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ERISA Preemption: Whether State Common Law Doctrines of Substantial Compliance Fall Under the Purview of ERISA

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INTRODUCTION

The United States Congress enacted the Employment Retirement Income Security Act ("ERISA") in 1974.[1] In general, ERISA regulates two types of employee benefit plans—pension plans and welfare plans. The term "welfare plan" covers "a wide variety of benefit programs, ranging from medical and hospital care to accident, death, disability, and unemployment benefits," whereas the term "pension plan" refers to "a plan that provides retirement income to employees."[2] One of Congress' goals when it enacted ERISA was to ensure that employers would not face "conflicting or inconsistent State and local regulation of employee benefit plans."[3] In order to accomplish this goal, ERISA "federalized the law of pensions and employee benefits by preempting state governance or regulation."[4] Specifically, section 514(a) of ERISA provides that Titles I and IV "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan."[5] Not all state laws relating to employee benefit plans are preempted by ERISA, however, because

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[1] Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001–1461 (2003)).

[2] BARBARA J. COLEMAN, PRIMER ON ERISA 5 (4th ed. 1993).

[3] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 99 (1983) (quoting 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams)).

[4] LAWRENCE A. FROLIK & KATHERINE MOORE, THE LAW OF EMPLOYEE PENSIONS & WELFARE BENEFITS at 1, ch. 4 (forthcoming 2003) (manuscript on file with author).

[5] 29 U.S.C. § 1144(a) (emphasis added).

ERISA also provides a "savings clause" for any state law regulating "insurance, banking, or securities."[6] Also, the "deemer clause" in ERISA pulls self-funded insurance plans back under the umbrella of ERISA preemption.[7]

"ERISA is an intricate, comprehensive statute."[8] Since ERISA's enactment, there has been a great deal of litigation about exactly what ERISA preempts. Although the United States Supreme Court has ruled on many of these issues, new issues continue to arise. One such issue is whether state common law doctrines of substantial compliance are preempted by ERISA. While the Supreme Court has not issued an opinion regarding such doctrines, several circuits have dealt with this issue. The circuits are split: The Fourth and Seventh Circuits have held that ERISA does preempt state common law doctrines of substantial compliance,[9] while the Ninth and Tenth Circuits have held that ERISA does not.[10] An analysis of past Supreme Court decisions about preemption and the purposes of ERISA indicates that the former group reached the correct decision.

Part I of this Note summarizes the relevant background information regarding ERISA, preemption, federal common law, and the state common law doctrines of substantial compliance.[11] Part II discusses the circuit courts' holdings regarding preemption of state common law doctrines of substantial compliance.[12] Part III argues that ERISA does preempt state common law doctrines regarding substantial compliance.[13] Finally, Part IV discusses federal common law of substantial compliance in relation to state doctrines.[14]

I. BACKGROUND

A. An Overview of ERISA Preemption

The Supremacy Clause of the United States Constitution provides, "This Constitution, and the Laws of the United States . . . shall be the

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[6] *Id.* § 1144(b)(2)(A).

[7] *Id.* § 1144(b)(2)(B).

[8] Boggs v. Boggs, 520 U.S. 833, 841 (1997).

[9] Metro. Life Ins. Co. v. Johnson, 297 F.3d 558, 566 (7th Cir. 2002); Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 561 (4th Cir. 1994).

[10] Bankamerica Pension Plan v. McMath, 206 F.3d 821, 830 (9th Cir. 2001); Peckham v. Gen. State Mut., 964 F.2d 1043, 1052 (10th Cir. 1992).

[11] *See infra* Part I, notes 15–68 and accompanying text.

[12] *See infra* Part II, notes 69–126 and accompanying text.

[13] *See infra* Part III, notes 127–57 and accompanying text.

[14] *See infra* Part IV, notes 158–66 and accompanying text.

supreme Law of the Land."[15] While the Clause does not mandate federal preemption of state law, it does authorize it.[16] Generally, preemption of state laws by federal laws may be express or implied and courts look to Congressional intent to determine whether a state statute should be preempted.[17] The drafters of ERISA explicitly stated that ERISA preempts all state law relating to employee benefit plans. The legislators specifically dismissed a limited preemption clause in favor of the broader clause.[18] While this may seem like a clear preemption situation, courts have had difficulty determining what exactly is preempted by the federal law.[19] Courts have noted that the preemption provisions in ERISA "are not a model of legislative drafting."[20] ERISA explicitly preempts state laws that are inconsistent with its provisions.[21] ERISA also preempts laws addressing matters it specifically regulates. Because it is much more difficult to understand what is included in the latter concept, litigation over preemption continues to arise. In response to the litigation over ERISA's lack of clarity, federal circuit courts have outlined a process for analyzing preemption. The Ninth Circuit laid out three types of state laws that are always preempted:

> (1) state laws that mandate employee benefit structures or their administration; (2) state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself; and (3) state laws providing alternate enforcement mechanisms for employees to obtain ERISA plan benefits.[22]

Commentators have stated that if "a state law does not fall within one of these categories, and it is a law of general application, then preemption

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[15] U.S. CONST. art. VI, cl. 2.

[16] *See* FROLIK & MOORE, *supra* note 4, at 1.

[17] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

[18] *Id.* at 99 (quoting 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams)).

[19] *See* Boggs v. Boggs, 520 U.S. 833, 839 (1997) (stating that "ERISA preemption questions are recurrent").

[20] FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)).

[21] 29 U.S.C. § 1144(a) (2003).

[22] JEFFREY LEWIS & MARY ELLEN SIGNORILLE, *ERISA Preemption*, *in* THE ELEVENTH ANNUAL NATIONAL INSTITUTE ON ERISA LITIGATION 6–7 (2001) (citing Ariz. State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715 (9th Cir. 1997)).

turns on the question of whether the relationship involved is one which is regulated by ERISA."[23] Still, the question of preemption continues to be litigated.

By definition, ERISA preempts state law if the provision in question is a state law that relates to an employee benefit plan.[24] For purposes of ERISA, "state" means "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone,"[25] and the term "state law" is comprised of "all laws, decisions, rules, regulations, or other State action having the effect of law."[26] Since the definition of the term "state law" is relatively clear, most of the litigation surrounding ERISA preemption centers around the phrase "relate to," from ERISA section 514(a).[27]

The Supreme Court has interpreted the scope of the phrase "relate to" differently over the past twenty years. Originally, the phrase was used "in [its] broad sense."[28] Under the Court's original expansive approach, a law "related to" an employee benefit plan if it had a "connection with or a reference to such a plan."[29] ERISA preempted state law even if no federal law conflicted with the state provision if the connection or reference was present.[30]

The Court first considered the scope of ERISA's preemption in *Alessi v. Raybestos-Manhattan, Inc.*[31] In *Alessi*, the Court stated, "ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern."[32] Since the decision in *Alessi*, the Court has held that ERISA preempts state workers' compensation laws that preclude plans from offsetting workers' compensation awards against pension plans,[33] fair employment laws that prohibit pregnancy as a justification for exclusion from disability benefit plans,[34] and state common law causes of action that challenge the improper processing of claims under ERISA plans.[35]

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[23] *Id.* at 7.
[24] 29 U.S.C. § 1144(b)(2)(A).
[25] *Id.* § 1002(10).
[26] *Id.* § 1144(c)(1).
[27] *Id.* § 1144(a).
[28] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983).
[29] *Id.* at 96–97.
[30] Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).
[31] Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).
[32] *Id.* at 525.
[33] *Id.*
[34] *Shaw*, 463 U.S. at 85.
[35] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

The Court's expansive approach was further refined in *Mackey v. Lanier Collection Agency & Service*.[36] In *Mackey*, the Supreme Court held that a state law intending to give effect to ERISA's underlying purposes was preempted.[37] The Court has repeatedly noted Congress' intent for ERISA to preempt all actions involving employee benefit plans.[38] Nonetheless, even when the Court interpreted the phrase broadly there were situations where the Court felt the connection was "too tenuous, remote, or peripheral" to warrant preemption.[39] According to the Court in *Mackey*, preemption did not apply to state law claims against ERISA plans such as unpaid rent, failure to pay creditors, or torts committed by the plans.[40]

Recently the Court has further narrowed the scope of ERISA's preemption. "Supreme Court decisions . . . seem to have 'put the brakes' on runaway ERISA preemption."[41] Now, "to determine whether a state law has the forbidden connection, [courts] look to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' [and] to the nature of the effect of the state law on ERISA plans."[42] In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Supreme Court unanimously rejected a challenge based on ERISA preemption saying that its earlier holdings emphasizing the literal meaning of "relate to" were not especially helpful.[43] Instead, the Court focused on the objectives of ERISA and the nature and effect of the state law on ERISA plans. Also, the Court began with the assumption that the historic police powers of the state would not be

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[36] Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988).

[37] *Id.* at 829–30.

[38] *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (holding that the purpose of the provision is to "ensure that plans and plan sponsors would be subject to a uniform body of benefits law"); *see also Shaw*, 463 U.S. at 99 (quoting Senator Williams and Representative Dent about the purposes of the ERISA legislation).

[39] *Shaw*, 463 U.S. at 100 n.21.

[40] *Mackey*, 486 U.S. at 833.

[41] LEWIS & SIGNORILLE, *supra* note 22, at 4.

[42] Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 325 (1997) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658–59 (1995)). For further discussion of Congress' purpose in enacting ERISA, see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987), where the Supreme Court was most concerned with whether preemption would further the purpose of ERISA. It held that attention to the purpose was particularly important.

[43] *Travelers Insurance*, 514 U.S. at 645.

superseded absent a clear indication of congressional intent.[44] The Court further buttressed this deference to state police powers in *De Buono v. NYSA-ILA Medical & Clinical Services Fund.* The Court held that when the regulation is an area of traditional exercise of the state's police powers, the party claiming preemption has the burden to prove that Congress did not intend to supersede state law.[45]

The circuit courts have had some difficulty interpreting the Supreme Court's decisions and have attempted to articulate tests to analyze whether state law claims "relate to" ERISA and therefore preempted. The Fifth Circuit's test says state law claims are not preempted where they do not affect the "relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries" or where "the state law involves an exercise of traditional state authority."[46] Other circuits have followed and have developed similar criteria for ERISA preemption.[47]

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[44] *Id.* at 655.

[45] De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997).

[46] Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., 793 F.2d 1456, 1467 (5th Cir. 1986).

[47] In *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989), the Second Circuit noted that the term "relate to" should be interpreted broadly. It stated that "ERISA does not preempt only state laws specifically designed to affect employee benefit plans or dealing with the subject matters covered by ERISA." *Id.* at 144. The Eighth Circuit discussed a variety of factors to be considered when determining whether the state law "relates to" an ERISA plan in *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341 (1991). It considered:

> [W]hether the state law negates an ERISA plan provision, whether the state law affects relations between primary ERISA entities, whether the state law impacts the structure of ERISA plans, whether the state law impacts the administration of ERISA plans, whether the state law has an economic impact on ERISA plans, whether preemption of the state law is consistent with other ERISA provisions, and whether the state law is an exercise of traditional state power.

Id. at 1344–45 (citations omitted). The Tenth Circuit listed the following four categories of laws which are preempted because they "relate to" ERISA plans:

> [L]aws that regulate the type of benefits or terms of ERISA plans. . . . [L]aws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. . . . [L]aws that provide rules for the calculation of the amount of benefits to be paid. . . . [L]aws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

The term "plan" has been defined several different ways. In *Donovan v. Dillingham*, the Eleventh Circuit held that a plan exists if "a reasonable person can ascertain intended benefits, a class of beneficiaries, the source of financing, and the procedures for receiving benefits."[48] Alternatively, the "functional test" examines "whether [the plan] is something Congress intended to be governed by ERISA."[49] Most importantly, the Supreme Court has held that ERISA only preempts "plans."[50] In *Fort Halifax v. Coyne*, the Court specifically distinguished between "plans" and "benefits," holding that the former is preempted while the latter is not.[51]

The "savings clause" in ERISA provides that any state law that regulates "insurance, banking, or securities" should not be preempted.[52] To evaluate whether a law is "saved" by the clause, the Fourth Circuit said first to "take what guidance is available from a 'common-sense' view of the language of the savings clause itself."[53] Second, the Circuit said to examine the McCarran-Ferguson factors: (1) whether the practice has the effect of "transferring or spreading the policyholder's risk," (2) whether the practice "is an integral part of the policy relationship between the insurer and the insured," and (3) whether the practice is "limited to entities within the insurance industry."[54] In order to survive preemption, a state law does not need to "satisfy all three McCarran-Ferguson criteria."[55] To be saved by the clause, however, the "law must not just have an impact on the insurance industry, but must be specifically directed towards that industry."[56] The savings clause has proven to be as complicated an issue as the phrase "relate to." While there has been little litigation on the banking and securities exceptions, the insurance exception has been the basis for

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Airparts Co., Inc. v. Custom Benefit Servs. of Austin, 28 F.3d 1062, 1064–65 (10th Cir. 1994) (quoting Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349, 1356–57 (9th Cir. 1986)).

[48] JAY CONISON, EMPLOYEE BENEFIT PLANS 322–23 (1993) (citing Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982)).

[49] *Id.* at 324.

[50] Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 8 (1987).

[51] *Id.* at 8.

[52] 29 U.S.C. § 1144(b)(2)(A) (2003).

[53] Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 560 (4th Cir. 1994) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48–49 (1987)).

[54] *Id.* at 560. The Court derived these factors from case law interpreting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2003).

[55] Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 373 (2002), *overruled in part by* Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003).

[56] *Pilot Life*, 481 U.S. at 50.

numerous cases.[57] Because it is so controversial, a full discussion of the savings clause is beyond the scope of this Note.

Some laws that meet the "savings clause" will nonetheless be preempted by ERISA because they fall under the "deemer clause." ERISA provides that "an employee benefit plan . . . shall [not] be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . of any State purporting to regulate insurance companies."[58] The Supreme Court has read the deemer clause to "exempt self-funded ERISA plans from state laws that 'regulat[e] insurance' within the meaning of the savings clause."[59] The deemer clause does not engulf the savings clause because "the savings clause retains the independent effect of protecting state insurance regulation of insurance contracts purchased by employee benefit plans."[60] Further, "a State may regulate [an insurance plan] indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it."[61]

B. Federal Common Law

When ERISA has preempted state common law and does not contain provisions relating to this situation, the Supreme Court has interpreted ERISA to authorize courts to develop and apply federal common law.[62] The courts may only create federal common law when it is appropriate under the circumstances.[63] Applying federal common law is inappropriate when "its application would 1) conflict with the statutory provisions of ERISA; 2) discourage employers from implementing plans governed by ERISA; or 3) threaten to override the explicit terms of an established ERISA benefit plan."[64]

C. State Common Law Doctrines of Substantial Compliance

Most states provide that if an insured person who is attempting to change an insurance policy substantially complies with the particular policy

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[57] *See* ABA, EMPLOYEE BENEFITS LAW 804 (Steven J. Sacher et al. eds., 2000).

[58] 29 U.S.C. § 1144(b)(2)(B) (2003).

[59] FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990) (alteration in original).

[60] *Id.* at 64.

[61] *Id.*

[62] Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 562 (4th Cir. 1994) (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109–11 (1989)).

[63] First Capital Life Ins. Co. v. AAA Communications, Inc., 906 F. Supp. 1546, 1557 (N.D. Ga. 1995) (citing *Adams*, 30 F.3d at 563 n.21).

[64] *Id.*

requirements to make the change, the change will be effective. "Small irregularities, . . . such as a failure to make a legible signature, or a failure to attach a rider to a policy, do not prevent the effectiveness of the intended change."[65] Courts apply the doctrine of substantial compliance to "avoid harsh results caused by a formalistic and overly technical adherence to the exact words of a particular benefit plan's beneficiary designation provision(s)."[66] The "mere unexecuted intention on the part of the insured to change his beneficiary," however, is not sufficient to make the change.[67] "[T]he question as to what constitutes . . . substantial compliance depends upon the particular provisions and circumstances involved."[68]

II. THE CIRCUIT SPLIT ON PREEMPTION AND STATE COMMON LAW DOCTRINES OF SUBSTANTIAL COMPLIANCE

A. ERISA Does Not Preempt State Common Law Doctrines Regarding Substantial Compliance

Two circuits have held that ERISA does not preempt state substantial compliance doctrines for insurance policies. In their decisions, the two circuit courts construed the breadth of ERISA's coverage narrowly. Since the two courts applied state common law, they did not find it necessary to discuss the application of federal common law.[69]

The Tenth Circuit was the first circuit court to consider this issue. In *Peckham v. Gem State Mutual*, the court construed ERISA's preemptive effect very narrowly and said ERISA only preempts state laws that materially modify benefit plans.[70] Andrea Peckham, an employee of AAA Engineering & Drafting, sued her insurance provider because the company refused to cover expenses incurred by her newborn son who was born with spina bifida and hydrocephalus.[71] Under her policy there were two ways to obtain coverage for a newborn baby, but Peckham failed to take the

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[65] 44 AM. JUR. 2D *Insurance* § 1756 (2003).

[66] *ERISA Does Not Preempt State Substantial Compliance Doctrine*, Nev. Emp. L. Letter, June 2000.

[67] Aetna Life Ins. Co. v. Weatherford, No. 90-5585, 1991 WL 11611, at *6 (6th Cir. Feb. 5, 1991) (quoting Jaudon v. Prudential Ins. Co. of Am., 279 F.2d 730, 733 (6th Cir. 1960)).

[68] 44 AM. JUR. 2D *Insurance* § 1756.

[69] Bankamerica Pension Plan v. McMath, 206 F.3d 821 (9th Cir. 2002); Peckham v. Gem State Mut., 964 F.2d 1043, 1052 (10th Cir. 1992).

[70] *Peckham*, 964 F.2d at 1052.

[71] *Id.* at 1046.

necessary steps for either.[72] As a result, the child was not covered by the policy, and the family incurred great medical expenses.[73] Among other things, Peckham claimed that she had "substantially complied" with the policy requirements.[74] Before considering the merits of the substantial compliance claim, the court evaluated whether ERISA preempts the state common law doctrine of substantial compliance.[75] The court held that "the doctrine of substantial compliance does not denigrate from an ERISA plan in a way that is significant enough to implicate the concerns underlying ERISA preemption."[76] The court then applied Oklahoma law to the claim and dismissed it on its merits.[77]

In *Bankamerica Pension Plan v. McMath*,[78] the Ninth Circuit held that the California common law doctrine of substantial compliance was not preempted by ERISA.[79] In this case, Clarence Montgomery, an employee of Bank of America, submitted an unsigned beneficiary form for the 401(k) plan naming Alexander McMath as the beneficiary.[80] Despite the omission of a signature, the form was accepted.[81] After Montgomery's death, the original beneficiaries and McMath all claimed they were entitled to benefit.[82] The 401(k) plan administrator said that McMath was entitled to benefit because the beneficiary form was valid despite the omission of the signature.[83] While the court held that Montgomery did not substantially comply with the beneficiary designation requirements, it stated that in general state common law doctrines of substantial compliance were not preempted by ERISA.[84] In its analysis, the court stated, "The current ERISA preemption analysis provides that a law 'relates to' an employee benefit plan if it has (1) a 'reference to,' or (2) a 'connection with' an ERISA plan."[85] Further, the court found that "a state law has 'reference to'

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[72] *Id.*
[73] *Id.*
[74] *Id.* at 1052.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 1052–53.
[78] Bankamerica Pension Plan v. McMath, 206 F.3d 821 (9th Cir. 2000).
[79] *Id.* at 830.
[80] *Id.* at 823–24.
[81] *Id.* at 824.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 830.
[85] *Id.* at 829 (citing Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997)).

ERISA plans where it 'acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA plans is essential to the law's operation.' "[86] The court held that California's doctrine of substantial compliance clearly did not fall under this definition.[87] To determine whether a law has a "connection with" an ERISA plan, the court said to look at " 'both the objectives of the ERISA statute as a guide to the scope of the state law . . .' and 'the nature of the effect of the state law on ERISA plans.' "[88] Following the court in *Peckham*, the Ninth Circuit held that "the doctrine of substantial compliance does not frustrate any of [ERISA's] objectives."[89] In addition, the court found that "the state law doctrine of substantial compliance would not affect the administration of the plan. Rather, it would aid in determining the identity of the recipient of the proceeds."[90] Since the doctrine of substantial compliance only affected the ownership of the benefits, the "connection with ERISA [was] too 'tenuous, remote or peripheral' to trigger preemption."[91]

B. ERISA Does Preempt State Common Law Doctrines of Substantial Compliance

In contrast, two circuits held that state common law doctrines of substantial compliance are preempted by ERISA.[92] Both of these circuit courts made and applied federal common law to fill in the gaps of ERISA. In addition, a few district courts have also discussed this issue and found that ERISA preempts state common law on the issue of substantial compliance.[93] While the Sixth Circuit has not specifically decided whether ERISA preempts state common law doctrines of substantial compliance, it has discussed a related issue and held that ERISA preempts state common law.[94]

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[86] *Id.* (quoting *Dillingham Constr.*, 519 U.S. at 325).

[87] *Id.*

[88] *Id.* (quoting *Dillingham Constr.*, 519 U.S. at 324).

[89] *Id.*

[90] *Id.*

[91] *Id.* at 830 (citing Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983)).

[92] Metro. Life Ins. Co. v. Johnson, 297 F.3d 558, 566 (7th Cir. 2002); Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 561 (4th Cir. 1994).

[93] *See, e.g.*, Harpole v. Entergy Ark., Inc., 197 F. Supp. 2d 1152, 1158–59 (E.D. Ark. 2002); First Capital Life Ins. Co. v. AAA Communications, Inc., 906 F. Supp. 1546, 1560 (N.D. Ga. 1995). *But see* Klover v. Antero Healthplans, 64 F. Supp. 2d 1003 (D. Colo. 1999) (holding that the Tenth Circuit rulings are binding in that ERISA does not preempt state common law doctrines of substantial compliance).

[94] Tinsley v. Gen. Motors, Inc., 227 F.3d 700, 703–04 (6th Cir. 2000).

In *Phoenix Mutual Life Insurance Co. v. Adams*, the Fourth Circuit rejected the Tenth Circuit's opinion in *Peckham*, holding that ERISA does preempt South Carolina's common law doctrine of substantial compliance.[95] In this case the insured, Bill Adams, remarried and wanted to change the beneficiary on his life insurance policy to his new wife.[96] He filled out a "dual-purpose" form to change the medical insurance to include his new step-daughter but failed to indicate what actions he wanted taken with respect to his life insurance beneficiary.[97] He later spoke to the Financial Accounting Manager for his employer, who had responsibility for some of the employees' benefits, about changing the beneficiary on his policy.[98] For unknown reasons, however, the manager failed to make the changes and left the company before Adams died.[99]

The Fourth Circuit criticized the Tenth Circuit's definition of "relate to" saying that it was "unduly restrictive."[100] Relying on the Supreme Court's decision in *Pilot Life Insurance Co. v. Dedeaux*,[101] the court held that the phrase "relate to" should have a "broad common-sense meaning such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.' "[102] Further, the court held that the doctrine is not incorporated in the savings clause, which "allows the operation of state law despite ERISA in specified areas such as the insurance industry when the law in question 'regulates' that area."[103] The court held that "South Carolina's substantial compliance doctrine . . . does not 'regulate' insurance" because it was not "specifically directed toward the insurance industry."[104]

Recently, the Seventh Circuit held that ERISA preempts Illinois' common law doctrine of substantial compliance.[105] In *Metropolitan Life Insurance Co. v. Johnson*, an employee, Jimmie Johnson, named his wife at the time as beneficiary.[106] After they divorced, Johnson named LaShanda Smith, Leonard Smith, and Carolyn Hall as beneficiaries.[107] When he made

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[95] *Adams*, 30 F.3d at 560.
[96] *Id.* at 557.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 560.
[101] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).
[102] *Adams*, 30 F.3d at 560 (quoting *Pilot Life*, 481 U.S. at 47–48).
[103] *Id.* at 560.
[104] *Id.* at 561 (citing *Pilot Life*, 481 U.S. at 50).
[105] Metro. Life Ins. Co. v. Johnson, 297 F.3d 558 (7th Cir. 2002).
[106] *Id.* at 560.
[107] *Id.*

this change, however, Johnson checked a box for a plan in which he was not enrolled, listed his mother's address instead of his own, and indicated that he was separated instead of divorced.[108] Upon his death, the employer, General Electric, contacted his former wife and informed her that she was the beneficiary, but the Smiths and Hall also claimed the proceeds of the life insurance policy.[109]

To decide whether he effectively changed the beneficiary form, the Seventh Circuit addressed the issue of "whether ERISA preempts a state's substantial compliance doctrine because the doctrine 'relates to' an ERISA plan."[110] The court discussed the decisions from the Ninth, Tenth, and Fourth Circuits on the issue.[111] In addition, the court relied heavily on the Supreme Court's decision in *Egelhoff v. Egelhoff*.[112] The Seventh Circuit held that since the "identity of that beneficiary clearly 'relates to' ERISA insofar as it 'governs the payment of benefits, a central matter of plan administration,' " the common law doctrine of substantial compliance was preempted.[113] The court stated, "*Egelhoff* stands for the proposition that a state law cannot invalidate an ERISA plan beneficiary designation by mandating distribution to another person. Similarly . . . the application of the legal doctrine of substantial compliance mandates a conclusion as to the identity of the proper recipient of such payments."[114] The court also reasoned, "It is thus very different from state laws which may have an incidental effect on ERISA plans, but which do not mandate certain choices or conclusions."[115]

While the Sixth Circuit has not specifically considered whether ERISA preempts state common law doctrines of substantial compliance. However, the court's holding in *Tinsley v. General Motors, Inc.* suggests that if faced with the issue, it would find that ERISA preempts state common law doctrines of substantial compliance.[116] Since the court's decision in *Tinsley*, one district court in the Sixth Circuit has used the decision to justify preemption of state common law doctrines of substantial compliance.[117]

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[108] *Id.* at 560–61

[109] *Id.* at 561.

[110] *Id.* at 565.

[111] *Id.* at 565–66.

[112] Egelhoff v. Egelhoff, 532 U.S. 141 (2001).

[113] *Johnson*, 297 F.3d at 566 (quoting *Egelhoff*, 532 U.S. at 148).

[114] *Id.*

[115] *Id.*

[116] Tinsley v. Gen. Motors, Inc., 227 F.3d 700 (6th Cir. 2000).

[117] *See* Life Ins. Co. of N. Am. v. Leeson, No. 00-CV-1394, 2002 WL 483563, at *5 (S.D. Ohio Mar. 19, 2002) (finding that "the substantial compliance doctrine 'relates to' the ERISA plan" and that "the substantial compliance doctrine is not

In *Tinsley*, the employee, Edward Williams, initially designated his niece, Willie Lee Tinsley, as the beneficiary of his life insurance plan with the General Motors Life Insurance and Disability Program.[118] He subsequently changed the beneficiary to Bevlah Calloway, his caretaker.[119] After Williams died, both Tinsley and Calloway claimed benefits under the plan.[120] Tinsley sued General Motors claiming that Williams was under undue influence by Calloway when he changed the beneficiary on his life insurance plan.[121]

The district court applied Michigan law to Tinsley's claims, but the circuit court found that federal law governed "because [the case] involve[d] an employee welfare benefit plan that [was] governed by the Employee Retirement Income Security Act."[122] The court found that since the claim concerned the "legitimacy of the beneficiary designation,"[123] it was governed by ERISA pursuant to the Supreme Court's decision in *Metropolitan Life Insurance Co. v. Taylor*,[124] which stated, ERISA " 'provides an exclusive federal cause of action for resolution of such disputes.' "[125] The court also noted that in the past, it has held that "claims touching on the designation of a beneficiary of an ERISA-governed plan fall under ERISA's broad preemptive reach and are consequently governed by federal law."[126]

III. ERISA SHOULD PREEMPT STATE COMMON LAW DOCTRINES OF SUBSTANTIAL COMPLIANCE

Preemption of state common law doctrines of substantial compliance by ERISA is proper for two reasons. First, preemption is in accord with the Supreme Court's past decisions. Second, a main purpose of ERISA is to

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saved from ERISA preemption" by the savings clause). The court used *Tinsley* to justify using federal common law to determine whether the employee had "substantially complied" with the policy requirements. *Id.* at *4–5.

[118] *Tinsley*, 227 F.3d at 702.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 703.

[123] *Id.* at 704.

[124] Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

[125] *Tinsley*, 227 F.3d at 704 (quoting *Taylor*, 481 U.S. at 62–63).

[126] *Id.* (citing Metro. Life Ins. Co. v. Marsh, 119 F.3d 415, 420 (6th Cir. 1997); Metro. Life Ins. Co. v. Pressley, 82 F.3d 126, 129 (6th Cir. 1996); McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990)).

guarantee a national set of standards for regulation of employee benefit plans. To fulfill this purpose, ERISA must preempt the state common law doctrines of substantial compliance. The Fourth Circuit's substantial compliance test is the appropriate federal common law to apply.

A. Supreme Court Decisions

Past Supreme Court decisions indicate that ERISA should preempt state common law doctrines of substantial compliance because the doctrines meet the elements of the preemption clause. The Court's decisions in *Egelhoff v. Egelhoff*,[127] *Shaw v. Delta Air Lines*,[128] and *Pilot Life Insurance Co. v. Dedeaux*[129] support a rule of preemption because of the broad definition of "relate to." Conversely, state common law doctrines of substantial compliance do not fall under the narrow exceptions to the phrase "relate to" noted in *California Division of Labor Standards Enforcement v. Dillingham Construction of North America, Inc.*[130] and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*[131] Finally, state common law doctrines of substantial compliance are not "saved" by ERISA's "savings clause."

State common law doctrines of substantial compliance fulfill the elements required by ERISA for preemption. First, the doctrines meet the definition of a "state law" according to ERISA because they are decisions and rules that have "the effect of law." Second, in that employee benefit plans are being examined, the common law doctrines "relate to" the plans. The Supreme Court emphasized the expansiveness of the preemption clause and the phrase "relate to" in both *Shaw* and *Pilot Life*. In *Shaw*, the Court defined "relate to" as having "a connection with or reference to such a plan."[132] The phrase was given meaning in its "broad sense."[133] In *Pilot Life*, the Court said that state law is preempted "even if the law is not specifically designed to affect such plans, or the effect is only indirect."[134]

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[127] Egelhoff v. Egelhoff, 532 U.S. 141 (2001).

[128] Shaw v. Delta Air Lines, 463 U.S. 85 (1983).

[129] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

[130] Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997).

[131] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

[132] *Shaw*, 463 U.S. at 96–97.

[133] *Id.* at 98.

[134] Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (citing *Pilot Life*, 481 U.S. at 47).

Furthermore, the phrase "relate to" is quite broad because "as many a curbstone philosopher has observed, everything is related to everything else."[135] Finally, in *Egelhoff*, the Court said that the identity of the beneficiary "relates to" ERISA because it "governs the payment of benefits, a central matter of plan administration."[136] Since state common law doctrines of substantial compliance also govern the payment of benefits, they "relate to" an employee benefits plan.[137]

Insofar as the Supreme Court has retreated from its originally expansive definition of "relate to," it is not enough to exclude common law doctrines of substantial compliance. In *Travelers Insurance*, the Court held that a state statute requiring hospitals to collect a surcharge from certain patients whose insurance coverage was purchased by their employers under an ERISA plan, but not other patients who were insured by Blue Cross & Blue Shield, was not preempted because the statute did not "relate to" an employee benefit plan.[138] The court held that the statute did not "relate to" an ERISA plan because the economic effect on ERISA plans was indirect and it was unlikely that Congress intended "to displace general health care regulation, which historically has been a matter of local concern."[139] *Dillingham Construction* provided that a state "prevailing wage" statute was not preempted by ERISA.[140] The state law at issue regulated an apprenticeship plan.[141] In its decision, the Court considered the objectives of ERISA and noted that apprenticeship standards and the wages paid had long been regulated by states.[142] Most importantly, the "prevailing wage statute alter[ed] the incentives, but [did] not dictate the choices, facing ERISA plans."[143] State common law doctrines of substantial compliance are different from the exceptions provided in *Travelers Insurance* and *Dillingham Construction*. The common law doctrines are not concerned

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[135] *Dillingham Constr.*, 519 U.S. at 335 (Scalia, J., concurring).

[136] Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001).

[137] *See* Metro. Life Ins. Co. v. Johnson, 297 F.3d 558, 566 (2002) (finding the distinction made by the Ninth Circuit that state common law doctrines of substantial compliance do not relate to an ERISA plan because it "would merely 'aid in determining the identity of the proper recipient of the proceeds' " (quoting Bankamerica Pension Plan v. McMath, 206 F.3d 821, 829 (9th Cir. 2000))).

[138] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

[139] *Id.* at 661–62.

[140] *Dillingham Constr.*, 519 U.S. at 334.

[141] *Id.* at 319.

[142] *Id.* at 325–30.

[143] *Id.* at 334.

with indirect economic effects on the employers and they have not been "a matter of local concern" historically so they do meet the "relate to" element.

Finally, the state common law doctrines of substantial compliance do not fall under ERISA's "savings clause." As the Fourth Circuit noted, a "common sense view of the word 'regulates'" means that "a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry."[144] The common law doctrines of substantial compliance apply to many areas of the law, not just insurance. Therefore, the doctrines are not directed at the insurance industry. Additionally, as the Fourth Circuit noted, an application of the McCarran-Ferguson factors does not provide reconciliation with the doctrines.[145] State common law doctrines of substantial compliance do not spread policy-holder risks, they are not an integral part of the policy relationship between the insured and the insurer, and are not directed at the insurance industry.

B. Purpose of ERISA

"An important objective of ERISA is to maintain a nationally uniform administration practice."[146] In order to successfully accomplish this objective, ERISA must preempt state law and common law doctrines such as the doctrine of substantial compliance.

The Supreme Court discussed the purposes of ERISA in *Ingersoll-Rand Co. v. McClendon*.[147] It stated that, according to its understanding, ERISA "was intended 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 or between States and the Federal Government."[148] If the employee benefit plans were not subject to a uniform body of law, then "the inefficiencies created could work to the detriment of the plan beneficiaries."[149] The Court

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[144] Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 561 (1994) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987)).

[145] *Id.*

[146] Jonathan Dotson, Note, Egelhoff v. Egelhoff: *The Supreme Court's Latest Attempt to Clarify ERISA Preemption and the Decision's Effect on Texas State Law*, 54 BAYLOR L. REV. 503, 515 (2002) (citing *Dillingham Constr.*, 519 U.S. at 326–27).

[147] Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).

[148] *Id.* at 142.

[149] *Id.*

also noted in *Shaw v. Delta Air Lines*[150] that ERISA's legislative history contains evidence that Congress intended for the preemptive scope to be broad.[151] The Court quoted Representative Dent as stating, "'Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans.'"[152] The Court also quoted Senator Williams who stressed that the "narrow exceptions specified in the bill" should eliminate "'the threat of conflicting or inconsistent State and local regulation of employee benefit plans.'"[153] Further, Senator Williams stated, "'This principle is intended to apply in its broadest sense to all actions of State or local governments, . . . which have the force or effect of law.'"[154]

In *Egelhoff v. Egelhoff*, the Supreme Court gave guidance about the type of law that would frustrate the purpose of ERISA. The Court found the Washington statute at issue had "a prohibited connection with ERISA plans because it interfere[d] with nationally uniform plan administration."[155] The Court was concerned because, as a result of the state statute, plan administrators could not "make payments simply by identifying the beneficiary specified by the plan documents."[156] This type of situation "[r]equiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators."[157] Similarly, the state common law doctrines of substantial compliance would require a plan administrator to learn the common law of fifty states in order to distribute the benefits of an insurance plan. The administrator could not simply rely on the names listed on the plan documents. Instead, the administrator would have to consult the common law of several states. This is a great frustration of the purpose of ERISA. In order for the intent of Congress to be fulfilled and for the purpose and objective of ERISA to be satisfied, the state common law doctrines of substantial compliance must be preempted.

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[150] Shaw v. Delta Air Lines, 463 U.S. 85 (1983).

[151] *Id.* at 98.

[152] *Id.* at 99.

[153] *Id.*

[154] *Id.*

[155] Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001).

[156] *Id.* (citations omitted).

[157] *Id.* at 149–50 (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)).

IV. FEDERAL COMMON LAW

If a court finds that ERISA preempts state common law on substantial compliance, it must decide what law to apply. Most create and apply federal common law to the situation. Courts are permitted to create federal common law to fill gaps in ERISA.[158] "The basis for development of the federal common law of ERISA is that Congress intentionally delegated to the federal courts broad power to create rights and obligations that are consistent with ERISA's underlying purposes . . . ."[159] Since ERISA does not provide for instances of substantial compliance, the courts can and should formulate a test to be applied to cases dealing with the issue.

The Fourth Circuit laid out a federal test for substantial compliance that the Seventh Circuit adopted:

> [A]n insured substantially complies with the change of beneficiary provisions of an ERISA life insurance policy when the insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.[160]

The Fourth Circuit's test includes "evidence of intent and substantial completion of the benefit change process but notably omits the 'all he could have done' element" used by the Ninth Circuit in *Bankamerica Pension Plan v. McMath*.[161]

The Fourth Circuit adopted the proper test for substantial compliance under federal common law. This test is a synthesis of the general principles of substantial compliance, and it provides the best results for employees and employers. Furthermore, the test is a common sense approach to the problem of substantial compliance. Despite the fact that a court applying state law would often reach the same result as if it had applied federal common law, preemption is "not precluded simply because a state law is

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[158] Michael J. Collins, *The Federal Common Law of ERISA*, *in* NYU INSTITUTE ON FEDERAL TAXATION § 16.01, 16-3 (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983)).

[159] *Id.*

[160] Davis v. Combes, 294 F.3d 931, 941 (7th Cir. 2002) (quoting Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 564 (4th Cir. 1994)).

[161] *Id.* (citing Bankamerica Pension Plan v. McMath, 206 F.3d 821 (9th Cir. 2000)).

consistent with ERISA."[162] Therefore, the court must go through the preemption test and then apply federal common law to the case.

Formulating and applying federal common law to these cases "does not constitute a [material] modification of the ERISA plan."[163] Therefore, it is not prohibited by 29 U.S.C. § 1102(a)(1) which prevents "the court from modifying or supplementing an ERISA plan."[164] Instead, the doctrine simply assists "the court in determining whether conduct should, in reality, be considered the equivalent of compliance under the contract."[165] Furthermore, "it does not conflict with ERISA's statutory provisions because ERISA is silent on the matter."[166]

V. CONCLUSION

ERISA should preempt state common law doctrines of substantial compliance. Congress' goal to provide a uniform set of rules for employers is the best justification for preemption. In addition, preemption is in accordance with the recent Supreme Court decisions regarding ERISA. Even if a court could reach the same conclusion when applying the state common law doctrines of substantial compliance as when preempting the state doctrines, it is important for the courts to be consistent with ERISA preemption. The Fourth and the Seventh Circuits have taken the correct approach to this issue and the other circuits should follow their lead. Finally, when ERISA preempts the state common law doctrines of substantial compliance the courts should develop federal common law as the Fourth and Seventh Circuits have done.

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[162] *Ingersoll-Rand Co.*, 498 U.S. at 139 (citing Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)).

[163] Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 563 (1994).

[164] *Id.* at 562.

[165] *Id.* at 563 (citing Peckham v. Gem State Mut., 964 F.2d 1043, 1052 (10th Cir. 1992)).

[166] *Id.*