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ERISA Preemption: Judicial Flexibility and Statutory Rigidity

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ERISA PREEMPTION: JUDICIAL FLEXIBILITY AND STATUTORY RIGIDITY

Leon E. Irish* and Harrison J. Cohen**

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Section 514(a) of the Employee Retirement Income Security Act (ERISA)¹ states that, subject to certain exceptions set forth in section 514(b), titles I and IV of ERISA “supersede any and all State laws insofar as they . . . relate to any employee benefit plan.”² On the basis of the experience in the courts and Congress in the ten years since ERISA’s enactment, it is clear that the inclusion of section 514(a) in ERISA was a mistake. Given well-established judicial doctrines of preemption, section 514(a) was unnecessary. And, while judicial doctrines have been molded by sensitivity to what is practicable and a reasonable balancing of competing interests, the categorical language and wider scope of section 514(a) has unavoidably at times called for unreasonable and impractical results. In short, the adoption of section 514(a) not only failed to fill any real need, but also created unnecessary problems for both the judiciary and those affected by private employee benefit plans.

The language of section 514(a) sweeps as broadly as the English language allows. In view of this breadth, judicial refusal to hold preempted any state law that touches upon an employee pension or welfare benefit plan strains ordinary notions of the proper boundaries between the legislative and judicial domains. Anyone advocating that ERISA preempts a particular state law can present an impressive array of arguments for that position, from the need to obey plain legislative language to the clearly enunciated congressional intent to free employee benefit plans from all but the specifically excepted areas of state law and reg-

1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of titles 5, 18, 26, 29, 31 & 42 U.S.C.).

2. 29 U.S.C. § 1144(a) (1982) (emphasis added). ERISA defines “employee benefit plan” as “an employee welfare benefit plan or employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” ERISA § 3(3), 29 U.S.C. § 1002(3) (1982). An “employee welfare benefit plan” is any plan, fund, or program established or maintained by an employer or employee organization for the purpose of providing benefits such as health care, sick pay, vacation pay, accident, disability, death, unemployment, training, day care, scholarship, and prepaid legal services benefits. ERISA § 3(1), 29 U.S.C. § 1002(1) (1982). An “employee pension benefit plan” is a plan, fund, or program providing retirement income or resulting in deferral of employee income until termination of employment or beyond. ERISA § 3(2), 29 U.S.C. § 1002(2) (1982). ERISA imposes reporting, disclosure, and fiduciary responsibility requirements on both types of plans. However, while ERISA governs certain substantive provisions of *pension* plans, *see, e.g.*, ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1982), ERISA does not regulate the content of *welfare* benefit plans.

ulation.³ Strict adherence to the literal scope and language of section 514(a), however, deprives courts of the flexibility that has proven crucially important in addressing questions of federal preemption and in the development of a "federal common law." The literal approach also makes it embarrassingly clear that Congress enacted ERISA while still oblivious to numerous problems related to benefit plans that the states had already recognized and addressed. At least one of ERISA's principal authors has consistently suggested that the apparent principle section 514(a) states is broader than the rule that ought to be enforced.⁴

The result has been an unhealthy conflict between two important sets of public policies: those regarding the protection of employee benefits, as expressed in section 2 of ERISA,⁵ and those governing the proper relationship of the judicial and legislative branches. Federal preemption of state law relating to pensions has engendered a collection of decisions notable for their diverse rationales and their diverse levels of rationality. For courts that only recently undertook the painstaking labor of crafting a federal common law of pensions, such questions surrounding the extent and purposes of preemption are unfortunate.

This Article attempts to describe the ways in which, and the reasons why, section 514(a) has caused the courts and Congress so much difficulty.⁶ Part I reviews the legislative history of section 514(a), with emphasis on the ambivalence Congress has shown toward its 1974 draftsmanship. Part II attempts to pro-

3. A thorough, principled argument for applying § 514(a) as broadly as possible is set forth in Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23 (1978). In Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313 (1984), the authors suggest an interpretation of § 514 under which § 514 is said to provide "more guidance for the proper resolution of the 'relate to' determination than either courts or commentators have recognized." *Id.* at 1338. However, application of that interpretation apparently results in an extremely broad presumptive sweep similar to that urged by Hutchinson & Ifshin. See Kilberg & Inman, *supra* at 1331-36.

4. Remarks of Senator Javits in this vein are discussed *infra* notes 12-13 and accompanying text. Commentaries critical of the difficulties § 514 creates include Kilberg & Heron, *The Preemption of State Law Under ERISA*, 1979 DUKE L.J. 383; Turza & Halloway, *Preemption of State Laws Under the Employee Retirement Income Security Act of 1974*, 28 CATH. U.L. REV. 163 (1979); Note, *ERISA: Preemption of State Health Care Laws and Worker Well-Being*, 1981 U. ILL. L. REV. 825.

5. 29 U.S.C. § 1001 (1982).

6. Because this Article deals primarily with interpretation of the phrase "relate to" as used in § 514(a), issues regarding the original exceptions to § 514(a), such as the insurance, banking, and securities law savings clause in § 514(b)(2), and the federal law savings clause in § 514(d), are beyond its scope. Those issues are briefly discussed, however, where necessary to make sense of developments under § 514(a).

vide a coherent description of the case law that has developed under section 514(a).⁷ Part III completes the legislative history by examining the two instances in which experience compelled Congress to revise section 514. Finally, Part IV discusses examples of problems courts have faced when crafting a federal common law of employee benefits in light of section 514, and concludes that the peculiar absence in section 514 of any recognition of state policies has had an adverse effect on the common law process. The primary shortcoming of section 514 is that, although it establishes a good starting point for thinking about ERISA preemption, it falls short both as a practical rule and as a guide to principled decisionmaking. Courts have thus had little choice but to create a federal common law of ERISA, including preemption, in spite of, and to some extent hindered by, the literal language of the statute.

I. LEGISLATIVE HISTORY OF SECTION 514

As the courts and commentators have often remarked, section 514 is the most expansive preemption clause Congress considered while drafting ERISA.⁸ Earlier versions of the bill that was to become ERISA limited the scope of preemption to state regulation of areas or subject matters specifically regulated by the federal legislation. But this was thought to be unsatisfactory. Senator Javits, ranking minority member of the Committee on Labor and Public Welfare, stated:

Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal

7. This description is organized chiefly by reference to the subject matter and the results of the cases discussed. Thus it differs from the fairly recent discussion of the case law in Part III of Kilberg & Inman, *supra* note 3, where the authors offered a description of the case law organized by reference to the analytical approaches of the published decisions.

8. See, e.g., *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); Committee on Fiduciary Responsibility, *Preemption and ERISA*, 13 A.B.A. REAL PROP. PROB. & TR. J. 977, 978-82 (1978) [hereinafter cited as *Preemption and ERISA*].

with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.⁹

As enacted, section 514 was intended to be very broad indeed. Senator Williams, floor manager of the bill and Chairman of the Committee on Labor and Public Welfare, stated that, except in limited circumstances, it would “preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.”¹⁰ Representative Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, characterized section 514 as “the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans.”¹¹

The foregoing remarks are unambiguous and widely quoted, and have removed all substantial doubt about the expansive meaning of ERISA’s language. Senator Javits, however, went beyond interpretation of the statutory language in his remarks. He suggested that section 514 was perhaps an overinclusive starting point for preemption analysis, noting parenthetically that “the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention.”¹² Senator Javits predicted that Congress would alter section 514 in the future if experience showed that it cut too deeply into the states’ responsibilities.¹³ He thus suggested that if section 514 turned out to reflect a less than optimal policy choice, it was not up to the courts to create exceptions in pursuit of a better policy, even though fashioning new applications of settled principles is traditionally the role of the judiciary, not Congress. Senator Javits’s

9. 120 CONG. REC. 29,942 (1974).

10. *Id.* at 29,933.

11. *Id.* at 29,197.

12. *Id.* at 29,942.

13.

The conferees—recognizing the dimensions of such a [preemption] policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

Id. ERISA § 3022(a)(5), 29 U.S.C. § 1222(a)(5) (1982), commanded a Joint Congressional Task Force to study “the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans.”

remarks, read in conjunction with the mandate of section 3022 of ERISA to the Joint Pension Task Force to study the practical effect and desirability of federal preemption, forecast further congressional inquiry into this area, and indicated that judicial tinkering would be inappropriate. It would have been appropriate, though, to have been skeptical about Congress's ability to respond flexibly when unforeseen circumstances demonstrated the wisdom of preserving an active role for state laws relating to benefit plans; one also might have been skeptical about the willingness of courts to relinquish their traditional role of accommodating rigid statutory language to myriad and varying factual circumstances.

Post-ERISA activity on Capitol Hill, although not as authoritative as pre-ERISA legislative history,¹⁴ confirms that section 514(a) was more in the nature of a quick statement of general principle than a workable, final rule.¹⁵ It also confirms that Congress has been unable to respond with sufficient speed and flexibility to the problems arising in preemption litigation under section 514(a). In oversight hearings in 1977 and 1978, House and Senate subcommittees received voluminous testimony from state officials, employer representatives, and insurance company representatives calling for both broader and narrower preemption rules. In 1979 Senators Williams and Javits introduced a bill, S. 209,¹⁶ with provisions that would have fine-tuned section 514 to accomplish some of the objectives sought by each side of the

14. See generally *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 116-19 & n.13 (1980) (discussing the significance to be attached to varieties of subsequent legislative history).

15. During one post-ERISA hearing, Rep. Erlenborn (R.-Ill.) gave an interesting hindsight view of § 514's genesis and intent:

First of all, let me say, having been through the entire legislative history of ERISA from the days the first proposals were made until the President signed a bill into law on Labor Day, 1974, one of the most dramatic changes in that legislative and political history of ERISA was the growing tendency of States to intervene in this area with laws to regulate pension and welfare plans.

That changed the political environment where many people who were opposed to the passage of Federal legislation were now seeking Federal legislation with *preemption*. That was key to the political support that was necessary to get ERISA enacted into law. It was the fear of having 50 different regulators in the 50 different States that led many employers to the conclusion that a Federal law was now desirable, a Federal law with comprehensive preemption.

Oversight on ERISA, 1978: Hearings on Public Law 93-406 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 95th Cong., 2d Sess. 531 (1978) [hereinafter cited as 1978 Oversight Hearings] (emphasis added).

16. 96th Cong., 1st Sess., 125 Cong. Rec. 933 (1979), reprinted in *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 9 (1979) [hereinafter referred to as 1979 ERISA Improvements Hearings].*

preemption controversy. Senator Javits, introducing the bill on the Senate floor, gave a detailed account of its purposes: it would create a new exception for certain "groundbreaking" state legislation;¹⁷ it would affirm certain cases in which courts upheld state laws, despite their obvious "relation to" employee benefit plans;¹⁸ it would overrule one court decision upholding other state laws;¹⁹ and finally, it was proposed "that committee report language affirm" two court decisions preempting state laws dealing with still other subject matters.²⁰ An interim report by the Senate Labor Committee on S. 209 affirmed Senator Javits's remarks.²¹

Although there is nothing unusual about corrective legislation, S. 209 was a rather unusual example. Senator Javits was recommending legislation dealing with a multitude of fact patterns, to each of which courts would normally be deemed capable of applying statutory rules. Only because of the extraordinary breadth of section 514, and perhaps because it was merely intended as a "first cut" at the preemption problem, was Congress faced, after less than five years of ERISA's operation, with such a laundry list of proposed extensions and curtailments. It turned out, however, that there was insufficient support for these refinements, and the bill was not passed. Similarly, the intended congressional Joint Pension Task Force study on preemption failed to materialize, with the result that, despite ERISA's mandate, there is still no comprehensive congressional study of preemp-

17. 125 CONG. REC. 947 (1979), reprinted in 1979 ERISA Improvements Hearings, *supra* note 16, at 99, 107. Senator Javits referred to the Hawaii Prepaid Health Care Act, which was struck down in *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). For a discussion of *Agsalud* see *infra* notes 59-61 and accompanying text.

18. 125 CONG. REC. 947 (1979), reprinted in 1979 ERISA Improvements Hearings, *supra* note 16, at 107. Senator Javits referred to *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981), and similar cases. For a discussion of *Stone* see *infra* notes 84-85 and accompanying text.

19. 125 CONG. REC. 947 (1979), reprinted in 1979 ERISA Improvements Hearings, *supra* note 16, at 107. The decision to be overruled was *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978). The correctness of this decision was recently confirmed in *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985). For a discussion of *Metropolitan Life* see *infra* text accompanying notes 148-50.

20. 125 CONG. REC. 947 (1979), reprinted in 1979 ERISA Improvements Hearings, *supra* note 16, at 107. The decisions to be affirmed were *Azzaro v. Harnett*, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977), and *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914 (D. Conn. 1978). For a discussion of *Heffernan*, see *infra* notes 139-43 and accompanying text.

21. SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 1ST SESS., S. 209: THE ERISA IMPROVEMENTS ACT OF 1979: SUMMARY AND ANALYSIS OF CONSIDERATION 46-49 (Comm. Print 1979) [hereinafter cited as S. 209 SUMMARY AND ANALYSIS].

tion, nor any sign that one is likely.²²

Although the bill Senator Javits discussed in 1979 was not enacted, two of its preemption-limiting aims were realized in legislation passed in 1983 and 1984. This legislation will be discussed following analysis of the case law that gave rise to the issues Senator Javits discussed. For present purposes, it should simply be noted that neither before nor after enactment of ERISA did Congress—let alone the courts or various litigants—view preemption policy issues as settled in the way that the sweeping statutory language of section 514 might suggest.

II. INTERPRETATION AND APPLICATION OF SECTION 514 BY THE COURTS

Although section 514(a) seems to preempt state law unequivocally, courts have often analyzed section 514 in terms of the traditional judicial preemption doctrines that operate independently of any specific statutory preemption provision.²³ Such analysis belies the facially plausible premise that “[s]tatutory preemption clauses eliminate the need for judicial inquiry into the overall purposes of national statutes and into the effect of state laws on the implementation of those statutes.”²⁴ Likewise, it shows that courts have often rejected the view that “[t]he historic judicial approaches toward implied federal preemption of state laws in the same field . . . seem of little relevance to the

22. An early congressional study appeared in the 1977 ACTIVITY REPORT OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, H.R. REP. No. 1785, 94th Cong., 2d Sess. 38, 46 (1977). The authors identified only one case decided up to that point “directly explor[ing] the scope of section 514,” *id.* at 50, and the only discussion of § 514(a) consisted of criticism of attempts to narrow the section. The authors concluded both that the general policy of § 514(a) “should not be disturbed” and that it may be necessary to narrow the statutory exceptions to it under § 514(b). *Id.* at 47.

23. Courts have justified analyses that look beyond the “plain meaning” of § 514(a) by reference to a Supreme Court dictum on the interpretation of statutes: “When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’” *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543-44 (1940)). See *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 504 n.4 (9th Cir.) (*per curiam*), *cert. denied*, 439 U.S. 831 (1978). Cf. *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 702 (N.D. Cal. 1977), *aff’d*, 633 F.2d 760 (9th Cir. 1980), *aff’d mem.*, 454 U.S. 801 (1981) (“*CPIRG* did not make a federal rule of ‘the quip that only when legislative history is doubtful do you go to the statute,’” quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947)). The legislative history of § 514, however, merely confirms its plain meaning. By comparison with the case law under § 514(a), the *CPIRG* dictum states a very conservative proposition.

24. Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 364-65 (1978).

interpretation of ERISA.”²⁵

The approach of many courts interpreting section 514 has been to balance state and federal interests under the guise of determining whether state laws that affect plans also “relate to” such plans within the meaning of section 514. In performing this balancing test on any particular state statute, courts have asked questions such as the following:

1. Does the state law regulate a matter ERISA regulates? State laws governing matters such as funding, disclosure, or fiduciary responsibility, which are also governed by ERISA, can be distinguished from laws that regulate employee benefit plans in ways that ERISA does not. Examples of the latter type of state laws are those requiring the inclusion of certain types of benefits in welfare benefit plans.²⁶

2. What is the principal purpose the state law was designed to promote? Some state laws may have been prompted by the same concerns that impelled Congress to enact ERISA, such as ensuring the security of employees’ claims to pension or welfare benefits. Other state laws that affect employee benefit plans, however, may reflect other core concerns, such as the protection of civil rights, familial support rights, or creditors’ rights.

3. To what degree does the state law affect employee benefit plans? Laws of “general application,” in particular, are more likely to be found to have only a minor or incidental impact on employee benefit plans.²⁷ But other laws might also be found to affect plans “in too tenuous, remote, or peripheral [a] manner to find that the law ‘relates to’ the plan.”²⁸

Broadly speaking, there are a number of cases in which the answers to these and similar questions have shaped the outcome of the ultimate ERISA preemption issues in just the way that

25. *Preemption and ERISA*, *supra* note 8, at 987.

26. *See supra* note 2.

27. The “general applicability” of the law, by itself, may or may not properly be taken into consideration in preemption analysis. On one hand, for example, § 514(b)(4) saves the “generally applicable criminal law of a state” from preemption. (Conflicting decisions construing the meaning of this savings clause are briefly discussed *infra* notes 66-67 and accompanying text.) On the other hand, courts in other preemption contexts have concluded quite sensibly that general applicability per se is not sufficient to avoid preemption:

Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national [labor] regulation would create potential frustration of national purposes.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (footnote omitted).

28. *Shaw v. Delta Air Lines*, 463 U.S. 85, 100 n.21 (1983).

they would affect a preemption decision rendered under the general judicial doctrines of preemption that operate without any specific statutory provision.²⁹ One such doctrine is stated in a well-known dictum by Justice Frankfurter:

[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor-Management Relations Act. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.³⁰

These observations do not produce an easily applied rule of decision. Courts addressing questions of preemption either generally or under section 514(a) with this dictum in mind may well draw varying conclusions as to whether the state regulation in question is "peripheral" to ERISA concerns, and whether the state-regulated matters are important to "local feeling and responsibility." Moreover, the subject matters addressed by a particular state law may be of intense interest to the state, yet of more than "peripheral concern" under ERISA. How competing state and federal interests should be weighed and balanced in resolving preemption questions turns on perceptions and values about which courts may reasonably be expected to disagree.

On its face, section 514(a) would seem to restrict the possibilities for such disagreements, for it gives courts and litigants reason to believe that the traditional tests should be ignored. But in some cases it is hard to avoid the conclusion that section 514(a) is the standard being ignored, if only implicitly. This disregard of section 514(a) raises the question whether ERISA would have

29. *Accord* Kilberg & Inman, *supra* note 3, at 1316. Although these authors have drawn a similar conclusion regarding some of the decided cases, they have ascribed the perceived departure of actual result from statutory language primarily to judicial "inability" rather than "judicial activism." *Id.* The record of the courts is not so much an indication of judicial fault of any kind, however, as it is an indication of the impracticability of the statutory language adopted by Congress.

30. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959) (footnote omitted). *See also* *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 539-40 & n.33 (1979).

made more sense without section 514. If ERISA preemption decisions had arrived at the same kind of accommodation of state and federal interests that has emerged under the Labor-Management Relations Act,³¹ which has no express preemption provision, then the language of section 514(a) would have been unnecessary, but harmless. Instead, the courts have waffled between contrary approaches, one of which seems mandated by the language of section 514(a), the other by sound policy considerations. Under this second approach, ERISA is viewed as "occupying the entire field,"³² but not to the total exclusion of compatible state laws of general application or those protecting certain core interests of intense and legitimate concern to the states. No court has expressly advanced such a view; but its occasional, implicit adoption might account for lapses in statutory analysis in opinions. As the Supreme Court observed in 1981, the language of section 514(a) "gives rise to some confusion."³³

The Supreme Court seems clearly to have intended to curb this flexible, balancing of interests approach in its decisions in *Alessi v. Raybestos-Manhattan, Inc.*,³⁴ *Shaw v. Delta Air Lines*³⁵ and *Metropolitan Life Insurance Co. v. Massachusetts*.³⁶ Dicta in *Alessi* can be read as emphasizing the breadth and power of section 514(a), and such readings undoubtedly have had important effects on subsequent lower-court decisions having no factual relationship to *Alessi*.³⁷ In *Shaw* the Court observed that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."³⁸ It went on to imply that this "normal sense" was the sense Congress intended, but the Court then seemed to backtrack in a puzzling footnote that stated: "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law

31. 29 U.S.C. §§ 141-188 (1982); see generally *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

32. *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1299 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

33. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523-24 (1981).

34. 451 U.S. 504 (1981).

35. 463 U.S. 85 (1983).

36. 105 S. Ct. 2380 (1985).

37. See, e.g., *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 679 F.2d 1307 (9th Cir. 1982), *vacated on other grounds*, 463 U.S. 1 (1983); *Delta Air Lines v. Kramarsky*, 666 F.2d 21 (2d Cir. 1981), *aff'd sub nom. Shaw v. Delta Air Lines*, 463 U.S. 85 (1983). *Franchise Tax Bd.* is discussed *infra* notes 129-35 and accompanying text. The key issues in *Kramarsky* are discussed *infra* notes 64, 78, 164 and text accompanying notes 64, 74-78.

38. 463 U.S. at 96-97.

'relates to' the plan."³⁹ In *Metropolitan Life*, the Court seems to have indicated an intention to forestall resort to this exception, stating that *Shaw* gave ERISA's "relate to" language its "broad common-sense meaning,"⁴⁰ and raising a plausible inference that this common-sense meaning was unencumbered by any exceptions for tenuous, remote, or peripheral effects.⁴¹

The current state of judicial ERISA preemption is further affected by legislation that has grown out of the disputes that spawned some of the most troublesome preemption issues in the courts. Although it is probably true that uncertainty in this area is in decline, the rules that have emerged are not necessarily grounded in any widely accepted policy framework.

A. *Preemption of State Laws Implicating the Subject Matters and Policies of ERISA*

With near uniformity, courts have held that ERISA preempts state laws regulating identical subject matters. Courts have also generally found that ERISA preempts state laws embodying policies similar to those embodied in ERISA.

1. *Identical subject matters in state and federal law*— The clearest cases for preemption are those in which a state seeks to regulate a matter federal law has already addressed. In *Alessi v. Raybestos-Manhattan, Inc.*,⁴² for example, the Supreme Court considered whether employers could, contrary to New Jersey law, reduce pension benefits by amounts of workers' compensation awards for which retirees were eligible. The Court determined that the Congress that enacted ERISA contemplated and "embraced" this type of pension benefit computation method.⁴³ New Jersey sought to bar its use with a statute that "applie[d] directly to this calculation technique."⁴⁴ As the Court observed, one "need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible

39. *Id.* at 100 n.21.

40. 105 S. Ct. at 2389.

41. On the other hand, it has been argued that the Court signaled the *opposite* intention in dicta asserting that a law that regulates "only" an insurer, or the way in which it may sell insurance, necessarily cannot "relate to" a benefit plan under § 514(a). *Id.* at 2390. See *Sasso v. Vachris*, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985), discussed *infra* notes 67-69 and accompanying text.

42. 451 U.S. 504 (1981).

43. *Id.* at 517-21.

44. *Id.* at 524-25.

intrusion on the federal regulatory scheme."⁴⁵ Where Congress dealt with a specific issue concerning pension plans, it could not have also intended to preserve a regulatory role for the states concerning that same issue.

Similarly, in *Hewlett-Packard Co. v. Barnes*,⁴⁶ California sought to regulate funding, disclosure, sales practices, and service quality in the delivery of health care services, including delivery through employee benefit health care plans. ERISA, of course, covered some of these same issues.⁴⁷ Not surprisingly, the district court wasted no time analyzing whether section 514 preempted the California law, stating simply that such a conclusion was "indisputable."⁴⁸

Alessi and *Hewlett-Packard* deal with state laws aimed specifically at employee benefit plans and regulation of subject matters that ERISA specifically addresses. Adopting analogous reasoning, the Third Circuit in *Hotel and Restaurant Employees and Bartenders International Local 54 v. Danziger*⁴⁹ held that New Jersey was powerless to exclude ex-convicts from responsible positions in casino-related union benefit plans because section 411 of ERISA⁵⁰ already provides for such exclusions.⁵¹

45. *Id.* at 525 (footnote omitted).

46. 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

47. *See, e.g.*, ERISA § 2(b), (c), 29 U.S.C. § 1001(b), (c) (1982).

48. 425 F. Supp. at 1300.

49. 709 F.2d 815 (3d Cir. 1983), *rev'd on other grounds*, 104 S. Ct. 3179 (1984).

50. 29 U.S.C. § 1111 (1982).

51. The state statute in question excluded disqualified individuals from positions with unions whose affiliates administer pension or welfare funds. This decision makes ERISA § 514(a) seem like the public policy equivalent of shooting oneself in the foot. The purpose of the state law in this case was to ensure that the recently legalized New Jersey casinos would not be taken over by organized crime. Prior to the Third Circuit decision in *Danziger*, the Wall Street Journal had reported that "to date at least, the most detailed information about the alleged links of criminal organizations with union health-care systems has emerged from the legwork of state crime commissions." Penn, *Organized Crime Finds Rich Pickings in Rise of Union Health Plans*, Wall St. J., Oct. 5, 1982, at 1, col. 6. It does not seem plausible that the drafters of ERISA intended to foist upon the Departments of Labor and Treasury the serious law-enforcement burdens regarding organized crime previously shouldered, in part, by the states.

Moreover, the district court that was reversed by *Danziger* stated, "We need not question at this juncture that the regulation of gambling is a matter 'deeply rooted in local feeling and responsibility.' . . . We have already discussed the historical reason why gambling has been considered anathema in the overwhelming majority of jurisdictions unless it has been subject to strict control." 536 F. Supp. 317, 331 (D.N.J. 1982).

The New Jersey Supreme Court, addressing a similar measure aimed at curbing infiltration by organized crime into longshoremen's unions operating in the Port of New York, observed that so long as criminals had run such organizations, "gambling, the narcotics traffic, loan sharking, short-ganging, payroll "phantoms," the "shakedown" in all its forms—and the brutal ultimate of murder—have flourished, often virtually un-

Other state laws, such as those governing contract rights and fiduciary responsibilities, may directly affect benefit plans without specifically naming them. Such laws clearly affect aspects of employee benefit plans that ERISA specifically regulates, and section 514(a) preempts them for the same reasons that it preempted the laws at issue in *Alessi*, *Danziger*, and *Hewlett-Packard*.⁵² Consistent with this view, at least one court held that

checked'” among the longshoremen. *Local 1804, Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 85 N.J. 606, 611, 428 A.2d 1283, 1286 (1981) (citation omitted). “Removing criminal elements from the waterfront in New York and New Jersey,” said the court, was thus “a *peculiarly local problem* in which each state has a compelling interest.” *Id.* at 613, 428 A.2d at 1287 (emphasis added).

52. See *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 183 (1985) (where employees seek severance pay under plan of former parent of employer, upon sale of their employer by former parent, ERISA preempts state law theories of liability based on breach of contract, fraud and deceit, breach of contract implied in fact, promissory estoppel, and estoppel by conduct); *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214 (D. Minn. 1985) (where employer sold its brewery to another company ERISA preempts parties' contract claims arising out of denials of severance pay to brewery employees retained under new ownership); *Adcock v. Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985) (similar facts and holding); *Holland v. Burlington Indus.*, 772 F.2d 1140 (4th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3412 (U.S. Nov. 29, 1985) (No. 85-929) (where employer sold a division as a going concern and division employees were retained by buyer, ERISA preempts state-law contract action by employees against seller for severance pay under seller's severance pay plan); *Anderson v. Ciba-Geigy Corp.*, 608 F. Supp. 668 (N.D. Ga. 1984), *aff'd*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 106 S. Ct. 410 (1985) (similar facts and holding); *Barry v. Dymo Graphic Sys., Inc.*, 394 Mass. 830, 478 N.E.2d 707 (1985) (similar facts and holding); *Musto v. American Gen. Corp.*, 615 F. Supp. 1483, 1494 (M.D. Tenn. 1985) (in dispute over employer's right to unilaterally terminate or reduce retirees' benefits, ERISA preempts state law claims for misrepresentation and breach of contract); *Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 563 F. Supp. 653 (C.D. Cal. 1983), *aff'd*, 750 F.2d 1458 (9th Cir.), *cert. denied*, 105 S. Ct. 2678 (1985) (in dispute over plan's right to phase out cost-of-living adjustments in existing retirees' benefits, ERISA preempts state law breach of contract claim against plan, employer, and trustees); *Retail Shoe Health Comm'n v. Reminick*, 62 N.Y.2d 173, 464 N.E.2d 974, 476 N.Y.S.2d 276 (1984), *cert. denied*, 105 S. Ct. 2034 (1985) (ERISA preempts state law claims against plan accountants and consultants for breach of fiduciary duties in failure to prevent misconduct by trustees); *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421 (E.D. Mo. 1984) (ERISA preempts state law claim that failure to pay benefits under plan is tortious breach of fiduciary duty); *Lucash v. Strick Corp.*, 602 F. Supp. 430 (E.D. Pa. 1984) (ERISA preempts state law claim by unsuccessful benefit claimant for breaches of duty of care, fiduciary duty, and/or contractual obligations); *Nolan v. Aetna Life Ins. Co.*, 588 F. Supp. 1375 (E.D. Mich. 1984) (ERISA preempts state law breach of contract claim against insurer of employer for denied benefits under welfare benefit plan); *Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 575 F. Supp. 1073 (E.D. Wis. 1983) (ERISA preempts state law breach of contract claim for benefits denied under ERISA plan); *Ovitz v. Jefferies & Co.*, 574 F. Supp. 488 (N.D. Ill. 1983) (in dispute over amount of benefits due participant on termination of employment, ERISA preempts state law theories of plan liability based on breach of contract and breach of fiduciary duty); *Felts v. Graphic Arts Employee Benefit Trust*, 680 S.W.2d 891 (Tex. Ct. App. 1984) (ERISA preempts all state law claims against plan for failure to pay promised benefits); *Hepler v. CBS, Inc.*, 39 Wash. App. 838, 696 P.2d 596 (holding that ERISA

ERISA preempts any state cause of action for tortious interference with an employee benefit plan.⁵³ Regardless of whether such a state cause of action could be said to further ERISA's overall goals, ERISA preempts it, stated one court, because section 510⁵⁴ provides its own remedies for such interference.⁵⁵ Numerous courts have held that state claims for wrongful termination of employment may be barred when termination is intended to deprive employees of plan benefits, because section 510 of ERISA also reaches such conduct.⁵⁶ The Seventh Circuit has unsurprisingly held that "state restitution law and equitable principles" may not be used to extend ERISA's remedies for mistaken contributions to pension plans.⁵⁷ Other courts have held that state law on unjust enrichment may not be invoked to prevent reversions of assets to employers otherwise permitted by section 4044 of ERISA.⁵⁸

preempts breach of contract claim under state Consumer Protection Act in dispute over disability benefits), *cert. denied*, 106 S. Ct. 343 (1985). *See also* *Vermeer v. Bunyard*, 72 Or. App. 79, 695 P.2d 57 (1985) (state law regarding attorney's fees preempted by ERISA where fees relate to actions to enforce contributions to plans; ERISA has its own fee provisions).

53. *See* *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 1084 (1981).

54. 29 U.S.C. § 1140 (1982).

55. *Dependahl*, 653 F.2d at 1215-16.

56. *Miner v. International Typographical Union Negotiated Pension Plan*, 601 F. Supp. 1390 (D. Colo. 1985); *Baker v. Kaiser Aluminum & Chem. Corp.*, 608 F. Supp. 1315 (N.D. Cal. 1984); *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984); *King v. James River-Pepperell, Inc.*, 593 F. Supp. 1344 (D. Mass. 1984); *Delisi v. United Parcel Serv., Inc.*, 580 F. Supp. 1572 (W.D. Pa. 1984); *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286 (N.D. Ill. 1983); *Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare and Pension Funds*, 559 F. Supp. 158 (N.D. Ill. 1982).

57. *Martin v. Hamil*, 608 F.2d 725, 729-30 (7th Cir. 1979).

58. *Bryant v. International Fruit Products Co.*, 604 F. Supp. 890 (S.D. Ohio 1985); *District 65, UAW v. Harper & Row Publishers*, 576 F. Supp. 1468 (S.D.N.Y. 1983); *UAW v. Dyneer Corp.*, 4 E.B.C. 1486 (N.D. Ohio 1983), *aff'd per curiam*, 747 F.2d 335 (6th Cir. 1984). *See also* *California Chamber of Commerce v. Simpson*, 601 F. Supp. 104 (C.D. Cal. 1985) (stating that § 514(a) prevents the state Labor Commission from investigating, holding hearings on, and taking assignment of severance benefit claims); *Azzaro v. Harnett*, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977) (stating that § 514(a) prevents New York State Insurance Department from investigating a participant's pension benefit status); *Cornell Mfg. Co. v. Mushlin*, 70 A.D.2d 123, 131, 420 N.Y.S.2d 231, 237 (1979) (holding that ERISA preempts any state cause of action based on an allegation that plan trustees wrongfully permitted a participant to take pension benefits in a lump sum). *But see* *Provience v. Valley Clerks Trust Fund*, 509 F. Supp. 388, 391-92 (E.D. Cal. 1981) (holding that ERISA does not preempt state law claims of fraudulent misrepresentation; failure, in bad faith, to pay a legitimate claim for benefits; and intentional infliction of emotional distress, because they arise under laws of "general application which [pertain] to an area of ['classically'] important state concern" and which have "only an indirect effect on the plan.") It is difficult to reconcile *Provience* with the purposes and trend of authority under § 514. California's state courts have apparently declined to accept the authority of

2. *Similar policies, different subject matters in state and federal law*— The case for preemption under the language of section 514(a) is nearly as clear when the state law at issue, although without a strict parallel in ERISA, is yet clearly motivated, as is ERISA, by concern for employees' pension or welfare benefits. For example, preemption is certainly called for by the statute when state law purports to regulate the content of employee benefit plans, even though ERISA is silent as to plan content. This reasoning is laid out clearly in *Standard Oil Co. v. Agsalud*,⁵⁹ which held that ERISA preempted a Hawaii statute that required employers to provide employees with health insurance that covered, among other things, treatment for alcohol and drug abuse. The state argued unsuccessfully that section 514 need not be interpreted as ruling out state regulation of this kind because the two statutes are complementary: ERISA regulated administrative aspects of welfare benefit plans, while the state law at issue regulated plan contents.⁶⁰ As the Ninth Circuit noted in affirming the district court, however, there is nothing in section 514(a) to support "a distinction between the state laws relating to benefits as opposed to administration."⁶¹

There are at least two reasons, beyond the face of section 514, why "complementarity" of the kind rejected in this case seems inconsistent with section 514. First, the interpretation proffered

this decision. *Provience v. Valley Clerks Trust Fund*, 163 Cal. App. 3d 249, 209 Cal. Rptr. 276 (1984). See *infra* Part II.B.3.a.

59. 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

60.

Insofar as the Hawaii Act does not regulate matters covered by ERISA (basically reporting, disclosure, funding, vesting, and fiduciary duties), it would not, under this interpretation, be superseded because it does not relate to employee benefit plans in any of the ways that ERISA relates to employee benefit plans.¹¹ ERISA and the Hawaii Act would be *complementary*, each occupying part of a field not occupied by the other. Under this interpretation, Hawaiian workers would obtain the protection of both the Hawaii Act, which regulates benefits but not administration, and ERISA, which regulates administration but not benefits. However wise Congress might have been to take this approach to preemption of state laws regulating employee benefit plans, Congress clearly rejected it.

11. Any argument that a state law concerning the same subject matter as ERISA does not "relate to" employee benefit plans within the meaning of § 514(a) is unsupported. As the evolution of the language of the preemption clause (see *Hewlett-Packard Co. v. Barnes*, *supra*, 425 F. Supp. at 1298 & nn. 13-14) unequivocally shows, that section was intended at the very least to preempt state laws regulating disclosure, reporting, vesting, funding, and fiduciary duties of plan administrators.

442 F. Supp. at 706-07 (emphasis added).

61. 633 F.2d at 765.

by Hawaii would have rendered meaningless the change in section 514 that the conference committee made prior to the enactment of ERISA in 1974. The very purpose of that change was to expand the ambit of section 514 beyond "perimeters of preemption [defined] in relation to the areas regulated by the bill."⁶²

Second, where benefit plans emerge from collective bargaining, there is a federal interest, reflected in federal labor law preemption doctrines, in precluding state interference with labor-management negotiations. An ERISA preemption policy that restricts "complementary" state legislation can arguably serve this federal interest. This argument, however, has its limits. Some state laws that neither discourage nor encourage collective bargaining, including laws mandating minimum benefits under insured benefit plans, are not preempted under the federal labor laws.⁶³

Of course, had section 514 never been enacted, and had the courts resorted solely to judicial preemption tests in *Agsalud*, the factors bearing on whether the Hawaii Act was preempted would have been completely different. As Part III will discuss, the holding in *Agsalud* generated congressional concern over the apparently "inadvertent" reach of section 514(a). Yet, the reasoning of the courts in *Agsalud* was quite compelling. Generalizing the holding of *Alessi*, the Second Circuit observed: "A state statute that eliminates from ERISA-covered employee benefit plans features that are [silently] permitted by federal law is preempted."⁶⁴ Courts have applied these principles in cases involving miscellaneous state law requirements applicable to employee benefit plans.⁶⁵ As one common example, numerous courts have

62. 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javits).

63. Compare *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985) (holding that state law mandating minimum mental health care coverage under insurance policies purchased by collectively bargained plans is not preempted by ERISA or the National Labor Relations Act), with *Alessi*, 451 U.S. at 525 (stating that the federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate the terms of collectively bargained plans).

64. *Delta Air Lines v. Kramarsky*, 666 F.2d 21, 25 (2d Cir. 1981), *aff'd sub nom. Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (stating that § 514(a) preempts state law requiring that employee benefit plans provide coverage for disability due to pregnancy on the same basis on which other disabling conditions are covered).

65. See, e.g., *Gilbert v. Burlington Indus.*, 765 F.2d 320 (2d Cir. 1985) (stating that § 514(a) preempts state law and administrative order requiring payment of "wage supplements" in the form of severance pay), *appeals docketed*, 54 U.S.L.W. 3179 (U.S. Sept. 16, 1985) (Nos. 85-441 & 85-460); *Champion Int'l Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984) (stating that § 514(a) preempts state administrative order requiring employer to give credit toward pension for years of service performed after age 65); *California Chamber of Commerce v. Simpson*, 601 F. Supp. 104 (C.D. Cal. 1985) (stating that § 514(a) preempts state laws and administrative manual insofar as they regulate severance pay

held preempted state statutes that simply enforce contractual obligations to make contributions to pension or welfare benefit plans, even where the state law imposes criminal penalties for failure to meet these obligations.⁶⁶ Although ERISA does not cover the same ground as these statutes, courts have generally had no trouble finding that they "relate to" ERISA-covered plans. One notable exception, however, is the New York Court of Appeals, which recently held in *Sasso v. Vachris*⁶⁷ that a state statute making shareholders liable for the debts of corporations to (among others) employee benefit plans⁶⁸ does not relate to such plans because it does not regulate their terms or conditions.⁶⁹

and severance pay disputes); *Northwest Airlines v. Gomez-Bethke*, No. 4-83-773 (D. Minn. April 1, 1984) (stating that § 514(a) preempts state administrative order requiring employer to provide ordinary sick leave or medical benefits for absences due to treatment of alcoholism); *California Hosp. Ass'n v. Henning*, 569 F. Supp. 1544 (C.D. Cal. 1983) (stating that § 514(a) preempts state law requiring employers to pay discharged employees vested vacation pay under ERISA-covered vacation plans), *rev'd on other grounds*, 770 F.2d 856 (9th Cir. 1985); *Dawson v. Whaland*, 529 F. Supp. 626 (D.N.H. 1982) (stating that § 514(a) preempts state law requiring group accident and health plan benefits to be extended to any beneficiary who otherwise would become ineligible for extended periods of time); *Stone & Webster Eng'g Corp. v. Ilsley*, 518 F. Supp. 1297 (D. Conn. 1981) (stating that § 514(a) preempts state law requiring employers to contribute to employee welfare funds while the employee is receiving or is eligible for workers' compensation), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983); *St. Paul Elec. Workers Welfare Fund v. Markman*, 490 F. Supp. 931 (D. Minn. 1980) (stating that § 514(a) preempts state laws mandating that (a) health benefit plans provide certain conversion benefits, and (b) such plans contribute to a state-wide risk-sharing plan); *General Split Corp. v. Mitchell*, 523 F. Supp. 427 (E.D. Wis. 1981) (similar facts and holding). *Cf. Blue Cross and Blue Shield v. Peacock's Apothecary, Inc.*, 567 F. Supp. 1258, 1276 (N.D. Ala. 1983) (state law regulating all "third party prescription programs," including "employee benefit plans," relates to plans and is preempted by § 514(a)). *Blue Cross v. Cannon*, 589 F. Supp. 1483 (D.R.I. 1984), involves an arguably preempted state law requiring every employee health benefit plan to offer participants the option of membership in a health maintenance organization; the decision withholds consideration of the preemption question, however, for jurisdictional reasons.

66. See, e.g., *Gilbert v. Burlington Indus.*, 765 F.2d 320 (2d Cir. 1985); *Trustees of Sheet Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund v. Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983); *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337 (N.D. Ill. 1983); *Calhoon v. Bonnabel*, 560 F. Supp. 101 (S.D.N.Y. 1982); *Plumbers Local Union No. 93 Health & Welfare Pension Fund v. Water-Men Plumbing Corp.*, No. 84-C-1439 (N.D. Ill. Feb. 4, 1985); *Commonwealth v. Federico*, 383 Mass. 485, 419 N.E.2d 1374 (1981).

67. 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985). See also *Sasso v. Millbrook Enters., Inc.*, 108 Misc. 2d 562, 438 N.Y.S.2d 59 (Sup. Ct. 1981); *Courtney v. Brooklyn & Queens Allied Oil Burner Corp.*, 112 Misc. 2d 89, 446 N.Y.S.2d 157 (Civ. Ct. 1981); *Goldstein v. Mangano*, 99 Misc. 2d 523, 417 N.Y.S.2d 368 (Civ. Ct. 1978). These lower court decisions were overruled, on non-ERISA grounds, by *Stoganovic v. Dinolfo*, 92 App. Div. 2d 729, 461 N.Y.S.2d 121 (1983), *aff'd*, 61 N.Y.2d 812, 473 N.Y.S.2d 972, 462 N.E.2d 149 (1984).

68. N.Y. BUS. CORP. LAW § 630 (McKinney 1963 & Supp. 1984).

69. There are a number of problems with the rationale of this decision, created as

*B. State Laws Implementing Policies Outside the Scope of
ERISA*

The reasoning that dictates section 514(a) preemption in *Agsalud* and some of the other cases involving "complementary" state regulation,⁷⁰ can sometimes be as compelling as the reasoning of cases like *Alessi*. As the "core" policies behind state and federal laws are distinguished, however, and especially as the former ascend in importance, the temptation becomes great to conclude that Congress did not intend to preempt the state law in question, absent an explicit reference to it. A presumption that seems to be firmly entrenched is "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."⁷¹ In some contexts, courts have been willing to conclude, despite the broad and explicit language of section 514, that it does not express "the clear and manifest purpose of Congress" to supersede certain "historic police powers of the States," even insofar as they relate to employee benefit plans.⁷²

Such an approach arguably might not save state law from preemption in a case like *Agsalud*. In that case, the state law requiring certain welfare plans to provide for alcohol and drug abuse treatment could be viewed as an outgrowth of concerns similar to those that spawned ERISA. ERISA created standards of disclosure and fiduciary conduct with respect to employee benefit plans, and the state law at issue in *Agsalud* created standards of coverage for such plans. Each was undoubtedly en-

much by ERISA as by the court's misinterpretation of § 514. It would be fair to characterize the state law at issue in *Sasso* as simply a device for piercing the corporate veil in ordinary contract actions to enforce employee benefit plans. One would have hoped that such a device would have been available, in appropriate circumstances, under federal as well as state contract law involving employee benefit plans, although such devices are sometimes more appropriately created by statute than by judge-made "common law," and ERISA has no provisions directed to this issue. However, if *Sasso* was simply a suit to enforce the terms of a plan, the court treated the suit incorrectly wholly apart from the preemption issue. Had the court acted properly, it would have dismissed the case as coming within the exclusive jurisdiction of the federal courts. See ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A) (1982). The court also erred in emphasizing its reliance on the supposed rule that § 514(a) only preempts state laws that regulate plan "terms and conditions." This questionable reading of the statute is really no more helpful in resolving the issues in *Sasso* than are the words of § 514(a) themselves.

70. See *supra* text accompanying notes 59-66.

71. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

72. See, e.g., *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978) (ERISA does not preempt state laws under which ex-spouses may garnish pension payments), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

acted primarily because, as Congress found, such plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," as well as "the continued well-being and security of millions of employees and their dependents."⁷³

The contents of plans, however, may also be dictated by the application of principles that were adopted for quite different purposes. Laws against sex discrimination provide a significant example. In *Gast v. State*⁷⁴ the Oregon Court of Appeals went so far as to hold that state civil rights laws that dictate the pregnancy-related content of benefit plans are not covered by section 514(a), stating: "We decline to make such a broad interpretation in the absence of any legislative declaration that Congress intended to create an enormous regulatory vacuum in areas that traditionally have been matters of vital state concern."⁷⁵ In its reasoning, if not its result, the *Gast* case is unique.⁷⁶ *Gast* responded to a policy concern that was vindicated by identical results in almost every other court outside the Second Circuit until *Shaw v. Delta Air Lines*⁷⁷ was decided; however, those other courts specifically declined to hold that such civil rights laws did not "relate to" plans within the meaning of section 514(a).⁷⁸

73. ERISA § 2(a), 29 U.S.C. § 1001(a) (1982).

74. 36 Or. App. 441, 585 P.2d 12 (1978).

75. *Id.* at 458, 585 P.2d at 23.

76. *But see* *Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund*, 583 S.W.2d 154, 159 (Mo. 1979) (ERISA does not preempt garnishment of welfare benefit plans: "We believe the approach taken by the court in *Gast* is persuasive."). Generally, of course, most courts reject *Gast's* premise that "there is no indication in any of the legislative history of an intent to preempt areas of state regulation which are not addressed by ERISA." *Gast*, 36 Or. App. at 458, 585 P.2d at 23.

77. 463 U.S. 85 (1983). *See infra* note 78.

78. Prior to *Shaw*, almost all courts had agreed that § 514(a) reached state sex discrimination laws that dictated benefit plan contents. *See, e.g., Westinghouse Elec. Corp. v. Maryland Comm'n on Human Relations*, 520 F. Supp. 539, 546 (D. Md. 1981). However, each of these cases raised an issue under § 514(d), namely, whether preemption of such laws would impair federal laws prohibiting sex discrimination. Most courts held that it would, and that such laws were accordingly saved from preemption by § 514(d). *See, e.g., Bucyrus-Erie Co. v. Department of Indus., Labor & Human Relations*, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980). *Contra* *Delta Air Lines v. Kramarsky*, 666 F.2d 21 (2d Cir. 1981), *aff'd sub nom. Shaw v. Delta Air Lines*, 463 U.S. 85 (1983); *Pervel Indus. v. Connecticut Comm'n on Human Rights & Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd mem.*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *International Ladies' Garment Workers' Local 111 v. Human Relations Comm'n*, 53 Pa. Commw. 229, 417 A.2d 1279 (1980).

The § 514(d) issue raised considerably more controversy than the § 514(a) issues. It is interesting to speculate how the courts in these cases would have construed § 514(a) had they not seen § 514(d) as an available safety valve. In 1980 the Supreme Court appeared arguably to have bound the lower courts to the *Bucyrus-Erie* view with its summary dispositions of *Mountain States Tel. & Tel. Co. v. Commissioner of Labor & Indus.*, 445

The understandable judicial inclination to reconcile section 514 with statutes responding to policies originating outside the employee benefits concerns of ERISA becomes greater when the applicable state laws are "of general application" and do not purport to govern employee benefit plans as such. In such cases courts, including the Supreme Court, speak of "remote," "peripheral," and "tangential" relations between state law and benefit plans,⁷⁹ or of laws "which affect employee benefit plans but which do not relate to them within the meaning of § 514(a)."⁸⁰ In such cases, however, it sometimes appears that the *intensity* of the state interest, rather than its "remoteness" from benefit plans, determines whether courts will hold that section 514(a) expresses a "clear and manifest [preemptive] purpose."⁸¹

1. *Intra-familial support*— The nearly uniform conclusion of the courts prior to the Retirement Equity Act of 1984⁸² was that the state has a sufficiently strong interest in the property and support rights of spouses and children to save laws that preserve such rights from ERISA preemption.⁸³ As discussed in Part III.B below, the Retirement Equity Act codified this result. Even prior to this legislative event, however, courts had held that a pension plan could be garnished in state court in order to satisfy the claim of a beneficiary's ex-wife to alimony or child support, despite section 514(a).⁸⁴ *Stone v. Stone*,⁸⁵ perhaps the

U.S. 921 (1980), and *Minnesota Mining & Mfg. Co. v. Minnesota*, 444 U.S. 1041 (1980), each of which dismissed an appeal, for want of a substantial federal question, from a state court decision adopting the *Bucyrus-Erie* interpretation. See also *United Fed'n of Teachers Welfare Fund v. State Human Rights Appeal Bd.*, 449 U.S. 803 (1980). *Shaw*, however, overruled the *Bucyrus-Erie* line of decisions, and held that, notwithstanding § 514(d), ERISA preempts state laws insofar as they mandate employee pregnancy benefits which can lawfully be denied under federal antidiscrimination law.

79. *Shaw*, 463 U.S. at 100 n.21.

80. *Stone v. Stone*, 450 F. Supp. 919, 932 (1978). The remarks of Rep. Dent indicated, on the other hand, that "relate to" in § 514 meant nothing less than "affect":

The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under color of law—which would *affect* any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

120 CONG. REC. 29,197 (1974) (emphasis added). Unless Dent was wrong, the *Stone* formulation is a semantic exercise that empties the statute's words of useful meaning.

81. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

82. Pub. L. No. 98-397, 98 Stat. 1426 (1984). For a discussion of the effect of the Retirement Equity Act on employee benefit plans, see *infra* Part III.B.

83. See generally Caples, *ERISA, Preemption and California Community Property Law*, 22 SANTA CLARA L. REV. 33 (1982); Note, *ERISA Preemption of State Law: The Meaning of "Relate to" in Section 514*, 58 WASH. U.L.Q. 143, 146 n.16, 157-61 (1980).

84. See, e.g., *Operating Eng'rs' Local 428 Pension Trust Fund v. Zamborsky*, 650

leading case in this field, held as did other later decisions⁸⁶ that pension plan funds could be garnished to satisfy a state court judgment that a monthly pension payment is part of the beneficiary's ex-wife's share of their community property. Another court held that a plan could be ordered to pay available benefits to an ex-spouse to satisfy a plan of property distribution, even where the employee had not yet elected to begin receiving payments.⁸⁷ Even though a beneficiary made specific provision for payment of his interest in a pension plan upon his death, the state law of community property could be invoked, said yet another court, to redirect part of his interest to his widow.⁸⁸

In these cases involving the intersection of federal pension law and state family law, courts invoked several arguments to avoid preemption. First, courts recognized the enhanced importance of state, as opposed to federal regulation of family matters.⁸⁹ Second, courts recognized that discharge of familial support obligations is a private function of direct significance to federal and state treasuries, for the alternative to spousal support may be

F.2d 196 (9th Cir. 1981); *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Central States, Southeast & Southwest Areas Pension Fund v. Parr*, 480 F. Supp. 924 (E.D. Mich. 1979); *Senco of Fla., Inc. v. Clark*, 473 F. Supp. 902 (M.D. Fla. 1979).

85. 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

86. *See Carpenters Pension Trust Fund v. Campa*, 444 U.S. 1028 (1980), *dismissing appeal, for want of substantial federal question, from In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979); *Carpenters Pension Trust v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981). *Cf. General Motors Corp. v. Townsend*, 468 F. Supp. 466 (E.D. Mich. 1976) (although ERISA § 514(a) does not preempt state law of garnishment, ERISA § 206(d) prevents divorced wife, who is entitled to half of ex-husband's pension pursuant to state court decrees, from obtaining garnishment against ERISA plan trustee).

87. *Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038 (7th Cir. 1983).

88. *Employees Sav. Plan of Mobil Oil Corp. v. Geer*, 535 F. Supp. 1052 (S.D.N.Y. 1982); *cf. United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Indus. Local 198 Pension Plan v. Myers*, 488 F. Supp. 704 (M.D. La. 1980), *aff'd on other grounds*, 645 F.2d 532 (5th Cir. 1981) (holding that state law of community property may be invoked to redirect interest to decedent's ex-spouse).

89.

Insofar as marriage is within temporal control, the States lay on the guiding hand. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). . . . On the rare occasion when state family law has come into conflict with a federal statute, the Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. . . . A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (citations omitted).

public welfare.⁹⁰

Third, Congress designed ERISA with the aim of protecting not only beneficiaries, but their dependents as well.⁹¹ Moreover, were ERISA to insulate the employee from his obligations to his nonemployee ex-spouse, the latter would retain no offsetting opportunities to replace the loss. By contrast, when ERISA preempted the state laws at issue in *Alessi* and *Hewlett-Packard*, it deprived employees of certain state-mandated terms that could theoretically be recouped through the process of collective bargaining. The nonemployee ex-spouse has no ability to guarantee his or her rights to support through collective bargaining; nor can he or she recoup the loss of state law protection by other means without perverting the incentives surrounding the institution of marriage itself.⁹²

Fourth, both of the agencies charged with administering ERISA, Treasury and Labor, interpreted ERISA as not preempting state laws of family property and support.⁹³ The views of Treasury and Labor in interpreting section 514(a) in this re-

90. See, e.g., *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 124-25 (2d Cir. 1979). In rejecting the argument that enforcement of state-ordered support payments would result in unanticipated increases in pension plan administration costs, the Second Circuit replied that: "[I]n our view, any increased administration costs must be regarded as a slight consideration when balanced against the heavy burden that will be imposed on the public treasury if dependent spouses and children cannot enforce support rights and must instead resort to welfare assistance." *Id.* at 125 (footnote omitted).

91. In ERISA § 2(a), Congress found "that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans. 29 U.S.C. § 1001(a) (1982) (emphasis added). As Judge Renfrew remarked in *Stone v. Stone*, "[i]t would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce." 450 F. Supp. at 926. This argument, however, appears to cut more strongly the other way. If the drafters of ERISA were already cognizant of the needs of employees' dependents, yet wished to "preempt the entire field" in which they were legislating, see 120 CONG. REC. 29,933 (1974) (remarks of Sen. Williams), then it is reasonable to believe that they included within ERISA itself all measures deemed necessary to protect family members.

92.

The insulation by ERISA of a substantial community asset from her community property claims if the marriage ends in divorce should not lead the nonemployee spouse to anticipate (and perhaps precipitate) that event by limiting her contributions to the marital partnership. The right of an employee to collect a pension from a plan covered by ERISA should encourage, not discourage, a prospective spouse to marry him.

Stone, 450 F. Supp. at 926.

93. See *American Tel. & Tel.*, 592 F.2d at 125. In this context as in others, "[c]ourts must respect 'the interpretation given the statute by the officers or agency charged with its administration,' particularly when the interpretation is made contemporaneously with the enactment of the statute." *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 705 (N.D. Cal. 1977) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

spect are entitled to "important but not controlling significance."⁹⁴ Needless to say, however, these agencies, like the courts, sometimes take positions based more on notions of desirable public policy than on the actual language or intent of the statute.

Finally, children and ex-spouses who are entitled to overdue support payments arguably need immediate protection in the form of judge-made exceptions to otherwise clear legislative pronouncements. Despite Congress's undoubtedly sincere intention to review and modify section 514 "[i]f it is determined that the preemption policy devised has the effect of precluding essential regulation at . . . the State . . . level,"⁹⁵ most courts cannot be expected to throw support case plaintiffs on the mercy of the legislative process.

2. *State laws with minimal impact on employee benefit plans*— Other types of cases illustrate that state laws can be of such peripheral import to employee benefit plans as to rightfully escape preemption under almost any analysis. For example, the Ninth Circuit in *Lane v. Goren*⁹⁶ held that benefit plan trusts, in their capacity as employers, must observe state laws against racial and age discrimination just as all other employers must. At least three courts have held that minority stockholders may invoke traditional state corporate fiduciary law against the majority stockholders even if the defendants have used the establishment of, contributions to, or withdrawals from, employee benefit plans as a means of depriving the complaining stockholders of their corporate rights.⁹⁷ The New York Court of Appeals has opined in dictum that although ERISA may preempt the "regulation of union prepaid legal services plans, qua plans," it "does not reach the professional licensure and regulation of lawyers, qua lawyers, who would render legal services under the plans."⁹⁸

94. See *Batterton v. Francis*, 432 U.S. 416, 424 (1977).

95. 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javits). See *supra* note 13.

96. 743 F.2d 1337 (9th Cir. 1984).

97. *Goben v. Barry*, 237 Kan. 822, 703 P.2d 1378 (1985); *Cornell Mfg. Co. v. Mushlin*, 70 A.D.2d 123, 420 N.Y.S.2d 231 (1979); *Smith v. Crowder Jr. Co.*, 280 Pa. Super. 626, 421 A.2d 1107 (1980).

98. *Feinstein v. Attorney-General*, 36 N.Y.2d 199, 205-06, 326 N.E.2d 288, 292, 366 N.Y.S.2d 613, 617-18 (1975). For these purposes, professional regulation of lawyers means

to assess the authenticity of the plan, to assure its freedom from any taint of improper professional conduct, to preserve the attorney-client relation, to require full disclosure to prevent fraud or other wrong upon the public, and, above all, to make sure that future professional conduct on behalf of the . . . organizations remains subject to disciplinary control by the Appellate Division

Id. at 205, 326 N.E.2d at 291, 366 N.Y.S.2d at 617. Subsequently, the Appellate Division

This view is in harmony with ERISA's legislative history: "Since the plans subject to Federal supervision would include plans providing prepaid legal services, it is intended that State regulation—but not bar association ethical rules, guidelines or disciplinary actions—in regard to such plans be preempted."⁹⁹ Presumably, doctors, dentists, and other professionals could render services as part of employee welfare benefit plans without the states thereby being stripped of all authority to regulate their professional conduct.

A recent Second Circuit case demonstrates, however, that even cases of this type—i.e., cases concerning state regulation of service providers who count benefit plans among their clientele—can dangerously approach the preempted zone. In *Rebaldo v. Cuomo*,¹⁰⁰ the court ruled that a state statute forbidding hospitals from negotiating discount inpatient charges with self-insured employee benefit plans does not "relate to" such plans.¹⁰¹ The statute at issue established a three-year demonstration project for controlling hospital costs. Each hospital was given an "inpatient revenue cap" and was required to establish a charge schedule designed to generate that amount of revenue. Non-governmental payors were required to pay schedule rates unless they fell into certain enumerated groups, such as certain health insurers, self-insured groups, and health maintenance organizations. Blue Cross payments were authorized to be made at twelve to fifteen percent discounts from the schedule.

An employee benefit plan not included in the excepted categories invoked section 514(a) to avoid the prohibition against negotiating discount rates. Because the law was part of a demonstration project undertaken in connection with federal efforts to contain Medicare costs, the state argued in the district court that, whether or not the law "related to" a plan, it was not preempted by ERISA because of the federal law savings clause in section 514(d). This argument did not prevail, and although no explicit attention was given to the question of whether the law "related to" the plan, the district court implicitly found that it did and held the law preempted.

held that ERISA did not preempt such regulation of prepaid legal plans. *In re UAW Legal Servs. Plan*, 69 A.D.2d 995, 416 N.Y.S.2d 133 (1979). See generally Pfennigstorf & Kimball, *Employee Legal Service Plans: Conflicts Between Federal and State Regulation*, 1976 Am. B. FOUND. RESEARCH J. 787.

99. 120 CONG. REC. 29,949 (1974) (remarks of Sen. Javits).

100. 749 F.2d 133 (2d Cir. 1984), cert. denied, 105 S. Ct. 2702 (1985).

101. Cf. *Bonser v. New Jersey*, 605 F. Supp. 1227 (D.N.J. 1985) (stating that plaintiff could not show a reasonable probability of success on a claim that ERISA preempts a state hospital billing system).

On appeal, the panel reversed, addressing itself solely to the section 514(a) issue.¹⁰² Rather than rely on the streamlined common-sense *Shaw* test,¹⁰³ the court started with the premise that “[t]he containment of hospital costs is an exercise of a State’s police powers, which should not be superseded by federal regulations unless that was the clear intent of Congress.”¹⁰⁴ Although employee health care plans are established to pay for items such as inpatient hospital care, the court equated that peculiarly important cost of plan operation with the background of civic costs and constraints—such as obedience to laws against racial discrimination, imposed in *Lane v. Goren*—faced by all organizations, regardless of purpose. Thus, the court in *Rebaldo* apparently observed no material distinction between a state’s requirement of compliance with a hospital cost containment law, on the one hand, and, say, an employment discrimination law on the other.

3. *Other state laws and the breakdown of judicial accord*—Outside of decisions involving familial support, corporate fiduciary law, and provider regulation, courts have not been as willing to dismiss preemption arguments based on section 514(a) alone, without recourse to the savings clauses in sections 514(b) and 514(d). Courts that have upheld state laws without resort to the savings clauses have not found unanimous support from other courts addressing the same issues.

a. *Fraud*— In *Providence v. Valley Clerks Trust Fund*¹⁰⁵ an employee sued a plan and its administrator over their failure to provide benefits under a health plan. The claims made by the plaintiff included fraudulent misrepresentation, bad faith refusal to pay the claim, and intentional infliction of emotional distress. A federal district court hearing the case held that state laws governing fraud and intentional infliction of emotional distress are, like family law, laws of general application responding to state policies so important that section 514(a) of ERISA does not preempt them, even insofar as they regulate the conduct of plan administration. This holding could not rely on the same arguments used in the family law context, and the state laws regard-

102. The author of the opinion indicated that he would have reversed based on the § 514(d) issue had it been found that the law did “relate to” the plan. 749 F.2d at 139-40.

103. Under this test, “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.” *Shaw*, 463 U.S. at 96-97 (footnote omitted).

104. 749 F.2d at 138.

105. 509 F. Supp. 388 (E.D. Cal. 1981).

ing misrepresentation at issue in *Provience* related to the specific "subject matters" of ERISA, thus suggesting that they should have been preempted on the same grounds set forth in *Alessi*.¹⁰⁶ Nevertheless, the federal *Provience* court reasoned that ERISA did not preempt these state law claims because they arose under laws of "general application which pertain to an area of ['classically'] important state concern" and which had "only an indirect effect on the plan."¹⁰⁷

The federal court that issued the *Provience* decision had acquired the case on removal from state court. After all federal questions were decided in the federal court, the case was remanded to the state court. The latter refused to hear the case, however, on the ground that ERISA *did* preempt all of the employee's state-law claims.¹⁰⁸ This decision to reject the federal *Provience* reasoning probably represents the majority view.¹⁰⁹ Such rejection, however, is not unanimous. As recently as April 1985, a federal district court, citing the federal *Provience* decision with approval, upheld a state claim alleging that plaintiffs were fraudulently induced to switch pension plans.¹¹⁰

b. Intentional infliction of emotional harm— The federal decision in *Provience* also allowed a state claim for intentional infliction of emotional distress. In *Kelly v. IBM*,¹¹¹ decided four months after *Shaw*, a federal district court found *Provience* to

106. The court in *Provience* argued that "[w]illful fraud falls outside the scope of the fiduciary regulation provisions of ERISA," 509 F. Supp. at 392, but it is not clear that this is true, and the state causes of action in *Provience* were indisputably directed toward regulating the precise subject matters of ERISA—disclosure and fiduciary conduct.

107. 509 F. Supp. at 391.

108. *Provience v. Valley Clerks Trust Fund*, 163 Cal. App. 3d 249, 209 Cal. Rptr. 276 (1984).

109. See, e.g., *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 706-09 (N.D. Ala. 1985) (holding that § 514 preempts any state claim for fraudulent representations about future pension benefits of existing employees resulting from sale of the ongoing business for which those employees work); *Justice v. Bankers Trust Co.*, 607 F. Supp. 527, 530-32 (N.D. Ala. 1985) (holding that § 514 preempts state law claims of fraud and misrepresentation against plan fiduciary premised on alleged suppression of facts fiduciary was obligated to disclose); *District 65, UAW v. Harper & Row Publishers*, 576 F. Supp. 1468, 1487 (S.D.N.Y. 1983) (holding that § 514(a) preempts common-law claims such as unjust enrichment, fraud, and conversion in a suit alleging wrongful acts in the termination of retirement plan); *Ogden v. Michigan Bell Tel. Co.*, 571 F. Supp. 520, 523 (E.D. Mich. 1983) (expressly rejecting *Provience* in case alleging employer and plan fiduciary fraudulently induced employees to forego certain pension benefits); *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286, 1293 (N.D. Ill. 1983) (expressly rejecting *Provience* in case alleging employee was fired in order to deprive him of pension benefits).

110. *Miller v. Lay Trucking Co.*, 606 F. Supp. 1326 (N.D. Ind. 1985). See also *Hepler v. CBS, Inc.*, 39 Wash. App. 838, 696 P.2d 596 (holding that state law governs benefit claimant's punitive damages claim despite § 514(a), and relying on *Provience* as primary authority), cert. denied, 106 S. Ct. 343 (1985).

111. 573 F. Supp. 366 (E.D. Pa. 1983), *aff'd mem.*, 746 F.2d 1467 (3d Cir. 1984).

be correct in this respect, and held that ERISA does not preempt a state law claim that an employer intentionally inflicted emotional distress through mishandling a claim for disability benefits. The *Kelly* decision emphasized that recovery for emotional distress is limited by state law to situations involving "intentionally 'outrageous conduct,'" and that the regulation of such conduct would affect plans too remotely to warrant preemption.¹¹² Other courts have held such claims preempted.¹¹³

c. *Discrimination*— In *Gast v. State*,¹¹⁴ an intermediate state appellate court upheld a state law governing the content of pension plans on the ground that it derived from important state policies against sex discrimination and thus did not "relate to" employee benefit plans. This appears to be a mistaken view, and was rejected first by the majority of courts, and eventually by the Supreme Court in *Shaw*.¹¹⁵ Like state laws governing tort and contract, state regulation of sex discrimination, regardless of its importance, cannot be supported with the same powerful arguments as state regulation of family property rights. Antidiscrimination laws in this country are as traditionally rooted in national policy as in "local feeling and responsibility." Nor is a state law requiring a welfare benefit plan provision merely "peripheral."

Other cases have addressed the problem of applying state age discrimination laws to ERISA plans, and have found that such laws "relate to" employee benefit plans. For example, in *Champion International Corp. v. Brown*,¹¹⁶ the Ninth Circuit held

112. *Id.* at 371. Cf. *Witkowski v. St. Anne's Hosp. of Chicago, Inc.*, 113 Ill. App. 3d 745, 447 N.E.2d 1016 (1983) (addressing on its merits, based on state cases, a claim that discharge to deprive employee of disability benefits amounted to intentional infliction of emotional distress). It is notable that the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1982), does not preempt state law actions for intentional infliction of emotional distress arising out of conduct which might also form the basis for unfair labor practice charges before the National Labor Relations Board. *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977). The NLRA would ordinarily preempt such an action if it did not fall within the exception stated in the *Garmon* case. See *supra* text accompanying note 30. In *Farmer* the Court stated that, to escape preemption, it is essential that the state tort be either unrelated to the specific unfair labor practice charge or be "a function of the *particularly abusive manner*" in which the unfair labor practice is accomplished or threatened. 430 U.S. at 305 (emphasis added).

113. See, e.g., *Russell v. Massachusetts Mutual Life Ins. Co.*, 722 F.2d 482, 493 (9th Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 3085 (1985); *Light v. Blue Cross and Blue Shield, Inc.*, 616 F. Supp. 558 (S.D. Miss. 1985); *Nolan v. Aetna Life Ins. Co.*, 588 F. Supp. 1375 (E.D. Mich. 1984); *Drummond v. McDonald Corp.*, 167 Cal. App. 3d 428, 213 Cal. Rptr. 164 (1985).

114. 36 Or. App. 451, 585 P.2d 12 (1978). See *supra* text accompanying notes 74-78.

115. See *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), discussed *supra* note 78 and text accompanying notes 38-39.

116. 731 F.2d 1406 (9th Cir. 1984).

that ERISA preempted a state law requiring a plan to give service credit (for benefit accrual purposes) for service rendered by post-retirement age employees. Regulations under ERISA specifically authorizing the challenged practice supported this conclusion.¹¹⁷

d. Debt collection— In *National Bank of North America v. Local 3, IBEW*,¹¹⁸ a state court upheld garnishment of pension plan benefits. Yet at least three federal courts and one state court have since held such garnishments preempted.¹¹⁹ In addition, one federal district court has held states preempted from collecting a pensioner's unpaid state income taxes, interest, and penalties directly from the pension plan trustee out of the retiree's pension benefits.¹²⁰

The argument for preemption in such cases goes beyond section 514, for section 206(d) of ERISA imposes special non-assignment requirements on pension plans.¹²¹ Because the conclusion in *National Bank of North America* that section 206(d) prohibits only voluntary assignments is contrary to the trend of authority, no other court has directly faced the issue of how section 514 affects garnishment of pension plans by non-family creditors. Other courts are thus unlikely to adopt the analysis of section 514 that was followed in *National Bank of North America*, both because the issue is unlikely to arise, and because *National Bank of North America* is clearly wrong.¹²²

117. Treas. Reg. § 1.411(b)-1(b)(3)(ii)(C) (1977). See also *Waukesha Engine Div. v. Department of Indus., Labor & Human Relations*, 619 F. Supp. 1310 (W.D. Wis. 1985); *Nolan v. Otis Elevator Co.*, No. A-51 (N.J. Feb. 26, 1986) (holding, despite *Shaw*, that if a state anti-discrimination law "relates to" a plan when used to challenge disparate treatment of employees based on age, § 514(d) nevertheless saves it).

118. 69 A.D.2d 679, 419 N.Y.S.2d 127 (1979).

119. *Tenneco, Inc. v. First Va. Bank*, 698 F.2d 688 (4th Cir. 1983); *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980); *Commercial Mortgage Ins. v. Citizens Nat'l Bank*, 526 F. Supp. 510 (N.D. Tex. 1981); *Christ Hosp. v. Greenwald*, 82 Ill. App. 3d 1024, 403 N.E.2d 700 (1980); cf. *Mason v. Eastman Kodak Co. (In re Parker)*, 473 F. Supp. 746 (W.D.N.Y. 1979) (stating that §§ 514(a) and 206(d) preempt any state law that would render bankrupt's pension plan credits subject to transfer, levy, or seizure); *Trustees of the Western Conference of Teamsters Pension Trust Fund v. Kramer*, No. C81-554M (W.D. Wash. Dec. 30, 1981) (stating that ERISA preempts imposition of attorney's lien on pension plan assets).

120. *Northwest Airlines v. Roemer*, 603 F. Supp. 7 (D. Minn. 1984).

121. 29 U.S.C. § 1056(d) (1982). The section states that, subject to various conditions and qualifications, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

122. Another court of the same jurisdiction has already rejected it. *Helmsley-Spear, Inc. v. Winter*, 74 A.D.2d 195, 198, 426 N.Y.S.2d 778, 780 (1980), *aff'd mem.*, 52 N.Y.2d 984, 419 N.E.2d 1078, 438 N.Y.S.2d 79 (1981). But see *Lowery v. Spector*, 77 A.D.2d 813, 813, 430 N.Y.S.2d 767, 767 (1980) (stating that "[w]e find nothing in the provisions of Federal law prohibiting a levy on [pension] trust funds once the trust has terminated

In *Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund*,¹²³ a state court held that ERISA does not preempt the garnishment of *welfare* benefit plan assets, even if the plan contains a spendthrift clause. If a plan is not a pension benefit plan, section 206(d)(1) of ERISA does not require spendthrift language. Thus, section 514(a) of ERISA would be the sole bar to the garnishment. The *Electrical Workers* court declined to apply section 514(a) out of concern that an unwarranted "regulatory vacuum" could be the result of such preemption.¹²⁴

A federal district court, with the approval of the Sixth Circuit in a post-*Shaw* affirmance, reached the same result in *Local 212 IBEW Vacation Trust Fund v. Local 212 IBEW Credit Union*¹²⁵ as did the state court in *Electrical Workers*. The court reasoned that the garnishment statute did not "relate to" the plan because "[t]he only 'regulatory' effect which can be identified is the administrative expense the fund may incur in processing the garnishment notices. We consider this 'regulatory' effect minimal and therefore insufficient to invoke ERISA's preemption provision."¹²⁶ In adopting this argument the court chose to interpret the "relate to" language by reference to the definition of "State" in the larger phrase "State laws insofar as they . . . relate to." Section 514(c)(2) of ERISA declares that the term "State" "includes a State . . . which purports to regulate . . . the terms and conditions of employee benefit plans . . ."¹²⁷

and the principal is available for distribution," and citing *National Bank of North America* with apparent approval); cf. *Plymouth Rock Fuel Corp. v. Bank of N.Y.*, 102 Misc. 2d 235, 236, 425 N.Y.S.2d 908, 908 (App. Term 1979) (per curiam) ("We are constrained to follow *National Bank of North America*"). In addition, the 1984 amendment of § 206(d) to permit involuntary assignments under qualified domestic relations orders would seem to clarify congressional intent to prohibit all other involuntary assignments, thus overruling *National Bank of North America*. See *infra* Part III.B.

123. 583 S.W.2d 154 (Mo. 1979).

124.

The enforcement of state court money judgments by creditors is a valid area of state concern, and is one which is totally unregulated by ERISA with respect to welfare plans. We decline to interpret ERISA to require preemption of Missouri laws in this area, "in the absence of any legislative declaration that Congress intended to create an enormous regulatory vacuum in areas that traditionally have been matters of vital state concern."

583 S.W.2d at 159 (quoting *Gast*, 585 P.2d at 23).

125. 549 F. Supp. 1299 (S.D. Ohio 1982), *aff'd per curiam*, 735 F.2d 1010 (6th Cir. 1984).

126. 549 F. Supp. at 1302. In this analysis the court was following the dissent in *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 679 F.2d 1307 (9th Cir. 1982), *vacated on other grounds*, 463 U.S. 1 (1983). For a discussion of *Franchise Tax Bd.* see *infra* text accompanying notes 129-35.

127. 29 U.S.C. § 1144(c)(2) (1982).

Thus, goes the argument, a law cannot be preempted by section 514(a) unless it purports to *regulate* plan terms and conditions.¹²⁸

The Ninth Circuit, on the other hand, held in *Franchise Tax Board v. Construction Laborers Vacation Trust*¹²⁹ that state interests must give way to ERISA when a state attempts to collect the tax liabilities of employees directly from employee welfare benefit plans. This case, which the Supreme Court vacated on jurisdictional grounds, involved an attempt by California to collect delinquent personal income taxes of union members by levying against money held in their union's vacation fund (Vacation Trust). The Vacation Trust, an employee welfare benefit plan under ERISA, was governed by a spendthrift clause purportedly protecting it from voluntary and involuntary assignments of all kinds.

The district court in *Franchise Tax Board* allowed the state to obtain the delinquent taxes directly from the Vacation Trust because the statutes authorizing this procedure did "not directly or indirectly regulate employee benefit plans and are wholly peripheral to the purposes of ERISA."¹³⁰ A Ninth Circuit panel reversed the district court, over the dissent of Judge Tang.¹³¹ The short opinion of the court was premised largely on the conclusory assertion that *Alessi v. Raybestos-Manhattan, Inc.*¹³² required reversal of the district court judgment.

In dissent Judge Tang argued that section 514 only preempts state laws having a "regulatory effect" on plans. The only "regulatory" effect at issue, he said, was "the administrative burden associated with processing levy notices."¹³³ He argued, however, that "[t]his effect is simply too minor to be considered 'regula-

128. Several other courts have resorted to the device of reasoning that a law which does *not* regulate the terms and conditions of plans cannot, by definition, "relate to" plans, even though in an individual case the law affects an employee benefit plan. See, e.g., *Rebaldo v. Cuomo*, 749 F.2d 133, 137 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2701 (1985) (discussed *supra* text accompanying notes 100-04); *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984) (described *supra* text accompanying note 96); *Sasso v. Vachris*, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985) (discussed *supra* footnotes 67-69 and accompanying text).

129. 679 F.2d 1307 (9th Cir. 1982), *vacated on other grounds*, 463 U.S. 1 (1983).

130. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, No. 80-02741-R (C.D. Cal. Dec. 3, 1980), *reprinted in* Appendix C of Supreme Court Jurisdictional Statement, at 21 (emphasis added).

131. 679 F.2d 1307 (1982).

132. 451 U.S. 504 (1981). For a discussion of *Alessi*, see *supra* text accompanying notes 42-45.

133. 679 F.2d at 1312 (Tang, J., dissenting).

tory.’”¹³⁴ The dissent also noted that “[a] finding of federal preemption here will pose a serious obstacle to the state’s exercise of [its sovereign taxing] power, casting doubt on section 514(a)’s constitutionality.”¹³⁵

The foregoing cases deal with attempts to reach plan assets to satisfy creditors of participants. In *Deiches v. Carpenters’ Health & Welfare Fund*,¹³⁶ a federal court held that a creditor of the employer could use New Jersey’s Insolvency & Reorganization “Preference” statute¹³⁷ to reach welfare benefit plan assets. For a substantial period, the employer had been delinquent in paying \$17,212.50 to a multiemployer plan. Less than a month after the employer satisfied the liability, one of its creditors filed a state action for a determination of insolvency and appointment of a receiver. State law authorized the receiver to void the employer’s recent payment to the plan as a preferential transfer, and the plan resisted the receiver’s demand for refund based on, among other things, section 514(a) of ERISA. The court held that section 514(a) did not preempt the state preference law because it did not “in any way affect the internal workings or rules and regulations of the ERISA plan.”¹³⁸

e. State taxes— Despite the constitutional concerns Judge Tang raised in his *Franchise Tax Board* dissent, two federal district courts have held that states are without power to levy a tax on an employee benefit plan measured in terms of the benefits paid. In *National Carriers’ Conference Committee v. Heffernan*,¹³⁹ plaintiffs were trustees of the Railroad Employees National Dental Plan. Under Connecticut law, the plan was subject to an annual tax of 2.75% imposed on the amounts paid as benefits to or on behalf of the residents of Connecticut by “em-

134. *Id.*

135. *Id.* at 1313. Judge Tang’s tenth amendment constitutionality argument, weak as it appeared from his opinion, was further damaged by the Supreme Court’s subsequent decision in *EEOC v. Wyoming*, 460 U.S. 226 (1983). There, the Court held that the federal government could apply the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)), to the employment relationships between state governments and their employees. The constitutional claim under the tenth amendment failed in that case because even such federal interference with the hiring and firing of state employees “does not ‘directly impair’ the State’s ability to ‘structure integral operations in areas of traditional governmental functions.’” 460 U.S. at 239. It would seem to follow a fortiori that preemption of a state tax collection procedure affecting only a small proportion of collections—namely, collections against employee benefit plans—similarly need not be found violative of the tenth amendment.

136. 572 F. Supp. 766 (D.N.J. 1983).

137. N.J. STAT. ANN. § 14A:14-14 (West 1969).

138. 572 F. Supp. at 771.

139. 454 F. Supp. 914 (D. Conn. 1978).

ployee welfare benefit plans.”¹⁴⁰ Then-district Judge Newman gave several reasons for holding the tax law preempted.

First, ERISA contains no savings clause directed at state tax laws.¹⁴¹ Second, ERISA’s legislative history revealed that Congress had considered and rejected a savings clause for state tax laws.¹⁴² Finally, the court noted that if section 514(a) did not preempt the law at issue, a state could use tax laws to regulate benefit plans.¹⁴³

In *General Motors Corp. v. California State Board of Equalization*,¹⁴⁴ the complaining taxpayers were insurance companies taxed by California on their “gross premiums.”¹⁴⁵ The insurers had sold group policies to provide employee benefits through plans under which the plan sponsors’ funds were used to pay all benefit claims below a so-called trigger point. Under California law “gross premiums” under these circumstances include the

140. CONN. GEN. STAT. § 12-212b (1983).

141. “In the tax area . . . where Congress has not excluded even general tax statutes from preemption, a statute specifically directed at an ERISA-covered plan must certainly come within the preemption provision.” 454 F. Supp. at 916.

142.

When the conference committee was considering the House and Senate version of the bill that eventually became ERISA, it received a recommendation from the administration regarding the scope of the preemption provision. The Secretaries of Labor and Treasury jointly suggested a revised preemption provision which read in part:

Notwithstanding the provisions of this section, a State shall have the authority to prescribe rules and regulations governing the tax qualification and taxation of contributions, distributions or income, of an employee pension plan (including a trust forming a part of such plan) as defined in the Welfare and Pension Plan Disclosure Act.

Administration Recommendations to the House and Senate Conferees on H.R. 2 to Provide for Pension Reform (April, 1974)

Id. at 917 (citation omitted).

143.

In the present action the challenged statute imposes a 2.75% annual tax on benefits paid by employee benefit plans. This contrasts with Connecticut’s tax on the premiums received by insurance companies, which is only 2%. . . . This tax structure may operate as an incentive to use traditional insurance, rather than ERISA-covered plans. Although the impact of the tax discrepancy may be only nominal at present, its economic impact is not the measure of its significance. Rather, the discrepancy is illustrative of the potential use of taxation as a means of regulation. Because of that potential, preempting state taxation of ERISA-covered plans is necessary to effectuate Congressional objectives.

Id. at 918 (citations omitted). In *General Split Corp. v. Mitchell*, 523 F. Supp. 427 (E.D. Wis. 1981), the court addressed a “use of taxation as a means of regulation” and struck it down. Under a state-wide health risk-sharing program there at issue, employee welfare benefits plans “themselves [were] taxed and [were] required to contribute to the risk-sharing plan.” *Id.* at 431.

144. 600 F. Supp. 76 (C.D. Cal. 1984).

145. CAL. CONST. art XIII, § 28; CAL. REV. & TAX. CODE §§ 12201, 12221 (West 1970 & Supp. 1985).

"entire cost of [an] employee benefit plan."¹⁴⁶ Thus, the tax was computed, in part, based on the benefits paid directly out of plan sponsors' assets. The district court held this tax preempted as an indirect tax on benefit payments "impeding the discretion of plan sponsors to fund their plan guarantees through a combination of general assets and excess risk insurance."¹⁴⁷

f. Other state law issues— The Supreme Court in *Metropolitan Life Insurance Co. v. Massachusetts*¹⁴⁸ recently noted that Massachusetts's law requiring all health insurance policies on state residents to provide minimum mental-health benefits¹⁴⁹ certainly "related to" employee benefit plans, insofar as the latter purchase group health insurance policies.¹⁵⁰ Two courts have ruled that where state laws invalidate certain types of subrogation clauses, section 514(a) preempts those laws if they are invoked to prevent the application of a subrogation clause in an employee benefit plan.¹⁵¹ The Seventh Circuit has stated in dicta that a state statute immunizing a settling defendant from any claim of contribution by a nonsettling defendant would be inapplicable, due to section 514(a), to the settlement of the Labor Department's suit against the Teamster health and welfare fund and its trustees.¹⁵² A federal district court has held, in a case called *Armco, Inc. v. Ludwick*,¹⁵³ that ERISA preempts state laws providing for administrative hearings to resolve claims under employee benefit plans. Under the terms of ERISA, a claim may ultimately be made in state court; but the state court procedure at issue in *Armco* required a prior administrative hearing. The district court opined that ERISA's goal of uniform-

146. *Metropolitan Life Ins. Co. v. State Bd. of Equalization*, 32 Cal. 3d 649, 661, 186 Cal. Rptr. 578, 585, 652 P.2d 426, 433 (1982).

147. 600 F. Supp. at 80. The court also based its result partly on ERISA § 514(b)(5)(B)(i), which had not been enacted when *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914 (D. Conn. 1978) was decided. See *infra* Part III.A.

148. 105 S. Ct. 2380 (1985).

149. MASS. ANN. LAWS ch. 175, § 47B (West 1977).

150. 105 S. Ct. at 2389. The Court went on, however, to find that the state law was saved by the insurance exception to § 514(a) contained in § 514(b)(2)(A). 105 S. Ct. at 2391-92. See also *Michigan United Food and Commercial Workers Unions v. Baerwaldt*, 767 F.2d 308 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 801 (1986). Cf. *Hood v. Prudential Ins. Co. of Am.*, 460 So. 2d 1227 (Ala. 1984) (holding that an employee's claim against the employer's insurer for bad faith refusal to pay employee benefits was saved by § 514(b)(2)(A), although the same claim against the employee benefit plan under which the insurer provided benefits to the employees was preempted by § 514(a)).

151. *Davis v. Line Constr. Benefit Fund*, 589 F. Supp. 146 (W.D. Mo. 1984); *Hunt v. Sherman*, 345 N.W.2d 750 (Minn. 1984).

152. *Donovan v. Robbins*, 752 F.2d 1170, 1179-80 (7th Cir. 1984).

153. *Armco, Inc. v. Ludwick*, No. 82-4066 (D. Kan. April 15, 1982) (preliminarily enjoining state administrative hearing).

ity would be frustrated if there were substantial differences in the law and procedure applied to employee benefit claims made in state and federal court.¹⁵⁴ A state court has held that when disability benefits under an ERISA plan are funded through an insurance contract sponsored and maintained by the employer, the question whether a benefit claimant must exhaust administrative remedies under the plan is a federal one, and conflicting principles of state insurance law are preempted.¹⁵⁵ On the other hand, three courts have held that state authorities bearing on the issue of whether pre-judgment interest is to be paid on a judgment arising out of an ERISA claim are not preempted by section 514(a).¹⁵⁶

Perhaps the most conceptually nettlesome preemption issues are those implicating ERISA policies arising one step removed from an actual plan. In the recent case of *Scott v. Gulf Oil Corp.*,¹⁵⁷ the Ninth Circuit took advantage of the arguable remoteness between a claim and an existing plan to partially avoid preemption. Gulf Oil sold a refinery to Thrifty Oil Corp., and negotiated terms of employment for refinery employees who chose to stay with the refinery under its new ownership. After the change, some employees sued Gulf, claiming that it had cheated them out of severance pay and tricked them into accepting employment with Thrifty without being covered by a severance pay plan. The employees alleged that they were entitled both to severance pay under a plan with Gulf, and to participation in a severance pay plan that Thrifty should have provided. The employees averred four state-law causes of action: breach of employment agreement, violation of public policy, breach of duty to act fairly and in good faith, and fraud and breach of fiduciary duties.

The court held that the Gulf severance pay system amounted to an ERISA plan. Because the breach of contract claim was a claim for failure to pay benefits under that plan, it was wholly preempted. Each of the other claims, however, rested partly on the alleged terms of the Gulf plan, and partly on misrepresenta-

154. Typescript op. at 3.

155. *Rhodes v. Aetna Life Ins. Co.*, 135 Mich. App. 735, 356 N.W.2d 247 (1984); *Martin v. Metropolitan Life Ins. Co.*, 140 Mich. App. 441, 364 N.W.2d 348 (1985). Cf. *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1404 (D. Nev. 1984) (noting that a state statute setting forth procedures for enforcing rights secured by realty cannot limit the Labor Department's enforcement authority because the statute is preempted by § 514).

156. *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984); *Gould, Inc. v. PBGC*, 589 F. Supp. 164 (S.D.N.Y. 1984); *LLC Corp. v. PBGC*, 537 F. Supp. 355 (E.D. Mo. 1982), *rev'd on other grounds*, 703 F.2d 301 (8th Cir. 1983).

157. 754 F.2d 1499 (9th Cir. 1985).

tions that Thrifty would be paying severance benefits comparable to those under the Gulf plan. In fact, the complaint alleged, Thrifty had no severance pay plan. The court chose to divide each of these three claims in two: one for benefits under the Gulf plan, and one for prospective benefits under the plan that they had rightfully expected Thrifty to adopt. The first half of each claim, the court found, "related to" a plan, but the second half did not, because each was for benefits under a purely fictional plan, and "[t]o preempt plaintiff's state-law claim for prospective benefits under these circumstances would leave them without an avenue of redress for the wrongs that they have alleged."¹⁵⁸ The problem with this reasoning, of course, is that it does not apply to a hypothetical case in which Thrifty *has* a severance pay plan in name, but under which the complaining employees receive nothing.¹⁵⁹ Yet there seems to be little logic in reaching different preemption results in this hypothetical case, on the one hand, and in the actual *Scott* case, on the other.

*Authier v. Ginsberg*¹⁶⁰ is another difficult preemption case which would have lent itself to the sort of fine line-drawing exhibited in *Scott*, but in *Authier* the Sixth Circuit took a broader view of section 514. A plan administrator, Mr. Authier, who was also an employee of the plan sponsor, was fired for alerting his co-fiduciaries and the plan participants of his concern about potential problems surrounding termination of the plan. Michigan case law provided that an employee may not be fired in violation of a "clearly articulated, well-accepted public policy,"¹⁶¹ and a jury found specifically that Authier was discharged for fulfilling his duties under ERISA. The Sixth Circuit held that "since ERISA created a substantive element of the Michigan action and since the action turns upon a fiduciary's duties under ERISA," ERISA preempted Authier's claim.¹⁶²

158. *Id.* at 1506. See also *Miller v. Lay Trucking Co.*, 606 F. Supp. 1326 (N.D. Ind. 1985) (stating that ERISA does not preempt claim for misrepresentation leading to a change in plans because the tort occurred when plaintiffs were not members of a plan); *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983) (stating that ERISA does not preempt claim that defendants misrepresented the existence of a non-existent plan).

159. In *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694 (N.D. Ala. 1985), a case similar to the foregoing hypothetical, the court reached an opposite preemption result than the court in *Scott*. See *supra* note 109.

160. 757 F.2d 796 (6th Cir.), *cert. denied*, 106 S. Ct. 208 (1985).

161. *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 367, 353 N.W.2d 469, 474 (1984) (Williams, C.J., dissenting).

162. 757 F.2d at 800.

C. *The Courts' Revolt*

The foregoing web of decisions, some reconcilable and some not, demonstrates at least two points. First, although the courts generally agree that Congress intended ERISA to "occupy the field" of employee benefit plan regulation, many have been unwilling to treat preemption under ERISA any differently than they would under a federal statute that "occupies the field" without containing a specific preemption provision. Thus, despite the facial clarity of section 514, conflicting judicial decisions abound. The basic judge-made preemption doctrine requires balancing, and judges necessarily differ in their views of how to weigh competing state and federal interests. Were the courts to follow the precise language of section 514(a), divergences of result would occur less frequently.

Even more perplexing, series of decisions by a single court or a single judge sometimes show a disturbing tendency to swing between radically opposed approaches to the preemption issue, as evidenced by Judge Renfrew's shift between *Agsalud* and *Hewlett-Packard*, on the one hand, and *Stone* on the other;¹⁶³ by Judge Kearse's shift between her pre- and post-*Alessi* decisions in *Kramarsky*, followed by another marked shift by a different Second Circuit panel in its post-*Shaw* decision in *Rebaldo*,¹⁶⁴ and by the Sixth Circuit's shift from a restricted view of preemption in the *Local 212 IBEW Vacation Trust Fund* garnishment case and a broad view in *Authier*.¹⁶⁵ These inconsistencies

163. See Hutchinson & Ifshin, *supra* note 3, at 59-60. See discussions of *Agsalud* at *supra* text accompanying notes 59-61; of *Hewlett-Packard* at *supra* text accompanying notes 46-48; and of *Stone* at *supra* notes 84-85. Certainly, the judicial position in such cases as *Stone*, where state laws are held to "affect" employee plans but not to "relate to" them, can be viewed as the mere manipulation of concepts to permit analysis equivalent to that explicitly required in the balancing of state and federal interests under the judicial doctrines of preemption.

164. Compare *Delta Air Lines v. Kramarsky*, 650 F.2d 1287 (2d Cir. 1981) (holding that summary U.S. Supreme Court dismissals of appeals in pregnancy benefits preemption cases mandated finding that state pregnancy benefits laws were *not* preempted by ERISA), with *Delta Air Lines v. Kramarsky*, 666 F.2d 21 (2d Cir. 1981) (on rehearing) (holding that *Alessi* vitiated the authority of summary dismissals in pregnancy benefits cases, and mandated finding that state pregnancy benefits laws *are* preempted by ERISA), and *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984) (holding that a law setting the minimum charges an employee benefit plan can pay a hospital for services does not "relate to" such plans), *cert. denied*, 105 S. Ct. 2702 (1985). For a discussion of the *Kramarsky* issues see *supra* notes 64, 78 and accompanying text, and of *Rebaldo* see *supra* text accompanying notes 100-04.

165. Compare *Local 212 IBEW Vacation Trust Fund v. Local 212 IBEW Credit Union*, 735 F.2d 1010 (6th Cir. 1984) (*per curiam*) (holding that state garnishment proceedings against employee welfare benefits plans are not preempted by ERISA), with

seem attributable to judicial uncertainty as to whether ERISA preemption should be addressed according to the straightforward strictures of the statute, or under the more searching but less definite standards of the judicial doctrines of preemption.

The debt collection cases, taken as a group, are also a good example of radical, inconsistent shifts in approach. Where courts have displayed faithful adherence to the literal language and legislative history of section 514(a), ignoring the contention that the breadth of section 514(a)'s sweep may have been "inadvertent,"¹⁶⁶ there has been little discussion. The relation between state law and the benefit plan having been established on the facts, the inquiry is soon at an end, as it was in *Franchise Tax Board*. Without doubt, the state collection statutes at issue there, as applied to employee benefit plan funds, "relate to" those plans in the ordinary sense Senators Williams and Javits and Representative Dent contemplated.¹⁶⁷ But in this sense, so do the general laws of garnishment and attachment held *not* to "relate to" benefit plans in *Stone* and other cases involving marital obligations.

Had the Supreme Court affirmed *Franchise Tax Board* on its merits, it would have stripped *Stone* and other marital obligation cases of the pretense that attachment statutes can "affect" plans yet not "relate to" them within the meaning of section 514 of ERISA. If the concept of "relate to" carries the ordinary meaning ascribed to it in ERISA's legislative history and in *Shaw*, that meaning could not be preserved unless the result in *Franchise Tax Board* mirrored the result in *Stone*. The difference in result between these two cases (as well as the continuing subplot of dispute over the proper result in non-marital debt collection cases) is convincing evidence that lower courts have sometimes disregarded the rigid language of section 514(a) when necessary to reach an acceptable accommodation of important, competing state and federal interests.¹⁶⁸

In the one area in which ERISA has arguably not preempted

Authier v. Ginsberg, 757 F.2d 796 (6th Cir.) (holding that state law prohibiting employee discharge in violation of public policy is preempted by ERISA if ERISA policies are the ones alleged to be violated), *cert. denied*, 106 S. Ct. 208 (1985). For discussions of *Local 212 IBEW Vacation Trust Fund* see *supra* text accompanying notes 125-27, and of *Authier* see *supra* text accompanying notes 160-62.

166. See S. REP. No. 646, 97th Cong., 2d Sess. 18 (1982), discussed *infra* text accompanying note 197.

167. See discussion *supra* text accompanying notes 9-11.

168. The Third Circuit in *Danziger* (see *supra* note 49 and accompanying text), on the other hand, displayed a disturbing unwillingness to search for such an accommodation.

the field by implication—namely, regulation of the contents of welfare benefit plans—preemption of state laws via section 514 has only marginally served the purposes that Congress set out to achieve in enacting ERISA. Such preemption precludes many interstate differences among state laws, but not all.¹⁶⁹ The premise of ERISA preemption in the *pension* area was that conflicts and inconsistencies between comprehensive federal regulation, on the one hand, and state and local regulation, on the other, would be avoided altogether.¹⁷⁰ Without federal regulation of the substantive content of welfare plans, preemption by ERISA in the welfare area offers only the benefit of scant but uniform nationwide welfare plan administration (and then only if all plans are self-insured), countered by the substantial burden of a regulatory vacuum that is filled, if at all, by *ad hoc* judicial creation of substantive rules. This is far different than the policy balance Congress struck in preempting state pension plan regulation.

Given the paucity of federal regulation of welfare benefit plans, and the occasional gaps in federal pension regulation, there is certainly room for argument in favor of a different legislative approach to preemption, especially where welfare benefit plans are concerned. Senator Javits expressed fear of “hastily contrived” state laws “not clearly connected to the Federal regulatory scheme.”¹⁷¹ But the cases demonstrate that ERISA itself often represents the “hasty contrivance,” and that its rough

169. In repeated congressional testimony since 1974, the ERISA Industry Committee (ERIC) and others have warned against the social costs of requiring one multistate employer to comply with different benefit laws in different states. See, e.g., *1978 Oversight Hearings*, *supra* note 15, at 522. Others have, of course, disputed the seriousness of these costs. See, e.g., *ERISA: Exemption from Preemption for Hawaii Prepaid Health Care Act: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education & Labor*, 97th Cong., 2d Sess. 90, 94 (1982) [hereinafter cited as *1982 Hawaii Hearings*]. However, it is clear that the ERIC position is shared by many and forms a prime motivation for the breadth of § 514(a). Despite this, the exemption of state insurance laws in ERISA § 514(b), as interpreted in cases such as *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985), and *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978), a much earlier decision of the First Circuit reaching the same conclusion as *Metropolitan Life*, has had the same effect as direct state requirements on benefit plans would have had, insofar as plans are funded by insurance. See also *Insurance Comm'r of Md. v. Metropolitan Life Ins. Co.*, 296 Md. 334, 463 A.2d 793 (1983) (holding that § 514(b) allows states to direct insured plans to make payments to particular types of providers). To the extent plan sponsors wish to avoid the expense of purchasing policies with different state-mandated benefits, the difference between § 514's impact on self-insured plans and its impact on third-party insured plans creates an unintended incentive for sponsors to shift away from third-party insurance and toward self-insurance.

170. 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javits); *1978 Oversight Hearings*, *supra* note 15, at 531 (remarks of Rep. Erlenborn).

171. 120 CONG. REC. 29,942 (1974).

edges might best be smoothed by sound judicial application of state laws.

III. LEGISLATIVE CONCESSIONS TO FLEXIBILITY IN ERISA PREEMPTION

As early as 1974 ERISA's drafters knew that they might have to reshape section 514 if experience under the enacted provision proved too difficult. As we have seen, courts have experienced difficulties from the beginning. Only in 1983 and 1984, however, did Congress finally alter the scope of section 514(a): first to permit partial enforcement of the Hawaii Prepaid Health Care Act struck down in *Standard Oil Co. v. Agsalud*,¹⁷² and second to partially legitimize the judicial behavior displayed in *Stone v. Stone*¹⁷³ and the other family property cases. The following section briefly discusses these two revisions, both to clarify where section 514(a) stands today and to demonstrate the extreme difficulty of using legislation to overcome the overinclusiveness of section 514 as enacted.

A. *The Hawaii Prepaid Health Care Act and Section 301 of Public Law 97-473*

The tension created by section 514's injection into the welfare benefit plan area produced *Standard Oil Co. v. Agsalud*,¹⁷⁴ and in turn elicited some of the original proposals to restrict section 514's broad sweep legislatively. These proposals resulted in a 1983 amendment to ERISA, but the change was limited so as (a) to cover only one state, Hawaii, and (b) to maintain preemption of the specific state law provision that generated the dispute in *Agsalud*. The amendment to ERISA saves from section 514(a) preemption the substantive provisions of the Hawaii Prepaid Health Care Act¹⁷⁵ that were in effect September 2, 1974, except insofar as they govern reporting, disclosure, and fiduciary re-

172. 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). See *supra* text accompanying notes 59-61.

173. 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981). See *supra* text accompanying notes 85-86.

174. 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

175. HAWAII REV. STAT. ch. 393 (1982).

sponsibility matters which are governed by ERISA.¹⁷⁶ In language not made a part of ERISA, the amending act declared that "[t]he amendment made by this section shall not be considered a precedent with respect to extending such amendment to any other State law."¹⁷⁷

Hawaii's Prepaid Health Care Act, enacted in June 1974, less than three months prior to the enactment of ERISA, requires employers in Hawaii to provide employees with prepaid health insurance.¹⁷⁸ Where applicable, employers must generally pay at least half of the premiums, and all premiums in excess of 1.5% of wages.¹⁷⁹ The Act mandates minimum required types of coverage: 120 days of inpatient hospital care; outpatient care; surgery; home, office, and hospital visits by physicians; laboratory services; and maternity care.¹⁸⁰ To preclude any conflict, the Act also "self-destructs" upon the effective date of any federal law "that provides for voluntary prepaid health care for the people of Hawaii in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory health care for the people of Hawaii."¹⁸¹

176. The language inserted by the amendment reads as follows:

- (A) Except as provided in subparagraph (B), subsection [514](a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).
- (B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—
 - (i) any State tax law relating to employee benefit plans, or
 - (ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.
- (C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

ERISA § 514(b)(5), as added by Pub. L. No. 97-473, § 301(a), 96 Stat. 2605, 2611-12 (1983).

177. Pub. L. No. 97-473, § 301(b), 96 Stat. 2605, 2612 (1983).

178. HAWAII REV. STAT. ch. 393 (1982).

179. *Id.* § 393-13.

180. *Id.* § 393-7(c).

181. *Id.* § 393-51. Comparison of pre- and post-Act data indicates that the health insured portion of Hawaii's workforce rose by 46,000 persons, or from less than 90% to 98%, as a result of the Act's passage. 1982 *Hawaii Hearings*, *supra* note 169, at 12-13, 25, 102, 116-17 (1982) (statements of Joshua Agsalud, Director, Hawaii Dep't of Labor; Albert H. Yuen, President, Hawaii Medical Servs. Assoc.; Spark M. Matsunaga, U.S.

At the outset of 1976, Standard Oil of California was apparently in compliance with the Act.¹⁸² In that year, however, Hawaii amended the Act to require, for the first time, coverage of drug and alcohol treatment.¹⁸³ Standard, which did not bring itself into compliance with the 1976 amendment, sued to prevent enforcement action by Hawaii, and prevailed on the ground that the Hawaii law was preempted.¹⁸⁴

In 1977, soon after the litigation began, Senators Inouye and Matsunaga introduced a bill that would have made ERISA inapplicable to employee benefit plans maintained solely for the purpose of complying with "health insurance laws."¹⁸⁵ The bill was unsuccessful. A bill the same Senators introduced in 1979 would have retained ERISA coverage of "health insurance laws," but would have exempted from section 514(a) Hawaii's law, as in effect on January 1, 1979, and any other state law found to be substantially identical to Hawaii's.¹⁸⁶ This bill was likewise unsuccessful.

In 1980 a Hawaii exemption became part of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA),¹⁸⁷ as passed by the Senate on two separate occasions.¹⁸⁸ The 1980 version preserved the Hawaii Act in effect January 1, 1979,¹⁸⁹ but

Senator (Hawaii)).

182. 1982 *Hawaii Hearings*, *supra* note 169, at 104 (statement of Sen. Matsunaga).

183. 1976 *Hawaii Sess. Laws* ch. 25 (amending HAWAII REV. STAT. § 393-7(c)).

184. *See supra* text accompanying notes 59-61.

185. S. 1383, 95th Cong., 1st Sess. (1977), reprinted in *ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor of the Senate Comm. on Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 94 (1978) [hereinafter cited as *1978 ERISA Improvements Hearings*].

186. The exemption would not, however, have covered "any provision of a State law which the Secretary determines to be similar to any provision of parts 1 [Reporting and disclosure], 4 [Fiduciary Responsibility] and 5 [Administration and Enforcement] of . . . subtitle" B of title I of ERISA. S. 209, 96th Cong., 1st Sess. § 155(2) (1979), reprinted in *1979 ERISA Improvements Hearings*, *supra* note 16, at 9, 43. The Senate Committee on Labor and Human Resources ultimately approved this bill, but the Committee deleted any reference to Hawaii and instead exempted any state law insofar as it required or regulated arrangements under which employers would provide health care benefits or services. The Committee also added a provision allowing the Secretary of Labor to enter into cooperative arrangements with states having such laws "to assist such States in effectuating the policies of provisions of such laws which are superseded by" parts 1, 4, and 5 of subtitle B, title I of ERISA. S. 209, as amended and approved by the Committee on Labor and Human Resources, § 155(2), reprinted in S. 209 SUMMARY AND ANALYSIS, *supra* note 21, at 90, 130-31.

187. Pub. L. No. 96-364, 94 Stat. 1208.

188. H.R. 3904, 96th Cong., 2d Sess. § 409, 126 CONG. REC. 20,247 (1980); 126 CONG. REC. 23,291 (1980); S. 3151, 96th Cong., 2d Sess., 126 CONG. REC. 27,069 (1980) (remarks of Sen. Matsunaga).

189. The 1980 version also exempted the Hawaii Act only to the extent its provisions

added the proviso that it not be construed to exempt from section 514(a) "any State tax law relating to employee benefit plans."¹⁹⁰ The House unequivocally rejected inclusion of the Hawaii preemption language in MPPAA, however, in order to "preserve the coalition of business support for [MPPAA] that enabled us to save the legislation from the antilabor amendments that threatened to kill it."¹⁹¹

The language upon which the Senate had acted favorably in 1980 was reintroduced in the Senate in 1981.¹⁹² Under this language, the Hawaii Act remained frozen as of January 1, 1979. A House bill, however, deleted this limitation entirely.¹⁹³

In 1982 the Senate passed a bill embodying the same general language, but with one important difference—it only saved the

were not described in parts 1, 4, and 5 of subtitle B, title I of ERISA. In addition, the 1980 version added the requirement that the Secretary of Labor "conduct a study on the feasibility of extending the exemption from section 514(a)" to similar laws of other states, and prescribed a report to Congress within two years.

In a summary of the provision reported jointly to the Senate, the Labor and Finance Committees noted that "this provision should not be interpreted as a precedent for subsequent exceptions for individual States. While subsequent exceptions may result from a study of the Hawaii plan, the result may also be a repeal of the exception and a return to total preemption." 126 CONG. REC. 19,598-600, 20,242-47 (1980).

190. ERISA § 514(b)(5)(B)(i), 29 U.S.C. § 1144(b)(5)(B)(i) (1982).

In the previous session of Congress the Senate Committee on Labor and Human Resources had expressed the view that *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914 (D. Conn. 1978), was correct in holding that ERISA preempted a state statute imposing a tax on benefits paid to state residents under an ERISA-covered dental plan. S. 209 SUMMARY AND ANALYSIS, *supra* note 21, at 47 & n.21. The legislative history of Public Law 97-473 twice explained the "state tax law" exception. First, the Senate Finance Committee report on the bill stated that "the provision *does not affect the status*, under the preemption provisions of ERISA, of any State tax law relating to employee benefit plans." S. REP. NO. 646, 97th Cong., 2d Sess. 18 (1982) (emphasis added). This language suggests a "hands off" approach to the question of whether or not ERISA preempts any state tax law, including Hawaii's. Yet it does raise the question of why state tax laws were singled out. Although the Hawaii Prepaid Health Care Act provides for subsidies to employers in certain cases to help them meet their obligations under the Act, there seems to be no "tax" on employers associated with these subsidies. See HAWAII REV. STAT. §§ 393-41 to -47 (1976). Penalties and recoveries, however, are available against noncomplying employers. *Id.* §§ 393-33, -48 (1976 & Supp. 1982).

When Senator Dole introduced the Senate report on Public Law 97-473 on the Senate floor, he gave a slightly different, but consistent, explanation of the "state tax law" clause: "The bill amends ERISA to provide that Hawaii law relating to employer maintained health insurance plans would not be preempted by ERISA to the extent that the Hawaiian law does not relate to matters thoroughly regulated under ERISA or impose tax liability on insurance premiums or benefits." 128 CONG. REC. S13,151 (daily ed. Oct. 1, 1982) (emphasis added).

191. 126 CONG. REC. 23,645 (1980) (remarks of Rep. Thompson).

192. S. 1232, 97th Cong., 1st Sess. (1981), reprinted in *1982 Hawaii Hearings*, *supra* note 169, at 8.

193. H.R. 4046, 97th Cong., 1st Sess. (1981), reprinted in *1982 Hawaii Hearings*, *supra* note 169, at 6.

Hawaii Act as in effect on January 1, 1976.¹⁹⁴ As a result, Congress did *not* save from preemption the very provision that had sparked the *Standard Oil v. Agsalud*¹⁹⁵ decision. Senator Matsunaga "reluctantly" agreed to this "only to facilitate House approval of the amendment."¹⁹⁶ Yet the Senate Finance Committee maintained, in its report, that it believed "that the preemption [in 1974] of the Hawaii Prepaid Health Care Act by ERISA was *inadvertent*."¹⁹⁷ The House, now disposed to work with, rather than wholly reject, the Hawaii exemption proposal, amended the Senate language to preempt all post-ERISA provisions of the Hawaii law and to bring it to the form finally enacted as section 301 of Public Law 97-473.¹⁹⁸

194. H.R. 5470, 97th Cong., 2d Sess. § 301(a), 128 CONG. REC. S13,147, S13,149 (daily ed. Oct. 1, 1982). *Cf.* Council of Hawaii Hotels v. Agsalud, 594 F. Supp. 449, 455 n.8 (D. Haw. 1984) (stating that the Senate originally chose a 1977 date under the mistaken assumption that it would not change the result in *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981)).

195. 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

196. 128 CONG. REC. S13,154 (daily ed. Oct. 1, 1982).

197. S. REP. NO. 646, 97th Cong., 2d Sess. 18 (1982) (emphasis added).

198. All amendments to the Hawaii Act after the date of ERISA's enactment were excluded from exemption under the House version, except those providing for the Hawaii Act's "effective administration." Compare ERISA § 514(b)(5)(B)(ii) as enacted (excluding from exemption any post-Sept. 2, 1974, amendment of the Hawaii Act "to the extent it provides for more than the effective administration of such Act as in effect on such date"), with § 514(b)(5)(A), as proposed in H.R. 5470 (Senate version), 128 CONG. REC. S13,149 (exempting from 514(a) the Hawaii Act "as in effect on January 1, 1976"). Also, the savings clause for part 5 (Administration and Enforcement) of subtitle B of title I of ERISA was restricted. Compare ERISA § 514(b)(5)(C) as enacted (saving only so much of part 5 as governs matters governed by parts 1 and 4) with § 514(b)(5)(C) as proposed in H.R. 5470 (Senate version), 128 CONG. REC. S13,149 (daily ed. Oct. 1, 1982) (saving part 5 in full). Lastly, the House deleted the requirement that the Labor Department study the feasibility of extending the exemption beyond Hawaii. See H.R. 5470 (Senate version) § 301(b), 128 CONG. REC. S13,149 (daily ed. Oct. 1, 1982). In its place the House adopted the language of the 1980 Senate report on the Senate's own language: "The amendment made by this section shall not be considered a precedent with respect to extending such amendment to any other State law." Pub. L. No. 97-473, § 301(b), 96 Stat. 2605, 2612 (1983). *Cf.* 126 CONG. REC. 19,598-600, 20,242-47 (1980), *quoted at supra* note 189.

Rep. Erlenborn, ranking minority member of the Education and Labor Committee, characterized § 301(b) of Public Law 97-473 as intended "[t]o help allay the fears of those who might otherwise view this action as the beginning of a weakening of Federal preemption under ERISA." 128 CONG. REC. H9610 (daily ed. Dec. 13, 1982). It is not stated whether § 301(b) is meant to forestall the use of § 301(a) as a precedent for future legislation, a precedent for future judicial interpretation, or both. Of course, no statute can actually forestall future legislation—on this ground, one might assume that § 301(b) was a message to the courts, and not future Congresses. On the other hand, a court plainly cannot use an "amendment" as "a precedent" for "extending such amendment." Thus, one must surmise that Congress intended § 301(b) not as a command to the courts, but rather a piece of advice to future Congresses.

The need for, and the history of, the Hawaii amendment sharply underscore the problems with section 514. On the one hand, a Senate Committee claimed that the original preemption of the Hawaii Act had been "inadvertent." And section 514(b) makes it clear that Congress had not meant to "occupy the entire field" of mandatory health insurance. Indeed, National Health Insurance was a lively and controversial topic during the period when ERISA was put in place, yet Congress refrained from going forward with it.¹⁹⁹ Mandatory health insurance is sufficiently complex and difficult to implement that, should Congress decide to occupy the field, prior experimental efforts of the states would be an important source of legislative wisdom.²⁰⁰ Accordingly, even from a perspective that is neutral with respect to the position of Standard Oil of California and other groups that fought to prevent the enactment of section 514(b)(5), it is likely that the preemptive effect of section 514(a) on prepaid health care laws was indeed unintended.

Given these unintended effects of section 514 as originally enacted, the subsequent insistence by preemption absolutists that all laws in any way related to employee benefits be preempted has probably deterred Congress from examining more carefully the areas in which it actually meant, in 1974, to override state laws and those in which it did not. There are many such laws, and Congress has yet to address them. But, as evidenced by the lengthy legislative history of the Hawaii exemption from preemption, use of statutory amendments to correct these inadvertences requires an enormous expenditure of time and effort—one that could have been avoided had the courts been left to balance competing state and federal interests through a flexible and adaptive judicial doctrine of preemption.

199. Over the last twenty years, legislative proposals for federalizing the provision or financing of health care in America, sometimes called National Health Insurance, have been numerous and controversial. They have yet to be enacted. See, e.g., *National Health Insurance: Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. (1980); STAFF OF HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 2D SESS., SUMMARIES OF SELECTED HEALTH INSURANCE PROPOSALS AND PROPOSALS TO RESTRUCTURE THE FINANCING OF PRIVATE HEALTH INSURANCE (Comm. Print. 1980).

200. Cf. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting):

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*B. Qualified Domestic Relations Orders Under the
Retirement Equity Act of 1984*

With *Stone v. Stone*²⁰¹ and the rest of the marital preemption cases,²⁰² Congress faced a different problem than with *Standard Oil Co. v. Agsalud*.²⁰³ In marital preemption cases, federal courts were adopting a position diametrically opposed to the language of the statute, as was clear from the opposite results reached in (a) debt collection cases involving ex-spouses, and (b) debt collection cases involving unrelated creditors.²⁰⁴

In the hope of overcoming this problem, Congress inserted new language in ERISA and the Internal Revenue Code to permit the application of state law in some family property cases, to prohibit it expressly in others, and, by clear inference in the legislative history, to prohibit application of state law in all other debt collection uses.²⁰⁵ The key to escaping preemption under the new law is the "qualified domestic relations order" (QDRO), defined in section 206(d)(3) of ERISA²⁰⁶ and section 414(p) of the Internal Revenue Code.²⁰⁷

A QDRO is defined as a domestic relations order, that is, an order pursuant to state domestic relations law relating to child support, alimony, or family property rights of spouses, ex-spouses, and children,²⁰⁸ that creates an alternate payee's right to benefits under a plan,²⁰⁹ and that meets several requirements as to specificity²¹⁰ and non-interference with existing plan provisions and existing QDROs as to type, form, and amount of benefits paid.²¹¹ The alternate payee must be a spouse, former spouse, child, or other dependent.²¹²

The nonassignment clauses ERISA and the Code require for

201. 450 F. Supp. 919 (1978).

202. See *supra* notes 82-95 and accompanying text.

203. 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 663 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

204. See *supra* notes 118-38 and accompanying text.

205. See, e.g., S. REP. No. 575, 98th Cong., 2d Sess. 19 (1984) (stating that the amendments "are necessary to ensure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA").

206. 29 U.S.C.A. § 1056(d)(3) (West 1985).

207. I.R.C. § 414(p) (West Supp. 1985).

208. ERISA § 206(d)(3)(B)(ii), 29 U.S.C.A. § 1056(d)(3)(B)(ii); I.R.C. § 414(p)(1)(B).

209. ERISA § 206(d)(3)(B)(i)(I), 29 U.S.C.A. § 1056(d)(3)(B)(i)(I); I.R.C. § 414(p)(1)(A)(i).

210. ERISA § 206(d)(3)(C), 29 U.S.C.A. § 1056(d)(3)(C); I.R.C. § 414(p)(2).

211. ERISA § 206(d)(3)(D), (E), 29 U.S.C.A. § 1056(d)(3)(D), (E); I.R.C. § 414(p)(3), (4).

212. ERISA § 206(d)(3)(K), 29 U.S.C.A. § 1056(d)(3)(K); I.R.C. § 414(p)(8).

pension plans must now state that they are inapplicable to QDROs. Instead, plans must provide for compliance with QDROs, but not *nonqualified domestic relations orders*.²¹³ Plans and plan administrators are required to adopt procedures for handling QDROs and determining whether orders are indeed QDROs.²¹⁴ The amended language makes numerous provisions to integrate the consequences of complying with QDROs into the existing ERISA and Code provisions governing plans in general.²¹⁵ Finally, new section 514(b)(7) of ERISA provides that section 514(a) shall not apply to QDROs.²¹⁶

These provisions, enacted in August 1984 as section 104 of the Retirement Equity Act of 1984 (REA),²¹⁷ represent the culmination of at least six years of legislative effort. In 1978 Representative Seiberling introduced a bill that would have simply modified the anti-assignment provisions of section 206(d) of ERISA and section 401(a)(13) of the Code by making them inapplicable to any assignment or alienation pursuant to a decree of divorce or separate maintenance, or an order of child support, so long as the order did not affect the time benefits were payable, and copies of the decree or order were submitted to the Secretaries of Labor and Treasury.²¹⁸

In 1979 bills in both the Senate and House included similar provisions, this time specifying that an order would be exempt only if it did not alter the date, timing, form, duration, or amount of benefit payments.²¹⁹ In 1981 Congress reconsidered the 1979 House bill.²²⁰ Until this point, these bills had generated little real activity in Congress. From 1981 on, however, comprehensive legislative proposals addressing women's pension rights included similar provisions.²²¹ These bills gradually added the

213. ERISA § 206(d)(3)(A), 29 U.S.C.A. § 1056(d)(3)(A); I.R.C. § 401(a)(13)(B).

214. ERISA §§ 206(d)(3)(G), 29 U.S.C.A. § 1056(d)(3)(G), (H); I.R.C. § 414(p)(6), (7).

215. ERISA § 206(d)(3)(F), (I), (J), 29 U.S.C.A. § 1056(d)(3)(F), (I), (J); I.R.C. §§ 72(m)(10), 402(a)(6) & (9), 402(e)(4), & 414(p)(5).

216. ERISA § 514(b)(7), 29 U.S.C.A. § 1144(b)(7).

217. Pub. L. No. 98-397, 98 Stat. 1426 (1984).

218. H.R. 13446, 95th Cong., 2d Sess. (1978) (introduced on July 12, 1978).

219. H.R. 1884, 96th Cong., 1st Sess. (1979) (introduced on Feb. 5, 1979); S. 209, 96th Cong., 1st Sess. § 128 (1979), *reprinted in 1979 ERISA Improvements Hearings, supra* note 21, at 9, 31-32. The Senate version would also have prevented plans from honoring any payment election not made by a participant or beneficiary. The House version would have added a paragraph to ERISA § 206(d)(3), stating that it was not intended to invalidate, impair, or supersede any state laws governing the acquisition, division, or distribution of community or marital property.

220. H.R. 1928, 97th Cong., 1st Sess. (1981) (introduced on Feb. 18, 1981).

221. *See, e.g.*, H.R. 1641, 97th Cong., 1st Sess. § 4 (1981) (introduced on Feb. 4, 1981); S. 1978, 98th Cong., 1st Sess. § 104 (1983) (introduced on Oct. 19, 1983); S. 918, 98th Cong., 1st Sess. §§ 3 & 4 (1983) (introduced on Mar. 24, 1983). *See also* H.R. 1488,

detail, including the express amendment of section 514,²²² that now appears with full force in the enacted REA provisions.

In House and Senate reports on REA, legislators described the changes regarding marital property as a clarification necessitated by a "divergence of opinion among the courts."²²³ The drafters also emphasized that the exception was limited to a subset of all domestic relations orders, a limit not previously outlined in the decisions of the courts.

Here again, as in the case of the 1983 Hawaii amendment to section 514, Congress demonstrated the inordinate amount of time and effort required to accomplish legislatively what might properly have been left to the courts. Moreover, in light of the wholesale disregard of the literal meaning of section 514(a) by the courts in family property cases, the slowness of Congress to amend ERISA to recognize that most state family property decrees are not preempted fostered the notion that, in all contexts, section 514(a) did not mean what it literally says. It remains to be seen whether the courts will respect the express and implied limitations of the 1984 amendments on non-QDROs.²²⁴

IV. FEDERAL PREEMPTION AND FEDERAL COMMON LAW

With the enactment of the two foregoing exceptions to section 514(a), Congress demonstrated the inability of the legislative process to perform the peculiarly judicial function of delineating the boundaries of state and federal law as they "relate to" employee benefit plans in a timely and sensitive fashion. The language of section 514(a) provides no basis on which to distinguish a case like *Stone v. Stone*²²⁵ from one like *Franchise Tax Board*.²²⁶ Yet correct public policy seems to demand that such a distinction be made. The purposes and policies that led Con-

98th Cong., 1st Sess. (1983) (bill identical to 1979 and 1981 House bills on marital property) (introduced on Feb. 15, 1983).

222. See S. 918, 98th Cong., 1st Sess. § 4 (1983).

223. H. REP. NO. 655 Part 2, 98th Cong., 2d Sess. 18 (1984); S. REP. NO. 575, 98th Cong., 2d Sess. 19 (1984). The only pro-preemption case cited for this divergence, however, was *Francis v. United Technologies Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978), which had been overruled by the 1980 Ninth Circuit *Stone* decision, also cited in the reports.

224. Cf. *In re Marriage of Williams*, 163 Cal. App. 3d 753, 766, 209 Cal. Rptr. 827, 835 (1985) ("The legislative history of [REA] does not condemn former case law permitting distribution of pension benefits to former spouses to satisfy spousal support obligations; rather, it merely recognizes the need for uniform standards.").

225. 450 F. Supp. 919 (1978); see *supra* text accompanying notes 84-85.

226. 679 F.2d 1307 (9th Cir. 1982), *vacated on other grounds*, 463 U.S. 1 (1983); see *supra* text accompanying notes 129-35.

gress to enact ERISA provided no basis for calling a halt to state experiments in comprehensive health care legislation, yet an amendment was required to permit even one such experiment that did not focus solely on insurance companies.²²⁷ Indeed, the experiment under review in *Rebaldo*²²⁸ probably did "relate to" benefit plans, and the Second Circuit's decision to avoid preemption, although no doubt wise as a matter of policy, is rather weak as a matter of statutory interpretation.

The problem is not merely theoretical. For courts to determine not only that state laws have been preempted but also how and whether to fill in gaps created by preemption, they must develop a common, coherent understanding of *why* state laws have been preempted. Were the basis for ERISA preemption similar to the broad principles of federalism set out by Justice Frankfurter in the *Garmon* case,²²⁹ then it would be clear that state laws, even if preempted, remain an important source of policy in crafting federal common law to fill the void. If preemption were limited to the subject matters ERISA covers, then it would be reasonable to infer that state laws should be respected only where Congress remained silent in ERISA. When all state laws that have any relation to employee benefit plans are preempted willy nilly, however, regardless of whether their purpose and subject matter are complementary to ERISA, it is hard for courts to craft a reasoned basis upon which to revivify appropriate and compatible state policies through creation of a federal common law of benefit plans. The problem with section 514(a), succinctly stated, is that it drains the preemption doctrine of both rationale and flexibility, implying that any law from a non-federal source is simply not relevant to benefit plans.

The remainder of this Article discusses some federal common law issues. This discussion is not exhaustive, but rounds out the analysis of the serious problems attending the enactment and interpretation of section 514(a) by focusing on the wide divergences of view the courts have shown as to the proper sources for and scope of a federal common law for benefit plans.

An extreme example of the difficulty caused by the inflexible preemption position reflected in the language of section 514(a) is

227. *Compare Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985) (discussed *supra* text accompanying notes 148-50), *with Standard Oil Co. v. Aghsalud*, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981) (discussed *supra* text accompanying notes 59-61).

228. 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2702 (1985); *see supra* text accompanying notes 100-04.

229. 359 U.S. 236 (1959); *see supra* text accompanying note 30.

the district court decision in *Amato v. Western Union International*.²³⁰ Xerox sold Western Union International to a subsidiary of MCI Communications Corp., and by an amendment to the Western Union pension plan, MCI caused certain Western Union employees to be shifted from that plan to MCI's plan. Under their old plan some employees could retire prior to age sixty-five without any reduction in their pension. Under MCI's plan, however, any early retirement would result in a pension actuarially reduced from the full pension available at age sixty-five. The employees sued Western Union, MCI, and its subsidiary on several grounds. Under ERISA, they alleged that the amendment unlawfully reduced their "accrued benefits"; that Western Union breached its fiduciary duties and engaged in a prohibited transaction; that defendants caused plan assets to inure to the benefit of Western Union; that the amendment was a partial plan termination calling for immediate vesting of prior benefits; and that the amendment triggered notification and reporting duties that had gone unmet. Under the "common law" plaintiffs alleged breach of contract provisions in the purchase agreement, plan, summary plan description, and trust agreement; tortious interference with contract relations between Western Union and plaintiffs; and unjust enrichment occasioned by the amendment's creation of a plan surplus.

The district court dismissed all but one of the claims. It first reasoned that ERISA defined the term "accrued benefit" as the annual benefit commencing at normal retirement age, or the actuarial equivalent of such benefit. An annual benefit commencing prior to normal retirement age, in this case sixty-five, necessarily exceeds the actuarial equivalent of the same annual benefit commencing at age sixty-five. The court concluded that the benefits of which plaintiffs were deprived were not "accrued benefits,"²³¹ and ERISA afforded *no* protection regarding those benefits. Largely on this basis, the court dismissed all of the ERISA claims except the claim that Western Union violated section 4043 of ERISA by failing to report to the Pension Benefit Guaranty Corporation (PBGC) that the plan had been amended in such a way that benefits payable with respect to some participants "may be decreased." It was clear that section 514 pre-

230. 596 F. Supp. 963 (S.D.N.Y. 1984), *aff'd in part, rev'd in part, and remanded*, 773 F.2d 1402 (2d Cir. 1985).

231. The Second Circuit reversed this portion of the district court decision. See 773 F.2d at 1414. To the extent that the Second Circuit reversed or remanded other portions of the decision, it did so largely to allow the district court to rethink its position in light of the reversal on the statutory "accrued benefits" issue. See *id.* at 1414, 1417-19.

vented plaintiffs from prevailing under state common law theories. The only possible remedy, then, was one under federal common law.

On its face much of this case seemed appropriate for application of federal common law. Plaintiffs had alleged the existence of an agreement, and a material breach of the agreement measurable in dollars. One would expect that, if true, these facts would give rise to a right of recovery. The court, however, held that no claim lay under federal common law. Its only explanation was a reference to a Third Circuit case, *Van Orman v. American Insurance Co.*,²³² in which the panel had noted, uncontroversially, that "[w]here Congress has established an extensive regulatory network and has expressly announced its intention to occupy the field, federal courts will not lightly create additional rights under the rubric of federal common law."²³³ Unlike *Amato*, however, *Van Orman* had invoked this principle to prevent federal common law from *upsetting* contractual expectations, not from helping to meet such expectations.²³⁴

This anomalous result shows how unguided preemption, together with gaps in ERISA's substantive provisions, contribute to creating unwarranted problems. Of course, the district court's reasoning in *Amato* may not represent a leading trend in this field.²³⁵ For example, *In re White Farm Equipment Co.*²³⁶ reached an opposite result where the issue was whether retirees who had been promised post-retirement health and welfare benefits could enforce that promise under federal common law. Although such benefits had not "accrued" within the technical meaning of ERISA, the court noted that "nothing in ERISA indicates that Congress intended to make contracts unenforceable.

232. 680 F.2d 301 (3d Cir. 1982).

233. *Amato*, 596 F. Supp. at 973 (quoting *Van Orman*, 680 F.2d at 312) (emphasis added).

234. The Second Circuit also mentioned *Van Orman* in the context of plaintiffs' common law claim of unjust enrichment. While the district court had relied on *Van Orman* for the proposition that "there is no federal common law of unjust enrichment under ERISA," the Second Circuit said it preferred to reject plaintiffs' unjust enrichment claim "on a narrower basis." 773 F.2d at 1419. The appellate court stated that, in view of §§ 403(c)(1) and 404(a)(1) of ERISA (as interpreted by the court) there was no need to supplement the statute with an ERISA common law of unjust enrichment "in the circumstances of this case." *Id.* There is no other hint in the opinion that a different set of circumstances would warrant such a supplementing, although other courts have stated that such circumstances can exist. *See, e.g., Aircro Indus. Gases v. Teamsters Health & Welfare Pension Fund*, No. 84-123 MMS (D. Del. Sept. 11, 1985).

235. Certainly its influence should be eclipsed by the Second Circuit's partial reversal, even though the latter court refrained from expressly rejecting the district court's approach to the federal common law of employee benefit plans.

236. 42 Bankr. 1005 (N.D. Ohio 1984).

Rather, if the state law is preempted, then the contract must be construed in accordance with federal law, in this case the federal common law of contract."²³⁷ In *Kuntz v. Reese*,²³⁸ the court held that a misrepresentation by a fiduciary to plan participants is a breach of fiduciary duty under ERISA section 404(a)(1)(A)(i),²³⁹ because it "would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections."²⁴⁰ Another court has given a reverse twist to reasoning of this type in order to *decline* finding a state law preempted by ERISA. In *Scott v. Gulf Oil Corp.*,²⁴¹ the court essentially held that, if benefits sought were not part of an actual plan, state law must govern that claim to ensure the availability of at least some form of relief.²⁴²

Other cases raise, without answering, questions of a similar type. Under the facts of *Authier v. Ginsberg*,²⁴³ for example, should it be the case that federal common law gives a fired plan administrator a cause of action for wrongful discharge because he is fired for fulfilling pension duties? And where pension benefits are forfeitable upon breaches by ex-employees of noncompetition agreements that would have been illegal under preempted state laws, should federal common law adopt rules as to which noncompetition agreements are valid and which are not?²⁴⁴

A divided Supreme Court recently aired these kinds of uncertainties in *Massachusetts Mutual Life Insurance Co. v. Russell*.²⁴⁵ The Ninth Circuit had held that extra-contractual damages could be recovered by a plan participant, under section 409(a) of ERISA,²⁴⁶ for breach of fiduciary duty based on alleged

237. *Id.* at 1014-15 (quoting *Holliday v. Xerox Corp.*, 555 F. Supp. 51, 55 (E.D. Mich. 1982), *aff'd*, 732 F.2d 548 (6th Cir.), *cert. denied*, 105 S. Ct. 294 (1984)). *See also* *Musto v. American Gen. Corp.*, 615 F. Supp. 1483, 1497-98 (M.D. Tenn. 1985) (applying federal common law, informed by state common law principles, to similar retirement benefits); *Cattin v. General Motors Corp.*, 612 F. Supp. 948 (E.D. Mich. 1985) (applying federal common law to early retirement benefits not protected by ERISA).

238. 760 F.2d 926 (9th Cir. 1985).

239. 29 U.S.C. § 1104 (1982).

240. *Id.* at 935 (quoting *Russell v. Massachusetts Mutual Life Ins. Co.*, 722 F.2d 482, 488 (9th Cir. 1983), *rev'd*, 105 S. Ct. 3085 (1985)).

241. 754 F.2d 1499 (9th Cir. 1985). *See supra* text accompanying notes 157-59.

242. 754 F.2d at 1506.

243. 757 F.2d 796 (6th Cir.), *cert. denied*, 106 S. Ct. 208 (1985).

244. *Cf. Lojek v. Thomas*, 716 F.2d 675 (9th Cir. 1983) (implying in dicta that ERISA preempts state common law on the validity of an anticompetition clause in a pension plan); *Hillis v. Waukesha Title Co.*, 576 F. Supp. 1103 (E.D. Wis. 1983) (discussing the reasonableness of an anticompetition clause in a pension plan by reference to state law).

245. 105 S. Ct. 3085 (1985).

246. 29 U.S.C. § 1105(a) (1982).

improper or untimely handling of benefit claims.²⁴⁷ The Supreme Court unanimously reversed, holding that section 409(a) did not expressly or impliedly offer plaintiffs relief of this kind. Because the plaintiff in *Russell* had relied entirely on section 409(a), and expressly disclaimed reliance on section 502(a)(3), which entitles participants to obtain "appropriate equitable relief" to redress ERISA or plan violations in general, the Court had no occasion to consider whether any provision of ERISA other than section 409(a) authorized recovery of extra-contractual damages.²⁴⁸ Four Justices, however, joined in a concurrence by Brennan that expressed concern about "dicta in the Court's opinion . . . that could be construed as sweeping more broadly than the narrow ground of resolution set forth above,"²⁴⁹ and about remarks viewed as "simply incompatible with the structure, legislative history, and purposes of ERISA."²⁵⁰

The concurrence stated that "[t]o the extent the Court suggests that administrators might not be fully subject to strict fiduciary duties to participants and beneficiaries in the processing of their claims *and to traditional trust-law remedies* for breaches of those duties, I could not more strongly disagree."²⁵¹ Whereas the Court expressed a reluctance to "'fine-tune' an enforcement scheme crafted with such evident care as the one in ERISA,"²⁵² the concurrence argued that, insofar as section 502(a)(3) authorized "'other appropriate equitable relief . . . to redress' ERISA violations . . . [it] can only be read precisely as authorizing federal courts to 'fine tune' ERISA's remedial scheme."²⁵³ The concurrence characterized the Court's remarks "about the constrictive judicial role in enforcing ERISA's remedial scheme" as "inaccurate,"²⁵⁴ and suggested that what the Court had done was to ignore ERISA's clear legislative history calling on courts to develop a federal common law for benefit plans.²⁵⁵

The two opinions in *Russell* reflect sharply divergent views on the correct approach to creating a federal common law for benefit plans. Given the importance that four Justices, and presumably Congress, ascribed to state sources of benefit plan law, it

247. *Russell v. Massachusetts Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983).

248. 105 S. Ct. at 3089 n.5.

249. *Id.* at 3095 (Brennan, J., concurring).

250. *Id.*

251. *Id.* (emphasis added).

252. *Id.* at 3093.

253. *Id.* at 3097 (Brennan, J., concurring).

254. *Id.*

255. *Id.* at 3097-98 (quoting 120 CONG. REC. 29,942, 29,933 (1974)).

seems unfortunate that the other five Justices appeared opposed to this approach.²⁵⁶ The stark language of section 514(a), when contrasted with the state trust-law roots of much of ERISA, does nothing to discourage this gap. Regardless of what the *content* of that law should be, Congress could have chosen several approaches to preemption that would have produced less controversy regarding the *method* of crafting a federal common law for benefit plans.

A successful preemption approach for these purposes should be sufficiently flexible to (a) account for differing degrees of past congressional attention to the different subject matters of ERISA; (b) allow for a balancing of competing federal and state interests in setting standards of conduct affecting benefit plans; and (c) allow for borrowing or enforcement of state laws and procedures, where extension of federal common law to a particular subject matter would constitute judicial usurpation of a peculiarly legislative function—as would be the case were federal courts to set out to establish garnishment procedures or criminal penalties for failures to contribute to benefit plans. Under a regime of this kind, decisions of federal common law would not be made in the artificial atmosphere of a state-law vacuum. Where appropriate, state law would control; and in other circumstances, courts would fashion federal common law with due regard to state-established norms of behavior.

256. The concurring opinion of Justice Brennan in *Russell* provides an important and perceptive statement of the importance of state law sources of this federal common law:

I believe that, in resolving this and other questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by *state* and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA's equitable remedies.¹⁸

18. "Where the courts are required themselves to fashion a federal rule of decision, the source of that law must be federal and uniform. Yet, *state* law where compatible with national policy may be resorted to and adopted as a federal rule of decision. . . . Here, of course, there is little federal law to which the court may turn for guidance. State regulation of insurance, pensions, and other such programs, however, provides a pre-existing source of experience and experiment in an area in which there is, as yet, only federal inexperience. Much of what the states have thus far developed, particularly in the insurance field, is statutory. In certain areas of public concern, the state legislatures have been quite active in enacting comprehensive regulatory schemes, and state statutory sources of law will no doubt play a major role in the development of a federal common law under ERISA, particularly in defining rights under employee benefit plans."

Id. at 3098-99 (quoting *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 426 F. Supp. 316, 325 (N.D. Ind.), *modified on other grounds*, 567 F.2d 692 (7th Cir. 1977) (emphasis added)).

CONCLUSION

The language of ERISA section 514(a) has made it impossible to develop a sound or internally consistent jurisprudence of ERISA preemption. Some positions that are fully justified, indeed required, by faithful adherence to the literal language of section 514 simply constitute bad policy, and would not, absent the rigid language of the statute, be adopted by the courts. Congress's delay in enacting needed statutory amendments probably served to heighten the perception that section 514(a) need not be taken too literally. The fairly strict adherence to the plain meaning of section 514(a) that has been demonstrated by the Supreme Court, however, and the obvious reluctance of Congress to enact any but the most limited or compelling exceptions to preemption, have undoubtedly clarified that in all but the most unusual case the preemption rule of ERISA is to be applied quite broadly and literally.

The clearly mandated but sweeping application of section 514(a) not only voids myriad state laws, it leaves grave uncertainties about how and whether to fill the gaps they created. Because there are enormous gaps to fill, the absence of guiding policy creates unfortunate difficulties and pressures for the courts. If the gaps are to be filled, the courts must derive a federal common law concerning trusts, fiduciary duties, contracts, remedies, and the like by reference to existing, largely state law sources. Some courts have seized on the combination of preemption and federal silence as a basis for ignoring such sources; others have reached the opposite conclusion. Had Congress made it clear that state policy concerns had a legitimate role to play in preemption issues, the transition from state to federal regulation of benefit plans would be smoother and less arbitrary. The Supreme Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*²⁵⁷ displays a clear lack of consensus on the basic policies that must inform this transition. The only safe prediction is that the process will continue to lurch forward and backward unpredictably, in large part because the rigidity and sweep of section 514(a) defy credibility and common sense in many cases, and because, when applied as written, it leaves courts without adequate guidance with respect to how and the extent to which to fashion a federal common law for employee benefit plans.

257. 105 S. Ct. 3085 (1985).

