.2d 1437, 1440 (11th Cir.1988) (noting that the insurance policy is not a traditional contract between an insured and the insurer but a federal policy governed by federal law). Section 8709(d)(1) "broadly preempts any state law that is inconsistent with the FEGLIA master policy." *Metropolitan Life Ins. Co. v. Christ*, 979 F.2d 575, 579 (7th Cir.1992).

Because Congress intended for FEGLI benefits to be paid and to belong to a designated beneficiary, we conclude that FEGLIA preempts Code § 20–111.1(D). Therefore, we will reverse the circuit court's judgment.

FACTS AND PROCEEDINGS

The relevant facts are not in dispute. In December 1996, Warren Hillman (Warren) named Maretta, his wife at the time, as the beneficiary of his FEGLI policy. The two divorced in December 1998 and Warren married Hillman in October 2002. Warren, however, never changed the beneficiary designation in his FEGLI policy. Hillman and Warren were still married when, in July 2008, Warren died. After her husband's death, Hillman filed a claim for benefits under Warren's FEGLI policy but was told the proceeds would be distributed to Warren's designated beneficiary, Maretta. Maretta filed a claim for and received the death benefits under the FEGLI policy in the amount of $124,558.03.

Hillman then filed an action against Maretta, claiming that pursuant to Code § 20–111.1(D), Maretta was liable to her for the death benefits received as the beneficiary of Warren's FEGLI policy. Hillman sought an ****34** order directing Maretta to pay those proceeds to Hillman or, alternatively, a judgment against Maretta in the amount received from the FEGLI policy. Maretta filed a demurrer and plea in bar. Citing numerous federal cases, Maretta claimed that Code §§ 20–111.1(A) and –111.1(D) are preempted by 5 U.S.C. §§

8705 and 8709 because the state statutes grant FEGLI benefits to someone other than the named beneficiary in violation of FEGLIA's terms. In a letter opinion, the circuit court overruled Maretta's demurrer and plea in bar, concluding that Code § 20–111.1(D) is not preempted by FEGLIA. Hillman then moved for summary judgment. Finding no material***40** facts in dispute, the circuit court granted Hillman's motion and entered judgment against Maretta in the amount of $124,558.03.

We granted Maretta this appeal. The sole issue is whether the circuit court erred in determining that Hillman's claim under Code § 20–111.1(D) is not preempted by FEGLIA. That issue is a question of law reviewed de novo on appeal. *See Johnson v. Hart*, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010).

ANALYSIS

[1][2] The Supremacy Clause in the United States Constitution provides that the laws of the United States "shall be the supreme law of the land ... any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, state laws in conflict with federal law are "without effect." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008) (internal quotation marks omitted). The preemption doctrine "has its roots" in the Supremacy Clause and "requires us to examine congressional intent." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). " '[T]he purpose of Congress is

the ultimate touchstone' in every pre-emption case." *Altria Group*, 555 U.S. at 76, 129 S.Ct. 538 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)).

[3][4][5][6] "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *de la Cuesta*, 458 U.S. at 152–53, 102 S.Ct. 3014 (internal quotation marks omitted). Even when Congress has stopped short of totally displacing state law in a specific area, state law is nevertheless preempted "to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 153, 102 S.Ct. 3014 (citations and internal quotation marks omitted); *see also, Dugan v. Childers*, 261 Va. 3, 8, 539 S.E.2d 723, 725 (2001) (" 'The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.' ") (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979)); *Metropolitan Life Ins. Co. v. Potter*, 533 So.2d 589, 591 (Ala.1988) ("Preemption may occur from explicit preemptive language in a statute, from implied congressional intent, ***41** or where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."). While there is a presumption against

preemption "in areas of traditional state regulation such as family law," *Egelhoff v. Egelhoff*, 532 U.S. 141, 151, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), "[the] relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Ridgway v. Ridgway*, 454 U.S. 46, 54, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981) (internal quotation marks omitted).

[7][8] In addition to the order of precedence set forth in 5 U.S.C. § 8705(a) and the preemption provision in 5 U.S.C. § 8709(d)(1), FEGLIA and the regulations promulgated thereunder contain provisions relevant to the specific preemption question before us. Pursuant to 5 C.F.R. § 870.802(f), an insured under a FEGLI policy can change his or her beneficiary "at any time without the knowledge or consent of the ****35** previous beneficiary. This right cannot be waived or restricted."[2] *Id.* The insured's beneficiary designation takes precedence over any court order for divorce, annulment, or separation unless that order has been received by the appropriate office prior to the insured's death. 5 U.S.C. § 8705(e); 5 C.F.R. § 870.801(d). In addition, any "designation, change, or cancellation of beneficiary in a will or any other document not witnessed and filed as required by [5 C.F.R. § 870.802] has no legal effect with respect to [FEGLI] benefits." 5 C.F.R § 870.802(c).

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[2] "Federal regulations have no less pre-emptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014.

Contrary to these provisions, Code § 20–111.1(A) revokes a beneficiary designation upon entry of a decree of annulment or divorce from the bond of matrimony and thus alters the order of precedence in 5 U.S.C. § 8705(a), which directs payment of FEGLI benefits first to the designated beneficiary regardless of marital status. As the parties acknowledged before the circuit court, FEGLIA preempts Code § 20–111.1(A). *See Metropolitan Life Ins. Co. v. Bell*, 924 F.Supp. 63, 65 (E.D.Tex.1995) (holding that 5 U.S.C. § 8709(d)(1) "certainly preempts any direct payment to anyone other than a listed beneficiary when a beneficiary is actually designated").

Unlike Code § 20–111.1(A), Code § 20–111.1(D) does not alter the direct payment of FEGLI benefits to a designated beneficiary. Instead, it grants a third party the right to recover those benefits ***42** from a designated beneficiary who is the former spouse of the insured. Code § 20–111.1(D). If Congress intended for FEGLI benefits to belong to the designated beneficiary to the exclusion of all others, then Code § 20–111.1(D) "stands as an obstacle to the accomplishment and execution of the full power and objectives of Congress" and is therefore preempted by FEGLIA. *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014.

Hillman argues, and courts have generally agreed, that FEGLIA manifests a congressional intent for administrative convenience. *See, e.g.*, *Kidd v. Pritzel*, 821 S.W.2d 566, 569–70 (Mo.Ct.App.1991) (holding that purpose of 5 U.S.C. § 8705 is "to provide for the speedy and economical settlement of

claims") (citing cases); *cf.* *Egelhoff*, 532 U.S. at 148, 121 S.Ct. 1322 (stating that the principal goal of Employee Retirement Income Security Act is to provide "a set of standard procedures to guide processing of claims and disbursement of benefits") (internal quotation marks omitted). But many courts have concluded that Congress also intended to grant an insured the right to name without restriction, and to the exclusion of all others, the person who will receive the benefits from a FEGLI policy. *See, e.g.*, *Metropolitan Life Ins. Co. v. Zaldivar*, 413 F.3d 119, 120–21 (1st Cir.2005) (FEGLIA preempts the imposition of a constructive trust on FEGLI proceeds once paid); *Metropolitan Life Ins. Co. v. Christ*, 979 F.2d 575, 578–79 (7th Cir.1992) (same); *O'Neal v. Gonzalez*, 839 F.2d 1437, 1440 (11th Cir.1988) ("Congress intended to establish ... for the benefit of designated beneficiaries, an inflexible rule that the beneficiary ... would receive the policy proceeds, regardless of other documents or the equities in a particular case."). Most relevant is the decision of the Supreme Court of the United States in *Ridgway*. Although *Ridgway* involved the Servicemen's Group Life Insurance Act (SGLIA), both FEGLIA and SGLIA contain identical "order of precedence" provisions. *Compare* 5 U.S.C. § 8705(a) *with* 38 U.S.C. § 1970(a). Regulations promulgated pursuant to SGLIA are also similar to those under FEGLIA. *See* 38 C.F.R. § 9.4(3)(b) (change in beneficiary may be made at any time). We thus agree with those courts that have considered *Ridgway* to be "highly persuasive, if not binding, in construing [FEGLIA]." *See* *Zaldivar*, 413 F.3d at 120 (citing cases in support).

In *Ridgway,* the insured serviceman named his wife as the beneficiary of his SGLIA benefits. 454 U.S. at 48, 102 S.Ct. 49. When the parties subsequently obtained a divorce, the state-law judgment ordered the ***43** insured to keep in force any existing life insurance policies for the benefit of his children. *Id.* The insured remarried and, contrary****36** to the command of the divorce order, changed the policy's beneficiary designation so that the proceeds would be paid pursuant to the statutory order of precedence set forth in 38 U.S.C. § 770(a), i.e., to his widow. *Id.* Both the widow and ex-wife, the latter on behalf of the insured's children, filed claims for the SGLIA policy proceeds. *Id.* at 49, 102 S.Ct. 49. The ex-wife also filed suit, asking that a constructive trust be placed on any proceeds paid to the widow. *Id.* The Supreme Judicial Court of Maine concluded that the widow should be named as the constructive trustee of the policy benefits and directed that the benefits be paid to the ex-wife on behalf of the insured's children. *Id.* at 50, 102 S.Ct. 49 (citing *Ridgway v. Prudential Ins. Co. of America,* 419 A.2d 1030, 1035 (Me.1980)).

On a writ of certiorari, the Supreme Court first described the history and terms of SGLIA, including its specified order of precedence for paying benefits, 38 U.S.C. § 770(a), and its anti-attachment provision. *Id.* at 52–53, 102 S.Ct. 49. The latter shielded policy payments from creditors' claims and from " 'attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.' " *Id.* (quoting 38 U.S.C. § 770(g)). Noting that "a state divorce decree, like other law governing the economic aspects of

domestic relations, must give way to clearly conflicting federal enactments," the Court then turned to its previous decision in *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950). *Ridgway*, 454 U.S. at 55, 102 S.Ct. 49.

In *Wissner*, the trial court held that benefits paid under the National Service Life Insurance Act (NSLIA), which allowed an insured to designate and change a beneficiary and contained an anti-attachment provision, were community property. *Wissner*, 338 U.S. at 658–59, 70 S.Ct. 398. Although the insured service member named his parents as beneficiaries of his NSLIA policy, the trial court nevertheless directed that proceeds be paid to the insured's widow. *Id.* at 657–58, 70 S.Ct. 398. The Supreme Court in *Wissner* reversed, finding that the trial court's judgment "nullifie[d] the soldier's choice and frustrate[d] the deliberate purpose of Congress." *Id.* at 659, 70 S.Ct. 398.

Quoting that language from *Wissner*, the majority in *Ridgway* then held:

> The present case, we feel, is controlled by *Wissner*. [J]ust as ... in *Wissner*, the insured service member possesses the right ***44** freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office. Here, as there, it appropriately may be said: "Congress has spoken with force and clarity in

> directing that the proceeds belong to the named beneficiary and no other."

Ridgway, 454 U.S. at 55–56, 102 S.Ct. 49 (quoting *Wissner*, 338 U.S. at 658, 70 S.Ct. 398). Finding that a state law imposing a constructive trust on SGLIA benefits was preempted by SGLIA, the Court explained: "Federal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary. That right is personal to the member alone. [O]nly [the insured] had the power to create and change a beneficiary interest in his SGLIA insurance." *Id.* at 59–60, 102 S.Ct. 49.

Under a separate heading, the Supreme Court then held that placing a constructive trust on the policy proceeds was also inconsistent with SGLIA's anti-attachment provision. *Id.* at 60–62, 102 S.Ct. 49. Notably, the Court pointed out that it had similarly invoked NSLIA's identical anti-attachment provision as an independent ground for the result reached in *Wissner*. *Id.* at 60, 102 S.Ct. 49.

In light of the virtually identical language used in FEGLIA and SGLIA, we conclude pursuant to *Ridgway* that it is Congress' intent that "only [the insured] [has] the power to create and change a beneficiary interest," that the right to do so cannot be waived or restricted, and that the FEGLI benefits belong to the named beneficiary. *Ridgway*, 454 U.S. at 60, 102 S.Ct. 49; *see* *Christ*, 979 F.2d at 579 (state's divorce decree and constructive trust conflicted with the rights of the insured specified under FEGLIA). Just as with SGLIA, "Congress has

spoken with force and clarity in directing that the [FEGLI] proceeds *belong to* the named beneficiary ****37** and no other."[3] *See* *id.* at 56, 102 S.Ct. 49 (emphasis added). That is, Congress did not intend merely for the named beneficiary in a FEGLI policy to receive the proceeds, only then to have them subject to recovery by a third party under state law. Simply put, "no persons other than [the beneficiary] have an interest in the policy benefits pursuant to FEGLIA." ***45***Metropolitan Life Ins. Co. v. Armstrong–Lofton*, 19 F.Supp.2d 1134, 1137 (C.D.Cal.1998); *see also* *O'Neal*, 839 F.2d at 1440 (Congress' intent under FEGLIA was to establish an "inflexible rule" that only the beneficiary would receive the policy proceeds, "regardless of other documents or the equities in a particular case."). Code § 20–111.1(D), by making liable "a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under" Code § 20–111.1(A), "create[s] a beneficiary interest" in the policy proceeds for someone other than the named insured. *Ridgway*, 454 U.S. at 60, 102 S.Ct. 49. In other words, Code § 20–111.1(D) "nullifies the [insured's] choice and frustrates the deliberate purpose of Congress." *Wissner*, 338 U.S. at 659, 70 S.Ct. 398. Thus, Code § 20–111.1(D) "actually conflicts with federal law [by] stand[ing] as an obstacle to the accomplishment and

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[3] In fact, Congress' preemptive intent is more apparent in FEGLIA than in SGLIA, which contains no provision similar to 5 U.S.C. § 8709(d)(1). *See* *Potter*, 533 So.2d at 594 (holding that given FEGLIA's express preemption provision, it is even more appropriate to conclude that Congress " 'has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other' ") (quoting *Ridgway*, 454 U.S. at 55–56, 102 S.Ct. 49).

execution of the full purposes and objectives of Congress." *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014 (internal quotation marks omitted). Therefore, we hold that Code § 20–111.1(D) is preempted by FEGLIA.

We are aware, as Hillman argues on brief, that our decision today stands in contrast to a majority of state court decisions. Unlike federal courts, state courts have generally held that FEGLIA does not preempt a state-law constructive trust on FEGLI proceeds for the benefit of someone other than the named beneficiary. *See generally McCord v. Spradling*, 830 So.2d 1188, 1202 (Miss.2002) (citing cases and finding persuasive state court holdings that the "distinction between beneficiary status and ultimate equitable entitlement obviates any issue of federal preemption of state-court action"); *Fagan v. Chaisson*, 179 S.W.3d 35, 42 (Tex.Ct.App.2005) (citing cases); *but see, Potter*, 533 So.2d at 593 (holding that FEGLIA preempted state court divorce judgment ordering insured to maintain ex-wife as beneficiary of existing life insurance policies). In doing so, however, these courts have misconstrued *Ridgway*, specifically its reliance on *Wissner*, and the separate, independent discussion of SGLIA's anti-attachment provision. *See Christ*, 979 F.2d at 581 ("SGLIA's anti-attachment provision ... was a separate ground" for finding preemption); *Metropolitan Life Ins. Co. v. McShan*, 577 F.Supp. 165, 169 (N.D.Cal.1983) ("In both *Wissner* and *Ridgway* the existence of an anti-attachment provision was an independent basis upon which the Supreme Court found preemption."). In *Fagan*, for example, the court stated that

"*Ridgway* was decided on two points," the first being that SGLIA's order of precedence for the payment of benefits merely conferred a right on the insured to designate a beneficiary. ***46** 179 S.W.3d at 44; *see also* *Kidd*, 821 S.W.2d at 570 (same). That interpretation is incorrect. The Court's first holding in *Ridgway*, made in reliance on its decision in *Wissner*, emphasized that the insured's right to designate a beneficiary and to alter that choice at any time evinced Congress' intent for the policy proceeds to " belong to the named beneficiary and no other."[4] *Ridgway*, 454 U.S. at 56, 102 S.Ct. 49 (internal quotation marks omitted). Hillman, and the courts on which she relies, fail to account for *Ridgway's* reliance on *Wissner*. According to the Supreme Court, *Wissner* controlled the outcome in *Ridgway*, *id.* at 55, 102 S.Ct. 49 and we conclude that *Ridgway*, in turn, controls the result in the case now before us.

****38** State courts distinguishing *Ridgway* also fail to acknowledge what is apparent from a plain reading of the decision, i.e., that its holding based on SGLIA's anti–attachment provision was a separate, independent basis for the result. *See, e.g.*, *McCord*, 830 So.2d at 1197 (distinguishing *Ridgway* solely on the grounds that SGLIA contained an anti-attachment provision). *Ridgway's* discussion of SGLIA's anti-attachment provision began with the statement: the "imposition of a constructive trust is *also* inconsistent with the anti-attachment provision." *Ridgway*, 454 U.S. at 60, 102 S.Ct. 49

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[4] The court in *Fagan* also mistakenly referred to the second holding in *Ridgway* based on SGLIA's anti-attachment provision as the "most important[ ]." *Fagan*, 179 S.W.3d at 44.

(emphasis added). In other words, *Ridgway* is not distinguishable on the basis that FEGLIA does not contain an anti-attachment provision.

In sum, the circuit court erred in concluding that Code § 20–111.1(D) is not preempted by FEGLIA.

CONCLUSION

For these reasons, we will reverse the judgment of the circuit court. Because we conclude that FEGLIA preempts Code § 20–111.1(D), we will enter judgment for Maretta.

Reversed and final judgment.

Justice McCLANAHAN, with whom Justice MILLETTE joins, dissenting.

Justice McCLANAHAN, with whom Justice MILLETTE joins, dissenting.

I.

The constitutional standard governing preemption under the Supremacy Clause, as contained in Article VI of the Constitution of ***47** the United States, presents a " 'high threshold' " for the invalidation of a state statute alleged to conflict with federal law. *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. ——, ——, 131 S.Ct. 1968, 1985, 179 L.Ed.2d 1031 (2011) (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (Kennedy, J.,

concurring in part and concurring in judgment)). Accordingly, courts are to address preemption claims "with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). The threshold for invoking preemption is even higher where, as here, the state statute at issue represents a state legislature's exercise of its police power in the area of domestic relations. *Rose v. Rose*, 481 U.S. 619, 625, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979); *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). That is because " 'the whole subject of domestic relations ... belongs to the laws of the States and not to the laws of the United States.' " *Rose*, 481 U.S. at 625, 107 S.Ct. 2029 (quoting *In re Burrus*, 136 U.S. 586, 593–94, 10 S.Ct. 850, 34 L.Ed. 500 (1890)).

Thus, as the United States Supreme Court has stated, " 'when state family law has come into conflict with a federal statute,' " courts should limit their Supremacy Clause review to a determination of " 'whether Congress has "positively required by direct enactment" that state law be pre-empted.' " *Id.* (quoting *Hisquierdo*, 439 U.S. at 581, 99 S.Ct. 802 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 49 L.Ed. 390 (1904)). Indeed, "[b]efore a state law governing domestic relations will be overridden," the Supreme Court has further explained, the state law " '*must do "major damage" to "clear and substantial" federal interests*.' " *Id.* (quoting *Hisquierdo*, 439 U.S. at 581, 99 S.Ct. 802

(quoting *Yazell*, 382 U.S. at 352, 86 S.Ct. 500)) (emphasis added).[1]

In my opinion, this high threshold for imposing preemption in the instant case has not been met. That is, I do not believe Code § 20–111.1(D) (triggered, itself, upon federal preemption of subsection A of the statute) is preempted by the Federal Employees' Group ****39** Life Insurance Act (FEGLIA), 5 U.S.C. § 8701 et seq. (2006 & Supp. II 2008).

***48** II.

Subsection A of Code § 20–111.1 provides, in relevant part: "Upon the entry of a decree of annulment or divorce from the bond of matrimony ... any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent...."[2]

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[1] *See* *Brandon v. Travelers Insur. Co.*, 18 F.3d 1321, 1326 (5th Cir.1994) (observing in preemption case that "[f]ederal respect for state domestic relations law has a long and venerable history" and that "[w]hen courts face a potential conflict between state domestic relations law and federal law, the *strong presumption* is that state law should be given precedence" because "family relations [law] has been a sacrosanct enclave" (emphasis added)).

[2] The terms of Code § 20–111.1(A) are expressly inapplicable "(i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contrary result as to specific death benefits, or (ii) to any trust or any death benefit payable to or under any

In revoking the beneficiary designation of a former spouse to a life insurance policy upon divorce, Code § 20–111.1(A) operates as a companion to the revocation-by-divorce statute in Virginia applicable to wills of former spouses, Code § 64.1–59.[3] Addressing the latter statute, this Court has explained that its passage was "a statutory declaration of public policy concerning wills of divorced testators, which provided ... that a divorced spouse is to be denied any benefits under a will executed prior to divorce" based on the testator's presumed change of intent upon divorce. *Papen v. Papen*, 216 Va. 879, 882–83, 224 S.E.2d 153, 155 (1976). "The General Assembly, in evaluating the advisability of [enacting Code § 64.1–59], undoubtedly concluded that the number of forgetful testators who would be benefited by the statute far exceeded the number of careful testators who might be inconvenienced by its enactment." *Id.* at 883, 224 S.E.2d at 155–56. The General Assembly no doubt adhered to a similar conclusion in subsequently enacting Code § 20–111.1(A) with its analogous revocation of a designation of a former spouse as a beneficiary on a life insurance policy upon divorce. *See generally* Alan S. Wilmit, Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 Cornell L.Rev. 653 (1988).

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trust," none of which is presented in this case. Code § 20–111.1(C).

[3] Code § 64.1–59 provides, in relevant part: "If, after making a will, the testator is divorced a vinculo matrimonii or his marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse...."

As appellant correctly asserts, however, Code § 20–111.1(A), as applicable to the facts in this case, is inconsistent with FEGLIA's directive as to whom life insurance benefits under a FEGLIA policy "shall be paid," as set forth in 5 U.S.C. § 8705(a). Under the ***49**5 U.S.C. § 8705(a) statutory "order of precedence," the first payee of the life insurance is "the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office...."[4] *Id.* Consequently, in this case, pursuant to 5 U.S.C. § 8705(a), the FEGLI policy holder's former spouse, appellant, as the designated beneficiary on the policy, received payment of the insurance proceeds through the federal Office of Personnel Management (the federal agency that administers FEGLIA). Under Code § 20–111.1(A), the policy holder's widow, appellee, would have received the insurance proceeds from her deceased husband's FEGLI policy.

Addressing such conflicts with state law, FEGLIA provides under 5 U.S.C. § 8709(d)(1) that "[t]he provisions of any contract under this chapter [5 USCS §§ 8701 et seq.] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions."

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[4] Several other alternative payees are then listed under 5 U.S.C. § 8705(a) in order of priority in the event there is no designated beneficiary, the first of these being the widow or widower of the deceased policy holder.

The majority thus concludes, and I agree, that Code § 20–111.1(A) is therefore preempted under the express terms of 5 U.S.C. § 8709(d)(1), as Code § 20–111.1(A) **40 would otherwise negate the payment dictated by 5 U.S.C. § 8705(a) where, as here, the designated beneficiary was a former spouse, and the designation was made prior to the divorce of the former spouse and the federal employee policy holder.

III.

The issue on appeal is thus whether Code § 20–111.1(D), which is triggered upon the federal preemption of subsection A of the statute, is itself preempted under FEGLIA.

The General Assembly amended Code § 20–111.1 in 2007 by adding subsection D to the statute, which provides as follows: "If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment *50 to the person who would have been entitled to it were this section not preempted." *See* 2007 Acts ch. 306.

Passage of this amendment no doubt reflects the General Assembly's recognition that subsection A of Code § 20–111.1 was preempted by FEGLIA pursuant to 5 U.S.C. § 8709(d)(1). The General Assembly dealt with this impediment to implementation of its public policy embodied in

subsection A's revocation-by-divorce provision for life insurance policies by establishing, in subsection D of Code § 20–111.1, an equitable remedy in favor of a third party who otherwise would have been entitled to receive the insurance proceeds pursuant to subsection A—in this case, the decedent's widow. Under the new provision, the former spouse, as the designated beneficiary, is made personally liable to the third party for an amount equal to the insurance proceeds paid to the former spouse upon the death of the federal employee policy holder.

Thus, as the majority acknowledges, unlike subsection A, subsection D "does not alter the direct payment of FEGLI benefits to a designated beneficiary" in establishing the equitable remedy against the former spouse. After assessing this key factor against the limited federal interest implicated under 5 U.S.C. § 8705(a)'s payment provision for FEGLI benefits, I believe that Code § 20–111.1(D) does no "major damage" to that federal interest. *Rose*, 481 U.S. at 625, 107 S.Ct. 2029 (citations and internal quotation marks omitted).

Viewed through the prism of our governing standard of review, FEGLIA simply does not evince congressional intent to shield a former spouse from liability against a third party claim involving FEGLI proceeds that have already been paid to the former spouse. Rather, as the majority also acknowledges, 5 U.S.C. § 8705(a)'s "order of precedence" for the payment of FEGLI benefits was enacted for the purpose of providing "administrative convenience" for the federal Office of Personnel Management (OPM) and the insurer in processing claims and

distributing benefits. *See* *Kidd v. Pritzel*, 821 S.W.2d 566, 568–70 (Mo.Ct.App.1991) (detailing the legislative history of 5 U.S.C. § 8705 and cited by the majority). Addressing this point, the Missouri Court of Appeals in *Kidd* aptly explains that

> [section] 8705 serves a valuable and worthwhile purpose by keeping the OPM and the insurance company out of legal entanglements. It fulfills the congressional intention by reducing***51** their administrative and legal hassles. *Regardless of what claims are brought to recover the proceeds once they are paid out to the designated beneficiary, the purpose of § 8705 has been served.* Neither the insurance carrier nor the government can be burdened by participation in a state judicial proceeding to recover the proceeds.

Id. at 572 (emphasis added). And this administrative convenience—the ability of the OPM and the insurer to simply pay the life insurance proceeds to the named beneficiary as directed by 5 U.S.C. § 8705, close the file, and move on to the next claim, as they did in this case—remains completely intact with the application of Code § 20–111.1(D). Accordingly, FEGLIA should not be held to preempt Code § 20–111.1(D).

I thus agree with the majority of state courts in other jurisdictions that have addressed the issue of preemption under FEGLIA and have similarly concluded that their ****41** state domestic relations

laws, in creating an equitable claim for an amount equal to the FEGLI insurance proceeds that have been paid to the named beneficiary, are not preempted by FEGLIA. *See, e.g.,* *Fagan v. Chaisson*, 179 S.W.3d 35, 42 (Tex.App.2005); *McCord v. Spradling*, 830 So.2d 1188, 1203 (Miss.2002); *Sedarous v. Sedarous*, 285 N.J.Super. 316, 666 A.2d 1362, 1363 (Ct.App.Div.1995); *Eonda v. Affinito*, 427 Pa.Super. 317, 629 A.2d 119, 123 (1993); *Kidd*, 821 S.W.2d at 575; *In re Estate of Anderson*, 195 Ill.App.3d 644, 142 Ill.Dec. 79, 552 N.E.2d 429, 434–35 (1990); *Roberts v. Roberts*, 560 S.W.2d 438, 439–40 (Tex.App.1977).

Unlike my colleagues, my view of congressional intent reflected in FEGLIA is not altered by *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), or *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950) (the case that the United States Supreme Court relied upon in deciding *Ridgway*), where the Court imposed post-payment protection for the life insurance proceeds paid to the respective armed services member's designated beneficiary in each of those cases. I believe *Ridgway*, a Servicemen's Group Life Insurance Act (SGLIA) case, and *Wissner*, a National Service Life Insurance Act (NSLIA) case, are distinguishable from the instant FEGLIA case.

NSLIA, as the predecessor to SGLIA, placed into effect a system of life insurance benefits specifically designed for our armed services members shortly before the beginning of World War II. It then lapsed at the end of the Korean War, when private commercial insurance ***52** generally became

available for service members. *Ridgway*, 454 U.S. at 50–51, 102 S.Ct. 49. SGLIA was subsequently enacted in response to private carriers' restrictions on coverage for service members as a result of the escalating Vietnam conflict. *Id.* at 50, 102 S.Ct. 49. Like federal employees under FEGLIA, armed services members possessed the right under both NSLIA and SGLIA to designate the beneficiaries of their choice. *Id.* at 55–56, 102 S.Ct. 49. Both NSLIA and SGLIA, however, contained an identical anti-attachment provision that was not included in FEGLIA. *Id.* at 60, 102 S.Ct. 49. Under the anti-attachment provision, "[p]ayments to the named beneficiary 'shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, *either before or after receipt by the beneficiary* ....' " *Wissner*, 338 U.S. at 659, 70 S.Ct. 398 (quoting 38 U.S.C. § 816) (emphasis added).

Assessing the beneficiary designation and anti-attachment provisions together, the Supreme Court in *Ridgway* explained: "'Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The *exemption provision is his guarantee* of the complete and full performance of the contract *to the exclusion of conflicting claims.* The end is a legitimate one within the *congressional powers over national defense,* and the means are adapted to the chosen end.'" *Ridgway*, 454 U.S. at 56–57, 102 S.Ct. 49 (quoting *Wissner*, 338 U.S. at 660–61, 70 S.Ct. 398 (emphasis added)). The Supreme Court then concluded its analysis by explaining that, with the anti-attachment clause,

"Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence. That is Congress' choice. It remains effective until legislation providing otherwise is enacted." *Id.* at 63, 102 S.Ct. 49.

FEGLIA, by contrast, simply made group life insurance available to federal employees so as to " 'appl[y] to Government service the best practices of progressive, private employers.'" *Fagan*, 179 S.W.3d at 45 (quoting *Kidd*, 821 S.W.2d at 568; some internal quotation marks omitted). Manifestly, its passage was "not attended by the exigenc[ies] that motivated" Congress when passing NSLIA and SGLIA in the context of national defense. *Id.* The omission of an anti-attachment clause in FEGLIA should thus be viewed as answering in the negative the question of whether Congress intended to preempt a state law like Code § 20–111.1(D)—one that impacts FEGLI ***53** benefits, if at all, only after the benefits have been paid to the designated beneficiary. With a ****42** comprehensive statutory scheme like FEGLIA, such an "omission [ ]" is a "significant one[ ]." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (addressing absence of anti-alienation provisions under ERISA as to welfare benefit plans). As the Texas Court of Appeals stated in an analogous FEGLIA case, " '[i]f Congress had desired to totally pre-empt all state law claims[,] it would have included an anti-attachment provision [in] FEGLIA. *Ridgway* expressly stated that if Congress chose to avoid the result in that case, it

could do so by enacting legislation which did not include an anti-attachment provision. That is precisely what Congress did when it enacted FEGLIA.'" *Fagan*, 179 S.W.3d at 45 (quoting *Kidd*, 821 S.W.2d at 571); *see Sedarous*, 666 A.2d at 1367 ("[I]f Congress had intended the same immunity of proceeds from state court action in FEGLIA as it provided for in SGLIA, it could easily have done so by the simple expedient of including SGLIA's anti-attachment provision in FEGLIA.").

I also find support for my position in both federal and state court decisions addressing preemption under the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., a statutory scheme more analogous to FEGLIA than either NSLIA or SGLIA.

Like FEGLIA's "order of precedence" under 5 U.S.C. § 8705(a) dictating payment of the insurance proceeds to the designated beneficiary, ERISA requires payment of life insurance benefits provided under an ERISA employee welfare benefit plan to the designated beneficiary. *Central States Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 677 (6th Cir.2000); *see Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009) (holding that the plan administrator must distribute benefits according to the plan documents pursuant to 29 U.S.C. § 1104(a)(1)(D), in order to satisfy ERISA's goal of establishing efficiency in benefit administration). Also like FEGLIA, ERISA expressly preempts "all State laws" that "relate to" an ERISA plan. 29 U.S.C. § 1144(a). And, like FEGLIA, ERISA

contains no anti-attachment or anti-alienation provision as to welfare benefit plans, which are the plans under ERISA that govern life insurance benefits. *See* *Mackey*, 486 U.S. at 836–37, 108 S.Ct. 2182. Furthermore, while ERISA does contain an anti-alienation provision for pension plans under 29 U.S.C. § 1056(d)(1), this provision simply requires each pension plan to "provide that benefits provided***54** under the plan may not be assigned or alienated." As such, section 1056(d)(1) is much more limited in scope than the anti-attachment provision contained in both NSLIA and SGLIA (which, again, is absent from FEGLIA).

Addressing this statutory framework under ERISA, the Sixth Circuit held in *Central States* that ERISA did not preempt the imposition of a constructive trust, under state law, on the life insurance benefits provided under an ERISA employee welfare benefit plan once those benefits had been distributed to the designated beneficiary according to the plan documents. *Central States*, 227 F.3d at 678–79. More specifically, as the Sixth Circuit explained:

> In this case, [appellee] seeks to impose a constructive trust on [her former husband's] ERISA welfare benefit plan benefits. [He] changed the beneficiary designation in accordance with the plan documents [thereby removing appellee as the beneficiary]. On this issue, our precedents are clear—the beneficiary card controls the person to whom the plan administrator

> must pay the benefits. However, we hold today that once the benefits have been released to the properly designated beneficiary, the district court has the discretion to impose a constructive trust upon those benefits in accordance with applicable state law if equity so requires.
>
> *Id.* at 679.

The Supreme Court of Michigan reached the same conclusion in *Sweebe v. Sweebe*, 474 Mich. 151, 712 N.W.2d 708 (2006). There, the appellant/former wife and the decedent/former husband entered into an agreement at the time of their divorce giving up any interest in any insurance policy of the other. The decedent had a life insurance ****43** policy governed by ERISA on which he had designated appellant as the beneficiary several years before their divorce, and never changed the designation after the divorce. *Id.* at 710. Appellee, decedent's subsequent wife/widow, acting on behalf of the decedent's estate, instituted an action under state law seeking to enforce the former wife's waiver to any claim to the proceeds from the decedent's life insurance policy. *Id.* The Michigan Supreme Court held that ERISA did not preempt the estate's state law claim to the insurance proceeds, and affirmed the lower court's order directing the former wife "to pay an amount equal to the insurance proceeds to the decedent's ***55** estate." *Id.* In reaching its decision, the Court recognized that, "under ERISA preemption, Michigan law cannot affect ERISA's determination of the proper beneficiary," and "ERISA provides that

a plan administrator must distribute the proceeds of the insurance policy to the named beneficiary." *Id.* at 711 (citations omitted). The Court concluded, however, that after the benefits are properly distributed under ERISA, as they were there, the issue of whether the former wife could "lawfully retain them" was an issue "governed exclusively by Michigan law." *Id.*

In *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir.1994), the Tenth Circuit reached a similar conclusion even as to ERISA pension benefits. There, the Court held that, while the anti-alienation provision of ERISA precluded a state claim for garnishment against pension benefits before their distribution to a plan participant or beneficiary, nothing in the legislative scheme protected the benefits following their distribution to such participant or beneficiary. *Id.* at 1082–83. That is, a creditor could "collect directly from the participant or beneficiary or, as [there], initiate an enforce[ment] procedure against a third-party bank [that held] the funds paid to the participant or beneficiary." *Id.*; *see* *Pardee v. Pardee*, 112 P.3d 308, 315–16 (Okla.Civ.App.2005) (holding that ERISA did not preempt allocation of a percentage of the pension plan funds to appellee pursuant to state law following distribution of the funds, as the funds "were no longer entitled to ERISA protection once [they] were distributed"); *Hoult v. Hoult*, 373 F.3d 47, 54–55 (1st Cir.2004) (holding that the anti-alienation provision under ERISA applies to pension funds "only while held by the plan administrator and not after they reach the hands of the beneficiary"); *Wright v. Riveland*, 219

F.3d 905, 919–21 (9th Cir.2000) (same); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54–56 (3rd Cir.1994) (same); *see also DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 974 (6th Cir.2006) (recognizing principle).

IV.

For the above-stated reasons, I would affirm the judgment of the circuit court in this case. In my opinion, the circuit court, in a thorough and well-reasoned opinion, correctly concluded that Code § 20–111.1(D) is not preempted by FEGLIA. Therefore, I dissent from the majority's decision reversing the circuit court's judgment.

Va.,2012.
Maretta v. Hillman
283 Va. 34, 722 S.E.2d 32

[Entered: July 30, 2010]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JACQUELINE HILLMAN

Plaintiff,

v. **CL 2009-15137**

JUDY A. MARETTA

Defendant.

ORDER

THIS CAUSE came to be heard upon Plaintiff's Motion for Summary Judgment and Memorandum of Points and Authorities previously filed herein;

IT APPEARING TO THE COURT that there are no material facts in dispute between the parties; and

IT FURTHER APPEARING TO THE COURT that Defendant, in opposition to Plaintiff's Motion for Summary Judgment, incorporated by reference the legal arguments and authorities set forth and presented to the Court in Defendant's Plea in Bar and Demurrer; and

IT FURTHER APPEARING TO THE COURT that this Court in an Opinion Letter written by the Honorable Michael F. Devine dated June 23, 2010 ruled on the issues raised by Defendant in her Plea in Bar and Demurrer, and upon review of said Opinion Letter, the pleadings filed and read herein, the appropriate statutes, and arguments of counsel, that this Order is a proper one, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is granted; and it is further

ORDERED that the Opinion Letter from the Honorable Michael F. Devine dated June 23, 2010 is hereby adopted by reference into this Order as though it were fully restated herein; and it is further

ORDERED that judgment is GRANTED to Plaintiff, JACQUELINE HILLMAN, in the amount of One Hundred Twenty Four Thousand Five Hundred Fifty Eight Dollars and Three Cents ($124,558.03) plus interest at the Judgment Rate from the date of the entry of this Order.

AND THIS CAUSE IS FINAL.

ENTERED this 30th day of July 2010.

/s/

JUDGE, Fairfax County Circuit Court

SEEN AND AGREED

SMOLENPLEVY

/s/ Daniel H. Ruttenberg
Daniel H. Ruttenberg, Esquire
Counsel for Plaintiff
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8045 Leesburg Pike, Suite 540
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703-790-1900
703-790-1754 (facsimile)

SEEN AND OBJECTED TO FOR THE REASONS SET FORTH IN THE OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, THE HEARING ON THE MOTION FOR SUMMARY JUDGMENT, THE DEMURER AND PLEA IN BAR, PLEADINGS IN SUPPORT OF THE DEMURRER AND PLEA IN BAR AND AT THE HEARING ON MAY 7, 2010.

PETERSON SAYLOR, PLC

/s/ George O. Peterson
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[Entered: June 25, 2010]

Not Reported in S.E.2d, 80 Va. Cir. 439,
2010 WL 7373701 (Va.Cir.Ct.)

(Cite as: 2010 WL 7373701 (Va.Cir.Ct.))

Circuit Court of Virginia.

Jacqueline **HILLMAN**
v.
Judy A. **MARETTA**.

No. CL 2009–15137.
June 25, 2010.

Daniel H. Ruttenberg, Esq., Smolen Plevy, P.C., Vienna, VA, for Plaintiff Jacqueline Hillman.

George O. Peterson, Esq., Peterson Saylor, P.L.C., Fairfax, VA, for Defendant Judy A. Maretta.

MICHAEL F. DEVINE, J.

***1** Dear Counsel:

Plaintiff Jacqueline Hillman ("Ms.Hillman") and Defendant Judy A. Maretta ("Ms.Maretta") came before the Court on May 7, 2010, on Ms. Maretta's Plea in Bar/Demurrer. The federal preemption issue presented by Ms. Maretta's motion is a matter of first impression in Virginia. After conducting the hearing on the motion, the Court took the matter under advisement.

In her motion, Ms. Maretta argues that the statutory "order of precedence" set forth in the Federal Employees' Group Life Insurance Act ("FEGLIA") preempts the constructive trust remedy provided by Virginia Code § 20–111.1(D), under which Ms. Hillman brought the instant cause of action. Under the FEGLIA order of precedence, policy proceeds are to be paid first to the designated beneficiary of the policy, and then to the widow if there is no designated beneficiary. The parties agree that Ms. Maretta is the proper beneficiary under FEGLIA, and that FEGLIA preempts Code § 20–111.1(A), which would have revoked the beneficiary designation of Ms. Maretta upon the entry of the divorce decree between Mr. Hillman and Ms. Maretta. The issue, then, is whether FEGLIA also preempts subsection (D) of that statute, which imposes a constructive trust on death benefit proceeds when subsection (A) is preempted, making a former spouse personally liable for the amount of the payment "to the person who would have been entitled to it" were subsection (A) not preempted. After full consideration of the pleadings, the *ore terms* arguments, and the applicable governing authorities, the Court now holds that Virginia Code § 20–111.1(D) is not preempted by FEGLIA for the reasons set forth herein.

BACKGROUND[1]

On December 2, 1996, William Hillman ("Mr.Hillman") designated Ms. Maretta, his wife at the time, as the beneficiary of his Federal Employees' Group Life Insurance ("FEGLI") policy. Although Mr. Hillman and Ms. Maretta divorced on December 29, 1998, and Mr. Hillman married Ms. Hillman on October 11, 2002, Mr. Hillman did not change the beneficiary designation of his FEGLI policy. Mr. Hillman died unexpectedly on July 28, 2008, while still married to Ms. Hillman.

In October 2008, after Ms. Hillman unsuccessfully filed a claim under Mr. Hillman's FEGLI policy, Ms. Maretta filed a claim for the death benefit and received proceeds in the amount of approximately $124,558.03. On October 22, 2009, Ms. Hillman filed the instant Complaint, alleging that she was entitled to the FEGLI proceeds pursuant to Virginia Code § 20–111.1(D), which would impose a constructive trust on the FEGLI proceeds by making Ms. Maretta personally liable to Ms. Hillman for the full amount of the benefit.

ANALYSIS

I. STANDARD OF REVIEW

A demurrer tests the legal sufficiency of a pleading and should be sustained if the pleading,

---

[1] The facts herein, which are laid out for the purpose of the instant motion only, are based on the undisputed facts contained in the parties' memoranda in support of or in opposition to Ms. Maretta's motion.

considered in the light most favorable to the plaintiff, fails to state a valid cause of action. VA.CODE ANN. § 8.01–273; *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 914 (2001). Similarly, a plea in bar is a defensive tool which shortens litigation by reducing it to a distinct issue of fact which, if proven, results in a bar to the Plaintiff's recovery. *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996). In this case, there are no issues of material fact for the Court to determine—the sole issue, which may be brought before the Court on either a demurrer or plea in bar, is whether the Virginia statute upon which Ms. Hillman's claim rests is preempted.

II. THE APPLICABLE LANGUAGE OF FEGLIA AND VIRGINIA CODE § 20–111.1

***2** FEGLIA § 8705, known as the statutory order of precedence, provides:

> Except as provided in subsection (e), the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death *shall be paid,* on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed

> writing received before death in the employing office ...
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee ...

5 U.S.C. § 8705 (emphasis added). In enacting FEGLIA, Congress expressly provided for the preemption of state laws regulating the extent of coverage or benefits that are inconsistent with FEGLIA in a preemption provision as follows:

> The provisions of any contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including *payments with respect to benefits) shall supersede and preempt any law* of any State or political subdivision thereof, or any regulation issued thereunder, *which relates to group life insurance* ***to the extent that the law or regulation is inconsistent with the contractual provisions.***

5 U.S.C. § 8709(d)(1) (emphasis added).

As previously stated, the parties agree that FEGLIA preempts Virginia Code § 20–111.1(A), which provides:

> Upon the entry of a [divorce] decree ... any revocable beneficiary designation contained in a then existing written contract owned by one party

> that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent.

Va.Code § 20–111.1(A).[2] The issue, then, is whether FEGLIA also preempts Subsection (D) of that statute, which provides:

> If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section *is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.*
>
> VA.CODE § 20–111.1(D) (emphasis added).

---

[2] The parties agree that this subsection is preempted because, by revoking the beneficiary designation, the statute directly conflicts with FEGLIA's requirements that plans be administered, and benefits be paid, in accordance with FEGLI plan documents. Further, subsection (A) is may provide for the distribution of proceeds to someone other than the designated beneficiary, and the FEGLIA order of precedence expressly provides that proceeds "shall be paid" to the designated beneficiary if there is one.

III. FEDERAL PREEMPTION OF STATE LAW

The Supremacy Clause of the United States Constitution makes "the Laws of the United States ... the supreme law of the Land ... anything in the Constitution or Law of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under the doctrine of federal preemption of conflicting state law, which is derived from the Supremacy Clause, federal preemption may be express or implied, and occurs in three situations. *Gade v. Nat 7 Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). First, Congress may expressly define the extent to which a federal statute preempts state law ("express preemption"). *E.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Second, preemption is implied when a pervasive scheme of federal regulation makes it reasonable to infer that Congress intended exclusive federal regulation of the field ("field preemption"). *English v.. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Third, preemption is also implied where state law actually conflicts with federal law, such that either (a) compliance with both state and federal law is impossible; or (b) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ("conflict preemption"). *Gade*, 505 U.S. at 98. The "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." *Id.*

***3** With respect to domestic relations law, the Supreme Court of the United States has said that

"state interests ... in the field of family and family-property arrangements ... should be overridden ... only where clear and substantial interests of the National Government ... will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352 (1966). "The pertinent questions are [1] whether the right as asserted conflicts with the express terms of federal law and [2] whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979). Thus, while this Court's "ultimate task ... is to determine whether [Virginia Code § 20–111.1(D)] is consistent with the structure and purpose of [FEGLIA] as a whole," *Gade*, 505 U.S. at 98, this Court will only find that FEGLIA preempts this domestic relations law if (1) Ms. Hillman's rights as asserted "conflicts with the express terms" of FEGLIA or (2) the Virginia statute's "consequences sufficiently injure" FEGLI objectives to require preemption. *Hisquierdo*, 439 U.S. at 583. Keeping these preemption maxims in mind, this Opinion Letter first discusses *Ridgway v. Ridgway*, 454 U.S. 46 (1981), and *Dugan v. Childers*, 261 Va. 3, 539 S.E.2d 723 (2001), as Ms. Maretta argues that the rationale underlying those cases governs the preemption issue in this case. This Opinion Letter then examines persuasive authority on the FEGLIA preemption issue, and applies each of the three federal preemption tests to Code § 20–111.1(D).

A. *Ridgway v. Ridgway*

In *Ridgway,* a United States Army Sergeant had designated that his life insurance proceeds be

paid as specified by law, despite a state court divorce decree obligating him to maintain life insurance for the benefit of his children. *Ridgway*, 454 U.S. at 48–49. The Supreme Court of the United States held that the federal law at issue, the Servicemembers' Group Life Insurance Act ("SGLIA"), preempted the state court decree obligation, and thus applied the federal statutory prescription for distribution of the proceeds. *Id.* at 63. The Court concluded that Congress, in enacting SGLIA, "spoke[ ] with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.* at 56, 59–60 ("[f]ederal law and federal regulations bestow upon the service member an *absolute right to designate* the policy beneficiary. That right is personal to the member alone.") (emphasis added).

In a separate section of its decision, the Court also held that the "imposition of a constructive trust upon the insurance proceeds is also inconsistent with the anti-attachment provision" in SGLIA. *Id.* at 57. That provision shields SGLIA payments "from taxation" and from "claims of creditors," and states that the payments "shall not be liable to attachment, levy, or seizure by or under *any legal or equitable process whatever*, either before *or after* receipt by the beneficiary." 38 U.S.C. § 770(g) (emphasis added). The Court emphasized "the unqualified sweep" of § 770(g), which prohibits, "in the broadest of terms," *any* attachment by *any* legal *or* equitable process *whatever*. *Ridgway*, 454 U.S. at 60–61 (rejecting the lower court's attempt to limit the reach of § 770(g) on the theory that the purpose of the anti-attachment provision was to protect the policy proceeds from the claims of creditors, and not from minor children

asserting equitable interests). In addition, the Court noted that the anti-attachment provision "prevents the vagaries of state law from disrupting ... congressional policy." *Id.* at 61. Earlier in the decision, the Court explained Congress' intent in enacting SGLIA as follows:

> ***4** Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.

Id. at 56–57 (quoting *Wissner v. Wissner*, 338 U.S. 655, 660–61 (1950)).

In sum, the Court's decision in *Ridgway* consists of two holdings: (1) the state divorce decree, by requiring the servicemember to maintain his children as the designees of his SGLIA policy, conflicts with the express terms of SGLIA and injures federal objectives by interfering with the servicemember's "absolute right to designate the policy beneficiary"; and (2) the imposition of a constructive trust conflicts with the express and broad terms of § 770(g), which shields SGLIA policy proceeds from all state equitable remedies. Thus, the Court did *not,* as Ms. Maretta contends, hold that imposition of a constructive trust conflicted with the

terms of SGLIA governing beneficiary designations—rather, the equitable remedy conflicted with the broad anti-attachment provision in SGLIA.

Unlike the *Ridgway* divorce decree, which *required* that the decedent maintain his children as his SGLIA beneficiaries, Virginia Code § 20–111.1 did not require that Mr. Hillman designate or maintain any particular individual(s) as his FEGLI beneficiary. Therefore, *Ridgway's* first holding is distinguishable on its facts. Moreover, as FEGLIA does not contain any anti-attachment provision, *Ridgway's* second holding is also distinguishable on its facts. Given these two differences, as well as the disparities of congressional intent in enacting SGLIA versus FEGLIA,[3] the Court finds that the Supreme Court's rationale in *Ridgway* does not govern the present FEGLIA preemption issue.

B. *Dugan v. Childers*

In *Dugan,* the Supreme Court of Virginia found that the federal law governing a military retiree's Survivor Benefit Plan ("SBP law") preempted a conflicting Virginia divorce decree that required the husband to assign his ex-wife half of his retirement benefits. *Dugan*, 261 Va. at 8, 539 S.E.2d at 725. The SBP law provides express procedures through which a former spouse may receive SBP annuity benefits—namely, the retiree is deemed to make the election to provide the annuity if the secretary of the appropriate branch of the military

[3] This memorandum discusses congressional intent in enacting FEGLIA under Section D of the Analysis.

service receives from the former spouse a written request, together with a copy of the court order, that such an election be deemed to have been made. 10 U.S.C. §§ 1450(f)(3)(A)(i)-(ii). Further, such request must be received by "the Secretary concerned" within one year of the date of the court order. *Id.* § 1450(f)(3)(C).

In finding preemption, the Court emphasized three points. First:

> In providing the means by which former spouses may become entitled to SBP annuity benefits, Congress enacted plain and precise statutory language placing conditions and limits on that right and made clear that any annuity benefits paid in compliance with the provisions of the SBP are not subject to legal process....
>
> ***5** When a special limitation is part of the statute creating the substantive right, the limitation is not merely a procedural requirement, but a part of the newly created substantive cause of action. The special limitation is a condition precedent to maintaining the claim and failure to comply with it bars the claim.

Dugan at 8–9, 539 S.E.2d at 725–26 (quotations omitted). In other words, the SBP law created the sole procedural and substantive means through which a former spouse may be entitled to a military retiree's SBP annuity payments. The

plaintiff's failure to comply with such procedures thus barred her equitable claim.

Second, the SBP law contains an anti-alienation provision that provides that "an annuity under [the SBP law] is not assignable or subject to execution, levy, attachment, garnishment, *or other legal process*" 10 U.S.C. § 1450(i) (emphasis added). In finding that this non-alienation provision "would be sufficient alone to require a finding of preemption," the Court held that "the term 'other legal process'... encompasses the imposition of a constructive trust upon annuity benefits. *Dugan* at 10, 539 S.E.2d at 726. Therefore, as in *Ridgway,* there was an anti-alienation provision that explicitly prevented the former spouse from using any legal process in an attempt to reach the military retiree's SBP benefits.

Third, the Court found that:

> '[T]he consequences of enforcing the conflicting state law principles sufficiently injures the objectives of the SBP so that federal law preempts the authority of state law'... [t]o award [the former spouse] the survivor's benefits she seeks would seriously conflict with and effectively cancel both the 'plain and precise' one-year limitation Congress placed on a former spouse's right to claim the benefits and the clear prohibition against subjecting an annuity to legal process.

Id. (quoting *King v. King*, 483 S.E.2d 379, 383 (Ga.Ct.App.1997)). The Court thus found that the Virginia divorce decree, which would effectively negate this federal one-year limitation, was appropriately overridden by the SBP law because clear and substantial federal interests would "suffer major damage if the state law [were] applied." *Id.* at 8, 539 S.E.2d at 725 (quoting *Yazell*, 382 U.S. at 352).

The facts and federal law at issue in the instant case are easily distinguishable on all three of these points. First, FEGLIA does not create a substantive cause of action through which Ms. Hillman could collect Mr. Hillman's FEGLI proceeds. Second, as noted above, FEGLIA does not contain any anti-alienation or similar provision that precludes the imposition of a constructive trust upon FEGLI proceeds. Third, if Ms. Hillman were to be able to reach the FEGLI proceeds, her actions would not be in direct contravention of any "plain and precise" requirement or "clear prohibition" expressly provided for in FEGLIA. The Court thus finds that the Supreme Court of Virginia's rationale in *Dugan* does not govern this case either.

C. FEGLIA Preemption of Foreign State Equitable Remedies

***6** While there is no binding authority with respect to FEGLIA preemption of Virginia law, there are a number of foreign state and federal courts that have encountered the FEGLIA preemption issue. Ms. Maretta cites a number of federal decisions that she claims stand for the proposition that FEGLIA

preempts state laws providing for constructive trusts and other equitable remedies. In each of these federal cases, however, the plaintiffs asserted their entitlement to the decedent's FEGLI proceeds through a divorce decree or separation agreement that *required* the insured to maintain his or her FEGLI policy for their benefit. These courts, employing the *Ridgway* rationale, held that the divorce decrees at issue directly conflicted with the FEGLIA provision granting an insured the absolute right to designate any beneficiary that he or she chooses. *Metro. Life Ins. Co. v. Zaldivar et al.*, 413 F.3d 119, 120 (1st Cir.2005) (holding that FEGLIA preempted a state divorce decree which ordered the insured to maintain his FEGLI policy for the benefit of his children from his first marriage); *Metro. Life Ins. Co. v. Christ, et al.*, 979 F.2d 575, 579–80 (7th Cir.1992) (holding that FEGLIA preempted a divorce decree that ordered the insured to designate his children as beneficiaries on his FEGLI policy); *Metro. Life Ins. Co. v. Armstrong–Lofton, et al.*, 19 F.Supp.2d 1134, 1137 (C.D.Cal.1998) (holding that, to the extent that California community property law gave the insured's former spouses or his daughter an interest in his FEGLI benefits, it conflicted with FEGLIA's order of precedence); *Metro. Life Ins. Co. v. Pearson*, 6 F.Supp.2d 469, 471 (D.Md.1998) (holding that the asserted right of the insured's child, based on his agreement with his mother during their divorce to name the child as his FEGLI beneficiary, was preempted by FEGLIA); *Metro. Life Ins. Co. v. Bell*, 924 F.Supp. 63, 65 (E.D.Tex.1995) (finding FEGLIA preemption of a state divorce decree that designated the decedent's

FEGLI policy as community property and then awarded the former spouse one-half of the proceeds).

Some of these federal decisions further held that the plaintiff's constructive trust claims injured the express objectives of another FEGLIA provision that allowed a divorce decree to govern a FEGLI beneficiary designation *if* the insured or the beneficiary provides a copy of the divorce decree to the employing agency *before* the insured's death. 5 U.S.C. § 8705(e) (providing that FEGLI proceeds "shall be paid ... to another person ... if and to the extent expressly provided for in the terms of any court decree of divorce ... [if] it is received, before the date of the covered employee's death, by the employing agency"). Similar to the provision regarding annuities for SBP benefits in *Dugan,* courts have held that this FEGLIA provision directly conflicts with state laws providing that beneficiary designations in state divorce decrees may be enforced through a constructive trust in lieu of the procedures expressly set forth in FEGLIA. *Zaldivar,* 413 F.3d at 120 (finding conflict preemption under this FEGLIA provision, as the divorce decree was not sent to the employing agency before the insured's death). The proposition, based on the foregoing federal authorities, that FEGLIA preempts *all* state laws that impose constructive trusts and other equitable remedies is therefore inaccurate given that these federal cases all involved divorce decrees that *mandated* that the insured designate a particular beneficiary. Furthermore, any state equitable remedy designed to enforce the divorce decrees in those cases was in direct contravention of the express FEGLIA procedures through which FEGLI

proceeds may be paid out in accordance with a divorce decree.

***7** In contrast to the federal cases, the vast majority of foreign state courts have upheld state laws establishing equitable remedies in FEGLI cases. However, none of these cases involve a state statute similar to Virginia Code § 20–111.1(D), and many of them, like the federal cases, involve divorce decrees or separation agreements under which an insured is obligated to provide insurance benefits to his former spouse and/or children. Consequently, there appears to be an incongruity between federal and state analyses of FEGLIA preemption issues. *McCord v. Spradling*, 830 So.2d 1188, 1193, 1203 (Miss.2002) ("while the federal courts have held that FEGLIA preempts state equitable actions, such is not the case with a large majority of state courts that have addressed this issue," including Texas, North Carolina, Illinois, Missouri, Pennsylvania, and New Jersey). Nevertheless, the Court finds the reasoning behind some of the state cases instructive.

In *Sedarous v. Sedarous,* for example, the New Jersey superior court held that FEGLIA does not preempt the state court from imposing a constructive trust on the insurance proceeds after the death of the insured. *666* A.2d 1362, 1363 (N.J.Super.Ct.App.Div .1995). Mr. Sedarous had designated his sister as the sole beneficiary of his life insurance policies. *Id.* He later commenced divorce proceedings against his wife, but before final judgment was entered, he died, and Mrs. Sedarous sought to impose a constructive trust on the FEGLI proceeds. *Id.* at 1363–64. The starting point for the

court's analysis was *Ridgway,* which the court found distinguishable because (1) "FEGLIA is not attended by the exigency that motivated SGLIA, namely the congressional intention to provide military personnel on active duty with insurance unavailable to them in the private market because of the hazardous nature of their work[; and (2)] FEGLIA, unlike SGLIA, does not have any anti-attachment provision." *Id.* at 1365. The court then concluded:

> Considering ... the administrative convenience that is at the heart of [FEGLIA, and] the intensity and pervasiveness of the state interest in the financial protection of the dependents of the divorced obligor spouse, we are confident that FEGLIA's lack of an anti-attachment provision is the critical factor justifying, if not indeed compelling, the conclusion that *Ridgway* does not govern the FEGLIA preemption issue. Clearly, if Congress had intended the same immunity of proceeds from state court action in FEGLIA as it provided for in SGLIA, it could easily have done so by the simple expedient of including SGLIA's anti-attachment provision in FEGLIA. The fact that it did not militates strongly against both a preemption conclusion and a mandatory extension of *Ridgway* to FEGLIA problems.

Id. at 1367. The New Jersey court then held that, in light of paramount state interest in domestic

relations, FEGLIA does not preclude the state court from imposing a constructive trust on insurance proceeds in the same manner as if the insurance had been privately contracted for. *Id.* at 1366–67.

***8** Finding *Sedarous* and similar state decisions persuasive, the Supreme Court of Mississippi also held that "the existence of a named beneficiary to whom the insurer is directed to pay any benefits does not eliminate any equitable claims to the funds paid." *McCord*, 830 So.2d at 1203. The court emphasized the portions of other state decisions that laid out Congress's intent in enacting FEGLIA—namely, to alleviate administrative difficulties when paying out death benefits and to avoid serious delay in paying the benefits to survivors. *Id.* at 1196 (quoting *Kidd v. Pritzel*, 821 S.W.2d 566, 573 (Mo.Ct.App.1991); *In re Estate of Anderson*, 552 N.E.2d 429, 435 (Ill.App.Ct.1990)). The court also found persuasive the other courts' holdings that the "distinction between beneficiary status and ultimate equitable entitlement obviates any issue of federal preemption of state-court action." *Id.* at 1203. In sum, the state court decisions generally hold that FEGLIA does not preempt all equitable state law principles due to (1) the lack of an anti-attachment provision as in SGLIA or the SBP law; and (2) the underlying policy rationale behind the implementation of FEGLIA.

D. FEGLIA Preemption of Virginia Code § 20–111.1(D)

1. Express Preemption

The express preemption provision in FEGLIA states that the provisions of any FEGLI contract shall preempt any state law that "relates to group life insurance to the extent that the [state law] is inconsistent with the contractual provisions." 5 U.S.C. § 8709(d)(1). This clause thus expressly preempts any state law that is inconsistent with the FEGLI master policy, which provides the insured an absolute right to designate the beneficiary that he or she chooses.

In this case, there is no *direct* inconsistency between that right and Code § 20–111.1(D), which provides a cause of action for the insured's spouse at the time of his or her death against a former spouse who receives payment of the death benefit "not for value." Va.Code § 20–111.1(D). While the Virginia statute may *indirectly* impact Mr. Hillman's beneficiary designation, there is a key distinction between beneficiary status and ultimate equitable entitlement once FEGLI proceeds have been paid out. *McCord*, 830 So.2d at 1193. Given that this Court must apply the federal preemption test in light of the United States Supreme Court's articulated deference to the paramount state interest in domestic relations, the Court finds that Virginia Code § 20–111.1(D) is not expressly preempted by 5 U.S.C. § 8709(d)(1).

2. Conflict Preemption

Virginia Code § 20–111.1(D) is impliedly preempted by FEGLIA if (1) the Virginia law actually conflicts with federal law, such that compliance with both statutes is impossible; or (2) the Virginia law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98. First, unlike *Ridgway* and *Dugan,* Code § 20–111.1(D) does not actually conflict with any procedure or right in FEGLIA—the Virginia law does not compel the insured to designate any particular beneficiary, and FEGLIA does not create a cause of action that could apply to an individual in Ms. Hillman's situation. If Ms. Hillman ultimately reaches the FEGLI proceeds, in contrast to *Dugan,* her actions would not be in direct contravention of any "plain and precise" requirement or "clear prohibition" expressly provided for in FEGLIA.

***9** Second, the House Report on the FEGLIA preemption provision explains that the provision was enacted "to eliminate all possibility of a conflict between Sections 7 and 8 of this Bill,[4] increasing levels of optional group life insurance available to employees, and any provision of state law limiting the amount of insurance which may be provided under a group insurance contract to citizens of the state." H.R.Rep. No. 96–1280 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3867, 3871. In addition, the

[4] Sections 7 and 8 relate to additional optional life insurance for the insured and optional life insurance for the insured's family members. H.R.Rep. No. 96–1280, *reprinted in* 1980 U.S.C.CA.N. 3867

Senate clarified that it had two reasons for establishing the FEGLI order of precedence: (1) to avoid administrative difficulties; and (2) to avoid serious delays in paying insurance benefits to survivors. *See* S.Rep. No. 1064 (1966), *reprinted in* 1966 U .S.C.C.A.N.2070, 2071; *Kidd*, 821 S.W.2d at 569–72 (examining the legislative history of 5 U.S.C. § 8705) (stating that " § 8705 serves a valuable and worthwhile purpose by keeping the OPM and the insurance company out of legal entanglements."). A state law providing an equitable cause of action for the individual who was the insured's spouse at the time of his or her death, so that they may reach survivor benefits that a former spouse received "not for value," does not stand as an obstacle to Congress's stated objectives in enacting FEGLIA.

Furthermore, Congress's inclusion of anti-alienation provisions in SGLIA and the SBP law, coupled with Congress's omission of a similar provision in FEGLIA, is demonstrative of Congress's intent to *not* make the payees of FEGLI proceeds exempt from state law causes of actions. *Sedarous,* 666 A.2d at 1367 ("FEGLIA's lack of an anti-attachment provision is the critical factor justifying, if not indeed compelling, the conclusion that *Ridway* does not govern the FEGLIA preemption issue."); *Kidd*, 821 S.W.2d at 571 ("[t]he omission of an anti-attachment clause supports a conclusion that nothing in FEGLIA dictates pre-emption of equitable state law principles."). If Congress intended FEGLIA to preempt equitable remedies, it would have expressly done so as it did with SGLIA and the SBP law.

3. Field Preemption

Even if Code § 20–111.1(D) is harmonious with FEGLIA, it may nevertheless be preempted if Congress had a "clear and manifest" intent of "complete ouster of state power" with respect to group life insurance for federal employees. *See Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963). *See also English v. Gen. Elec. Co.*, 496 U.S. at 79 (stating that preemption is implied when a pervasive scheme of federal regulation makes it reasonable to infer that Congress intended exclusive federal regulation of the field). As stated in the preceding section, Congress's omission of an anti-alienation provision in FEGLIA is one indication that Congress did not intend to completely occupy the field.

In addition, the United States Supreme Court has held that the preemption statute contained in the Federal Employees Health Benefits Act ("FEHBA"), which is almost identical to 5 U.S.C. § 8709(d)(1), does not completely preempt state law with respect to that field. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 680 (2006). That preemption clause provided:

> ***10** The terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(l). The language of the FEHBA preemption provision—"which relates to health insurance or plans"—is even broader than the FEGLIA preemption provision language—"which relates to group insurance to the extent that the law or regulation is inconsistent with the contractual provisions." Therefore, given the Supreme Court's conclusion in *McVeigh,* that Congress placed an express *limitation* on the reach of the FEGLIA preemption clause, and that FEGLIA lacks an anti-alienation provision, the Court finds that Congress did not intend exclusive federal regulation of the field at issue.

CONCLUSION

For the reasons set forth above, the Court holds that Virginia Code § 20–111.1(D) is not preempted by FEGLIA, and thus Ms. Maretta's Plea in Bar/Demurrer is hereby overruled. Ms. Maretta's exceptions to the Court's ruling are noted for each of the reasons ably articulated by her counsel on brief and at the May 7, 2010 hearing.

Very truly

Judge Michael F. Devine

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Not Reported in S.E.2d, 80 Va. Cir. 439, 2010 WL 7373701 (Va.Cir.Ct.)