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# Personal Injury Victims as Insurance Collection Agents: ERISA Preemption of State Antisubrogation Laws

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**PERSONAL INJURY VICTIMS AS INSURANCE  
COLLECTION AGENTS: ERISA PREEMPTION OF STATE  
ANTISUBROGATION LAWS**

*Jonathan P. Connery\**

*The Employee Retirement Income Security Act (ERISA) was enacted in 1974 to protect the pension rights of employees nationwide. However, due to its broad preemptive powers, ERISA has since developed into a tool used by health insurers to recover millions of dollars in tort damages meant to benefit employees with ERISA health plans. This practice, known as subrogation, has been met with legislative backlash in the form of state antisubrogation statutes, which attempt to limit the enforceability of subrogation clauses found in almost all ERISA health plans. However, many courts have held that ERISA preempts these antisubrogation statutes, thereby affirming insurers' ability to recover funds intended to compensate injured victims. These decisions often have disastrous and life changing consequences for injured employees. After examining ERISA's preemptive clauses and the Supreme Court cases delineating their limits, this Note argues that state antisubrogation statutes should be upheld against preemption challenges. This result is necessary to preserve ERISA's original purpose: protection of employees nationwide.*

INTRODUCTION

Deborah Shank, a mother of three, sustained permanent brain damage as the result of a car accident in 2000, relegating her to a

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wheelchair for the rest of her life.<sup>1</sup> The health plan Shank received as a Wal-Mart employee covered her medical bills.<sup>2</sup> Shank filed a lawsuit against the trucking company responsible for the accident and was awarded a \$700,000 settlement.<sup>3</sup> After legal fees and disbursements, Shank was left with \$417,477.<sup>4</sup> Soon after the settlement, Wal-Mart's health insurer commenced an action against Shank to enforce its subrogation rights, seeking recovery of every dollar it had paid for her medical care, which totaled \$469,216.<sup>5</sup> Ultimately, the Eighth Circuit upheld a District Court decision in favor of Wal-Mart and required Shank to surrender all the money left from the settlement.<sup>6</sup> Wal-Mart corporate communications director Daphne Moore attempted to soften the blow by pointing out Wal-Mart was only recovering the \$417,477 left in the Shank trust and not the entire \$469,216 to which it had originally claimed a right.<sup>7</sup> This result set off a wave of media backlash, and, as a result of media shaming, Wal-Mart quickly abandoned its subrogation claim and allowed Shank to keep the money left in the trust.<sup>8</sup> In a subsequent statement on behalf of Wal-Mart, Daphne Moore stated: "Occasionally others help us step back and look at a situation in a different way . . . . This is one of those times."<sup>9</sup> However, while the enormous media response resulted in a just outcome for Deborah Shank, others are not so lucky. The far more typical case is that of Jim Ridler, who suffered

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<sup>1</sup> Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank, 500 F.3d 834, 835 (8th Cir. 2007); Vanessa Fuhrmans, *Accident Victims Face Grab for Legal Winnings*, WALL ST. J. (Nov. 20, 2007), <http://www.wsj.com/articles/SB119551952474798582>.

<sup>2</sup> *Shank*, 500 F.3d at 835.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 839–40.

<sup>7</sup> Tara Parker-Pope, *Injured Woman Wins Wal-Mart Saga*, N.Y. TIMES: WELL (Apr. 4, 2008), <http://well.blogs.nytimes.com/2008/04/04/injured-woman-wins-wal-mart-saga/> ("While Wal-Mart's benefit plan was entitled to more than the amount that remained in the Shank trust, the plan only recovered the funds remaining in that trust."); see *Shank*, 500 F.3d at 835 (detailing financial figures relating to the lawsuits).

<sup>8</sup> Parker-Pope, *supra* note 7.

<sup>9</sup> *Id.*

a broken neck and other injuries in 1991 when his motorcycle was struck by a negligent driver.<sup>10</sup> Ridler recovered \$450,000,<sup>11</sup> out of which his health insurer took \$406,000 for the medical expenses it had paid, leaving Ridler with only \$29,000 after attorneys' fees.<sup>12</sup> In an interview with SmartMoney Magazine, Ridler stated: "So I pay the premium, and then when something happens that I need the insurance for, they want their money back? . . . The way I figure it, my health insurance is just a loan."<sup>13</sup> Ridler's situation is all too common.

Deborah Shank and John Ridler received health insurance through benefit plans governed by the Employee Retirement Income Security Act (ERISA).<sup>14</sup> Congress enacted ERISA in 1974 after almost a decade of congressional investigation into the regulation and administration of employee pension plans nationwide.<sup>15</sup> Congress was spurred into action by the 1963 closing of the Studebaker automobile plant in South Bend, Indiana, which resulted in over 4,000 employees losing some or all of their pension plans.<sup>16</sup> The purpose of ERISA was to protect participants in employee benefit plans<sup>17</sup> and achieve uniformity in the

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<sup>10</sup> See Michelle Andrews, *Adding Insult to Injury*, SMARTMONEY MAG., July 2000, at 130, 133, <http://erisawithprofessorbaron.com/wp-content/uploads/Smart-Money-Magazine-Article.pdf?phpMyAdmin=2b1c4fc8405at1c9bcde7>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see also *Health & Welfare Plan for Emps. of REM, Inc. v. Ridler*, 124 F.3d 207 (8th Cir. 1997).

<sup>13</sup> Andrews, *supra* note 10, at 133.

<sup>14</sup> *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Shank*, 500 F.3d 834, 835 (8th Cir. 2007); *Emps. of REM, Inc.*, 124 F.3d at 207.

<sup>15</sup> Delia M. Druley, *South Dakota State Medical Holding Company, Inc. v. Hofer: A Deferential Standard of Review Permits ERISA Administrators to Contravene Their Fiduciary Obligations*, 54 S.D. L. REV. 266, 266 (2009).

<sup>16</sup> *Id.* at 277 n.110; see also James A. Wooten, "The Most Glorious Story of Failure in the Business": *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 683-84 (2001) ("No single event is more closely associated with ERISA than the shutdown of the Studebaker plant in South Bend, Indiana.").

<sup>17</sup> 29 U.S.C. § 1001(b) (1978) ("It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . .").

administration of such plans, which had previously been subject to varying state laws and regulations.<sup>18</sup> To further this goal, Congress set certain minimum standard requirements for employee benefit plans<sup>19</sup> and vested ERISA with wide-ranging preemptive powers.<sup>20</sup> Congress passed ERISA almost unanimously.<sup>21</sup>

Despite this Congressional history, ERISA has developed into a vehicle for insurers providing health coverage to employee health plans to pursue subrogation claims and rights of reimbursement against the settlement funds of injured victims.<sup>22</sup> This practice, which all fifty states prohibited prior to ERISA,<sup>23</sup> is now pursued with a “terminator-like” focus and aggression by certain employers, despite ERISA itself remaining completely silent on the issue of subrogation in personal injury cases.<sup>24</sup> In *US Airways v. McCutchen*, the Supreme Court dealt with a fact pattern typical to many ERISA subrogation cases.<sup>25</sup> Plaintiff James E. McCutchen sustained personal injuries in a car accident and later recovered a total of \$110,000 from the tortfeasor in settlement of his claim for

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<sup>18</sup> *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); see also Landon Wade Magnusson, Note, *Golden Gate and the Ninth Circuit’s Threat to ERISA’s Uniformity and Jurisprudence*, 2010 BYU L. REV. 167, 167 (2010) (“[O]ne of ERISA’s primary purposes [is] uniformity.”).

<sup>19</sup> *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983)).

<sup>20</sup> Howard Shapiro et al., *ERISA Preemption: To Infinity and Beyond and Back Again? (A Historical Review of Supreme Court Jurisprudence)*, 58 LA. L. REV. 997, 1000 (1998) (describing ERISA as containing the “broadest statutory preemption provision to date”).

<sup>21</sup> Druley, *supra* note 15, at 277.

<sup>22</sup> Roger M. Baron & Anthony P. Lamb, *The Revictimization of Personal Injury Victims by ERISA Subrogation Claims*, 45 CREIGHTON L. REV. 325, 325–30 (2012).

<sup>23</sup> *Id.* at 326.

<sup>24</sup> Professor Baron, *Radio Health Journal on ERISA Reimbursement* (Mar. 19, 2011), <http://erisawithprofessorbaron.com/audio-and-video/radio-health-journal-episode-on-erisa-reimbursement/> (“There are certain employers who perhaps have a terminator attitude with regard to pursuing subrogation even in the light of some of the most atrocious circumstances.”).

<sup>25</sup> *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1543 (2013); see also *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006).

damages.<sup>26</sup> After attorneys' fees, McCutchen was left with a settlement of \$66,000.<sup>27</sup> US Airways, McCutchen's employer, had in place a health benefits plan which had paid out \$66,866 in medical expenses for the injuries sustained by McCutchen in the car accident.<sup>28</sup> US Airways demanded full reimbursement for McCutchen's medical expenses—the total of all remaining settlement funds *plus* \$866 out of his own pocket.<sup>29</sup> The Court summarized US Airways' pursuit of reimbursement as requiring McCutchen, its insured, to "pay for the privilege of serving as US Airways' collection agent."<sup>30</sup>

Enforcement of subrogation and reimbursement rights in the manner seen in *McCutchen* currently fuels an industry providing billions of dollars in windfall cash recoveries to insurers.<sup>31</sup> This practice has been hotly contested throughout the country with widely varying results and numerous trips to the Supreme Court.<sup>32</sup> In August of 2014, the Second Circuit issued a decision in *Wurtz v. Rawlings* concerning ERISA's preemption of New York's

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<sup>26</sup> *McCutchen*, 133 S. Ct. at 1543.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1550. Ultimately, the Court ruled that the "common fund" doctrine was a valid method of interpreting the insurance contract between McCutchen and US Airways because the plan terms did not expressly disavow application of that doctrine. *See id.* at 1549–51; *see also* Benjamin Garbe, *In ERISA We Trust: U.S. Supreme Court Rules that ERISA Plan Language Cannot Be Trumped by Equitable Defenses in Fiduciary Action for Reimbursement*, 9 A.B.A. HEALTH ESOURCE (July 2013), [http://www.americanbar.org/content/newsletter/publications/aba\\_health\\_esource\\_home/aba\\_health\\_law\\_esource\\_1307\\_garbe.html](http://www.americanbar.org/content/newsletter/publications/aba_health_esource_home/aba_health_law_esource_1307_garbe.html). Therefore, the case was remanded on the issue of whether US Airways should have to pay a portion of the attorneys' fees paid out of the settlement. *McCutchen*, 133 S. Ct. at 1551.

<sup>31</sup> Baron & Lamb, *supra* note 22, at 325.

<sup>32</sup> *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 334–35 (1997) (Scalia, J. dissenting) ("[T]his Court has accepted certiorari in, and decided, no less than 14 cases to resolve conflicts in the Courts of Appeals regarding ERISA preemption of various sorts of state law. The rate of acceptance, moreover, has not diminished (we have taken two more ERISA preemption cases so far this Term), suggesting that our prior decisions have not succeeded in bringing clarity to the law.").

antisubrogation law in which it acknowledged a conflict with Third, Fourth, and Fifth Circuit holdings.<sup>33</sup>

While enforcement of subrogation rights provides a significant stream of revenue for insurers, the stakes for individual personal injury victims are even larger. Enforcement of an insurance company's subrogation rights can result in the loss of a significant portion of settlement funds awarded to an injured plaintiff and can even lead to the plaintiff losing the entire settlement.<sup>34</sup> This can create situations where, despite the clear liability of a defendant and the presence of severe personal injury to the plaintiff, the plaintiff's case is economically untenable, both for the attorneys involved and for the injured victim.<sup>35</sup> Several states have acknowledged the need to limit insurance companies in their "terminator-like" pursuit of subrogation recoveries and have attempted to pass antisubrogation statutes.<sup>36</sup> Other states have incorporated select common law doctrines in attempts to alleviate the hardships that can arise from strict enforcement of subrogation clauses in ERISA governed health plans.<sup>37</sup> However, even states

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<sup>33</sup> *Wurtz v. Rawlings Co.*, 761 F.3d 232, 243 (2d Cir. 2014).

<sup>34</sup> *See Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank*, 500 F.3d 834 (8th Cir. 2007) (holding that Wal-Mart was entitled to reimbursement for the full portion of remaining settlement funds from Shank's personal injury settlement where Shank had sustained permanent brain damage as a result of a car accident); *see also* Randi Kaye, *Brain-Damaged Woman at Center of Wal-Mart Suit*, CNN (Mar. 25, 2008), <http://www.cnn.com/2008/US/03/25/walmart.insurance.battle/> (discussing the circumstances surrounding Shank's case).

<sup>35</sup> Gregory Pitts, Comment, *E.R.I.S.A. Subrogation as Interpreted Within the Seventh Circuit - A Roadmap for Managing First Dollar Recovery*, 35 J. MARSHALL L. REV. 765, 766 (2002).

<sup>36</sup> *See* Daran Kiefer, *Anti-Subro Laws: Multiple States Have Proposed or Passed Laws that Threaten Carriers' Abilities to Subrogate, and the Trend is Expected to Continue*, CLAIMS MGMT. (May 21, 2010), <http://claims-management.theclm.org/home/article/anti-subro-laws> (listing states with passed or pending antisubrogation statutes); *see also* GARY L. WICKERT, *ERISA AND HEALTH INSURANCE SUBROGATION IN ALL 50 STATES*, §§ 3.01–3.51 (5th ed. 2013) (discussing antisubrogation measures in all fifty states).

<sup>37</sup> WICKERT, *supra* note 36, at §§ 3.01–3.51.

that have enacted antisubrogation statutes have been thwarted by the extensive scope of ERISA's preemption powers.<sup>38</sup>

This Note addresses ERISA's preemption of state antisubrogation laws with the view that judicial overextension of ERISA's preemptive powers, resulting in the nullification of state antisubrogation laws, undermines ERISA's fundamental purpose: to protect employees covered under employee benefit plans.<sup>39</sup> ERISA's wide-ranging preemptive powers, coupled with the statute's silence on the issue of subrogation, has created a "regulatory vacuum" in which health insurers dictate the scope and enforceability of their subrogation rights while remaining largely free from efforts of state legislatures to place limits on these rights.<sup>40</sup> This note asserts that state antisubrogation laws must be upheld in the face of ERISA preemption challenges so as to protect injured victims from the unjust result of having to surrender significant portions of any recoveries they might gain from a third-party tortfeasor. When subrogation clauses are enforced through the mechanisms of ERISA's preemptive clauses, the statute's fundamental purpose is defeated.

Part I provides a brief background on health-insurer subrogation claims and rights of recovery against settlement funds obtained by their insured in third-party tort actions. Part II describes ERISA's two primary preemptive powers: express preemption and complete preemption. In so doing, Part II focuses on the Second Circuit's decision in *Wurtz v. Rawlings*, which

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<sup>38</sup> See, e.g., *Wurtz v. Rawlings Co.*, 933 F. Supp. 2d 480 (E.D.N.Y. 2013), *vacated and remanded*, 761 F.3d 232 (2d Cir. 2014); *Levine v. United Healthcare Corp.*, 402 F.3d 156 (3d Cir. 2005); *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278 (4th Cir. 2003).

<sup>39</sup> Baron & Lamb, *supra* note 22, at 326–27 (2012) ("It is no small irony that Congress originally passed ERISA for the purpose of uniformly protecting '[t]he interests of participants in employee benefit plans and their beneficiaries.'" (citing 29 U.S.C. § 1001(b) (2012))).

<sup>40</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) ("Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the 'equitable relief' allowable under § 502(a)(3), a 'regulatory vacuum' exists: '[V]irtually all state law remedies are preempted but very few federal substitutes are provided.'" (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456 (3d Cir. 2003))).



upheld a revised New York antisubrogation statute and determined that ERISA did not preempt the statute. This part also discusses the conflicting decisions in the Third, Fourth, and Fifth Circuits. Part III analyzes the policy implications for and against insurance subrogation, with a particular focus on the rise of state antisubrogation laws. Part IV concludes with a proposed solution to the overextension of ERISA based subrogation enforcement, bolstered by the Second Circuit's decision in *Wurtz*. This solution is grounded in recognition of the fundamental differences between funds attained via third-party actions and benefits distributed in accord with ERISA governed health plans. Courts can use this distinction to uphold antisubrogation statutes in the face of preemptive challenges under ERISA, ensuring that the practical effects of ERISA conform with the statute's original purpose: to protect employees and their beneficiaries.<sup>41</sup>

## I. SUBROGATION AND ERISA—A MISMATCHED MARRIAGE

### A. *Enforcement of Subrogation Claims—ERISA and Appropriate Equitable Relief*

Subrogation is defined as “[t]he substitution of one party for another whose debt the party pays.”<sup>42</sup> In the specific context of personal injury litigation and health insurer subrogation, subrogation entitles the “insurer to be substituted to the rights of the insured and pursue recovery directly from a tortfeasor or, *when the insured recovers from the tortfeasor, to be reimbursed*”<sup>43</sup> from

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<sup>41</sup> 29 U.S.C. § 1001(b) (2012).

<sup>42</sup> *Subrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>43</sup> Subrogation and right of reimbursement are often used interchangeably by courts and practitioners but there is a technical difference between the two. 16 COUCH ON INSURANCE § 226:4 (3d ed. 2015). Subrogation was a remedy historically invoked in the field of property insurance. See Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 LOY. U. CHI. L.J. 49, 54–55 (2008) (discussing history of subrogation and distinctions between subrogation and reimbursement). “Strict subrogation,” in the context of ERISA personal injury claims, occurs when the insurer intervenes in or prosecutes the tort action and recovers its funds directly from the tortfeasor. See *id.* Reimbursement, on the other hand, is often written into health plans in a separate clause and purports to give the insurer the right to

that recovery.”<sup>44</sup> As the *McCutchen* case reveals, subrogation and reimbursement rights allow for an insurer to recover funds against its own insured or the third-party tortfeasor for medical funds paid out in the event of a settlement or judgment against the tortfeasor.<sup>45</sup> The following hypothetical illustrates the drastic effect of subrogation claims in the personal injury context: a pedestrian is severely injured in a car accident and incurs medical expenses exceeding \$100,000, all of which are covered by the victim’s employee health benefit plan.<sup>46</sup> The third-party tortfeasor has a \$100,000 insurance policy.<sup>47</sup> The health plan then takes this entire settlement “pursuant to its own right of subrogation,” and leaves the victim with nothing.<sup>48</sup>

ERISA itself does not mention a right of subrogation.<sup>49</sup> Instead, insurers have used the enforcement mechanism and preemption clause under ERISA to establish a super-contractual right<sup>50</sup> to include enforceable subrogation and reimbursement clauses in their insurance contracts.<sup>51</sup> Courts have routinely held that the

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collect its portion of settlement funds directly from its own insured after the insured has settled his or her claim against the tortfeasor. *See id.* Both practices aim to achieve the same result: recoupment of funds the insurer paid for the insured’s medical bills from a settlement with the third-party tortfeasor. *See id.* This Note will use the term “subrogation” to encompass both strict subrogation and right of reimbursement claims.

<sup>44</sup> COUCH ON INSURANCE, *supra* note 43, at § 222:5 n.26 (emphasis added) (citing *Paulsen v. Dep’t of Soc. & Health Servs.*, 898 P.2d 353 (Wash. Ct. App. 1995)).

<sup>45</sup> *See* *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1542–43 (2013).

<sup>46</sup> *Pitts*, *supra* note 35, at 765.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 766.

<sup>49</sup> *Id.* at 772.

<sup>50</sup> *Maher & Pathak*, *supra* note 43, at 72–76 (discussing development of subrogation as contractual right); *see also* Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It’s Time to Recognize the Elephant in the Courtroom*, 55 *MERCER L. REV.* 595, 616 (2004) (“This argument, articulated in the first person of the ERISA plans themselves, could be stated as follows: ‘We have given ourselves the right to reimbursement and it should be enforced without question.’ Reduced to basic terms, the argument is simply, ‘Because we say so.’”).

<sup>51</sup> *Pitts*, *supra* note 35, at 772 (“Congress specifically prescribed for fiduciary plan provisions to ‘supersede any and all State laws’ that ‘relate to any

terms of ERISA plans must be strictly enforced.<sup>52</sup> Furthermore, ERISA § 502(a) includes an enforcement mechanism that allows plan fiduciaries to seek “appropriate equitable relief.”<sup>53</sup> The Supreme Court has held that subrogation clauses are enforceable as appropriate equitable relief under ERISA, subject to some technical requirements.<sup>54</sup> Beneficiaries challenging the subrogation clauses in their health plans often cannot utilize state antisubrogation laws and common law doctrines due to ERISA’s broad preemptive powers.<sup>55</sup> This allows insurers to create

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employee benefit plan.’ . . . [T]his provision is regularly interpreted to allow fiduciary plans to maintain first dollar priority over recoveries made by injured participants . . . . ERISA plans are given free reign to incorporate strong subrogation provisions into the plan language, which state laws cannot circumvent.” (footnote omitted) (quoting 29 U.S.C. § 1444(a) (2000)).

<sup>52</sup> *Kennedy v. Conn. Gen. Life Ins. Co.*, 924 F.2d 698, 700 (7th Cir. 1991) (“ERISA instructs courts to enforce strictly the terms of plans . . .”).

<sup>53</sup> 29 U.S.C. § 1132(a) (2012).

<sup>54</sup> The Supreme Court addressed the enforceability of subrogation clauses in *Great-West v. Knudson* and *Sereboff v. Mid-Atlantic*. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006). *Sereboff* established that reimbursement clauses were enforceable as “appropriate equitable relief” under ERISA so long as the insurer sought to recover from funds which were actually in the possession of the insured. *Sereboff*, 547 U.S. at 361–69. This clarified confusion arising after the decision in *Knudson*. *Knudson* held that an insurer attempting to enforce its reimbursement clause was not seeking “appropriate equitable relief” under ERISA because the settlement funds the insurer pursued were not actually in the possession of the insured, but had already been placed into a special needs trust for the care of *Knudson* who had been rendered a quadriplegic as a result of a car accident. *Knudson*, 534 U.S. at 207, 221. Essentially, the reimbursement claim was not enforceable in *Knudson* only because the insurer was “out-manuevered” once the settlement funds were placed into a special needs trust instead of being taken into possession directly by its insured. This would come to be known as the “possession theory” and insurers simply revised their collection practices to fall into line with this technical requirement. *Sereboff*: *ERISA Subrogation Regains Life After Great-West*, THOMPSON HINE, [http://benefitslink.com/articles/sereboff\\_thompson\\_hine.pdf](http://benefitslink.com/articles/sereboff_thompson_hine.pdf) (last visited Sept. 11, 2015).

<sup>55</sup> See *Sereboff*, 547 U.S. at 368; see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (“[ERISA’s] preemptive scope was as broad as its language.”).

enforceable subrogation terms in their ERISA plans despite several states' legislative efforts to limit or bar subrogation entirely.<sup>56</sup>

On the surface, the connection between ERISA and insurance subrogation rights is difficult to identify.<sup>57</sup> ERISA's enforcement mechanism is detailed in ERISA § 502(a), 29 U.S.C. § 1132, which states, in relevant part, as follows:

A civil action may be brought—. . .

(3) by a participant, beneficiary, or *fiduciary* (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[.]<sup>58</sup>

Subrogation as equitable relief was expressly affirmed in *Sereboff v. Mid Atl. Med. Servs., Inc.*, in which the Supreme Court held that appropriate equitable relief under § 502(a) included “plans’ rights to enforce reimbursement and subrogation provisions . . . even when state-law equitable defenses purport to limit such rights.”<sup>59</sup> ERISA does not expressly provide for an insurer’s right of subrogation against its insured.<sup>60</sup> Rather, under *Sereboff*, the

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<sup>56</sup> Caroline Wrenn Cleveland, *ERISA Preemption: As the Federal Courts Identify the Outer Boundaries of ERISA’s Preemption Clause, What are the Implications for South Carolina State Actions?*, 42 S.C.L. REV. 743, 748 (1991) (“[ERISA’s preemption clause] has swept away conflicting state actions.”).

<sup>57</sup> See Arnold Levinson, *The Tragedies of ERISA’s Unintended Preemption of State Law Remedies*, PILLSBURY & COLEMAN, LLP, <http://www.pillsburycoleman.com/News/Published-Works/The-Tragedies-of-ERISA.pdf>, (last visited Sept. 11, 2015) (“Both the language of ERISA and its extensive legislative history show that this result was never intended by ERISA’s drafters. There is not a single sentence in the legislative history that would suggest an intent for such a dramatic reordering of the rights of insured and insurance companies.”).

<sup>58</sup> 29 U.S.C. § 1132(a) (2012).

<sup>59</sup> Brief for Defendants-Appellees the Rawlings Co., Oxford Health Plans (NY), Inc. and UnitedHealth Group Inc., *Wurtz v. Rawlings Co.*, 761 F.3d 232 (2d Cir. 2014) (No. 13-1695-cv), 2013 WL 3964707, at \*7–8 (first citing *Sereboff*, 547 U.S. at 361–65; and then citing *U.S. Airways Inc. v. McCutchen*, 133 S. Ct. 1537, 1546–48 (2013)).

<sup>60</sup> Ashley Aunita Prebula Frazier, *ERISA Subrogation and the Controversy over Sereboff: Silencing the Critics, the Divided Bench Is a Legitimate Standard*, 45 GA. L. REV. 579, 594–95 (2011) (“ERISA does not contain a

ERISA plan between the insurer and the insured functions as an equitable contract and the subrogation clauses found in the plan establish a “constructive trust” or “equitable lien” over a portion of any settlement funds the insured may receive as a result of a tort action against a third-party.<sup>61</sup> The Supreme Court analogized this constructive trust with the facts in *Barnes v. Alexander*, in which attorney Barnes promised two other attorneys a portion of the contingency fee in a particular case if and when the case succeeded.<sup>62</sup> This analogy illustrated that, as in subrogation claims in the personal injury context, it is not necessary that the money or the funds actually be in existence at the time the “equitable contract” is formed (the moment when the employee agrees to be covered under the terms of the health benefit plan), but only that an agreement exists between the two parties as to how the funds will be divided in the event of a settlement.<sup>63</sup> These subrogation clauses are often uniform clauses contained in standard form plans<sup>64</sup> and in many cases the insured does not contest the presence or specificity of the subrogation clause itself. Rather, an insured seeking to avoid the loss of settlement funds to a subrogation claim must rely on state antisubrogation statutes or common law doctrines that aim to mitigate the effect of the subrogation clauses.<sup>65</sup>

### B. ERISA’s Preemptive Powers

Scholars and courts have both described ERISA as containing the broadest preemptive power of any federal statute.<sup>66</sup> The

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statutory provision explicitly permitting, prohibiting, or controlling subrogation, or allowing for a right of reimbursement.”).

<sup>61</sup> *Sereboff*, 547 U.S. 356, 362–63.

<sup>62</sup> *Id.* at 357 (citing *Barnes v. Alexander*, 232 U.S. 117, 34 (1914)).

<sup>63</sup> *Id.*

<sup>64</sup> WICKERT, *supra* note 36, at § 12-1 (providing sample subrogation and reimbursement clauses to be used in ERISA plans).

<sup>65</sup> *Id.* at §§ 3.1–3.51 (discussing antisubrogation measures in all fifty states); *see also Sereboff*, 547 U.S. at 368 (holding plaintiffs did not have access to equitable defenses against subrogation claim, such as the “make whole” doctrine where terms of the plan expressly disavowed these defenses).

<sup>66</sup> Shapiro, *supra* note 20, at 1000 (describing ERISA as containing the “broadest statutory preemption provision to date”); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (“The House and Senate sponsors emphasized

purpose of ERISA's preemptive power was to ensure minimum standards of protection for employees under their health benefit plans.<sup>67</sup> ERISA's broad preemptive power has allowed insurers to control the terms of their contracts with immunity from state legislative decisions as to whether those terms should or should not be enforceable.<sup>68</sup> This has led to an untenable gap in which "[v]irtually all state law remedies are preempted but very few federal substitutes are provided," leading to a tremendous amount of insurer discretion in the structuring of qualified ERISA insurance plans.<sup>69</sup> Furthermore, the muddled and seemingly contradictory language of ERISA's preemptive powers has created a "web of ERISA confusion."<sup>70</sup> The Supreme Court has derided ERISA's preemptive clauses, stating that they are "not a model of legislative drafting."<sup>71</sup> Due to the confusion arising from these particular clauses, methods of interpreting ERISA's preemptive powers are constantly shifting, with no clear consensus in sight.<sup>72</sup>

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both the breadth and importance of the preemption provisions. Representative Dent described the 'reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans' as ERISA's 'crowning achievement.'" (quoting 120 CONG. REC. 29197 (daily ed. Aug. 20, 1974) (statement of Rep. Dent)).

<sup>67</sup> 29 U.S.C. § 1001(b) (2012).

<sup>68</sup> Baron, *supra* note 50, at 616; WICKERT, *supra* note 36, at 5-14 ("The main reason that subrogating plans have a stronger position under ERISA than they have under state laws is that many state law 'Antisubrogation' Doctrines and common law defenses are preempted.").

<sup>69</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456-57 (3d Cir. 2003) (Becker, J., concurring)).

<sup>70</sup> *Murzyn v. Amoco Corp.*, 925 F. Supp. 594, 601 (N.D. Ind. 1995).

<sup>71</sup> *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739-40 (1985) ("[W]hile the general preemption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time."). This Note recognizes one of the fundamental incongruities of the express preemption and savings clauses. Where the preemption clause aims to broadly strip states' legislative powers, the savings clause broadly attempts to give it back. *Id.*

<sup>72</sup> See Karla S. Bartholomew, *ERISA Preemption of Medical Malpractice Claims in Managed Care: Asserting a New Statutory Interpretation*, 52 VAND.

ERISA contains two separate methods of preemption: express preemption under ERISA § 514(a), 29 U.S.C. § 1144(a),<sup>73</sup> (sometimes referred to as conflict preemption) and complete preemption under § 502(a).<sup>74</sup> The Supreme Court established the current approach to express preemption under § 514 in *Kentucky Assn' of Health Plans v. Miller*. The Court outlined complete preemption under § 502(a) in *Kentucky Assn' of Health Plans v. Miller* and *Aetna Health Inc. v. Davila*.<sup>75</sup>

### *C. Express Preemption Under ERISA § 514*

ERISA § 514, 29 U.S.C. § 1144, contains three interrelated clauses referred to as the express preemption clause, the savings clause, and the deemer clause. The express preemption clause states as follows:

a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter *shall supersede any and all State laws* insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975 . . . .<sup>76</sup>

The savings clause states as follows:

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to

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L. REV. 1131, 1133 (1999) (“The Supreme Court’s tortured attempts to give effect to the statutory language have led to doctrinal confusion and ‘chaos’ in the lower courts. Little judicial guidance, therefore, currently exists for interpreting ERISA’s poorly constructed preemption clause.” (quoting Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 78 (1996))).

<sup>73</sup> 29 U.S.C. § 1144(a) (2012).

<sup>74</sup> 29 U.S.C. § 1132(a) (2012).

<sup>75</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003).

<sup>76</sup> 29 U.S.C. § 1144(a)(2012).

exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.<sup>77</sup>

The third and final clause critical to subrogation analysis under ERISA is the deemer clause which states as follows:

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.<sup>78</sup>

ERISA's express preemption clause is notable for its exceptions. Under the savings clause, state laws that "regulate insurance, banking or securities"<sup>79</sup> are saved from preemption.<sup>80</sup>

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<sup>77</sup> 29 U.S.C. § 1144(b)(2)(A)(2012).

<sup>78</sup> 29 U.S.C. § 1144(a)-1144(b)(B)(2012). Self-funded plans are not "saved" from preemption due to the deemer clause, therefore any antisubrogation regulations by a state will always be preempted from application to self-funded plans. *Metro. Life Ins. Co.*, 471 U.S. at 747 ("We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not."). The difference between self-funded plans and fully-insured plans is straightforward. Employers that create self-funded plans collect premiums and then establish a fund to satisfy any claims or to pay for medical benefits directly. Troy Paredes, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 234 (1997). Fully-insured plans are plans in which the employer purchases insurance for its plan participants from a third-party insurer. *Id.* This note focuses exclusively on fully-insured plans so the deemer clause is irrelevant for this analysis.

<sup>79</sup> 29 U.S.C. § 1144(a)(2012).

<sup>80</sup> *Metro. Life Ins. Co.*, 471 U.S. at 740 ("[T]he savings clause appears broadly to preserve the States' lawmaking power . . .").



The deemer clause holds that self-funded ERISA plans cannot be deemed to be insurers and therefore cannot be saved from preemption.<sup>81</sup> The Supreme Court provided the most succinct explanation of § 514's "mechanics" in *Pilot Life v. Dedeaux*: "If a state law 'relate[s] to . . . employee benefit plan[s],' it is preempted. The savings clause excepts from the preemption clause laws that 'regulat[e] insurance.'"<sup>82</sup> This savings clause was intended to preserve the states' traditional ability to regulate insurance.<sup>83</sup> However, the statute itself does not provide any guidance on interpreting the savings clause and the question of which state laws regulate insurance has been contentiously litigated, with widely varying results.<sup>84</sup> The interaction between ERISA's wide preemption clause purporting to "supersede any and all state laws . . . relat[ing] to any employee benefit plans" and the equally wide savings clause protecting state regulation of insurance has been repeatedly criticized by the Supreme Court as self-contradictory<sup>85</sup> and the Court has invited Congress to consider

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<sup>81</sup> *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

<sup>82</sup> *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (alteration in original) (citation omitted) (quoting ERISA § 514(a)-(b)(2)(A)).

<sup>83</sup> *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002) ("[S]tate laws regulating the substantive terms of insurance contracts were commonplace well before the mid-70's[.]. It is therefore hard to imagine a reservation of state power to regulate insurance that would not be meant to cover restrictions of the insurer's advantage . . ." (alteration in original) (quoting *Metro. Life Ins. Co.*, 471 U.S. at 742)); Matthew G. Vansuch, *Not Just Old Wine in New Bottles: Kentucky Ass'n of Health Plans, Inc. v. Miller Bottles A New Test for State Regulation of Insurance*, 38 AKRON L. REV. 253, 264-65 (2005) ("Consistent with McCarran-Ferguson's preference for state regulation of insurance and the premise that insurance is not its focus, ERISA 'saves' state laws that regulate insurance from preemption. 'State law' has been broadly interpreted, in accordance with ERISA's sweeping definition.").

<sup>84</sup> See Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105, 108-09 (2001) ("ERISA's preemption language has become the bane of practitioners and the courts. The Supreme Court has issued no fewer than eighteen opinions dealing with ERISA preemption . . .").

<sup>85</sup> *Metro. Life Ins. Co.*, 471 U.S. at 739-40 (quoting 29 U.S.C. § 1144(a) (2012)).

rewriting the express preemption clause.<sup>86</sup> The Second and Fourth Circuit Courts of Appeals are the only two circuits to have directly addressed the issue of express preemption of antisubrogation statutes as applied to insured health plans.<sup>87</sup> Both courts cited the Supreme Court's holding in *FMC Corp. v. Holliday* and held that state antisubrogation statutes, when applied to insured health plans, are saved from preemption under the savings clause.<sup>88</sup>

#### D. The Savings Clause—State Regulation of Insurance

In 2003, the Supreme Court acknowledged that its savings clause holdings had “misdirected attention” and “failed to provide clear guidance to lower federal courts.”<sup>89</sup> The Court displaced its prior analysis for a new, simplified approach in *Kentucky Ass'n v. Miller*.<sup>90</sup> *Miller* outlined the current test for determining which laws “regulate insurance” and are therefore saved from ERISA preemption.<sup>91</sup> The test laid out two requirements under the savings clause: 1) the state law in question must be “specifically directed toward”<sup>92</sup> insurance and 2) the state law must “affect the risk pooling arrangement between the insurer and the insured.”<sup>93</sup>

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<sup>86</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222–23 (2004) (Ginsburg, J. dissenting) (“I also join the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.” (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring))).

<sup>87</sup> *Wurtz v. Rawlings Co.*, 761 F.3d 232, 240–41 (2d Cir. 2014); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 286 (4th Cir. 2003).

<sup>88</sup> *Wurtz*, 761 F.3d at 240; *Singh*, 335 F.3d at 286.

<sup>89</sup> *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 339–40 (2003).

<sup>90</sup> *Id.* at 334–42.

<sup>91</sup> *Id.*; Vansuch, *supra* note 83, at 256 (“*Miller* clarified the savings clause analysis by establishing a broad, two-step test for determining if a state law regulates insurance.”).

<sup>92</sup> *Miller*, 538 U.S. at 334 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987)).

<sup>93</sup> *Id.* at 338.

## 1. Specifically Directed Toward Insurance

For a law to be specifically directed toward insurance and therefore satisfy the first prong of the savings clause test in *Miller*, the law must regulate insurers “with respect to their insurance practices.”<sup>94</sup> This approach was a holdover from the Court’s previous decision in *FMC Corp. v. Holliday*.<sup>95</sup> *FMC Corp.* dealt squarely with Pennsylvania’s antisubrogation statute and held that the statute did “not merely have an impact on the insurance industry; it [was] aimed at it.”<sup>96</sup> The primary argument raised by ERISA health insurers attempting to dislodge antisubrogation statutes from savings clause protection following *FMC Corp.* and *Miller* is overbreadth.<sup>97</sup> In *Miller*, petitioners argued before the Supreme Court that since the state law in question regulated health maintenance organizations (“HMOs”) that were not insurers but were only providing administrative services, the law could not be classified as one specifically directed towards insurance.<sup>98</sup> The Supreme Court denied this contention and stated that even laws with some degree of overbreadth resulting in their potential application to noninsurers could still be saved from ERISA preemption.<sup>99</sup> Due to the precedent set by the Supreme Court’s decisions in *FMC Corp.* and *Miller*, state antisubrogation laws have subsequently been held to qualify as laws specifically

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<sup>94</sup> *Id.* at 334 (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002)).

<sup>95</sup> *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

<sup>96</sup> *Id.* at 61.

<sup>97</sup> See Brief for Defendants-Appellees The Rawlings Co., Oxford Health Plans (NY), Inc. and UnitedHealth Group Inc., *Wurtz v. Rawlings Co.*, 761 F.3d 232 (2d Cir. 2014) (No. 13-1695-cv), 2013 WL 3964707, at \*37 (“[New York’s antisubrogation statute] contains a broad definition of what constitutes a ‘benefit provider.’ . . . [which] hardly singles out insurance.”); Brief of Appellee, *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278 (4th Cir. 2003) (No. 01-1102), 2002 WL 32726921, at \*26 (“While laws regulating subrogation rights apply in part to holders of insurance, they do not regulate the insurance industry directly.”).

<sup>98</sup> *Miller*, 538 U.S. at 334.

<sup>99</sup> *Id.* at 337–38.

directed toward insurers, and therefore satisfy the first prong of the Miller test.<sup>100</sup>

## 2. Risk Pooling

The fundamental idea of insurance and risk pooling is that a large group of insureds will pay relatively small, predetermined amounts (insurance premiums) which will in turn create a large pool to fund health insurance payments in the event that one of the insurance plan members has a catastrophic accident.<sup>101</sup> Similar to its treatment of the savings clause, *Miller* did not lay out a set of discrete rules to guide lower courts in interpreting the risk-sharing requirement.<sup>102</sup> Instead, the Court described some of the elements that factored into its decision to save the statute in *Miller* from ERISA preemption.<sup>103</sup> Most important among these factors was the Court's assertion that a saved state law need not actually spread risk, but must "substantially affect the risk-pooling arrangement."<sup>104</sup> One of the main arguments in favor of subrogation acknowledges that subrogation (and by extension, the negation of subrogation rights) affects the risk-pooling

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<sup>100</sup> See *Wurtz v. Rawlings Co.*, 761 F.3d 232, 240 (2d Cir. 2014); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 286 (4th Cir. 2003).

<sup>101</sup> Beverly Cohen, *Saving the Savings Clause: Advocating a Broader Reading of the Miller Test to Enable States to Protect ERISA Health Plan Members by Regulating Insurance*, 18 GEO. MASON L. REV. 125, 144–45 (2010) ("[R]isk pooling refers to the principle that risk averse individuals will often prefer to take a small but certain loss [payment of premiums] in preference to a large uncertain one [catastrophic illness]. Thus, insurance systems pool economic risk, resulting in a small loss to many [in the form of insurance premiums] rather than a large loss to the unfortunate few." (alterations in original) (quoting *Standard Ins. Co. v. Morrison*, 537 F. Supp. 2d 1142, 1150 (D. Mont. 2008))).

<sup>102</sup> *Miller*, 538 U.S. at 341–42; Cohen, *supra* note 101 at 136 ("The *Miller* Court's explanation of what it means to 'substantially affect the risk pooling arrangement between the insurer and the insured' was scant.").

<sup>103</sup> See, e.g., Cohen, *supra* note 101, at 136–37 (discussing four factors illustrated by the *Miller* Court as useful in determining whether the state law at question affects the risk-pooling arrangement).

<sup>104</sup> *Miller*, 538 U.S. at 338–39 & n.3.

arrangement.<sup>105</sup> Proponents of subrogation frequently claim that monies recovered through subrogation result in lower insurance premiums for consumers.<sup>106</sup> This can only occur because the end result of subrogation is to place the risk of payment for medical benefits on third-party tortfeasors or the injured victim.<sup>107</sup>

Express preemption of antisubrogation statutes, while still subject to overbreadth arguments, is no longer a serious threat to preempt insured ERISA health plans due to the reading of the savings clause in *FMC Corp. and Miller*.<sup>108</sup> However, ERISA's enforcement mechanism, found in § 502, has been held to have a different type of preemptive power.

### *E. Complete Preemption Under ERISA § 502*

ERISA's second preemptive power is rooted in ERISA § 502(a)(1)(B). As mentioned above, § 502(a) provides a federal right of enforcement for plan fiduciaries and beneficiaries seeking "equitable relief."<sup>109</sup> However, this has also provided another means of preempting state antisubrogation statutes called complete

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<sup>105</sup> See, e.g., Eric J. Pickar, Student Article, *Westfield Insurance Company, Inc. v. Rowe: The South Dakota Supreme Court Rejects the Common Law "Made Whole" Doctrine on a Property Insurance Subrogation Claim*, 47 S.D. L. REV. 316, 324–25 (2002) ("[A]n essential notion of subrogation is that the insured should be barred from obtaining . . . one recovery from the insurer under the contractual provisions of the insurance policy, and a second recovery from the tortfeasor under tort principles . . . [T]his is the very principle most ardently argued by insurance attorneys in defense of subrogation.").

<sup>106</sup> See, e.g., WICKERT, *supra* note 36, at 1-38 ("[S]ubrogation is a key mechanism by which insurance premiums are kept in check and held to a minimum.").

<sup>107</sup> See Brief Amici Curiae for the National Ass'n of Subrogation Professionals and the Self Insurance Institute of America, Inc. in Support of Petitioner, *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013) (No. 11-1285), 2012 WL 3875233, at \*25.

<sup>108</sup> Defendants' petition for a writ of certiorari to the Supreme Court in *Wurtz v. Rawlings* does not contest the Second Circuit's holding that New York's antisubrogation statute was saved from preemption. Petition for a Writ of Certiorari, *Rawlings Co. v. Wurtz*, 135 S. Ct. 1400 (2015) (No. 14-487), 2014 WL 5475202, at \*5.

<sup>109</sup> 29 U.S.C. § 1132(a)(3) (2012).

preemption.<sup>110</sup> Complete preemption occurs where “Congress’ intent in enacting a statutory scheme is to supplant state law completely.”<sup>111</sup> In 1987, the Supreme Court established the complete preemption doctrine of § 502(a)(1)(B), stating: “[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.”<sup>112</sup> In a companion decision on ERISA preemption handed down the same day, the Supreme Court held that § 502(a)(1)(B) was the exclusive remedy for any plan participant or fiduciary seeking enforcement or clarification of rights under the plan.<sup>113</sup> The effects of § 502 preemption are two-fold. First, the Supreme Court has held that ERISA’s exclusive enforcement mechanism provides a federal venue for any claims which could at some point have been brought under § 502.<sup>114</sup> This is primarily a jurisdictional effect of complete preemption, which allows removal of state actions to federal court if the claims can be characterized as seeking “to enforce . . . rights under the terms of the plan” or “to recover benefits due under the terms of the plan” as provided in § 502.<sup>115</sup> This aspect of “complete preemption is a misnomer.”<sup>116</sup>

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<sup>110</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) (holding “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy [of § 502(a)(1)(B)] conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted.”).

<sup>111</sup> Gary L. Wickert, *2nd Circuit Strips Fully-Insured Plans of Preemption of New York Antisubrogation Law*, MATHIESEN, WICKERT, & LEHRER, S.C. (Aug. 27, 2014), <http://www.mwl-law.com/2nd-circuit-strips-fully-insured-plans-preemption-new-york-antisubrogation-law/>.

<sup>112</sup> *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

<sup>113</sup> *Id.* (“The deliberate care with which ERISA’s civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA’s civil enforcement remedies were intended to be exclusive.”).

<sup>114</sup> *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

<sup>115</sup> 29 U.S.C. § 1132(a)(1)(B) (2012).

<sup>116</sup> *Lehmann v. Brown*, 230 F.3d 916, 919 (7th Cir. 2000) (“[C]omplete preemption’ is a misnomer, having nothing to do with preemption and

Complete preemption in this context simply results in the re-characterization of any state law claims as claims for enforcement of plan terms or benefits under § 502.<sup>117</sup> However, once a claim has fallen into the net of § 502 complete preemption, the claimant's remedies are limited to those permitted under ERISA, which include "benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits."<sup>118</sup> The logic behind ERISA's complete preemption is fundamentally simple: any claims which *can* be brought under § 502 *must* be brought under § 502, and these claims will be limited to § 502 remedies.<sup>119</sup>

In 2004, the Supreme Court laid out a new, two-pronged test for complete preemption in *Aetna Health Inc. v. Davila*.<sup>120</sup> The first part of the test is whether an "individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B)."<sup>121</sup> The second part of the test asks whether there is any other "independent legal duty that is implicated by a defendant's actions."<sup>122</sup> Often, courts analyze plaintiffs' claims and will hold them to be completely preempted by ERISA if the claims require the courts to interpret the terms of the plan.<sup>123</sup> If plaintiffs' claims do not hinge on any interpretation of the plans' terms than they are not claims that "could have been brought under ERISA § 502(a)(1)(B)" and do not satisfy the first prong of the *Davila* test. If the defendant's liability hinges on the existence and

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everything to do with federal occupation of a field. The name misleads because, when federal law occupies the field . . . *every* claim arises under federal law.").

<sup>117</sup> *Id.* at 919–20.

<sup>118</sup> *Dedeaux*, 481 U.S. at 53.

<sup>119</sup> *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990) ("Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA . . .").

<sup>120</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

<sup>121</sup> *Id.* at 210.

<sup>122</sup> *Id.*

<sup>123</sup> *See Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 967 (7th Cir. 2000) (identifying factors to consider when determining whether to recharacterize a state law claim as an ERISA claim, which includes "whether the plaintiff's state law claim cannot be resolved without an interpretation of the contract" (quoting *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487 (7th Cir. 1996))).

administration of an ERISA plan, then the claim does not implicate an independent legal duty but is dependent on the plan and its terms.<sup>124</sup>

## II. THE TANGLED WEB OF ERISA PREEMPTION—CIRCUIT SPLITS BEFORE AND AFTER *WURTZ*

### *A. Antisubrogation Statutes Preempted*

In three separate decisions, the Third, Fourth, and Fifth Circuits found state antisubrogation statutes to be completely preempted under ERISA § 502. The Fifth Circuit dealt directly with ERISA’s complete preemption of a Louisiana antisubrogation law in *Arana v. Ochsner*.<sup>125</sup> Arana was injured in a car accident and was covered under his mother’s employer-sponsored ERISA health plan, which paid approximately \$180,000 in medical benefits as a result of Arana’s injuries.<sup>126</sup> After Arana obtained settlements against the tortfeasor, Ochsner Health Plan (“OHP”) claimed a right of reimbursement in the amount of \$180,000 in medical benefits out of Arana’s settlement proceeds.<sup>127</sup> Arana filed suit in Louisiana state court, relying on Louisiana Insurance Code § 22.663, which prohibited subrogation claims.<sup>128</sup> OHP removed the case to the Eastern District of Louisiana on the grounds that Arana’s claims were really claims “to recover benefits” under § 502 and were therefore completely preempted by ERISA.<sup>129</sup>

On appeal, the Fifth Circuit held that Arana’s claims, based on Louisiana’s antisubrogation statute, were nonetheless claims to recover benefits under his ERISA plan.<sup>130</sup> In reaching this

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<sup>124</sup> See *Davila*, 542 U.S. at 213 (“[I]nterpretation of the terms of respondents’ benefit plans forms an essential part of their [state law] claim, and . . . liability would exist here only because of petitioners’ administration of ERISA-regulated benefit plans.”).

<sup>125</sup> *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003).

<sup>126</sup> *Id.* at 435.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 435–36.

<sup>129</sup> *Id.* at 436.

<sup>130</sup> *Id.* at 438.



conclusion, the Fifth Circuit relied on a tenuous legal fiction, stating:

Arana's benefits are under something of a cloud, for OHP is asserting a right to be reimbursed for the benefits it has paid for his account. It could be said, then, that although the benefits have already been paid, Arana has not fully 'recovered' them . . . free and clear of OHP's claims.<sup>131</sup>

The Court further stated that "one could say that Arana seeks to enforce his rights under the terms of the plan, for he seeks to determine his entitlement to retain . . . benefits."<sup>132</sup> Arana argued that complete preemption alone under ERISA was not enough to establish federal jurisdiction but rather that both express and complete preemption were required.<sup>133</sup> The Fifth Circuit, however, expressly departed from its own prior holdings, which had required both complete preemption under § 502 and express preemption (referred to in the decision as conflict preemption) under § 514 and held instead that complete preemption alone was enough to justify federal jurisdiction.<sup>134</sup>

Seven days prior to the Fifth Circuit's decision in *Arana*, the Fourth Circuit addressed a similar set of issues in *Singh v. Prudential Health Care Plan, Inc.*<sup>135</sup> Sabriyana Singh recovered a settlement from a third-party tortfeasor for injuries sustained in a car accident and Prudential sought reimbursement of funds paid for Singh's medical treatment.<sup>136</sup> Singh paid the reimbursement claim and afterwards filed suit in Maryland state court under the theory that the Maryland HMO Act, which the Maryland Court of Appeals stated prohibited HMOs from "pursuing . . . subrogation after [its] members have received damages from a third-party tortfeasor," barred Prudential's reimbursement claim.<sup>137</sup> The Fourth Circuit ultimately held that Singh's claims were "saved"

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 439.

<sup>134</sup> *Id.* at 440.

<sup>135</sup> *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278 (4th Cir. 2003).

<sup>136</sup> *Id.* at 281.

<sup>137</sup> *Id.* (quoting *Riemer v. Columbia Med. Plan, Inc.*, 747 A.2d 667, 697 (Md. 2000)) (alteration in original).

from express preemption by § 514's savings clause but were nonetheless completely preempted under § 502.<sup>138</sup> The court's express preemption holding correctly relied on the Supreme Court's decision in *FMC Corp.* that state antisubrogation statutes as applied to fully insured plans are laws that regulate insurance and are saved from preemption.<sup>139</sup> The *Singh* decision, however, erred when addressing § 502's complete preemption of Singh's claims. The Fourth Circuit held that Singh sought entitlement to "undiminished benefits" under her plan and therefore was actually stating a claim for benefits that must be brought under § 502.<sup>140</sup>

The Fourth Circuit's characterization of actions founded on antisubrogation statutes relies on the same legal fiction as the Fifth Circuit's decision in *Arana*. The Fourth and Fifth Circuit decisions ignore the fact that in both cases the health benefits due to the injured plaintiffs had already been paid as required under the terms of the plans.<sup>141</sup> It is a mischaracterization to describe the plaintiffs' claims in *Arana* and *Singh* as claims for benefits due when the benefits had already been received. The Fifth Circuit's holding that *Arana*'s benefits remained under "something of a cloud"<sup>142</sup> is sheer fiction; *Arana* had already received his benefits.<sup>143</sup> It is unclear how benefits that had already been fully paid and administered could remain under something of a cloud, especially when *Arana* had no obligation to pursue the tortfeasor in the third-party action. Similarly, the Fourth Circuit's insertion of the critical, but misplaced modifier, "*undiminished* benefits," illustrates the court's rejection of the factual circumstances in that case: Singh had already received all the benefits due to her under the terms of her plan. Singh's plan benefits were not diminished, her tort settlement was.<sup>144</sup>

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<sup>138</sup> *Id.* at 282–85.

<sup>139</sup> *Id.* at 286.

<sup>140</sup> *Id.* at 290.

<sup>141</sup> *Arana v. Ochsner Health Plan*, 338 F.3d 433, 436 (5th Cir. 2003); *Singh*, 335 F.3d at 281.

<sup>142</sup> *Arana*, 338 F.3d at 438.

<sup>143</sup> *Id.* at 435 (“[OHP] paid approximately \$180,000 in benefits under the terms of an employer-sponsored health plan . . .”).

<sup>144</sup> *Singh*, 335 F.3d at 281 (“Prudential . . . paid Singh \$950.12 in respect to injuries sustained . . .”).

The Third Circuit's decision in *Levine v. United Healthcare Corp.* relies heavily on the decisions in *Arana* and *Singh*.<sup>145</sup> *Levine* involved three separate plaintiffs who were injured in three separate events but were all covered under health insurance plans provided by United Healthcare Corporation and Horizon Blue Cross and Blue Shield of New Jersey.<sup>146</sup> All three claimants negotiated settlements with the respective tortfeasors, and all three claimants were targeted by their health insurer through reimbursement claims.<sup>147</sup> After the three plaintiffs in *Levine* satisfied the reimbursement claims, the New Jersey Supreme Court announced that New Jersey's antisubrogation statute overruled a New Jersey Department of Insurance regulation that had permitted subrogation and reimbursement clauses.<sup>148</sup> The plaintiffs in *Levine* filed their claims in New Jersey state court relying on the antisubrogation statute to recover the amounts they had paid to satisfy the reimbursement claims.<sup>149</sup> The Third Circuit held that the plaintiffs' claims in *Levine* were claims for benefits due under the terms of their plans and therefore completely preempted under ERISA § 502(a).<sup>150</sup> The Third Circuit stated that the "[plaintiffs] claim essentially that they are entitled to have certain health insurance claims paid under their ERISA plans. It is impossible to determine the merits of the Insureds' claims without delving into the provisions of their . . . plans."<sup>151</sup> Here again, the Third Circuit constructed a fiction as a means of tying the plaintiffs' claims to the terms of their plans despite the fact that the benefits had already been satisfactorily administered.

These three decisions all overlook a critical factor that reveals the dichotomy between actions to enforce plan provisions and actions based in antisubrogation statutes. Tort claims involve far more damage elements than merely medical expenses<sup>152</sup>—elements such as pain and suffering, mental and emotional

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<sup>145</sup> *Levine v. United Healthcare Corp.*, 402 F.3d 156, 163 (3d Cir. 2005).

<sup>146</sup> *Id.* at 159.

<sup>147</sup> *Id.* at 159–60.

<sup>148</sup> *Id.* at 160 (citing *Perreira v. Rediger*, 778 A.2d 429 (N.J. 2001)).

<sup>149</sup> *Id.* at 158–59.

<sup>150</sup> *Id.* at 162–63.

<sup>151</sup> *Id.* at 163.

<sup>152</sup> *Maher & Pathak*, *supra* note 43, at 76.

anguish, loss of services, and loss of future earnings.<sup>153</sup> Therefore, reimbursement out of this settlement fund does not actually involve a strict, traceable reimbursement for medical benefits, but rather depletes funds intended to compensate the insured for other claims arising from their injury. This is especially true in cases involving catastrophic, life changing injuries as the third-party tortfeasor's insurance policy is unlikely to cover for the true extent of the damages.<sup>154</sup> *Great-West Life Ins. Co. v. Knudson*, another subrogation case before the Supreme Court, dealt with claims against Janette Knudson, a women who was rendered a quadriplegic after a car accident and settled her action against the tortfeasor for \$650,000.<sup>155</sup> The original distribution of the settlement funds, after payment of attorneys' fees and other liens, left Janette Knudson with \$256,745.30 for the establishment of a special needs trust.<sup>156</sup> Great-West nonetheless asserted a right to be reimbursed \$411,157.11 for medical payments made for Knudson's treatment.<sup>157</sup> Once again, this illustrates the false connection that has been created between benefits due under the plan<sup>158</sup> and tort-settlement funds. Knudson had already recovered her benefits and the money paid in settlement for her tort action represented compensation for the pain, suffering, and loss of

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<sup>153</sup> *Id.* (“[T]he scope of compensable loss is broader than the scope of the insured loss.”); George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REG. 237, 242–43 (1992) (“[F]irst-party insurance provides no coverage whatsoever of pain and suffering loss, while pain and suffering comprises a significant portion of tort law damages for almost all injuries.” (footnote omitted)).

<sup>154</sup> David D. Leishman, *Adding Insult to Injury: ERISA, Knudson, and the Error of the Possession Theory*, 89 MINN. L. REV. 1214, 1238 (2005) (“A case for equitable restitution might be made in those cases where, after accounting for the defendant's medical expenses, suffering, lost wages, and attorney's fees, she still comes out ahead. But even in such a scenario . . . the policyholder has necessarily incurred costs beyond just her medical expenses (including pain and suffering and attorney fees).”).

<sup>155</sup> *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 207 (2002).

<sup>156</sup> *Id.* at 207–08.

<sup>157</sup> *Id.* at 208.

<sup>158</sup> *Id.* at 214.

earnings that she would have to endure for the rest of her life.<sup>159</sup> Indeed, this distinction formed one of the common law's primary justifications for disallowing subrogation in the personal injury context: "the loss-victim's deal with the insurer for compensation was a deal entirely separate from the loss-victim's right to recover from the tortfeasor."<sup>160</sup> Recognition of this distinction establishes that any action by an insured to keep or regain funds acquired as a result of a tort settlement cannot be construed as an action to recover benefits due under the terms of the plan and therefore should not be subjected to complete preemption under ERISA.

### *B. Untangling the Web—Wurtz v. Rawlings*

The facts at issue in *Wurtz v. Rawlings* mirrored those seen in the Third, Fourth, and Fifth Circuit cases analyzed above. The plaintiffs in *Wurtz* sued and recovered settlements for separate personal injury actions against third-party tortfeasors.<sup>161</sup> The plaintiffs were covered by ERISA health benefit plans that had paid for medical treatment.<sup>162</sup> The plaintiffs had already paid their ERISA insurers the claimed reimbursement sums.<sup>163</sup> Afterwards, the "plaintiffs sought a declaration that . . . defendants did not have a right to seek reimbursement or subrogation of medical benefits against plaintiffs' tort settlements" and "sought damages for unjust enrichment and deceptive business practices."<sup>164</sup> The Eastern District of New York held that the plaintiffs' claims were both expressly and completely preempted by ERISA.<sup>165</sup> Specifically, the plaintiffs' claims in *Wurtz* were based on N.Y. Gen. Oblig. Law § 5-335 which, at the time of the District Court's ruling, stated:

- (a) When a plaintiff settles with one or more defendants in an action for personal injuries . . . it

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<sup>159</sup> *Id.* at 207.

<sup>160</sup> Maher & Pathak, *supra* note 43, at 70.

<sup>161</sup> *Wurtz v. Rawlings Co.*, 761 F.3d 232, 237 (2d Cir. 2014).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Wurtz v. Rawlings Co.*, 933 F. Supp. 2d 480, 509 (E.D.N.Y. 2013), *vacated and remanded*, 761 F.3d 232 (2d Cir. 2014).

shall be conclusively presumed that the settlement *does not include any compensation* for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there is a statutory right of reimbursement . . . *no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party*, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider.<sup>166</sup>

The District Court held that, despite the statutory language of N.Y. Gen. Oblig. Law § 5-335, the claims were expressly preempted as they did not regulate insurance as required by ERISA's savings clause.<sup>167</sup> Specifically, the District Court found that because the statute referenced benefit providers it was overly broad and did not qualify as a law that regulates insurance to be saved from express preemption under § 514's savings clause.<sup>168</sup> The District Court also found the plaintiffs' claims to be completely preempted under ERISA § 502(a)(1)(B) because the plaintiffs' request for a declaratory judgment holding the defendants' liens to be invalid under N.Y. Gen. Oblig. Law § 5-335 was, in reality, a claim for benefits and therefore plaintiffs' claims could only be brought under ERISA § 502(a)(1)(B).<sup>169</sup>

In response to the portion of the ruling holding that the savings clause did not apply because the statute was overly broad, the New York State Legislature amended N.Y. Gen. Oblig. Law § 5-335.<sup>170</sup>

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<sup>166</sup> N.Y. GEN. OBLIG. LAW § 5-335 (McKinney 2009) (emphasis added) (amended 2013).

<sup>167</sup> *Wurtz*, 933 F. Supp. 2d at 502 (citing *Howard v. Gleason Corp.*, 901 F.2d 1154, 1156 (2d Cir. 1990)).

<sup>168</sup> *Id.* at 505–06.

<sup>169</sup> *Id.* at 509.

<sup>170</sup> N.Y. GEN. OBLIG. LAW § 5-335 (McKinney 2015) (citing Editor's Notes on LexisNexis) (enacted 2009 and amended 2013).

Specifically, the legislature removed the term *benefit provider* from the statute and replaced it with the term *insurer*.<sup>171</sup> The amended statute's statement of legislative intent made clear the legislature's disapproval of the lower court's ruling in *Wurtz*.<sup>172</sup> The legislature went on to state, in very clear terms, that the purpose of the amendment was to:

ensure that insurers will not be able to claim or access any monies paid in settlement of a tort claim . . . so that the burden of payment for health care services, disability payments, lost wage payments or any other benefits for the victims of torts will be borne by the insurer and not any party to a settlement of such a victim's tort claim.<sup>173</sup>

This purports to eliminate ERISA plan insurers' rights of subrogation. The amended statute was made retroactively applicable.<sup>174</sup> The plaintiffs in *Wurtz* appealed the District Court's judgment and the amended statute was passed in time for the Second Circuit's consideration of their appeal.<sup>175</sup>

The Second Circuit vacated the Eastern District of New York's ruling and remanded the case.<sup>176</sup> The decision limited the scope of ERISA preemption and upheld New York's antisubrogation statute.<sup>177</sup> In so doing, the court applied the same tests for express and complete preemption as those used by the District Court but arrived at completely opposite conclusions on every question presented.<sup>178</sup> The Supreme Court denied a petition for a writ of certiorari filed on behalf of the health insurers in *Wurtz*, thereby cementing the Second Circuit's decision.<sup>179</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* The legislature further stated the purpose of the statute was to "regulate insurance" and thereby avoid ERISA preemption. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See id.*; *Wurtz v. Rawlings Co.*, 761 F.3d 232 (2d Cir. 2014).

<sup>176</sup> *Wurtz*, 761 F.3d at 245.

<sup>177</sup> *Id.* at 240–41.

<sup>178</sup> *Id.* at 242–43.

<sup>179</sup> *Wurtz v. Rawlings Co.*, 135 S. Ct. 1400 (2015) (denying the health insurers' petition for a writ of certiorari).

In deciding the express preemption issue, the Second Circuit pointed out that even under the prior statutory language (containing the term “benefit provider” instead of “insurer”), the statute satisfied the first prong and was specifically directed towards insurance entities.<sup>180</sup> In deciding this, the Second Circuit stated that a law impacting benefit providers was not per se invalid.<sup>181</sup> Rather, the critical factor is whether the statute “does not merely have an impact on the insurance industry; [but] is aimed at it.”<sup>182</sup> The court held that even absent the more specific language in the statute as amended, the law was still sufficiently directed towards insurance companies to qualify for ERISA preemption under the first prong.<sup>183</sup>

The Second Circuit found the New York statute also satisfied the second prong in that it “substantially affect[ed] risk pooling between insurers and insureds.”<sup>184</sup> In language mimicking the statute’s statement of legislative intent, the court stated: “Section 5-335 requires that insurers bear the risk of medical expenses whether or not the insured settles or goes to trial, and it thus substantially affects risk pooling between insurers and insureds.”<sup>185</sup> This set a much lower bar than the District Court, which held this prong could only be satisfied if the state law affected the insurance market as a whole, not simply the small subset of ERISA insureds that attain settlements after personal injury events.<sup>186</sup>

In analyzing the complete preemption issue, the Second Circuit characterized the plaintiffs’ claims in a manner completely different from that of the District Court. The Circuit Court held that N.Y. Gen. Oblig. Law § 5-335 was not completely preempted under § 502(a)(1)(B) because the plaintiffs were not seeking to enforce their rights under the plan.<sup>187</sup> Instead, according to the Court, the plaintiffs relied on New York’s antisubrogation statute

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<sup>180</sup> *Wurtz*, 761 F.3d at 236 n.1, 240–41.

<sup>181</sup> *Id.* at 240.

<sup>182</sup> *Id.* at 241 (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990)).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Wurtz v. Rawlings Co.*, 933 F. Supp. 2d 480, 505 (E.D.N.Y. 2013), *vacated and remanded*, 761 F.3d 232 (2d Cir. 2014).

<sup>187</sup> *Wurtz*, 761 F.3d at 242.



to enforce a “state right . . . to be free from subrogation.”<sup>188</sup> This reasoning meant that the plaintiffs’ claims were not those of the type to normally be brought under § 502(a)(1)(B) and were therefore not completely preempted under the first prong of the *Davila* test.<sup>189</sup> Furthermore, the Second Circuit found that the plaintiffs’ claims implicated an independent legal duty and therefore were not preempted under the second prong of the *Davila* test, because the New York statute “prohibit[ed] . . . subrogation . . . [p]laintiffs’ claims do not derive from their plans or require investigation into the terms of their plans; rather they derive from N.Y. Gen. Oblig. Law § 5-335.”<sup>190</sup> The plaintiffs’ claims were grounded in the state right provided by the antisubrogation statute and therefore “the terms of plaintiffs’ ERISA plans are irrelevant to their claims.”<sup>191</sup>

### C. Subrogation after Wurtz

The Supreme Court’s denial of certiorari in *Wurtz* means insurers of fully-insured ERISA plans will no longer be able to enforce subrogation or rights of reimbursement against the personal injury settlements of their insureds in New York.<sup>192</sup> This avoids replicating the unjust and untenable situation that occurred as a result of an enforceable subrogation clause involving New Jersey resident Justin Rose,<sup>193</sup> a nine year old infant who suffered second and third degree burns to over 77% of his body.<sup>194</sup> Rose was a dependent to an ERISA plan which paid for \$1.2 million

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 243 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004)).

<sup>191</sup> *Id.* at 242.

<sup>192</sup> Wickert, *supra* note 111; see also F.A. Kelley, *U.S. Supreme Court Denies Certiorari in New York Antisubrogation Case*, YOUR LAWYER (Mar. 3, 2015), <http://www.yourlawyer.com/blog/u-s-supreme-court-denies-certiorari-new-york-antisubrogation-case/>.

<sup>193</sup> *Walker v. Rose*, 22 F. Supp. 2d 343 (D.N.J. 1998); see also Martha Neil, *Employee Benefits Law Is as Thorny as Ever, and Recent Changes Mean Lawyers Need to Be Doubly Careful When Trekking Through the Brambles*, ABA J., June 2001, at 54.

<sup>194</sup> *Walker*, 22 F. Supp. 2d at 345; Neil, *supra* note 193, at 54.

dollars in necessary medical treatment for Rose's injuries.<sup>195</sup> Ultimately, Rose's personal injury case against the tortfeasor resulted in a \$600,000 settlement.<sup>196</sup> The health insurer brought suit in the United States District Court of New Jersey to enforce its subrogation clause, demanding that the entirety of Rose's settlement be paid to the health insurer as reimbursement for payment of his medical expenses.<sup>197</sup> The court strictly enforced the health insurer's subrogation clause with the result that Rose and his family were forced to surrender the entire settlement to his health insurer.<sup>198</sup> The decision in *Wurtz*, if adopted by other Circuit Courts, can ultimately signal an end, or at least a diminishing, of insurance companies' ability to enforce subrogation clauses without limitation from state regulation.

The Second Circuit expressly acknowledged that its decision in *Wurtz* constituted a circuit split with the Third, Fourth, and Fifth Circuits.<sup>199</sup> The critical question raised in the petition for certiorari in *Wurtz* and by the Second Circuit's decision, as well as in opposing decisions in the Third, Fourth, and Fifth Circuits, was whether a state law "saved" from express preemption by § 514's savings clause can nevertheless still be completely preempted under § 502. This is an untenable result which would render the savings clause moot. It is unlikely that Congress intended to "save" certain state laws from preemption only to preempt them again in another clause.<sup>200</sup> A review of the conflicting holdings demonstrates the soundness of the Second Circuit's decision in *Wurtz* and the problems with the approaches taken by the Third, Fourth and Fifth Circuits.

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<sup>195</sup> *Walker*, 22 F. Supp. 2d at 345.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 352.

<sup>199</sup> *Wurtz v. Rawlings Co.*, 761 F.3d 232, 243 (2d Cir. 2014).

<sup>200</sup> *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739–40 (1985).

## III. POLICY IMPLICATIONS

There are two primary policy justifications advanced by proponents of subrogation.<sup>201</sup> The first is that subrogation recoveries result in increased revenues for insurance companies that are then passed down to consumers in the form of lower premiums.<sup>202</sup> The second justification is that subrogation prevents a “double recovery” on the part of the insured.<sup>203</sup> This theory is based on the notion that an insured should not be permitted to recover for the same incident twice, i.e. medical benefits arising out of the ERISA plan and settlement funds from a tort action.<sup>204</sup> Neither of these justifications are sound.

*A. Lower Premiums*

Proponents of subrogation claim that the practice “serves the laudable goal[] of . . . keeping insurance rates down.”<sup>205</sup> This claim has been questioned by various commentators and found unpersuasive by a number of courts. The very nature of subrogation in the personal injury context calls this claim into question. Recoveries out of subrogation claims are highly unpredictable whereas insured losses must be covered by the insurance policy regardless of the context in which it was

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<sup>201</sup> Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. REV. 237, 242 (1996).

<sup>202</sup> Allison Ruuska, *What is Subrogation?*, PROGRESSIVE (Dec. 10, 2007), [https://www.progressive.com/understanding-insurance/entries/2009/9/1/what\\_is\\_subrogation/](https://www.progressive.com/understanding-insurance/entries/2009/9/1/what_is_subrogation/) (“The successful recovery of money we’ve paid on claims allows us to pass the savings to you, in turn helping to keep your insurance rates down.”; see WICKERT, *supra* note 36, at 1-38 (5th ed. 2013) (“[S]ubrogation is a key mechanism by which insurance premiums are kept in check and held to a minimum.”).

<sup>203</sup> See, e.g., F. Joseph Du Bray, *A Response to the Antisubrogation Argument: What Really Emerged from Pandora's Box*, 41 S.D. L. REV. 264, 269 (1996) (describing how “a commonly recognized theme of the South Dakota Supreme Court is that subrogation prevents the insured from recouping a double recovery for the same injury”).

<sup>204</sup> Leishman, *supra* note 154, at 1226–27.

<sup>205</sup> Michelle J. d’Arcambal, *The Assault on Subrogation*, SB81 ALI-ABA 461, 464 (1997).

sustained.<sup>206</sup> If an insured is struck by lightning, the insurer must cover those medical expenses under the terms of the plan to the same extent that it covers an insured who is injured in a car accident. Any subrogation recovery depends on a number of unpredictable factors such as the provable liability of the tortfeasor, the tortfeasor's insurance policy, and the willingness of the insured to pursue the case.<sup>207</sup> Even if all these factors line up favorably, extended litigation in the tort action can delay a settlement for years. Instead, insurance rates are based on "actuarial estimates . . . [t]hey are not usually computed with any possible recovery from third-party sources in mind because the mathematical probability of such a recovery is difficult to determine."<sup>208</sup> Statistics bear this out: "over the past 20 years health benefit costs . . . have increased by an average of 7.2 percent annually and premium increases have averaged 7.1 percent annually."<sup>209</sup> Insurance premiums are determined on the basis of losses and do not take subrogation recoveries into account.<sup>210</sup>

### B. Double Recovery

The double recovery justification of subrogation posits that "to permit the insured to receive[] payment from both the wrongdoer and the insurer would be to give him double compensation for his loss."<sup>211</sup> However, a tort settlement compensates the injured victim for losses that are unconnected to the payment of past medical benefits. These tort settlements are often limited to the extent of the tortfeasor's insurance coverage and do not compensate the victim to the full extent of his or her injuries.<sup>212</sup> Since subrogation attempts to recover money paid out for medical benefits, the

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<sup>206</sup> Scott M. Aronson, *ERISA's Equitable Illusion: The Unjust Justice of Section 502(a)(3)*, 9 EMP. RTS. & EMP. POL'Y J. 247, 285 (2005).

<sup>207</sup> *Id.*; see also, Baron, *supra* note 50, at 629–31.

<sup>208</sup> *Cooper v. Argonaut Ins. Cos.*, 556 P.2d 525, 527 (Alaska 1976).

<sup>209</sup> *Premiums 101*, AHIP, <http://ahip.org/Issues/Premiums-101.aspx> (last visited Sept. 11, 2015).

<sup>210</sup> Baron, *supra* note 201, at 244.

<sup>211</sup> d'Arcambal, *supra* note 205, at 464.

<sup>212</sup> Maher & Pathak, *supra* note 43, at 76 ("Rarely do tort recoveries actually make the loss-victims whole.").

largest subrogation claims will often be made against insureds with grievous injuries. The ultimate effect of strictly enforcing these subrogation claims under the framework of ERISA will be to leave some victims destitute.<sup>213</sup> This directly conflicts with the laudable goals Congress had in mind when enacting the statute.

## CONCLUSION

The rise of subrogation against injured victims covered by employee health plans was not a result that was intended or expected by the drafters of ERISA,<sup>214</sup> and the harsh effects of subrogation are not felt by the majority of those covered by ERISA plans. However, for the few unfortunate enough to become acquainted with the subrogation clauses in their plans after suffering a devastating injury, the effects are profound. Subrogation under ERISA must be limited. This is best accomplished by allowing state legislatures to make their own decisions on subrogation. This may result in some states deciding to limit or ban subrogation altogether. Regardless of any state's particular decision, however, simply upholding existing state antisubrogation laws in the face of preemptive challenges would help to address the "regulatory vacuum" which currently exists under ERISA.<sup>215</sup> The framework for accomplishing this has already been provided by the Second Circuit's decision in *Wurtz*. The savings clause was intended to allow states to regulate

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<sup>213</sup> Roger M. Baron, *Catastrophic Situations*, PROFESSOR BARON, <http://erisawithprofessorbaron.com/catastrophic-situations/> (last visited Sept. 11, 2015).

<sup>214</sup> Baron & Lamb, *supra* note 22, at 326–27 ("It is no small irony that Congress originally passed ERISA for the purpose of uniformly protecting '[t]he interests of participants in employee benefit plans and their beneficiaries.'" (alteration in original) (citing 29 U.S.C. §1001(b) (2012))); 29 U.S.C. §1001(b) (2012) ("It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries.").

<sup>215</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (Ginsburg, J., concurring) (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456 (3d Cir. 2003) (Becker, J., concurring)).

insurance.<sup>216</sup> When an insured invokes an antesubrogation statute as a means to keep funds attained through a tort settlement, no amount of crafty legal wording should succeed in turning that into an action for benefits due under the plan. It is time to allow insureds all the rights given to them by their own state legislatures and put an end to the practice of using injured victims as collection agents for insurance companies.<sup>217</sup>

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<sup>216</sup> *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002) (“[S]tate laws regulating the substantive terms of insurance contracts were commonplace well before the mid-70’s’ . . . . It is therefore hard to imagine a reservation of state power to regulate insurance that would not be meant to cover restrictions of the insurer’s advantage in this kind of way.” (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742 (1985))); Vansuch, *supra* note 83, at 264–65 (“Consistent with McCarran-Ferguson’s preference for state regulation of insurance and the premise that insurance is not its focus, ERISA ‘saves’ state laws that regulate insurance from preemption. ‘State law’ has been broadly interpreted, in accordance with ERISA’s sweeping definition.”).

<sup>217</sup> *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1550 (2013).