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ROMNEY v. LIN: ERISA PREEMPTION OF SECTION 630 OF NEW YORK'S BUSINESS CORPORATION LAW

In 1974, Congress enacted the Employment Retirement Income Security Act ("ERISA")¹ to establish a national uniform system of regulating employee benefit plans.² Widespread abuse by employers of employee benefit plans prompted the need for such regulation.³ By subjecting employers to various and sometimes

¹ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. § 1001 (1994)) [hereinafter ERISA].

² An employee benefit plan is defined to include both pension and welfare plans. ERISA § 3(3), 29 U.S.C. § 1002(3). An "employee pension benefit plan" is defined as a plan that provides retirement income or income deferral. ERISA § 3(2), 29 U.S.C. § 1002(2). An employee welfare benefit plan includes any program that provides benefits for reasons such as illness, accident, disability, unemployment, or death. ERISA § 3(1), 29 U.S.C. § 1002(1). ERISA does not govern the substantive content of employee benefit plans, nor does it require that they provide such plans. Walter E. Schuler, Note, *The ERISA Pre-Emption Narrows: Analysis of New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company and its Impact on State Regulation of Health Care*, 40 ST. LOUIS U. L.J. 783, 787 (1996). Although the terms "plan," "fund," and "program" are not defined by ERISA, the courts have given some guidance. For example, in *Donovan v. Dillingham*, the United States Court of Appeals for the Eleventh Circuit defined an ERISA plan as, "[w]hether from the surrounding circumstances, a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." 688 F.2d 1367, 1373 (11th Cir. 1982). ERISA "imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Id.* at 90 (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981)).

³ See Rebecca S. Fellman-Caldwell, Note, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.: The Supreme Court Clarifies ERISA Preemption*, 45 CATH. U. L. REV 1309, 1320 (1996) (citing employer abuse to include inadequately financing and fraudulently administering plans, using employee contributions to pension plans to fund union activities not related to retirement, limiting plan coverage to small number of employees and benefiting only high ranking employees); Schuler, *supra* note 2, at 787 (stating that throughout 1960's pension plan abuses increased dramatically and ERISA responded to growing size and scope of employee benefit plans and their financial impact on interstate commerce, employees and their dependents, and federal tax revenues); David T. Shapiro, Note, *The Remission of ERISA Preemption: An Examination of Blue*

conflicting regulations, piecemeal regulation of employee benefit plans at the state and federal level proved to be inadequate.⁴ "In enacting ERISA, Congress was primarily concerned with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."⁵ In response to these concerns, Congress "established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator."⁶

In addition to its regulatory requirements, ERISA contains a comprehensive civil enforcement provision, section 502(a), that allows a plan participant or beneficiary to bring a civil action to recover benefits due, to enforce existing rights, or to clarify rights to future benefits.⁷ Moreover, to facilitate uniform administration of the law, Congress included a broad preemption provision to "allow a single set of regulations to govern the administration of benefit plans."⁸ Section 514(a) of ERISA states

Cross/Blue Shield v. Travelers Insurance Co., 28 CONN. L. REV. 917, 918 (1996) ("Fund administrators were infamous for exploiting plan assets in the mid-1900s." (citing 120 CONG. REC. 29214 (1974) (statement of Rep. Daniels))).

⁴ See Fellman-Caldwell, *supra* note 3, at 1321-22 (explaining that state regulation led to lack of uniformity throughout nation); Schuler, *supra* note 2, at 787 (stating that previously existing "regulations and remedial mechanisms proved ineffective in the protection of employees' pension plan rights and in the deterrence of pension plan abuses").

⁵ Massachusetts v. Morash, 490 U.S. 107, 115 (1989) (citing California Hosp. Ass'n v. Henning, 770 F.2d 856, 859 (1985)).

⁶ Morash, 490 U.S. at 114 (citing Alessi, 451 U.S. at 510).

⁷ ERISA, Pub. L. No. 93-406, § 2, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1132(a) (1994)). 29 U.S.C. § 1132(a)(3) provides in relevant part:

A civil action may be brought ... (3) by a participant ... (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan

Id. "Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA" Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990).

⁸ Fellman-Caldwell, *supra* note 3, at 1320; see New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 646 (1995) ("[B]asic thrust of the preemption clause was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."); see also David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 429 (1987) (discussing ERISA's broad preemption of state law); Susan Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 29-30 n.96 (1995) (arguing that Congress' quest for uniformity has actually led to more confusion and discord in

that, unless specifically exempt,⁹ ERISA “supersede[s] any and all State laws insofar as they may now or hereafter relate to an employee benefit plan.”¹⁰ Today, ERISA preemption is one of the most frequently litigated issues under the statute and has resulted in the preemption of various state statutes and common laws.¹¹

Recently, in *Romney v. Lin*,¹² the United States Court of Appeals for the Second Circuit addressed the question of whether ERISA preempts section 630 of the New York Business Corporation Law (“BCL”).¹³ Section 630 of the BCL was originally en-

field of employee benefits laws); Fellman-Caldwell, *supra* note 3, at 1321-22 (“Without ERISA’s preemption clause, employee benefit plans could be subjected to fifty different sets of state law, resulting in unreasonable administrative costs that might discourage employers from providing employee benefits.”); *see generally* Daniel W. Sherrick, *ERISA Preemption: An Introduction*, 64 MICH. BUS. L.J. 1074 (1985) (discussing ERISA’s preemption provision).

⁹ ERISA § 514(b)(2), 29 U.S.C. § 1144(a) (laws regulating insurance, banking, and securities, as well as government plans, tax exempt church plans, and plans in compliance with worker’s compensation, unemployment compensation, and disability insurance are exempt from ERISA preemption); *see also* Catherine L. Fisk, *Article: The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 46 (1996) (“ERISA covers any employer or employer-union ‘plan, fund or program’ that provides pensions or benefits for health care, child care, vacations, sickness, disability, death, apprenticeship, training or scholarships.”) (citing 29 U.S.C. § 1002(1), (2) (1988)). “[P]lans specifically exempt are those maintained ‘solely’ to comply with state workers’ compensation, disability, or unemployment laws government and church sponsored plans.” *Id.* (citing 29 U.S.C. § 1003(b) (1988)).

¹⁰ ERISA § 514(a), 29 U.S.C. § 1144(a).

¹¹ Fisk, *supra* note 9, at 35. ERISA has been held to preempt laws relating to family leave, prevailing wage laws, working conditions of apprentices, mechanics’ liens, wrongful death, taxes on hospitals, medical malpractice claims, etc. *Id.* at 37. “It is a rich irony that ERISA, which was heralded at its enactment as significant federal protective legislation, has through its preemption provision been the basis for invalidating scores of protective state laws.” *Id.* at 38. ERISA itself does not indicate whether a particular state law relates to a plan in a manner that it should be preempted. *Id.* at 49. If a state law is preempted, or superseded, by ERISA, the logical question then becomes “what would they be ‘superseded’ by. Presumably, the laws would be superseded by silence, that is by the absence of regulation.” *Id.* at 49.

¹² *Romney v. Lin*, 94 F.3d 74 (2d Cir. 1996).

¹³ BCL section 630 provides in relevant part:

(a) The ten largest shareholders ... of every corporation ..., no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees

(b) For the purposes of this section, wages or salaries shall mean all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee. These shall

acted to provide employees with protection in the event of employer insolvency.¹⁴ BCL section 630(a) imposes joint and several liability on the ten largest shareholders of a closely-held corporation for specified corporate obligations enumerated in the statute.¹⁵ Specifically, the ten largest shareholders are personally liable for "all debts, wages or salaries due and owing to any of its laborers, servants or employees."¹⁶ BCL section 630(b) defines "wages and salaries" to include "employer contributions to or payments of insurance or welfare benefits [and] employer contributions to pension or annuity funds"¹⁷ Significantly, as it applies to pension plans, the statute imposes liability on shareholders only after the corporate entity fails to satisfy a judgment for delinquent contributions.¹⁸ After obtaining a judgment

specifically include but not be limited to salaries, overtime, vacation, holiday and severance pay; employer contributions to or payments of insurance or welfare benefits; employer contributions to pension or annuity funds; and other moneys properly due or payable for services rendered by such employee.

Id.

¹⁴ See *Lindsey v. Winkler*, 277 N.Y.S.2d 768, 770 (Dist. Ct. Nassau County 1967) ("Section 630 of the Business Corporation Law was enacted as a safeguard to laborers, servants or employees of corporations which, upon insolvency of the corporation, would leave such working people without recourse and payment for their work, labor and services.").

¹⁵ N.Y. BUS. CORP. LAW § 630(a) (McKinney 1986); see Jeffrey S. Klein & Nicholas J. Pappas, *The Preemption of Liability for Unpaid Wages, Benefits*, N.Y. L.J., Dec. 2, 1996, at 3 (tracing section 630 as statutory cause of action against corporation's shareholders to Manufacturing Corporations Act of 1848). N.Y. SESS. LAWS 1848, ch. 40, sec. 18 stated: "[t]he stockholders of any company organized under the provisions of this act, shall be jointly and severally liable for all debts that may be due and owing their laborers, servants and apprentices, for services performed for such corporation." *Id.* at 4 n.1. The Court of Appeals narrowed section 630's predecessor, Stock Corporation Law section 71, by holding that the New York law did not apply to foreign corporations doing business in New York. See *Armstrong v. Dyer*, 198 N.E. 551 (N.Y. 1935). The effect of section 630 has increased concerns regarding the liability of corporate executives and the need for personal liability insurance. Robert H. Roshe, *New York's Response to the Director and Officer Liability Crisis: A Need to Reexamine the Importance of D&O Insurance*, 54 BROOK. L. REV. 1305, 1351-53 (1989) (discussing need to enhance personal liability protection for corporate directors and officers).

¹⁶ N.Y. BUS. CORP. LAW § 630(a) (McKinney 1986).

¹⁷ *Id.* § 630(b). Section 630(b) defines "wages" and "salaries" as "all compensation and benefits payable by an employer ... for personal services rendered by such employee." *Id.* Such services include "salaries, overtime, vacation, holiday and severance pay; employer contributions to or payments of insurance or welfare benefits; employer contributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee." *Id.*

¹⁸ *Id.* § 630(a) ("An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation

against a corporation for failure to make contributions to an employee pension plan, BCL section 630 allows a plan fiduciary or participant to enforce the un-executed judgment against the corporation's ten largest shareholders.¹⁹

In *Romney*,²⁰ the Second Circuit held that ERISA preempts BCL section 630.²¹ In this case, the plaintiff-employee (the "Union") obtained an arbitration award against a closely-held New York corporation ("Goodee Fashions") for failure to make required contributions to four union benefit funds.²² The Supreme Court of New York County confirmed the award and issued a judgment.²³ After an unsuccessful attempt to enforce the judgment against the corporation, the Union sued the principal shareholder ("Lin") of Goodee Fashions under BCL section 630 to enforce the judgment.²⁴ Lin removed the action to federal court,²⁵ and the district court dismissed the claim for failure to state a claim upon which relief may be granted.²⁶ The Union's motion to remand was denied, and the Union appealed to the Second Cir-

upon a judgment recovered against it for such services.").

¹⁹ *Id.*

²⁰ 94 F.3d 74 (2d Cir. 1996).

²¹ *Id.* at 76; see also *Employee Benefits: ERISA Preempts Law Holding Shareholders Liable for Delinquent Plan Contributions*, BNA CORP. COUNS. DAILY, Oct. 7, 1996, at D4; David E. Rovella, *ERISA Pre-empts Suit Against Stockholders*, NAT'L L. J., Sept. 16, 1996, at B3.

²² *Romney*, 94 F.3d at 74. Goodee Fashions, a New York corporation, entered into a collective bargaining agreement with the Union whereby the corporation was obligated to make contributions to employee benefit funds. *Id.* at 77. Only three of these funds were ERISA funds and were at issue on appeal. *Id.* Goodee Fashions failed to make the contributions and the Union eventually won a default arbitration award. *Id.* The award was confirmed by the New York State Supreme Court and a judgment was entered in the amount of \$70,647.17. *Id.* Execution against the corporation was returned unsatisfied. *Id.* at 74. *Romney*, the Union's Manager-Secretary, instituted this action. *Id.*

²³ *Id.* at 77.

²⁴ *Id.*

²⁵ See *Romney v. Lin*, 894 F. Supp. 163, 165 (S.D.N.Y. 1995), *aff'd*, 94 F.3d 74 (2d Cir. 1996). The claim was originally filed in Supreme Court, New York County. *Id.* Defendant removed the suit on the basis that the claim was preempted by ERISA. *Id.*

²⁶ *Romney*, 94 F.3d at 77 (dismissing claim pursuant to FED. R. CIV. P. 12(b)(6)). In ruling that section 630 was preempted by ERISA the district court reasoned that "ERISA contains a detailed provision regarding civil enforcement" and that the ERISA enforcement scheme "does not authorize any type of action against officers and stockholders of a corporate employer to recover contributions owed to an ERISA fund." *Romney*, 894 F. Supp. at 166; see *Romney v. Cai*, Nos. 94 CV 2546-94 CV 2548, 1996 WL 331184, *3 (E.D.N.Y. 1996) (agreeing that ERISA preempts BCL § 630).

cuit arguing that the district court lacked subject matter jurisdiction over the state law claim.²⁷

The Second Circuit prefaced its ruling on the jurisdiction and removal issues with a discussion of the doctrine of complete preemption.²⁸ Under the doctrine of complete preemption, in order for the state law claim to be properly removed to federal court, it must both "relate to" an ERISA plan within the meaning of ERISA's preemption provision and be supplanted by ERISA's civil enforcement provision.²⁹ The Second Circuit then concluded that BCL section 630 "relate[d] to" ERISA and fell "within the scope of [ERISA's] civil enforcement provision."³⁰ The suit, held the *Romney* court, was therefore properly removed to federal court.³¹ After determining removal jurisdiction was properly conferred, the Second Circuit concluded that ERISA preempted section 630 of the BCL.³² The court reasoned that "§ 630 'relates to' ERISA (1) because it refers to ERISA plans, or, alternatively, (2)

²⁷ *Romney*, 94 F.3d at 74. Defendant Lin alleged removal jurisdiction on three separate grounds: diversity of citizenship, preemption under the Labor Management Relations Act, and preemption under ERISA. *Id.* at 77. The court concluded that ERISA preemption conferred subject matter jurisdiction and did not address the other possibilities. *Id.* at n.3. "[P]reemption alone is insufficient to support removal jurisdiction ... the other requisite [is] whether Romney's suit under § 630 is 'within the scope [of] the civil enforcement provisions' of ERISA § 502(a)." *Id.* at 78.

²⁸ According to the well-pleaded complaint rule, a cause of action does not arise under federal law unless a federal question appears in the plaintiff's statement of his claim. See Paul J. Ondrasik Jr. & Sara E. Hauptfuehrer, *Removal Jurisdiction in ERISA Cases - The Doctrine of 'Complete' Preemption*, 4 No. 5 ERISA LITIG. REP. 4 (1995). "Under the so-called 'well-pleaded complaint rule' a case does not 'arise under' federal law unless the federal question 'necessarily' appears in the plaintiff's statement of his claim." *Id.* (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). Preemption, when asserted as a defense, does not transform a state law cause of action into a claim arising under federal law. *Id.* "Complete preemption," however, provides an exception to the well-pleaded complaint rule. *Id.* at 4-5 (providing examples of how doctrine of complete preemption has been recognized with regard to ERISA claims). A state law claim will be completely preempted by ERISA, and therefore removable, only if the state law cause of action satisfies a two prong test: (1) the state law claim must "relate to" an ERISA plan within the meaning of section 514(a); and (2) the state law claim must be supplanted by one under ERISA section 502(a), ERISA's civil enforcement provision. *Id.* at 5 (citing *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1982)). "When the doctrine of complete preemption does not apply, but the plaintiff's state claim is arguably preempted under section 514(a), the district court, being without removal jurisdiction, cannot resolve the dispute regarding preemption." *Id.* at 6.

²⁹ See *supra* note 28 for discussion of doctrine of complete preemption.

³⁰ *Romney*, 94 F.3d at 83.

³¹ *Id.*

³² *Id.* at 84.

because it constitutes an 'alternative enforcement mechanism' to ERISA § 502(a).³³ In the past, BCL section 630 had escaped ERISA's preemptive effect and in rendering their decisions, both the Second Circuit and the district court acknowledged a conflicting ruling by the New York Court of Appeals.³⁴

³³ *Id.* at 83.

³⁴ See *Sasso v. Vachris*, 484 N.E.2d 1359, 1363-64 (1985) (holding that section 630 was not preempted by ERISA). *But see* *Romney v. Cai*, Nos. 94 CV 2546-94CV 2548, 1996 WL 331184, *3-4 (E.D.N.Y. 1996) (holding that BCL section 630 was preempted by ERISA); *McMahon v. McDowell*, 479 U.S. 971, 971 (1986) (evidencing Supreme Court's choice to remain silent on ERISA preemption of state regulations similar to section 630); *cf.* *McMahon v. McDowell*, 794 F.2d 100, 108 (3d Cir. 1986) (holding that Pennsylvania wage payment and collection law seeking to impose liability on employer or its officers and directors for unpaid pension plan contributions was preempted by ERISA). The Supreme Court denied certiorari to resolve the matter despite Justice White's dissent acknowledging the conflict between *Sasso* and *McMahon*. *McMahon v. McDowell*, 479 U.S. 971, 971 (1986).

In *Sasso*, the New York Court of Appeals held that ERISA did not preempt BCL section 630. *Sasso*, 484 N.E.2d at 1363-64. The *Sasso* court reasoned that section 630 was remedial in nature, merely providing an additional enforcement mechanism by which employees can recover delinquent contributions to employee benefit plans. *Id.* at 1362. Relying on *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), the *Sasso* court stated that section 630 did not "regulate, directly or indirectly, the terms and conditions" of employee benefit plans and accordingly did not "relate to" employee benefit plans within the meaning of section 514(a) of ERISA. *Sasso*, 484 N.E.2d at 1363-64 (citing 29 U.S.C. § 1144(c)(2)). The *Sasso* court further stated that section 630 regulated only the employer and not the content of an employee benefit plan. *Id.* at 1363 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 758 (1985)); see also Patricia Loftus-Mattnews, *Preemption or Preservation of State Remedies Under ERISA? The New York Court of Appeals Preserves a State Remedy in Sasso v. Vachris*, 60 ST. JOHN'S L. REV. 567, 577 (1986) (discussing *Sasso* court's reliance on *Metropolitan Life Insurance Company* and discussing Court of Appeals analogy of laws regulating insurer to those regulating employer and concluding that laws regulating only employer did not "relate to" ERISA plan).

The holding of *Rebaldo* was later overruled by *Ingersoll-Rand Co. v. McClen- don*, 498 U.S. 133 (1990). Despite reliance on *Rebaldo*, *Sasso* was still regarded as valid New York law. See Klein & Pappas, *supra* note 15, at 3 ("New York state courts have continued to recognize that § 630 provides a viable cause of action against shareholders for unpaid wages and salaries."); see also 'Sasso' Is Still Valid New York Law Despite Federal Cases on Preemption, N.Y. L.J., Oct. 5, 1995, at 25 (stating that Justice Gerace upheld *Sasso* in *Trustees of the National Automatic Sprinkler Industry Pension Fund v. Sandberg* based on United States Supreme Court's refusal in *McMahon v. McDowell*, 479 U.S. 971 (1986), to disturb *Sasso* opinion). The viability of a section 630 claim now depends on the forum where the claim is ultimately adjudicated. See Klein & Pappas, *supra* note 15, at 4 ("[I]n light of *Romney's* rejection of *Sasso*, the viability of a § 630 claim relating to an ERISA plan in New York, at least for the time being, will depend on the forum where the claim is ultimately adjudicated.") (italics added). Unless the New York Court of Appeals or the Second Circuit changes its position, the conflict will have to be resolved by the Supreme Court or the New York Legislature. *Id.* Employers faced with this type of claim will likely seek removal to federal court. *Id.*

Part One of this Comment discusses the evolution of the law surrounding ERISA's general policies and broad preemptive power. Part Two analyzes the *Romney* decision and argues that the Second Circuit erred in holding that BCL section 630 was preempted by ERISA. Finally, Part Three discusses recent developments in the area of ERISA preemption.

I. EVOLUTION OF ERISA PREEMPTION

The United States Supreme Court has addressed the scope of ERISA preemption on many occasions³⁵ and has broadly construed ERISA's preemption provision.³⁶ Historically, the Supreme Court has applied a plain meaning approach when determining whether state laws were preempted by ERISA.³⁷ This plain meaning approach focused on interpreting the words

³⁵ See, e.g., *California Div. of Labor Standards Enforcement v. Dillingham Construction*, 117 S. Ct. 832 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 113 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 724 (1985); *Metropolitan Life Ins. Co.*, 471 U.S. 724; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

³⁶ The preemption provision has been described as having "unparalleled breadth." *Holland v. Burlington Indus. Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1985). ERISA contains an explicit and broad preemption provision. ERISA § 514(a), 29 U.S.C. 1144(a); see, e.g., *Alessi*, 451 U.S. at 524 (invalidating, on preemption grounds, New Jersey statute that prohibited pension plans from offsetting workmen's compensation benefits against employee retirement benefits because it related to pension plans governed by ERISA by eliminating one method for calculating pension benefits); see also *Shapiro*, *supra* note 3, at 294-95 (stating that words of section 514 have been cause of "endless stream of litigation"). See generally *Fisk*, *supra* note 9, at 47 (discussing case decisions interpreting "relates to" portion of section 514, and noting that term "relates to" needs modifier in order to have concrete meaning and depending on modifier selected, term could take on many different possible meanings).

³⁷ See *Shaw*, 463 U.S. at 97 n.16 (turning to Black's Law Dictionary for definition of "relate" in order to interpret preemption provision and "relate" was defined as: "To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"); *Greater Wash. Bd. Of Trade*, 506 U.S. 125 (relying on Black's Law Dictionary definition of "relate"); see also *Fisk*, *supra* note 9, at 65 ("*Shaw* was the beginning of the Court's fruitless pursuit of a plain language approach to ERISA preemption").

“relate to” in ERISA section 514(a).³⁸ Using this approach, state laws were found to “relate to” benefit plans and were thus preempted, if “in the normal sense of the phrase, ... [the state law] ha[d] a connection with or reference to such a plan.”³⁹ The fact that a state law was not designed to affect, or had only an indirect effect on, an ERISA benefit plan would not save the state law from preemption.⁴⁰ Courts viewed the purpose of the state law as irrelevant with regard to the issue of ERISA preemption. ERISA was held to displace not only laws that were inconsistent with the federal law, but those that were consistent with it as well.⁴¹ Some limitations, however, were placed on ERISA’s preemption provision. For example, the Supreme Court held early on that state laws that “affect employee benefit plans in too tenuous, remote, or peripheral a manner” do not warrant a finding that the state law “relates to” the plan.⁴² The Court, however, provided little guidance as to what constitutes “too tenuous, remote, or peripheral” and ultimately the limitation provided little assistance when analyzing a state statute.⁴³

The sweeping nature of the plain meaning approach used by the Supreme Court led to numerous challenges of virtually every type of state regulation that was remotely related to employee

³⁸ See, e.g., *Greater Wash. Bd. Of Trade*, 506 U.S. 125; *Ingersoll-Rand*, 498 U.S. 133; *PMC Corp.*, 498 U.S. 52; *Fort Halifax Packing Co.*, 482 U.S. 1; *Shaw*, 463 U.S. 85.

³⁹ *Shaw*, 463 U.S. 85 (finding that New York’s Disability Benefits Law had connection with or reference to ERISA plans); see also *Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992) (finding law requiring “[a]ny employer who provides health insurance coverage for an employee ... [to] provide health insurance coverage equivalent to the health insurance coverage of the employee while the employee receives or is eligible to receive workers’ compensation benefits under this chapter” was “related to” ERISA plan).

⁴⁰ *Pilot Life Ins. Co.*, 481 U.S. 41 (holding insurance bad faith tort claims preempted).

⁴¹ See *Shaw*, 463 U.S. at 100 (preempting New York Human Rights Law designed to further purpose of ERISA); see also *Alessi*, 451 U.S. at 524 (“Whatever the purpose of the statute, we conclude that it ‘relates to pension plans’ governed by ERISA because it eliminates one method for calculating pension benefits that is permitted by federal law.”) (emphasis added).

⁴² *Shaw*, 463 U.S. at 100 n.21.

⁴³ *Id.* While the court provided no guidance as to what should be considered “too remote or peripheral,” it did, however, offer the example of *American Telephone & Telegraph Company v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979), which found that state garnishment of man’s income to enforce alimony and child support was not preempted because it related to pension plans “in the most remote and peripheral manner.”

benefit plans. In 1995, however, the Supreme Court dramatically departed from its plain meaning approach when it decided *Blue Cross & Blue Shield v. Travelers Insurance Company*.⁴⁴ The *Blue Cross* Court acknowledged that the text of ERISA's preemption provision was "unhelpful" in determining whether state laws have a "connection with" ERISA plans.⁴⁵ The Court stated that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'"⁴⁶ The Court then adopted a new approach to ERISA preemption whereby "ERISA's objectives [would serve] as a guide to the scope of the state law that Congress understood would survive."⁴⁷

II. ANALYSIS OF *ROMNEY V. LIN*

In holding that removal jurisdiction was properly conferred upon the district court, the Second Circuit not only found that

⁴⁴ *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). In *Blue Cross*, the Court upheld a New York statute requiring hospitals to collect surcharges from patients covered by commercial insurers and certain other health maintenance organizations (HMOs), but not from patients covered by Blue Cross/Blue Shield. *Id.* at 1674. Several commercial insurers filed suit claiming that the New York statute "relates to" ERISA and thus pre-empts imposing surcharges on patients whose commercial insurance coverage was purchased by an ERISA plan. *Id.* at 1672. The District Court for the Southern District of New York granted the plaintiffs summary judgment. *Travelers Ins. Co. v. Cuomo*, 813 F. Supp. 996, 999 (S.D.N.Y.), *aff'd*, 14 F.3d 708 (2d Cir. 1993), *rev'd sub nom.*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). Before being reversed by the U.S. Supreme Court, the Court of Appeals for the Second Circuit affirmed the district court. *Travelers Ins. Co.*, 14 F.3d at 725 (relying on *Shaw*, 463 U.S. 85, and *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992)). The Second Circuit held that ERISA's preemption clause must be read broadly to preempt any state law having a connection with, or reference to, covered benefit plans. *Id.* at 719.

⁴⁵ *Blue Cross*, 514 U.S. at 656. The Second Circuit concluded that "the three surcharges 'relate to' ERISA because they impose a significant economic burden on commercial insurers and HMOs" and thus "have an impermissible impact on ERISA plan structure and administration." *Travelers Ins. Co.*, 14 F.3d at 721. The United States Supreme Court reversed, holding New York's surcharge statute did not "relate to" employee benefits within the meaning of ERISA's preemption provision. *Blue Cross*, 514 U.S. at 649. "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656; *see also Massachusetts v. Morash*, 490 U.S. 107 (1989) (finding the language of ERISA section 514 unhelpful).

⁴⁶ *Blue Cross*, 514 U.S. at 655 (citations omitted).

⁴⁷ *Id.* at 656.

BCL section 630 was related to ERISA, but also that the Union's cause of action fell within the scope of ERISA's civil enforcement provision.⁴⁸ The Second Circuit erred on each of these holdings.

A. *Does BCL section 630 "relate to" an ERISA plan?*

The Second Circuit in *Romney* approached the question of whether BCL section 630 was preempted by ERISA by analyzing whether the statute "relate[d] to" ERISA.⁴⁹ The *Romney* court defined the phrase "relates to" as "having a connection with or reference to."⁵⁰ The Second Circuit further opined that a state law is "relate[d] to" ERISA plans if the state law either made an explicit reference to ERISA plans or disserved the basic purpose of ERISA's preemption provision.⁵¹ The court concluded that BCL section 630 was preempted on both grounds, although either ground standing alone, according to the court, would have been sufficient to support a finding of ERISA preemption.⁵²

1. Explicit Reference

In *Mackey v. Lanier Collection Agency and Service*,⁵³ the Supreme Court of the United States provided guidance on what is required to find that a state law explicitly refers to ERISA. At issue in *Mackey* were two Georgia statutes, an anti-garnishment statute and a garnishment statute of general application. The anti-garnishment statute provided in pertinent part: "[f]unds or benefits of a pension, retirement, or employee benefit plan or program *subject to the provisions of the federal Employment Retirement Income Security Act of 1974*, as amended, shall not be subject to the process of garnishment"⁵⁴ The Court held that this particular anti-garnishment statute was preempted by

⁴⁸ See *Romney*, 94 F.3d at 80 (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987), and *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 573 (2d Cir. 1995)).

⁴⁹ *Id.* at 78.

⁵⁰ *Id.* (citing *Shaw*, 463 U.S. at 96-97).

⁵¹ *Id.* at 78 (defining basic purpose of preemption as means to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.") (citing *Greenblatt*, 68 F.3d at 574).

⁵² *Romney*, 94 F.3d at 78.

⁵³ 486 U.S. 825 (1982).

⁵⁴ See *id.* at 828 n.2 (quoting GA. CODE ANN. § 18-4-22.1 (1982)) (emphasis added). This statute had the effect of protecting ERISA welfare benefit plans from garnishment according to Georgia law, but did not afford the same protection to non-ERISA plans. *Id.* at 830 n.4.

ERISA section 514(a) because it explicitly referenced and solely applied to ERISA employee benefit plans.⁵⁵

In contrast, the court concluded that ERISA did not preempt Georgia's general garnishment statute.⁵⁶ The Court distinguished the general application garnishment statute from the anti-garnishment statute on the basis that the former did not contain language that "specifically mention[ed]" or "single[d] out" ERISA plans for special treatment.⁵⁷

Analyzing BCL section 630 within the framework provided by the Supreme Court in *Mackey*, it is apparent that the Second Circuit erred in holding that BCL section 630 made explicit reference to ERISA by defining "wages or salaries" as "all compensation and benefits payable by an employer ... includ[ing] ... employer contributions to or payments of insurance or welfare benefits [and] employer contributions to pension or annuity funds"⁵⁸ BCL section 630 does not make explicit reference to ERISA by specifically mentioning or singling out ERISA plans.⁵⁹ The basic thrust of BCL section 630 is to define shareholder liability for certain types of corporate debt enumerated in the statute.⁶⁰ BCL section 630's relationship to ERISA is "too tenuous, remote or peripheral ... to warrant a finding" that BCL section 630 "relates to" or explicitly references an ERISA plan.⁶¹

⁵⁵ *Id.* at 830 ("Ga. Code Ann. § 18-4-22.1, which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures is pre-empted under § 514(a). The state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach.").

⁵⁶ *Id.* at 831-32.

⁵⁷ *Id.* at 831. The Court recognized that ERISA's preemptive effect is not limited to state laws explicitly referencing ERISA and went on to analyze whether the Georgia general garnishment statute "relates to" ERISA welfare benefit plans. *Id.* The Court held that ERISA does not "forbid garnishment of an ERISA welfare benefit plan, even where the purpose is to collect judgments against plan participants." *Id.* at 841.

⁵⁸ See *Romney v. Lin*, 94 F.3d 74, 79 (2d Cir. 1996) (quoting N.Y. BUS. CORP. LAW § 630(b)).

⁵⁹ See *supra* notes 12-19 and accompanying text for discussion of BCL section 630.

⁶⁰ See *supra* notes 12-19 and accompanying text for discussion of BCL section 630.

⁶¹ See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983) (setting forth the "too tenuous, remote or peripheral" standard); see also *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992) (quoting *Shaw*).

2. Disservice to the Purpose of Preemption (Avoiding a Multiplicity of Regulation)

The *Romney* court further justified its conclusion by maintaining that BCL section 630 disserved the basic purpose of preemption.⁶² Congress's primary intention when enacting ERISA was to protect against the mismanagement of plan funds⁶³ and to provide for the uniform administration of ERISA plans.⁶⁴ With the inclusion of ERISA's preemption provision, Congress intended to relieve employers from having to comply with differing and inconsistent state regulatory requirements.⁶⁵ In enacting ERISA with its broad preemption provision, Congress thus intended to provide an incentive to employers to maintain ERISA plans by alleviating the burdens caused by subjecting employers to a multiplicity of state regulations. Congress did not intend for ERISA to preempt any and all state statutes providing incentives to, or deterring corporate employers from, establishing and maintaining ERISA plans.⁶⁶

The *Romney* court incorrectly viewed BCL section 630 as an "alternative enforcement mechanism" that would interfere with the uniform administration of employee benefit plans.⁶⁷ The court reasoned that ERISA does not provide for shareholder liability and "[b]y changing remedies § 630 would alter the incen-

⁶² See *Romney*, 94 F.3d at 80 (stating that basic purpose of preemption is "namely 'to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans' ") (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995)).

⁶³ *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 117 S. Ct. 832, 838 (1997) (citing *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)).

⁶⁴ *Blue Cross*, 514 U.S. at 657 (citing *Ingersoll-Rand v. McClendon*, 498 U.S. 113, 142 (1990)).

⁶⁵ *Id.* The *Blue Cross* Court noted that the preemption provision was enacted "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among states ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Id.* at 656-57 (quoting *Ingersoll Rand*, 498 U.S. at 142). Representative Dent stated the purpose was to "eliminate the threat of conflicting and inconsistent State and local regulation." *Id.* at 657 (quoting 120 CONG. REC. 29197 (1974)).

⁶⁶ See, e.g., *Dillingham Constr.*, 117 S. Ct. 832 (upholding California's prevailing wage law which provided economic incentive to comply with the State's requirements); *Blue Cross*, 514 U.S. 645 (upholding a New York surcharge statute despite the fact that it tended to make Blue Cross/Blue Shield plans look more attractive than other commercial insurance).

⁶⁷ See *Romney*, 94 F.3d at 80 (quoting *Blue Cross*, 514 U.S. at 657).

tives for employers to create and maintain ERISA plans, and thereby would affect ERISA plans in ways Congress did not intend."⁶⁸ Any effect that BCL section 630 might have on the creation of ERISA plans is too indirect to support a finding of preemption. BCL section 630 neither affects the primary liability of corporate employers for delinquent ERISA plan contributions, nor does it mandate or affect any terms of the plan itself.

Unable to base its finding of preemption upon the aforementioned substantive grounds, the Second Circuit attempted to justify its conclusion with the proposition that BCL section 630 "would alter the incentives for employers to create and maintain ERISA plans," and thereby affect ERISA plans.⁶⁹ This argument is flawed in several respects. The Second Circuit's argument fails to recognize and respect the separate identities of a corporation and its shareholders by assuming that a corporation will make decisions with respect to establishing ERISA funds based on the potential for shareholder liability. Given that a corporation and its shareholders are separate and distinct legal entities, it is unlikely that a corporation would refuse to establish an ERISA plan based solely upon the fear of potential future shareholder liability. Even if this were the case, the opinion of the Supreme Court in *Blue Cross & Blue Shield v. Travelers Insurance Company*⁷⁰ indicates that such an effect would nevertheless be too indirect to warrant preemption.

In *Blue Cross*, the Court concluded that ERISA did not preempt a New York statute imposing surcharges on commercial insurance coverage and not on Blue Cross & Blue Shield plans funded by ERISA plans.⁷¹ "Because ERISA plans ... were predominant among the purchasers of insurance, the statute was asserted to run afoul of ERISA's preemption provision."⁷² The Supreme Court upheld the New York statute despite the fact that the additional surcharges imposed on commercial insurance would make Blue Cross & Blue Shield plans more attractive to

⁶⁸ *Id.* at 81 (stating that permitting suits against shareholders under section 630 reallocates burden of establishing and maintaining ERISA plans).

⁶⁹ *Id.*

⁷⁰ 514 U.S. 645 (1995).

⁷¹ *Blue Cross*, 514 U.S. 645.

⁷² *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 117 S. Ct. 832, 839 (1997) (citing Brief for Petitioner at 1-2, *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (No. 93-1408)).

consumers and would have an effect on the choices made by insurance buyers.⁷³ Even though “[t]he resulting cost variations encouraged insurance purchasers, including ERISA plans, to provide insurance benefits through [Blue Cross & Blue Shield],”⁷⁴ the Court upheld the statute reasoning that it “did not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself,”⁷⁵ nor did “the indirect influence of the surcharges preclude uniform administrative practice or the provision of a uniform interstate benefit package.”⁷⁶

Analyzing BCL section 630 according to the reasoning set forth in *Blue Cross*, it logically follows that any effect BCL section 630 might have on the creation of ERISA plans would be indirect as well. A state statute providing for shareholder liability, like a statute imposing additional surcharges, has only an indirect effect on ERISA plans and therefore does not “relate to” ERISA in a way that requires preemption. Further, BCL section 630 does “not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan,” nor does “the indirect influence of [BCL section 630] preclude uniform administrative practice or the provision of a uniform interstate benefit practice.”⁷⁷ BCL section 630 imposes no regulatory requirements with regard to the administration of employee benefit plans and in no way impinges on Congress’s goal of uniform administration of employee benefit plans.⁷⁸

B. Does BCL Section 630 Fall “Within the Scope of” ERISA’s Civil Enforcement Provision?

The Supreme Court has acknowledged that state laws providing alternative enforcement mechanisms to ERISA’s civil enforcement provision “relate to” ERISA plans and, thus, trigger

⁷³ *Blue Cross*, 514 U.S. at 659. “Although there is no evidence that the surcharges will drive every health insurance consumer to the Blues [Blue Cross/Blue Shield], they do make the Blues more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans.” *Id.*

⁷⁴ *Dillingham Constr.*, 117 S. Ct. at 840.

⁷⁵ *Blue Cross*, 514 U.S. at 659.

⁷⁶ *Id.*

⁷⁷ See *supra* notes 12-19 and accompanying text for discussion of BCL section 630.

⁷⁸ See *supra* notes 12-19 and accompanying text for discussion of BCL section 630.

preemption.⁷⁹ The Second Circuit in *Romney* held that BCL section 630 fell within ERISA's enforcement provision, ERISA section 502(a),⁸⁰ which allows a plan fiduciary, participant, or beneficiary to enforce the obligation of an employer to contribute to employee benefit plans pursuant to ERISA section 515.⁸¹ According to the *Romney* court, a cause of action already existed for the Union to recover the delinquent contributions to ERISA funds under ERISA section 502, predicated upon a violation of ERISA section 515.⁸² BCL section 630 was thus determined to be an "alternative enforcement mechanism." The claims that a plan fiduciary or participant can bring under BCL section 630 and ERISA sections 502 and 515 are, however, distinctly different. ERISA section 515 establishes a cause of action only against an "employer."⁸³ Curiously, the *Romney* court failed to distinguish a corporation from its shareholders and characterized both as "employers."⁸⁴ According to past decisions rendered by the Sec-

⁷⁹ *Blue Cross*, 514 U.S. at 658. "[W]e have held that state laws providing alternate enforcement mechanisms also relate to ERISA plans, triggering pre-emption." *Id.* (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990)). In *Ingersoll*, ERISA preempted employee's state law wrongful discharge suit. *Ingersoll-Rand Co.*, 498 U.S. 133. The employee alleged his discharge resulted from his employers desire to avoid making contributions to the employee pension fund. *Id.* The Court reasoned that ERISA section 510 already protected plan participants from termination based on improper employer motivations. *Id.* at 143.

⁸⁰ See *Romney v. Lin*, 94 F.3d 74, 80 (2d Cir. 1996). ERISA section 502(a) sets forth a "comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 80 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). The Second Circuit in *Romney* applied reasoning similar to an earlier decision when stating "[t]he effect of ERISA preemption is wholly to eliminate state law claims by benefit plan participants and beneficiaries, leaving them only the causes of action specifically provided in the statute's civil enforcement provisions." *Id.* at 81 (quoting *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992)) (emphasis omitted).

⁸¹ See *id.* at 80. ERISA section 515 provides in relevant part: "Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall make such contributions in accordance with the terms and conditions of such plan or such agreement." ERISA § 515, 29 U.S.C. § 1145.

⁸² *Romney*, 94 F.3d at 81 ("ERISA § 502(a) already provides a cause of action to enforce employer contributions to ERISA plans: a plan fiduciary may obtain relief for delinquencies pursuant to ERISA § 515).

⁸³ ERISA § 3, 29 U.S.C. § 1002(5) (ERISA section 3 defines an employer as anyone "acting indirectly in the interest of an employer, in relation to an employee benefit plan").

⁸⁴ See *Romney*, 94 F.3d at 80-81 (discussing BCL section 630's relationship to ERISA section 515 and ERISA section 502(a)).

ond Circuit, an “employer” within the meaning of ERISA section 515 is one who is “obligated” to make contributions.⁸⁵ Although individual shareholders of a corporation may voluntarily choose to obligate themselves personally for contributions to ERISA plans, and thereby become “employers” within the meaning of ERISA section 515, without assuming personal liability a shareholder cannot constitute an “employer.”⁸⁶ Without the underlying violation of ERISA section 515, no valid ERISA cause of action was involved in *Romney v. Lin*.

The Second Circuit’s reasoning offends the concept that a corporation and its shareholders are separate legal entities. Shareholders have no general personal obligation to contribute to pension or welfare benefit funds. Under BCL section 630 the obligation to satisfy an outstanding judgment against the corporation for employee related services is triggered only upon the default of the corporation.⁸⁷ The Second Circuit failed to recognize the difference between an “employer” obligated to contribute to ERISA funds and a “shareholder” with no such obligation.⁸⁸ Because the “ten largest shareholders” of a corporation do not constitute an “employer” within the meaning of ERISA section 515, the action brought by the Union in *Romney* was improperly removed to federal court.⁸⁹ Without a finding that the “ten largest shareholders” constitute an “employer,” the second prong of the doctrine of complete preemption is not satisfied.⁹⁰ That is, the action does not fall within ERISA’s civil enforcement provi-

⁸⁵ See *Cement and Concrete Workers Dist. Council Welfare Fund v. Lollo*, 35 F.3d 29, 36-37 (2d Cir. 1994) (stating that employer under ERISA is one who is contractually obligated to make pension contributions); see also *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 575 (2d Cir. 1995) (defining “employer” within meaning of ERISA § 3 to be anyone “acting indirectly in the interest of an employer[] in relation to an employee benefit plan”) (quoting 29 U.S.C. §1002(5)); *Rockney v. Blohorn*, 877 F.2d 637, 643 (8th Cir. 1989) (asserting that corporate officers could be held liable under ERISA if terms of plan imposed liability); *Massachusetts Laborers’ Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 25 (1st Cir. 1988) (permitting recovery under section 515 against employers obligated to make contributions).

⁸⁶ See *Cement and Concrete Workers Dist. Council Welfare Fund*, 35 F.3d 29.

⁸⁷ See *supra* notes 12-19 and accompanying text for discussion of BCL section 630.

⁸⁸ See *Romney*, 94 F.3d at 80-81.

⁸⁹ See *supra* note 28 and accompanying text for discussion of doctrine of complete preemption.

⁹⁰ See *supra* note 28 and accompanying text for discussion of doctrine of complete preemption.

sion.⁹¹

This assertion is clearly illustrated by the Supreme Court's decision in *Peacock v. Thomas*.⁹² In *Peacock*, the Court held that a "veil-piercing claim does not state a cause of action under ERISA and cannot independently support federal jurisdiction."⁹³ In *Peacock*, the plaintiff-employee recovered a judgment against a corporate employer for unpaid contributions to ERISA funds.⁹⁴ The judgment was returned un-executed and the plaintiff-employee later filed a veil-piercing claim seeking to enforce the judgment against the corporation's largest shareholder.⁹⁵ The Court stated that veil-piercing is not an independent ERISA cause of action, "but rather is a means of imposing liability on an underlying cause of action."⁹⁶ "Because ... no 'underlying' violation of any provision of ERISA or an ERISA plan [was alleged]," jurisdiction was not properly conferred upon the district court.⁹⁷ The Court further stated that "[o]ther than the existence of the ERISA judgment itself, this suit has little connection to the ERISA case."⁹⁸ Although the Court disposed of the appeal on ju-

⁹¹ See *supra* note 28 and accompanying text for discussion of doctrine of complete preemption.

⁹² 116 S. Ct. 862 (1996) (reversing Fourth Circuit decision for lack of jurisdiction).

⁹³ *Id.* at 866.

⁹⁴ *Id.* at 865. In 1987, Thomas, a former employee of Tru-Tech, Inc., filed an ERISA suit against Tru-Tech and Peacock, an officer and shareholder of Tru-Tech, for delinquent pension benefits. *Id.* Finding that Peacock was not a fiduciary, the district court entered a judgment against Tru-Tech only. *Id.*

⁹⁵ *Id.* "Thomas unsuccessfully attempted to collect the judgment from Tru-Tech. Thomas then sued Peacock in federal court claiming that Peacock had entered into a civil conspiracy to siphon assets from Tru-Tech to prevent satisfaction of the ERISA judgment." *Id.* The complaint was later amended to assert a claim for "Piercing the Corporate Veil Under ERISA and Applicable Federal Law." *Id.* The district court agreed to pierce the corporate veil and the Court of Appeals affirmed. *Id.* at 866. The Supreme Court granted certiorari and reversed. *Id.*

⁹⁶ *Id.* at 866-67 (quoting 1 C. KEATING & G. O'GRADNEY, FLETCHER CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 41, p. 603 (perm. ed. 1990)).

⁹⁷ See *id.* at 867. The Court rejected the argument that this "suit arose under ERISA § 502(a)(3), which authorizes civil actions for 'appropriate equitable relief to redress violations of ERISA or the terms of an ERISA plan.'" *Id.* at 866 (quoting 29 U.S.C. § 1132(a)(3)). Section 502(a)(3) "does not, after all, authorize 'appropriate equitable relief' at large, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or ... enforc[ing] any provisions' of ERISA or an ERISA plan." *Id.* (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993)) (emphasis omitted).

⁹⁸ See *id.* at 869 (describing how action to enforce judgment was based on theory of relief that did not exist at time court entered judgment in ERISA case).

jurisdictional grounds, the possibility that the plaintiff-employee might ultimately be successful in enforcing the judgment against the shareholder was not ruled out.⁹⁹

The similarities between an action implemented under BCL section 630 and an action premised on veil-piercing are similar. Both actions seek to hold shareholders liable for an existing ERISA judgment and therefore have only a remote connection to ERISA. In both *Peacock* and *Romney*, each of the plaintiff-employees had previously obtained a judgment for delinquent contributions to employee benefit plans. The employees were merely seeking to enforce the judgment against shareholders of the corporate employer. Although the employee in *Peacock* was suing under a veil-piercing theory and the employee in *Romney* was suing under BCL section 630, neither suit alleged an underlying ERISA violation.

In *Romney*, it was only after unsuccessful attempts to collect the judgment against the corporation that the Union brought suit under BCL section 630(a) to enforce the judgment against the principal shareholder. The Union did not seek to hold the principal shareholder liable under ERISA. Other than the existence of an ERISA judgment, the BCL section 630(a) claim had only a remote connection to ERISA and should not alone provide the basis for federal jurisdiction.

Moreover, BCL section 630 is a state law mechanism that defines and imposes liability upon shareholders for pre-existing corporate debt.¹⁰⁰ In *Mackey v. Lanier Collection Agency and Service*,¹⁰¹ the Supreme Court concluded that "Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans"¹⁰² The

⁹⁹ *Id.* at 866 ("Even if ERISA permits a plaintiff to pierce the corporate veil to reach a defendant not otherwise subject to suit under ERISA, Thomas could invoke the jurisdiction of the federal courts only by independently alleging a violation of an ERISA provision or term of the plan.")

¹⁰⁰ See *supra* notes 12-19 and accompanying text for discussion of BCL section 630.

¹⁰¹ 486 U.S. 825 (1988).

¹⁰² See *id.* at 831. The Court distinguished between two types of actions: 1) those brought pursuant to ERISA section 502 to secure benefits or enforce rights against ERISA plans, and 2) actions against ERISA plans for state-law claims. *Id.* at 832-33. "ERISA does not provide an enforcement mechanism for collecting judgments in either of these two types of actions." *Id.* at 833. "[S]tate-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA

Mackey Court further held that ERISA preemption did not preclude the application of a state statute despite the fact that it imposed administrative costs and burdens upon ERISA plans.¹⁰³ BCL section 630 is not an "alternative enforcement mechanism."¹⁰⁴ Rather, it is a state-law mechanism for enforcing a judgment and is triggered only by a corporation's default.¹⁰⁵ Furthermore, even if any administrative costs and burdens would be imposed upon ERISA plans as a result of the enforcement of BCL section 630, their effects would be indirect.¹⁰⁶

III. RECENT DEVELOPMENTS IN ERISA PREEMPTION

In February 1997, the Supreme Court rendered its most recent ERISA preemption decision, *California Division of Labor Standards Enforcement v. Dillingham Construction*.¹⁰⁷ In *Dillingham Construction*, California's prevailing wage law, which allows for the payment of lower apprenticeship wages to employ-

plan." *Id.* at 834.

¹⁰³ See *id.* at 831. Petitioners described the prospective administrative burdens and costs by stating that plan trustees would be "served with a garnishment summons, become parties to a suit, and must respond and deposit the demanded funds due the beneficiary-debtor-funds that otherwise they are required to hold and pay out to those beneficiaries." *Id.*

¹⁰⁴ See *Matarazzo v. Segall*, 580 N.Y.S.2d 644, 646 (N.Y. Civ. Ct. Kings County 1992) (opining that "[a] section 630 action is therefore regarded not as a renewed determination on the merits but rather as an enforcement mechanism to protect the employees of closely held corporations."), *rev'd on other grounds*, 600 N.Y.S.2d 890, 892 (Sup Ct. App. Term 1993) (reversing summary judgment because, "[w]hile there is an 'enforcement mechanism' in place to permit the suit against the shareholder, there should still be a requirement that permits the shareholder to have his or her day in court"); see also *supra* notes 12-19 and accompanying text for discussion of BCL section 630.

¹⁰⁵ See *Lindsey v. Winkler*, 277 N.Y.S.2d 768, 770 (Dist. Ct. Nassau County 1967) ("Section 630 of the Business Corporation Law was enacted as a safeguard to laborers, servants or employees of corporations which, upon insolvency of the corporation, would leave such working people without recourse and payment for their work, labor and services.").

¹⁰⁶ See, e.g., *Blue Cross*, 514 U.S. 645, 660 (1995) (providing example of indirect effect on plan administration). In *Blue Cross*, the Supreme Court found that a statute requiring hospitals to collect surcharges did "not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself" and any "indirect influence of the surcharges [did not] preclude uniform administrative practice or the provision of a uniform interstate benefit package." *Id.* at 660. Accordingly, it is asserted that section 630 does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself nor does its indirect influence preclude uniform administrative practice or the provision of a uniform interstate benefit package. *Id.*; accord *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 117 S. Ct. 832 (1997).

¹⁰⁷ 117 S. Ct. 832 (1997).

ees participating in approved state programs, was not preempted.¹⁰⁸ Even though the result of the application of California's statute is that a higher prevailing wage must be paid to employees not participating in state-approved apprenticeship programs, the Court found the California wage law to be indistinguishable from the surcharge statute at issue in *Blue Cross*.¹⁰⁹ Neither law "bind[s] ERISA plans to anything."¹¹⁰ The effect of the California wage law, according to the Court, is "merely to provide some measure of economic incentive to comport with the State's requirements, at least to the extent that those programs seek to provide apprentices who can work on public works projects at a lower wage."¹¹¹ "The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans."¹¹²

The Court, proceeding on the assumption that historic state police powers were not to be preempted by ERISA and finding no indication in ERISA or its legislative history that Congress intended to preempt such statutes, upheld the California statute.¹¹³ "We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort."¹¹⁴ Not only does this opinion affirm *Blue Cross* and indicate that *Romney* was wrongly decided, the decision clearly sets forth a standard to be followed in future ERISA

¹⁰⁸ *Id.* at 835. "The State of California requires a contractor on a public works project to pay its workers the prevailing wage in the project's locale. An exception to this requirement permits a contractor to pay a lower wage to workers participating in an approved apprenticeship program." *Id.* In *Dillingham Construction*, the petitioner charged Dillingham, the contractor, and Sound Systems Media, the subcontractor, with violating Cal. Lab. Code Ann. Section 1771 by paying the lower apprenticeship wage, rather than the higher prevailing wage to apprentices not participating in state approved programs. *Id.* at 836.

¹⁰⁹ *Id.* at 840.

¹¹⁰ *Id.* at 841.

¹¹¹ *Id.*

¹¹² *Id.* at 842. "It cannot be gainsaid that [the California wage statute] has the effect of encouraging apprenticeship programs—including ERISA plans—to meet the standards set out by California, but it has not been demonstrated here that the added inducement created by the wage break available on state public works projects is tantamount to a compulsion upon apprenticeship programs." *Id.*

¹¹³ *Id.* at 841. "Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to pre-empt state apprenticeship training standards ... we are reluctant to alter our ordinary assumption that the historic police powers of the States were not to be superseded by the Federal Act." *Id.*

¹¹⁴ *Id.* at 842.

preemption cases. Justices Scalia and Ginsburg, in a concurring opinion, advocated disposing of the "relates to" analysis in its entirety stating that "applying the 'relate to' provision according to its terms was a project doomed to failure"¹¹⁵ "We discern no solid basis for believing that Congress, when it designed ERISA, intended to fundamentally alter traditional pre-emption analysis."¹¹⁶

Shortly after the *Dillingham Construction* decision was rendered, the Second Circuit once again faced an ERISA preemption issue. In *Burgio and Campofelice, Inc. v. NYS Department of Labor*,¹¹⁷ the Second Circuit held that section 220 of the New York Labor Law was not preempted by ERISA.¹¹⁸ Although the *Burgio* court purported to apply *Blue Cross* and *Dillingham Construction*, it declined to confront the erroneous decision rendered in *Romney*. The *Burgio* court attempted to distinguish *Romney* by stating that "Burgio's obligation does not arise under ERISA or a collective bargaining agreement providing for ERISA benefits, but directly under Labor Law § 223."¹¹⁹ In *Burgio*, the Second Circuit appeared to misunderstand BCL section 630 and its implications or it simply refused to recognize its mistake in *Romney*. A shareholder's liability under BCL section 630 does not arise under ERISA or a collective bargaining agreement providing for ERISA benefits, but directly under New York Business Corporations Law section 630.

The *Burgio* court further undermined the validity of the *Romney* decision when it stated that "[a]n ERISA preemption action is not the appropriate vehicle by which to decide such matters, particularly since *Burgio* cannot, as a non-signatory to

¹¹⁵ *Id.* at 843.

¹¹⁶ *Id.* (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 99 (1993)). The concurring opinion indicated that current ERISA jurisprudence should apply the law of ordinary field and conflict preemption. *Id.*

¹¹⁷ 107 F.3d 1000 (2d Cir. 1997). In *Burgio*, "a general contractor[] brought this action (1) to enjoin the state from enforcing New York Labor Laws §§ 220, 223 (McKinney 1986 & Supp. 1997) (the prevailing wage law), against *Burgio* for wage supplements that *Burgio's* subcontractor allegedly failed to pay its employees; and (2) to declare the prevailing wage law preempted by federal law." *Id.* at 1003.

¹¹⁸ *Id.* "Section 220 ... requires that all bidders on public works contracts assume the cost of prevailing wage supplements" *Id.* New York Labor Law defines wage supplements to include "health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training." *Id.* Despite this definition of "wage supplements," the Second Circuit did not find that section 220 explicitly referenced ERISA.

¹¹⁹ *Id.* at 1010.

the collective bargaining agreements with the unions, be held liable to the benefit plans as an 'employer' under ERISA."¹²⁰ This is exactly the point the Second Circuit failed to recognize in *Romney*. The shareholder at issue in *Romney* was not a signatory to the collective bargaining agreement and likewise could not be characterized as an "employer" under ERISA.

Although the Second Circuit reached the correct decision in *Burgio*, the portion of the opinion distinguishing *Burgio* from *Romney* is questionable at best. Reconciling the *Burgio* and *Romney* decisions is difficult. In light of such divergent reasoning, it is difficult to determine whether the Second Circuit is correctly applying the law of ERISA preemption. The Supreme Court appears to have clarified its stance on ERISA preemption. Hopefully, the Second Circuit will follow suit.

CONCLUSION

The Second Circuit, in *Romney v. Lin*, erred in holding that section 630 of New York's Business Corporation Law is preempted by ERISA. BCL section 630 does not relate to ERISA by either explicitly referring to ERISA or by disserving the purpose of preemption. Further, BCL section 630 does not fit squarely within ERISA's civil enforcement scheme. The requirements of complete preemption not being present, the Second Circuit improperly held that BCL section 630 was preempted by ERISA.

Heather M. Susac

¹²⁰ *Id.*

