

Spring 2013

When Do State Laws Determine ERISA Plan Benefit Rights?, 47 J. Marshall L. Rev 145 (2013)

Albert Feuer

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WHEN DO STATE LAWS DETERMINE ERISA PLAN BENEFIT RIGHTS?

ALBERT FEUER*

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The Employee Retirement Income Security Act of 1974, as amended (“ERISA”)¹

“shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] employee benefit plan.”²

Such preemption does not “exempt or relieve any person from any law of any State which regulates insurance, banking, or securities,”³ but an employee benefit plan shall not be “deemed” to be engaged in such activities for purposes of such state regulation.⁴ Nor does the preemption “apply to any generally applicable criminal law of a State.”⁵ This ERISA preemption section is “[p]erhaps the broadest preemption section ever enacted.”⁶

The bill setting forth the Employee Retirement Income

* The Law Offices of Albert Feuer, J.D., Yale Law School, Mathematics Ph. D., Columbia University. This article is dedicated to the memory of Samuel Eilenberg, one of the author’s Ph. D. thesis advisors, who would have celebrated his 100th birthday in 2013. Professor Eilenberg showed how senior faculty and practitioners may use their experience and knowledge to bring coherence and clarity to subjects with a multitude of results that appear to be subject to disparate rules.

1. The Employee Retirement Income Security Act of 1974 [hereinafter “ERISA”], Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.).

2. ERISA § 514(a), 29 U.S.C. § 1144(a) (2012).

3. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

4. See ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (indicating that there is no preemption for a plan established primarily for purpose of providing life insurance).

5. ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4).

6. Johnny H. Killian et al., *The Constitution of the United States of America Analysis and Interpretation*, S. Doc. No. 108-17, 262 (prepared by Congressional Research Service) (2002), available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf> (last visited March 24, 2013).

Security Act of 1974⁷ had overwhelming Congressional support. The committee members unanimously approved the conference report for the bill (hereinafter the “ERISA Conference Report”).⁸ The ERISA Conference Report was approved unanimously by the Senate,⁹ and by a House vote of 407 to 2.¹⁰

I. INTRODUCTION

ERISA was enacted because existing federal and state law did not adequately protect employee benefit plan participants and beneficiaries. Thus, Title I of the Act, the focus of this article, is entitled, “Protection of Employee Benefit Rights.”¹¹ Other titles have a similar emphasis.¹² The broad preemption of ERISA insures that state law will neither diminish nor enhance its protections. This article discusses the extent to which any of the five following general state laws affect ERISA benefit rights: (1) criminal law; (2) tax law; (3) debtor-creditor law; (4) domestic relations law; and (5) laws pertaining to property transfers on death.¹³ A similar discussion of how state power of attorney and

7. Pub. L. No. 93-406, 88 Stat 829-1035 (1974).

8. See 120 Cong. Rec. 29,928 (Aug. 22, 1974) [hereinafter the “ERISA Conference Report”] (indicating that the conference report was unanimously approved).

9. See 120 Cong. Rec. 29,963 (Aug. 22, 1974) (indicating that five absent Senators declared that if they were present they would have voted yes, but none of the other absent Senators declared that if they were present they would have voted no).

10. See 120 Cong. Rec. 29,215-16 (Aug. 20, 1974) (indicating that twenty-four of the twenty-five absent members were paired, so if the paired Congressman had voted the result would have been 419 to 14).

11. ERISA §§ 1-734.

12. Title II contains amendments to the federal tax provisions, many of which condition tax benefits on compliance with provisions similar to the Title I provisions. ERISA §§ 1001-2006. Title III describes the role of different federal entities in the enforcement of ERISA provisions. ERISA §§ 3001-3042. Title IV describes how the federal government will insure the payment of retirement benefits from certain pension plans. ERISA §§ 4001, 4402.

13. This article will not discuss the extent to which ERISA preempts state statute of limitation laws, state contract or misrepresentation law claims for employee benefits, state insurance laws (including claims review standards), state bankruptcy rules, state rules for recovering Medicaid expenditures, or most state labor laws (other than prevailing wage statutes and laws pertaining to the withholding of wage contributions to ERISA plans).

There are many excellent general preemption discussions. See, e.g., JEFFREY LEWIS ET AL., EMPLOYEE BENEFITS LAW 11-1-11-100 (BNA Books, 3d ed. 2012) [hereinafter “EMPLOYEE BENEFITS LAW”] (discussing the extensive case-law); see also Michael S. Gordon, Introduction to First Edition, included in EMPLOYEE BENEFITS LAW cxvi-cxvii (discussing the intentions of the legislative draftsmen); David Gregory, *The Scope of ERISA Preemption of State Law*, 48 U. PITT. L. REV. 427 (Winter 1987) (discussing the legislative history of ERISA, the statute, and the case-law); Kathryn J. Kennedy and Paul Shultz III, EMPLOYEE BENEFITS LAW: QUALIFICATION AND ERISA

guardian laws affect ERISA benefit rights may be found in an article entitled, *How Should ERISA Plans Handle Powers of Attorney and Court-Appointed Guardians and the Absence of Such Agents for Participants Lacking Capacity?*¹⁴

ERISA explicitly addresses each of these traditional state powers. ERISA significantly reduced, but did not eliminate, the ability of the states to exercise those powers with respect to ERISA plans, and their participants and beneficiaries.

There are three central preemption questions concerning the interaction between ERISA benefit entitlements and the five state laws. First, to what extent does ERISA permit those state laws to determine who is entitled to receive benefit payments from ERISA plans in whole or in part? Second, to what extent does ERISA permit those state laws to determine whether others may wrest plan benefit payments from plan participants or beneficiaries in whole or in part? Third, to what extent does ERISA permit those laws to determine indirectly the character and value of benefit rights, such as state taxes on plans or benefit providers, which

REQUIREMENTS 469-71 (LexisNexis, 2006) (discussing enforcement issues); John H. Langbein, David A. Pratt, and Susan J. Stabile, PENSION AND EMPLOYEE BENEFIT LAW 83-95, 818-905 (Foundation Press, 5th ed. 2010) [hereinafter "LANGBEIN PENSION LAW"] (discussing the legislative history, the statutory structure and the case-law); COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 645-766 (Thomson West, 2d. ed. 2007) [hereinafter "MEDILL EMPLOYEE BENEFITS LAW"] (discussing the legislative history and general principles in the context of extensive excerpts from the case-law); Howard Shapiro, Rene E. Thorne, and Edward F. Harold, *ERISA Preemption: to Infinity and Beyond and Back Again? (A Historical Review of Supreme Court Jurisprudence)*, 58 LA. L. REV. 997 (1998) (discussing the lack of clarity in the case-law and arguing that Congress made ERISA preemption so broad because of the need for a uniform federal regulatory and administrative scheme for ERISA plans); JAYNE E. ZANGELEIN ET AL., ERISA LITIGATION 121-80 (BNA Books, 4th ed. 2011) [hereinafter "ERISA LITIGATION"] (discussing the statutory language and the extensive case-law), 645-766 (discussing the legislative history and general principles in the context of extensive excerpts from the case-law); Wagner, Bianchi, and Marathas, 374-3rd T.M., *ERISA—Litigation, Procedure, Preemption and Other Title I Issues*, A-23-A-36 (2012) (discussing the legislative history, the statute, and the case-law); and Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807 (1999) (discussing the legislative history and the case-law and proposing an approach incorporating the ERISA context which implies that states may regulate HMOs and similar managed care providers and furnish tort remedies against them even when such providers are engaged by ERISA plans).

14. See Albert Feuer, *How Should ERISA Plans Handle Powers of Attorney and Court-Appointed Guardians and the Absence of Such Agents for Participants Lacking Capacity?*, 54 BLOOMBERG TAX MGMT. MEMO. 351 (Sept. 9, 2013) available at <http://ssrn.com/abstract=2324629> (last visited March 24, 2014) (setting forth benefit rights in addition to the right to recover benefits or to designate beneficiaries, which are the principle focus of this article). The article did not observe that a guardian may consent on behalf of a participant's incapacitated spouse to a participant's waiver of the required spousal survivor benefits. Treas. Reg. § 1.401(a)(20), Q & A 27 (amended 2006).

may diminish the funds available to pay benefits?

This article seeks to give readers the tools to draw their own preemption conclusions by reviewing and presenting extensive excerpts from ERISA, ERISA's legislative history, ERISA's regulations, and ERISA case law.

This article presents five ERISA preemption principles that give ERISA a modest role in resolving the three basic preemption issues, although many courts have not fully embraced these principles. The article also discusses how the five principles govern benefit rights in theory and in practice. These principles provide that, absent one of the four explicit exclusions or an implicit exclusion (such as that for the state regulation of health care providers), a state law is preempted if, and only if, the law: (1) prevents an ERISA plan participant or beneficiary from exercising benefit rights under the terms of such a plan; (2) affects an ERISA enforcement mechanism; or (3) imposes a specified mandate on an ERISA plan.

First, ERISA preempts any state law that prevents, in whole or in part, the exercise by a participant or a beneficiary of a benefit right under the terms of an ERISA plan. In particular, ERISA preempts a state law directing: (1) an ERISA plan to pay benefits to a person other than the person entitled to the benefits under the plan terms; or (2) a participant to designate a specific person as a beneficiary.

Second, ERISA preempts any state law, other than a generally applicable criminal law, that would render any benefit right of a participant or beneficiary "meaningless." In particular, ERISA preempts the use of: (1) a state-law law claim that arises from a participant's or beneficiary's right to an ERISA plan benefit to (a) compel the plan to pay the claimant such benefit, or (b) wrest the benefit or the amount of the benefit from the person entitled to those benefits under the plan terms, *i.e.*, the participant or beneficiary; or (2) a state law to penalize a participant, or the participant's estate, for failing to make a specified designation. However, a state tax law claim may be used to wrest a portion of an individual's ERISA distributed benefits to pay the state taxes imposed on the individual for those benefits.

Third, ERISA preempts any state law that adds or supplements an ERISA enforcement mechanism, or determines:

- Who is entitled to a plan report, or disclosure, or what must be, or may be, reported or disclosed (a reporting or disclosure mandate), other than one needed to implement a state law that is not otherwise preempted. Thus, state agencies that regulate health care providers may require an ERISA plan's health care facilities to report the information needed to implement such regulation. Furthermore, a state law imposing a tax on ERISA plan participants or beneficiaries based on their benefits, or a state law that (1) imposes none of

the below mandates, (2) does not prevent an ERISA plan participant or beneficiary from exercising benefit rights, and (3) does not affect an ERISA enforcement mechanism, may impose a reporting or disclosure mandate that is limited to the information needed to implement the tax law;

- the plan's benefit terms, including whether the plan must, or may, provide any of those benefits (a benefit terms mandate), other than one needed to implement a state-law that is not otherwise preempted, such as the benefits an ERISA plan health care facility may provide;
- who funds benefits, or what funding rules must be, or may be, imposed (a funding mandate), other than one needed to implement a state-law that is not otherwise preempted, such as the permissible premiums charged by an ERISA plan's life insurer; or
- Who is a fiduciary, or what fiduciary responsibilities must be, or may be, imposed (a fiduciary mandate).

Each such mandate shall hereinafter be designated as an ERISA General Mandate, and they shall be collectively designated as the ERISA General Mandates.

Fourth, ERISA does not preempt a state law that indirectly affects benefit rights by acting directly on plans, rather than directly on the plan benefit of a participant or beneficiary, unless the law prevents a participant or beneficiary from exercising his or her plan benefit rights, adds, or supplements an enforcement mechanism, or imposes an ERISA General Mandate. Thus, a state law is not preempted merely because it reduces the assets a plan has available to distribute as benefits to all its participants and beneficiaries, unless the reduction prevents the plan from paying any benefits. In particular, ERISA does not preempt the state taxation of plans if the tax law does not (1) prevent a participant or beneficiary from exercising his or her plan benefit rights, (2) add or supplement an enforcement mechanism, or (3) impose an ERISA General Mandate other than those mandates needed to implement the state tax.

Fifth, the ERISA preemption of a state statute is not determined by whether: (1) the statute refers to an ERISA plan or primarily affects ERISA plans; (2) the statute is a generally applicable law (except for generally applicable criminal laws that ERISA does not preempt); or (3) the statute imposes an administrative burden or economic cost on an ERISA plan. However, the statute is preempted if the reference, burden, or cost prevents a participant or beneficiary from exercising a benefit right under a plan's terms, results in an ERISA General Mandate (other than those needed to implement a state-law not otherwise preempted as described *supra*) or an enforcement mechanism. Thus, ERISA preempts confiscatory taxes or burdens which prevent a plan from providing benefits or prevent a participant or

beneficiary from retaining a benefit.

The Internal Revenue Code of 1986, as amended (the “Code”) addresses many matters that ERISA regulates. However, the Code, unlike ERISA, provides no means to compel plans or anyone else to pay benefits to plan participants or beneficiaries or to disclose any information to them. Instead, violations of the Code requirements may result only in unfavorable income-tax consequences for plans, their sponsors, participants, and beneficiaries. The Internal Revenue Service (“IRS”) sometimes permits a plan to address a violation of a Code requirement without fully complying with the requirement even when the requirement is identical to an ERISA requirement.¹⁵ In addition, the IRS may impose tax penalties on those who engage in specified conflict of interest transactions with tax-qualified pension plans.¹⁶ Thus, Code provisions raise no state law preemption issues.

II. ERISA BASICS

A. ERISA Protections for Plan Participants and Beneficiaries

ERISA protects participants and beneficiaries of those employee benefit plans governed by ERISA. These plans, referred to hereinafter as “ERISA plans,” consist of welfare plans¹⁷ and pension plans.¹⁸ ERISA welfare plans¹⁹ include healthcare, health

15. See e.g., *Cent. Laborers’ Pension Fund v. Heinz*, 541 U.S. 739, 739-40 (2004) (holding that an amendment that retroactively changed the suspension of benefit rules violated the anti-cutback rules of ERISA § 204(g), 29 U.S.C. § 1054(g), notwithstanding a contrary ruling in IRS Rev. Proc. 2005-23, 2005-1 C.B. 991, with respect to the tax qualification of those same provisions). See generally Albert Feuer, *Scriveners’ Errors, Drafting Errors, Operational Failures, Retroactive Amendments, Reformatations, ERISA, and the Tax Qualification of Pension Plan Trusts, Part I*, 31 TAX MGMT WEEKLY REP. 34 (Jan. 9, 2012) available at <http://ssrn.com/abstract=1983524> (last visited March 24, 2014); see also Albert Feuer, *Scriveners’ Errors, Drafting Errors, Operational Failures, Retroactive Amendments, Reformatations, ERISA, and the Tax Qualification of Pension Plan Trusts Part II*, 31 TAX MGMT WEEKLY REP. 75 (Jan. 16, 2012) available at <http://ssrn.com/abstract=1987303> (last visited March 24, 2014) (discussing the distinction between Code compliance and ERISA compliance).

16. Such transactions are called prohibited transactions. They are defined and governed by Code § 4975. 26 U.S.C. § 4975 (2013).

17. ERISA § 3(1), 29 U.S.C. § 1002(1).

18. ERISA § 3(2), 29 U.S.C. § 1002(2).

19. Welfare plans are generally defined as plans which provide participants or their beneficiaries with medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. ERISA § 3(1), 29 U.S.C. § 1002(1). These plans do not include payroll practices, such as sick pay, holiday pay, jury pay, or overtime. 29 C.F.R. § 2510.3-1(b)(3). See also *Massachusetts v. Morash*, 490 U.S. 107, 114-121 (1989) (distinguishing between ERISA covered welfare benefit plans and the

expense-reimbursement, life insurance, and disability, vacation, and severance plans. There are two basic kinds of ERISA pension plans.²⁰ First, are pension plans maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.²¹ Such plans are often called Top-Hat Plans.²² Second, are the vast majority of pension plans, which do not have such a limited purpose.²³ ERISA requires that these more widely used plans provide spousal survivor benefits.²⁴ Accordingly, these plans will hereinafter be referred to as “Spousal Survivor Benefit Plans.”²⁵

ERISA provides ERISA plan participants and beneficiaries with five increasing levels of protection.²⁶ The most extensive protections are limited to certain retirement plans, as is suggested by the formal ERISA title containing the phrase, “retirement income security.”

First, ERISA protects a participant and beneficiary of any ERISA plan by authorizing each such person to enforce the exercise of his or her federal benefit rights under the plan terms, including, but not limited to the right to recover the person’s

customary unfunded vacation benefit plans, which ERISA does not cover).

20. ERISA § 3(2), 29 U.S.C. § 1002(2).

21. ERISA §§ 201(2), 301(a)(3), 401(a)(1), 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). ERISA does not regulate unfunded pension plans, which are excess benefit plans. ERISA § 4(b)(5), 29 U.S.C. § 1003(b)(5).

22. See e.g., Andrew L. Oringer & Stacy L. DeWalt, *Courts Decide a Select Group of New Top Hat Cases*, J. OF RETIREMENT PLANNING 19 (May-June 2008) available at http://tax.cchgroup.com/images/FOT/JORP_05-08_Oringer-DeWalt.pdf (last visited March 24, 2014); Bruce McNeil, *Claims for Benefits Under Nonqualified Deferred Compensation Arrangements*, 41 COMP. P. J. 239, 239-40 (Oct. 4, 2013).

23. Pension plans, which are not subject to the exceptions for excess benefit plans and pension plans, such as Simplified Employee Plans, consisting only of IRAs. ERISA § 201, 29 U.S.C. § 1051.

24. ERISA § 205, 29 U.S.C. § 1055.

25. See Albert Feuer, *How the Supreme Court and the Department of Labor May Dispel Myths About ERISA’s Family Law Provisions and Protect the Benefit Entitlements that Arise Thereunder*, 45 J. MARSHALL L. REV. 635, 705 (Spring 2012) available at <http://repository.jmls.edu/cgi/viewcontent.cgi?article=1003&context=lawreview> (last visited March 24, 2014) [hereinafter “Feuer’s ERISA Myths”] (identifying and discussing two major ERISA myths: the plan administrative convenience myth, i.e., that a major purpose of ERISA is to reduce administrative burdens on plan sponsors and administrators, and the women’s myth, i.e., that ERISA was amended in 1984 to make it easier for women to enforce domestic relation orders pertaining to ERISA benefits).

26. Cf. PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW, at 11-23 (2010) (breaking ERISA into four different successive levels of regulation: (1) some employee benefits are not subject to any (2) reporting and disclosure rules, strict fiduciary rules, and preemption; (3) complex regulation of pension plans, including minimum standards; and (4) the most stringent rules for defined benefit plans, including minimum accrual and funding rules and plan termination rules).

benefits (other rights may, but need not include the right to choose a beneficiary).²⁷ ERISA further protects this entitlement by: (1) prohibiting anyone from interfering with the attainment or exercise of ERISA rights;²⁸ (2) imposing fiduciary responsibilities on any person who exercises any discretion over such a plan's assets or operations or is compensated for giving investment advice to such plans, including those responsible for reviewing benefit claims;²⁹ (3) requiring all benefit denials be given a full and fair review by a plan fiduciary;³⁰ and (4) authorizing the U.S. Department of Labor (the "DOL") to enforce any ERISA provision, one of which requires that plans make benefit payments pursuant to plan terms.³¹ The terms of an ERISA plan describe: (1) the plan benefits; (2) the requirements that each plan participant or beneficiary must meet in order to be entitled to those plan benefits; (3) how the plan benefits are financed; (4) how the plan benefits are determined and paid; and (5) the procedure for making and reviewing a benefit claim.

Second, ERISA further protects participants and beneficiaries in Spousal Survivor Benefit Plans and most welfare plans, such as healthcare, health expense-reimbursement, life insurance, disability, vacation, and severance plans.³² ERISA requires that such plans must comply with reporting and disclosure requirements.³³ The DOL may, and does, exempt some welfare plans from all of the ERISA reporting and disclosure requirements.³⁴ ERISA, may, and does, provide alternative ways to comply with these requirements for pension plans.³⁵ A DOL regulation exempts Top-Hat Plans from virtually all the reporting and disclosure requirements of ERISA.³⁶

27. See ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (also providing right to determine benefit rights without seeking a distribution).

28. See ERISA § 510, 29 U.S.C. § 1140 (providing civil relief for those suffering from such interference); see also ERISA § 511, 29 U.S.C. § 1141 (providing that criminal penalties may be imposed on those who coercively interfere with or prevent the exercise of ERISA rights).

29. See ERISA § 3(21), 29 U.S.C. § 1002(21) (declaring, not defining, such persons as fiduciaries without setting forth their duties and responsibilities).

30. 29 C.F.R. § 2560.503-1.

31. ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

32. Welfare plans that are covered by ERISA, but not subject to the reporting and disclosure requirements, are set forth in 29 C.F.R. § 2520.104-22, 24, 25, and 43.

33. ERISA §§ 101-111, 29 U.S.C. §§1021-1031.

34. ERISA § 104(a)(3), 29 U.S.C. §1024(a)(3). See e.g., 29 C.F.R. § 2520.104-22 (exempting apprentice plans from all reporting and disclosure requirements other than to report the plan to the DOL).

35. ERISA § 110, 29 U.S.C. §1030.

36. Pension plans that are covered by ERISA, but not subject to the reporting and disclosure requirements, other than to report the plan to the DOL, are set forth in 29 C.F.R. § 2520.104-23, although it may be argued that the DOL lacks the authority to establish such a broad exemption.

Third, ERISA further protects participants and beneficiaries in Spousal Survivor Benefit Plans and welfare plans. ERISA requires that (1) such plans must be established and maintained pursuant to a written document;³⁷ and (2) any person who exercises any discretion over such a plan's assets or operations or is compensated for giving investment advice to such plans, not merely those responsible for reviewing benefit claims, must comply with stringent fiduciary requirements.³⁸ ERISA exempts Top-Hat Plans from these requirements,³⁹ although as discussed *supra*, their fiduciaries are subject to unspecified ERISA fiduciary requirements, and claim fiduciaries are subject to the claims fiduciary requirements.

Fourth, ERISA further protects participants and beneficiaries in Spousal Survivor Benefit Plans by providing that those plans must: (1) provide spousal survivor benefits;⁴⁰ (2) defer to specified domestic relations orders and no other such orders;⁴¹ (3) prohibit the alienation of benefits;⁴² (4) satisfy minimal participation requirements;⁴³ and (5) satisfy minimal benefit accrual and vesting requirements.⁴⁴ No such requirements apply to ERISA plans that are not Spousal Survivor Benefit Plans, such as a Top-Hat Plan,⁴⁵ or a healthcare plan.⁴⁶ However, there are also distinct benefit terms mandates for healthcare and healthcare expense-reimbursement plans,⁴⁷ which this article will not discuss.

Fifth, ERISA further protects participants and beneficiaries in a subset of Spousal Survivor Benefit Plans by imposing funding requirements on such plans,⁴⁸ and providing a federal government guarantee for certain benefits of those pension plans.⁴⁹ Such protection does not extend to those Spousal Survivor Plans, which are individual account plans,⁵⁰ such as 401(k) plans. Individual account plans are not entitled to the federal benefit guarantees.⁵¹

37. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

38. ERISA §§ 3(21), 401-414, 29 U.S.C. §§ 1002(21), 1101-1114. *See* 29 C.F.R. § 2560.503-1 (setting forth the requirements applicable to fiduciaries making claims decisions).

39. ERISA § 401(a)(1), 29 U.S.C. § 1101(a)(1).

40. ERISA § 205, 29 U.S.C. § 1055.

41. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).

42. ERISA § 206(d), 29 U.S.C. § 1056(d).

43. ERISA §§ 202, 210, 211, 29 U.S.C. §§ 1052, 1060, 1061.

44. ERISA §§ 203, 204, 210, 211, 29 U.S.C. §§ 1053, 1054, 1060, 1061.

45. ERISA § 201(2), 29 U.S.C. § 1051(2).

46. ERISA § 201(1), 29 U.S.C. § 1051(1).

47. ERISA §§ 601-734, 29 U.S.C. §§ 1161-1191(c). This article will not discuss rights under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

48. ERISA §§ 301-305, 29 U.S.C. §§ 1081-1085.

49. ERISA §§ 4001-4067, 29 U.S.C. §§ 1301-1431.

50. ERISA § 3(34), 29 U.S.C. § 1002(34).

51. *See* ERISA § 4021(b)(1), 29 U.S.C. § 1321(b)(1) (excluding individual account plans from federal benefit guarantees).

Thus, there are three basic ERISA benefit protections: (1) ERISA gives ERISA plan participants and beneficiaries the right to exercise benefit rights under the terms of an ERISA Plan; (2) ERISA imposes ERISA General Mandates, *i.e.*, reporting or disclosure mandates, benefit terms mandates, a funding mandates, or fiduciary mandates, and (3) ERISA provides mechanisms for enforcing benefit rights and ERISA mandates.

B. Basic ERISA Preemption Principles

In general, ERISA preempts any state law that may or does “relate to any employee benefit plan” regulated by ERISA.⁵² This concept shall be denoted herein as the “ERISA General Preemption Rule.” The phrase “state law” includes all statutes, decisions, rules, regulations, or other state action having the effect of state law.⁵³ State statutes are often enforced with a state-court or administrative-agency order. Thus, such orders are preempted under the same standards as state statutes. For simplicity, the ERISA § 514 provisions, including both the ERISA General Preemption Rule and the exclusions set forth in that statute, shall be denoted herein as the “ERISA Express Preemption.”

The ERISA Express Preemption explicitly excludes from preemption subsets of five general state laws, each of which is a traditional state police power.⁵⁴ There is a broad exclusion for the most obvious police power, criminal law, but only for generally applicable criminal laws.⁵⁵ There is a broad exclusion for insurance, banking, and securities regulation of those providing such services to ERISA plans,⁵⁶ but the exclusion is not applicable to ERISA plans engaging in such activities.⁵⁷ There is a narrow exclusion for the insurance regulation of an ERISA plan established primarily for providing death benefits,⁵⁸ but none for the insurance regulation of an ERISA plan established primarily for providing healthcare reimbursements. There are some narrow health care regulation exclusions,⁵⁹ but there is no exclusion from ERISA preemption for health care regulation even though state

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

53. ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1).

54. Exclusions for state Medicaid programs, multiple employer welfare arrangements, and automatic employee contributions are being disregarded for the purpose of this discussion.

55. ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4).

56. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

57. *See* ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (providing that an ERISA plan or a trust associated with such a plan, shall not be deemed to be an entity subject to the insurance, banking or securities law exclusion).

58. ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B).

59. *See* ERISA § 514(b)(5)(A), 29 U.S.C. § 1144(b)(5)(A) (giving limited exclusion for the Hawaii Prepaid Health Care Act); *see also* ERISA § 514(b)(9), 29 U.S.C. § 1144(b)(9) (giving limited exclusion for state laws pertaining to portability of health insurance coverage).

regulation of health care providers can affect the benefits provided by health care plans.

The Supreme Court interprets statutes using the following five principles:⁶⁰ (1) a statute should be construed “in conformity with its dominating general purpose;”⁶¹ (2) statutory words should be interpreted as taking their ordinary, contemporary, common meaning when Congress enacted the statute;⁶² (3) a statute should be construed so as to avoid rendering “superfluous” any statutory language;⁶³ (4) the inquiry should begin and end with the statutory words, if the words are unambiguous;⁶⁴ and (5) if the text is ambiguous, one may “have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.”⁶⁵ Justice Robert H. Jackson stressed the limited circumstances in which legislative history is a useful tool,⁶⁶ while Justice Stephen Breyer stressed the wide

60. See generally WILLIAM ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATIVE AND STATUTORY INTERPRETATION* Chs. 7 and 8 (2000) (discussing general statutory interpretation principles for all courts); HENRY M. HART, JR. & ALBERT M. SACKS, *The Legal Process: Basic Problems in The Making and Application of Law 1111-1380* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing general statutory interpretation principles with particular emphasis on when and how to supplement the statutory words for all courts); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 576-588 (2013) (discussing canons of statutory interpretation); YULE KIM, *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* CONG. RES. SERV. (2008); LARRY M. EIG, *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* CONG. RES. SERV. (2011).

61. See *Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943) (holding that oil lease assignments qualified as regulated “securities” or “investment contracts” under the statute, because sellers were offering exploration services in addition to the leaseholds).

62. See *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004) (holding that mineral reservations for United States in federal land grant statute did not cover gravel).

63. See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (holding that the tolling of statute of limitations for claims under Fair Credit Reporting Act until discovery of violation is limited to the statutory fraud exception).

64. *BedRoc*, 541 U.S. at 183.

65. See *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154-55 (1932) (holding that Congress intended to provide that railroads receiving US guaranty payments in accord with an ICC certification may not be required to refund any part of such payment on the basis of a post-payment change by the ICC of its method to compute guarantee payments, if the initial certificate did not arise because of fraud or a mistake in the original computation). *But see* HART, *supra* note 60, at 1255-1344 (discussing post-enactment aids to interpretation).

66. See Robert H. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 538 (1948) (stating that “[i]t is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage.”).

circumstances in which legislative history is a useful tool.⁶⁷ In contrast, Justice Thomas has argued that the Constitution's Bicameral and Presentment Clauses implies that preemption analysis consists of asking whether the ordinary meanings of state and federal law conflict, and should not consider the legislative history or statutory purpose.⁶⁸

A review of the language of the ERISA Express Preemption in concert with quick review of the other ERISA sections, using the first four principles would appear to yield eight unambiguous conclusions, although the courts, as discussed *infra*, have often reached different conclusions.

- First, the dominating general purpose of ERISA is the protection of plan participants and beneficiaries. This is why Title I of ERISA is entitled "Protection of Employee Benefit Rights," and the ERISA declaration of policy refers again and again to protecting the interests of participants (or employees) and their beneficiaries.⁶⁹
- Second, any state law, not exempted therein, that expressly conflicts with any ERISA provision relates to an ERISA plan. Thus, the ERISA Express Preemption preempts any such conflicting state law. In particular, ERISA preempts any state law that conflicts with the ERISA provision that plan terms determine the benefit rights of a plan's participants and beneficiaries.
- Third, ERISA does not preempt some state laws relating to an employee benefit plan, such as those requiring: (1) suppliers of goods to fulfill their contract obligation to all persons, including ERISA plans; (2) employers, including ERISA plans, to comply with state minimum wage laws; or (3) physicians employed by health care providers, including ERISA plans, to have state licenses. Similarly, ERISA would not preempt the application of a theft law to a person who steals money from an ERISA plan.
- Fourth, ERISA does not preempt a state law that only has a non-tenuous effect on any of the ERISA protections for plan participants and beneficiaries. Thus, ERISA does not preempt

67. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-62 (1992) (describing and defending five circumstances where it is useful for courts can to look to legislative history: (1) avoiding an absurd result; (2) drafting error; (3) determining specialized meaning; (4) identifying a reasonable purpose; and (5) choosing among reasonable interpretations of a politically controversial statute).

68. See *Hillman v. Maretta*, 569 U.S. ___, 2013 U.S. LEXIS 4167 at **28-29, 133 S. Ct. 1943, 1955 (2013) (Thomas, J., concurring) (holding there was preemption of a state law revoking a Federal Government Employees Life Insurance designation upon a participant's divorce) (citing *Wyeth v. Levine*, 555 U.S. 555, 585-88 (2009) (holding that FDA labeling laws do not preempt state law product liability claims)).

69. ERISA § 2(a), (b), (c), 29 U.S.C. § 1001(a), (b), (c).

laws, such as the contract, minimum wage, physician licensing, or theft laws described *supra*.

- Fifth, ERISA preempts those state laws that non-tenuously affect any of the rights of a participant to benefits under an ERISA plan's terms, including the right to receive benefit payments, to designate a beneficiary, or to a full and fair review of any benefit claim. All ERISA plan participants and beneficiaries must have these rights. Thus, the ERISA Express Preemption is most likely to prevent state law from modifying those rights.
- Sixth, ERISA preempts state laws that have a non-tenuous effect on any of the ERISA's benefit protections for plan participants and beneficiaries. Their provision is the ERISA dominating general purpose. Thus, the ERISA Express Preemption is most likely to prevent state law from modifying such protections.
- Seventh, a generally applicable state law with more than a tenuous effect on rights to employee benefits under an ERISA plan's terms is preempted by ERISA if it is not a criminal law. Otherwise, there would have been no need for an explicit exclusion for only those criminal laws that are generally applicable.
- Eighth, ERISA plans and plan benefit distributions may be subject to state income tax because ERISA does not exempt plans or such distributions from tax.

Further analysis of the ERISA legislative history, ERISA, and the case law is needed to clarify the significance of the phrase "relate to any employee benefit plan." The phrase seems to depend on the significance of two other phrases "a non-tenuous effect," and "ERISA benefit protections." Several major questions need to be answered to determine the precise interaction between ERISA and state law, *i.e.*, the federalism role of ERISA:

- Employee Benefit Plan Question: What is an ERISA employee benefit plan? ERISA only protects participants and beneficiaries in such plans.
- Employee Benefit Right Questions: What is the extent of the ERISA benefit rights, which include, but are not limited to the right to recover benefits and to designate beneficiaries? Under what conditions, if any, does ERISA preempt a law having a tenuous effect on an ERISA employee benefit plan, but a non-tenuous effect on plan participants or beneficiaries? In particular, under what conditions, if any, does ERISA preempt a state law pertaining to benefits that have been distributed to plan participants or beneficiaries?
- Criminal Law Questions: What is a criminal law? What is a generally applicable criminal law?
- Tax Law Questions: In 1983, tax laws became the only general

state laws that are expressly subject to the ERISA Express Preemption.⁷⁰ Which tax features are preempted, and which are permitted? Which taxes, if any, may be imposed on plans? Which taxes, if any, may be imposed on plan participants and beneficiaries? Under what conditions, if any, may taxes be withheld from ERISA plan benefit payments? Under what conditions, if any, may tax levies be applied to an ERISA plan's benefit payments? Under what conditions, if any, may tax levies be applied with respect to benefits that have been received by ERISA plan participants or beneficiaries?

- **Debtor-Creditor Law:** Debtor-creditor laws are the only one of the five general laws that have always expressly conflicted with a substantive ERISA requirement, *viz.*, certain pension plans must prohibit the alienation of benefits (the "Alienation Prohibition").⁷¹ To what extent, if any, does the Alienation Prohibition render ineffective state court orders by creditors for the payment of debts? Under what conditions, if any, may a creditor compel a plan to make benefit payments to such creditor, and which plans may be so compelled? Under what conditions, if any, may a creditor compel recipients of plan benefit payments to pay such creditor a portion of those payments?
- **Domestic Relations Law Questions:** In 1984, domestic relation laws became the only one of the five general state laws for which there is a narrow explicit exclusion from the ERISA Express Preemption, namely for a domestic relations order that is a qualified domestic relations order ("QDRO").⁷² What is a domestic relations order? What is a QDRO? Under what conditions, if any, may persons use domestic relations orders to compel plans to make benefit payments to them, and which plans may be so compelled? Under what conditions, if any, may a person use a domestic relations order to compel a recipient of plan benefits to pay such person those benefits?
- **Transfers on Death Law:** Transfers on Death law is the only one of the five general laws which has an important feature addressed in an ERISA definition, *viz.*, a beneficiary.⁷³ Under what conditions, if any, may state law be used to determine plan beneficiaries for survivor benefits? Under what

70. ERISA § 514(b)(5)(B), 29 U.S.C. § 1144(b)(5)(B). This section was added by Pub. L. No. 97-473 § 301(a), 96 Stat. 2605, 2611-2612 (1983).

71. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1). A similar ERISA conflict was introduced in 1984 for domestic relations orders that are not qualified domestic relations orders with the addition of ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3) by Pub. L. No. 98-397 § 104(a), 98 Stat. 1426, 1433-36 (1984).

72. ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7). This section was added by Pub. L. No. 98-397 § 104(b), 98 Stat. 1426, 1436 (1984). A similar exemption was later added to the same section for qualified medical child support orders by Pub. L. No. 103-66 § 4301(d), 107 Stat. 312, 377 (1993).

73. ERISA § 3(8), 29 U.S.C. § 1002(8).

conditions, if any, may state law be used to compel plan participants to designate specified parties as their beneficiaries? Under what conditions, if any, may state law beneficiaries, who are not plan beneficiaries, compel plans to make benefit payments to those persons, and which plans may be so compelled? Under what conditions, if any, may state law beneficiaries, who are not plan beneficiaries, compel recipients of plan benefit payments to pay a portion of those payments to those state law beneficiaries?

III. THE SUPREMACY CLAUSE AND SOME NON-ERISA PREEMPTION DECISIONS THE SUPREME COURT CITED IN ITS ERISA PREEMPTION DECISIONS

The Supremacy Clause of the United States Constitution provides that federal law is the “supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁷⁴

In 1962, the Supreme Court held in *Free v. Bland*, that community-property law could not be used to defeat a right to a federal entitlement.⁷⁵ The Court therein considered the entitlement to survivor benefits from a federal U.S. savings bond that had been acquired with community property by a married couple and had been issued in the name of both spouses with an “or” between the names.⁷⁶ Under the relevant federal regulations such designation provided that “[i]f either co[-]owner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner.”⁷⁷ Thus, a surviving spouse, rather than the decedent’s sole heir and son from an earlier marriage, was entitled to full ownership of a savings bond.⁷⁸ The court declared:

The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall [in 1824] when he stated for the Court that any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.⁷⁹

Moreover, the Court in *Free* emphasized the extent of the preemption by further stating that the father could not be required

74. U.S. CONST. art. VI, § 1, cl. 2.

75. *Free v. Bland*, 369 U.S. 663 (1962).

76. *Id.* at 664-65.

77. *Id.* at 667 n.5 (citing 31 C.F.R. § 315.20).

78. *Id.* at 670.

79. *Id.* at 666 (citations omitted).

to use additional resources that he had to pay the son half of the value of such bond:

Notwithstanding this [survivorship] provision, the State awarded full title to the co-owner but required him to account for half of the value of the bonds to the decedent's estate. *Viewed realistically, the State has rendered the award of title meaningless.* Making the bonds security for the payment confirms the accuracy of this view. If the State can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the State has interfered directly with a legitimate exercise of the power of the Federal Government to borrow money.⁸⁰

It should be noted that domestic relations law, however, may be applied to obtain an ownership interest in a federal savings bond.⁸¹

Much of the confusion about the extent of preemption of a federal statute may stem from the Supreme Court's approach in 1949 in *H.P. Hood & Sons, Inc. v. Du Mond*.⁸² The Court described a broad exemption for protective state statutes to the rule that the commerce clause of the Constitution⁸³ preempts state laws that burden interstate commerce, as follows:

This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.⁸⁴

One respected commentator has similarly observed that the degree of deference of federal statutes to state laws depends upon the protection afforded by the state law in question.⁸⁵ Such an emphasis on the protective nature of the state law may distract from the most important factor determining the preemptive effect

80. *Id.* at 669 (emphasis added).

81. *See* 31 C.F.R. § 315.22 (providing for deference to divorce decree provisions that determine the parties' interest in U.S. bonds). Such provisions may be based on community property interests or equitable distribution. *Id.* However, it would appear that state elective-share laws that attempted to incorporate U.S. bonds in the statutory elective estate would be preempted on the same basis as the Free community property claim. *Id.*

82. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

83. U.S. CONST. art. I, § 8, cl. 3.

84. *H. P. Hood & Sons, Inc.*, 336 U.S. at 533.

85. *See* William L. Lynch, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 369-71 (1978) [hereinafter "*Preemption Analysis*"] (stating that state laws that protect the people inside state borders from physical injury have received the greatest deference). Laws that protect the people inside state borders from other dangers have received less deference. *Id.* at 363. State laws that purport to protect people mostly outside state borders have received little deference. *Id.*

of a federal statute. Namely, the terms of the federal statute, which, as discussed in *Free supra*, preempts any conflicting law, regardless of the protective nature of the state law, although the commentator did not make this mistake.⁸⁶

A. The Supreme Court Declares that a Federal Law That Pervasively Regulates a Field Preempts Any State Law Within the Regulated Field, But There is a Presumption Against Such Implicit Field Preemption

The key preemption issue of this article is the extent, if any, to which ERISA preempts the five state laws. Supreme Court preemption decisions often cite a 1947 decision of the Court, *Rice v. Santa Fe Elevator Corp.*⁸⁷ for the first of two contrasting principles that it presented. The first principle is that absent express preemption language there is a presumption against the preemption of state police laws, such as the five under consideration. The ERISA Express Preemption has such express language, so it is unclear why the Court cites this principle in ERISA decisions as it often does.⁸⁸ The second principle that is rarely cited in ERISA decisions is that if there is “pervasive” regulation of a field by a federal law, the federal law preempts any state law on a federally regulated matter within the field.⁸⁹ However, the ERISA Express Preemption may preempt even more state laws because it uses the phrase “related to,” which means that ERISA preemption includes, but may go beyond, matters that ERISA specifically regulates.⁹⁰ This broad inclusion is supported by the fact that as discussed *infra*, ERISA precursors limited preemption to matters regulated by ERISA.

86. See *id.* at 364-369 (explaining that express preemption provisions foreclose any need to analyze the statutory purpose).

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

88. See *e.g.*, *Malone v. White Motor Corp.*, 435 U.S. 497 (1978); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *D. C. v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992) [hereinafter “*Greater Washington*”]; *New York State Conference of Blue Shield & Blue Shield Plans v. Travelers Inc. Co.*, 514 U.S. 645 (1995) [hereinafter “*Travelers*”]; *Boggs v. Boggs*, 520 U.S. 833 (1997); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

89. Field preemption had been discussed earlier, although not in the sense of a pervasive federal law. See *generally* *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (referencing earlier decisions and holding that a new federal law requiring the registration of all aliens precluded enforcement of a pre-existing state law mandating registration of aliens within such state). *But see Preemption Analysis, supra* note 85, at 369-71 (describing this principle as finding preemption when there is a “potential conflict” between the federal and the state law).

90. See also Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 934-38 (Spring 2007), available at <http://repository.jmls.edu/cgi/viewcontent.cgi?article=1248&context=lawreview> [hereinafter “*Feuer’s Survivor Benefits*”] (last visited March 24, 2014) (discussing how the “relate to” preemption allows courts to overcome their reluctance to find field or conflict preemption of state laws).

Rice found a state law was expressly preempted, but in a dictum laid the foundation for the implicit field preemption doctrine (“Field Preemption”).⁹¹ Field Preemption provides that if the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the States to supplement it, then any such supplementary law is preempted because it implicitly conflicts with the regulation.⁹² Of course, this leaves the questions of how to define the field and a supplementary law.⁹³

The Supreme Court held, in *Rice*,⁹⁴ that the United States Warehouse Act (the “Warehouse Act”)⁹⁵ preempted an Illinois statute, which sought to impose requirements on federally licensed warehousemen on matters addressed by the Warehouse Act. The decision rested upon the following addition of express preemption language to the statute in 1931, that “the mandatory words ‘the power, jurisdiction, and authority’ of the Secretary conferred under the [Warehouse] Act ‘shall be exclusive with respect to all persons’ licensed under the Act.”⁹⁶

The Court observed that both the House Committee and the Senate Committee that prepared the addition described the addition as designed to make the federal act independent of any state legislation or regulation.⁹⁷ Thus, Illinois could not regulate a federal warehouse licensee on the matters regulated by the federal act, and those state provisions were preempted.⁹⁸ However, there was no preemption of provisions on matters not expressly regulated.⁹⁹ Although, the Court was not applying Field Preemption because there was express preemption, this approach appears to be more limited than the Court’s description of the scope of Field Preemption.

The *Rice* Court decision discussed the applicable preemption analysis for federal statutes that, unlike the Warehouse Act, lacked express preemption language:

Congress legislated here in [a] field which the States have traditionally occupied. *So we start with the assumption 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.* Such a purpose may be evidenced in several ways [in addition to express preemption sections, such as one in the Warehouse Act]. *The scheme of federal regulation may be so*

91. *Rice*, 331 U.S. at 230.

92. *See generally Killian, supra* note 6, at 266-268.

93. *Id.* at 266-67.

94. *Rice*, 331 U.S. at 230.

95. United States Warehouse Act, 39 Stat. 486 (1916) (codified in scattered section of 7 U.S.C.S. § 241 et seq. (2012)).

96. *Rice*, 331 U.S. at 233 (emphasis added).

97. *Id.* at 234.

98. *Id.*

99. *Id.* at 237-38.

pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.¹⁰⁰

The Court did not define the scope of state police powers or describe the fields which the States have traditionally occupied. The Court recently cited this Field Preemption language and analysis to support its holding in *Arizona v. United States*¹⁰¹ that parts of the Arizona alien-registration law were preempted.

Finally, the *Rice* Court addressed the extent to which a federal statute preempts a state statute if the statute contains a broad express preemption section, such as that in the Warehouse Act, as follows:

The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.¹⁰²

However, in the case before it, the *Rice* Court defined regulated matters narrowly. As discussed *supra*, it held that state laws pertaining to those warehouse matters regulated by the Warehouse Act were preempted by the Act.¹⁰³ However, it held there was no preemption of state laws pertaining to those warehouse matters not expressly regulated by the Act.¹⁰⁴ Thus, *Rice* suggests that the courts will show a deferential approach toward state law even when there is an express preemption provision in a federal law.

Thus, *Rice* is of limited relevance to the fundamental issue of the ERISA Express Preemption, namely the extent to which it preempts state law. The *Rice* presumption against implicit preemption is inapplicable because the ERISA Express Preemption as discussed, *supra*, has express preemption language. Moreover, the *Rice* deferential approach toward express preemption language is also inapplicable because the express ERISA language is far broader than that in the Warehouse Act,

100. *Id.* at 230-31 (emphasis added) (citations omitted).

101. *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492, 2501-2504, 2012 U.S. LEXIS 4872 at **18-30 (June 25, 2012).

102. *Rice*, 331 U.S. at 236.

103. *Id.*

104. *Id.* at 236-37.

which resulted only in the preemption of state laws in matters expressly regulated by ERISA. The ERISA Express Preemption language is not only broader but specifies three kinds of statutes, each of which is a traditional police power, that are not preempted, and one kind of statute, criminal law, the most unambiguous police power, that is partially preempted. *Rice* does not support the proposition that the “relate to” ERISA concept depends in any manner upon the character of the state law, such as whether it is a traditional police power, not expressly excluded. Rather, the extent of preemption would seem to be decided by the basic statutory interpretation principle of considering the extent to which the state law affects ERISA’s dominating general purpose of protecting plan participants and beneficiaries, *i.e.*, its benefit protection provisions.

B. Supreme Court Decisions Distinguishing Federal Laws That Preempt a Field From Those That Do Not

Several ERISA preemption discussions by the Supreme Court¹⁰⁵ cite a Supreme Court decision in 1963, *Florida Lime & Avocado Growers, Inc. v. Paul*,¹⁰⁶ that a state law was not preempted. The decision illustrated the difficulty of deciding whether Field Preemption applies, which is a question only for statutes that lack express preemption provisions. A closely divided Court held in *Florida Lime & Avocado Growers*,¹⁰⁷ that a California state marketing law permitting only mature avocados, which the law defined as those with an oil content of at least 8% by weight, to be sold in state was not preempted by the federal agricultural law, which measured maturity by the weight, size and planting date of the avocados.¹⁰⁸ Florida avocado growers raised the issue because their avocados could be mature even though they lacked the oil content required by California.¹⁰⁹

First, the Court plurality concluded that producers could comply with both the federal and state law,¹¹⁰ *i.e.*, there was no conflict preemption. Second, it cited the statement about deference to “historic police power” in *Rice, supra*.¹¹¹ The Court was unable to find evidence of “an unambiguous congressional

105. See *e.g.*, *Alessi*, 451 U.S. at 522 (1981) (citing *Florida Lime & Avocado Growers, Inc.* in its ERISA preemption discussion); see also *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983) (stating that the Court has frequently resolved preemption disputes in a similar jurisdictional posture); *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.* (“*Dillingham Constr.*”), 519 U.S. 316, 336 (1997) (citing to *Florida Lime & Avocado Growers* in its discussion of preemption).

106. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

107. *Id.* at 136-37.

108. *Id.* at 136-37, and 158-59.

109. *Id.* at 137-40.

110. *Id.* at 142-146.

111. *Id.* at 146.

mandate” for preemption.¹¹² The federal statute had no language pertaining to preemption or uniform standards, but instead referred to minimum standards.¹¹³ The legislative history showed an expectation that state regulation would continue after the enactment of the law.¹¹⁴ Finally, the substantial local variation in the federal production rules was consistent with the existence of parallel state regulation.¹¹⁵

In contrast, the dissenters observed that the federal government rejected the validity of the California test for maturity,¹¹⁶ and California had rejected 6% of the Florida avocados.¹¹⁷ They asserted that the federal statutory intention is to regulate the maturity and quality of produce “which may be marketed in . . . any and all interstate markets.”¹¹⁸ Thus, they concluded that California undermined the purpose of the federal statute at issue, by imposing maturity and quality standard different from the federal government.¹¹⁹ Therefore, the dissent concluded that the *Rice* requirements for a pervasive scheme of federal regulation were satisfied.¹²⁰

Many ERISA preemption discussions by the Supreme Court¹²¹ begin with a reference to *Jones v. Rath Packing Co., Inc.*,¹²² a 1977 decision in which the Supreme Court had little difficulty in finding field preemption of a state food labeling statute because one of the *Rice* criteria was satisfied. In particular, the federal Fair Packaging and Labeling Act (“FPLA”) permitted weight discrepancies because of moisture despite good distribution practices, whereas the state did not allow such discrepancies.¹²³

112. *Id.* at 147.

113. *Id.* at 147-48. In contrast, the Tobacco Inspection Act, 49 Stat. 731-735 passed the day before had such uniform standards language.

114. *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 149-50.

115. *Id.* at 150-51.

116. *Id.* at 163.

117. *Id.* at 166.

118. *Id.* at 175.

119. *Id.* at 167-175.

120. *Id.* at 176.

121. *See e.g., Malone*, 435 U.S. at 504 (beginning its ERISA preemption discussion with *Jones v. Packing Co.*); *see also Alessi*, 451 U.S. at 522 (referring to *Jones* in its discussion on when ERISA preemption is or is not favored); *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. California*, 463 U.S. 1, 20, n.20 (1983) (citing *Jones* in its discussion of availability of injunctive relief to enjoin the enforcement of preempted state laws); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985) (quoting *Jones* at the beginning of its preemption discussion); *Travelers*, 514 U.S. at 655 (citing *Jones* in support of the proposition that the historic police powers of the states are not preempted unless there is a clear and manifest purpose); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (quoting *Jones* for the principle that states traditionally regulate health matters).

122. *Jones v. Rath Packing Comp. Inc.*, 430 U.S. 519, 519 (1977).

123. *Id.* at 536-38.

However, the *Jones* Court held that the legislative history showed that “a major purpose of the FPLA is to facilitate value comparisons among similar products,” which would be undermined if different weight systems were permitted in different states.¹²⁴ Thus, the Court concluded there was an implicit conflict with state labeling requirements, which implied that those requirements were preempted by field preemption.¹²⁵

IV. THE SUPREME COURT HOLDS THAT THE MAJOR PRE-ERISA FEDERAL EMPLOYEE BENEFITS LAW, THE WELFARE AND PENSION PLANS DISCLOSURE ACT (“WPPDA”), DOES NOT PREEMPT THE SUBSTANTIVE REGULATION OF EMPLOYEE BENEFIT PLANS

The Labor Management Relations Act of 1947,¹²⁶ often called the Taft-Hartley Act, introduced the non-tax regulation of employee benefit plans, but the regulation was limited to collectively bargained plans. Section 302 of the Taft-Hartley Act requires that contributions to such plans be made “for the sole and exclusive benefit of the employees . . . and their families and dependents.”¹²⁷ Federal benefit claims could be brought by participants and beneficiaries against collectively bargained employee benefit plans based on the allegation that the plan as structured violated Section 302 of the Taft-Hartley Act.¹²⁸ In 1982, the Supreme Court in *UMWA Health & Retirement Funds v. Robinson*,¹²⁹ mentioned in a dictum that there was an issue whether the federal courts could enforce the fiduciary duties imposed by this section on such plan trustees.¹³⁰ The Court thus declined to resolve a split in the federal circuits about such judicial authority.¹³¹ In 1982, there was little need to resolve the split

124. *Id.* at 540-43.

125. *Id.* at 525-26 and 543.

126. Labor Management Relations Act (“Taft-Hartley Act”), Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.).

127. 29 U.S.C. § 186(c) (1947).

128. *See e.g.*, *Insley v. Joyce*, 330 F. Supp. 1228 (N.D. Ill. 1971) (denying motion to dismiss benefit claim based on allegation that break service rule violated exclusive benefit rule); *see also* *Rehmar v. Smith*, 555 F.2d 1362, 1369-72 (9th Cir. 1976) (remanding a decision reversing denial of survivor benefits to person other than spouse so that denial may be reviewed under arbitrary and capricious standards rather than resolving ambiguities in favor of participant).

129. *United Mine Workers Health & Ret. Funds v. Robinson*, 455 U.S. 562 (1982).

130. *See Id.* at 573, n.12 (1982) (holding that the plan may be amended by a collective bargaining agreement to increase health benefits only for certain widows of participants). Thus, there was no need to consider the court’s authority to review a benefit decision by the plan trustees. *Id.*

131. *See generally* John A. McCreary, Jr., *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 DUQUESNE L. REV.

because as discussed *infra*, such enforcement was provided in 1974 when ERISA was enacted.

Before ERISA, the federal government regulated employee benefit plans primarily with the Welfare and Pension Plans Disclosure Act of 1958, as amended [hereinafter “WPPDA”].¹³² The initial act contained reporting and disclosure requirements, but no substantive plan benefit requirements. The WPPDA did not provide participants or beneficiaries with the right to enforce benefit claims.

The Act covered welfare plans that were established for the purpose of providing “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.”¹³³ Collectively bargained plans were covered by the WPPDA.¹³⁴ Plans covering no more than twenty-five employees were not subject to the WPPDA.¹³⁵

The WPPDA required plan administrators to file with the DOL and make available upon request to plan participants and beneficiaries a description of the plan and an annual report containing financial information.¹³⁶ The only persons who could enforce the requirements in the initial act were plan participants and beneficiaries.¹³⁷ The initial version provided that the WPPDA did not preempt state laws pertaining to the operation or administration of the covered plans,¹³⁸ even though the associated Senate Report described the many weaknesses of those state laws.¹³⁹

1033, 1035-41 (1985) (discussing the employee benefits provisions imposed by the Taft-Hartley Act).

132. Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958) as amended by the Welfare and Pension Plans Disclosure Act Amendments, Pub. L. No. 87-420, 76 Stat. 35 (1962) [hereinafter “WPPDA”]. For a more general and detailed discussion of this statute see James A. Wooten, *Legislative and Political History of ERISA Preemption Part 3*, J. PENSION BENEFITS 15, 15-18 (2008) (discussing the evolution of ERISA preemption). We are disregarding the tax-qualification rules, which, as discussed *supra*, imposed tax penalties for non-compliance but did not require plans to pay any benefits or to disclose plan information to plan participants and beneficiaries. *Id.*

133. Pub. L. No. 85-836, 72 Stat. 997, § 3(a)(1).

134. See *e.g.*, *id.* at 5(b)(1) (the administrator definition would not otherwise reference those designated under a collective bargaining agreement).

135. *Id.* at § 4(b)(4).

136. *Id.* at §§ 5-7.

137. *Id.* at § 9(c).

138. See Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, § 10(b), 72 Stat. 997, 1003 (1958). *But see* Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, § 10(a), 72 Stat. 997, 1002-03 (1958) (prohibiting a state, other than employer’s home state, from requiring a state filing of items on federal required filings if copies of the federal filing were filed with such state).

139. See S. REP. 85-1440, at 9-16 (2d. Sess. 1958) (describing the

The WPPDA was extensively amended in 1962.¹⁴⁰ The Secretary of Labor was given the right to investigate and enjoin violations of the WPPDA,¹⁴¹ prescribe disclosure forms,¹⁴² and enforce newly enacted criminal laws banning kickbacks or bribery of plan officials.¹⁴³ The bonding requirements added a new Section 13, which superseded any overlapping state requirements.¹⁴⁴ However, the Amendment provided that nothing in the Amendment “authorize[d] the Secretary [of Labor] to regulate, or interfere in the management of, any welfare or pension benefit plan.”¹⁴⁵ The exemption for small plans was changed to apply only to one with at most twenty-five participants rather than one whose sponsor had less than twenty-five employees.¹⁴⁶

In 1978, the Supreme Court confirmed in *Malone v. White Motor Corp.*,¹⁴⁷ that the WPPDA, as in effect immediately before ERISA became effective, did not preempt state substantive regulation of employee benefit plans.¹⁴⁸ The Court therein decided that the WPPDA did not preempt a Minnesota statute setting forth minimum funding and vesting rules for pension plans. White Motor Corp. challenged the law because the company had terminated a collectively bargained plan, when the plan lacked sufficient assets to pay all accrued benefits, and provided that benefits could only be paid from the plan’s assets.¹⁴⁹ The Court first noted in a footnote that ERISA preempted the Minnesota law, but such preemption was moot because the plan termination at issue occurred before ERISA’s effective date.¹⁵⁰ After expressing reluctance to find a state law was preempted without clear congressional intent to do so, the Court held that the National Labor Relation Act of 1947 (commonly referred to as the Taft-Hartley Act),¹⁵¹ often does not preempt state regulation of pensions, even though pensions must be a subject of bargaining under such Taft-Hartley Act.¹⁵² The Court based its similar

inadequacies of the existing criminal laws, trust law, and insurance regulation).

140. *See generally* Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, 76 Stat. 35 (1962) (setting forth amendments of the WPPDA).

141. Pub. L. No. 87-420, § 15, 76 Stat. 35, 37-38 (1962).

142. Pub. L. No. 87-420, § 7, 76 Stat. 35, 36 (1962).

143. Pub. L. No. 87-420, § 17, 76 Stat. 35, 41-43 (1962).

144. Pub. L. No. 87-420, § 16, 76 Stat. 35, 39-40 (1962).

145. Pub. L. No. 87-420, § 15, 76 Stat. 35, 38 (1962).

146. Pub. L. No. 87-420, § 6, 76 Stat. 35, 36 (1962).

147. *Malone*, 435 U.S. 497 (1978).

148. *Id.* at 514.

149. *Id.* at 499-502.

150. *Id.* at 499, n.1.

151. Labor Management Relations Act (“Taft-Hartley Act”), Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

152. *Malone*, 435 U.S. at 504-505.

conclusion about the WPPDA on both the statutory language and its legislative history. In particular, there was no basis to imply congressional preemption intent from the following relevant statutory language within the WPPDA § 10(b) titled “Effect of Other Laws:”

The provisions of this Act, except subsection (a) of this section and section 13, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.¹⁵³

Also, § 10(a), after shielding an employer from duplicating state and federal filing requirements, makes clear that other state laws remained unaffected:

Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan.¹⁵⁴

The court found further support for the lack of preemption in the legislative history of the WPPDA,¹⁵⁵ such as the following language from the report of the Senate Committee that helped develop the initial WPPDA language: “[The] legislation proposed is not a regulatory statute. It is a disclosure statute and by design endeavors to leave regulatory responsibility to the States.”¹⁵⁶

The Court also distinguished the WPPDA deferential approach to state regulations from the opposite approach of ERISA by citing a WPPDA draftsman’s statement:

This present bill [for WPPDA] provides for far more than anticorruption legislation directed against the machinations of dishonest men who betray their trust. Rather, it inaugurates a new social policy of accountability. . . . This policy could very well lead to the establishment of mandatory standards by which these plans must be governed.¹⁵⁷

The Court then distinguished the WPPDA from ERISA as follows:

It is also clear that Congress contemplated that the primary responsibility for developing such ‘mandatory standards’ would lie

153. *See id.* at 505 (emphasis added).

154. *See id.*

155. *Id.* at 506-512.

156. *Id.* at 507 (citing S. REP. NO. 1440, 85th Cong., (2d Sess. at 18 (1958)).

157. *Id.* at 512 (citing the statement by Senator Howard Smith, the ranking Republican on the Senate Committee that prepared the relevant bill at 104 CONG. REC. 7517 (April 28, 1958)).

with the States. Although Congress came to a quite different conclusion in 1974 when ERISA was adopted, the 1958 Disclosure Act clearly anticipated a broad regulatory role for the States.¹⁵⁸

Thus, the court held that the Minnesota statute was not preempted by the WPPDA.¹⁵⁹

The dissent made two points. First, the dissent was disturbed that unlike ERISA the Minnesota law was retroactively effective.¹⁶⁰ In particular, after the plan sponsor terminated the plan, the state law increased the plan sponsor's obligation.¹⁶¹ Second, the dissent argued that the national labor law preference for collective bargaining resulted in the preemption of the state statute for the collectively bargaining plan at issue notwithstanding the WPPDA deference to state law on the regulation of employee benefit plans.¹⁶²

V. LEGISLATIVE HISTORY OF ERISA PREEMPTION
PROVISIONS, RIGHTS OF PARTICIPANTS TO ENFORCE
BENEFIT RIGHTS, SPOUSAL PROTECTIONS AND
ALIENATION PROHIBITION UNTIL THE APRIL 1974
SUBMISSION OF HOUSE AND SENATE BILLS TO
CONFERENCE COMMITTEE

White Motor leaves no question that ERISA preempts state laws that attempt to regulate the funding of ERISA plans. It also confirmed that ERISA transformed the employee benefit regulatory regime from one governed principally by the states to one governed principally by the federal government. However, the Court did not have to address therein the significance of the statutory phrase "relate to any employee benefit plan" because there was no question that ERISA preempted a state law governing pension funding and vesting standards. Thus, the decision provides no obvious implications for the ERISA preemption of any of the five state laws that are the subject of this article.

The ERISA legislative history sheds much light on the intended and actual significance of the ERISA Express Preemption.¹⁶³ This article's review of the legislative history of the initial version of ERISA is based in large part on the analysis and

158. *Id.*

159. *Id.* at 514.

160. *Id.* at 517-18 n.* (Powell, J., dissenting).

161. *Id.*

162. *Id.* at 515-518.

163. See James A. Wooten, *supra* note 132, at 15-18 (providing a general and detailed discussion of the history of the ERISA Express Preemption).

the sources set forth in James A. Wooten's a very comprehensive and thoughtful THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY [hereinafter "ERISA POLITICAL HISTORY"].¹⁶⁴ Considerable reliance was also placed on the sources, and indices set forth in the ERISA legislative history prepared by the Staff of Senate Committee on Labor and Public Welfare [hereinafter "ERISA LEG. HISTORY"].¹⁶⁵ It should be noted that this approach has been criticized as unlikely to generate any useful preemption conclusions because the history is so ambiguous.¹⁶⁶

President Ford's ERISA signing statement, which focused entirely on the retirement plan aspects of ERISA, declared that ERISA had "its genesis in a message to the Congress by President Nixon on December 8, 1971."¹⁶⁷ The cited message of President Nixon was entitled, "Special Message to the Congress on a Pension Reform Program," and also focused entirely on retirement plans.¹⁶⁸ The President therein referred to a proposal he offered in March of 1970, which like ERISA, was not limited to pension plans. It thus seems useful to begin the consideration of the development of ERISA with President Nixon's proposed 1970 legislation, which Senator Jacob Javits introduced as S. 3589 on March 13, 1970.¹⁶⁹

Every proposed bill, as discussed *infra*, shares the ERISA dominating general purpose, and provides additional benefit protections to plan participants and beneficiaries. Moreover, those

164. See JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY (U.C. Press, 2004) [hereinafter "ERISA POLITICAL HISTORY"] (presenting a general and detailed discussion of the history of ERISA, whereas this article is primarily focused on preemption issues). See also THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE, S. Part. 98-221, 1-45 (Aug. 1984) (describing the development of ERISA in broad strokes with almost no mention of the preemption provisions).

165. Staff Of S. Comm. On Labor and Public Welfare, 94TH CONG. LEG. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: PUBLIC LAW 93-406, at 3-65 (1976) [hereinafter "ERISA LEG. HISTORY"].

166. See e.g., Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. LEG. 35, 52-57 (1996) (discussing the ambiguity of the statute and the official legislative history).

167. *Statement by the President*, OFFICE OF THE WHITE HOUSE, <http://www.fordlibrarymuseum.gov/library/document/0248/whpr19740902-008.pdf> (last visited March 24, 2014).

168. *Special Message to the Congress on a Pension Reform Program*, THE AMERICAN PRESIDENCY PROJECT (Dec. 8, 1971), available at <http://www.presidency.ucsb.edu/ws/?pid=3248> (last visited March 24, 2014).

169. 116 CONG. REC. 7278 (March 13, 1970). But see, the ERISA LEG. HISTORY, *supra* note 165 (beginning with the introduction of pension legislation in both houses in January of 1973; ERISA POLITICAL HISTORY, *supra* note 164 (beginning with the origins of the American private pension plan system in the 19th century).

bills, like ERISA that is not restricted to tax provisions, preempt state laws which would affect any of those protections, subject to four explicit exclusions. This article will focus on four characteristics of these bills: (1) benefit rights provided, (2) the general preemption rule, (3) the exclusions from the general preemption rule; and (4) benefit terms mandates imposed with respect to spousal benefits and the alienation of benefits.

President Nixon's legislation presented by Senator Javits in March of 1970 imposed additional fiduciary, reporting and disclosure responsibilities on the welfare and pension plans subject to the WPPDA.¹⁷⁰ It also had four pertinent characteristics, as discussed *infra*. First, participants and beneficiaries are given the right to bring federal civil actions to recover benefits due them under the terms of the plans. Second, the law provided that the state laws related to the responsibilities imposed by the proposed legislation would be preempted. Third, there were four explicit exclusions from preemption. Banking law, insurance law, securities law, and any state law, which affects the rights of participants or beneficiaries to recover plan benefits, were all excluded. Fourth, there were no benefit terms mandates. Thus, there were none pertaining to spousal benefits or the alienation of their benefits.

The conference committee appointed to prepare legislation that both houses could approve (the "Conference Committee") was presented, as discussed *infra*, in April 1974 with bills which shared slightly different versions of the four characteristics in addition to imposing substantial reporting and disclosure mandates, benefit terms mandates, funding mandates, and fiduciary mandates on the employee benefit plans covered by the respective bills. First, both provided participants and beneficiaries with the right to bring federal civil actions to recover benefits due under the terms of the plans covered in the respective bills. Second, both provided that state laws that related to subject matters regulated by the proposed legislation would be preempted. Third, there were four explicit exclusions from preemption. Banking law, insurance law, securities law, and any state law which affects the rights of participants or beneficiaries to recover plan benefits are all excluded. Fourth, both required some pension plans, but not welfare plans, to provide default spousal benefits and prohibit the alienation of their benefits.

These changes on their face clarify the intended scope of the preemption provisions for the Congressional bills that impose much more extensive mandates than the President's proposed bill. The prohibited relation would appear to be an effect on a mandate. The bills do not discuss how much an effect results in preemption.

170. See 116 CONG. REC. 7278-80 (March 13, 1970) (Senator Javits describing the significance of the legislation that he is introducing).

There is no indication that preemption is determined by whether the effect is intended or direct. In general, these bills appear to preempt any state law which imposes a reporting and disclosure mandate, benefit terms mandate, funding mandate, or a fiduciary mandate on a plan subject to the bills. It should be irrelevant whether the effect is direct or indirect. However, the bills must permit those reporting mandates needed to enforce state laws that are not otherwise preempted, although not explicitly excluded from the bill's preemption provisions, such as state laws taxing pension payments or state laws regulating the practice of medicine requiring a plan to file reports with respect to the physicians they employ to treat plan participants. Questions remain whether there is preemption of a state law that seeks to impose (1) a mandate that differs in character from a bill mandate, such as requiring a cost of living feature for pension plans, or (2) a mandate on a plan that is not subject to such a mandate under the bill, such as a benefit terms mandate on an uninsured health care reimbursement plan.

The bills provided, as discussed *infra*, that state law may affect the right of participants and beneficiaries to recover benefits, such as to receive plan benefit payments. *A fortiori*, state law may affect such other rights as the right to choose the time or manner of benefit payment, to designate a beneficiary or to choose plan investments, which the bills do not address. The bills submitted to the Conference Committee could also reasonably have been concluded not to preempt state laws that required: (1) pension plans to withhold taxes from pension payments, (2) employee benefit plans to garnish benefit payments to pay a participant's debts, (3) employee benefit plans to pay a participant's benefits pursuant to the terms of domestic relations order; or (4) employee benefit plans to make plan payments in accord with a participant's community property interest in the benefits. On the other hand, there would be a question whether the funding provisions caused the preemption of state laws that criminalized the failure to make a required contribution to a plan covered by the bills.

*A. The March 1970 Initial Proposal by President Nixon
Supplements the WPPDA, Authorizes Participants to Enforce
Right to Benefit Payments, Introduces Fiduciary
Responsibilities and Preempts Laws Related to Regulation of
Fiduciary Responsibilities and Reporting, Disclosure
Requirements, But Preemption Explicitly Excludes Benefit
Claims and Banking, Insurance, and Securities Laws*

On March 13, 1970 Senator Jacob Javits introduced President Nixon's proposed 1970 legislation, as S. 3589.¹⁷¹ The bill, which

171. *Id.* at 7278.

would have amended the WPPDA, was called the Employee Benefits Protection Act.¹⁷² The bill imposed fiduciary responsibilities on those handling plan assets.¹⁷³ Participants and beneficiaries were given right to bring a federal civil action to recover benefits under the terms of the plan or clarify the right to future benefits.¹⁷⁴ However, the right applied only to plans subject to the WPPDA, and thus excluded small plans and unfunded plans for executives, as discussed *supra*. The bill contained the following preemption language:

Sec. 18. It is hereby declared to be the express intent of Congress that except for actions authorized by section 9(e) (1) (B) of this Act [benefit claims], the provisions of this Act shall supersede any and all laws of the States and of political sub-divisions thereof insofar as they may now or hereafter relate to the fiduciary, reporting and disclosure responsibilities of persons acting on behalf of employee benefit plans: Provided, That nothing herein shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act to be filed with the Secretary. Nothing herein shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (other than the Welfare and Pension Plans Disclosure Act of 1958 as amended (92 Stat. 994)) or any rule or regulation issued under any such law.¹⁷⁵

Thus, the insurance, banking, or securities law exclusion was present in the President's initial bill. The bill used the phrase "relate to," but only those laws that related to specified responsibilities regulated by the legislation were preempted.¹⁷⁶ The bill had no provisions pertaining to spousal benefits or an alienation prohibition.

We will not discuss any subsequent legislation until the May 1972 precursor to ERISA, which, as discussed *infra*, was the first employee benefits reform bill to be approved by a congressional committee after the introduction of the President's proposal.¹⁷⁷

172. S. 3589, 91st Cong. (2d. Sess. 1970), reprinted in 116 CONG. REC. 7280-84 (March 13, 1970).

173. See *id.* § 3, at 6 (adding definition (w) of fiduciary to WPPDA); see also *id.* § 11, at 26 (adding section 14 to WPPDA defining fiduciary responsibility).

174. See *id.* § 9, at 23 (adding section 9(e) to WPPDA).

175. See *id.* § 14 at 37-38 (emphasis added) (adding new section 18 to WPPDA).

176. *Id.*

177. See ERISA POLITICAL HISTORY, *supra* note 164, at 155-80 (discussing what occurred during the time between the introduction of the President's bill and the introduction of the Senators' bill in May 1972).

B. The May 1972 Senate Precursor to ERISA Supplements the WPPDA, Authorizes Participants to Enforce the Right Benefit Payments, Introduces Fiduciary Responsibilities, and Preempts Laws Related to Regulated Subject Matters, Which Preemption Explicitly Excludes Benefit Claims and Banking, Insurance, and Securities Laws

On May 11, 1972, Senators Harrison Williams and Jacob Javits introduced S. 3598 with eleven cosponsors.¹⁷⁸ The bill, which would have supplemented the WPPDA, was called the Retirement Income Security for Employees Act.¹⁷⁹ The bill, like the President's bill presented in March of 1970, imposed fiduciary responsibilities on those handling plan assets.¹⁸⁰ The DOL was the federal agency that was authorized to bring actions to compel compliance with the statutory terms.¹⁸¹ As in the President's bill presented in March of 1970, participants and beneficiaries were given the right to recover benefits under the terms of the plan or clarify the right to future benefits.¹⁸² Again, the bill applied only to plans subject to the WPPDA. Thus, none of the bill's substantive or enforcement provisions applied to pension plans that covered no more than twenty-five participants,¹⁸³ or were unfunded plans established primarily for a select group of management employees.¹⁸⁴

On September 15, 1972, when the bill was reported to the Senate by the Senate Labor and Public Welfare Committee, as amended, was the first pension reform legislation to be approved by a congressional committee.¹⁸⁵ The original bill had added a new section 15 to the WPPDA, entitled "Fiduciary Standards."¹⁸⁶ The reported bill added a provision to those standards requiring plans to "provide adequate and fair procedures to participants and beneficiaries when their benefit claims or applications are denied."¹⁸⁷ The bill continued to exclude small plans and unfunded plans for executives from its enforcement provisions.

178. S. 3598, 92d Cong. (2d. Sess. 1972).

179. *Id.* at Preface.

180. *See id.* § 502 at 52 (adding definition (25) of fiduciary to WPPDA); *see also id.* § 509, at 70 (adding section 15 to WPPDA defining fiduciary responsibility).

181. *See id.* §§ 601-02 at 81-82 (giving the DOL extensive authority to compel compliance with the law's requirements). Participants are also given authority to compel compliance. *Id.* § 603 at 82-83.

182. *Id.* § 604, at 83-84.

183. *Id.* § 104(b)(4), at 20.

184. *Id.* § 104(b)(6), at 20.

185. James A. Wooten, *Legislative and Political History of ERISA Preemption Part 2*, 14 J. PENSION BENEFITS 5, 8 (2007).

186. S. 3598, 92d Cong. § 509, at 70-80 (2d. Sess. 1972).

187. *See* S. REP. NO. 92-1150, at 43 (2d. Sess. 1972) (describing the introduction of the claims review procedures in S. 3598, 92nd Cong. § 510 at 169, 181 (2d. Sess. 1972)).

The bill as originally introduced and as reported to the Senate contained the following preemption language:

Sec. 609 (a.) It is hereby declared to be the express intent of Congress that, *except for actions authorized by section 604 of this title [benefit claims]*, the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the States and of political subdivisions thereof insofar *as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act*, except that nothing herein shall be construed

(1) to exempt or relieve any employee benefit plan not subject to this Act or the Welfare and Pension Plans Disclosure Act from any law of any State;

(2) to exempt or relieve any person from *any Act of any State which regulates insurance, banking, or securities* or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act to be filed with the Secretary; or

(3) to alter, amend, modify, invalidate, impair or supersede any law of the United States other than the Welfare and Pension Plans Disclosure Act or any rule or regulation issued under any law except as specifically provided in this Act.¹⁸⁸

Thus, the insurance, banking, or securities law exclusion was present in the initial bill. The bill used the phrase “relate to,” but only those laws that related to unspecified subject matters regulated by the legislation or the WPPDA were preempted.¹⁸⁹ The bill, as shown *supra*, permitted state law to affect employee benefit rights by affecting the enforcement by participants and beneficiaries of those rights.

The report that accompanied the bill as reported from the Senate Labor and Public Welfare Committee¹⁹⁰ described broad preemption and asserted that having plans governed by uniform law gives an unspecified advantage as follows:

Except where plans are not subject to the Retirement Income Security for Employees Act [*i.e.*, the bill] or the Welfare and Pension Plans Disclosure Act, and in certain other enumerated circumstances, state law is preempted. *Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law* in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. As indicated

188. See S. 3598, 92d Cong. § 609(a), at 86, 181-82 (2d. Sess. 1972) (emphasis added) (accompanying S. REP. NO. 92-1150 (1970) Section (b), which permits state laws that compel accountings or state court jurisdiction to apply federal law with the fiduciary, reporting, and disclosure requirements, has been omitted).

189. *Id.*

190. S. REP. NO. 92-1150 (2d. Sess. 1972).

previously, however, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired.¹⁹¹

The bill reported out by the Senate Labor Committee on September 15, 1972 was referred to the Senate Finance Committee on September 19, 1972, which reported out a bill on September 26, 1972.¹⁹² This bill retained the reporting and fiduciary standards, but eliminated the vesting and funding standards as well as the provisions providing for insurance of terminated plans; thus, the proponents of the original bill decided to not push it any further in the 92nd Congress.¹⁹³

C. The January 1973 House Precursors to ERISA Supersedes the WPPDA, Authorizes Participants to Enforce the Right to Benefit Payments, Introduces Fiduciary Responsibilities, Preempts State Laws Related to Regulated Responsibilities, Which Preemption Explicitly Excludes Benefit Claims and Banking, Insurance, and Securities Laws

On January 3, 1973, the House precursors of the legislation that would become ERISA were introduced by Representatives John Dent and Carl Perkins as H.R. 2¹⁹⁴ and as H.R. 462.¹⁹⁵ Both were referred to the Committee on Education and Labor on the same day.¹⁹⁶ The first House bill was entitled the Employee Benefit Security Act. Unlike the Senate's 1972 bill or the President's 1970 bill, the proposed reform act did not amend the WPPDA, but superseded it.¹⁹⁷ The House bill imposed fiduciary responsibilities not only on those handling plan assets, but also on those administering the plan.¹⁹⁸ The Senate 1972 bill gave participants and beneficiaries the right to recover benefits under the terms of the plan or clarify the right to future benefits.¹⁹⁹

191. *Id.* at 43 (emphasis added).

192. ERISA POLITICAL HISTORY, *supra* note 164, at 184-86.

193. *Id.* at 186-89.

194. Employee Benefit Security Act, H.R. 2, 93d Cong. (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3-65.

195. Employee Retirement Benefit Security Act, H.R. 462, 93d Cong. (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 67-87.

196. ERISA LEG. HISTORY, *supra* note 165, at 3 and 67.

197. Employee Benefit Security Act, H.R. 2, 93d Cong., § 115, at 49 (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3, 51.

198. Employee Benefit Security Act, H.R. 2, 93d Cong. § 2, at 3 (setting forth the policy of the act), § 3(23), at 10-11 (defining "fiduciary"), § 111, at 39-44 (imposing fiduciary responsibility) (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3, 5, 12-13, 41-46.

199. Employee Benefit Security Act, H.R. 2, 93d Cong. § 106(e)(1)(b), at 31, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3, 33. Participants also had the right to enforce disclosure and fiduciary requirements. *Id.* at § 106(e)(1)(a), (2) at 31, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3, 33.

There was no exemption from this enforcement provision for small plans or for unfunded plans for executives.²⁰⁰ The second bill, H.R. 462 was entitled the Employee Retirement Benefit Security Act, and was concerned only with providing federal insurance for certain pension plans. It contained no preemption provisions.

The preemption section in the first House bill is entitled, "Effect on Other Laws," and reads as follows:

Sec. 114. It is hereby declared to be the express intent of Congress that *except for actions authorized by section 106(e)(1)(B) of this Act [benefit claims]*, the provisions of this Act shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter *relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans: Provided*, That nothing herein shall be construed to exempt or relieve any person from *any law of any State which regulates insurance, banking, or securities* or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act to be filed with the Secretary. Nothing herein shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (other than the Welfare and Pension Plans Disclosure Act) or any rule or regulation issued under any such law.²⁰¹

Thus, the insurance, banking, or securities law exclusions were present in the initial House bill, as well as the Senate's 1972 bill, and the President's 1970 bill. All the bills used the phrase "relate to," but limited the relation to specified subject matters the bills regulated. The above House preemption provision, like that for the Senate's 1972 bill, expressly permits state law to affect employee benefit rights by affecting the enforcement by participants and beneficiaries of those rights. Unlike the Senate's 1972 bill reported out by the Senate Labor Committee, no provision addresses the processing of claims.

The definition of employee welfare plans in the House's first bill is virtually identical to the current ERISA version.²⁰² The definition of a pension plan is less inclusive than the current ERISA version; the latter includes severance plans.²⁰³ Neither

200. *But see* Employee Benefit Security Act, H.R. 2, 93d Cong. § 101(b)(3), at 13, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3, 15 (explaining that small plans were excluded from portions of bill other than those for the enforcement of benefit rights).

201. Employee Benefit Security Act, H.R. 2, 93d Cong., § 114, at 48-49, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3, 50-51 (emphasis added).

202. *Cf.* Employee Benefit Security Act, H.R. 2, 93d Cong. § 3(1) at 3, 4, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5, 6 and ERISA § 3(1), 29 U.S.C. § 1002(1).

203. *Cf.* Employee Benefit Security Act, H.R. 2, 93d Cong. at 3, 4-5, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5, 6-7 to ERISA § 3(2), 29 U.S.C. § 1002(2).

requires a plan to have a written document.²⁰⁴

On October 2, 1973, the Committee on Education and Labor reported to the House of Representatives a revised H.R. 2.²⁰⁵ There continued to be no exemption from this enforcement provision for small plans or unfunded plans for executives. There were no significant changes to the preemption provision. However, two provisions were added to prohibit any interference with rights protected under the proposed bill.²⁰⁶ One permitted the imposition of criminal penalties on the coercive interference with such rights.²⁰⁷

D. The January 1973 Senate Precursor To ERISA Supplements The WPPDA, Authorizes Participants To Enforce the Right to Benefit Payments, Introduces Fiduciary Responsibilities, and Preempts Laws Related to Regulated Subject Matters, Which Preemption Explicitly Excludes Benefit Claims and Banking, Insurance, Securities Laws

On January 4, 1973, a Senate precursor of the legislation that would become ERISA was introduced by Senator Williams, Senator Javits, and a large number of other sponsors in the Senate as S. 4.²⁰⁸ The bill was called the Retirement Income Security for Employees Act and referred to the Committee on Labor and Public Welfare.²⁰⁹ It was identical to S. 3598 as reported and approved unanimously by the Committee on Labor and Public Welfare in September of 1972.²¹⁰ The Summary of the Major Provisions of the bill prepared for consideration by the Committee on Labor and Public Welfare included a brief summary of the preemption section.²¹¹ Senator Javits supported his assertion that the uniform requirements resulting from preemption would diminish bad behavior by fiduciaries and plans by referring to one of the principal findings of the Senate Labor Subcommittee as follows:

Fifth. The lack of uniform requirements of conduct by fiduciaries and employers in the administration and operation of their pension

204. Cf. Employee Benefit Security Act, H.R. 2, 93d Cong., § 3(1),(2) at 3, 4, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5, 6 to ERISA §§ 3(1) and 3(2), 29 U.S.C §§ 1002(1) and 1002(2).

205. Employee Benefit Security Act, H.R. 2, 93d Cong., reprinted in ERISA LEG. HISTORY, *supra* note 165, at 2181.

206. Employee Benefit Security Act, H.R. 2, 93d Cong., §§ 510, 511, at 161-62, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 2181, 2341-42.

207. Employee Benefit Security Act, H.R. 2, 93d Cong., § 511, at 161-62, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 2181, 2341-42.

208. Retirement Income Security for Employee Act, S. 4, 93d Cong. (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 93-189.

209. Retirement Income Security for Employee Act, S. 4, 93d Cong. (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 93.

210. Introductory Remarks of Senator Jacob Javits (Jan. 4, 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 203.

211. Reprinted in ERISA LEG. HISTORY, *supra* note 162, at 191, 201-202.

funds which results in abuses and unsound practices which jeopardize the security of the assets and threaten the availability of funds for employees.²¹²

On March 13, 1973, a Senate bill, which presented many amendments to the pension tax-qualification tax provisions, was introduced by Senator Lloyd Bentsen as S. 1179 and referred to the Senate Finance Committee.²¹³ That bill relied only on Code sanctions for the failure of a pension plan to be tax-qualified in order to improve benefit protections for participants and beneficiaries of such plans, rather than providing anyone with the ability to go to court to compel the desired behavior.

On April 18, 1973, an amended version of S. 4 was reported to the Senate by the Senate Committee on Labor and Public Welfare.²¹⁴ Civil actions to recover benefits by participants continued to be limited to WPPDA plans,²¹⁵ thereby excluding small plans and unfunded plans for executives. The fiduciary standards continued to require plans to "provide adequate and fair procedures to participants and beneficiaries when their benefit claims or applications are denied."²¹⁶ The preemption section appears to have been unchanged.²¹⁷ However, as with the House bill reported out in October of 1973, two provisions were added to prohibit any interference with rights protected under the proposed bill or the WPPDA.²¹⁸ One permitted the imposition of criminal penalties on the coercive interference with such rights.²¹⁹

The report of the Senate Committee on Labor and Public Welfare described the enforcement provisions of the reported bill, including the preemption provisions, in language virtually

212. *Id.* at 204.

213. Comprehensive Private Pension Security Act of 1973, S. 1179, 93d Cong (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 780-1062.

214. Retirement Income Security for Employee Act, S. 4, 93d Cong. (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 389.

215. *Cf.* Retirement Income Security for Employee Act, S. 4, 93d Cong. § 604 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 184 (initial draft), 580-81 (final draft).

216. *See* S. REP. NO. 93-127, 93rd Cong., 1st Sess., 43 (1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 587, 620 (discussing amended bill). *Cf.* Retirement Income Security for Employee Act, S. 4, 93d Cong. § 510 (1st Sess. 1973) (introducing new WPPDA Section 15 entitled Fiduciary Standards), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 181 (initial bill), 576-77 (amended bill).

217. *Cf.* Retirement Income Security for Employee Act, S. 4, 93d Cong. § 609 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 186-88 (initial draft), and at 582-85 (amended draft).

218. Retirement Income Security for Employee Act, S. 4, 93d Cong. §§ 610-611, at 197-98 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 389, 585.

219. Retirement Income Security for Employee Act, S. 4, 93d Cong. § 611, at 197-98 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 389, 585.

identical to that used in the 1972 committee report for the predecessor bill except for the addition of language describing the reason for the addition of the prohibition on the interference with rights protected under ERISA or the WPPDA.²²⁰ Virtually the same language was used by the House Education and Labor Committee with respect to the similar enforcement provisions in the version of H.R. 2 it reported to the House of Representatives on October 2, 1973.²²¹ The Senate report described the enforcement provisions of the reported bill in the section by section analysis as follows:

TITLE VI. ENFORCEMENT

Section 601.—This section empowers the Secretary to petition the federal courts to compel a pension or profit-sharing-retirement plan to comply with the Act [registration and plan funding requirements] or effect recoveries of moneys which be due under the Act.

Sections 602, 603, 604, and 605. —These sections provide that when the Secretary has reason to believe that a pension, profit-sharing, retirement plan, or other employee benefit plan is violating the Act or the plan's governing documents, he may seek relief in the federal courts to compel the return of assets to the fund, to require payments to be made, to require the removal of a fiduciary, and to obtain other appropriate relief. *Plan participants also may seek relief in federal and state courts against violations committed by a fiduciary, including his removal from office. They may also seek relief to recover benefits required to be paid under the plan in the same courts.* The Secretary has the right to remove an action pending in state court to the federal courts for relief provided under this Act.

Sections 607 and 608.—These sections provide that administrators and fiduciaries have the right to obtain judicial review of the actions of the Secretary. The bill provides a statute of limitations of five years for actions arising under the Act.

Section 609.—*This section provides that this Act supersedes state laws covering the same matters.* However, the Act does not exempt or relieve any person from complying with *any state law regulating insurance, banking, and related matters*, and does not remove state jurisdiction over plans not subject to the Act. State courts are not prevented from asserting jurisdiction in compelling the accounting of a fiduciary or requiring clarification of the plan. The Secretary or a plan participant may remove such a case from the state to the federal court if it involves the applicability of the Act.

220. Cf. S. REP. NO. 93-127, at 35-36 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 587, 621-22; S. REP. NO. 92-1150, at 43 (2d. Sess. 1972)).

221. Cf. S. REP. NO. 93-127, at 35-36 (1st Sess. 1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 162, at 587, 621-22; H.R. REP. NO. 93-533, at 17 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2348, 2364.

Section 610.—This section makes it unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the plan or the Act or the Welfare and Pensions Plans Disclosure Act or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan or the Act or the WPPDA.

Section 611.—This section makes it a criminal offense for any person to use fraud, force, or violence or threats thereof to restrain, coerce, intimidate or attempt to restrain, coerce, intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, the Act or the WPPDA.²²²

The Committee stressed the importance of the bill's federal enforcement regime, which would have authorized plan participants and beneficiaries to bring their own federal actions to recover benefit payments or to combat fiduciary violations. Additionally, the bill would have prohibited interference with the attainment or exercise of the statutory employee benefit rights of plan participants or beneficiaries.

E. The April 1973 Presidential Precursor to ERISA Supplements the WPPDA, Authorizes Participants to Enforce Benefit Claims, Introduces Fiduciary Responsibilities and Preempts Laws Related to Regulated Responsibilities, Which Preemption Explicitly Excludes Benefit Claims and Banking, Insurance, Securities Laws

On April 12, 1973, the President's precursor of the legislation that would become ERISA was introduced by Senator Javits in the Senate as S. 1557.²²³ This bill was similar to S. 3589, discussed *supra*, which Javits had also introduced on behalf of President Nixon on March 13, 1970 with the same title, the Employee Benefits Protection Act. Participants and beneficiary were again authorized to bring actions to recover benefits due under the plan terms for WPPDA plans,²²⁴ and thereby continued to exclude small plans and unfunded executive plans. Senator Javits observed that this bill did not: (1) prohibit interference with the rights provided by the bill; (2) assure that due process would be afforded to benefit claims; (3) prevent default waivers of spousal benefits; or (4)

222. See S. REP. NO. 93-127, at 47-48 (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 587, 633-34 (emphasis added). Although, the summary does not mention the securities exclusion from the preemption provisions, the bill explicitly mentions it.

223. Employee Benefits Protection Act, S. 1557, 93d Cong. (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 280-323.

224. Employee Benefits Protection Act, S. 1557, § 9(b), at 14, 93d Cong. (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 280, 303.

permit participants to bring federal actions for all benefit claims.²²⁵ This shows the importance that Senator Javits ascribed to the inclusion of those features in S. 4. Nevertheless, Senator Javits described the bill as an important step forward.²²⁶ The bill amended the WPPDA to strengthen the disclosure requirements and introduce federal fiduciary standards. The new section 18 entitled “Effect of Other Laws,” which follows, was very similar to the corresponding section in S. 4 and in S. 3589:

Sec. 18 (a) It is hereby declared to be the express intent of Congress that *except for actions authorized by section 9(e)(1)(B) of this Act [benefit claims],* the provisions of this Act shall supersede any and all laws of the States and of political sub-divisions thereof insofar as *they may now or hereafter relate to the fiduciary, reporting, and, disclosure responsibilities of persons acting on behalf of employee benefit plans: Provided—*

(1) to exempt or relieve any employee benefit plan not subject to this Act from any law of any State;

(2) to exempt or relieve any person *from any law of any State which regulates insurance, banking, or securities* or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act be filed with the Secretary; or

(3) to alter, amend, modify, invalidate, impair, or supersede any other law of the United States.²²⁷

Thus, the insurance, banking, or securities law exclusion was present. The legislation also limited the phrase “relate to,” to specified subject matters regulated by the legislation, *i.e.*, the amended WPPDA. Again, the provision expressly permits state law to affect employee benefit rights by affecting the enforcement by participants and beneficiaries of those rights.

Senator Javits described how it was believed that the preemption provision would encourage compliance with the statute’s reporting, disclosure and fiduciary requirements:

The Act provides for a uniform source of law for evaluating the fiduciary conduct of persons acting on behalf of employee benefit plans and a singular reporting and disclosure system in lieu of burdensome multiple reports. However, State law will continue to apply to plans not subject to the Act. *This application of State law will include actions brought by participants and beneficiaries to recover benefits due under the plan or to clarify rights to future*

225. Introductory Statement of Sen. Jacob Javits to Employee Benefits Protection Act, S. 1557, 93d Cong. (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 274.

226. *Id.*

227. *Reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 274, 319 (emphasis added). Section (b), which refers to state laws that compel accountings or state court jurisdiction to apply federal law with the fiduciary, reporting, and disclosure requirements, has been omitted as was the case with S. 3598. *Id.*

benefits.

States may require the filing with a State agency of copies of reports required under the Act, and actions in State courts for accountings are expressly allowed if certain conditions are met, including adequate notice to participants and the Secretary. Furthermore, the Act expressly authorizes cooperative arrangements with State agencies as well as other Federal agencies and *provides that State laws regulating banking, insurance and securities remain unimpaired.*²²⁸

F. The Incorporation in the ERISA Precursors of (1) The Spousal Survivor Benefit Requirement and (2) The Prohibition of Pension Benefit Alienations and the Further Development of ERISA

The legislative history shows that the spousal survivor benefit provisions and prohibitions were both included in ERISA after deliberation, which sheds light on their significance.²²⁹ There was extensive Congressional debate of the ERISA spousal survivor benefit provisions. In order to comply with the constitutional requirement that tax measures originate in the House of Representatives,²³⁰ the Senate ERISA precursor, which included many tax qualification provisions, was incorporated into a House-passed tax bill addressing the spousal survivor benefits of members of the military. In contrast, the alienation prohibition was not extensively debated, and appeared in different portions of the different precursors. However, the prohibition, as discussed *infra*, was intended to assure that benefits from a class of pension plans were “actually available to retirement purposes.”

Neither the 1970 Presidential bill,²³¹ nor the 1973 Presidential bill,²³² included any benefit terms mandates. Thus, neither imposed any spousal survivor benefit terms mandates nor prohibited the alienation of benefits. Benefit terms mandates first appeared in S. 3598,²³³ which Senators Williams and Javits introduced on May 11, 1972, with eleven cosponsors. They included minimal participation and vesting provisions for covered pension plans.²³⁴ Welfare plans were not subject to these

228. Reprinted in ERISA LEG. HISTORY, *supra* note 165, at 279 (emphasis added).

229. *But see* Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 IOWA L. REV. 431, 440-463 (1991) [hereinafter “*Watson’s Broken Promises*”] (presenting a different analysis of the development of ERISA and its spousal survivor benefit provisions).

230. U.S. CONST. art. I, § 7.

231. S. 3589, 91st Cong. (2d. Sess. 1970).

232. S. 1557, 93d Cong. (1st Sess. 1973).

233. S. 3598, 92d Cong. (2d. Sess. 1972).

234. *Id.* §§ 201-02, at 24-27.

requirements.²³⁵ The bill excluded small plans and unfunded executive plans from these mandates.²³⁶ The Senate Labor Committee reported an amended bill on September 15, 1972, which included a prohibition on the alienation of pension benefits.²³⁷ The prohibition included a provision “for the final disposition” of benefits when “beneficiaries cannot be located or ascertained within a reasonable time.”²³⁸ The report essentially repeated the legislative language, but did not discuss its purpose.²³⁹ Neither the original bill nor the reported bill required any spousal survivor benefit.

On September 21, 1972, the President signed into law a bill that improved the pension protections for spouses of American service members by introducing the “Survivor Benefit Plan.”²⁴⁰ Under the Survivor Benefit Plan, the default pension option for a retiring serviceperson or a serviceperson who died after reaching retirement age would be a joint and 55% survivor benefit, which would be paid to the surviving spouse, if any, and if none, to any surviving dependent children.²⁴¹ Such default could be rejected by the service member who would receive a single life annuity (whose annual payment would be much greater than the joint and 55% survivor benefit),²⁴² but notice was required to be given the spouse.²⁴³ Before the introduction of this plan, a service member could select such a joint and survivor pension, but the default choice was the single life annuity.²⁴⁴ However, when Congress approved the Survivor Benefit Plan, Congress failed to amend the Code to protect a service member choosing to receive a joint and survivor annuity from being taxed as though he received and assigned to the annuitant the value of the resulting benefit reduction.²⁴⁵

Benefit terms mandates first appeared in a House precursor to ERISA discussed in this article in H.R. 2,²⁴⁶ which Representatives Dent and Perkins introduced on January 3, 1973. The mandates included minimal participation and vesting

235. *Id.*

236. *See id.* § 104(b)(4) (excluding small plans); *see also* § 104(b)(6), at 20 (excluding unfunded executive plans). There was no change in the revision, which retained the same sections.

237. S. 3598 § 202(a)(4) in S. REP. NO. 92-1150, at 114-15 (2d. Sess. 1972).

238. *Id.*

239. S. REP. NO. 92-1150, at 18 (2d. Sess. 1972).

240. Pub. L. No. 92-425, 86 Stat. 706 (1972).

241. Pub. L. No. 92-425 §§ 1450-51, 86 Stat. 706, 708-10 (1972).

242. Pub. L. No. 92-425 § 1452, 86 Stat. 706, 710 (1972).

243. Pub. L. No. 92-425 § 1448(a), 86 Stat. 706, 707 (1972).

244. S. REP. NO. 93-394, at 1-2 (2d. Sess. 1958) *reprinted in* ERISA LEG. HISTORY, *supra* note, 165 at 1572-73.

245. *Id.*

246. Employee Benefit Security Act, H.R. 2, 93d Cong. (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3-65 (1976).

provisions for covered plans.²⁴⁷ Only pension plans were subject to these requirements.²⁴⁸ Life insurance and health insurance plans were not subject to these requirements, although their participants could recover benefits under this bill, as discussed *supra*. This bill contained no spousal survivor benefit provisions, and it did not prohibit the alienation of benefits.²⁴⁹ Neither provision was contained within the revised bill as reported by the House Education and Labor Committee to the House of Representatives on October 2, 1973.²⁵⁰ However, unfunded executive plans became exempt from the participation and vesting requirements.²⁵¹ There was no change in the right of a participant or beneficiary to bring a federal action to recover benefits from such plans.²⁵²

Benefit terms mandates also appeared in S. 4²⁵³ which was introduced on January 4, 1973, by Senator Williams and Senator Javits, among others. S. 4 discussed *supra*, as identical to S. 3598, as reported and approved unanimously by the Committee on Labor and Public Welfare on September 15, 1972. Thus, it included a prohibition on the alienation of pension benefits, but no spousal survivor provisions. The Summary of the Major Provisions of the S. 4 bill, prepared for consideration by the Committee on Labor and Public Welfare, included a description of the prohibition,²⁵⁴ which was simply a condensed form of the restatement of the statutory language that had appeared in the Committee's 1972 report on S. 3598.²⁵⁵

Benefit terms mandates also appeared in S. 1179,²⁵⁶ introduced on March 13, 1973, by Senator Lloyd Bentsen, as discussed *supra*. They included minimal participation and vesting provisions for covered plans as tax-qualification requirements.²⁵⁷ This bill contained no spousal survivor benefit provisions and did

247. *Id.* at § 201-06 at 49-55.

248. *Id.*

249. *But see* Index ERISA LEG. HISTORY, *supra* note 165, at xxii (listing a reference to assignments or alienation at 56, which contains H.R. 2 §§ 203(d)-(f), none of which pertain to benefit alienations).

250. 119 CONG. REC. 32455 (Oct. 2, 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2181-2347.

251. Employee Benefit Security Act, H.R. 2, 93d Cong. § 201(b)(5), at 123, (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2303.

252. Employee Benefit Security Act, H.R. 2, 93d Cong. § 503(e)(1)(b), at 154 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2334.

253. Retirement Income Security for Employee Act, S. 4, 93d Cong. (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 93-189.

254. *Reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 191, 193.

255. S. REP. NO. 92-1150, at 18 (2d. Sess. 1972).

256. Comprehensive Private Pension Security Act of 1973, S. 1179, 93d Cong (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 230-272.

257. *Id.* § 321-22, at 5-10, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 230, 234- 239.

not prohibit the alienation of benefits.

The revised S. 4 bill was reported on April 18, 1973 to the Senate by the Senate Committee on Labor and Public Welfare and made no changes to its alienation prohibition.²⁵⁸ However, a spousal survivor benefit provision was added, without using those precise words.²⁵⁹ In particular, the revision added a provision to the fiduciary standards requiring that only written waivers of survivor benefits were effective, although no plans were required to provide survivor benefits.²⁶⁰ The provision does not use the word spouse. The Senate Report stated, however, that this was intended to protect widows as follows:

Finally, the Committee has become aware of numerous instances in which *the widows of deceased pension plan participants have failed to receive the survivorship or death benefits which they have relied on* because the husband while alive had through inadvertence or misunderstanding, failed to exercise the survivorship or death benefit option in his retirement plan. In order to correct the loss of survivorship or death benefits which arise by reason of failure to comply with plan technicalities, the Committee adopted a provision which assures that survivorship or death benefit options cannot be lost by default on the part of the worker. The provision adopted by the Committee specifies that in order for the death benefit option to be waived by the participant, there must be a writing signed by the participant to such effect, after such participant has received a written explanation of the terms and conditions of the option and the effect of such waiver.²⁶¹

On June 27, 1973, the House, without any nay votes, approved H.R. 4200, which amended the Code to protect a service member choosing to receive a joint and survivor annuity under the Survivor Benefit Plan from adverse tax consequences.²⁶² The Senate received and immediately referred the bill to the Senate Finance Committee.²⁶³ Less than a month later, on July 18, 1973,

258. *Cf.* Retirement Income Security for Employee Act, S.4, 93d Cong. § 202(a)(4) (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 119 (initial draft); 511-12 (final draft).

259. This addition was prefigured six days earlier when Senator Javits introduced the President's 1973 proposal. At such time he had criticized the bill's absence of "protections against loss by default of survivorship benefit options." *See* Introductory Statement of Sen. Jacob Javits to Employee Benefits Protection Act, S. 1557, 93d Cong. (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 274 (explaining that this was included in a list of features he described as being in S.4, but not in the President's 1973 proposal, as discussed *supra*).

260. Retirement Income Security for Employee Act, S.4, 93d Cong. § 510 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 577.

261. S. REP. NO. 93-127, at 35 (1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 587, 621 (emphasis added).

262. 119 CONG. REC. 21,773 (June 27, 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 666-71.

263. 119 CONG. REC. 22,003 (June 28, 1973), *reprinted in* ERISA LEG.

Senator Frederick Mondale proposed that, in order to protect elderly widows, both H.R. 4200 and S. 4 should be amended to provide that all pension plans covered by such legislation plans offer joint and survivor annuity benefits.²⁶⁴ This proposed amendment was not adopted at that time. However, combined with the provisions in S. 4, preventing default waivers of survivor benefits, the proposal likely helped lay the groundwork of the subsequent Senate adoption of the stronger spousal survivor provisions in S. 4 that Senator Mondale praised.²⁶⁵

On August 21, 1973, the Finance Committee reported to the Senate a revised S. 1179, which still relied only on Code sanctions.²⁶⁶ There was no alienation prohibition, but the tax qualification provision required that a participant be offered the option of a joint and survivor benefit.²⁶⁷ The Senate Report stated that this “miscellaneous provision” was intended to protect widows as follows:

Under present law, there is no requirement that a qualified retirement plan must offer the option of a survivor annuity. This can result in a hardship where an individual primarily dependent on his pension as a source of retirement income is unable to make adequate provision for his spouse’s retirement years, should he predecease her. To correct this situation, the committee provision requires that a joint and survivor annuity be offered as an option with request to any benefit under a qualified retirement plan, which is payable as an annuity. If the option is exercised, and a survivor annuity is elected, the participant’s own annuity may be reduced, so that the value of the joint and survivor annuity and the value of the annuity the participant would have been entitled to receive had the option not been exercised are actuarially equivalent.²⁶⁸

However, there was no similar requirement for plans other than tax-qualified pension plans, such as pension plans established primarily for a select group of management employees, life insurance plans, or disability plans.

On September 13, 1973, Senator Vance Hartke proposed that in order to protect elderly widows, S. 1179 should be amended to provide, as S. 4 already did, that the default pension benefit be a

HISTORY, *supra* note 165, at 672.

264. 119 CONG. REC. 24,456-57 (July 18, 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 675-76 and 678-79.

265. Remarks of Senator Mondale during September 19, 1973 Senate floor discussion of S. 4, 119 CONG. REC. 30410 (Sept. 19, 1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1864.

266. S. 1179, 93d Cong. (1st Sess. 1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 780-1062.

267. S. 1179, 93d Cong. § 261, 95 (1st Sess. 1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 780, 874.

268. *See* Private Pension Reform, S. REP. NO. 93-383, 146 (1st Sess. 1973) (describing S. 1179, 93d Cong. (1st Sess. 1973)), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1063, 1214.

joint and survivor benefit that the participant could decline.²⁶⁹ No proposal was made requiring spousal benefits from plans other than tax-qualified pension plans, such as pension plans established primarily for a select group of management employees, life insurance plans, or disability plans. On September 17, 1979, the Senate Finance Committee reported H.R. 4200 without any changes and recommended that the Senate approve the bill.²⁷⁰

On September 19, 1973, the Senate approved, without any nay votes, H.R. 4200 with one major change, an amalgamation of S. 4 and S. 1179 had been appended to the bill.²⁷¹ One new feature of H.R. 4200 was a requirement that tax qualified pension plans providing annuity benefit payments must provide that the default payment for a married participant is a joint and survivor annuity.²⁷² No provision required spousal benefits to be provided by plans other than tax-qualified pension plans, even though the bill authorized beneficiaries of life insurance plans, health plans, and disability plans to recover benefits from such plans. Moreover, the alienation prohibition had been transformed into a plan tax qualification requirement rather than an independently enforceable obligation as it had been in S. 4.²⁷³ If “beneficiaries cannot be located or ascertained within a reasonable time,” the alienation prohibition also had become completely inapplicable.²⁷⁴

The amalgamation also introduced an alternative to civil actions to recover benefits from covered plans. Participants and beneficiaries could bring a civil action to recover benefits due under the terms of a covered plan.²⁷⁵ However, certain pension plans must provide “a procedure for the fair and just review under the plan of any [benefit] dispute” with the administrator, and give the participant or beneficiary the right to arbitrate to such dispute if not satisfied with the administrator’s action rather than to start a civil action.²⁷⁶ There is no such provision for other plans, such as health care reimbursement plans or life insurance plans. Moreover, the DOL could waive the participant’s access to court or arbitration if it finds a collectively bargained dispute resolution

269. *Reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1250-51.

270. Tax Treatment of Survivor Benefit Plans of the Uniformed Services, S. REP. NO. 93-394 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1572-74.

271. 119 CONG. REC. 30,428 (Sept. 19, 1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1881-82. *See generally* ERISA POLITICAL HISTORY, *supra* note 164, at 212-216.

272. H.R. 4200, 93d Cong. § 261 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1882, 1946-47.

273. *Id.*

274. *Id.* (the prior version, as discussed *supra*, only exempted the dispositions of benefits from the alienation prohibition in such cases).

275. H.R. 4200, 93d Cong. § 694, at 218-19 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1882, 2100-01.

276. H.R. 4200, 93d Cong. § 691(a), (b), & (d), at 214-15 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1882, 2096.

process for such pension plans to be fair and effective.²⁷⁷

In late September 1973, two House bills were introduced and referred to the Ways and Means Committee following. First, on September 24, 1973, Representative Al Ullman, acting Chair of the Ways and Means Committee, introduced H.R. 10470, which was referred to the Ways and Means Committee.²⁷⁸ H.R. 10470 was identical to the H.R. 4200 approved by the Senate on September 19, 1973.²⁷⁹ Thus, the bill included as new tax qualification requirements, an alienation prohibition and a spousal survivor benefit provision. There were no preemption provisions. Second, on September 25, 1973, Representative John Erlenborn, the ranking Republican on the House Committee on Education and Labor, introduced H.R. 10489, which was referred to the Ways and Means Committee.²⁸⁰ The bill contained no spousal survivor benefit's provision, and the alienation prohibition was not a tax-qualification requirement. However, the alienation prohibition was part of the substantive vesting requirements,²⁸¹ and was accompanied by a preemption provision.²⁸²

On February 5, 1974, Representative Ullman introduced H.R. 12481,²⁸³ which was referred to the Ways and Means Committee he chaired, and like S. 1179 discussed, *supra*, based its employee benefit regulation on Code sanctions rather than independent obligations. H.R. 12481 provided that if a pension plan provides for annuity payments, then the default benefit must be a joint and survivor, which the participant was permitted to waive without any notice to his spouse, although the requirement was only a tax-qualification requirement.²⁸⁴ The accompanying House Report observes that this provision is intended to permit a participant to protect his spouse by requiring tax-qualified pension plans to give each participant the option of choosing a joint and survivor annuity when the participant selects his benefit.²⁸⁵

H.R. 12481, like H.R. 10489, prohibited the alienation of pension plan benefits, but unlike H.R. 10489, made the prohibition only a tax-qualification requirement.²⁸⁶ The bill did not treat as an

277. H.R. 4200, 93d Cong. § 691(c), at 215 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1882, 2097.

278. H.R. 10470, 93d Cong. at 1 (1st Sess. 1973).

279. ERISA POLITICAL HISTORY, *supra* note 164, at 224.

280. H.R. 10489, 93d Cong. at 1 (1st Sess. 1973).

281. *Id.* § 203(d) at 75.

282. *Id.* § 414 at 115.

283. H.R. 12481, 93d Cong. (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2394-2583.

284. H.R. 12481, 93d Cong. § 1021(a) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2394, 2468-69.

285. Private Pension Tax Reform, H. REP. NO. 93-779 (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2584, 2654-655.

286. H.R. 12481, 93d Cong. § 1021(c) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2394, 2470-71.

alienation “any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment for the purpose of paying premiums on life, medical, or hospital insurance or for any noncommercial and nonprofit purpose specified under regulations prescribed by the Secretary or his delegate.”²⁸⁷ The accompanying House Report describes the purpose of this prohibition as “[t]o further ensure that the employee’s accrued benefits are actually available to retirement purposes,”²⁸⁸ and described the 10% exception as designed to reinforce this purpose.²⁸⁹

On February 19, 1974, Representative Ullman introduced H.R. 12855,²⁹⁰ which replaced H.R. 12481,²⁹¹ and, in turn, replaced H.R. 10470, as the Employee Benefit Protection Act considered by the Ways and Means Committee. H.R. 12855 did not substantively change the spousal benefit.²⁹² No provision required spousal benefits from plans other than tax-qualified pension plans, such as pension plans established primarily for a select group of management employees, life insurance plans, or disability plans.

On February 21, 1974, H.R. 12855 was reported out of the Ways and Means Committee. Among the changes was the omission of any restriction on the use of the voluntarily assigned pension benefit from the 10% exception.²⁹³ As discussed *supra*, the most recent Senate bill adopted prior to this, *i.e.*, H.R. 4200 as adopted on September 19, 1973, had no 10% exception, but had an exception when beneficiaries “cannot be located or ascertained within such reasonable period of time.”²⁹⁴

In February of 1974, there was also activity in the House Committee on Education and Labor. On February 13, 1974, Representative Dent, who chaired the House General Labor Subcommittee of the House Committee on Education and Labor, introduced H.R. 12781,²⁹⁵ which was referred to the House Committee on Education and Labor. Like H.R. 10489, introduced by Representative Erlenborn and discussed, *supra*, H.R. 12781 had a substantive requirement that pension plans prohibit

287. H.R. 12481, 93d Cong. § 1021(c) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2394, 2471.

288. Private Pension Tax Reform, H. REP. NO. 93-779 (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2584, 2655.

289. Private Pension Tax Reform, H. REP. NO. 93-779, at 67 (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2584, 2656.

290. H.R. 12855, 93d Cong. (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2924-3114.

291. ERISA POLITICAL HISTORY, *supra* note 164, at 237.

292. H.R. 12855, 93d Cong. § 1021(a) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2924, 2998-3000.

293. H.R. 12855, 93d Cong. § 1021(c) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2924, 3002.

294. H.R. 4200, 93d Cong. § 261 (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1882, 1946-47.

295. H.R. 12781, 93d Cong. (2d Sess. 1974).

assignments.²⁹⁶ Moreover, unlike H.R. 10489, the section governing the distribution of pension benefits also included a substantive requirement for spousal survivor pension benefits if the plan offered annuity benefits.²⁹⁷

On February 20, 1974, Representative Dent introduced and submitted to the House Committee on Education and Labor, H.R. 12906,²⁹⁸ which replaced H.R. 12781,²⁹⁹ and also revised H.R. 2. This revision made no change in the substantive requirement for spousal survivor pension benefits or its placement among the distribution requirements. However, the substantive requirement prohibiting the alienation of benefits was moved in an unchanged form to the section concerning fiduciary responsibilities.³⁰⁰

On February 25, 1974, Representative Perkins announced that H.R. 12906 would be combined with H.R. 12855, which contained amendments to the Code consistent with the requirements that not depend on plans being tax-qualified set forth in H.R. 12906, to form a comprehensive bill to replace H. R. 2.³⁰¹ Representative Perkins, Chair of the House Committee on Education and Labor summarized the bill in remarks to the House on the same day.³⁰² The new bill would contain two titles, the first contained regulations of employee benefit plans derived from H.R. 12906, and the second contained amendments to the Code consistent with those regulations derived from H.R. 12855.

G. The Final Pre-Conference Revisions of the House and Senate Bills That Will Be Transformed into ERISA (1) Explicitly Exclude Benefits Claims and Laws Governing Banking, Insurance, and Securities from Preemption, (2) Require a Spousal Survivor Benefit, and (3) Prohibit Pension Benefit Alienation

On March 4, 1974, the Senate approved a revised form of H.R. 4200, which was presented to the House as a revision of the H.R. 2.³⁰³ Other than changing the statutory references to be consistent with the numbers in the current bill there was no change in the original preemption section, which was applicable to state laws

296. *See Id.* at § 204(d) (pertaining to the distribution of benefits rather than the vesting of benefits as in H.R. 10489).

297. *Id.* at § 204(c).

298. Employee Benefit Security Act, H.R.12906, 93d Cong. § 111(i) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2761, 2820.

299. ERISA POLITICAL HISTORY, *supra* note 164, at 237.

300. Employee Benefit Security Act, H.R.12906, 93d Cong. (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2761-2923.

301. 120 CONG. REC. 3977 (Feb. 25, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3293.

302. 120 CONG. REC. 3977-4001 (Feb. 25, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3293-3350.

303. Retirement Income Security Act, H.R. 2, 93d Cong. § 699 (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3599-3895.

relating to the unspecified subject matters regulated by the legislation with the exception of rights to recover benefits.³⁰⁴ The spousal survivor benefit provisions and the alienation prohibition were similarly unchanged, and both appeared only in the tax qualification requirements.³⁰⁵

On February 28, 1974, the House approved a revised form of H.R. 2 by a vote of 376 to 4.³⁰⁶ The revisions with technical corrections added by the House clerk³⁰⁷ included no substantive change in the right of participants and beneficiaries to bring civil actions to recover benefits due under the terms of the plan,³⁰⁸ and continued to have no provision governing the claims review process of the plan. The revision included the following more extensive preemption provision:

Sec. 514. (a) It is hereby declared to be the express intent of Congress that, *except for actions authorized by section 503(e) (1) (B) of this Act [benefit claims]* and except as provided in subsection (b) of this section the provisions of part 1 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as *they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities*, of persons acting on behalf of any employee benefit plan to which part 1 applies.

(b) Nothing in part 1 of this subtitle shall be construed to exempt or relieve any person from any law of any State which *regulates insurance, banking, or securities* or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this title to be filed with the Secretary. *No employee benefit plan subject to the provisions of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company* or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

304. Retirement Income Security Act, H.R. 2, 93d Cong. § 699 (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3599, 3820.

305. Retirement Income Security Act, H.R. 2, 93d Cong. § 261(a) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3599, 3664.

306. 120 CONG. REC. 4781-82 (Feb. 28, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 162, at 3593-96 (stating that fifty of the fifty-one absent members were paired, so if the paired Congressman had voted the result would have been 401-29). The House then unanimously authorized the Clerk to make technical corrections in punctuation, paragraph headings and cross-references. 120 CONG. REC. 4782 (Feb. 28, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3596.

307. Employee Benefit Security Act, H.R. 2, 93d Cong. (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3898-4250.

308. Employee Benefit Security Act, H.R. 2, 93d Cong. § 502(e)(1)(B), at 150 (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3898, 4047.

(c) It is hereby declared to be the express intent of Congress that the provisions of parts 2, 3, and 4 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as *they may now or hereafter relate to the nonforfeitability of participant's benefits in employee benefit plans described in section 201(a) or 301(a) [i.e., subject to such rules], the funding requirements for such plans, the adequacy of financing of such plans, portability requirements for such plans, or the insurance of pension benefits under such plans.*

(d) Nothing in this section shall be construed to prohibit a delegation of authority by the Secretary to an appropriate State agency as permitted under section 506 of this Act.

(e) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in 115(a) [under the applicable terms of the WPPDA for periods before its repeal by this Act]) or any rule or regulation issued under any such law.³⁰⁹

This significantly broadened the scope of preemption that was in the initial House legislation. First, the government insurance of benefits and the substantive funding, portability, nonforfeitability requirements explicitly have preemption effects. The initial House bill contained those features, but did not give any of them preemptive effect. The bill last approved by the Senate contained such features,³¹⁰ but its preemption provision was based on a less explicit rendition of the provisions having a preemptive effect.³¹¹ Second, unlike the bill last approved by the Senate, the House bill substantially diminished the banking, insurance, and securities exclusions by adding a so-called deemer clause, which prevents those exclusions from being used to treat employee benefit plans as engaged in any such activities.³¹² Thus, it would appear that the states may use these laws only to regulate providers of banking, insurance, and securities services to employee benefit plans. The only exception is for a plan acting primarily to provide life insurance. However, there is no similar exception acting primarily to provide health insurance. Thus, the bill permits plans to self-insure for health care costs, but not for life insurance, unless the latter is incidental to another purpose, such as providing pensions. On the other hand, as discussed, *infra*, states may regulate the way employee benefit plans choose to provide

309. Employee Benefit Security Act, H.R. 2 § 514(a), at 160, 93d Cong. (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3898, 4057-59 (emphasis added).

310. Retirement Income Security for Employees Act, H.R. 4200, Titles II-V, at 13-202, 93d Cong. (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1883, 1895-2084.

311. Retirement Income Security for Employees Act, H.R. 4200, § 699, at 221, 93d Cong. (1st Sess. 1973), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 1883, 2103.

312. *See generally* ERISA LITIGATION, *supra* note 13, 145-54 (4th ed. 2011).

healthcare, but not the way the plans choose to provide banking services, such as participant loans

The revised form of H.R. 2 adopted by the House retained the spousal survivor and alienation prohibition provisions of its two precursors. There was no change in the H.R. 12855 tax-qualification requirements for spousal survivor benefits³¹³ or the alienation prohibition.³¹⁴ Nor was there a change to the spousal survivor provisions from the H.R. 12906 benefit distribution requirements,³¹⁵ or to the fiduciary requirement of an alienation prohibition.³¹⁶ Both remained plan requirements independent of the plan tax qualification rules.

After a floor discussion, the House adopted more demanding benefit terms mandates designed to benefit women, such as an amendment by Congresswoman Bella Abzug to liberalize the pension plan participation rules, which she asserted would be particularly helpful to women who are often in the paid work force for less time than men.³¹⁷ Congresswomen Shirley Chisholm offered considerable data to support proposals for more liberal participation rules and qualification for spousal benefits, which proposals would particularly benefit women and low-paid workers.³¹⁸ Prior to the floor discussion, Congresswoman Patricia Schroeder expressed her enthusiastic support for the proposed bill, including its default joint and survivor annuity provision, which could only be waived by an informed participant.³¹⁹ Although she offered no such amendment, Congresswoman Schroeder expressed a preference for a provision in which both the participant and the participant's spouse would have to consent to the waiver of the default benefit.³²⁰ Finally, the House rejected a proposal by Congresswoman Elizabeth Holtzman, which would have required pension plans to offer spousal survivor benefits in the event a participant died before reaching the plan's normal retirement benefit.³²¹

313. Employee Benefit Security Act, H.R. 2, 93d Cong. § 1021(a) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3898, 4132-35.

314. Employee Benefit Security Act, H.R. 2, 93d Cong. § 1021(c) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3898, 4136.

315. Employee Benefit Security Act, H.R. 2, 93d Cong. § 204(c)(1) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3898, 3981-83.

316. Employee Benefit Security Act, H.R. 2, 93d Cong. § 111(i) (2d Sess. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3898, 3956.

317. 120 CONG. REC. 4722-23 (Feb. 28, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3507-12.

318. 120 CONG. REC. 4773-75 (Feb. 26, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 1165, at 3495-96.

319. 120 CONG. REC. 4316-17 (Feb. 26, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3495-97.

320. 120 CONG. REC. 4317 (Feb. 26, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3497.

321. 120 CONG. REC. 4723-26 (Feb. 28, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3512-18.

VI. LEGISLATIVE HISTORY OF ERISA PREEMPTION
PROVISIONS, RIGHTS OF PARTICIPANTS TO ENFORCE
BENEFIT RIGHTS, SPOUSAL PROTECTIONS, AND
ALIENATION PROHIBITION BETWEEN APRIL 1974
SUBMISSION OF HOUSE AND SENATE BILLS TO
CONFERENCE COMMITTEE AND THE ENACTMENT OF
ERISA

In April 1974, the Conference Committee was presented with two bills, as discussed *infra*. Each bill shared slightly different versions of four characteristics, and imposed substantial reporting and disclosure mandates, benefit terms mandates, funding mandates, and fiduciary mandates on the employee benefit plans covered by the respective bills. First, both provided participants and beneficiaries with the right to bring federal civil actions to recover benefits due under the terms of the plans covered in the respective bills. Second, both provided that state laws that related to subject matters regulated by the proposed legislation would be preempted. Third, four laws were explicitly excluded to some extent from preemption: banking law, insurance law, securities law, and any state law affecting the rights of participants or beneficiaries to recover plan benefits. Fourth, both required some pension plans, but no welfare plans, to provide default spousal benefits and to prohibit the alienation of their benefits.

Each of these four characteristics was changed, as discussed, *infra*, in the bill reported by the Conference Committee, which became the initial version of ERISA. First, participants and beneficiaries were given not only the right to recover benefits due under all plans, but the right to have a claims fiduciary review their benefit claim, and the ability to “enforce [in federal court] his rights under the terms of the plan.” Second, preemption was no longer limited to matters regulated by the legislation, but rather applied to any state law that may “relate to any [ERISA] employee benefit plan.” Third, the major preemption exclusion for laws affecting the rights of participants or beneficiaries to recover plan benefits was replaced by a narrow exclusion limited to generally applicable criminal laws, and the banking, insurance, and securities law exclusion was narrowed to prevent the regulation of plan activities (other than those of a plan primarily acting as a life insurer). Fourth, pension plans other than unfunded executive plans, were required to provide spouses with default survivor benefits if they provided annuity benefits, and to prohibit the alienation of their benefits.

These changes, on their face, clarify the terms of the required spousal survivor provision and alienation prohibition within ERISA, and the scope of the ERISA Express Preemption. The

prohibited relation appears to be an effect not only on mandates, but on enforcement mechanisms and /or benefit rights. ERISA does not discuss how much of an effect results in preemption. Like its predecessors, ERISA does not describe how to determine whether a state law has the relation that results in preemption.³²² As was the case with the pre-conference bills, ERISA appears to preempt any state law imposing a reporting and disclosure mandate, benefit terms mandate, funding mandate, or a fiduciary mandate on a plan for which ERISA imposes such mandates. However, any rational interpretation would permit state-law regulations of health, which are not otherwise preempted by ERISA, to impose reporting mandates and benefit restrictions as discussed *supra*.

ERISA leaves little question that ERISA preempts state laws that seek to impose a reporting and disclosure mandate, benefit terms mandate, funding mandate, or a fiduciary mandate on any ERISA plan, such as benefit terms mandates on uninsured health care reimbursement plans, even though ERISA imposes no such mandates on such plans except to the extent, as discussed *supra*, such provisions are needed to implement a state law that is not otherwise preempted. There also seems to be little question that ERISA preempts any state law that adds, supplements, or diminishes an ERISA enforcement mechanism other than a generally applicable criminal law. Thus, there seems little question that state laws criminalizing the failure to make a required employee benefit plan contribution would be preempted unless they were generally applicable.

Finally, ERISA provides participants not only with the right to recover benefits (including the right to receive benefit payments from a covered plan), but such other rights as the right to choose the time or manner of benefit payment, designate a beneficiary, or to choose plan investments. Thus, those rights relate to plans covered by the bills. Therefore, it would appear that ERISA preempts any state law preventing the exercise of any of those rights. In particular, the final bill revisions made indicate that ERISA preempts state laws requiring: (1) pension plans to withhold taxes from pension payments; (2) employee benefit plans

322. *But see* Employee Retirement Income Security Act of 1974 § 514(c)(2) in H.R. Rep. No. 93-1280 at 82 (1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4358 (defining states as entities which purport to regulate the terms and conditions of ERISA plans may suggest that ERISA preempts only state laws that are designed to regulate such plan terms). This suggestion would be more convincing if the language were contained in the definition of state law at § 514(c)(1) or in the relate clause at § 514(a) of the same bill. Moreover, such interpretation would imply that ERISA does not preempt any generally applicable laws because a generally applicable statute is presumably not designed, at least not designed principally to regulate ERISA plans. Thus, there would have been no reason to exclude generally applicable criminal laws from the ERISA Express Preemption Rule.

to garnish benefit payments to pay a participant's debts; (3) employee benefit plans to pay a participant's benefits pursuant to the terms of domestic relations order; or (4) employee benefit plans to make plan payments in accord with a participant's community property interest in the benefits. Tax withholdings, unlike tax reports, are not needed to enforce state income taxes, as shown by the many forms of income subject to federal tax reporting but no mandatory withholding, such as business payments to independent contractors.³²³ Thus, mandatory withholding may not be justified as needed to implement a state law that ERISA does not preempt in the same fashion that ERISA does not preempt the mandate that ERISA plans report annual benefit payments to the states taxing such payments.³²⁴

This textual analysis does not resolve all preemption issues. Questions remain about state laws affecting any ERISA benefit protection in a non-tenuous manner, however defined, which does not impose a mandate described above, change an enforcement mechanism, or prevent the exercise by a participant or a beneficiary of a benefit right under the terms of an ERISA plan. There are also questions about the meaning of the words "prevent," "impose," or "change," and the extent of benefit rights, particularly for distributed benefits.

A. *The April 1974 Administration Proposal to the Conference Committee That Only Laws Related to the Regulation of Specified Areas Be Preempted, with Explicit Exclusions for Benefit Claims, Tax, Banking, Insurance, and Securities Laws*

On April 2, 1974, a conference committee was appointed to try to produce legislation that both houses could approve (the "Conference Committee").³²⁵ Before the end of April, the Administration prepared and submitted to the Conference Committee members (the "Congressional Conferees") an analysis of each of the different approaches in the two versions of H.R. 2.³²⁶ The Administration concluded therein that:

The preemption provisions under the House bill are extremely vague, while the Senate bill is too broad since it preempts all state laws covering areas regulated under the Act, which includes *the tax aspects of retirement plans*.³²⁷

323. Code § 6041 (2013). *But see* Code § 3406 (requiring withholding if the payee does not provide his taxpayer identification number to the payor).

324. *See e.g.*, IRS 2013 Form 1099-R Copy 1 which may be used to make annual filings re pension plan distributions with states.

325. Reprinted in ERISA LEG. HISTORY, *supra* note 165 at 4276.

326. Administration Recommendations to the House and Senate Conferees on H. R. 2 to Provide for Pension Reform (Apr. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5047, 5047-5149.

327. Administration Recommendations to the House and Senate Conferees on H. R. 2 to Provide for Pension Reform, at 108 (Apr. 1974), *reprinted in*

Moreover, the Administration proposed the following language to address both its general concern about the extent of the preemption, and its specific concern about the ability of states to determine how to tax retirement plans, and their participants:

EFFECT ON OTHER LAWS

It is hereby declared to be the express intent of Congress that *except for actions authorized by Section (fill in the Section which permits a participant to bring a civil action in State or Federal court)* the provisions of (list the Titles or Sections which deal with participation, vesting, funding, reporting, disclosure and fiduciary standards, termination insurance, enforcement and additional plan requirements (as set out in House bill Section 1021) [the Alienation Prohibition and Spousal Survivor Benefit provisions of the tax-qualification rules³²⁸] or the Welfare and Pension Plans Disclosure Act, shall supersede any and all laws of the States and of political subdivisions thereof insofar as they *may now or hereafter relate to the regulation of participation, vesting, funding, reporting, disclosure and fiduciary standards, termination, insurance, enforcement and additional plan requirements (as set out in House bill Section 1021) or subject matters regulated by the Welfare and Pension States Disclosure Act*, except that nothing shall be construed—

(1) to exempt or relieve any employee pension benefit plan not subject to (list Titles or Sections above) or the Welfare and Pension Plans Disclosure Act from any law of any State;

(2) to exempt or relieve any person from *any law of any State which regulates insurance, banking, or securities* or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act to be filed with the Secretary; or

(3) to alter amend modify, invalidate, impair, or supersede any other law of the United States.

Notwithstanding the provisions of this section, *a state shall have the authority to prescribe rules and regulations concerning the tax qualification and taxation of contributions, distributions or income, of an employee pension benefit plan* (including a trust forming a part of such plan) as defined in the Welfare and Pension Plans Disclosure Act (House bill).³²⁹

Thus, there was no question that the Congressional Conferees were aware of language by which they could adopt: (1) a far narrower preemption approach with respect to the matters preempted; (2) a far broader exclusion for banking, insurance, and

ERISA LEG. HISTORY, *supra* note 165, at 5047, 5146 (emphasis added).

328. This is a somewhat odd reference because the preemption provisions govern the plan requirements rather than the cited tax qualification requirements.

329. Administration Recommendations to the House and Senate Conferees on H. R. 2 to Provide for Pension Reform, at 109 (Apr. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5047, 5147 (emphasis added).

securities law; and (3) a preemption exclusion for those laws affecting the enforcement by participants and beneficiaries of their benefit rights. Nevertheless, they rejected this Administration approach and enacted the ERISA Express Preemption, which contained no exclusion for state tax laws. One has to ask if the Administration believed that without its proposed language the bill would preempt state laws “concerning the tax qualification and taxation of contributions, distributions or income, of an employee pension benefit plan.”³³⁰ If so, was a state precluded from taxing or exempting from tax such items, and if so, which was precluded, because both could not be the case.

The Administration favored the House proposal that the joint and survivor benefit form be the default only if the participant has been married for a minimum period.³³¹ The Administration took no position on the different exceptions to the alienation prohibition in the Senate and House bills, discussed *supra*. The Administration took no position on prohibition of interference with the exercise or attainment of ERISA rights or the due process requirements for claims review.

B. The Conference Committee Recommends that the Preemption Provision (1) Applies to State Laws that Relate to any Employee Benefit Plan, (2) Does not Exempt Benefit Claims or Tax Law, and (3) Includes Exclusions only for Laws Governing Banking, Insurance, and Securities, and Generally Applicable Criminal Law

Between May 15, 1974 and June 19, 1974, the staff of the Conference Committee prepared and submitted to the Conference Committee an analysis of each the different approaches in the two versions of H.R. 2.³³² The part that addressed the preemption

330. *Id.*

331. Administration Recommendations to the House and Senate Conferees on H. R. 2 to Provide for Pension Reform, at 101-03 (Apr. 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5047, 5141-43.

332. Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform—Part One—Participation Vesting, Funding, Actuaries, Jurisdiction and Portability (May 15, 1974) (“Summary of Differences Part I”); Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform-Part Two—Termination Insurance, Reporting and Disclosure (June 5, 1974) (“Summary of Differences Part II”); Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform-Part Three-Fiduciary and Enforcement (June 12, 1974) (“Summary of Differences Part III”); and Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform-Part Four-Limitations on Contributions and Benefits, Employee Savings for Retirement, Lump-sum Distributions, Administration and Enforcement, Miscellaneous (June 19, 1974) (“Summary of Differences Part IV”), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5151-5319.

provisions was issued on June 12, 1974.³³³ The staffers recommended that most of the House approach be adopted.³³⁴ There was disagreement about Section 514(b), which narrowed the insurance, banking, or securities law exclusion.³³⁵ Thus, some staffers suggested that the exclusion be adopted for three years so that a commission could study its effects.³³⁶ The staff disregarded the preemption exemption exclusion for state laws affecting actions to recover benefits present in both bills from its summary of their respective preemption provisions.³³⁷

On August 12, 1974, the Conference Committee presented to the House Report number 93-128, which included a revised H.R. 2.³³⁸ The preemption provision at Section 514 of the proposed bill³³⁹ followed neither the Administration recommendations to narrow the scope of preemption nor their own staff's recommendation to retain the House's broad but limited preemption with the explicit exclusion for benefit claims. Instead, the Conference Committee agreed on essentially the ERISA Express Preemption (without any of the post-ERISA amendments),³⁴⁰ with far broader preemption provisions than were present in either bill. However, the Conference Committee provided at Section 3022(a)(4) of the bill³⁴¹ that within two years of the enactment a joint congressional task force would review "the effects and desirability of" the preemption with respect to only pension and similar plans. This is far broader than the review suggested by their staff, discussed, *supra*.

C. *The August 1974 Conference Committee Report and Floor Discussion of the Broad ERISA Preemption Provisions*

A Joint Explanatory Statement of the Committee of

333. Summary of Differences Part III, *supra* note 332, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5249-87.

334. Summary of Differences Part III, *supra* note 332, at 32-34, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5282-84.

335. Summary of Differences Part III, *supra* note 332, at 33, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5283.

336. Summary of Differences Part III, *supra* note 332, at 34 (June 12, 1974) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5284.

337. Summary of Differences Part III, *supra* note 332, at 32-33, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5283-84.

338. H.R. REP. NO. 93-1280 (1974), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 4277-4654.

339. Employee Retirement Income Security Act of 1974, § 514 in H.R. REP. NO. 93-1280, at 82-83, reprinted in ERISA LEG. HISTORY, *supra* note 165, at 4277, 4357-58.

340. The only difference was that the provision about District of Columbia being treated as a state was added as the 72nd correction when H. CON. RES. 609 was adopted on Aug. 22, 1974. ERISA LEG. HISTORY, *supra* note 165, at 4733.

341. Employee Retirement Income Security Act of 1974, § 3022(a)(4) in H.R. REP. NO. 93-1280, at 205 reprinted in ERISA LEG. HISTORY, *supra* note 165, at 4277, 4476.

Conference (“Joint Statement”) was submitted in concert with the bill.³⁴² The statement did not explain why the Conference Committee drafted such a broad preemption provision. The bill provides that it “shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] employee benefit plan.”³⁴³ The bill also narrows the state law exclusions by not permitting state banking, insurance, or securities laws to regulate plans,³⁴⁴ and eliminates the exclusion for laws pertaining to the right to enforce rights to recover benefits due under the terms of a plan.

The statutory language Congress approved shows that the ERISA preemption is quite broad. First, the argument used by the *Rice* Court to limit the preemption of the law at issue to matters expressly regulated may not be used to argue that because the law does not establish funding and benefit terms mandates for health reimbursement plans, such state laws are not preempted.³⁴⁵ The “relate to” language eliminates the relevance of Congress’s failure to expressly regulate such aspects of those plans.³⁴⁶ Second, the law would similarly preempt any state law attempting to mandate the kind or benefit amount made available by a plan subject to the bill,³⁴⁷ even if the law is silent on such a mandate. Third, the same “relate to” language implies that the law preempts state laws that relate to plans by adding, supplementing, or diminishing the law’s enforcement mechanisms, with one notable exclusion, namely for generally applicable criminal laws.³⁴⁸ However, as discussed, *infra*, permissible criminal laws are not limited to those used to enforce plan rights. Fourth, the addition of the preemption of state laws affecting the enforcement of the rights of a plan participant or beneficiary implies the preemption of state laws

342. H.R. REP. NO. 93-1280, at 249-387 (1984) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4518-4654.

343. *See* Employee Retirement Income Security Act of 1974 § 514(a) in H.R. REP. NO. 93-1280, at 82 (1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4357.

344. *See* Employee Retirement Income Security Act of 1974 § 514(b)(2)(A)(B) in H.R. REP. NO. 93-1280 at 82 (1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4357 (stating, however, that plans acting primarily as life insurers may be regulated by the states).

345. The states may, however, regulate the funding and benefits offered by health care insurers as part of their insurance regulation. *See Metro. Life Ins. Co.*, 471 U.S. at 748 (1985) (explaining that states may require insurers to provide mental health benefits in all products they offer to ERISA health reimbursement plans).

346. *Cf. Rice*, 331 U.S. at 237-38 (holding no preemption of state warehouse laws on matters not expressly regulated by the federal statute).

347. There were no explicit references to the level of benefits or other kinds of benefits, such as cost of living features, in the preemption provisions of the bills referred to the Conference Committee.

348. H.R. REP. NO. 93-1280, at 383, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4650.

pertaining to who receives the benefits, who selects the form of the benefit, or who is the plan beneficiary.

The substantial breadth of the ERISA preemption is supported by the decision of the Conference Committee to add the following definitions to the preemption section:

(c) Definitions. For purposes of this section:

(1) The term “State law” includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.

(2) The term “State” includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.³⁴⁹

No such definitions appear in any of the predecessor bills, their associated reports or floor discussions, or the reports of the staff of the Conference Committee, discussed *supra*. The first subdivision, *supra*, provides that the preempted state laws are not limited to statutes. ERISA preempts a broad range of state actions, including, but not limited to, the actions set forth. The second subdivision, *supra*, provides that the preempted actions are not limited to those by states, which term is defined in ERISA § 3(10). ERISA preempts actions by a broad range of state actors, including, but not limited to, those set forth. However, as with the phrase “relate to any employee benefit plan” in ERISA § 514(a), the precise reach of the phrase “purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans” in ERISA § 514(c) is not self-evident.³⁵⁰

The floor discussion of the conference substitute bill showed that this substantial broadening of the preemption was quite deliberate and intended to prevent state law from undermining ERISA’s protections for plan participants and beneficiaries. However, the only one of the five state laws under consideration in this article that was explicitly mentioned in the discussion is criminal law.

Representative Dent, one of the principal proponents and managers of the consideration of the bills that became ERISA in the House of Representatives, described the preemption provision of the substitute bill as follows:

349. Employee Retirement Income Security Act of 1974 § 514(c) in H.R. REP. NO. 93-1280 at 82 (1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4358.

350. *See e.g.*, William J. Kilberg and Paul D. Inman, *OBSERVATION: Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1327-36 (1984) [hereinafter *Kilberg and Inman Preemption*] (arguing that if the second subdivision did not limit ERISA preemption to those state laws that “purport to regulate” the terms and conditions of ERISA, ERISA would absurdly preempt any state law affecting a plan).

*Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. We followed to a large extent the same approach as in Public Law 93-222, 87 statute (414) [sic], where the regulation of health maintenance organizations was foreclosed to State authority—section 113(a) [sic].*³⁵¹

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 code of law—which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).*³⁵²

Representative Dent used field preemption language to describe the legislation even though the legislation had express preemption language, as was the case in *Rice*, which had presented the field preemption concept, *supra*. Representative Dent stated that a state law would be preempted if its relation to a covered plan was that it would “affect” a plan.

Senator Williams was one of the principal proponents and managers of the consideration of the bills that became ERISA in the Senate. He immediately preceded his discussion of the preemption provision of the substitute bill with a description of the protections the bill provided to plan participants and beneficiaries, such as the ability of the Secretary of Labor to bring actions to obtain their benefits or their ability to bring such federal actions.³⁵³ Senator William’s preemption description, which follows, was briefer than that of Representative Dent.

It should be stressed that with the narrow exceptions specified in

351. The common approach in the two statutes is to preempt state regulation. However, this garbled reference is not very helpful in interpreting the phrase “relate to any employee benefit plan.” See Health Maintenance Organization Act of 1973, Pub. L. No. 93-222, 87 Stat. 914 (1978) (adding a preemption section entitled, Restrictive State Laws and Practices, § 1311(a) to the Public Health Service Act, rather than the cited § 113(a) as the correct citation for the law). Moreover, the HMO provision does not use the phrase “relate to,” but instead describes very explicitly the features of preempted state laws. *Id.*

352. See House Floor Discussion on Conference Report on H.R. 2 Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29,197 (Aug. 20, 1974), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 4656, 4670-71 (emphasis added) (following the quote was a brief discussion of the intended continuation of the reporting exemption of apprentice plans).

353. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29933 (Aug. 22, 1974), reprinted in ERISA LEG. HISTORY, *supra* note 1462 at 4733, 4745.

the bill, the substantive and enforcement provisions of the conference substitute are *intended to 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 . . . which have the force or effect of law. Consistent with this principle, State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized[,] for example, prepaid legal services programs-whether closed or open panel-authorized by Public Law 93-95. The preemption provisions of the conference substitute shall generally become applicable on January 1, 1975.³⁵⁴

Senator Williams, like Representative Dent, described the legislation with field preemption language. Senators Williams and Javits subsequently had an exchange with Senator Robert Taft about the extent to which the bill would regulate legal service plans,³⁵⁵ but were not questioned about any other aspects of the preemption provisions. This exchange shows that Congress intended that the ERISA Express Preemption would prevent state laws from regulating the terms of welfare plans, such as legal services programs, even though ERISA did not regulate the terms of such plans.³⁵⁶ However, it also showed that Congress was not concerned about state regulations of the legal profession, such as requiring all attorneys to complete continuing legal education, which did not affect the terms of legal service plans.

Senator Javits, like Senator Williams, one of the principal proponents and managers in the Senate of the consideration of the bills that became ERISA, preceded his discussion of the preemption provision of the substitute bill with praise of the requirement that plans provide a full and fair review of all benefit claims.³⁵⁷ Senator Javits's description of the preemption provision, which follows, also emphasized that the intention was to preclude interference with federal regulation:

354. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29933 (Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4745-46 (emphasis added).

355. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29948-49 (Aug. 22, 1974) (statements of Senators Javits, Taft, and Williams), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4733, 4789-90.

356. *See generally* Michael S. Gordon, *The History of ERISA's Preemption Provision and Its Bearing on the Current Debate Over Health Care Reform*, EBRI ISSUE BRIEF 28-30 (No. 135, March 1993), *available at* <http://www.ebri.org/pdf/briefspdf/0393ib.pdf> (last visited March 24, 2014).

357. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29941 (Aug. 22, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4733, 4769.

Both House and Senate bills provided for preemption of State law, but — with one major exception appearing in the House bill [perhaps the one for Banking, Insurance, and Securities, which is also in Senate bill]—defined the perimeters of preemption in relation to the areas regulated by the [B]ill. *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 with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, *the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs*. The conferees—recognizing the dimensions of such a 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.

In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, *imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing State termination insurance programs, et cetera, will be superseded*. It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.

At the same time, the Secretary of Labor is authorized to enter into agreements with officials of State agencies to assist him in the performance of his functions under the conference substitute, which could include arrangements, for example, for auditing specific plans or assisting in the collection and monitoring of required plan data.³⁵⁸

Senator Javits, like Representative Dent and Senator Williams, used field preemption language to describe the legislation. Senator Javits mentioned the planned review of preemption, without clarifying that the legislation only provided for the review of preemption issues concerning pension issues. Senator Javits's reference to the general applicable criminal law exclusion in the above quote implies that Congress intended to

358. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29942 (Aug. 22, 1974), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 4733, 4770-71 (emphasis added).

permit general state criminal laws imposing criminal penalties on the failure to make plan contributions, such as those that criminalize the failure to pay wages or wage supplements. However, Senator Javits presented no example. Thus, he described the exclusion without mentioning the most generic criminal laws, such as theft laws. There seems little question that because those laws are too tenuously related to the ERISA benefit protections, ERISA does not preempt the application of such laws against those who may steal from employee benefit plans.

D. The Conference Committee Staff Recommendations, the August 1974 Conference Committee Report and Floor Discussion of the Spousal Survivor Requirement, and the Alienation Prohibition

On May 15, 1974, the staff of the Conference Committee prepared and submitted to the Conference Committee an analysis of the different approaches in the two versions of H.R. 2 for the spousal survivor provisions and the alienation prohibition.³⁵⁹ The staff recommended that plan sponsors be able to impose a year of marriage requirement for spousal survivor pensions, and the Conference Committee considered the scope of the pre-retirement benefit that plans could provide.³⁶⁰ The Committee agreed to give sponsors the one-year option,³⁶¹ and permitted, but did not require, any pre-retirement spousal benefit.³⁶² The staff recommended acceptance of the 10% exception to the alienation prohibition.³⁶³ The Committee included a 10% exception.³⁶⁴

The Joint Statement discussed how the spousal survivor provision had been crafted to: (1) provide spouses with retirement and pre-retirement protection; (2) give participants a reasonable opportunity to obtain an unreduced annuity payment; and (3) give plan sponsors the ability to protect themselves against adverse selection by participants of joint and survivor annuities.³⁶⁵ However, the Joint Statement did not discuss why spousal survivor benefits were only required for a subset of pension

359. Summary of Differences Part I, *supra* note 332, at 24-26, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5151, 5177-79.

360. Summary of Differences Part I, *supra* note 332, at 25, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5151, 5177-78.

361. Employee Retirement Income Security Act of 1974 § 205(d) in H.R. REP. NO. 93-1280, at 43 (1984), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4318.

362. Employee Retirement Income Security Act of 1974 § 205 in H.R. REP. NO. 93-1280, at 43-44 (1984), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4318-19.

363. Summary of Differences Part I, *supra* note 332, at 25-26, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5151, 5178-79.

364. Employee Retirement Income Security Act of 1974 § 206(d)(2) in H.R. REP. NO. 93-1280, at 45 (1984), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4320.

365. H.R. REP. NO. 93-1280, at 279-80 (1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4546-47.

plans.³⁶⁶ The provisions were inapplicable to pension plans primarily for the highly compensated (*i.e.*, Top-Hat Plans), to life insurance plans, or to disability plans.³⁶⁷

The only reference in the House floor discussion to spousal survivor benefits was a description of the provision permitting a sponsor to determine the joint and spousal benefit by reducing the participant's life annuity to take into account both actuarial equivalents and any adverse selection experience.³⁶⁸ Senator Williams similarly referred only to those provisions in his discussion of spousal survivor benefits in the Senate floor discussion.³⁶⁹ Senator Javits discussed the spousal survivor benefits in more detail, particularly the pre-retirement spousal benefit.³⁷⁰ However, there was no discussion on the floor of the House or the Senate about why spousal survivor benefits were only required for a subset of pension plans.³⁷¹

The Joint Statement did not discuss the purpose of the alienation prohibition,³⁷² but did discuss the terms of the alienation prohibition as follows:

Under the conference substitute, a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, [a] garnishment or levy is not to be considered a voluntary assignment. Vested benefits may be used as collateral for reasonable loans from a plan, where the fiduciary requirements of the law are not violated.³⁷³

366. *See id.* Employee Retirement Income Security Act of 1974 § 201 in H.R. REP. NO. 93-1280 at 30-31 (1984) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4305-06 (providing that spousal survivor provisions are not applicable to Top-Hat Plans, or individual retirement accounts in pension plans, or any welfare plans).

367. *Id.*

368. House Floor Discussion on H.R. 2, 120 CONG. REC. 29192, (Aug. 20, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4656, 4669.

369. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29930 (Aug. 22, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4733, 4738.

370. Senate Floor Discussion, 120 CONG. REC. 29935, 29937, 29940 (Aug. 22, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4733, 4752, 4756-57, 4765.

371. *See* House Floor Discussion on H.R. 2, 120 CONG. REC. 29192-215 (Aug. 20, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 162, at 4656-721; Senate Floor Discussion, 120 CONG. REC. 29929-62 (Aug. 22, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4733-4828.

372. *See* Summary of Differences Part I, *supra* note 332, at 25-26, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5151, 5178-79 (recommending changes from the alienation prohibitions in the two bills without discussing the purpose of the prohibition).

373. H.R. REP. NO. 93-1280, at 280 (1974), *reprinted in* ERISA LEG.

The Committee apparently intended to provide that repayments of plan loans should not be treated as assignments or alienations, although the statute exempts the loans rather than the repayments from such characterization.³⁷⁴

There was no floor discussion of the alienation prohibition.³⁷⁵

E. The Conference Committee Staff Recommendations, the August 1974 Conference Committee Report and Floor Discussion of the Benefit Enforcement Provisions (Including the Claims Review Requirement) and the Protection against Interference with ERISA Rights

On June 12, 1974, the staff of the Conference Committee prepared and submitted to the Conference Committee an analysis of the different approaches in the two versions of H.R. 2 by which participants and beneficiaries could enforce their plan benefit rights, and the prohibition on the interference with ERISA rights.³⁷⁶ The staff recommended the adoption of the common approach of permitting participants to bring civil actions to recover benefits and determine future rights to recover benefits.³⁷⁷ The staff could not reach a consensus in whether to adopt either the voluntary or the involuntary arbitration provisions, and the extent to which to make it available.³⁷⁸ However, some recommended all plans have an unspecified claims procedure, which would have to be explained to plan participants and beneficiaries and could only make denials in a writing explaining the reason for the denial.³⁷⁹ The staff recommended that the slightly broader prohibition of interference provisions of the Senate bill be adopted.³⁸⁰

The Joint Statement gave no explanation of the reason for the Committee's more expansive approach to enforcement rights in the conference bill, which also included the right "to enforce his [the

HISTORY, *supra* note 165, at 4277, 4547 (footnote omitted).

374. The same mistake is repeated in Treas. Reg. § 1.401(a)-13(d)(2) (as amended 1988).

375. See House Floor Discussion on H.R. 2, 120 CONG. REC. 29192-215 (Aug. 20, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4656-721 and Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29928-62 (Aug. 22, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4733-4828.

376. Summary of Differences Part III, *supra* note 332, at 23-25, 30-31, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5249, 5273-75, 5280-81.

377. Summary of Differences Part III, *supra* note 332, at 23, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5249, 5273.

378. Summary of Differences Part III, *supra* note 332, at 24-25, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5249, 5274-25.

379. Summary of Differences Part III, *supra* note 332, at 25, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5249, 5275.

380. Summary of Differences Part III, *supra* note 332, at 30-31, *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5249, 5280-81.

participant's or beneficiary's] rights under . . . the plan,³⁸¹ not merely the right to recover the benefit due and to clarify the right to future benefits. Instead, it presented the following brief summary that ignored the expansion:

Civil actions by participants and beneficiaries. In addition, under the bill as passed by both the House and Senate, civil action may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility.

Under the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility.³⁸²

The Joint Statement observed that the bill now required every covered plan to provide a fair and full review of any benefit denial, which had to be in writing.³⁸³ There was no mention of the fact this requirement was now in a distinct statute.³⁸⁴ The Joint Statement described³⁸⁵ the more demanding coercive provisions the Conference Committee chose to include in the Conference bill.³⁸⁶

Senator Williams summarized to the Senate the benefit enforcement provisions (including the claims review requirement), and the protections against interference with ERISA rights in the Conference bill.³⁸⁷ Like the Joint Statement, his summary did not mention the granting to participants and beneficiaries the right to bring a civil action to enforce any of their benefit rights, not merely the right to recover benefits.³⁸⁸ Senator Williams, however, stated in that summary, that civil actions for benefit denials could not be "based on application of the substantive requirements of this legislation."³⁸⁹ However, there is no such limitation in ERISA, which generally requires that such substantive requirements be

381. Employee Retirement Income Security Act of 1974 § 502(a)(1)(B) in H.R. REP. NO. 93-1280, at 75 (1984), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4350.

382. H.R. REP. NO. 93-1280, at 326-27 (1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165 at 4277, 4593-94.

383. H.R. REP. NO. 93-1280, at 328 (1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165 at 4277, 4595.

384. Employee Retirement Income Security Act of 1974 § 503 in H.R. REP. NO. 93-1280, at 78 (1984), *reprinted in* ERISA LEG. HISTORY, *supra* note 165 at 4277, 4353.

385. H.R. REP. NO. 93-1280, at 330-31 (1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4597-98.

386. Employee Retirement Income Security Act of 1974, § 510-511 in H.R. REP. NO. 93-1280, at 80 (1984), *reprinted in* ERISA LEG. HISTORY, *supra* note 165 at 4277, 4355.

387. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29933 (Aug. 22, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165 at 4733, 4745.

388. *Id.*

389. *Id.*

part of the plan terms.³⁹⁰ Therefore, such a claim would be based on the terms of the plan as required under the enforcement section.³⁹¹

Senator Javits summarized to the Senate how the claims procedure provisions had adopted the Senate's full and fair review approach to benefit denials.³⁹² He also defended arbitration as "a relatively inexpensive way for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the courts," and was encouraged that the Conference Committee had directed a committee to look further into the feasibility of such an approach.³⁹³ Senator Javits noted that an arbitration option had been opposed on the basis that they would stimulate "frivolous benefit disputes."³⁹⁴

*F. Congress Overwhelmingly Approves ERISA with the
Expectation that the ERISA Express Preemption Will Assure
that ERISA, Not State Law, Determines the Extent of the
Benefit Protections for Employee Benefit Plan Participants and
Beneficiaries*

No part of the legislative history suggests that Congress adopted the ERISA Express Preemption, in whole or in part, to reduce the administrative or cost burdens on employee benefit plan sponsors and administrators. Rather, ERISA's dominating general purpose is the protection of plan participants and beneficiaries. Congress achieved this purpose by: (1) imposing plan requirements (including, but not limited to claim review requirements, reporting and disclosure requirements, fiduciary, participation, service, and vesting requirements); (2) giving participants and beneficiaries a federal right to enforce their benefit rights (including, but not limited to, obtaining plan benefits); and (3) prohibiting interference with these benefit rights. These features placed substantial administrative and cost burdens on plan sponsors and administrators. The ERISA Express Preemption limits state law interference with the ERISA federal regime for assuring that employee benefit rights are enforceable, including the right to be paid promised employee benefits. On the other hand, a consequence of subjecting sponsors

390. See e.g., ERISA §§ 202, 203, 29 U.S.C. §§ 1052, 1053 (setting minimal participation and vesting rules respectively).

391. Perhaps, the Senator meant to say that an action needs to be brought first under ERISA 502(a)(3), 29 U.S.C. § 1132(a)(3), to reform the plan to comply with ERISA before the benefit claim may be brought.

392. Senate Floor Discussion on Conference Report on H.R. 2, Employee Retirement Income Security Act of 1974, 120 CONG. REC. 29941 (Aug. 22, 1974), reprinted in ERISA LEG. HISTORY, *supra* note 162165, at 4733, 4769.

393. *Id.*

394. *Id.*

and administrators to only one federal regulatory regime by preempting any state laws relating to that regime, is that state laws will not increase the substantive and administrative burden of complying with this regime.³⁹⁵

One of the major reasons that representatives of large businesses and unions supported the enactment of ERISA was that at such time the states' regulatory regime of plans appeared to be changing from the *de minimis* regulation that both preferred, to the more stringent regulation that both abhorred.³⁹⁶ Thus, those representatives saw ERISA Express Preemption, which unlike its predecessors, as discussed *supra*, did not limit preemption to federally regulated matters, as a way to prevent states from adopting or applying what they considered excessively burdensome rules, such as the substantial taxes that New Jersey sought to impose on plan sponsors who terminated pension plans that were not fully funded.³⁹⁷ On the other hand, the progressive proponents of greater federal protections for employee benefit rights probably supported the ERISA Express Preemption, which unlike its predecessors, as discussed *supra*, applied preemption to benefit rights and the enforcement of benefit protections, as a way to prevent states from adopting or applying laws that would diminish the benefit rights of plan participants and beneficiaries or the ERISA enforcement mechanisms. Therefore, the progressives, like the large businesses and unions, saw the ERISA Express Preemption as a tool to prevent the states from interfering with the federal regulatory regime that both had agreed upon. The states, the final party, whose support was needed to enact ERISA, probably supported the ERISA Express Preemption, which unlike its predecessors, as discussed *supra*, diminished the excluded state laws, but still excluded the ones that mattered most to the states. As discussed *supra*, Congress from the start of the ERISA drafting process until the Conference Committee proposal excluded from preemption (1) state banking, insurance, and securities laws, and (2) state laws affecting the enforcement of employee benefit rights and protections. However, as discussed *supra*, Congress dramatically reduced the latter exclusion from preemption in the final version of ERISA to one for generally applicable criminal laws. There is no evidence that the states, or anyone else, made any effort to exclude from the ERISA Express Preemption state domestic relations laws, property laws, or creditor laws during any part of the legislative process. However, as discussed *supra*, all the predecessor bills permitted

395. *But see* Kathryn Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L. REV. 1083, 1089 (June 2001) (stating that "preemption was obviously designed to reduce the cost of plan administration").

396. *See* Wooten, *supra* note 132, at 31.

397. ERISA POLITICAL HISTORY, *supra* note 164, at 204-05.

state laws, including those laws, to affect benefit rights and their enforcement other than for the plans for which ERISA prohibited the alienation of benefits.

In short, all four major players expected that the regulatory regime that was agreed upon would not be enhanced or diminished by state laws other than the one general state law that is fully excluded from ERISA preemption, the limited regulation of plans established primarily for life insurance, and the three state laws that are excluded only when applicable to plan providers or to a plan established primarily to provide death benefits.³⁹⁸ During the drafting process, Congress did not explicitly consider excluding any other state laws, other than tax laws, which exclusion was considered and rejected by the Conference Committee. This rejection implies that states may under some circumstances tax ERISA plans, their participants or beneficiaries, contributors to ERISA plans, or third parties doing business with ERISA plans. Thus, ERISA Express Preemption was intended to assure that a state law, other than one excluded in whole or in part, may not enhance or undermine the ERISA benefit protections of plan participants and beneficiaries, particularly their right to obtain promised benefits, which applied to all ERISA plans. Obviously, Congress did not believe this could be achieved by the narrower approach of the superseded precursor bills, which essentially preempted only state laws related to the substantive requirements set forth in what became ERISA sections numbering in the 100s, 200s, 300s, and 400s.³⁹⁹

The “relate to” phrase reflected a Congressional recognition that ERISA permits some state laws to affect the ERISA benefit protections. At least two kinds of state laws are implicitly

398. Questions later arose about the agreed regulatory regime, many of which were resolved by Supreme Court decisions. *See* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989) (deciding that the arbitrary and capricious standard of review was not applicable to plan benefit denials). The Supreme Court described ERISA as a reticulated statute when holding that certain protections were unavailable for plan participants and beneficiaries. *See, e.g.,* *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (holding no extra-contractual damages available under the reticulated statute); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261-62 (1993) (holding no monetary damages may be imposed on non-fiduciaries participating in a fiduciary breach). Additional preemption exclusions were added after the initial enactment of ERISA, as discussed, *infra*.

399. *But see* Daniel M. Fox & Daniel C. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL'Y 47 (1988) (arguing that the ERISA Express Preemption was proposed by the Conference Committee to prevent the states from regulating ERISA self-insured plans, particularly health insurance and legal services plans). The authors did not explain why the Conference Committee also added a provision to preempt all state enforcement laws other than generally applicable criminal laws and expanded the benefit rights beyond the right to recover and determine benefit payments. *Id.* In contrast, this article focuses on these extensive rights.

permitted to have substantial effects on the ERISA protections even though they are not explicitly excluded from the ERISA Express Preemption Rule. Both traditionally govern the provision of benefits by plans that ERISA specifically authorizes without making any attempt to regulate such provision. States may regulate how lawyers practice, which may determine the benefits an ERISA legal services plan may offer, and how the benefits are offered. States may regulate how health care providers operate, which may determine the benefits an ERISA health care clinic may offer, and how the benefits are offered. It is most reasonable to interpret “the relate” to phrase to permit these laws to avoid preemption only if they have minimal effects on the other ERISA benefits protections. In particular, the associated reporting and disclosure mandates that ERISA permits those laws to impose so the laws are enforceable may only require information needed to administer the permissible law without creating undue burdens, such as clinic reports to the local health agency. Moreover, by not exempting ERISA plans or their participants and beneficiary from state tax Congress also permitted some state tax laws to be imposed. These state laws may similarly impose limited reporting mandates, such as requiring ERISA plans to file annual tax reports and respond to audit requests.

On August 20, 1974, the House approved the Conference Committee’s report, including the substitute bill, by a vote of 407-2,⁴⁰⁰ and a set of small changes set forth in House Concurrent Resolution 609 without an objection.⁴⁰¹ On August 22, 1974, the Senate approved the Conference Committee’s report and the concurrent resolution by a vote of 85-0.⁴⁰² These votes provide considerable evidence that there was overwhelming support for ERISA, its provisions, and their intended meaning. This meaning may be ascertained from (1) the evolution of the bills that were transformed into ERISA, (2) the statements on the floor of the Congress, (3) the legal and political context in which the legislation was developed, and (4) the Congressional reports and Administration recommendations. At the signing ceremony for ERISA, President Ford praised the increased benefit rights that ERISA provided workers, observed that it was appropriate that he was signing the ERISA bill on September 2, 1974, which was Labor Day.⁴⁰³

400. 120 CONG. REC. 29215 (Aug. 20, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4717-20.

401. H. CON. RES. 609, 93d Cong. (2d. Sess. 1974), 120 CONG. REC. 29,216-19 (Aug. 20, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4722-30.

402. 120 CONG. REC. 29,925-28, 29,963 (Aug. 22, 1974), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4827-4828, 4835. Five of the senators not present were reported at the vote to have declared that if present they would have voted to approve the bill. *Id.*

403. ERISA LEG. HISTORY, *supra* note 165, at 5321.

VII. PREEMPTION ISSUES PRESENTED IN THE COURSE OF THE SUBSTANTIAL ERISA REVIEW AND PREPARATION OF 1978 AND 1979 REFORM BILLS, NEITHER OF WHICH WAS ADOPTED

There were no Supreme Court decisions on ERISA preemption before 1980 other than *White Motor Corp.*,⁴⁰⁴ discussed, *supra*, which confirmed that ERISA preempted state laws directly addressing pension issues, which ERISA regulated, such as the funding and vesting of benefits. In 1979, there were significant reviews of the issues raised by the implementation of ERISA within and without Congress discussed *infra*. However, the initial ERISA § 3022 requirement that there be a full study and review of the ERISA Express Preemption with respect to pension matters within 24 months of the September 24, 1974 enactment of ERISA⁴⁰⁵ was never implemented.⁴⁰⁶ Most ERISA provisions had an effective date for existing plans with calendar years of the first day of the year beginning January 1, 1976,⁴⁰⁷ with the exception of the provisions insuring pension benefits, which were effective as of the time of the enactment.⁴⁰⁸ Thus, it was sensible to wait until two to three years after that effective date, *i.e.*, until 1978 or 1979, to evaluate the effects of the preemption and other features of ERISA.⁴⁰⁹

A. *A Law Review Article Describing the ERISA Preemption Issues Recognized in 1979*

A law review article by James D. Hutchinson and David M.

404. *Malone*, 435 U.S. at 497.

405. H.R. REP. NO. 93-1280, § 3022(a)(4), at 205 (1984), *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4277, 4476.

406. Introductory Remarks of Senator Jacob Javits on S. 209; Hearings Before the Senate Committee on Labor and Human Resources, 96th Cong. 1st Sess. on S. 209, at 99, 106 (Feb. 6-8, 1979) [hereinafter “1979 Senate ERISA Review”]. However, the Subcommittee of Labor Standards of the House Committee on Education and Labor had a Pension Task Force, which conducted hearings on the implementation of ERISA and issued a report, H.R. REP. NO. 94-1785 (2d. Sess. 1977). That report did not mention spousal rights, domestic relations, or the alienation prohibition, but focused on the exclusion for state regulation of banking, insurance, and securities providers and suggested that the exclusion be narrowed. *Id.* at 46-49. The staff of the Conference Committee had recommended that the study be limited to the issue but ERISA directed that a far more wide-ranging review be conducted, as discussed *supra*.

407. Pub. L. No. 93-406 §§ 111(b)(2), 211(b)(2), 306(b), 414(b)(2), 1017(b), 1024, 1034, 88 Stat. 829, 851, 867, 874, 889, 932, 943, 948 (1974).

408. Pub. L. No. 93-406, §§ 4082, 88 Stat. 829, 1034-35 (1974).

409. 1979 Senate ERISA Review, *supra* note 406, at 99-109 (Introductory Remarks of Sen. Javits).

Ifshin (“*Chicago Preemption Review*”),⁴¹⁰ has a good discussion of the preemption issues that scholars recognized at the start of 1979. In particular, the *Chicago Preemption Review* draws the conclusions set forth *infra*, about the five state laws that are the subject of this article.⁴¹¹

The *Chicago Preemption Review* observes that the generally applicable criminal law exclusion was ambiguous, but is unaware of any decision addressing its scope.⁴¹² The article concludes that, “a state law making theft illegal would be enforceable against one accused of stealing assets from a plan, whereas a statute limited to prohibiting only thefts from employee benefit funds would not.”⁴¹³ This conclusion is based on a more limited sentence in dicta of a tax preemption decision *Nat’l Carriers’ Conference Comm. v. Heffernan* (hereinafter “*Heffernan II*”),⁴¹⁴ cited in a footnote of the article that “Congress apparently intended to preempt criminal laws directed specifically at employee benefit plans.”⁴¹⁵ Moreover, the article does not discuss whether the general theft law would be sufficiently related to an employee benefit plan to be preempted if there were no exception for generally accepted criminal laws. The *Chicago Preemption Review* observes that the criminal law was not a very effective tool for regulating employee benefit plans because such law does not address many plan abuses, such as the failure to fund plans adequately, and the high standards of proof required to impose criminal sanctions prevent their wide use.⁴¹⁶ However, by addressing some abuses criminal law may still be a useful tool.

The *Chicago Preemption Review* does not discuss any issues with respect to the preemption of tax law, although they cited a

410. James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23 (1978) [hereinafter “*Chicago Preemption Review*”]. Despite the 1978 date of the issue with the article, the article refers to a proposed bill, S. 209, 96th Cong 1st Sess. (1979) that was not introduced until 1979. *Id.* See also Stephen R. Snodgrass, *ERISA Preemption of State Law: The Meaning of “Relate to” in Section 514*, 58 WASH. U. L. Q. 143 (1980) (citing *Chicago Preemption Review* and proposing four approaches to interpreting the ERISA Express Preemption with particular emphasis on insurance law, domestic relations law, and civil rights law), available at <http://digitalcommons.law.wustl.edu/lawreview/vol58/iss1/9> (last visited March 24, 2014).

411. *But see Chicago Preemption Review*, *supra* note 410 (disregarding the authors’ extensive discussion of issues about the scope of the insurance, banking, securities exclusions, and *Malone*, 435 U.S. 497).

412. *Id.* at 71-72.

413. *Id.* at 72.

414. See *Nat’l Carriers’ Conference Comm. v. Heffernan*, 454 F. Supp. 914 (D. Conn. 1978) [hereinafter *Heffernan II*] (holding that ERISA preempted a state tax equal to a percentage of an ERISA welfare plan’s annual benefit payments).

415. *Chicago Preemption Review*, *supra* note 410, at 72 n.293 (citing *Heffernan II*, 454 F. Supp. at 916).

416. *Id.* at 29.

decision, *supra*, that ERISA preempted a Connecticut statute imposing a 2.75% tax on the benefits distributed by a dental benefit plan.⁴¹⁷ The article does not discuss any issues pertaining to debtor-creditor laws, although it cited in a footnote two decisions that a creditor may attach 10% of a participant's pension payments on the basis that such attachments qualify for the 10% exception for voluntary assignments.⁴¹⁸ The *Chicago Preemption Review* also does not mention transfer upon death or rights to elect against a decedent's property dispositions.

The *Chicago Preemption Review* extensively discusses domestic relations issues.⁴¹⁹ The article severely criticizes a Second Circuit decision, *Am. Tel. & Tel. Co. v. Merry*,⁴²⁰ and a Ninth Circuit district court decision, *Stone v. Stone*,⁴²¹ on which the Second Circuit relied, that domestic relations orders were not preempted by either the ERISA Express Preemption or the Alienation Prohibition.⁴²² The article criticizes the *Stone* court for basing its conclusion, that the ERISA Express Preemption is inapplicable on the policy assertion that "both California's interest in governing the disposition of marital property and justice to the non-employee spouse necessitate permitting a direct cause of action against the plan," rather than on an analysis of the meaning of the words "relate to."⁴²³ The *Chicago Preemption Review* also criticizes the *Stone* court for asserting that the purpose of ERISA is to protect the family, and disregarding the plain language of the Alienation Prohibition, and the regulations issued thereunder,⁴²⁴ that contain no exception for domestic relations orders or other worthy claims against the participant.⁴²⁵ They observe, however, that several other district courts and the U.S. Justice Department supported this basis for the *Stone* decision, in both common-law and community property jurisdictions.⁴²⁶

The *Chicago Preemption Review* mentions two district courts that held ERISA preempted domestic relations law based on community property rights. In one, *Francis v. United Technologies Corp.*,⁴²⁷ the article notes the court held that the former spouse lacked standing because she was not a participant

417. *Id.* at 72.

418. *See id.* at 58 n.218 (referring to the exception in ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2)).

419. *Id.* at 58-65, 77-78.

420. *Am. Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979).

421. *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978).

422. *Chicago Preemption Review*, *supra* note 410, at 58-62.

423. *Id.* at 60.

424. Treasury Reg. § 1.401(a)-13.

425. *Chicago Preemption Review*, *supra* note 410, at 50-61.

426. *Id.* at 61-62.

427. *Francis v. United Technologies Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978).

or named a beneficiary by the participant.⁴²⁸ The article also mentions but does not discuss, *Gen. Motors Corp. v. Townsend*,⁴²⁹ holding domestic relations law did not violate the ERISA Express Preemption, but did violate the Alienation Prohibition.

The *Chicago Preemption Review* recommends that Congress decide the conditions, if any, under which it wishes to carve out an exclusion from the ERISA Express Preemption and the Alienation Prohibition to insure uniform treatment of domestic relations orders by employee benefit plans.⁴³⁰ In particular, the article supports legislation proposed by Cong. John Seiberling in 1978⁴³¹ that provided if a participant or beneficiary were receiving pension payments, the Alienation Prohibition would not be violated by a domestic relations order providing for payments of alimony and child support from such payments.⁴³² However, this proposal would have been ineffective because exempting an order from the Alienation Prohibition does not mean that the order is thereby incorporated within the plan terms. Thus, the order may be inconsistent with the plan terms, in which case the ERISA Express Preemption would preempt it.⁴³³

The fallacy of the Seiberling approach may be illustrated by a participant who makes a claim for a pension benefit of an annuity beginning at age 65 equal to his final year's salary of \$100,000 per year. There is no ERISA prohibition on such a benefit, but the right to the benefit is determined by whether the plan terms provide the participant with such a benefit.

B. The Proposed ERISA Improvement Act of 1979 and the ERISA Preemption Issues it Addressed

In 1979 Senators Williams and Javits introduced legislation entitled the ERISA Improvements Act of 1979.⁴³⁴ The Act would have amended ERISA § 2, 29 U.S.C. § 1002, which is entitled Congressional Findings and Declaration of Policy, by adding the following paragraph:

(d) It is hereby further declared to be the policy of this Act to foster the establishment and maintenance of employee benefit plans

428. *Chicago Preemption Review*, *supra* note 410, at 62.

429. *Gen. Motors Corp. v. Townsend*, 468 F. Supp. 466 (E.D. Mich. 1976)

430. *Chicago Preemption Review*, *supra* note 410, at 64-65, 77-78.

431. H.R. 13446, 95th Cong. (2d Sess. 1978), *reprinted in* Hearings Before the Senate Committee on Labor and Human Resources, 95th Cong. 2d Sess. on S. 3017, at 1050-1052 (Aug. 15, 16, 17, 1978) [hereinafter "1978 Senate ERISA Review"].

432. *Chicago Preemption Review*, *supra* note 410, at 77-78.

433. *But see* ERISA § 206(d)(3). As discussed *infra*, the Section was subsequently amended to provide that an order that is a qualified domestic relations order becomes part of the plan terms and a beneficiary designation.

434. ERISA Improvements Act of 1979, S. 209, 96th Cong. (1st Sess. 1979), *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 9-94.

sponsored by employers, employee organizations, or both.⁴³⁵

The addition was justified because, “[i]n considering simplifications to ERISA Congress should thus evaluate proposals with the balance between benefits and costs clearly in focus.”⁴³⁶ However, the proposed addition was strongly criticized by Karen Ferguson of the Pension Rights Center as inconsistent with the national “needs for retirement income.”⁴³⁷ The bill was reported to the Senate, but died without being debated on the floor.⁴³⁸

Congress never adopted the provision to weaken ERISA’s fundamental objective of protecting plan participants and beneficiaries, even though the provision was characterized as a way to improve the balance between benefits and costs of retirement plan regulation. In contrast, provisions in the same bill to exempt certain domestic relations orders from the ERISA Express Preemption, or to enhance the spousal survivor protections, were similar to provisions adopted in 1984 with the enactment of Retirement Equity Act of 1984 (“REACT”),⁴³⁹ as discussed *infra*. Moreover, similar language about fostering ERISA pension plans was included in the policy statement within the less extensive reform bill prepared in 1978 that also had provisions to reduce administrative burdens on plans and their sponsors, and was also not adopted by Congress.⁴⁴⁰

The proposed ERISA Improvements Act of 1979 addressed many issues, including preemption.⁴⁴¹ Senator Javits described two conclusions reached by him pertaining to the five state laws that are the subject of this article. First, Senator Javits recommended that committee report language, not statutory language, should reaffirm the correctness of Nat’l Carriers’

435. ERISA Improvements Act of 1979, S. 209, 96th Cong. § 102, at 5-6 (1st Sess. 1979), *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 9, 13-14.

436. Prepared Statement of the American Academy of Actuaries at 1979 at 2-3, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 990, 991-92.

437. Prepared Statement of Karen W. Ferguson on behalf of the Pension Rights Center at 1979 at 1-4, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 892-96.

438. Senate Committee on Labor and Human Resources, 96th Cong., Legislative Calendar 108 (final ed., Jan. 4, 1981).

439. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984).

440. S. 3017, 95th Cong. § 101 (2d Sess. 1978), *reprinted in* 1978 Senate ERISA Review, *supra* note 425, at 3, 6-7. However, unlike the 1979 bill, the policy language applied only to the 1978 bill, not to ERISA.

441. See Senator Javits’ remarks, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 99-100 (describing his introduction with Senator Williams a year earlier, the ERISA Improvements Act of 1978, S. 3017, 95th Cong. (2d Sess. 1978), which was also a comprehensive set of reform proposals). Even though the 1978 legislation had no preemption provisions, it served as a basis for the ERISA Improvements Act of 1979. *Id.*

Conference Comm. v. Heffernan (hereinafter "*Heffernan I*"),⁴⁴² which he described as upholding the preemption of a state law.⁴⁴³ However, *Heffernan I* had held in 1977 that the federal Tax Injunction Act does not prevent a plan from going to federal court to enjoin the enforcement of a state tax that the plan claimed was preempted by ERISA.⁴⁴⁴ Senator Javits probably intended to refer to *Heffernan II* cited in the *Chicago Preemption Review*, which held in 1978 that ERISA preempted a Connecticut tax of 2.75% of the benefits paid by an ERISA healthcare reimbursement plan, when the tax on premiums paid to an insurer were 2.00%.⁴⁴⁵ Second, Senator Javits recommended that the legislation resolve the conflict discussed in the *Chicago Preemption Review* about the effectiveness of domestic relations orders as follows:

The second exception to broad Federal preemption provided in our bill involves State common law or community property domestic relations laws. The bill provides that:

Federal preemption does not reach a judgment, degree or order, including an approval of a property settlement, pursuant to a State common law or community property domestic relations law which: First, affects the marital property rights of any person in any benefit payable under a pension plan or the legal obligations of any person to provide child support or make alimony payments, and second, does not require a pension plan to alter the effective date, timing, form, duration or amount of any payments under the plan or to honor any election provided under the plan which is made by a person other than a participant or beneficiary.

The bill also provides the ERISA's antiassignment and alienation of benefits rule does not apply to such judgment, decree or order. *The purpose of these provisions is to reserve for the States their traditional control over marital and family matters, and to assist plan administrators who are faced with the conflicting duties of obeying State court decrees to pay benefits to plan participants' former spouses and also complying with the Federal antialienation rule under penalty of plan disqualification.*⁴⁴⁶

Unlike the Seiberling 1978 legislation, discussed *supra*, this legislation would have made the specified domestic relations orders effective, although it did not resolve all the tax-qualification issues. By exempting the orders from the ERISA Express Preemption, the state orders would override any contrary ERISA

442. *Natl Carriers' Conference Comm. v. Heffernan*, 440 F. Supp. 1280 (D. Conn. 1977) [hereinafter "*Heffernan I*"].

443. Senator Javits prepared remarks regarding ERISA Improvements Act of 1979, S. 209, 96th Cong. (1st Sess. 1979), reprinted in 1979 Senate ERISA Review, *supra* note 406, at 106-107.

444. *Heffernan I*, at 1284.

445. *Chicago Preemption Review supra* note 404, at 72 n.293 (citing *Heffernan II*, at 916 n.293)

446. *Id.* at 107 (emphasis added).

provision including both the Alienation Prohibition and the provision that ERISA plan benefit rights are determined by the terms of the plan. Thus, the amendment to the Alienation Prohibition was unnecessary, although an amendment to the corresponding Code section⁴⁴⁷ was needed to maintain the plan's tax qualification if such orders were permitted. The legislation did not resolve all the tax-qualification issues because a plan that complies with the specified domestic relations orders may not satisfy the qualification requirement that the plan be operated in accord with the terms of the plan document.⁴⁴⁸

There was considerable discussion of this proposal by members of the administration, advocates for women's rights and plan sponsors, as discussed *infra*. A similar, but more limited set of exemptions became part of REACT in 1984, as discussed *infra*.

The Secretary of Labor supported this proposal by presenting the above arguments in the framework of protecting women, while preserving uniform national regulation of employee benefit plans.⁴⁴⁹ The Secretary of Labor, however, proposed alternative language, which made no substantive changes.⁴⁵⁰ The Assistant Treasury Secretary for Tax Policy supported the position of the Secretary of Labor, but suggested that the legislation clarify that this amendment is not changing but clarifying the law.⁴⁵¹ This is a somewhat odd position since the regulations describing the meaning of the Alienation Prohibition, which were promulgated by the U.S. Department of Treasury less than two years before, did not exempt any domestic relations orders from the prohibition for tax-qualification purposes. Senator Schroeder supported the proposal,⁴⁵² as did Ms. Anita Nelam of the National Women's

447. Code § 401(a)(13).

448. *See* Treas. Reg. § 1.401-1(a)(2) (as amended 1988) (requiring tax-qualified plans to follow plan documents). *But see* Rev. Rul. 80-27; 1980-1 C.B. 85 (explaining that the IRS disregarded this requirement in a pre-REACT ruling that a pension plan would not lose its tax qualification for complying with a court order requiring the distribution of the benefits of a participant in pay status to the participant's spouse or children to meet the participant's alimony or support obligations); Treas. Reg. 1.401(a)-13(g)(2) (as amended 1988) (indicating a post-REACT holding that the lack of provisions pertaining to a QDRO does not disqualify the plan).

449. Secretary of Labor Ray Marshall's remarks at 1979 Senate ERISA Review, *supra* note 400, at 113-114. *See also* Prepared Statement Secretary of Labor Ray Marshall at 9-12, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 124, 132-135.

450. Secretary of Labor Ray Marshall Apr. 27, 1979 letter in response to request by Senator Williams, Chairman of S. Comm. On Labor and Human Resources, for comments regarding each section of S. 209 at 30, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 154, 183.

451. Assistant Secretary of Treasury (Tax Policy) Donald C. Lubick May 1, 1979 letter response to request by Senator Williams, Chairman of S. Comm. On Labor and Human Resources, for comments re each section of S. 209 at 5, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 225, 230.

452. Testimony by Ms. Patricia Schroeder dated Feb. 1, 1979 at 7, *reprinted*

Political Caucus.⁴⁵³

Plan sponsors proposed three sets of substantive changes to the domestic relations proposals.

First, the ERISA Industry Committee, an association of 100 major corporations providing employee benefits, proposed that the provisions only apply to pension payments that were being paid rather than to benefits that were payable.⁴⁵⁴

Second, the Western Council of Teamsters proposed that the law: (1) "require orders to contain sufficient information to permit the [pension] plan to easily determine what it is supposed to do and to require the order to be served on the plan no more than 90 days before benefits commence;"⁴⁵⁵ (2) permit plans to avoid being joined to divorce actions until shortly before plan payments are to be made; (3) protecting plans, agents, and insurers against double liability if they make payments pursuant to a bill that does not meet ERISA's standards; and (4) provide that domestic relations orders not cause a participant's dependent or former spouse to become a plan beneficiary.⁴⁵⁶ The Teamsters also proposed alternative statutory language.⁴⁵⁷ The alternative defined the permissible orders and their effects in the ERISA Express Preemption section, and added language to the Alienation Prohibition declaring that the orders described in the preemption section will not be affected by the Prohibition.

Third, Kaiser Aluminum & Chemical Corp. expressed concern about the correctness of the underlying premise that plan benefit options are always so simple that they will always be obvious to

in 1979 Senate ERISA Review, *supra* note 406, at 1043, 1049.

453. Testimony by Ms. Anita Nelam of the National Women's Political Caucus presented on Feb. 7, 1979, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 634, 636.

454. Prepared Statement of the ERISA Industry Committee (ERIC) Before the Senate Committee on Human Resources presented on Feb. 7, 1979 to the S. Comm. on Labor and Human Resources at 12-13, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 351, 362-363. This position was supported by the March 22 letter of Mr. H. P. Kneen, Jr., the Plan Administrator of the IBM Employee Benefit Plans to the S. Comm. on Labor and Human Resources, at 4, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 1053, 1056; Mar. 23 written statement of Mr. H. Weston Clarke, Jr., Vice President, Human Resources, American Telephone and Telegraph Company to the S. Comm. on Labor and Human Resources, at 10, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 1068, 1078.

455. Theodore L. Groom Mar. 23, 1979 Letter on behalf of W. Conf. Teamsters Pen. Tr. Fund to Senator Williams, Chairman of S. Comm. On Labor and Human Resources, supplementing Feb. 7, 1979 statement before Committee, at 9, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 589, 597.

456. *Id.* at 6-13, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 589, 594-601.

457. *Id.* at 1-3, first attachment 1-3, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 589, 602-607.

non-participants.⁴⁵⁸ Thus, considerable litigation would be spawned about whether the order requires an available payment option.⁴⁵⁹ Kaiser also suggested that if the proposal is nevertheless adopted: (1) parties to divorce should bear the costs of the plan reviewing and processing such orders; (2) participants should retain the right to select the plan benefit option notwithstanding any state order to the contrary; (3) a non-participant should be required to provide all information needed to make payments within 90 days of initial payment; and (4) domestic relations orders should not cause a participant's dependent or former spouse to become a plan beneficiary.⁴⁶⁰

The Secretary of Labor, like Senator Javits and the other parties who offered comments, failed to discuss why it was sensible to defer to domestic relations orders only for those applicable to those pension plans subject to the spousal survivor provisions.⁴⁶¹ It would appear that the same policy justifications that apply to those orders apply to domestic relations orders pertaining to benefits from pension plans not subject to the spousal survivor provisions, such as unfunded plans primarily for highly compensated employees ("Top-Hat Plans"),⁴⁶² or welfare plans, such as disability plans, life insurance, or severance plans, which historically were often sources of income for a participant's divorced spouse or other dependents. This lack of consideration may have been a consequence of an absence of decisions with respect to such plans at that time. However, one would expect

458. March 23 letter of Mr. Joel Hassen, General Attorney, Pension and Benefits, Kaiser Aluminum & Chemical Corp to the S. Comm. on Labor and Human Resources, at 2, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 1061, 1062.

459. *Id.*

460. *Id.* at 2-4, *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 1061, 1062-1064.

461. *See* ERISA Improvements Act of 1979, S. 209, 96th Cong. § 128 (adding an alienation exemption at ERISA § 206(d)(3)); at 23-24, 155 (adding the preemption exemption based on ERISA § 206(d)(3) as ERISA § 514(b)(4)); at 35-36 (1st Sess. 1979), *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 9, 31-32, 43-44.

462. Unfunded pension plans that are maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. ERISA § 201(2), 29 U.S.C. § 1051(2). *See e.g.*, *Daft v. Advest, Inc.*, 658 F.3d 583, 594-95 (6th Cir. 2011) (discussing the standard of review of top-hat determinations by plan administration, particularly their select group nature); *see also* *In re IT Grp., Inc.*, 448 F.3d 661, 667-69 (3d Cir. 2006) (discussing the characteristics of such plans, particularly their unfunded nature). Such plans are often called non-qualified because their unfunded nature prevents them from qualifying for the favorable tax treatment that is generally provided to ERISA deferred compensation plans under Code § 401(a). *See generally*, MICHAEL J. NASSAU, DEFERRED COMPENSATION: DESIGN ISSUES AND THE CONSTRUCTIVE RECEIPT DOCTRINE IN EXECUTIVE COMPENSATION (Michael Sirkin & Lawrence Cagney eds., 2012).

that the very limited litigation would have stimulated a discussion of the implications of the litigation for these other plans. There was a similar absence of such consideration of the same point in the development of REACT, as discussed *infra*, which also confined the provisions for the deference to domestic relations orders to those pertaining to Spousal Survivor Benefit Plans.

VIII. INITIAL ERISA PREEMPTION DECISIONS BY THE SUPREME COURT WITHOUT OPINIONS

Five of the Supreme Court's initial ERISA decisions, without opinions, made preemption holdings. Although the lack of opinions means that the holdings are restricted to the precise issues decided,⁴⁶³ all seemed to consider rather broad issues. Thus, they are of considerable precedential value. First, ERISA did not preempt state community property law or orders pursuant to state domestic relation law.⁴⁶⁴ Thus, in case of conflict, both would supersede the terms of an ERISA pension plan. Second, ERISA did not preempt state court orders making pension plans parties to divorce actions.⁴⁶⁵ Third, ERISA preempted state laws that governed welfare participation rules⁴⁶⁶ or the form of welfare benefits.⁴⁶⁷ Fourth, preemption may not be avoided by characterizing the mandated benefit payments as exercises of the state's taxing power. Thus, in case of conflict, plans terms would supersede such state laws. Fifth, an unfunded severance pay policy is an ERISA plan even if the employer files no ERISA reports, the policy has no formal claims procedure, and no written plan documents were made available to participants.⁴⁶⁸ Thus, states may not regulate such informal arrangements.

The Supreme Court has unanimously proclaimed that dismissals for want of substantial federal question⁴⁶⁹ and

463. See generally John A. Frey, *Supreme Court's views as to precedential weight of Supreme Court memorandum decision summarily affirming lower federal court judgment on appeal or summarily dismissing appeal from state court*, 139 L. ED. 2d 979 (2012).

464. *In re Marriage of Campa*, 152 Cal. Rptr. 362 (Cal. Ct. App. 1979); see also *Carpenters Pension Trust Fund for N. California v. Campa*, 444 U.S. 1028 (1980) (stating the case was dismissed for want of a substantial federal question).

465. *Id.*

466. *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (2d. Cir. 1982), *aff'd sub nom. Arcudi v. & Webster Eng'g Corp.*, 463 U.S. 1220 (1983).

467. *Standard Oil Co. of California v. Agsalud*, 633 F. 2d 760 (9th Cir. 1980); *aff'd* 454 U.S. 801 (1981).

468. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320 (2d. Cir. 1985) *aff'd* 477 U.S. 901 (1986), *aff'd sub nom. Roberts v. Burlington Indus., Inc.*, 477 U.S. 901 (1986)

469. Such decisions applied only to appeals of right from preemption decisions of the highest courts of any state, which right was abolished in 1988

affirmances without opinions are not decisions to deny review, but rather are “decisions on the merits.”⁴⁷⁰ Thus, the holdings were binding “on state courts and other federal courts.”⁴⁷¹ Moreover,

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.⁴⁷²

However, in his *Bradley* concurrence, Justice Brennan emphasized that such holdings are limited to the particular facts involved, and the reasoning needed to address those facts.⁴⁷³ The Court has not distinguished a summary affirmance, *i.e.*, one without an opinion, and a dismissal for want of a substantial federal question, which also has no opinion, in the case of an appeal that the Supreme Court must accept, such as the ones under consideration.⁴⁷⁴ The only rational conclusion is that the latter always affirms by answering the questions presented in the jurisdictional statement in the negative, while the former does not answer any of those questions, but simply affirms the result below.

A. *ERISA Does Not Preempt Community Property Law or Domestic Relations Orders*

In 1979, the California Court of Appeals held in *In re Marriage of Campa* [hereinafter “*California Campa*”],⁴⁷⁵ that ERISA did not preempt: (1) an order joining an ERISA pension

by 28 U.S.C. §1257, revised in the Supreme Court Selections Act of 1988 Pub. L. No. 100-352, § 3, 102 Stat 662, 662 (1988). See generally ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 213, 215-17 (7th. ed. 1993)

470. See Letter from all nine Justices of the United States Supreme Court to Sen. De Concini (June 22, 1978), reprinted in Eugene Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A. 1325, 1328 (1979) (discussing the proposal to make appeals, such as *Campa*, no longer as of right but subject to the Court's discretion). Virtually the same letter was written by Chief Justice Burger to Rep. Kastenmeier (June 17, 1987), reprinted in S. REP. NO. 300, 100th Cong. 5 (2d Sess. 1988), in the year that the proposal was adopted.

471. *Id.* Both virtually identical letters (citing *Mandel v. Bradley*, 432 U.S. 173 (1977) (per curiam); *Hicks v. Miranda*, 422 U.S. 332 (1975)).

472. *Mandel*, 432 U.S. at 176.

473. *Id.* at 179-80 (Brennan, J., concurring).

474. The Supreme Court may dismiss the appeal for the lack of a substantial federal question when it does not consider the issue important enough to issue a decision on the merits. In contrast, with a certiorari petition, Supreme Court dismissals of certiorari petition affirm the result below, but without expressing any view of the questions presented. See *e.g.*, *Boumediene v. Bush*, 549 U. S. 1328, 1329 (Breyer J., dissenting) (2007) (denying Guantanamo prisoner cert petition re denial of writ of habeas corpus).

475. *In re Campa*, 152 Cal. Rptr. at 362.

plan, the Carpenters Pension Trust Fund for Northern California [hereinafter “the Carpenters’ Plan”] to a state domestic relations proceeding regarding the pension payments; or (2) a domestic relations order based on state community property law that directed the Carpenters’ Plan to pay a portion of the participant’s benefit to his spouse, when the participant began to receive his plan benefits, even though the plan document prohibited such plan payments to a spouse.⁴⁷⁶

The Carpenters’ Plan filed an appeal with the Supreme Court in 1979 after the California Supreme Court affirmed *California Campa* in a decision without an opinion.⁴⁷⁷ The jurisdictional statement for the appeal contained only the following two questions:

1. Do the provisions of Title I of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California Community property law and implementing statutes and court rules insofar as they relate to an employee pension benefit plan covered by that Act?
2. Does a state court have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan?⁴⁷⁸

Both sides relied on a brief filed by the DOL with the Ninth Circuit in 1979 with respect to an appeal of the District Court *Stone*⁴⁷⁹ decision (the “*Stone* DOL Brief”).⁴⁸⁰

The Carpenters’ Plan focused on the *Stone* DOL Brief’s three preemption conclusions. First, a participant’s current or former spouse is not an ERISA plan participant or beneficiary by virtue of state community property law.⁴⁸¹ Thus, the current or former spouse would lack standing to obtain a benefit payment from the Carpenters’ Plan,⁴⁸² which should have led to a reversal of the decision below. Second, state community property law may not be used to provide a participant’s spouse or former spouse with rights greater than those of the participant.⁴⁸³ Third, to the extent the interest of a participant’s spouse or former spouse is derived only from state property law, such interest may not be enforced against

476. *Id.* at 363.

477. Appellants’ Jurisdictional Statement, Carpenters Pension Trust Fund for N. Cal., v. Campa, 444 U.S. 1028 (June 19, 1979) (No. 78-1881).

478. *Id.* at 7.

479. 450 F. Supp. 919.

480. The brief was reproduced in full at BNA Pension Reporter No. 221, Jan. 8, 1979, p. R-7-R-14 [hereinafter “*Stone* DOL Brief”]; see also *Chicago Preemption Review*, *supra* note 410 (criticizing a similar Justice Department brief).

481. *Id.* at R-11.

482. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

483. *Stone* DOL Brief, *supra* note 480, at R-12.

an ERISA plan.⁴⁸⁴

The former spouse cited and repeated much of the *Stone* DOL Brief's reasoning and conclusion that the DRO was enforceable because it was subject to an implicit exemption from the Alienation Prohibition.⁴⁸⁵ The DOL asserted that ERISA had no provision giving a participant the right to select a beneficiary, thereby defeating a community property claim to death benefit proceeds.⁴⁸⁶ However, the DOL disregarded one of the most fundamental provisions of ERISA, *viz.*, the provision that gives participants enforceable benefit rights under the plan terms, including the right to select a beneficiary pursuant to those terms.⁴⁸⁷

The *Stone* DOL Brief disregarded the Treasury regulation on the Alienation Prohibition that was issued in February 1978 and rejected the DOL position, although the brief was filed in December 1978.⁴⁸⁸ The DOL, instead, presented two arguments. First, similar language in other pre-ERISA federal statutes had been found not to prohibit the enforcement of family support obligations.⁴⁸⁹ However, none of the cited statutes presented the issue before the court, *i.e.*, whether the enforcement was preempted by a provision such as the ERISA Express Preemption. Second, the DOL asserted that property divisions based on community property law, like family support obligations, rested on equities, namely, one in favor of a fair division of property, which justifies an implicit exemption from the Alienation Prohibition.⁴⁹⁰ In early 1979, as discussed *supra*, the U.S. Department of Treasury asked Congress to confirm this implicit exemption in its

484. *Id.* at R-8, R-9-R-12.

485. Appellees' Motion to Affirm Lower Court Ruling, *Carpenters Pension Trust Fund for N. Cal. v. Campa*, 444 U.S. 1028 (Sept. 17, 1979) (No. 78-1881) at 4-7.

486. *Stone* DOL Brief, *supra* note 480, at R-13.

487. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

488. *Stone* DOL Brief, *supra* note 480, at R-14. *But see* Treasury Regulation § 1.401(a)-13 (as issued on Feb. 17, 1978) (providing that the ERISA phrase "assigned or alienated," has a far broader meaning than the DOL claimed). In particular, the phrase includes any payments to a party other than the one entitled to those payments under the plan terms. *Id.* The regulation contains a list of explicit exclusions, none of which refers to any claims based on domestic relations orders. *Id.*

489. *Stone* DOL Brief, *supra* note 480, at R-12. Two decisions were cited: *In re Flanagan*, 31 F. Supp. 402 (D.C. Cir. 1940) (holding that veterans disability benefits paid to a lunatic's representative were subject to alimony claims); *Schlaefel v. Schlaefel*, 112 F.2d 177 (D.C. Cir. 1940) (determining that DC disability payments are subject to alimony claims that are not debts but obligations). The latter was the cited basis for *Flanagan*. However, *Schlaefel* did not mention or address federal preemption because it only considered the interaction of two D.C. statutes. In particular, *Schlaefel* held that because the alimony obligation was not a prohibited alienation, it could be enforced against the disability payments.

490. *Stone* DOL Brief, *supra* note 480, at R-13.

analysis of S. 209, the ERISA Improvement Act of 1979.⁴⁹¹ However, that bill was not approved by the Senate before the Supreme Court's decision in this case.

The Supreme Court dismissed the Carpenters Plan's appeal for want of substantial federal question ("*Sup Ct. Campa*").⁴⁹² The Court also held that attorneys' fees should not be assessed against the Carpenters Plan,⁴⁹³ thereby finding that the Plan's litigation position was not unreasonable. The broadness of the implications of the decision that a domestic relations order based on community property overrides pension plan terms to the contrary, depends on the extent to which it extends beyond the holdings of *California Campa*. In fact, after the Supreme Court's decision, there were lower court decisions extending *California Campa* using an analysis similar to that of the California Court of Appeals. There were also no post-Supreme Court decisions holding that ERISA preempted domestic relations orders. The *Campa* litigation and its progeny are discussed in more detail in an article entitled, *How the Supreme Court and the Department of Labor May Dispel Myths about ERISA's Family Law Provisions and Protect the Benefit Entitlements That Arise Thereunder* [hereinafter "*Feuer's ERISA Myths*"].⁴⁹⁴

B. ERISA Preempts State Law Benefit Terms Mandate Even if the Mandate is Characterized as a State Tax

In 1980, the Ninth Circuit affirmed in *Standard Oil Co. of California v. Agsalud*,⁴⁹⁵ that ERISA preempted the Hawaii Prepaid Health Care Act, requiring all employers in the state to provide their employees with a comprehensive prepaid health care plan.⁴⁹⁶ The court did not discuss the "relate to" requirement, but instead focused on whether any exemption was applicable. The court found no exemption from the ERISA Express Preemption for state mandated plans.⁴⁹⁷ The court also rejected the characterization of the mandate that employers pay half their employee's premiums as an exercise of the state's taxing power because a tax must be paid to the government rather than to a third party.⁴⁹⁸ It was not clear why an exercise of the state taxing

491. Assistant Secretary of Treasury (Tax Policy) Donald C. Lubick May 1, 1979 letter response to request by Senator Williams, Chairman of S. Comm. On Labor and Human Resources, for comments re each section of S. 209, at 5, reprinted in 1979 Senate ERISA Review, *supra* note 406, at 225, 230.

492. *In re Campa*, 152 Cal. Rptr. at 362; *Carpenters Pension Trust Fund for N. Cal.*, 444 U.S. at 1028.

493. *In re Campa*, 152 Cal. Rptr. at 362; *Carpenters Pension Trust Fund for N. Cal.*, 446 U.S. at 906.

494. *Feuer's ERISA Myths*, *supra* note 25, at 689-698.

495. *Agsalud*, 633 F.2d at 760.

496. *Id.* at 763.

497. *Id.* at 764.

498. *Id.* at 765.

power would not be preempted by ERISA, although there is a brief reference to such a tenth amendment argument.⁴⁹⁹ The court also rejected the relevance of the exemption for domestic relations orders because such orders affected plans far more tangentially than the law at issue.⁵⁰⁰ Finally, the court observed that in 1979 Congress rejected a proposal to exempt the Hawaiian plan from the ERISA Express Preemption when it failed to adopt S. 209, as discussed *supra*.⁵⁰¹

In 1981, the Supreme Court affirmed the above Ninth Circuit decision without providing an opinion.⁵⁰²

In 1982, the Second Circuit affirmed, in *Stone & Webster Engineering Corporation v. Ilsley*,⁵⁰³ that ERISA similarly preempted a state law requiring an employer to provide health and life insurance coverage for a former employee receiving workers' compensation due to a job-related injury. The court focused on the "relate to" requirement and found it satisfied the requirement because the only purpose of the state law was to add a benefit requirement to an ERISA plan. The court rejected the assertion that this was too remote a regulation to be preempted.⁵⁰⁴ The *Ilsley* court distinguished the law at issue from that it had found exempt in *Merry*,⁵⁰⁵ discussed *supra*. The *Ilsley* court described the latter exemption as based on "[t]he ancient family law concepts of maintenance and support of a spouse and the use of a state court's process to uphold and enforce a spouse's rights were not thought to have been preempted by ERISA."⁵⁰⁶ However, as discussed in the *Chicago Preemption Review*, *supra*, Congress, rather than the courts, should make such policy judgments, and courts should focus on the tenuousness of a state law's effect on employee benefit plans in deciding whether ERISA preempts such law.

In 1983, the Supreme Court affirmed the above Second Circuit decision without providing an opinion.⁵⁰⁷

C. ERISA Preempts State Regulation of Informal And Unfunded Severance Policies

In 1985, the Second Circuit, in *Gilbert v. Burlington Indus., Inc.*,⁵⁰⁸ considered whether an informal and unfunded severance policy was an ERISA welfare plan. The issue arose when thirty-

499. *Id.* at 765.

500. *Id.* at 766.

501. *Id.*

502. *Agsalud*, 454 U.S. 801 (1981), *affg.* *Agsalud*, 633 F.2d 760.

503. *Ilsley*, 690 F.2d at 323.

504. *Id.* at 329.

505. *Id.* (citing *Merry*, 592 F.2d at 121).

506. *Id.*

507. *Arcudi*, 463 U.S. 1220 (1983) *affg.* *Ilsley*, 690 F.2d 323.

508. *Gilbert*, 765 F.2d at 320.

eight employees were denied severance benefits after Burlington Industries sold its operations as a going concern to Kayser-Roth.⁵⁰⁹ The severance pay policy at issue provided that benefits would be paid to employees “involuntarily terminated from the Company;” including terminations “due to job elimination.”⁵¹⁰ Under this policy, severance benefits were awarded or denied automatically rather than through a formal claims process, and the benefits varied from two weeks to twelve months of pay depending on the participant’s service and compensation at the time of termination.⁵¹¹ Shortly before the sale, Burlington informed its employees that they would not qualify for severance benefits as a result of the Kayser-Roth sale.⁵¹² The participants alleged that Burlington had failed to comply with the ERISA reporting and disclosure requirements, including the requirement that plan participants be provided with plan documents upon request.⁵¹³ The first time that Burlington filed the required annual ERISA disclosure report regarding severance was after plaintiffs filed claims with the New York State Department of Labor (“NYS DOL”).⁵¹⁴

The NYS DOL became involved and the litigation arose because ERISA did not appear to protect the participants in the severance policy at issue. This apparent failure arose because ERISA does not specify the standard under which courts should review benefit denials, and the courts filled that gap with a very deferential review standard, which the Supreme Court subsequently rejected in 1989 in *Firestone Tire & Rubber v. Bruch*.⁵¹⁵ The Second Circuit did not apply the “*contra proferentem*” standard, *i.e.*, that ambiguities in written documents are construed against the draftsman of the document.⁵¹⁶ Nor did it

509. *Id.* at 322-23.

510. *Id.*

511. *Id.*

512. *Id.*

513. *See id.* at 323 (stating that the appellant alleged, “that Burlington never sought to comply with ERISA respecting its severance pay policy. That is, they claim that: it never published or filed an annual report, a financial statement, a plan description or a statement of plan modifications; it did not designate a fiduciary for the plan or inform employees of their rights under ERISA and the plan; there was no established claims procedure; and, apart from the company’s ‘open door’ grievance policy, there was no established appeals procedure.”).

514. *Id.*

515. *See Bruch*, 489 U.S. at 101 (holding that a *de novo* review standard is applicable to denial of severance benefits to employees who continued with purchaser of business).

516. *See, e.g., United States v. Seckinger*, 397 U.S. 203, 211 (1970) (rejecting the claim that a federal contract drafted by federal government placed full burden on contractor who shared negligence); *see also Connor v. Phoenix Steel Corp.* 249 A.2d 866, 869 (S. Ct. Del. 1969) (holding that a discharged employee with 28 years’ service was entitled to early retirement benefits and the court applied the *contra proferentem* doctrine before the

apply *de novo* review, *i.e.*, choosing the most reasonable position. Instead, the court reviewed and upheld the Burlington denial under an arbitrary and capricious standard.⁵¹⁷ However, the court did suggest that an employer's violations of ERISA's requirements may "sufficiently taint its denial of severance pay so as to warrant a finding that it was arbitrary and capricious."⁵¹⁸ The Fourth Circuit took a similar position in *Holland v. Slack*, a case involving the Burlington severance plan.⁵¹⁹ The court therein found it was not arbitrary and capricious for Burlington to interpret the plain language to restrict severance benefits to employment terminations where an employee's job was eliminated.⁵²⁰

The *Gilbert* court affirmed a decision that ERISA plans include informal and unfunded severance plan policies.

The court used three arguments to reject the appellant's argument that "a promise or agreement to pay severance benefits, without more, does not constitute a welfare benefit plan within the meaning of ERISA."⁵²¹ First, an ERISA plan could be funded from general assets.⁵²² Second, although an unfunded severance benefit policy may be described as a payroll practice, such a policy does not implicitly fall within those practices that are excluded from ERISA and are paid during employment.⁵²³ The court did not discuss which unfunded severance plans are payroll practices. For example, would a plan that provided severance to any terminated employee equal to the employee's accrued, but unused, vacation time be a payroll practice?⁵²⁴ Finally, the court held that ERISA protected severance policy benefits because such benefits were described as welfare plan benefits in 29 U.S.C. § 186(c), the National Labor Relations Act provisions cited by the ERISA

enactment of ERISA).

517. *See Gilbert*, 765 F.2d at 322, 328 (following the plaintiff's lead in applying the arbitrary standard of review).

518. *Id.* at 329.

519. *Holland v. Slack*, 772 F.2d 1140, 1143 (4th Cir. 1985); *aff'd sub nom. Brooks v. Burlington Ins. Inc.*, 477 U.S. 901 (1986).

520. *Id.* at 1148-1150.

521. *Gilbert*, 765 F.2d at 324.

522. *Id.* at 324-25.

523. *See id.* at 326 (citing 29 C.F.R. §§ 2510.3-1(a)(4) and 29 C.F.R. §§ 2510.3-1(b)).

524. *Cf. Massachusetts v. Morash*, 490 U.S. 107 (1989) (holding that a policy of making payments to terminating employees of accrued but unused vacation payment from general assets was a payroll practice, and thus not an ERISA plan) to *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 at 736-37 (2d Cir. 2001) (holding that there was an ERISA severance plan because: (1) the employer had to undertake "ongoing, particularized, administrative" analysis of each case; (2) "the reasonable employee would perceive an ongoing commitment by the employer to provide some employee benefits;" and (3) "the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria.") (quoting *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2d Cir. 1996)).

payroll practice regulations.⁵²⁵

The *Gilbert* court similarly concluded that the state law requiring payment of the plan benefits related to the ERISA plan because the law affected whether benefits are paid.⁵²⁶ The court rejected the argument that these wage collection statutes are the exercise of fundamental police powers, similar to domestic relations laws, which the Second Circuit had held ERISA did not preempt.⁵²⁷ The court found such characterization was not sufficient to avoid preemption, but the state law must also affect an ERISA plan in “too tenuous, remote or peripheral a manner.”⁵²⁸ In particular, determining who will receive ERISA plan benefits is far more tenuous than whether benefits will be paid.⁵²⁹ There was no discussion of whether such a distinction was sensible or whether the state law could be defended as a generally applicable criminal law.⁵³⁰ The court, however, observed that the employer’s failure to comply with the ERISA reporting, disclosure, and fiduciary requirements could indicate that the employer was arbitrary and capricious in excluding such employee terminations from the severance policy.⁵³¹

In 1986, the Supreme Court affirmed the above Second Circuit decision without providing an opinion.⁵³²

IX. INITIAL ERISA PREEMPTION DECISIONS BY THE SUPREME COURT WITH OPINIONS

There were several early ERISA preemption decisions, discussed *infra*, by the Supreme Court holding that enhancements to ERISA protections, including benefit terms mandates, were related to ERISA plans. Thus, ERISA preempted those laws. This

525. *Gilbert*, 765 F.2d at 324-25.

526. *Id.* at 326-27.

527. *Id.* at 327.

528. *Id.*

529. *Id.*

530. *But see Holland*, 772 F.2d at 1144 (involving a companion action brought in North Carolina federal courts, analyzing a state statute (N.C. Gen. Stat. § 95-25.7 (1985), providing only for civil penalties). In contrast, a New York state statute (NY Labor L. § 198-c), which was at issue in *Gilbert*, made it a misdemeanor to fail to pay wage supplements.

531. *See Gilbert*, 765 F.2d at 328-29. The *Gilbert* court referred to a decision, *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356 (9th Cir. 1985) in which the court had overturned a severance pay denial on the basis that the procedural irregularities implied that the plan had not been amended to exclude the employees. In *Gilbert*, however, the issue was not the effectiveness of a plan amendment but the significance of the severance plan terms. *Id.*

532. *See Roberts*, 477 U.S. at 901 (indicating that the appeal was brought by the New York State Commissioner of Labor); *see also Brooks*, 477 U.S. at 901 (indicating that the appeal was brought by a former employee); *Gilbert*, 765 F.2d at 320; *Holland*, 772 F.2d at 1140.

was consistent with the idea, discussed *supra*, that ERISA was drafted to be carefully balanced to accommodate the interests of plan participants and beneficiaries as well as those of plan administrators and sponsors. Thus, as discussed *supra*, by approving the ERISA Express Preemption, Congress assured that it would have to amend ERISA to enhance or diminish ERISA protections. However, as discussed *infra*, these decisions laid the foundation for future questionable decisions because they contained observations not needed for these decisions. In particular, as discussed *infra*, some observed that one relation to an ERISA plan is a reference to such plans, but failed to emphasize that the key question was whether the effects of the resulting relation were too tenuous to result in preemption.

A. *ERISA Preempts State Laws that Enhance ERISA Protections of Plan Participants or Beneficiaries, Including Benefit Terms Mandates*

There were six early preemption decisions by the Supreme Court holding that ERISA preempts state laws that enhanced ERISA protections, including benefit terms mandates. The Court gave no reason to doubt that such relations are always non-tenuous. Thus, although the Court never made such a statement, ERISA preempts all such laws.

In 1981, the Supreme Court decided, in *Alessi v. Raybestos-Manhattan*,⁵³³ that ERISA preempts a New Jersey law prohibiting pension plan benefits from being offset by workers compensation benefits.⁵³⁴ The *Alessi* state law prohibition conflicted with an ERISA regulation permitting, but not requiring, such an offset to pension plan benefits.⁵³⁵ Thus, if the regulation was correct, the statute would have been preempted even if there were no ERISA Express Preemption.

In 1983, the Supreme Court decided in *Shaw v. Delta Airlines*,⁵³⁶ that ERISA preempts a New York law requiring ERISA disability plans⁵³⁷ to provide maternity benefits when neither ERISA nor the federal non-discrimination laws contained such mandate.⁵³⁸ Even though ERISA did not address such coverage,

533. *Alessi*, at 504.

534. *Id.* at 525.

535. *See id.* at 517-18 (referring to 26 CFR § § 1.411 (a)-(4)(a)).

536. *Shaw*, 463 U.S. at 85.

537. Disability plans, which are maintained solely for the purpose of complying with local disability rules, are exempt from ERISA coverage. ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3). The Supreme Court remanded the case to determine the applicability of this exemption. *Shaw*, 463 U.S. at 109.

538. *Id.* at 108-09. The issue before the Court was whether Delta Airways was obligated to pay the locally mandated benefits accruing before April 29, 1979, when the federal Pregnancy Discrimination Act first prohibited such discrimination. *Id.* at 88-89. After such date, there was no ERISA preemption issue because the benefits at issue were required by a federal law. *Id.*

the ERISA Express Preemption governs because of its application to state laws that “relate to any” ERISA plan, such as a benefit coverage mandate, which conflicted with plan terms in this case.⁵³⁹ ERISA preempts the law because the relation is non-tenuous.⁵⁴⁰

In 1985, the Supreme Court decided, in *Metro. Life Ins. Co. v. Massachusetts*,⁵⁴¹ that ERISA preempts a state law requiring any healthcare expense-reimbursement plan with surgical and hospital coverage to include mental health coverage.⁵⁴² In this case, even though ERISA did not address such coverage, the general provision of the ERISA Express Preemption governed because of its application to state laws that “relate to any” ERISA plan.⁵⁴³ The conflict with the plan terms in this case appears to establish a non-tenuous relation. Massachusetts conceded that the law was related to an ERISA plan, and the Court did not discuss the tenuousness of the relation.⁵⁴⁴ However, ERISA did not preempt the law in the case before the Court because the insurance plan coverage exception to ERISA preemption, which only applied to insured plans, saved the law.⁵⁴⁵ The Court, however, observed that the proposed ERISA Improvement Act of 1979, which was not adopted, included a provision to preempt benefit terms mandates for insured plans.⁵⁴⁶

In 1987, the Supreme Court decided in *Pilot Life Ins. Co. v. Dedeaux* (“*Pilot*”),⁵⁴⁷ that ERISA preempts state common-law tort and contract actions asserting improper processing of a benefit claim under an insured employee benefit plan.⁵⁴⁸ The Court’s decision is somewhat confusing because it declares that common law actions are subject to the general provision of the ERISA Express Preemption, but does therein explain their non-tenuous relation to ERISA plans. There seems little question of such relation because the actions would enhance the ERISA provisions for enforcing benefit claims against such plans. However, the Court presented its detailed preemption analysis⁵⁴⁹ in the context of explaining why the insurance plan coverage exception to the general provision of the ERISA Express Preemption is inapplicable.⁵⁵⁰ The Court therein set forth its broad conclusions

539. *Id.* at 97.

540. *Id.* at 100, n.21.

541. *Metro. Life Ins. Co.*, 471 U.S. at 724.

542. *Id.* at 758.

543. *Id.* at 739.

544. *Id.*

545. *Id.* at 739-749.

546. *See id.* at 740 (referring to ERISA Improvements Act of 1979, S. 209, 96th Cong. § 155, at 34-35 (1st Sess. 1979)), *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 9, 42-43.

547. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

548. *Id.* at 54.

549. *Id.* at 52-56.

550. *Id.* at 48-52, 56-57.

about the ERISA enforcement provisions:

The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.⁵⁵¹

In 1990, the Supreme Court decided in *Ingersoll-Rand Co. v. McClendon*,⁵⁵² that ERISA preempts state common-law actions for wrongful discharge to prevent the vesting of benefits under a pension plan.⁵⁵³ The Court unanimously embraced the *Pilot* analysis that ERISA preempted the state law enhancement of ERISA enforcement actions.⁵⁵⁴ However, the Court in *Ingersoll-Rand Co.* presented this analysis in the context of implicit conflict preemption, rather than the ERISA Express Preemption, without any explanation for this change.⁵⁵⁵ The plurality relied on the general provision of the ERISA Express Preemption.⁵⁵⁶ The Court correctly rejected the assertion that ERISA preempts only state laws that affect plan terms, conditions, or administration.⁵⁵⁷ The Court failed to observe that laws that enhanced ERISA enforcement mechanisms are preempted, as discussed *supra*, or as it had held three years earlier in *Pilot*, discussed *supra*. The Court instead observed that:

Neither of these limitations [on preemption] is applicable to this case. *We are not dealing here with a generally applicable statute that makes no reference to [such as a general garnishment statute], or indeed functions irrespective of, the existence of an ERISA plan [such as a severance statute governing benefits that are not part of a plan].* Nor is the cost of defending this lawsuit a mere administrative burden. Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. *As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself. . . .*

The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan. In the words of the Texas court, the cause of action 'allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.' 779 S.W.2d, at 71. Thus, in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. *Because the court's inquiry must be*

551. *Id.* at 54.

552. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

553. *But see Id.* at 136 (explaining that under the described facts the discharge did not deprive the plaintiff of the benefits at issue).

554. *Id.* at 144-45.

555. *Id.* at 142-45.

556. *Id.* at 138-42.

557. *See Id.* at 141-142 (dismissing the relevance of the plaintiffs' assertion that the state law did not so affect ERISA plans).

*directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan.*⁵⁵⁸

This explanation raises many questions. The Court cannot mean that any state law action naming an ERISA preemption plan is preempted because then general contract actions involving contracts pertaining to a plan's purchase of office supplies would be preempted. The Court cannot mean that a state court action requiring an inquiry directed at an ERISA plan is preempted for the same reason. What is the essence of an ERISA plan other than ERISA benefits? The Court reference to generally applicable laws suggests that ERISA would not preempt the use of a state general contract statute to recover benefit payments due under the plan terms, which are described by the Court as not being the essence of ERISA plans. This is *prima facie* absurd.

In 1992, the Supreme Court decided, in *D.C. v. Greater Washington Bd. of Trade* (hereinafter "*Greater Washington*"),⁵⁵⁹ that ERISA preempts a state law requiring employers to continue coverage under a health care reimbursement plan while an employee is receiving workers' compensation.⁵⁶⁰ In this case, even though ERISA did not address such coverage, the ERISA Express Preemption governed because of its application to state laws that "relate to any" ERISA plan, such as one mandating benefit coverage.⁵⁶¹ The Court rejected the assertion that including the state law within the state's permissible regulation of ERISA-exempt workers' compensation plans saved the law from preemption, and instead held that the law's relation to ERISA plans is the determinative factor.⁵⁶² The Court observed that the state statute is preempted on the basis of the statutory reference to ERISA welfare plans. The Court then described how the statute requires changes in the plan's benefit structure, which is the kind of non-tenuous relation to an ERISA plan that seems to result *prima facie* in ERISA preemption.

B. The Supreme Court Creates Confusion About the General ERISA Preemption by Observing that "Reference to" is Included Within the Meaning of the Phrase "Relate to" in the Course of Holding that ERISA Preempts Only State Laws with Non-Tenuous Effects on ERISA Plans

The confusion about the significance of a statutory reference to employee benefit plans originated with the *Shaw* Court's attempt in 1983, while considering whether ERISA preempted a state disability law, to clarify the meaning of the phrase "relate to"

558. *Id.* at 139-40 (emphasis added).

559. *Greater Washington*, 506 U.S. at 125.

560. *Id.* at 126.

561. *Id.* at 129-133.

562. *Id.* at 131.

by restating the words as follows:

“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.”⁵⁶³

This restatement is footnoted with the following reference to the following Black’s Law Dictionary definition:

Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.⁵⁶⁴

No explanation is given why the only words the Court selected from the above are “connect[ed] with” and “refer[ence].” The irrelevance of the Court’s restatement is shown by the *Shaw* Court’s conclusion that a law requiring employers to pay employees specified benefits, notwithstanding the plan terms, relates to ERISA plans. This conclusion was based on the substantial effects of the state law on such an ERISA plan.⁵⁶⁵

The *Shaw* Court provides a far more pertinent clarification of the significance of “relate to” phrase in a footnote that declares that there is no ERISA preemption for very tenuous relations as follows:

Some state actions may *affect* employee benefit plans in *too tenuous*, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan. *Cf.* *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (CA2 1979) (state garnishment of a spouse’s pension income to enforce alimony and support orders is not pre-empted).⁵⁶⁶

The Court correctly made no distinction between relations that depend on ERISA references and other relations in this description of the “tenuous” test. However, the footnote reference only to *Merry*⁵⁶⁷ is odd. Why did the Court not instead refer to its own 1980 ruling in *Sup Ct. Campa*, discussed *supra*, that ERISA did not preempt a domestic relations order enforcing the community property rights of the participant’s former spouse?

In 1985, the Supreme Court repeats and cites the *Shaw* restatement of “relate to” in *Metropolitan Life Ins. Co.*, while considering whether ERISA preempted a state law requiring healthcare expense-reimbursement plans to include a certain benefit.⁵⁶⁸ The Court first shows the irrelevance of this “reference”

563. *Shaw*, 463 U.S. at 96-97.

564. *See id.* at 98, n.16 (referring to Black’s Law Dictionary 1158 (5th ed. 1979)). The decision also references the *Chicago Preemption Review*, *supra* note 410, for its discussion of the history of the development of the preemption language. *Id.* at 99, n.19.

565. *Id.* at 98-100.

566. *Id.* at 100 n.21 (emphasis added).

567. *Merry*, 592 F.2d at 118.

568. *Metropolitan Life Ins. Co.*, 471 U.S. at 739.

rephrasing by first observing that the law at issue is not called a “benefit plan law.”⁵⁶⁹ The Court reached the obvious conclusion that a law requiring an employee benefit plan to purchase specified benefits relates to the ERISA plan because the effects of the law on such plan’s benefits are again substantial rather than tenuous.⁵⁷⁰

In 1987, the Supreme Court in *Pilot Life Ins. Co.*,⁵⁷¹ repeats and cites its two earlier decisions for the restatement rephrasing “relate to.” Again, the irrelevance of the “reference” rephrasing is shown, when the Court cites *Shaw* for the proposition that preemption is not limited to “state laws specifically designed to affect employee benefit plans.”⁵⁷² The Court reached a similar obvious conclusion that a state law providing causes of action for the failure to pay benefits under plan terms relates to ERISA plans because the effects of the law on such a plan are again substantial rather than tenuous.⁵⁷³

In 1990, the Supreme Court repeats and cites the *Shaw* restatement rephrasing “relate to” in *Ingersoll-Rand Co.*,⁵⁷⁴ while considering whether ERISA preempted a state common-law action for wrongful discharge to prevent attainment of benefits under a pension plan. The Court based its preemption conclusion in large measure on the state law claim’s reference to a pension plan, and the fact that the action depended on the existence of an ERISA plan.⁵⁷⁵ Moreover, the Court described the purpose of the ERISA Express Preemption as follows:

The conclusion that the cause of action in this case is preempted by § 514(a) is supported by our understanding of the purposes of that provision. Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; *the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government.* Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.⁵⁷⁶

This is a bizarre statement because a few pages earlier the Court had observed that a state statute is not preempted merely because it creates an administrative burden for an ERISA plan.⁵⁷⁷ Moreover, in this case the state law claim is for the wrongful

569. *Id.*

570. *Id.*

571. *Pilot Life Ins. Co.*, 481 U.S. at 47.

572. *Id.* at 47-48.

573. *Id.* at 48.

574. *Ingersoll-Rand Co.*, 498 U.S. at 139.

575. *See Id.* at 139-40 (seeming to presume that all pension plans are ERISA plans, even though there are non-ERISA plans, such as church plans and plans restricted to partners).

576. *Id.* at 142 (emphasis added).

577. *See id.* at 139 (explaining that the burdens imposed on plans of state law levies do not cause them to be preempted).

discharge to avoid paying pension benefits. Thus, there is no question that the claim is related to an ERISA plan without any need to resort to any burden analysis or to any Black's Law Dictionary definitions because the effects of the state law claim on the rights of plan employee benefits, namely the mechanisms to enforce those rights, are substantial rather than non-tenuous.⁵⁷⁸

In 1992, the Supreme Court repeats and cites the *Shaw* restatement rephrasing "relate to" in *Greater Washington*,⁵⁷⁹ but declares that ERISA preempts a state law referring to an ERISA plan on that basis alone without explanation other than a citation to *Mackey v. Lanier Collection Agency & Serv., Inc.*,⁵⁸⁰ discussed *infra*. The Court in *Greater Washington* considered whether ERISA preempted a state law governing the persons covered by a health reimbursement plan. As in *Ingersoll-Rand Co.*, the Court noted a reference in the state law at issue to ERISA plans,⁵⁸¹ although again the reference was not limited to ERISA plans,⁵⁸² and held this reference established the relation to a health reimbursement plan.⁵⁸³ The Court observed, but did not rely on, the finding of the court below⁵⁸⁴ of the serious impact of the state law on the employee benefit plan by requiring that existing health care coverage be continued after an employee becomes eligible for workers' compensation. Thus, again there is no question that the effect of the law on the employee benefit plan's benefits is substantial rather than tenuous.

Justice Stephens argued in the *Greater Washington* dissent that the "relate to" preemption concept requires more than a reference to ERISA plans; it must also have more than a tenuous effect on an employee benefit plan.⁵⁸⁵ In particular, Stephens found no such effect because he interpreted the state law to require the employer to include in workers' compensation payments the cost of continuing health care coverage, but not to require the health care reimbursement plan to continue to provide individuals receiving workers' compensation with plan coverage.⁵⁸⁶

X. AMENDMENTS OF ERISA PREEMPTION PROVISIONS

ERISA amendments have addressed the preemption provisions pertaining to state tax, domestic relations, and benefit

578. *Id.* at 139-140.

579. *Greater Washington*, 506 U.S. at 129.

580. *Id.* (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988)).

581. *Id.* at 130.

582. *Id.* at 128.

583. *Id.* at 130.

584. *Id.* at 129.

585. *Id.* at 135-37 (Stephens, J., dissenting).

586. *Id.* at 133-34, 137-38 (Stephens, J., dissenting).

plan enforcement laws.⁵⁸⁷ In 1983, a provision was added that declared explicitly that state tax law is subject to the ERISA Express Preemption.⁵⁸⁸ In 1984, a provision was added to the ERISA Express Preemption declaring that domestic relations orders meeting enumerated conditions are not preempted, but those failing to do so were preempted.⁵⁸⁹ In 1986, a provision was added to a provision other than the ERISA Express Preemption, which confirmed explicitly that the preemption exclusion for domestic relations orders was limited to orders pertaining to pension plans which are Spousal Survivor Benefit Plans.⁵⁹⁰ In 1993, a provision was added to the ERISA Express Preemption declaring that domestic relations orders meeting enumerated conditions pertaining to medical care for a participant's children were not preempted,⁵⁹¹ and technical amendments were made to this provision in 1998.⁵⁹² In 2006, a provision was added to the ERISA Express Preemption that declared explicitly that if certain enumerated conditions are met then an arrangement for automatic employee contributions to pension plans is subject to the ERISA Express Preemption.⁵⁹³ Each amendment setting forth an exclusion from the ERISA Express Preemption did so under very limited conditions, supporting the conclusion that state laws are preempted if they affect any of the three fundamental benefit protections absent an explicit exclusion.

A. Congress Reverses Supreme Court and Provides a Limited Exclusion for the Hawaii Prepaid Health Care Act from ERISA Preemption and Confirms Preemption of State Tax Laws

In 1983, the Hawaii Prepaid Health Act was granted a limited exclusion from the ERISA preemption.⁵⁹⁴ In 1981, the

587. Amendments pertaining to other state laws, such as the addition of ERISA § 514(b)(8), 29 U.S.C. § 1144(b)(8) to permit states to recover Medicaid expenditures, will not be discussed.

588. ERISA Amendments of 1983, Pub. L. No. 97-473 § 301(a), 96 Stat. 2605, 2611-12 (1983) (codified at ERISA § 514(b)(5)(B)(i), 29 U.S.C. § 1144(b)(5)(B)(i)).

589. Retirement Equity Act of 1984, Pub. L. No. 98-397 § 104, 98 Stat. 1426, 1434-36 (1984) (codified at ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7)).

590. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1898(c)(4), 100 Stat. 2085, 2953 (1986) (codified at ERISA § 206(d)(3)(L), 29 U.S.C. § 1056(d)(3)(L)).

591. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 Title IV, Subtitle D § 4301(c)(4)(A), 107 Stat. 312, 377 (1993) (codified at ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7)).

592. See Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, Title IV, § 401(h)(2)(A)(i), (ii), 112 Stat. 645, 668 (1998) (removing "subsection (b)(7)(D)" from the Omnibus Budget Reconciliation Act of 1993, and replacing it with "subsection (b)(7)").

593. Pension Protection Act of 2006, Pub. L. No. 109-280 § 920(f)(1), 120 Stat. 780, 1039 (2006) (codified at ERISA § 514(e), 29 U.S.C. § 1144(e)).

594. ERISA Amendments of 1983, Pub. L. No. 97-473 § 301(a), 96 Stat. 2605, 2611-12 (1983) (codified at ERISA § 514(b)(5)(B)(i), 29 U.S.C.

Supreme Court held in a decision, without an opinion, as discussed *supra*, that the Act was preempted under ERISA as originally enacted.⁵⁹⁵ The exclusion was expressly linked with a provision that addressed the preemption of state tax law by adding the following provision:

(A) Except as provided in subparagraph (B), subsection (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.⁵⁹⁶

The exclusion was limited by a provision as follows in a later subparagraph not mentioned in the above exclusion subparagraph:

(C) Notwithstanding subparagraph (A) [setting forth the exclusion from ERISA preemption], parts 1 and 4 of this subtitle [the reporting and disclosure sections and the fiduciary sections], and the preceding sections of this part [the enforcement sections, including the claims sections] 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 [enacted Jan. 14, 1983]), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 [29 U.S.C. § 1136] 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 1 and 4 [the reporting and disclosure sections and the fiduciary sections] and the preceding sections of this part [the enforcement sections including the claims sections].⁵⁹⁷

In particular, the applicable preemption disregarded only the sections in Part 2, which addresses required benefit terms, and in Part 3, which addresses funding.

The report of the conference committee accompanying the enactment of the bill⁵⁹⁸ does not discuss why Congress so limited the Hawaii Prepaid Health Care Act preemption exclusion, nor what was intended by preempting the parts of the Act relating to reporting and disclosure mandates. Congress could have not intended that ERISA preempted the implementation of the Act by preventing a state-law mandate that a covered employer report whether it had complied with the Act requirement that the employer had provided its employees with a comprehensive prepaid health care plan. As with the initial enactment of ERISA, Congress probably intended to preempt any reporting mandate in the Act that required information not needed to implement the Act. Nor did the report discuss why Congress did not choose to

§ 1144(b)(5)(B)(i)).

595. *Agsalud*, 454 U.S. 801, *aff'g. Agsalud*, 633 F.2d 760.

596. ERISA §§ 514(b)(5)(A), (B), 29 U.S.C. §§ 1144(b)(5)(A), (B).

597. ERISA § 514(b)(5)(C), 29 U.S.C. § 1144(b)(5)(C).

598. H.R. REP. NO. 97-984, at 11-22, 97th Cong. (2d Sess. 1983).

give other states such leeway. In contrast, the proposed but unadopted ERISA Improvement Act of 1979, S. 209, discussed *supra*, which had the same limitations on the exclusion for health care plans, extended the relief to all states with similar legislation.⁵⁹⁹ The proposal was vigorously defended by the two U.S. Senators from Hawaii.⁶⁰⁰

The report also did not discuss the provision quoted above that state tax laws were preempted like other state laws not otherwise exempted.⁶⁰¹ The 1979 proposal included no state tax law reference.⁶⁰² The 1982 Congress⁶⁰³ may have wished to leave little doubt that states may not avoid ERISA preemption by denominating a benefit terms mandate as a tax, as Hawaii did in its post-1979 litigation arguments in defense of the Hawaii Prepaid Health Care Act, as discussed *supra*.

Some insight into the intended scope of the state law tax preemption that Congress reaffirmed is provided by the explanation that Senator Robert Dole presented when he reported the bill to the Senate on behalf of the Senate Finance Committee. Senator Dole explained the addition of the limited exclusion from preemption of the Hawaii Prepaid Health Care Act as follows:

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*.⁶⁰⁴

This view is consistent with introductory remarks of Senator Jacob Javits about the unadopted ERISA Improvement Act of 1979, S. 209,⁶⁰⁵ which bill, as discussed *supra*, included the predecessor to the 1983 act. In particular, Senator Javits, as discussed *supra*, recommended⁶⁰⁶ that the committee report accompanying the legislation reaffirm that *Heffernan II*,⁶⁰⁷ had

599. ERISA Improvements Act of 1979, S. 209, 96th Cong. § 155(2), at 35 (1st Sess. 1979), *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 9, 43.

600. *See* 1979 Senate ERISA Review, *supra* note 406, at 642-44, 645-51 (reporting Senator Sparky Matsunaga remarks and Prepared statement of Senator Daniel K. Inouye at the hearings before the Senate Committee on Labor and Human Resources on S. 209).

601. H.R. REP. NO. 97-984, at 11-22, 97th Cong. (2d Sess. 1983).

602. ERISA Improvements Act of 1979, S. 209, 96th Cong. (1st Sess. 1979), *reprinted in* 1979 Senate ERISA Review, *supra* note 406.

603. The bill was adopted in 1983 by the 97th Congress that began its session in 1981.

604. 128 CONG. REC. 26902 (Oct. 1, 1982).

605. Senator Javits prepared remarks regarding ERISA Improvements Act of 1979, S. 209, 96th Cong. (1st Sess. 1979), *reprinted in* 1979 Senate ERISA Review, *supra* note 406, at 99-108.

606. *Id.* at 106-07.

607. *Heffernan II*, at 918.

correctly decided, in 1978, that ERISA preempted a state tax on the amount of benefits paid by an ERISA health care reimbursement plan. This interpretation is also consistent with the intention of the ERISA draftsmen, as described by Michael S. Gordon,⁶⁰⁸ to limit the ability of states to regulate self-insured health care reimbursement plans—direct regulation was limited by restricting the insurance exclusion from the ERISA Express Preemption to plans insured with third parties.⁶⁰⁹ However, if the aim is to prevent regulation, it is not clear that all premium-like taxes on benefits act as a regulation, which proposition seems to have been rejected by *Travelers* and *De Buono*, described *infra*. If the aim was to stop such taxes, why did Congress not simply prohibit such taxes on self-insured plans?

B. Congress Reverses the Supreme Court and Substantially Limits Which Domestic Relations Orders ERISA Does Not Preempt

When Congress approved REACT in 1984, it seemed to build upon its earlier proposals in 1978 and 1979 with respect to the treatment of domestic relations orders, discussed *supra*. The 1979 proposal, which apparently built upon the 1978 proposal, had three major domestic relations features: (1) the preemption exclusion was limited to those domestic relations orders that govern benefits from those plans that would be Spousal Survivor Benefit Plans; (2) the preemption exclusion was limited to those orders that require no change in the effective date, timing, form, duration, or amount of any benefit payments; and (3) the preemption changes were coordinated with similar changes in the Alienation Prohibition and the corresponding Code provisions.⁶¹⁰

REACT arose directly from legislation introduced a year earlier, *i.e.*, in 1983, and extensive hearings conducted in that year. There were two major Senate proposals. S. 19 entitled the “Retirement Equity Act of 1983” was introduced by Senator Dole and other senators on January 26, 1983.⁶¹¹ S. 888 entitled the “Economic Equity Act” was introduced by Senator David

608. Michael S. Gordon, minority counsel for pensions on the Senate Labor and Public Welfare Committee from 1970 until 1975, assisted in the drafting and enactment of ERISA.

609. See Gordon, *supra* note 356, at 28-29 (discussing how the ERISA Express Preemption was adopted in part to prevent states from imposing premium-like taxes on non-insured health care reimbursement plans).

610. See H.R. 13446, 95th Cong. (2d Sess. 1978), reprinted in ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the S. Subcomm. on Labor of the Comm. on Human Res. and the S. Subcomm. on Private Pension Plans and Fringe Benefits on the Comm. Of Fin., 95th Cong. on S. 3017, at 1050-1052 (Aug. 15, 16, 17, 1978) and S. 209, 96th Cong. §§ 128, 155, 205(j), 23-24, 35-36, and 62-63 (1st Sess. 1979) reprinted in 1979 Senate ERISA Review, *supra* note 406, at 1, 32-32, 43-44, 70-71.

611. Retirement Equity Act of 1983, S. 19, 98th Cong. (1st Sess. 1983).

Durenberger and other senators on March 23, 1983.⁶¹² Both bills were considered at hearings with numerous witnesses and submissions before the Senate Finance Committee on June 20 and 21, 1983,⁶¹³ and before the Senate Committee on Labor and Human Resources on October 3, 1983.⁶¹⁴ On November 18, 1983, the Senate agreed⁶¹⁵ on a combined bill.⁶¹⁶ There were two major House proposals. H.R. 2090, titled the “Economic Equity Act of 1983,” was introduced by Congresswoman Schroeder and others on March 14, 1983.⁶¹⁷ The bill is identical to the Senate bill with the same name.⁶¹⁸ H.R. 2100, entitled the “Private Pension Reform Act of 1983,” was introduced by Congresswoman Geraldine Ferraro and others on March 15, 1983.⁶¹⁹ Both bills were considered at hearings with numerous witnesses and submissions before the Select Committee on Aging on June 14, 1983,⁶²⁰ before the Subcommittee of Labor Relations of the Committee on Education and Labor on September 29, 1983,⁶²¹ and before the Ways and Means Committee on October 25, 1983.⁶²²

As in 1978 and 1979, both REACT and its legislative history, show that Congress intended to exempt from preemption only those domestic relations orders that attempted to govern the benefits of Spousal Survivor Benefit Plan,⁶²³ which were also the only plans for which spousal survivor benefits were required and enhanced by REACT as discussed *infra*. There was no discussion in any of the REACT hearings about requiring spousal survivor

612. Economic Equity Act, S. 888, 98th Cong. (1st Sess. 1983).

613. *Potential Inequities Affecting Women: Hearings of S. 19 & S. 888 Before the S. Comm. On Fin.*, S. HRG. 98-313, 98th Cong., Parts I, 2, and 3 (1st Sess. 1983).

614. Retirement Equity Act of 1983: Hearing on S. 19 before the Subcomm. on Labor of the S. Comm. on Labor and Human Res., S. HRG. 98-417, 98th Cong. (1st Sess. 1983).

615. 129 CONG. REC. 34,359 (Nov. 18, 1983).

616. Retirement Equity Act of 1983, H.R. 2769, 98th Cong. (1st Sess. 1983).

617. Economic Equity Act of 1983, H.R. 2090, 98th Cong. (1st Sess. 1983).

618. 129 CONG. REC. 5073, (March 15, 1983) (introductory statement confirming the identity of the two bills by a co-sponsor of one of the bills, Congresswoman Barbara Mikulski).

619. Private Pension Reform Act of 1983, H.R. 2100, 98th Cong. (1st Sess. 1983).

620. *Women's Pension Equity, Hearing of House Select Committee on Aging*, H.R. Comm. Pub. No 98-401, 98th Cong. (1st Sess. 1983).

621. 129 CONG. REC. D1259 (1983) (daily ed. Sept. 29, 1983); *Women's Pension Equity, Hearing of Subcommittee of Labor Relations of the House Committee on Education and Labor* H.R. Comm. Pub. No. 98-401, 98th Cong. (1st Sess. 1983).

622. 129 CONG. REC. D1383 (1983) (daily ed. Oct. 25, 1983). Economic Equity Act and Related Tax and Pension Reform, Hearing of Ways and Means Committee, H.R. Serial. No 98-51, 98th Cong. (1st Sess. 1983).

623. *But see* Elizabeth M. Wells, *State Domestic Relations Orders Under ERISA and the Code—An Unfortunate Hodgepodge*, N.Y.U. REV. EMP. BEN. 15-7, 15-12, 15-15 (2011) (showing how legislative materials and policy arguments support broad ERISA plan coverage).

benefits for any plans other than Spousal Survivor Benefit Plans. This may reflect the belief that those other plans, such as life insurance plans, did not provide the kind of on-going support to surviving spouses with few resource whom Congress wished to protect.⁶²⁴ Nor was there any discussion of the effects of domestic relations orders on any plans other than Spousal Survivor Benefit Plans. Thus, under general principles, the ERISA Express Preemption preempts state domestic relations orders or state spousal survivor provisions that are applicable to any other ERISA plan.

REACT refined the 1979 approach by permitting a domestic relations order to make benefit payment changes under limited circumstances if the change does not increase the actuarial value of the benefits.⁶²⁵ REACT also introduced a new concept, a qualified domestic relations order (“QDRO”),⁶²⁶ which is a domestic relations order that meets the statutory benefit restrictions and the statutory conditions for giving notice to plan participants and plan administrators.⁶²⁷ Moreover, although none of the initial bills had this feature, in accord with some suggestions presented at Senate hearings in 1979 discussed, *supra*, REACT (1) permits plans to avoid a double payment liability if plan administrators provide advance notice and otherwise behave prudently,⁶²⁸ and (2) treats individual with benefit rights under QDROs as plan beneficiaries.⁶²⁹

REACT, however, made one far more major change in the 1979 approach. ERISA now treats people whose rights are derived from a QDRO as plan beneficiaries, even though plan sponsors had opposed such characterization at Senate hearings in 1979, as discussed *supra*, and in the 1983 hearings.⁶³⁰ Finally, REACT

624. See e.g., *Watson’s Broken Promises*, *supra* note 229, at 483 (arguing against proposals to have life insurance rather than pension plans provide survivor benefits).

625. ERISA § 206(d)(3)(E), 29 U.S.C. § 1056(d)(3)(E).

626. ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B).

627. All the major bills took this approach without giving the orders a distinct name. See Private Pension Reform Act of 1983, H.R. 2100 §§ 3-4, at 11-14, 98th Cong. (1st Sess. 1983) (authorizing the transfer of pension benefits pursuant to a state domestic relation law judgment, decree, or order related to child support, alimony payments, or marital property rights); see also Economic Equity Act of 1983, H.R. 2090 §§ 104-05, at 13-15, 98th Cong. (1st Sess. 1983) (same provisions as in H.R. 2100); Retirement Equity Act of 1983, S. 19 § 5, at 6-14, 98th Cong. (1st Sess. 1983) (differs from H.R. 2100 in imposing more restrictions on permissible distributions and lacking any preemption exclusions, but adding a domestic relations exclusion to the ERISA alienation prohibition); Economic Equity Act, S. 888 §§ 104-05, at 13-15, 98th Cong. (1st Sess. 1983) (same provisions as in H.R. 2090).

628. ERISA § 206(d)(3)(H)-(I), 29 U.S.C. §§ 1056(d)(3)(H)-(I).

629. See ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J).

630. See e.g., *Potential Inequities Affecting Women: Hearings on S. 19 & S. 888 Before the S. Comm. On Fin. Part 2*, 98th Cong. 468-69 (1st Sess. 1983) (prepared statement of National Employees Benefit Institute) (expressing

made explicit what was implicit in the prior proposals. A domestic relations order that attempts to govern the benefits of a Spousal Survivor Benefit Plan violates the Alienation Prohibition if it is not a QDRO.⁶³¹ Thus, ERISA preempts such an order.

The REACT Congressional committee reports issued in 1984 disregard a fundamental change in the legal environment between 1979, when the REACT precursors were considered, and 1984, when REACT was considered and enacted. In 1979, the *Chicago Preemption Review*, as discussed *supra*, described a significant division among the courts on whether ERISA preempted domestic relations orders that sought to govern pension plan benefits. That division no longer existed in 1984 as discussed more fully in *Feuer's ERISA Myths*.⁶³² By such year, *Sup Ct. Campa* and its progeny were well-established.⁶³³ Those decisions had already held that Spousal Survivor Benefit Plans must follow the terms of a domestic relations order even if the order was not consistent with plan terms. Under the reasoning of these decisions, which rested on the principle that ERISA did not preempt domestic relations law, all pension plans including Top-Hat Plans, and all employee benefit plans, including life insurance plans, would be required to follow the terms of domestic relations orders regardless of the plan terms.

There was extensive testimony about this change in law,⁶³⁴ and pleas by plan sponsors for explicit limits on the extent to which domestic relations orders could and did affect ERISA plans.⁶³⁵ Thus, Marjorie O'Connell, a prominent divorce attorney

opinion that receipt of pension benefits in accord with domestic relations orders should not establish transferee as plan beneficiary).

631. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A). This explicit provision was not in any of the four initial bills, but was implicit.

632. *Feuer's ERISA Myths*, *supra* note 25, at 703-07. Cf. Terrence Cain, *A Primer on the History and Proper Drafting of Qualified Domestic-Relations Orders*, 28 T.M. COOLEY L. REV. 417 at 449-457 (2011) (arguing that REACT was a consequence of the conflicting decisions about the extent to which ERISA preempted domestic relations orders).

633. See e.g., *Kilberg and Inman Preemption*, *supra* note 350, at 1320, 1326 (stating and criticizing the fact that "[i]n the areas of marital property and family support laws, the courts have found an essentially irrebuttable presumption against pre-emption").

634. *But see Women's Pension Equity: Hearing Before the H. Comm. on Aging*, 98th Cong. 129, H.R. Comm. Pub. No 98-401 at 129, 131-32, 98th Cong. (1st Sess. 1983) (statement of Doris Jonas Freed) (expressing concern that the Supreme Court may apply the holdings of *Hisquierdo*, *McCarthy*, and *Ridgway* to domestic relations claims for ERISA benefits, seemingly unaware of the decision in *Sup. Ct. Campa*).

635. See e.g., *Potential Inequities Affecting Women: Hearings on S. 19 & S. 888 Before the S. Comm. On Fin. Part 1*, at 225, 98th Cong. 237 (1st Sess. 1983) (prepared statement of Richard H. Fay, Chamber of Commerce of the United States) (advocating for explicit limits on the ability of domestic relations orders to affect ERISA plans); *Potential Inequities Affecting Women: Hearing of S. 19 & S. 888 Before the S. Comm. On Fin. Part 2*, 98th Cong. 379-

who had written extensively in the area, wrote of the near unanimity of the courts finding that domestic relations orders did not violate the Alienation Prohibition.⁶³⁶ John Chapoton, the Assistant Treasury Secretary for Tax Policy, referred to a “divergence of opinion” about whether ERISA preempt community property claims to pension benefits without citing any decisions.⁶³⁷ In contrast, Ms. O’Connell advocated on June 20, 1983, that Congress set limits on which domestic relations orders ERISA preempted in order to prevent results such as the holding upheld by the Supreme Court. The Court, in the prior week, refused to certify a petition to review a Ninth Circuit holding that a former spouse could pursue ERISA benefit claims on the basis of the terms of a DRO that were not consistent with the plan documents.⁶³⁸

However, Congress focused much of its attention on the abuses set forth in personal stories. For example, Millicent O. Goode found that Bethlehem Steel refused to comply with a divorce decree awarding her half of her husband’s pension,⁶³⁹ which Cong. Ferraro described as an example of a situation addressed by her bill.⁶⁴⁰ Ann Moss, the Director of the Women’s Pension Project summarized such a need for legislation as follows:

Many women who are awarded pension shares would like to receive their benefits directly from the plan and Millicent Goode was an example of that. But in spite of an order from the divorce court some plans have refused to pay a divorced wife her share of the benefits on the grounds that ERISA makes it impossible for them to pay

86 (1st Sess. 1983) (letter from Attorneys Charles A. Storke & Louis T. Mazeway on behalf of the Western Conference of Teamsters Pension Trust Fund) (establishing clear rules for treatment of domestic relations important part of proposed bills).

636. *Potential Inequities Affecting Women: Hearings on S. 19 & S. 888 Before the S. Comm. On Fin. Part 1*, 98th Cong. 237 (1st Sess. 1983) (statement of Marjorie O’Connell).

637. *Potential Inequities Affecting Women: Hearings on S. 19 & S. 888 Before the S. Comm. On Fin. Part 3*, 98th Cong. 13 (1st Sess. 1983) (statement of John Chapoton).

638. *Potential Inequities Affecting Women: Hearings on S. 19 & S. 888 Before the S. Comm. on Fin. Part 1*, 98th Cong. 198 (1st Sess. 1983) (statement of Marjorie O’Connell). The *Reyes* decision mentioned without citation was *Bd. of Trustees of Carpenters Pension Trust Fund For N. California v. Reyes*, 688 F.2d 671, 673 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (June 13, 1983) (the denial of certiorari may have occurred because of the *res judicata* basis for the decision).

639. *Women’s Pension Equity: Hearing Before the H. Comm. on Aging*, 98th Cong. 20-22 (1st Sess. 1983) (statement of Millicent O. Goode) (explaining how the plan was willing to make support payments but not property payments because the IRS had only approved the former for tax-qualification purposes, which do not affect ERISA plan obligations).

640. *Women’s Pension Equity: Hearing Before the H. Comm. on Aging*, H.R. Comm. Pub. No. 98-401, at 39, 98th Cong. 39 (1st Sess. 1983) (statement of Cong. Geraldine Ferraro).

benefits to anyone other than the pensioner himself. *The courts always rules against the plans, saying that Congress meant to protect pensioners from creditors, not shield them from their family responsibilities.* But until this rule is clarified in Federal law, there will be divorced women, like Mrs. Goode, who will have to go back to court, if they can afford it to make plans to comply with State court orders.⁶⁴¹

It is not clear if the issue was the failure to follow existing law. If so, the solution may not have been an additional law, but rather improved education about the law. Nor is it clear why, if the law provides for deference to state domestic relations law, ERISA should have been changed to limit the kind of domestic relations orders that ERISA does not preempt, as in each of the proposals.⁶⁴² Mrs. Goode's situation also suggests that the difficulty was not the ERISA rules but the tax-qualification rules, which at that time did not explicitly permit pension payments to a former spouse for marital property rights in a pension. Perhaps, tax-qualification changes could have resolved many of the situations.⁶⁴³

The statutory language of REACT, unlike the 1984 Congressional committee reports which accompanied the legislation, shows a recognition of the 1984 state of the law with respect to the effect of domestic relations orders on ERISA Plans, and a clear intention to change the state of law prospectively.⁶⁴⁴ As discussed in *Feuer's ERISA Myths* there is only one rational explanation for the significance of the REACT addition of the following exclusion from the ERISA General Preemption Rule:

(7) Subsection (a) shall not apply to qualified domestic relations

641. *Women's Pension Equity: Hearing Before the H. Comm. on Aging*, 98th Cong. 64 (1st Sess. 1983) (statement of Ann Moss), H.R. Comm. Pub. No 98-401 at 62, 64 (emphasis added). *See also Potential Inequities Affecting Women: Hearings on S. 19 & S. 888*, Before the S. Comm. On Fin. Part 2, S. HRG. 98-313 Part 2, 98th Cong. at 106, 113-14 (1st Sess. 1983) (prepared statement of Judith Avner on behalf of NOW Legal Defense and Education) (speaking to the need for legislative clarification preemption because confusion still exists despite most courts finding no preemption issue).

642. *See Women's Pension Equity: Hearing before the H. Comm. on Aging*, H.R. Comm. Pub. No 98-401 at 82-83 (1st sess. 1983) (discussion between Cong. Olympia Snowe and Ann Moss) (discussing whether it was advisable to have complete ERISA deference to state domestic relations order or to establish ERISA rules for dividing pension benefits on divorce similar to those for civil service pensions).

643. *See The Proposed Retirement Equity Act of 1983*, S. 19, § 5 at 6-14 8, 98th Cong. (1st Sess. 1983) (disregarding the ERISA Express Preemption and addressing only the tax qualification and ERISA issues associated with the Alienation Prohibition, but not the tax-qualification requirement that plans follow plan documents, discussed *supra*).

644. *See Feuer's ERISA Myths*, *supra* note 25, at 711-12 (explaining provisions of REACT to show that REACT did not adversely affect any pre-REACT domestic relations orders).

orders (within the meaning of section 206(d)(3)(B)(I)). . . .⁶⁴⁵

Congress was not merely reversing the *Sup Ct. Campa* holding about the effectiveness of domestic relations orders seeking to govern pension plan benefits. Rather, Congress was repudiating the Court's underlying presumption that ERISA did not preempt domestic relations orders. In particular, REACT clarified that ERISA preempted all domestic relations orders that were not QDROs.⁶⁴⁶ Under this reasoning, state courts lack the authority to direct ERISA plans or their fiduciaries to do anything other than: (1) determine whether the order is a QDRO; or (2) follow the terms of an order that is determined to be a QDRO. State courts have this limited authority under the ERISA provisions permitting them to enforce or clarify benefit rights.⁶⁴⁷ Thus, the *Sup Ct. Camp* holding that state courts were permitted to join ERISA plans to domestic relations proceedings, would be implicitly preempted except to the extent the court is deciding whether an order is a QDRO or is enforcing a QDRO. However because there is no REACT provision or other ERISA provision addressing this issue, one may argue that the *Sup Ct. Camp* joinder holding may remain viable and permit additional related state court interventions.

The QDRO definition is applicable only to Spousal Survivor Benefit Plans. Thus, the preemption exclusion for QDROs does not apply to a domestic relations order to the extent the order seeks to govern an ERISA plan other than a Spousal Survivor Benefit Plan, such as a life insurance plan. The 1986 enactment of the REACT technical corrections, which included the addition of ERISA § 206(d)(3)(L), 29 U.S.C. § 1056(d)(3)(L), and a similar addition to the corresponding Code tax qualification provision, confirms that Spousal Survivor Benefit Plans are the only ERISA plans that must follow domestic relations orders that satisfy QDRO-like rules.⁶⁴⁸ Congress expressly intended that the two added provisions “clarif[y] that the qualified domestic relations provisions do not apply to any plan to which the assignment or alienation restrictions [the Alienation Prohibition] do not apply.”⁶⁴⁹ A more general discussion of the contrary arguments used by many courts, all of which rest on the belief that Congress should

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

646. *Feuer's ERISA Myths*, *supra* note 25, at 710-12.

647. ERISA §§ 502(a)(1)(B), (e)(1), 29 U.S.C. §§ 1132(a)(1)(B), (e)(1). *See generally Feuer's ERISA Myths*, *supra* note 25, at 762-63 (discussing the authority of state courts with respect to actions concerning ERISA benefits and plans).

648. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1898(c)(4), 100 Stat. 2085, 2953 (1986).

649. S. REP. NO. 99-313, at 1106 (1986). The final bill made no change to this section other than changing the section number from 1897(c) to 1898(c). Thus, the explanation remained unchanged. H.R. REP. NO. 99-514, at II-857, *reprinted in* 1986 U.S.C.C.A.N. 4075, 4941.

have not limited the spousal survivor provisions to Spousal Survivor Benefit Plans, is available at *Feuer's ERISA Myths*.⁶⁵⁰

C. *Congress Imposes Two Distinct Mandates for Spousal Survivor Benefit Plans: (1) A Spousal Survivor Benefit Mandate, and (2) The Spousal Survivor QDRO Benefit Mandate*

REACT imposes two distinct benefit terms mandates.

First, Spousal Survivor Benefit Plans must provide survivor benefits to a participant's spouse, who thereby becomes a plan beneficiary.⁶⁵¹ These benefits may be waived by a participant only with the consent of the participant's spouse, if any, witnessed by a third party.⁶⁵² This mandate is hereinafter designated as the Spousal Survivor Benefit Mandate.⁶⁵³ In the initial version of ERISA, spousal survivor benefits were not required for as large a set of plans and could be waived without the consent of the participant's spouse.⁶⁵⁴ No change was made to the preemption provisions. The only ERISA provision that was changed was the initial spousal survivor benefit provision, in which the mandate replaced the prior provisions.

Second, Spousal Survivor Benefit Plans must provide domestic relations benefits to a participant's spouse, former spouse, child, or other dependent, who thereby becomes a plan beneficiary, if and only if, the requirements for a QDRO are satisfied.⁶⁵⁵ This mandate is hereinafter designated as the Spousal Survivor QDRO Benefit Mandate. The initial version of ERISA made no express provision for such benefits, but the courts had found state domestic relations law controlled these benefits as in *Sup Ct. Campa* and its progeny.⁶⁵⁶ Congress declined to change only the tax law to prevent any adverse tax consequences that could arise from permitting domestic relations law to control ERISA benefits. Instead, REACT changed the preemption provisions to limit the conditions under which state domestic relations law was controlling. The only other ERISA provision that was changed was the one containing the Alienation

650. *Feuer's ERISA Myths*, *supra* note 25, at 741-45.

651. Pub. L. No. 98-397 § 103, 98 Stat. 1426, 1429-33 (1984).

652. ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2).

653. *See generally Feuer's ERISA Myths*, *supra* note 25, at 707-09 (describing how the mandate permits spousal survivor benefits to be waived).

654. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 205, 88 Stat. 829, 862-864. A similar provision was made part of the tax qualification rules at I.R.C. § 401(a)(11). Pub. L. No. 93-406, § 1021(a), 88 Stat. 829, 935-37. Qualification requirements, however, do not provide participants or beneficiaries with substantive benefit rights unless the plan terms include those requirements.

655. Pub. L. No. 98-397 § 104, 98 Stat. 1426, 1433-36 (1984).

656. *See generally Feuer's ERISA Myths*, *supra* note 25, at 694-96 (explaining how the courts consistently held that ERISA did not preempt domestic relations orders after *Sup Ct. Campa*).

Prohibition to which the Spousal Survivor QDRO Benefit Mandate was added.

D. Congress Imposes a Medical Child Support Mandate

In 1993, a statute was enacted to provide that domestic relations orders may be used to compel an ERISA health reimbursement plan to provide coverage to the participant's child if such coverage is otherwise available from the plan.⁶⁵⁷ Orders fulfilling the statutory conditions are qualified medical child support orders, and are treated as the terms of the associated ERISA health reimbursement plan to which the order refers, and thus must be followed by such plan.⁶⁵⁸ Orders attempting to provide benefits to a participant's former spouse do not meet these conditions. Thus, they may be disregarded by ERISA plans if not otherwise authorized by the plan's terms.

E. Congress Addresses the Preemption of State Laws Governing Employee Contributions to Pension Plans

Finally, the Pension Protection Act of 2006 encouraged participation in 401(k) plans through automatic employee contribution provisions.⁶⁵⁹ If certain enumerated conditions are met, then an arrangement for such automatic employee contributions to pension plans is subject to the ERISA Express Preemption.⁶⁶⁰ The report by the Joint Committee on Taxation did not explain the purpose of the provision, although the report stated, "no inference is intended as to the effect of conflicting State regulations prior to date of enactment [the effective date of the provision]."⁶⁶¹ The report also stated, "[t]he State preemption rules under the bill are not limited to arrangements that meet the requirements of a qualified enrollment feature."⁶⁶² However,

657. ERISA § 514(b)(7) (amended by Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 Title IV, Subtitle D, § 4301(c)(4)(A), 107 Stat. 312, 377 (1993)).

658. ERISA § 609(a)(2)(A), 29 U.S.C. § 1169(a)(2)(A).

659. Pension Protection Act of 2006, Pub. L. No. 109-280 § 902, 120 Stat. 780, 1033-39 (2006).

660. ERISA § 514(e), 29 U.S.C. § 1144(e) was added to ERISA by the Pension Protection Act of 2006, Pub. L. No. 109-280 § 902(f)(1), 120 Stat. 780, 1039 (2006).

661. *Technical Explanation of H.R. 4, the Pension Protection Act of 2006, as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006*, J. COMM. REP. TAX. No. 38-06, 230 (2006) [hereinafter "*Technical Explanation*"]. See also U.S. Dep't of Labor Advisory Opinion 2008-02A (Feb. 8, 2008) [hereinafter "*Opinion 2008-02A*"] (holding ERISA preempted a Kentucky law applicable to ERISA welfare plans; such plans may not have a statutory automatic contribution arrangement). On the other hand, after the provision's effective date, ERISA does not preempt state laws that govern employee contribution arrangements which do not meet the statutory requirements. *Id.*

662. *Opinion 2008-02A*, *supra* note 661; *Technical Explanation*, *supra* note

neither the report nor the statute defines the phrase “a qualified enrollment feature,” which may be the notice requirements applicable to the covered automatic employee contribution arrangements.⁶⁶³ The preemption provision presumably addressed a concern that automatic employee contribution arrangements would violate state rules regarding permissible wage withholdings.⁶⁶⁴ This is an odd concern because ERISA appears to preempt state laws governing amounts withheld from an employee’s compensation for plan contributions because DOL regulations treat those amounts as plan assets “as of the earliest date on which such contributions can reasonably be segregated from the employer’s general assets.”⁶⁶⁵

XI. THE STATE LAWS FOR WHICH THERE IS AN APPARENT
CONSENSUS THAT ERISA PREEMPTS THEM, AND THE
STATE LAWS FOR WHICH SUCH A CONSENSUS IS
LACKING

There is an apparent consensus that, as discussed *infra*, barring an explicit exclusion from the ERISA Express Preemption Rule, ERISA preempts state laws that impose reporting and disclosure mandates, funding mandates, fiduciary mandates, or a benefit terms mandate. Additionally, barring one of the explicit exclusions, ERISA preempts state laws that supplement, enhance, or diminish ERISA enforcement mechanisms.⁶⁶⁶ Each of these matters may be subsumed under the rubric of protecting the rights of employee benefits under a plan’s terms. Each of the matters other than the enforcement provisions was included in the preemption provisions of both the Senate and House precursors of ERISA that the Conference Committee considered. There seems to be a consensus that the explicit exclusions are interpreted narrowly in order to prevent them from becoming the general rule.

Upon further reflection there is a consensus, as discussed *infra*, that there are also implicit exclusions from the ERISA Express Preemption Rule that result from the structure of ERISA. For example, there is consensus that the states may regulate the

661, at 230.

663. ERISA § 514(e)(3), 29 U.S.C. § 1144(e)(3).

664. See e.g., EMPLOYEE BENEFITS LAW, *supra* note 13, at 6-19 n.131 (asserting that the amendment addressed a concern that ERISA did not preempt state laws governing automatic employee contributions to ERISA plans).

665. 29 C.F.R. § 2510.3-102.

666. As discussed *supra*, there is a question about the extent to which ERISA plans may be joined to domestic relations proceedings as held by the Supreme Court in *In re Campa*, 152 Cal. Rptr. at 362; *Carpenters Pension Trust Fund*, 444 U.S. at 1028 (1980) (dismissed for want of a substantial federal question).

provision of health care. Unlike the state regulation of insurance law, there is no deemer exception for plans acting as health care providers. There is division about the extent of this implicit exclusion, and for that of the implicit exclusion for taxation of ERISA plans. On the other hand, the decision of Congress in REACT, discussed *supra*, to limit the previously court approved exclusion for domestic relations orders to those that are QDROs strongly suggests that the implicit exclusions, like the explicit exclusions, are quite limited in number and extent.

However, there is no consensus about preemption resulting from state laws affecting the most fundamental protection available to every ERISA plan participant and beneficiary, *viz.*, the terms of the ERISA plan to determine who has the right to a benefit and to exercise a benefit right. There is also disagreement about the extent, if any, to which ERISA preempts state laws indirectly affecting benefit rights, but refer to ERISA plans, or impose administration or cost burdens on ERISA plans. All are discussed, together with the extent of the preemption of the five state laws that are the subject of this article, *infra*. In all cases, the decisive factor would appear to be whether the state law has a non-tenuous effect on an ERISA benefit protection.

XII. TRILOGY OF FOLLY — SUPREME COURT DISREGARDS
 (1) THE ERISA REQUIREMENT THAT PLAN TERMS
 DETERMINE BENEFIT RIGHTS, AND (2) THE ERISA
 RULE THAT ERISA DOES NOT PREEMPT A STATE LAW
 WHICH AFFECTS ERISA BENEFIT PROTECTIONS IN A
 NON-TENUOUS MANNER

Three Supreme Court holdings (two of which were part of a single decision) in the late 1980s laid the foundation for later confusion about the extent of ERISA preemption. Each disregarded the key feature of ERISA plans, namely that they are employee benefit plans, and the ERISA dominating general purpose of protecting plan participants and beneficiaries. In those cases, the Court disregarded the principle that ERISA preempts state laws, such as benefit terms mandates, that may be inconsistent with plan terms.

First, in 1987, a closely divided Court held in *Fort Halifax Packing Co, Inc. v. Coyne*,⁶⁶⁷ that a state mandated severance benefits arrangement did not constitute an ERISA plan.⁶⁶⁸ The Court concluded that ERISA did not preempt the state law. In the course of reaching this holding, the *Fort Halifax* Court described

667. *Fort Halifax Packing Co, Inc. v. Coyne*, 482 U.S. 1 (1987).

668. *Id.* at 6.

the purpose of the ERISA Express Preemption as preventing multiple state laws from imposing administrative burdens on employee benefit plans. This may sometimes be a consequence of ERISA preemption. However, this is not its purpose. The purpose of ERISA preemption is to assure that state laws do not supplement, enhance, or diminish any of the ERISA benefit protections of plan participants and beneficiaries, including the mandate that benefit rights are determined solely by plan terms. Nevertheless, the Supreme Court almost twenty years later similarly confused ERISA's administrative consequences with its purposes:

The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions, see ERISA § 514, 29 U.S.C. § 1144, which are intended to ensure that employee benefit plan regulation would be “exclusively a federal concern.”⁶⁶⁹

Second, in 1988 the Court unanimously held in *Mackey, v. Lanier Collection*,⁶⁷⁰ that ERISA preempted any statute referring to ERISA plans without regard to the tenuousness of the statute's effects on the plans.⁶⁷¹ Under this preemption by reference rule, the Court held that ERISA preempted the exemption of a state law of employee benefit plans from the law's effects even though such exemption means that the law would not affect ERISA plans.

Third, a closely divided Court in *Mackey* decided that ERISA does not preempt a state law violating no ERISA provision, other than the requirement that for all ERISA plans, plan benefits are determined by plan terms.⁶⁷² Under this preemption by lack of ERISA prohibition rule, the Court permitted state law garnishments of welfare plan benefits, without considering the plan terms or the extent of the administrative burden, imposed on the plan by the state law.⁶⁷³ The Court held, as it had in *Sup Ct. Campa*, as discussed, *infra*, without an opinion, that ERISA gave participants no right to receive their benefits from the plan. Moreover, as discussed, *infra*, the *Mackey* Court implicitly presented a simple preemption rule. ERISA does not preempt generally applicable state laws but preempts state laws that reference ERISA. The Court later disavowed such a generally applicable rule in *Egelhoff v. Egelhoff*⁶⁷⁴ discussed, *infra*.

There was a fourth foolish statement, which was dictum in *Mackey II*, that the Alienation Prohibition “prohibits the use of

669. *Aetna Health, Inc. v. Davila*, 542 U.S. 200 at 208 (2004) (citations omitted) (holding ERISA preempted Texas statute imposing duty to exercise ordinary care in medical plan coverage decision).

670. *Mackey*, 486 U.S. 825 (1988).

671. *Id.* at 830.

672. *Id.* at 841.

673. *Id.* at 831-41.

674. *Egelhoff v. Egelhoff*, 532 US 141 (2001).

state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants.”⁶⁷⁵ This dictum is discussed in the discussion of the protection provided by the Alienation Prohibition for distributed benefits, *infra*.

A. *Supreme Court Holds That Because it Asserted That a State Mandated Severance Policy Requires No Ongoing Administrative Scheme, the Policy is not an ERISA Plan, Thus ERISA Does not Preempt the Benefit Terms Mandate of the Policy*

The *Fort Halifax* decision, that there was no preemption of the state law, was based on the Court’s conclusion that the Maine law setting forth a complex severance policy did not constitute an ERISA plan.⁶⁷⁶ Thus, ERISA did not preempt the law.⁶⁷⁷ The *Fort Halifax* Court’s conclusion rested on the incorrect assertion that the Maine policy required no administrative scheme, which was described as a prerequisite for an ERISA plan.⁶⁷⁸ The dissent correctly observed that this assertion and the Court holding were at odds with its earlier holding, without an opinion, in *Gilbert* and with ERISA, neither of which presented such a requirement.⁶⁷⁹ Moreover, the Maine policy requires an administrative scheme, including paying the benefits and maintaining the requisite claims review procedure, to assure compliance with the complex eligibility and benefit amount rules of the required policy, discussed *infra*.

The Court in *Fort Halifax* was confronted with a severance payment policy, set forth in a Maine statute, rather than in an employer document, requiring an employer that closes or relocates a facility with more than 100 employees to pay severance to eligible employees of one week of pay for each year of employment at the facility.⁶⁸⁰ An employee was not eligible for the benefit if the employee accepts employment at the new facility or was not employed for at least three years prior to the termination.⁶⁸¹ The Court held that there was no ERISA plan because the statute did not require “an ongoing administrative program for processing claims and paying benefits.”⁶⁸²

675. *Mackey*, 486 U.S. at 836.

676. *Fort Halifax*, 482 U.S. at 15-19.

677. *Fort Halifax*, 482 U.S. at 19.

678. *Id.* at 18.

679. *Id.* at 23-26.

680. *Id.* at 1-2.

681. *Id.* at 2.

682. *Id.* at 12. *See also* EMPLOYEE BENEFITS LAW, *supra* note 13, at 11-9-11-10 (discussing how the courts have used this criteria to determine whether an arrangement is an ERISA plan). *But see* *Dakota, Minnesota, & E. R.R. Corp. v. Schieffer*, 648 F.3d 935, 938 (8th Cir. 2011) (discussing whether a one person severance arrangement constitutes an ERISA plan and finding the arrangement at issue did not require an ongoing administrative arrangement;

The *Fort Halifax* Court began and conducted its analysis in a very odd fashion. Rather than asking which criteria determines an ERISA plan, it put the cart before the horse and asked which criteria determines whether a plan is subject to the ERISA Express Preemption without describing what constitutes an ERISA plan. The Court referred in a footnote⁶⁸³ to *Donovan v. Dillingham* (“*Dillingham*”),⁶⁸⁴ which considered the question of when an ERISA plan became effective, rather than what constitutes an ERISA plan,⁶⁸⁵ but is often cited for the definition of an ERISA plan.⁶⁸⁶ In particular, in *Dillingham* the court concluded that an ERISA plan became effective when “from the surrounding circumstances a reasonable person can [first] ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.”⁶⁸⁷

However, it would have seemed appropriate for the Court to use a slightly different approach for defining an ERISA plan. Five terms appear to define an employee benefit plan: (1) the intended plan benefits; (2) the benefits to which each participant and beneficiary will be entitled; (3) how the benefits are financed; (4) how benefits are determined and paid; and (5) how benefit claims are made and reviewed.⁶⁸⁸ The dominating general purpose of ERISA is the protection of participants and beneficiaries. Thus, it is reasonable to presume that if benefits are ERISA benefits, such

thus, it was not an ERISA plan); *Cantrell v. Briggs & Veselka Co.*, 2013 U.S. App. LEXIS 17922 (5th Cir. Aug. 27, 2013) (holding that individual employment agreements providing for severance payments did not constitute an ERISA plan, but the majority and dissent about disagreed how to apply the ERISA plan criteria requiring “an administrative scheme to make ongoing discretionary decisions based on subjective criteria” even though most ERISA pension plans require no such discretionary decisions). The reluctance of some courts to find an ongoing administrative arrangement and thereby give claimants access to state law relief is illustrated by *Aguirre-Santos v. Pfizer Pharmaceuticals, LLC*, 2013 U.S. Dist. LEXIS 151515 (D. P.R. Oct. 21, 2013) (holding a severance arrangement not an ERISA plan because “there is nothing discretionary about the timing, amount or form of the payment,” although only employees involuntarily terminated for specified reasons excluding for cause qualified for payments, which were not lump sum payments but could extend twelve, twenty-six or fifty-two weeks).

683. *Fort Halifax*, at 12, n.6.

684. *Donovan v. Dillingham* (“*Dillingham*”), 688 F.2d 1367 (11th Cir. 1982).

685. *See id.* at 1374-75 (holding that subscribing employers and unions to a multiple employer trust had established ERISA health care reimbursement plans).

686. *See, e.g.*, EMPLOYEE BENEFITS LAW, *supra* note 13, at 11-5-11-8. *See also* *Cox ex rel. Cox v. Reliance Standard Life Ins. Co.*, 1:13-CV-00104 AWI, 2013 U.S. Dist. LEXIS 70601 at *7-*19 (E.D. Cal. May 17, 2013) (holding supplemental features of group life insurance plan was an ERISA plan, and providing a good discussion of the *Dillingham* criteria and decisions relying on the criteria).

687. *Dillingham*, 688 F.2d at 1372-73.

688. *See id.* at 1373 (describing the second term as the beneficiaries and conflating the final two terms).

as the severance benefits at issue, they are derived from an ERISA plan. Therefore, it appears that an ERISA plan is an arrangement with the five required plan terms in which an employer, employee organization, both, or their or their agents (for simplicity we will refer only the employer) play more than a *de minimis* role beyond paying salary, wages, and similar compensation, with respect to the final three plan terms, *i.e.*, the financing of ERISA benefits, the determination and payment of the benefits, or the processing of claims. This is, as discussed *infra*, essentially how the DOL regulations define an ERISA plan. This approach is consistent with the ERISA dominating general purpose of protecting employee benefit plan participants and benefits, including the right to be paid promised employee benefits, while recognizing that ERISA plays no role in assuring the payment of salary, wages, and similar compensation.

The Court in *Fort Halifax* asserted that the ERISA Express Preemption applies to a state law that relates to “employee benefit plans,” rather than to benefits so that the Maine law is not preempted because it requires a benefit rather than a plan.⁶⁸⁹ This is a distinction without a difference. Benefits must be part of a benefit plan that determines how the benefits are financed, and who is entitled to plan benefits. This distracted the Court from the key question. If the benefits are ERISA benefits, such as the severance benefits at issue, why is there not an employee benefit plan? Thus, the issue is as discussed, *infra*, whether the employer involvement exceeds a *de minimis* role, in which case there is an ERISA plan. The employer in *Fort Halifax*, because of the complex eligibility conditions, as discussed, *infra*, took on such a role with respect to the determination of individual benefits, the payment of benefits, and the processing of benefit claims.⁶⁹⁰

There are extensive ERISA provisions describing which benefit plans ERISA covers. The *Fort Halifax* majority discussed none. Three general kinds of benefit plans that cover employees⁶⁹¹ of non-exempt employers⁶⁹² are not ERISA plans. First, those that are not established or maintained by the employer or an employee organization, *i.e.*, where the employer does little more than collect

689. See *Fort Halifax*, 482 U.S. at 8 (discussing the significance of the use of the phrase “employee benefit plan” in the ERISA Express Preemption).

690. *But see* Worker Adjustment and Retraining Notification Act, P.L. No. 100-379, 102 STAT. 890 (1988), which establishes a simpler federal severance pay system, in which each eligible employee obtains up to 60 days of compensation if the employer gives no notice of a major layoff . . . This system is codified at 29 U.S.C. §§ 2101 –to 2909. Unlike ERISA, the system does not preempt state law. 29 U.S.C. § 2105.

691. See 29 C.F.R. § 2510.3-3(b) (2013), (stating that only plans that cover employees are considered “employee benefit plan[s].”).

692. See ERISA § 4(b), 29 U.S.C. § 1003(b) (2012) (identifying exempt employers, such as church and government plans, although church plans may choose to be covered).

and transmit voluntary employee contributions for a plan that it makes available to its employees.⁶⁹³ A traditional example is a Code § 403(b) plan in which employers do little more than permit employees to decide the extent, if any, to which they wish to make contributions to such plan.⁶⁹⁴ Second, some plans only provide benefits that so closely resemble the regular payment of wages or salary that the ERISA regulations treat such plans as payroll practices,⁶⁹⁵ rather than as ERISA plans. Traditional examples are overtime pay or payments to employees from general assets for time during which no duties are performed, such as vacation time.⁶⁹⁶ Again the employer takes on only *de minimis* responsibilities beyond those it has with respect to the payment of wages and salaries with respect to: (1) financing the plan beyond making benefit payments; (2) determining and paying plan benefits; and (3) processing plan claims. The ERISA regulations do not include severance benefits among payroll practices,⁶⁹⁷ but generally include severance plans as ERISA welfare benefit plans.⁶⁹⁸ The Supreme Court had held severance benefits are not implicitly included as a payroll practice when it affirmed *Gilbert*,⁶⁹⁹ without an opinion, two years earlier in 1985, as discussed *supra* and *infra*. Third, bonus plans, which do not systemically defer payments to the termination of employment or beyond, are not ERISA pension plans.⁷⁰⁰ Unlike severance plans, which are not pension plans under certain circumstances,⁷⁰¹ bonus plans are not explicitly included as ERISA welfare plans.⁷⁰² Thus, bonus plans are not ERISA plans. Unlike payroll practices, bonus plans often have extensive administrative schemes, but, like payroll practices, they are maintained and operated as part of the regular compensation programs for existing employees, and have an explicit exemption.

The Court then argued that preempting the Maine statute would not further the purpose of the ERISA Express Preemption, which it asserted was “to establish a uniform administrative

693. See ERISA § 3(1)-(3), 29 U.S.C. § 1002(1)-(3) (requiring an ERISA plan to be established or maintained by an employer or employee organization, or both).

694. 29 C.F.R. § 2510.3-2(f).

695. 29 C.F.R. § 2510.3-1(b).

696. *Id.* § 2510.3-1(b)(3).

697. See *id.* § 2510.3-1(b) (listing payroll practices).

698. 29 C.F.R. § 2510.3-1(a)(3).

699. *Gilbert, v. Burlington Industries*, 765 F.2d at 326 (2d. Cir. 1985), *summarily aff'd* 477 U.S. 901 (1986).

700. 29 C.F.R. § 2510.3-2(c).

701. 29 C.F.R. § 2510.3-2(b) (plans may not have payments in excess of twice the employee’s annual compensation, make payments over more than two years, or be contingent upon retirement).

702. 29 C.F.R. § 2510.3-1 (describing welfare plans in general, includes welfare plans in (a)(3) but does not mention bonus plans).

scheme.”⁷⁰³ As discussed *supra*, this was a consequence rather than the purpose of the provision. The purpose of the ERISA Express Preemption, as discussed *supra*, is to prevent state law from interfering with the ERISA federal regime for assuring that employee benefit rights are enforceable, including the right to be paid promised employee benefits. The Court then argued there is no such threat from the Maine informal severance payment policy because:

The purposes of ERISA’s pre-emption provision make clear that the Maine statute in no way raises the types of concerns that prompted pre-emption. *Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer’s obligation.* It is for this reason that Congress pre-empted state laws relating to plans, rather than simply to benefits. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

The Maine statute neither establishes, nor requires an employer to maintain, an employee benefit plan. *The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer’s obligation.*⁷⁰⁴

However, this argument disregards the fact that like all ERISA plans, the mandated arrangement requires the employer to establish and maintain an administrative scheme, namely a procedure to determine and pay severance benefits to qualifying former employees. Despite the Court’s statement to the contrary, more than a *de minimis* procedure is needed for the Maine informal severance payment policy, because, unlike a policy to distribute turkeys to all employees at Christmas,⁷⁰⁵ its terms may not be satisfied without a substantial compliance procedure. In particular, the severance policy requires determinations: (1) that there is a facility with the minimum number of employees; (2) whether and when the facility has been closed; (3) how to measure each employee’s length of service at the plant to determine the payment entitlement; (4) whether the employee has worked for three years at the employer; (4) whether the employee accepts

703. *Fort Halifax*, 482 U.S. at 9. See also Katherine A. McAllister, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, 1485-86 (2011) (relying on the Court’s *Pilot* decision to assert that “the primary rationale for ERISA’s broad preemption provision is uniform plan administration”).

704. *Fort Halifax*, 482 U.S. at 11-12 (emphasis added).

705. See 29 C.F.R. § 2510.3-1(d) (holding that holiday gift policies are not ERISA plans).

employment at a new facility; and (5) if challenged, whether the benefit was computed correctly.⁷⁰⁶

Finally, the Court argues that the Maine statute does not “implicate the regulatory concerns of ERISA.”⁷⁰⁷ The Court described these concerns as being with the administrative activities covered by ERISA’s reporting and disclosure requirements and fiduciary standards.⁷⁰⁸ The Court asserted ERISA is concerned only with preventing the employer abuse associated with administrative activities, such as improper financial transactions, which are not at risk with the Maine informal severance pay policy.⁷⁰⁹

The Court thereby disregarded the most fundamental protection ERISA provides to all plan participants and beneficiaries. All have the right to a full and fair review of all claims and the right to bring federal actions to enforce their plan benefit rights (including, but not limited to, the recovery of benefits) under the plan terms. Plans, particularly unfunded ones, such as informal severance payment policies or Top-Hat Plans, can abuse participants by failing to pay plan participants all their benefits. ERISA’s regulatory concerns are thus implicated by the severance policy. Therefore, the policy constitutes a state mandated ERISA plan, which ERISA preempts.

The dissent observed that the Court was without any explanation reversing its holding in *Gilbert*,⁷¹⁰ that an informal severance payment policy was an ERISA Plan.⁷¹¹ The majority responded that in *Gilbert*, “[t]he precise question was simply whether severance benefits paid by a plan out of general assets, rather than out of a trust fund, should be regarded as employee welfare benefits under 29 U. S. C. § 1002.”⁷¹² However, as discussed *supra*, the Second Circuit could only reach the decision affirmed by the Supreme Court by making two other holdings. First, a policy of providing severance benefits constituted a benefit plan.⁷¹³ Second, such a plan, even if informal, was not exempt from ERISA coverage as a payroll practice, such as a sickness, vacation,

706. *Fort Halifax*, 482 U.S. at 5.

707. *See id.* at 13 (relying in part on remarks in a post-ERISA House report, H.R. REP. NO. 94-1785 (1st Sess. 1977) supporting legislation that was never adopted).

708. *Id.* at 15-16.

709. *Id.* at 16.

710. *See Gilbert, v. Burlington Industries*, 765 F.2d at 326 (2d. Cir. 1985), *summarily aff’d* 477 U.S. 901 (1986) (holding that an unfunded severance pay policy was an ERISA employee welfare benefit plan).

711. *Fort Halifax*, 482 U.S. at 23-26 (White, J., dissenting)

712. *Id.* at 18 (emphasis added).

713. *Gilbert*, 765 F.2d at 325-26 (describing its analysis as first determining that the policy was an ERISA plan than determining the payroll practice exception was inapplicable).

holiday pay policy.⁷¹⁴ The Court in *Fort Halifax* gave no explanation for its disregard of those holdings. In contrast, two years later the Supreme Court in 1989 in *Massachusetts v. Morash*,⁷¹⁵ discussed the significance of the payroll practices exception, when it determined that an employer policy of making payments to terminating employees of accrued but unused vacation payment from general assets was a payroll practice, and thus not an ERISA plan.⁷¹⁶ Under the Gilbert/Morash approach, the policy is an ERISA plan, unless the policy consists of making payments of accrued but unpaid ongoing compensation upon the termination of any employee, such as vacation pay, sick pay, or general leave, in which case the policy is a payroll practice.. In short, a severance policy is an ERISA plan unless the policy is part of the employer's process for making regular cash compensation payments to employees, and is thereby a payroll practice.

In contrast, the case-law follows *Ft. Halifax* in determining whether a severance plan payable from general assets is an ERISA plan by asking whether there is an ongoing administrative scheme without any baseline for establishing such a scheme.⁷¹⁷ This latter approach results in fewer plans being covered by ERISA, such as those in *Fort Halifax*. Thus, this approach, unlike the article's proposed approach, has the perverse effect of giving more protection to plan participants because it gives more former employees access to state protections that are superior to the ERISA protections.⁷¹⁸ However, the Gilbert/Morash approach seems more consistent with the purpose of the ERISA Express Preemption, which is to prevent state law from interfering with the ERISA federal regime for assuring that employee benefit rights are enforceable, while not interfering with the state regulation of rights to wages, salary and similar regular compensation payments.

714. *Id.* at 326.

715. *Massachusetts v. Morash*, 490 U.S. 107 (1989).

716. *Id.* at 120-21.

717. *See generally* ERISA LITIGATION, *supra* note 13, 20-21 (4th ed. 2011) (discussing how the courts determine whether there is "ongoing administrative scheme," for policies that require the determination of which terminating employees qualify for the benefit, and the computation of each qualifying employee's benefit, neither of which requires any additional work for a policy of paying all terminated employees their accrued but unpaid vacation pay).

718. *Cf.* James P. Baker, ERISA's Better Mousetrap, 24 Ben. L. J. 1 (2011) (describing how employers find it an advantage for an employment policy to be characterized as an ERISA Top-Hat Plan for which the ERISA Express Preemption preempts state protections). A similar result occurs for severance plans, *See e.g.*, Gilbert, 772 F.2d 1140 *aff'd* 477 U.S. 901 (1986) (holding state protective labor law was preempted for ERISA severance plans).

B. Supreme Court Holds That ERISA Preempts Any State Law to the Extent That the Law Refers to an ERISA Plan Regardless of the Tenuousness of the Law's Effects on the Plan, and Suggests that ERISA Preempts any State Law that Treats any ERISA Plan More Favorably Than Similarly Situated Entities

The *Mackey I* holding, that a reference in a state law to an ERISA plan results in the preemption of the law regardless of the tenuousness of the law's effects on the plan, was based on the Court's misreading of its *Shaw* decision.⁷¹⁹ The Court unanimously held in *Mackey I* that ERISA preempted an exemption from the Georgia general garnishment statute for "[f]unds or benefits of a pension, retirement, or employee benefit plan or program subject to the provisions of the federal Employee Retirement Income Security Act of 1974, as amended. . . ."⁷²⁰ In other words, the Court held that a state could not explicitly exempt ERISA benefit payments from garnishments.

The Court cited the *Shaw* restatement of the "relate to" phrase as follows:

"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 v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (emphasis added). On several occasions since our decision in *Shaw*, we have reaffirmed this rule, concluding that state laws which make "reference to" ERISA plans are laws that "relate to" those plans within the meaning of § 514(a). *See, e. g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). In fact, we have virtually taken it for granted that state laws which are "specifically designed to affect employee benefit plans" are pre-empted under § 514(a). *Cf. Pilot Life Ins. Co. v. Dedeaux, supra*, at 47-48; *Shaw v. Delta Air Lines, Inc., supra*, at 98.⁷²¹

The garnishment law referred directly to ERISA plans.⁷²² Therefore, the Court concluded that the state law related to ERISA and thus was preempted.⁷²³ In a subsequent decision, *Greater Washington*, discussed, *supra*, the Court described a non-tenuous relation between a state law and an ERISA plan before and after observing there was ERISA preemption "on the basis alone" of a purported reference to ERISA plans.⁷²⁴ However, although the party claiming preemption therein conceded that the benefits required under the challenged law "are set by reference to

719. *Mackey*, 486 U.S. at 830.

720. *Id.* at 828, n.2.

721. *Id.* at 829 (emphasis in original) (internal quotations omitted) (quoting *Shaw*, 463 U.S. at 96-97).

722. *Id.* at 828, n.2.

723. *Id.* at 829-30.

724. *Greater Washington*, 506 U.S. at 130-31.

covered employee benefit plans,⁷²⁵ the statute cited therein did not mention ERISA or limit its coverage to ERISA plans, but instead referred to health insurance plans.⁷²⁶ In Greater Washington, the state law imposed a burden on ERISA plans, namely a benefit terms mandate, rather than bestowing a benefit as in *Mackey I*, in which ERISA plan participants were protected from benefit garnishments.

The Supreme Court had never previously preempted a law solely on the basis of an ERISA reference in any of the decisions the Court cited⁷²⁷ or any other decisions. This was probably because as discussed, *supra*, *Shaw* also contains the following relevant statement in a footnote: “[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.”⁷²⁸ Moreover, a state statute provision preventing an ERISA plan from being affected by another state statute means that the statutes in concert do not affect ERISA plans and contrary to the above quote were not “designed” to affect ERISA plans. Thus, ERISA does not preempt any part of the statutes.

Therefore, the statutory prohibition on the garnishment of ERISA plans should have been upheld, and the Court should have not gone beyond its authority to decide only cases and controversy.⁷²⁹ Thus, it should not have considered the theoretical question of whether ERISA would preempt the application to a vacation plan of the general garnishment statute without its ERISA exemption.⁷³⁰

The irrationality of the *Mackey I* preemption holding is shown because the same reasoning that considers only the ERISA plan reference, but disregards the statute’s lack of effect on ERISA plans or their benefits, would also result in the preemption of a

725. *Id.* at 128.

726. *Cf. Id.* at 130 (“Section 2(c)(2) of the District’s Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted”) to *id.* at 128 (Section 2(c)(2) of the District’s Equity Amendment Act is quoted).

727. *Shaw*, 463 U.S. at 96-97; *Pilot Life Ins. Co.* 481 U.S. at 47-48; and *Metro. Life Ins. Co.*, 471 U.S. at 739.

728. *Shaw*, 463 U.S. at 100 n.21. The Supreme Court therein cited *Am. Telephone and Telegraph Co.*, 592 F.2d 118, 121 (1973) (“State garnishment of a spouse’s pension income to enforce alimony and support orders is not preempted” as, perhaps, presenting such an example). *Shaw*, 463 U.S. at 100m n.21.

729. See U.S. CONST art. III, sec. 2 (explaining when federal courts may exercise jurisdiction).

730. This may reflect the Court’s strong apparent desire to decide whether ERISA preempted the application of the general Georgia garnishment statute to ERISA plans other than Spousal Survivor Benefit Plans. This strong apparent desire is consistent with the Court’s decision to appoint an amicus curiae when the creditor elected not to appear in Court. *Mackey*, 486 U.S. at 829, n.3.

statute explicitly providing for the garnishment of ERISA plan benefits. This is absurd. ERISA cannot preempt both the garnishment and an exemption from the garnishment of ERISA plan benefits. A law's preemption is not determined by whether it references ERISA plans, or how it references such plans, but how it affects ERISA benefit protections. Non-tenuous effects are preempted. Tenuous effects are not.

The *Mackey I* Court suggested that the reference in the state law to an ERISA plan at issue has a non-tenuous relation to the plan without using the word "non-tenuous."⁷³¹ The Court observed in a footnote that the prohibition resulted in a benefit to ERISA welfare benefit plans because non-ERISA welfare plans were subject to garnishment.⁷³² However, if simply treating ERISA plans more favorably than other entities, is a non-tenuous relation that results in the preemption of a state law, then ERISA would preempt (1) state provisions that permit tax-free rollovers from tax-qualified pension plans, which are primarily ERISA plans,⁷³³ (2) state provisions that exempt tax-qualified plans, from state tax, and (3) criminal statutes which do not include employee plans in their coverage, such as compensation collection statutes that do not address employee benefit payments, such as the forwarding of health reimbursement plan premium payments. None of these preemptions can be justified on any reasonable basis.

C. The Supreme Court Holds that ERISA Does Not Preempt a State Law if the Law Does Not Refer to an ERISA Plan and Does Not Conflict with any ERISA Provision, Other Than the Provision Giving Each ERISA Participant the Right to Enforce His or Her Plan Benefit Rights

The *Mackey II* holding that ERISA does not preempt state law garnishments of vacation benefit plan payments was based on the inability of the majority to find a specific ERISA provision prohibiting the garnishment of such benefits.⁷³⁴ The four dissenters, by contrast, argued that because garnishments had

731. See generally *id.*

732. The Court observed that non-ERISA pension and retirement plans are exempted from garnishment, but no exemption is provided for non-ERISA employee welfare benefit plans. *Id.* at 831, n.4.

733. See e.g., Treasury Inspector General for Tax Administration, *Statistical Trends in Retirement Plans* 9 (Aug. 9, 2010) (the vast majority of tax-qualified retirement plans file Form 5500 annual returns required under Code § 6058, but this excludes non-ERISA plans, such as church plans and one participant plans) available at <http://www.treasury.gov/tigta/auditreports/2010reports/201010097fr.pdf> (last visited Jan. 30, 2014). Although the state tax statute may simply follow federal income tax rules, the state tax regulations often incorporate the rollover rules explicitly so under the preemption by reference rules of *Mackey I* there would be preemption.

734. *Mackey*, 486 U.S. at 835-40.

non-tenuous effects on the vacation plan such garnishments were preempted. Neither opinion considered whether the garnishment violated ERISA provision giving each participant in an ERISA plan the right to enforce his or her plan benefit rights.

As in *Fort Halifax*, the Justices were distracted by the express reference in the ERISA Express Preemption to state laws that relate to “employee benefit plans” rather than to “employee benefits.”⁷³⁵ This remains a distinction without a difference. Benefits must be part of the benefit plan that determines how the benefits are financed, and who is entitled to plan benefits. Thus, the court missed the relevant point. ERISA preempts state laws that relate to the ERISA benefit protections absent a statutory exception, as discussed *supra*. ERISA preempts a state law if the law has non-tenuous effects on a plan’s employee benefit rights, such as preventing a participant from obtaining his benefit payment under the plan terms,⁷³⁶ as the garnishment did in this case.

The *Mackey II* majority argued that because ERISA permits run-of-the-mill plan creditors to garnish plan property, such garnishments were not related to an ERISA plan.⁷³⁷ Consequently, the Court asserted that there was no reason to treat garnishments of a participant’s benefits as any more related to a pension plan.⁷³⁸ The only ERISA restriction on garnishments the Court perceived was the Alienation Prohibition, which it observed is limited to Spousal Survivor Benefit Plans.⁷³⁹ Thus, the Court asserted ERISA could not preempt the garnishment of other plans, such as vacation plans.

This *Mackey II* Court argument is fundamentally flawed. ERISA permits run-of-the-mill creditors to garnish the property of an ERISA plan because those claims do not have the kind of relation that results in ERISA preemption. The *Mackey II* Court failed to consider what kind of relation results in preemption. The Court disregarded the right of a participant in any ERISA plan to obtain benefits under the terms of the plan.⁷⁴⁰ Preventing the exercise of such rights is a non-tenuous relation. Thus, unless the participant has pursuant to the plan terms either made the creditor a plan beneficiary by assigning his benefits to the creditor or directed the plan to pay his benefits to the creditor, the plan must pay the benefits at issue to the participant.⁷⁴¹ Under the

735. *Id.* at 836.

736. ERISA § 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B).

737. *Mackey*, 486 U.S. at 832-33.

738. *Id.* at 835-36.

739. *Id.* at 836-37.

740. ERISA § 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B).

741. ERISA does not prevent the plan from making benefit payments to a creditor who is not a plan beneficiary. However, such payment does not relieve the plan of the obligation to make the benefit payments to the participant, unless the payment is made pursuant to the plan terms at the

Court's reasoning because ERISA does not prohibit state-law contract claims for benefits, but ERISA permits run of the mill service providers to enforce contract claims against ERISA plans, ERISA must also permit state-law contract benefit claims. This *reductio ad absurdum* results because the Court determined whether a state law is preempted without considering the extent to which the state law affects an ERISA benefit protection.

The *Mackey II* dissent, unlike the majority, considered the administrative burden imposed on the plan administrator by garnishments of a participant's benefits.⁷⁴² The dissent concluded that such garnishments would impose, "a substantial and onerous obligation" on the garnishee, the plan administrator.⁷⁴³ Moreover, such garnishments may be distinguished from garnishments of plan assets because the burden of the latter would fall on a third party rather than on the plan administrator.⁷⁴⁴ The dissent also observed that the mere absence of an ERISA prohibition does not preclude a sufficient relation of a state law to the plan to result in preemption.⁷⁴⁵ All these arguments are correct. Yet, as with the majority, none address the direct effects of a garnishment on the participant, namely he would be deprived of the benefit payments to which he is entitled under the plan terms. State law garnishments are preempted to prevent such deprivation.

The *Mackey II* arguments are more fully discussed in *Feuer's ERISA Myths*.⁷⁴⁶

XIII. SUPREME COURT DECLARES THAT ERISA PREEMPTS ANY STATE LAW TO THE EXTENT THE LAW REFERS TO ERISA PLANS, MANDATES BENEFIT STRUCTURE OR BENEFIT ADMINISTRATION, OR PROVIDES AN ENFORCEMENT MECHANISM, BUT PERMITS STATE LAWS THAT AFFECT BENEFIT AMOUNTS AND PROVIDERS INDIRECTLY WITHOUT ANY OF THE ABOVE FEATURES

In the mid-1990s the Supreme Court, as discussed *infra*, issued its first decisions explicitly addressing state laws that indirectly affect benefit entitlements under the terms of an ERISA plan. The Court, as discussed *infra*, found that none of the laws

explicit request of the plan participant or beneficiary. Thus, a prudent plan fiduciary would seek to recover the payment to the creditor from the creditor and/or the plan fiduciary that authorized such payment.

742. *Mackey*, 486 U.S. at 841-45 (Kennedy, J., dissenting).

743. *Id.* at 842 (Kennedy, J., dissenting).

744. *Id.* at 844 (Kennedy, J., dissenting).

745. *Id.* at 841-42 (Kennedy, J., dissenting).

746. *Feuer ERISA Myths, supra* note 25, at 713-716, n.8.

were preempted because none produced the direct effects that would give rise to ERISA preemption. The Court, as discussed *infra*, also held that ERISA does not preempt a state-law which only affects benefit rights by imposing a cost on an ERISA plan thereby reducing the assets that may be allocated to the plan's benefits. This is consistent with the fact that ERISA does not exempt ERISA plans from taxes. If indirect reductions of benefits in and of themselves caused preemption, all state taxes on ERISA plans would be preempted. Thus, all ERISA plans would be exempt from state taxes. However, the Court had earlier permitted direct reductions of participant rights to benefit payments in *Mackey II*, when it held that ERISA did not preempt state law garnishments of vacation plan benefits,⁷⁴⁷ even though the Court acknowledged without any discussion that this prevented a participant from receiving his or her plan benefits.⁷⁴⁸

The Supreme Court decisions in the 1990s presented five broad conclusions, although the first three were not applied to the matters at issues therein.

First, ERISA preempts a state law referring to or acting exclusively on ERISA plans. The Court failed to explain why there is no need to consider whether the effects of such law on ERISA plans are non-tenuous particularly when the Court follows this by a criticism of using "an uncritical literalism" to interpret the significance of the "relate to" phrase.⁷⁴⁹ There is no similar automatic preemption for laws that act primarily, but not exclusively upon, ERISA plans, without a specific reference to ERISA plans as occurred with the state law at issue in *Greater Washington*.⁷⁵⁰ In all cases, a state law should only be preempted if the law affects ERISA plans in a non-tenuous manner.

Second, if a statute provides enforcement mechanisms other than those provided by ERISA, ERISA preempts those mechanisms. There is no dispute about this.

Third, if a statute mandates employee benefit structures or "their administration," ERISA preempts such mandates. The Court did not discuss the phrase "their administration," and each of the examples cited by the Court concerned employee benefit structure.

Fourth, if a statute indirectly affects benefits under the terms of an ERISA plan by imposing burdens on an ERISA plan, the effects are non-tenuous if the law does not implicitly mandate any benefit choice.⁷⁵¹ In particular, ERISA does not preempt prevailing

747. *Mackey*, 486 U.S. at 841.

748. *Id.* at 831-32.

749. *Dillingham Constr.*, 519 U.S., at 325 (citing *Travelers*, 514 U.S., at 656, which made the same criticism after its preemption by reference assertion).

750. *Greater Washington*, 506 U.S. 125 (1992).

751. *Travelers*, 514 U.S. 645 (1995). In contrast, in *Mackey I*, the state law

wage statutes pertaining to apprentice plans,⁷⁵² or laws that impose surcharges or taxes on certain benefit providers.⁷⁵³ In each decision, the Court stated there was no evidence of an implicit benefit terms mandate without discussing the size of the cost burden that could constitute such a mandate. The Court also stated that the statute did not preclude a uniform administrative practice, although each imposed the same adverse consequence of an administrative burden, namely a cost burden for operating in the state with the law at issue. This conclusion implies that ERISA only preempts a state law relating to benefit payments if the law conflicts with the benefit terms. Some commentators have asserted this limitation of preemption to conflict preemption extends to all state laws not merely state laws which indirectly affect benefit entitlements, enforcement mechanism and benefit mandates.⁷⁵⁴

The Court never described how a state law may preclude a uniform administrative practice unless the state law otherwise imposes an ERISA General Mandate, in which case ERISA preempts the law. Thus, there is no apparent reason for introducing a preemption test focused on administrative burdens, particularly since such burdens may be valued, and the Court ruled that imposing a monetary burden on the plan does not result in ERISA preemption if there is no resulting benefit terms mandate.

Fifth, ERISA does not preempt the state regulation of the provision of health care, such as the regulation of medical-care quality and the hospital workplace.⁷⁵⁵

Finally, the Court holdings imply that ERISA permits a state-law reporting or disclosure mandate for ERISA plans that is limited to the information needed to implement in a non-burdensome manner a state law that is not otherwise preempted, such as (1) the tax return filing and audit requests that a plan may be required to comply with for a tax, such as the one approved in *De Buono*, described *infra*; (2) the requirements that an ERISA

bestowing the benefit of an exemption from garnishments, which affected neither the plan's benefit structure nor the administration of the benefit structure, resulted in the preemption of the exemption, as discussed *supra*.

752. *Dillingham Constr.*, 519 U.S. 316, 334 (1997).

753. *Travelers*, 514 U.S. at 646; *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815-16 (1997).

754. *See e.g.*, MEDILL EMPLOYEE BENEFITS LAW, *supra* note 13, at 648 (asserting that the ERISA preemption jurisprudence has "evolved from a broad field preemption approach in the Court's early preemption decision to "a more narrowly tailored conflict preemption analysis today"). Under this approach, states could impose reporting and disclosure mandates in addition to those imposed by ERISA because such additional requirements do not conflict with the ERISA mandates. Similarly, they could impose more stringent funding mandates than ERISA.

755. *Travelers*, 514 U.S., at 660-61, which is cited by *Dillingham Constr.*, 519 U.S., at 329.

plan's health care facilities file the *information* needed by state agencies to regulate the medical care quality as described in *Kilian*, described *infra*; or (3) the requirements that an employer maintain payroll records for inspection for compliance with the state-law prevailing-wage requirements approved in *Dillingham Constr.*, described *infra*.⁷⁵⁶

A. *Supreme Court Holds that ERISA Does Not Preempt a State Law That Imposes Surcharges Only On Blue Cross Insurers Because Its relation to ERISA Plans is Too Tenuous*

In 1995, the Supreme Court unanimously held in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* ("*Travelers*")⁷⁵⁷ that ERISA did not preempt a New York State law imposing surcharges on hospital patients with non-Blue Cross private insurance (including self-insured ERISA plans).⁷⁵⁸ The surcharges were designed to compensate Blue Cross for enrolling subscribers that the other insurers would not enroll.⁷⁵⁹ The Court observed that the Second Circuit had found ERISA preemption because the surcharges would make it less likely that ERISA health reimbursement plans would choose non-Blue Cross private insurers and therefore would "have an impermissible impact on ERISA plan structure and administration."⁷⁶⁰ The Court nevertheless held that the law did not "relate to" any ERISA plan.⁷⁶¹

The *Travelers* Court began its analysis by referring to the *Rice* presumption against the preemption of state law,⁷⁶² which is a bit odd since the *Rice* court was referring to a law with an implicit preemption rather one with an express preemption, such as the ERISA Express Preemption. The ERISA question is how extensive is the explicit "relate to" preemption. The Court described the ERISA Express Preemption as follows:

We simply must go beyond the unhelpful text and the frustrating

756. See generally Albert Feuer, *Does ERISA Permit State-Law Reporting and Disclosure Mandates to Implement Criminal Laws, Insurance Laws, Tax Laws, Labor Laws, Domestic Relations Laws, Health Care Laws, or Other State Laws?*, 42 BLOOMBERG BNA COMP P. J. (2014) (discussing why ERISA permits domestic and reporting mandates needed to implement any state law that ERISA does not otherwise preempt).

757. *Travelers*, 514 U.S. at 645.

758. *Id.* at 649.

759. *Id.* at 658.

760. *Id.* at 654 (citation omitted) (quoting the Second Circuit decision, *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 721 (2d. Cir. 1994)). The Second Circuit finding of preemption was being appealed. The Court did not consider whether the statute was preempted because it imposed the surcharges on patients with ERISA self-insurance. *Travelers*, 514 U.S. at 652.

761. *Id.* at 649.

762. *Id.* at 655.

difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive . . .

The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.⁷⁶³

The Court made a similar incorrect characterization of preemption in *Fort Halifax* as discussed *supra*. The Court reviewed its prior decisions and rediscovered the tenuous limitation for the “relate to” concept that it had presented in *Shaw* in 1983, although it attributed the limitation to the Greater Washington,⁷⁶⁴ which in 1992 gave credit to *Shaw*.

The first preemption test the *Travelers* Court discovered was *Shaw*’s recognition that the meaning of the phrase “relate to” includes “refer to,” but the Court disregarded *Shaw*’s requirement of a non-tenuous relation.⁷⁶⁵ The Court then referred to the Greater Washington holding that ERISA preempts a state law which “specifically refers to welfare benefit plans regulated by ERISA,” even though as discussed, *supra*, the Greater Washington statute as set forth therein had no such reference.⁷⁶⁶ The rule that a state law that refers to ERISA is preempted, shall be hereinafter designated as the *Travelers* Preemption by Reference Rule. The surcharge law, which operated indirectly on plans, had no ERISA reference.⁷⁶⁷ Thus, the statute at issue needed to be further reviewed.⁷⁶⁸

The Court then discovered a second test by organizing the state laws it had preempted into three categories, those that (1) mandated employee benefit structures; (2) mandated plan administration of employee benefit structures; or (3) provided alternative enforcement mechanisms.⁷⁶⁹ The *Travelers* Court made no attempt to explain why ERISA would preempt a state-law enforcement mechanism, but not preempt a state law affecting what the mechanism was protecting, *i.e.*, the benefit rights of an ERISA participant or beneficiary. The Court also made no attempt to explain how state law could mandate plan administration other than by imposing an ERISA General Mandate, which are not limited to benefit terms mandates. The *Travelers* Court declared that the surcharge’s indirect influence did not “bind plan administrators to any particular choice [of benefits or benefit providers] and thus function as a regulation of

763. *Id.* at 656-57.

764. *Id.* at 661.

765. *Id.* at 656.

766. *Id.*

767. *Id.*

768. *Id.*

769. *Id.* at 658.

an ERISA plan itself.⁷⁷⁰ Thus, the surcharge law did not fit within any of the three categories. Finally, the Court did not discuss the size of the acceptable surcharges, but stated that, “there is no evidence that the surcharges will drive every health insurance consumer to the Blues.”⁷⁷¹ Because of this pleading deficiency, which seems to set a high preemption threshold, the Court was able to avoid the issue of how large of a cost differential constituted a mandate, which may be an issue because competing insurance products often differ significantly in cost and benefits. Thus, the Court concluded that the law was not preempted because the cost differential did not “force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.”⁷⁷²

The *Travelers* Court declared that the surcharge’s indirect influence did not “preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishe[d] to provide one.”⁷⁷³ However, such preclusion would occur if the law had any of the three listed effects, so it is unclear why the Court mentioned either criterion.

The Court observed that if ERISA preempted any state laws that affected benefit costs, ERISA would also have to preempt other healthcare regulation, such as quality control laws, which affect the cost of healthcare and the healthcare insurance premiums paid by ERISA plans.⁷⁷⁴ The Court considered it more reasonable to find that the effects on ERISA plans of all these health care regulations were too tenuous for any of these regulations to be preempted. This conclusion was based on the assertion that health regulations historically are a matter of local concern⁷⁷⁵ and that the regulations were encouraged by a federal law passed and adopted by Congress in 1974.⁷⁷⁶ The Court also endorsed its prior disregard of ERISA benefit rights in *Mackey* without mentioning those rights, but again referred to the small administrative burden of paying benefits to a person other than a plan participant or beneficiary.⁷⁷⁷

The Court, as it had in *Ingersoll-Rand*,⁷⁷⁸ discussed *supra*, left many questions about what kind of administrative or cost burdens would result in the preemption of a state law. Again the better approach is to disregard any administrative or cost burden

770. *Id.* at 659.

771. *Id.* at 659.

772. *Id.* at 668.

773. *Id.* at 660.

774. *Id.* at 661.

775. *Id.* at 661.

776. *Id.* at 665. However, the cited federal law, the National Health Planning and Resources Development Act of 1974, did not authorize the state rules at issue. 42 U.S.C. §§ 300k-300t; Pub. L. No. 93-641 (1975).

777. *Travelers*, 514 U.S. at 662.

778. *Ingersoll-Rand Co.*, 498 U.S. at 142.

analysis or consideration of whether the law is a traditional state power. Rather, it is preferable to ask whether the state law results in a change in benefit rights under the plan terms, a new, enhanced, or diminished enforcement mechanism, or an ERISA General Mandate. If not, the law's effects on ERISA protections are too tenuous to result in ERISA preemption.

B. Supreme Court Holds That ERISA Does Not Preempt a State Law That Imposes Taxes on Operators of Health Care Facilities, Including ERISA Plans, Because Its Relation to ERISA Plans is too Tenuous

In 1997, the Supreme Court in *De Buono v. NYSA-ILA Medical & Clinical Services Fund*,⁷⁷⁹ held that ERISA did not preempt a New York State law, the Health Facility Assessment ("HFA"), which imposed taxes on the gross receipts of operators of medical facilities.⁷⁸⁰ The Court observed that the Second Circuit had found ERISA preemption because the tax depleted the assets of the ERISA plan; thus, it had a more immediate impact on the plan than the surcharges on the insurers that were not preempted in *Travelers*.⁷⁸¹

The Court repeated its *Travelers* analysis. It began by observing as it had in *Travelers*, that the historic police powers of the State include the regulation of matters of safety and health.⁷⁸² Thus, the burden is on the proponents of preemption to overcome the presumption that Congress does not intend to overrule state law.⁷⁸³ There is no reference in the state law to an ERISA plan and the statute has none of the three listed effects on ERISA plans.⁷⁸⁴ Thus, the law is not preempted, and the state law is described with the following conclusory language:

the HFA is one of "myriad state laws" of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not "relate to" them within the meaning of the governing statute.⁷⁸⁵

The Court observes that there is no difference between the direct and indirect effect of the tax because if the plan had obtained the services from a third party, that party, like *Travelers*, would have paid the assessment.⁷⁸⁶ The Court made the same reservation as it had in *Travelers*. There would be preemption if

779. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997).

780. *Id.* at 816.

781. *Id.* at 812 (citing *NYSA-ILA Medical and Clinical Serv. Fund v. Axelrod*, M. D., 74 F.3d 28, 30 (1996)).

782. *Id.* at 814.

783. *Id.*

784. *Id.* at 815.

785. *Id.*

786. *Id.* at 816.

the tax were so substantial as to “as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers,” without discussing the size of the tax at issue and why it had no such effect.⁷⁸⁷ The Court again failed to discuss whether a law with indirect effects, that had none of the three direct effects discussed, could ever be preempted. This decision’s analysis suggests that the answer is no.

C. Supreme Court Holds That ERISA Does Not Preempt a State Law That Imposes Lower Prevailing Wages For Participants in Approved Apprentices Programs, Which Included But Were Not Limited to ERISA Apprentices Plans

In 1997, the Supreme Court held in *California Division of Labor Standards Enforcement v. Dillingham Construction N.A. Inc.* (“*Dillingham Constr.*”),⁷⁸⁸ that ERISA did not preempt a California law providing that participants in approved apprentice programs may be paid compensation below the usual state prevailing requirements applicable to public works contractors.⁷⁸⁹

The Court repeated its *Travelers* analysis. The Court began as it had in *Travelers*, with the *Rice* presumption of no preemption.⁷⁹⁰ It found no showing that the state law regulated only ERISA apprentice plans; thus, the *Travelers* Preemption by Reference Rule did not provide for preemption.⁷⁹¹ The Court held that the statute was indistinguishable from the surcharge program in *Travelers*, which it held was not preempted because it did not mandate employee benefit structures or their administration.⁷⁹² As in that case, the state traditionally regulated apprenticeship standards and the wages paid on state public works, and those standards were remote from traditional areas of ERISA regulation, such as fiduciary responsibility and reporting and disclosure requirements.⁷⁹³ As with the state health surcharge, a federal law encouraged state standards for apprentice programs, which made preemption unlikely.⁷⁹⁴ However, most important, the statutory effects were too tenuous because:

Like New York’s surcharge requirement, the apprenticeship portion of the prevailing wage statute does not bind ERISA plans to anything. No apprenticeship program is required by California law to meet California’s standards. See *Southern Cal. ABC*, 4 Cal. 4th at 428, 841 P.2d at 1013. If a contractor chooses to hire apprentices for a public works project, it need not hire them from an approved

787. *Id.* at 816, n.16.

788. *Dillingham Constr.*, 519 U.S. 316 (1997).

789. *Id.* at 319.

790. *Id.* at 325.

791. *Id.* at 325-28.

792. *Id.* at 330.

793. *Id.* at 331.

794. *Id.*

program (although if it does not, it must pay these apprentices journeyman wages).⁷⁹⁵

In a concurrence, Justice Scalia joined by Justice Ginsberg argued that careful analysis of the ERISA Express Preemption is unnecessary because the Court is essentially interpreting it as identifying the field in which field preemption applies.⁷⁹⁶ This may describe the preemption of state laws that constitute ERISA General Mandates, but may not encompass the preemption of state laws that prevent a participant from exercising benefit rights under the terms of an ERISA plan, which the Conference Committee added to the preemption provisions of the bill that was approved by Congress as ERISA as described, *supra*.

XIV. THE SUPREME COURT HOLDS THAT ERISA PREEMPTS A STATE LAW CLAIM OF A PERSON THAT ARISES FROM A PARTICIPANT'S OR BENEFICIARY'S RIGHT TO AN ERISA PLAN BENEFIT THAT WOULD PREVENT THE PLAN FROM PAYING THE PARTICIPANT OR BENEFICIARY SUCH BENEFIT OR PERMIT THE PERSON TO WREST THE BENEFIT OR THE AMOUNT OF THE BENEFIT FROM THE PARTICIPANT OR BENEFICIARY

In 1997, the Supreme Court held that a state law preventing the retention of ERISA pension plan benefit payments was preempted.⁷⁹⁷ In 2001, the Court extended the holding to non-pension plan benefits.⁷⁹⁸ Moreover, the Court proclaimed that ERISA did not provide meaningless title. Thus, ERISA benefit rights include the right of a plan participant or beneficiary to receive and retain plan benefits.⁷⁹⁹ Thus, ERISA was held to preempt a state community property law and a state revocation upon divorce law to the contrary.

The reasoning of the two decisions implies that a person with a state law claim that arises from a participant's or beneficiary's right to an ERISA plan benefit may not compel the plan to pay it such benefit or wrest the benefit or the amount of the benefit from the participant or beneficiary. A state law claim arises from a participant's or beneficiary's right to an ERISA plan benefit if such claim would disappear if the participant or beneficiary had not obtained the benefit. In particular, the claims in both decisions would have disappeared if the beneficiary had not obtained the

795. *Id.* at 332.

796. *Id.* at 334-336 (Scalia, J., concurring).

797. *Boggs*, 520 U.S. at 836.

798. *Egelhoff*, 532 U.S. at 143.

799. *Boggs*, 520 U.S. at 843; *Egelhoff*, 532 U.S. at 152.

benefit at issue. If the plan terms had provided for deference to the state law claim, the claimant would have been a plan beneficiary, and there would have been no preemption issue. However, a claim against the beneficiary for the beneficiary's home mortgage payment would remain if the beneficiary had not obtained the benefit at issue, and thus be enforceable against such benefit. Similarly, ERISA preempts a physician's state law claim for payment of services based on the patient's ERISA plan coverage, but not one based on the value of the services provided.

A fortiori, these two decisions undermine the viability of the (1) *Mackey II* holding that permitted a state garnishment law to prevent an ERISA plan's payments of vacation benefits to a plan participant, to which the participant was entitled under the plan terms, and (2) the suggestion that ERISA does not preempt generally applicable state laws, since both preempted laws were generally applicable.

On the other hand, this analysis is not fully applicable to state-law claims based on the taxation of the plan benefits distributed to a participant or a beneficiary. Such claims arise from the individual's right to an ERISA plan benefit, but must be treated like state-law claims that do not so arise and remain viable. Thus, tax claims may be used by the state to wrest the tax amount of the benefit from the individual. If this were not the case, ERISA plan payments would be rendered tax-exempt in fact, even though ERISA does not make an individual's ERISA benefits tax-exempt. However, such tax claims may not be used to compel the plan to pay the state such tax amount from the individual's benefit, because tax laws may still be implemented without such authority, and the ERISA Express Preemption appears to permit non-tenuous effects on the ERISA benefit protections only to the extent needed to implement a state law that is otherwise not preempted. No such limits apply to state laws, such as generally applicable criminal laws, that are explicitly excluded from the ERISA Express Preemption.

A. Supreme Court Holds That (1) ERISA Preempts a State Community Property Law That Gives a Participant's Spouse the Right to Dispose of Part of the Participant's Pension Benefit at Her Death if She Predeceases the Participant, and (2) Her Legatees Do Not Have the Right to Obtain the Distributed Benefits of the Participant

In 1997, the Supreme Court held in *Boggs v. Boggs*,⁸⁰⁰ that ERISA preempts a Louisiana community property law permitting a participant's spouse to transfer a portion of his ERISA pension

800. *Boggs*, 520 U.S. 833. A more extensive discussion may be found at *Feuer's ERISA Myths*, *supra* note 25, at 720-725.

benefit to their children when she predeceased him.⁸⁰¹ Thus, those children did not thereby derive an entitlement to the pension amounts paid to him or his designated beneficiaries following his death. There appeared to be no challenge of the decision below that the plans had no direct liability to the children.⁸⁰²

In *Boggs* the participant's first wife, Dorothy, died in 1979.⁸⁰³ In 1980, a Louisiana court ascribed to the first wife's estate an interest of \$21,194.29 in the undistributed interest of the participant's savings plan (the "Savings Plan").⁸⁰⁴ The first wife's will gave (a) the participant a life interest in her assets and one third of the remainder, and (b) her children two-thirds of the remainder.⁸⁰⁵ The participant remarried Sandra within a year of the first wife's death, *i.e.*, in 1980.⁸⁰⁶ In 1985, he retired and received (a) a lump sum distribution of \$151,628.94 from the Savings Plan, which he rolled into an IRA—he made no withdrawals before his death in 1989; (b) AT&T shares from an ESOP, which he retained until his death; and (c) the initial payments of a qualified joint and survivor annuity with survivor rights in Sandra, his second wife, from a distinct retirement plan (the "Retirement Plan").⁸⁰⁷ Under the participant's will, his widow Sandra received a life interest in the AT&T shares and Sandra appeared to be the sole beneficiary of the IRA.⁸⁰⁸ After the participant's death, the adult children of Dorothy and the participant, sought the property they claimed to have been entitled to as of the date of their mother's death, namely a portion of (a) the annuity payments received by the participant during his life, (b) the annuity payments being received by the participant's widow, (c) the IRA account, and (d) the ESOP shares.⁸⁰⁹

The Court did not begin its analysis with the *Rice* presumption against preemption, but with the traditional statement that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."⁸¹⁰ The Court decided by a vote of 7-2 that the children were not entitled to receive from the widow, payment for any part of the spousal survivor benefits paid to the participant's widow from the Retirement Plan in accord with the ERISA requirement for the Spousal Survivor Benefit Mandate.⁸¹¹

801. *Boggs*, 520 U.S. at 842-44.

802. *Id.* at 838.

803. *Id.* at 836.

804. *Id.* at 837.

805. *Id.* at 836-37.

806. *Id.* at 836.

807. *Id.*

808. *Id.* at 837.

809. *Id.*

810. *Boggs*, 520 U.S. at 845 (citing *Shaw*, 463 U.S. at 90).

811. *Id.* at 842. The Spousal Survivor Benefit Mandate is at ERISA § 205, 29 U.S.C. § 1055 (2012).

The dissent, however, argued that (a) to the extent that the spouse had received other assets from the estate she was liable to the children to use them to compensate the children for the value of the survivor benefits that she received, and (b) ERISA was only concerned with the uniformity of payments by ERISA plans.⁸¹² Thus, the dissent argued there would be no ERISA violation if the widow was required to provide the children with property other than the survivor benefits that she received.⁸¹³ The majority rejected this argument. In particular, the majority observed that the statutory beneficiary designations of the Spousal Survivor Benefit Mandate were designed to insure an income stream to the surviving spouse.⁸¹⁴ Thus, the children's community property claim was a preempted ERISA General Mandate:

It would undermine the purpose of ERISA's mandated survivor's annuity to allow Dorothy, the predeceasing spouse, by her testamentary transfer to defeat in part Sandra's entitlement to the annuity § 1055 guarantees her as the surviving spouse. This cannot be. States are not free to change ERISA's structure and balance.⁸¹⁵

The Court, by a vote of 5-4, found a state law conflict with another designation mandate, the right of a participant to choose his beneficiary pursuant to the plan terms, preempted the children's claim to a portion of (a) the Savings Plan benefits that the participant had received and rolled over into an IRA, (b) the stock the participant had received from an ESOP, and (c) the Retirement Plan annuity benefits that the participant received, but had not rolled over into an IRA or other tax-qualified plan.⁸¹⁶ The majority emphasized that the children were not plan beneficiaries under the plan terms.⁸¹⁷

The majority stated that the enactment of REACT made inapplicable its prior 1980 decision, *Sup Ct. Campa*,⁸¹⁸ which

812. *Boggs*, 520 U.S. at 862-74 (Breyer, J., dissenting).

813. *Id.* at 871-73.

814. *Id.* at 843-44.

815. *Id.* at 844.

816. *Id.* at 844-50.

817. *Id.* at 845-50.

818. *Id.* at 849-50. The Supreme Court also explicitly overruled decisions that reached the same results as *Campa*, such as *Stone v. Stone*, 633 F.2d 740 (9th Cir. 1980) (holding ERISA does not preempt state-court orders requiring a pension plan to pay [in the future] a community property share of a plan participant's monthly benefit payments directly to his or her ex-spouse), *Sav. & Profit Sharing Fund of Sears Emps. v. Gago*, 717 F.2d 1038 (7th Cir. 1983) (holding ERISA does not preempt a direction by the participant's former spouse pursuant to a domestic relations order that the plan make plan payments to her when the participant could have given, but had not yet given, direction for plan payments to begin), and *Eichelberger v. Eichelberger*, 584 F. Supp. 899 (S.D. Tex. 1984) (holding ERISA does not preempt right of former spouse pursuant to domestic relations order to direct investments of her share of participant's pension account).

permitted domestic relations claims to override ERISA plan terms. Moreover, the Court observed that the ERISA's spousal survivor benefit provisions and QDRO provisions addressed the scope of a nonparticipant spouse's community property interests.⁸¹⁹

The Court "reinforced" its designation argument by referring to the Alienation Prohibition,⁸²⁰ but then referred to the participant's designation pursuant to the plan terms "[a]s was true with survivors' annuities, it would be inimical to ERISA's purposes to permit testamentary recipients to acquire a competing interest in undistributed pension benefits, which are intended to provide a stream of income to participants and their beneficiaries."⁸²¹

The Court repeated its *Free* statement that giving full title to an individual but forcing the individual to account for the value is to provide "meaningless title."⁸²² The Court paraphrased that statement:

If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit.⁸²³

The majority in its final paragraph emphasized the critical importance of extending ERISA protection to distributed ERISA benefits as follows:

The axis around which ERISA's protections revolve is [sic] the concepts of participant and beneficiary. When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. *It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits.* Their state-law claims are pre-empted. The judgment of the Fifth Circuit is Reversed.⁸²⁴

Almost a hundred years earlier, the Court had rejected a similar alchemy claim that a state community property right magically sprang into effect after the federal government transferred another federally protected right, albeit to homestead property, in *McCune v. Essig*,⁸²⁵ and observed that unrelated state claims against the person with the federal right could be enforced against the distributed homestead.⁸²⁶

819. *Boggs*, 530 U.S., at 850.

820. *Id.* at 851.

821. *Id.* at 852.

822. *Id.* at 853.

823. *Id.* (emphasis added).

824. *Id.* at 854 (emphasis added).

825. *McCune v. Essig*, 199 U.S. 382 (1905). A more extensive discussion of the decision may be found at *Feuer's ERISA Myths*, *supra* note 25, at 653-654.

826. *McCune*, at 390.

The Court's conclusion does not depend on the benefit being from a Spousal Survivor Benefit Plan, or from a pension plan. Nor do they prevent all state-law claims from being applied to distributed benefits. That preemption seems to be limited to state-law claims based on "an interest in the undistributed benefits." Such claims include ownership claims, as in *Boggs*, contract claims and claims of unjust enrichment, as discussed in *Hillman*,⁸²⁷ *infra*. As discussed *infra*, the structure of ERISA determines the extent to which ERISA preempts such claims.

Under the *Boggs* and the *McCune* reasoning, it would appear no state law claim that arises from a participant's or beneficiary's right to an ERISA benefit under the plan terms may be used to wrest the benefit from such participant or beneficiary. A state-law claim arises from a participant's or beneficiary's right to an ERISA plan benefit if the claim would disappear if the participant or beneficiary had no such benefit right, which is a reasonable way of determining whether the state-law claim based on "an interest in the undistributed benefits." In particular, a claim arises from a participant's or beneficiary's right to an ERISA plan benefit if the claim were solely based on a promise by the participant to forward the plan benefit payments to the claimant, such as pension advances discussed *infra*. In such case there would have been no claim if the participant had no benefit right. Thus, the claim would be preempted, unless the promise complied with the plan terms, if any, for the assignment of the benefit so the claimant would have the right to obtain the benefit payments from the plan or from the participant. On the other hand, a claim to enforce a debt that did not depend upon a participant's right to an ERISA benefit, such as a debt on a Macy's credit card would not be so related, and could be enforced against the distributed benefit under this analysis.

The Court rejected the dissent's appeal to the *Rice* presumption against preemption.⁸²⁸ Instead, the Court focused on the ERISA purpose and the conflict with that purpose, which is similar to its *Free* approach. The Court stated, "[w]e can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case."⁸²⁹

827. *Hillman v. Maretta*, 569 U.S. ___, 133 S. Ct. 194, 2013 U.S. LEXIS 4167 (June 3, 2013).

828. *Boggs*, 520 U.S. at 861 (Breyer, J., dissenting) (citing *Rice*, 331 U.S. at 218).

829. *Id.* at 841 (emphasis added).

B. Supreme Court Holds That (1) ERISA Preempts a State Law That Revokes an ERISA Plan Beneficiary Designation Upon a Divorce, (2) State Law Designated Beneficiaries May Not Wrest the Benefits From the ERISA Beneficiary, and (3) ERISA Preempts Generally Applicable Non-Criminal Laws That Violate an ERISA General Mandate

In 2001, the Supreme Court held in *Egelhoff v. Egelhoff*,⁸³⁰ that ERISA pre-empts a Washington state law that attempts to override a participant's designation of his or her spouse in an ERISA pension plan or an ERISA life insurance plan upon the participant's divorce.⁸³¹ Thus, the adult children of the participant's first wife were again not entitled to obtain the benefits either directly from the plan or indirectly from the participant's second wife, who was the participant's duly designated beneficiary at the time of his death.⁸³²

The *Egelhoff* Court stated: “[a]nd as we have noted, the statute at issue here directly conflicts with ERISA’s requirements that plans be administered, and benefits be paid, in accordance with plan documents.”⁸³³ These ERISA requirements are fiduciary requirements, applicable to most, but not all ERISA plans.⁸³⁴ These fiduciary requirements⁸³⁵ are a consequence of the more fundamental requirement that participants and beneficiaries in all ERISA plans may enforce their right to plan benefit entitlements.⁸³⁶ By definition, plan terms determine ERISA plan beneficiary entitlements.⁸³⁷ Thus, state statutes providing for revocation of spousal designations upon the participant's divorce would also be preempted for plans not subject to the referenced fiduciary rules, such as Top-Hat Plans.⁸³⁸

The *Egelhoff* Court also distinguished generally applicable laws, which regulate “areas where ERISA has nothing to say,” such as state laws permitting a lower prevailing wage for workers in approved apprentice plans, which include but are not limited to ERISA plans, which are not preempted because they only incidentally affect ERISA plans,⁸³⁹ from a statute, such as the one at issue, which is apparently a generally applicable law, but

830. *Egelhoff*, 532 U.S. 141. A more extensive discussion of this decision may be found at *Feuer’s ERISA Myths*, *supra* note 25, at 725-29.

831. *Egelhoff*, 532 U.S. at 147-48.

832. *Id.* at 144-46.

833. *Id.* at 150.

834. *See* ERISA § 401(a), 29 U.S.C. § 1101(a) (2012) (identifying the plans that are not subject to those fiduciary requirements).

835. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (2012) requires compliance with such entitlements that may be enforced under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

836. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012).

837. ERISA § 3(8), 29 U.S.C. § 1002(8) (2012).

838. ERISA § 401(a)(1), 29 U.S.C. § 1101(a)(1) (2012).

839. *Egelhoff*, 532 U.S. at 148 (citing *Dillingham Constr.*, 519 U.S. at 330).

preempted because it “governs the payment of benefits, a central matter of plan administration.”⁸⁴⁰ Thus, the Court is declaring that ERISA may preempt generally applicable laws, however, such laws are defined. Because state garnishment laws seek to govern the payment of ERISA plan benefits, even though they may be generally applicable laws,⁸⁴¹ they are preempted. Therefore, the Court implicitly rejected *Mackey II*'s holding that ERISA permitted the state law garnishment of ERISA benefit payments. This earlier holding had been reached without any consideration of the “core ERISA concern” of paying benefits in accord with plan terms.⁸⁴²

The *Egelhoff* Court also declared that the statute at issue conflicted with “one of the principal goals of ERISA,” namely, to enable employers “to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.”⁸⁴³ However, the Court's statement about the principal goal of ERISA was based solely on its earlier *Ft. Halifax Packing Co.* statement that such uniformity was the principal goal of the ERISA Express Preemption rather than the goal of ERISA.⁸⁴⁴ The discussion *supra* of *Ft. Halifax Packing Co.* challenges even this more limited characterization.

The Court perceived a conflict with this uniformity goal because:

*Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been “revoked” by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.*⁸⁴⁵

The *Egelhoff* Court relied on ERISA's purpose of protecting

840. *Id.*

841. *Cf. De Buono*, 520 U.S. at 811 n.6 (stating that “certain laws of general application” are not preempted while summarizing the reasoning of the court below).

842. *See Egelhoff*, 532 U.S. at 147 (setting forth the “core ERISA concern”).

843. *Id.* (internal quotations omitted and emphasis added) (quoting *Fort Halifax Packing Co.*, 482 U.S. at 9). This sentence was used by the *Coyne* Court to describe the purpose of the ERISA Express Preemption. *Id.* The Court therein considered the purpose of the ERISA Express Preemption in order to determine the significance of the phrase “employee benefit plan.” *Id.* The Court did not therein characterize uniformity as a principal goal of ERISA. *Id.*

844. *Fort Halifax Packing Co.*, 482 U.S. at 9 (the Court was describing the purpose of the ERISA Express Preemption in order to determine the significance of the phrase “employee benefit plan” in such provision).

845. *Id.* at 148-49 (emphasis added) (footnotes omitted).

plan participants and beneficiaries to reject the argument that the state law did not impose an undue burden on plan administrators.⁸⁴⁶ That rejected argument was based on the statutory provisions permitting administrators to avoid liability to a second claimant either by refusing to make payments until the benefit dispute is resolved or by following plan designations unless they had notice of a marital dissolution.⁸⁴⁷

The Court emphasized that the primary ERISA concern was not to minimize administrative burdens on plans but to protect participant benefit rights:

If they [the plan administrators] instead decide to await the results of litigation before paying benefits, they will simply transfer to the beneficiaries the costs of delay and uncertainty. n.3 Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would *undermine the congressional goal of “minimizing the administrative and financial burdens” on plan administrators—burdens ultimately borne by the beneficiaries.*

n.3 The dissent observes that the Washington statute permits a plan administrator to avoid resolving the dispute himself and to let courts or parties settle the matter. See post, at 6. *This observation only presents an example of how the costs of delay and uncertainty can be passed on to beneficiaries, thereby thwarting ERISA’s objective of efficient plan administration.*⁸⁴⁸

The *Egelhoff* Court did not thereby disavow the *Travelers*’ correct holding that state laws are not preempted simply because they impose a financial burden on an ERISA plan. Instead, the *Egelhoff* Court was observing that ERISA was intended to insure that participants receive their benefit entitlements from the plan without any undue administrative delay. Nor did the *Egelhoff* Court treat ERISA as concerned only with whether a participant or beneficiary timely receives the benefit from the plan. Thus, the Court again prevented a person with a state-law claim that arises from a beneficiary’s right to an ERISA plan benefit (which thus is based on “an interest in the undistributed benefits”) from wresting the benefit or the amount of the benefit from the beneficiary.

C. Supreme Court Affirms That State Law Claims Arising from a Beneficiary’s Right to ERISA Benefits May Not Be Used to Wrest the Benefits From the ERISA Designated Beneficiary

In 2009, the Supreme Court held in *Kennedy v. Plan Administrator of the Du Pont Savings and Investment Plan*,⁸⁴⁹ that a waiver by the participant’s former spouse of his pension benefits

846. *Id.* at 149.

847. *Id.*

848. *Id.* at 149-50 (emphasis added) (citations omitted).

849. *Kennedy v. Plan Adm’r of the Du Pont Sav. and Inv. Plan*, 555 U.S. 285 (2009).

in their divorce decree did not give the participant's estate, the default designee under the plan terms, the right to obtain those benefits from the plan if the waiver did not comply with terms of the plan document.⁸⁵⁰ The Court then declined in a footnote⁸⁵¹ to express a view whether the daughter "could have brought an action in state or federal court" to wrest the benefit from her mother, the designee.⁸⁵² There are at least three reasons this is a very odd dictum about an issue that was not before the Court.⁸⁵³ First, the Court had been informed that the mother lacked the resources to make such a payment,⁸⁵⁴ so no case or controversy about the issue could be before the Court. Second, the relevant question is not the ability to bring an action, which is always possible, but whether there were any circumstances in which such an action would be successful, which the Court did not discuss. Third, the Court followed the dictum by comparing its own 1997 decision in *Boggs* with two state supreme court decisions to the contrary.⁸⁵⁵ However, neither cited decision makes any convincing distinction between its holding and *Boggs*.⁸⁵⁶ Nevertheless, there have been numerous lower court decisions holding that ERISA does not preempt a state law claim that arises from a participant's or beneficiary's right to an ERISA plan benefit. In particular, there were holdings of no ERISA preemption of a claim based on a waiver incorporated into a divorce similar to that in *Kennedy*, such as *Andochik v. Byrd*.⁸⁵⁷ These decisions are also not very

850. *Id.* at 299-300.

851. *Id.* at 300, n.10.

852. *Id.*

853. *Kennedy*, 552 U.S. at 1178 (granting certiorari for question 3); Brief for Petitioner at i, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009) (No. 07-636) 2008 WL 2008 WL 1989722.

854. See Petitioner's Reply Brief on the Merits at 33-34, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 2008 WL 3336770 (2009) (filed Aug. 7, 2008) (No. 07-636) at 33-34, available at http://www.americanbar.org/content/dam/aba/publishing/preview/public_d_preview_briefs_pdfs_07_08_07_636_PetitionerReply.authcheckdam.pdf (last visited Jan. 30, 2014).

855. *Kennedy*, 555 U.S. at 300, n.10 (comparing *Boggs*, 520 U.S. 833 with *Sweebe v. Sweebe*, 712 N.W.2d 708 (Mich. 2006) and *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2004)).

856. See e.g., Albert Feuer, *The Kennedy Supreme Court Giveth with footnote 13, but Taketh with footnote 10, the Department of Labor and Many Lower Courts and Miss the Decision's Ultimate Meaning*, 39 COMP. PLAN J. 111, at 119-124 (June 3, 2011) available at <http://ssrn.com/abstract=1859809> (last visited Jan. 31, 2014).

857. *Andochik v. Byrd*, 709 F.3d 296 (4th Cir. 2013) cert. denied 2013 U.S. LEXIS 7046 (U.S. Oct. 7, 2013). See also *Zolper v. Bauer*, 2008 U.S. Dist. LEXIS 50858 (W. Ky. July 2, 2008) (holding ERISA does not preempt contract government the extent to which surviving spouse may keep distributed plan benefits because the contract does not affect who is entitled to receive the benefit from the plan).

convincing.⁸⁵⁸

The Supreme Court recently implicitly reaffirmed and broadened its support for its *Boggs* and *Egelhoff* holdings that state-law claims arising from a person's right to ERISA benefits may not be used to wrest benefits from the person entitled to the benefits under the terms of any ERISA plan. The Court held in *Hillman v. Maretta*⁸⁵⁹ that the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA) preempts a Virginia revocation upon divorce law, which requires the participant's former spouse, who was his designee under the federal law, to pay the survivor benefit to the default designee. The majority focused on its finding that the purpose of beneficiary designation provision was not to serve solely for the plan sponsor's "administrative convenience" but to give the participant the right to choose his or her beneficiary in accord with the clear terms of the plan.⁸⁶⁰ Justice Thomas in a separate concurring opinion declared there was no need to look at the statutory purpose of the federal law but found preemption because the state law would otherwise render a federal beneficiary designation law meaningless.⁸⁶¹ Justice Alito observed that the state law, like the federal law, seemed focused on administrative convenience, and neither looked for evidence of the participant's actual intent at the time of his death.⁸⁶² Justice Alito did not distinguish between the administrative convenience of the federal government, which would not care whether the designee kept the benefit, and the administrative convenience of the participant, who would care very deeply about whether his or her duly designated designee could keep the benefit. All of these arguments are applicable to ERISA whose dominating general purpose is the protection of plan participants and beneficiaries. Thus, the ERISA goal is to further the administrative convenience of the duly designated designee. In particular, ERISA preempts state laws that prevent a participant from exercising any of his benefit rights, including, but not limited to, the right to choose his beneficiary by complying with the plan designation terms.⁸⁶³

858. See generally Albert Feuer, *A Misguided Kennedy Offspring from the Third Circuit*, 31 TAX MGMT. WEEKLY J. 564 (April 23, 2012) ("*Feuer's Misguided Offspring*") available at <http://ssrn.com/abstract=2047238> (last visited Jan. 30, 2014).

859. *Hillman v. Maretta*, 569 U.S. ___, 133 S.Ct. 1943 2013 U.S. LEXIS 4167 (June 3, 2013).

860. *Id.* at *14-*25.

861. *Id.* at *28-*33 (Thomas, J. concurring) (expressing similar points to those in Justice Thomas's cited statement in the *Egelhoff* majority opinion).

862. *Id.* at *35-*37 (Alito, J. concurring) (suggesting that an explicit expression intent contrary to the designation described in the statute would be effective under certain circumstances). The Justice may have been thinking of a designation that substantially complied with the statutory requirements such as those discussed, *infra*, for ERISA plans.

863. See generally Albert Feuer, *The Supreme Court Finds Federal Life Insurance Rules Preempt State Law in Hillman v. Maretta and Reinforces*

Moreover, the seven justices who joined the majority opinion made clear that the Court had granted certiorari in order to issue a wide-ranging decision that rejected state-law attempts to wrest benefits from a FEGLIA beneficiary, whether based on domestic relations claims, waiver claims, constructive trust claims, contract claims, or unjust enrichment claims.⁸⁶⁴ Such reasoning may be applied *mutatis mutandis* to preempt a similar broad range of attempts to wrest distributed ERISA benefits from an ERISA beneficiary using state-law claims arising from the beneficiary's ERISA benefit entitlements.

XV. ERISA DOES NOT PREEMPT (1) GENERALLY APPLICABLE STATE CRIMINAL LAWS THAT DO NOT RELATE TO ERISA PLANS, SUCH AS THEFT LAWS, (2) GENERALLY APPLICABLE CRIMINAL LAWS THAT RELATE TO ERISA PLANS, SUCH AS WAGE AND WAGE SUPPLEMENT COLLECTION LAWS, USURY LAWS, (3) LAWS TO IMPLEMENT GENERALLY APPLICABLE CRIMINAL SANCTIONS THAT EXPLICITLY REFER TO ERISA BENEFITS, SUCH AS LAWS TO COLLECT CRIMINAL FINES AND RESTITUTION, OR (4) CIVIL SLAYER LAWS THAT AUTOMATICALLY IMPLEMENT SPECIFIED HOMICIDE CONVICTIONS, BUT PREEMPTS (1) CRIMINAL LAWS APPLYING PRIMARILY TO ERISA PLANS OR ERISA BENEFITS, OR (2) GENERALLY APPLICABLE NON-CRIMINAL LAWS THAT ARE INCONSISTENT WITH PLAN TERMS (WHICH DETERMINE BENEFIT RIGHTS, IMPOSE PROHIBITED MANDATES, OR PROVIDE ERISA ENFORCEMENT MECHANISMS

Congress apparently used the generally applicable criminal law exclusion from the ERISA Express Preemption Rule to balance

ERISA Protections for ERISA Plan Participants and Beneficiaries, 32 TAX MGMT. WEEKLY J. 1040 (Aug. 5, 2013) (“*Feuer’s Hillman Article*”) (stating that a state law will be preempted if it attempts to: (1) compel a participant in an ERISA plan or in the Federal Thrift Savings plan to choose a beneficiary specified under state law, (2) punish the participant’s estate if the duly designated beneficiary was not such specified beneficiary; or (3) prevent a duly designated beneficiary from receiving or keeping the designated benefits). available at <http://ssrn.com/abstract=2306911> (last visited Jan. 30, 2014).

864. *Id.* at *12-*13. See generally *Feuer’s Hillman Article*, *supra* note 867.

two concerns: (1) states must be prevented from enhancing or diminishing any of the three fundamental ERISA benefit protections; (2) states must be permitted to punish those who violate state criminal statutes not directed at any of those protections. In particular, the exclusion assures that ERISA does not preempt three classes of criminal statutes that relate non-tenuously to benefit entitlements: (1) those that criminalize the failure to make ERISA plan contributions, if the more than half the value of protected compensation is non-ERISA compensation, (2) those that criminalize behavior by ERISA plans, if more than half of the regulated entities are persons other than ERISA plans, and (3) those criminal laws that deprive a criminal of ERISA benefits, if more than half of the deprived income of criminals is non-ERISA income. There is no similar exclusion from ERISA preemption for generally applicable federal laws of any kind.⁸⁶⁵

Neither ERISA nor the regulations thereunder define the phrase “generally applicable.” It is reasonable to define generally applicable laws as those which apply to actors, most of whom are non-ERISA plans, or to income (compensation), most of which is of a non-ERISA character. One could, however, argue that ERISA permits criminal laws that address a smaller percentage of such non-ERISA compensation or non-ERISA actors. For example, one could apply the *Travelers* approach discussed *supra*, that divides state laws that affect ERISA benefits indirectly into two classes for preemption purposes. Those that refer to ERISA are preempted. Other laws, which, however, are not described in *Travelers* as generally applicable, are preempted only if they have prohibited effects on ERISA plans. One could similarly conclude that ERISA does not preempt criminal laws, which do not reference ERISA plans, ERISA plan benefits, or ERISA participants or beneficiaries.

Neither ERISA nor the regulations thereunder define the phrase “criminal laws,” which may impose not only imprisonment, probation or fines, but may also, like preempted civil laws, require wrongdoers to pay restitution or reparations.⁸⁶⁶ It is reasonable to define criminal laws to include those statutes that impose sanctions denominated therein as criminal sanctions. ERISA provides that the Alienation Prohibition does not apply to criminal judgments, orders, or decrees involving crimes against ERISA plans that expressly provide for the offset of benefits equal to an

865. ERISA § 514(d), 29 U.S.C. § 1134(d) (providing that the interaction between ERISA and other federal laws needs to be considered on a case-by-case basis).

866. See e.g., N.Y. PENAL L. § 60.27 (McKinney 2013). See generally Note, *Victim Restitution in the Criminal Process: a Procedural Analysis*, 97 HARV. L. REV. 931 (1984) (describing and distinguishing criminal restitution from civil damages).

amount that the criminal is ordered to pay the plan.⁸⁶⁷ Thus, it is reasonable to presume that state criminal orders, judgments, orders, or decrees that deprive individuals of ERISA benefits must also provide explicitly that there will be such deprivation to qualify for the generally applicable criminal law exclusion. The slayer rules discussed *infra*, which deprive killers of their victim's death benefits under specified circumstances, are difficult to incorporate in criminal laws. The deprivation of death benefits does not fit within the usual criminal sanction of payments to the state, *viz.*, criminal fines, or payments to victims, *viz.*, reparations or restitution,⁸⁶⁸ because the victim was not deprived of his death benefit by the killing, but of the difficult to value right to choose who obtains the death benefit.⁸⁶⁹ Moreover, death benefit entitlements are usually determined by property law or the law of wills.⁸⁷⁰ Thus, it seems reasonable to treat an automatic death benefit deprivation if a person is convicted of specified homicides, such as first degree or second degree murder, as qualifying for the generally applicable criminal law exclusion whether the benefit deprivation provisions are in the property law or the criminal law. More generally, it would also appear that civil laws, to the extent, they are used to implement generally applicable criminal sanctions, such as mechanisms to enforce the payment of criminal fines, restitution or reparations,⁸⁷¹ qualify for the generally applicable criminal law exclusion. On the other hand, if a civil court rather than the criminal court is determining whether to deprive the slayer of the benefit, whether it be of a beneficiary's death benefits or a participant's life benefits, the civil court is not simply implementing the criminal court decision, but deciding how to treat the criminal. Thus, such civil action should not qualify for the generally applicable criminal law exclusion, and the criminal

867. ERISA § 206(d)(4), 29 U.S.C. § 1056(d)(4) (this section seems to be applicable primarily to federal actions, which are not explicitly excluded from the ERISA Express Preemption Rule). However, plans do not need to defer to judgments, orders, decrees and agreements, simply because they do not violate the Alienation Prohibition. The plan terms must also provide for such deference, as is done for QDROs, in ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J). If the statute superseded ERISA, then it would override the ERISA requirement that the plan terms and the Alienation Prohibition must be followed.

868. *See e.g.*, Robert J. Dieter, Restitution in Criminal Cases, 30 *The Colorado Lawyer* 125 (2001).

869. *But see* ERISA § 205, 29 U.S.C. § 1055 (providing that the spouse of a participant in a Spousal Survivor Benefit Plan must approve the participant's waiver of the spouse's death benefit, so that if the spouse is the killer, the participant would have had to get divorced to obtain the right to change the beneficiary).

870. *See e.g.*, UNIF. PROB. CODE (amended 2010) (discussing the law of wills, intestacy, and alternative property dispositions).

871. *See e.g.*, N.Y. CRIM. PROC. L. § 420.10.6 (McKinney 2013) (describing the use civil enforcement tools to collect fines, restitution or reparation).

may not be deprived of the death benefit.

ERISA, permits contract law, tort law, or common law concepts, such as the law preventing undue enrichment, to be used to deprive a beneficiary of distributed ERISA plan benefits, on the basis of the beneficiary's criminal behavior for non-slayer crimes. The amount of the criminal's liability under such claims requires a civil court determination even if the criminal's civil liability follows automatically from the conviction. Thus, unlike the automatic slayer deprivations of the unambiguous death benefit amount or the enforcement of criminal restitution judgments, these claims are not eligible for the generally applicable criminal law exclusion. Therefore, ERISA plans may not be compelled to pay the damages to the person with the civil judgment nor may the criminal be compelled by the civil court to direct the ERISA plan to make such payment to the successful claimant. However, because these judgments do not arise from a participant's or beneficiary's right to an ERISA plan benefit, the judgments may be enforced against the criminal after he receives the ERISA as discussed, *supra*. The same analysis may even be used in slayer crimes if the liability is not determined by reference to the employee benefit, such as a wrongful death judgment.

ERISA does not preempt the use of general theft laws against those who steal funds from ERISA plans just as it does not preempt the use of general contract laws by ERISA plans or their providers to enforce contracts for goods and services.

In general, ERISA preempts only three classes of state criminal laws *viz.*, those whose effect is primarily to: (1) enforce ERISA contribution or benefit obligations; (2) regulate ERISA plan terms and (3) to deprive criminals of ERISA benefits. Preemption is unaffected by statutory intent. The DOL advisory opinions provide examples of the distinction between generally applicable criminal laws that ERISA does not preempt, even if the laws are related non-tenuously to ERISA plans, and other criminal laws that ERISA preempts only to the extent the laws are related non-tenuously to ERISA plans. In contrast, the conflicting case law that focuses on criminal laws pertaining to payments to ERISA plans does not always make such a distinction. Instead, the case-law that focuses on criminal laws that deprive criminals of ERISA benefits largely disregards the generally applicable criminal law exclusion.

A. *The DOL Advisory Opinions Show the Distinction Between Generally Applicable Criminal Laws That ERISA Does Not Preempt, and Other Criminal Laws that ERISA Preempts Only to Extent They Relate Non-Tenuously to ERISA Plans*

In 1979, the DOL in its first advisory opinion on criminal

laws held, in Opinion 79-35,⁸⁷² that ERISA preempts the Massachusetts “Health, Welfare and Retirement Funds” law to the extent that the law provides for fines and/or imprisonment where there has been embezzlement or fraud involving employee plan assets or delinquent contributions by an employer.⁸⁷³ The law was not a generally applicable criminal law because it “applies only to welfare and pension plans.”⁸⁷⁴ Thus, the DOL focused on the statutory effect, *i.e.*, the application of the law, rather than its purpose. The DOL, however, created confusion by its statement that “[i]f the general grand larceny provisions of a state code apply to pension trustees, the exception provided in § 514(b)(4) would apply.”⁸⁷⁵ However, the generally applicable criminal law exception, which as discussed, *supra*, is not needed for such a general law to avoid ERISA preemption. Thus, the statement would make the generally applicable criminal law exception a nullity, which violates the cardinal statutory interpretation principle that statutes should be construed “so as to avoid rendering superfluous” any statutory language.⁸⁷⁶

In 1984, the DOL in its second advisory opinion on criminal laws presented, in Opinion 84-06,⁸⁷⁷ a good example of a generally applicable criminal law, namely one providing criminal penalties for usury.⁸⁷⁸ The DOL observed that “[s]ince the [criminal law] proscriptions of the Consumer Credit Code at issue are not intended to apply specifically to an activity related to employee benefit plans, we believe that the section 514(b) exception [for generally applicable criminal laws] to preemption should apply.”⁸⁷⁹ There was a need to resort to the generally applicable criminal law exclusion because the law, unless a general theft law, regulates an employee benefit, namely plan loans, and thus relates to an ERISA plan. The DOL observed that this holding was consistent with its earlier holding that ERISA preempts state laws, which prohibit usury but do not impose criminal penalties.⁸⁸⁰ Thus, ERISA preempts the generally applicable civil version of the usury statute, but not the criminal version even though both prohibit the same ERISA benefit plan behavior, making plan loans with

872. U.S. Dep’t of Labor Advisory Opinion 79-35A (May 31, 1979), 1979 ERISA LEXIS 57.

873. *Id.*

874. *Id.* at *3.

875. *Id.* at *3.

876. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (holding that the tolling of statute of limitations for claims under Fair Credit Reporting Act until discovery of violation is limited to the statutory fraud exception).

877. Greenleaf, U.S. Dep’t of Labor Advisory Opinion 84-06A (Jan. 17, 1984), 1984 ERISA LEXIS 42.

878. *Id.*

879. *Id.* at *5.

880. *Id.* (referring to *Grogan*, U.S. Dep’t of Labor Advisory Opinion 81-70A (Sept. 9, 1981), 1981 ERISA LEXIS 19).

excessive interest rates.⁸⁸¹

On the other hand, the DOL in its next three advisory opinions held, as it had in its first opinion, that attaching criminal law penalties laws directed exclusively or primarily at ERISA plans does not save the statutes from ERISA preemption, although the analysis of the first opinion is rather questionable. In 1984, the DOL held in Opinion 84-18A⁸⁸² that ERISA preempts criminal penalties for the violation of Puerto Rican rules for withholding compensation payments from employees and contributing such withholding to employee benefit plans.⁸⁸³ The later holding in Opinion 94-27A⁸⁸⁴ (which expressly relied on Opinion 84-18A, which held that ERISA preempts the New York law imposing criminal penalties for failing to obtain authorizations for any payroll deductions, including but not limited to employee benefit plan contributions⁸⁸⁵) raises questions about the DOL analysis of the Puerto Rican statute. In both cases, the DOL did not consider whether the state criminal law was applicable primarily to ERISA plans,⁸⁸⁶ but concluded that ERISA preempted the law because it “prohibits specified conduct by employers in their capacity as providers of benefits,”⁸⁸⁷ which is why it is necessary to determine if the criminal law is generally applicable. The DOL declared this was unnecessary in Opinion 84-18A because “[a]lthough section 7 [the section establishing criminal penalties] thus deals with many aspects of an employer’s relations with its employees, we believe each activity proscribed by the Act must be separately evaluated in order to determine whether the criminal sanction, as applied to

881. *Cf.* In re Seolas, 140 B.R. 266 (1992) (ERISA does not preempt application of state usury prohibition to loans by ERISA to persons who are not participants or beneficiaries).

882. Robbins, U.S. Dep’t of Labor Advisory Opinion 84-18A (April 19, 1984), 1984 ERISA LEXIS 29.

883. *Id.* See also *Guillot*, U.S. Dep’t of Labor Advisory Opinion 88-17A (Dec. 19, 1988), 1988 ERISA LEXIS 17 (ERISA preempts the Puerto Rico law on payroll deductions for ERISA plan contributions of Title I ERISA plans); Judson, U.S. Dep’t of Labor Advisory Opinion 93-05A (Mar. 9, 1993), 1993 ERISA LEXIS 5 (ERISA preempts the Puerto Rico law prohibition on payroll deductions by IBM for contributions to IBM Deferred Savings Plan); and Padro, U.S. Dep’t of Labor Advisory Opinion 96-01A (Feb. 8, 1996), 1996 ERISA LEXIS 1 (ERISA preempts application of Puerto Rican criminal law to payroll deductions for pension plan loan repayments).

884. Taylor, U.S. Dep’t of Labor Advisory Opinion 94-27A (Aug. 31, 1994) 1994 ERISA LEXIS 52 at *6-*7.

885. *Id.*

886. There is a question about whether New York law at issue, N.Y. LAB. L. § 193(1)(b), was applicable primarily to ERISA plans because it authorized non-ERISA plan deductions for labor dues, charitable deductions, and bond purchases.

887. Robbins, U.S. Dep’t of Labor Advisory Opinion 84-18A (April 19, 1984), 1984 ERISA LEXIS 29 at *6-*7, and Taylor, (U.S. Dep’t of Labor Advisory Opinion 94-27A (Aug. 31, 1994), ERISA LEXIS 52, at *6-*7.

that conduct, is ‘generally applicable.’⁸⁸⁸ The fallacy of this argument is shown by the fact that it would result in there being no generally applicable criminal law exclusions because the question of general applicability only arises if the law applies to an ERISA plan or its benefit rights. In 1987, the DOL held in Opinion 87-9A⁸⁸⁹ that ERISA preempts criminal penalties for the violation of state rules prohibiting health reimbursement plans from requiring the use of mail order pharmacies.⁸⁹⁰ Similarly, in 1989 the DOL held in Opinion 89-01A⁸⁹¹ that ERISA preempts criminal penalties for the violation of state rules prohibiting health reimbursement plans from requiring the use of out of state pharmacies.⁸⁹²

B. Correct but Poorly Reasoned Court Decisions That ERISA Does Not Preempt Criminal Laws Which Incidentally Enforce ERISA Contribution or Benefit Obligations, But Preempts Criminal Laws if Their Primary Effect is to (1) Enforce ERISA Contribution or Benefit Obligations, or (2) Mandate Plan Terms

ERISA does not preempt generally applicable criminal laws, such as laws criminalizing the intentional non-payment of both wages and wage supplements. However, ERISA preempts generally applicable civil laws that require the payment of wages and wage supplements, to the extent that they apply to ERISA benefits and contributions to ERISA plans. This is similar to the DOL conclusion that ERISA preempts civil usury laws, but not criminal usury laws, which both seek to prevent ERISA plans from charging excessive interest on plan loans. On the other hand, ERISA preempts a criminal law that is not generally applicable, such as one that applies only to or primarily to ERISA plans, whether it be to contribution delinquencies or to permissible pharmacy benefits.

Much confusion stems from the failure to distinguish narrow laws applicable primarily to ERISA plans from laws that criminalize the failure by an employer or its officers to pay employees all their earned compensation. Nearly 80% of such compensation consists of wages,⁸⁹³ legally required non-ERISA

888. Robbins, U.S. Dep’t of Labor Advisory Opinion 84-18A (Apr. 19, 1984), 1984 ERISA LEXIS 29, at *6-*7.

889. Kelly, U.S. Dep’t of Labor Advisory Opinion 87-9A (Nov. 25, 1987), 1987 ERISA LEXIS 7.

890. *Id.*

891. Mikita, U.S. Dep’t of Labor Advisory Opinion 89-01A (Feb. 10, 1989), 1989 ERISA LEXIS, at 7.

892. *Id.*

893. *See e.g.*, BUREAU OF LABOR STATISTICS NEWS RELEASE EMPLOYER COSTS FOR EMPLOYEE COMPENSATION, (March 12, 2014) *available at* <http://www.bls.gov/news.release/ecec.nr0.htm> (providing that wages and salary constitute 69.4% of compensation for civilian workers).

benefits, such as social security,⁸⁹⁴ and supplemental pay, such as overtime.⁸⁹⁵ A substantial part of the less than 20% of compensation devoted to other benefits goes to non-ERISA benefits, such as 7.0% to paid leave,⁸⁹⁶ which is usually a payroll practice, or to profit-sharing plans, which are not ERISA plans when in-service distributions are customary.⁸⁹⁷ Thus, less than 14% may be expected to constitute contributions to ERISA plans.

The earliest decision was *Goldstein v. Mangano*,⁸⁹⁸ which held in 1978 that ERISA does not preempt N.Y. Lab L. § 198-c.⁸⁹⁹ That section, which makes it a crime to fail to pay “benefits or wage supplements” which supplements include, but are not limited to reimbursement for expenses; health, welfare, and retirement benefits, and vacation, separation or holiday pay. The section is part of an article, entitled Payment of Wages,⁹⁰⁰ and the punishment of the crime is set forth in a companion statute, which treats the failure to pay benefits or wage supplements in the same manner as the failure to pay any other compensation.⁹⁰¹ Thus, as described, *supra*, the statute is primarily applicable to non-ERISA payments. Therefore, it is a generally applicable criminal law that is thereby saved from ERISA preemption. The New York Civil Court hearing the case presumed that if ERISA did not preempt the law’s criminal liability, than there would be a basis for imposing civil liability on a corporation and its corporate officers to make required contributions to ERISA plans. Thus, the court decided that the only issue it had to resolve was whether ERISA

894. *Id.* (legally required non-ERISA benefits constitutes 7.8% of compensation).

895. *Id.* (supplemental pay constitutes 2.4% of compensation).

896. *Id.* (unpaid leave constitutes 7.4% of compensation). See 29 C.F.R. § 2510.3-1(b) (1975) (when such payments are made from general assets they are payroll practices exempt from ERISA).

897. See 29 C.F.R. § 2510.3-2(c) (as amended in 1982) (providing that bonus plans are pension plans if payments are systematically deferred until termination of employment, which suggests a profit-sharing plan permitting in-service distributions of all benefits is not an ERISA plan). *Cf. McKinsey v. Sentry Ins.*, 986 F.2d 401, 406 (10th Cir. 1993) (bonus plan not ERISA pension plan because participants may withdraw all vested benefits at any time) to *Bingham v. FIML Natural Resources, LLC* 2013, U.S. Dist. LEXIS 85421(D.C. Col. June 18, 2013) (holding that a bonus plan which defers the payment of some benefits until the termination of employment is an ERISA plan).

898. *Goldstein v. Mangano*, 417 N.Y.S.2d 368 (N.Y. Civ. Ct. 1978) (holding that the criminal liability provision of the New York Labor Law was within the ERISA preemption exception for any “generally applicable criminal law of the state,” and permitted assessment of liability against the corporate officer responsible for the failure to make the required contributions).

899. *Id.* at 373-75.

900. N.Y. Lab. Law Art 6 §§ 190-199a (Consol. 2013).

901. N.Y. Lab. Law § 198-a (Consol. 2013). Moreover, for purposes of that statute, wages include benefits and wage supplements. N.Y. Lab Law § 190 (Consol. 2013).

preempted the criminal parts of the cited labor law.⁹⁰²

The *Goldstein* court began its analysis by observing that Senator Javits had described the generally applicable criminal law exception as follows:

In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, *imposing criminal penalties on failure to contribute—unless a criminal statute of general application . . . will be superseded.*⁹⁰³

The *Goldstein* court observed that ERISA does not define a “generally applicable law,” and thus looked to New York law, which provides that such a law is “one which extends to the entire State and embraces all persons or things of a particular class.”⁹⁰⁴ In particular, the labor law at issue is one such law; thus, ERISA does not preempt the law.⁹⁰⁵

However, the cited New York law re the significance of a generally applicable law addresses an unrelated issue, namely, the ability of a local government to adopt laws inconsistent with New York state law as shown by a review of the decision the *Goldstein* court cited, *People v. Wilkerson*,⁹⁰⁶ for the meaning of the phrase.⁹⁰⁷ In particular, the *Wilkerson* court therein held that the City of Rochester was not permitted to criminalize casual gambling.⁹⁰⁸ The *Wilkerson* court stated:

The power of a municipality to enact local laws is conferred by article IX of the State Constitution. However, such local laws may not be inconsistent with a general law of the State relating to the same enumerated subject. Paragraph (10) of subdivision (C) of section 2 lists “protection, order, conduct, safety, health and well-being of persons or property” among the subjects enumerated. . . . The Constitution defines a general law as one which “in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.”⁹⁰⁹

Additionally, the state penal law is such a general law.⁹¹⁰ The Rochester law is not consistent with the general state penal law, which criminalizes gambling, but exempts casual gambling from

902. *Goldstein*, 417 N.Y.S.2d at 373 (referring to two decisions holding that the statute created an implied civil action).

903. *Id.* at 374. This statement was part of the Senate Floor Discussion on Conference Report on H.R. 2 Employee Retirement Income Security Act of 1974 on Aug 22, 1974, 120 Cong Rec. 29942 (Aug. 22, 1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 4747, 4771.

904. *Goldstein*, 417 N.Y.S.2d at 374.

905. *Id.* at 374-375.

906. *People v. Wilkerson*, 342 N.Y.S.2d 936 (N.Y. Monroe Cty. Ct. 1973).

907. *Goldstein*, 417 N.Y.S. 2d at 375.

908. *Wilkerson*, 342 N.Y.S. 2d at 942.

909. *Id.* at 939.

910. *Id.*

its prohibition.⁹¹¹ Thus, the Rochester law is of no effect.⁹¹²

The *Goldstein* court would have been better advised to look more closely at the complete statement of Senator Javits, *supra*, who stated a law which imposed “criminal penalties on failure to contribute” to an employee benefit plan would be preempted unless it was a law of general application. There is such a law, namely one that criminalizes the failure to pay employee wages and other compensation. By contrast, a law that criminalizes only the failure to make contributions to employee benefit plan funds or insurers would not be generally applicable and would be preempted by ERISA.⁹¹³ As discussed, *supra*, if the law criminalizes the failure to pay employee benefits in the context of the failure to pay compensation, which are not primarily ERISA benefits, then the law is a generally applicable criminal law, and thus not preempted.

Finally, the *Goldstein* court correctly observed that a criminal law is one that imposes criminal penalties. There is no need for the law to be called a criminal law or to be part of the criminal law, as long as it had criminal penalties such as the law at issue, which had been in the penal law until 1965 when it became part of the labor law.⁹¹⁴

The New York Court of Appeals held in 1984, in *Stoganovic v. Dinolfo*,⁹¹⁵ that no state civil action was implied by a violation of N.Y. Lab L. § 198-c.⁹¹⁶ The court agreed with the statement in *Stoganovic*⁹¹⁷ that there is nothing in the statute describing the legal penalties for the criminal violation,⁹¹⁸ nor in its legislative history “suggesting that the Legislature intended that the section should impose civil liability as well.”⁹¹⁹ On the other hand, in 1985 the same Court of Appeals upheld in *Sasso v. Vacharis*⁹²⁰ a state

911. *Id.* at 939-940.

912. *Id.* at 942.

913. However, if it can be shown that a large portion of the plans associated with such funds are not ERISA plans, as would be the case if the sponsors of many such plans were churches, which are exempt from ERISA under ERISA 4(b)(2), 29 U.S.C. § 1003(b)(2) (2012), then these laws may be generally applicable. Thus, ERISA would not preempt the laws.

914. *Goldstein*, 417 N.Y. S. 2d at 375. On the other hand, there may be an issue if the statute only imposes fines, which are not always criminal penalties. For example, parking violation fines would not seem to be criminal fines.

915. *Stoganovic v. Dinolfo*, 462 N.E.2d 149 (N.Y. 1984) (adopting the reasoning stated in the memorandum at the Appellate Division (461 N.Y.S.2d 121)).

916. *See* N.Y. Lab. Law § 198-c (McKinney 2008) (setting forth the penalties for violations of N.Y. Lab L. § 198-a, the section at issue in *Goldstein*, 417 N.Y.S.2d 368).

917. *Stoganovic v. Dinolfo*, 461 N.Y.S.2d 121 (N.Y. App. Div. 1983).

918. N.Y. Lab. Law § 198-a (Consol. 2013).

919. *Stoganovic*, 461 N.Y.S.2d at 122.

920. *Sasso v. Vacharis*, 484 N.E. 2d 1359 (N.Y. 1985) (the section had been held to be preempted by ERISA in the lower courts).

non-criminal statute holding that the ten largest shareholders of a corporation are civilly responsible for the corporation's contribution shortfall to ERISA plans. In 1989 the Eighth Circuit issued a contrary decision in *Rockney v. Blohorn*⁹²¹ with respect to a similar claim of personal liability of corporate officers pertaining to Top-Hat benefits from a bankrupt corporate plan sponsor.⁹²²

In 1983, the Third Circuit held in a footnote to *Carpenters Health and Welfare Fund v. Ambrose*⁹²³ without explanation that ERISA did not preempt the criminal or civil aspects of the Pennsylvania Wage Payment and Collection Law. In 1986, an Illinois district court reached the same conclusion of no preemption with no explanation with respect to the criminal and explicit civil liability aspects of the Illinois Wage Payment Collection Act in *Upholster's International Health and Welfare Fund Trust v. Pontiac Furniture, Incorporated*.⁹²⁴

In 1986, the United States Supreme Court confirmed that no civil liability could be implicitly or explicitly imposed by wage collection statutes when as discussed, *supra*, it affirmed *Gilbert*,⁹²⁵ thereby holding that the civil action provisions, if any, of N.Y. Lab L. § 198-c were preempted.⁹²⁶

There were several decisions beginning in 1981 with *Massachusetts v. Federico*,⁹²⁷ correctly holding that ERISA preempted narrow criminal statutes, but for the wrong reasons. That decision considered a Massachusetts statute that provided that

any person or employee, and the president, secretary, and treasurer . . . of a corporation which is an employer, who is party to an agreement to pay or provide the contributions or benefits covered by [c. 151D entitled Health, Welfare and Retirement Funds] . . . , and who refuses or fails or neglects to pay such contributions or payments within thirty days after [they] are required to be made shall be punished by a fine of not more than five hundred dollars or by imprisonment in a jail or house of correction for not more than one year, or both.⁹²⁸

There was no question that the statute related to an ERISA plan. The only issue was the applicability of the exception for generally available criminal laws.⁹²⁹ Massachusetts asserted that

921. *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989).

922. *Id.* at 638-639.

923. *Carpenters Health and Welfare Fund v. Ambrose*, 727 F.2d 279, 282 n.5 (3d Cir. 1983).

924. *Upholster's Int'l Health and Welfare Fund Trs. v. Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (D. Ill. 1986).

925. *Gilbert v. Burlington Industries*, 765 F.2d 320 (2d. Cir. 1985) *summarily aff'd* 477 U.S. 901 (1986).

926. *Id.* at 327.

927. *Commonwealth v. Federico*, 419 N.E. 2d 1374 (Mass. 1981).

928. *Id.* at 1376.

929. *Id.*

the statute was a generally applicable criminal law because like the one in *Goldstein* it “punishes all employers, as well as certain corporate officers, who fail to abide by their contractual obligations to make contributions to retirement benefit plans.”⁹³⁰ *Federico* rejected that argument because it asserted “Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans” as described in the *Chicago Preemption Review* and DOL Advisory Opinion 79-26, both of which it cited.⁹³¹ The court repeated those sources’ incorrect assertions that the only generally applicable criminal laws were general theft statutes, which the court asserted would otherwise be preempted as related to ERISA plans.⁹³² However, as described, *supra*, those general laws would only be tenuously related to ERISA plans and thus not be preempted. Thus, this argument would make the exception for generally available criminal laws a nullity.

However, as in *Goldstein*, the court reached the correct result despite the incorrect reasoning about the extent of the exclusion. The law at issue in this case was not a generally applicable law but one in a chapter entitled “Health, Welfare and Retirement Funds,” which statute was directed primarily at the collection of plan contributions to funded benefit plans, did not include any payroll practices, and thus was primarily focused on ERISA plans.

In 1986 a Connecticut district court, in *Sforza v. Kenco Constructional Contracting Company*,⁹³³ also held that ERISA preempted a narrow criminal law, although with the following provisions:

Any proprietor or partner who fails to pay the contributions when due to an employee welfare fund . . . or any officer, director or employee of any corporation who has been made responsible by the corporation for payment of such contributions which have not been paid when due, shall be fined not more than two hundred dollars or imprisoned not more than thirty days or both for each week of nonpayment. . . .⁹³⁴

There was no question that the statute related to an ERISA plan. The only issue was the applicability of the exception for generally available criminal laws.⁹³⁵ The *Sforza* court decision dismissed the *Goldstein* New York State law argument, while relying on the *Federico* argument that ERISA preempts all criminal laws other than general theft laws, and a Third Circuit ruling that ERISA preempted the associated civil liability on corporate officers and shareholders to make the plan

930. *Id.* at 1377.

931. *Id.* at 1378.

932. *Id.*

933. *Sforza v. Kenco Constructional Contracting Co.*, 674 F. Supp. 1493 (D. Conn. 1986).

934. *Id.* at 1494.

935. *Id.* at 1494.

contributions.⁹³⁶ As in *Frederico* the lawsuit was being brought by an ERISA fund seeking to obtain contributions from the corporate officers.⁹³⁷ Moreover, as in *Frederico* the statute was not generally applicable because it was directed primarily at the collection of plan contributions to funded benefit plans, which did not include any payroll practices, and thus was primarily focused on ERISA plans.

In 1987 a California state appellate court, in *Cairy v. Superior Court for the County of Los Angeles*, 237 Cal. Rptr. 715 (Cal. Ct. App. 1987),⁹³⁸ also held that ERISA preempted a narrow criminal law although with the following provisions:

Whenever an employer has agreed with any employee to make payments to a health or welfare fund, pension fund or vacation plan, or other such plan for the benefit of the employees, or a negotiated industrial promotion fund, or has entered into a collective bargaining agreement providing for such payments, it shall be unlawful for such an employer willfully or with intent to defraud to fail to make the payments required by the terms of any such agreement.⁹³⁹

This case was very unusual because the state was not seeking to compel payment of a delinquent ERISA plan contribution but to prosecute a corporate officer for failing to make such payment.⁹⁴⁰ After deciding that the statute related to an ERISA plan, the only issue was the applicability of the exception for generally available criminal laws.⁹⁴¹ After dismissing the *Goldstein* argument as permitting all criminal laws other than bills of attainders⁹⁴² the court went to the legislative history. The court set forth the same Javits quote about permitting criminal penalties for plan contributions as was presented in *Goldstein*, but like the *Goldstein* court ignored it.⁹⁴³ Instead, it focused on the statements about the intended breadth of the ERISA Express Preemption thereby precluding a broad exclusion for all criminal laws.⁹⁴⁴ Again the right answer was reached because the statute was not a generally applicable criminal law. Instead, the law was directed primarily at the collection of plan contributions to funded benefit plans, and thus was primarily focused on ERISA plans. In contrast, generally applicable laws also govern payroll practices and other non-ERISA plan payments on behalf of employees.

As in *Goldstein*, the *Cairy* court would have been better

936. *Id.* at 1494-95.

937. *Id.* at 1493.

938. *Cairy v. Superior Court for the County of Los Angeles*, 237 Cal. Rptr. 715 (Cal. Ct. App. 1987).

939. *Id.* at 716.

940. *Id.*

941. *Id.* at 716-17.

942. *Id.* at 717-18.

943. *Id.* at 718.

944. *Id.*

advised to use as a starting point to determine what constitutes a generally applicable criminal law the statement of Senator Javits, *supra*, that the concept may, but need not, include a law which imposed “criminal penalties on failure to contribute” to an employee benefit plan.⁹⁴⁵ It then would have realized that ERISA exempted some but not all criminal laws. The *Cairy* court would then have not laid the foundations for the many incorrect decisions that followed.

C. Incorrect and Poorly Reasoned Court Decisions That ERISA Preempts Criminal Laws Whose Incidental Result is to Enforce ERISA Contribution or Benefit Obligations, Such as Laws to Assure the Payment of Employee Wages and Wage Supplements

The earliest decision for a statute not limited to employee benefit plans was *Trustees of Sheet Metal Workers' International Association Production Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc.*, (hereinafter, “*Aberdeen*”),⁹⁴⁶ in which a New York district court held in 1983 that ERISA preempted the application of N.Y. Lab L. § 198-c to delinquent employer contribution obligations to ERISA plans. As in *Goldstein* the presumption was that if ERISA did not preempt the law’s criminal liability, then there would be a basis for imposing civil liability on a corporation and its corporate officers to make required contributions to ERISA plans.⁹⁴⁷ The *Aberdeen* court rejected the *Goldstein* court’s reliance on the state law significance of generally applicable laws, which analysis would have left no criminal laws preempted.⁹⁴⁸ The *Aberdeen* court described the ERISA legislative history as “not helpful” without citing any of the history.⁹⁴⁹ The court expressed its agreement with the views in *Frederico* and dicta in non-criminal law cases as follows:

This court agrees with those views. No doubt Congress did not wish to supersede criminal laws applying in general terms to conduct such as larceny or embezzlement. But if the words “generally applicable” contained in the exception are to mean anything, laws aimed specifically at benefit plans cannot stand.⁹⁵⁰

Rather than explain what it means for a law to be “aimed specifically at benefit plans” the *Aberdeen* court simply declared that the New York Statute was so aimed, even though as

945. See Javits quote, *supra* note 818.

946. *Trustees of Sheet Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983). See also *State of New York v. Saxton*, 907 N.Y.S.2d 316 N.Y. (N.Y. App. Div. 2010) (same conclusion in criminal prosecution when state concedes that N.Y. Lab L. § 198-c was not a generally applicable criminal law).

947. *Id.* at 562.

948. *Id.* at 562-63.

949. *Id.* at 563.

950. *Id.*

discussed, *supra*, more than 85% of the compensation addressed by the statute did not concern ERISA plans or benefits.⁹⁵¹ There was a similar decision in 2010 in *State of New York v. Saxton*.⁹⁵² However, the State accepted the characterization of the law as not being a generally applicable criminal law,⁹⁵³ so the decision provides little guidance about such characterization.

The next decision that considered a statute not limited to employee benefit plans was *Baker v. Caravan Moving Corporation*⁹⁵⁴ in which an Illinois district court held in 1983 that ERISA preempted the application of the Illinois Wage Payment Collection Act to collect delinquent employer contribution obligations to ERISA plans. However, the court focused on the criminal aspects of the law, even though they did not appear to be invoked in the action before the court. The *Baker* court observed that the Illinois statute was broader than the Massachusetts law preempted in *Frederico* because the former governed the entire employer-employee relation not merely the relation between the employer and ERISA plans.⁹⁵⁵ Nevertheless the court concluded without explanation that the Illinois law was not a generally applicable criminal law, but cited the reasoning in *Frederico* and DOL Advisory Opinion 79-26, which both restricted the phrase to general criminal laws, such as the larceny laws.⁹⁵⁶ Thus, the court held that ERISA preempted the state law.⁹⁵⁷ As discussed, *supra*, this approach makes the general applicable criminal law exception a nullity, which is not a permissible interpretation of a statutory provision.

In 1986, a Bronx criminal court in *State of New York v. Art Steel Company Inc. ("Art Steel")*,⁹⁵⁸ cited *Aberdeen* for its holding that ERISA preempted the application of N.Y. Lab L. § 198-c to bring a criminal action based on the failure to meet employer contribution obligations to an ERISA plan. The Court offered three distinct arguments for its conclusion.

First, N.Y. Lab L. § 198-c was not a generally applicable criminal law because the legislature had moved it from the penal law to the labor law thereby causing it to be construed more strictly than penal laws.⁹⁵⁹ It is not clear what such construal

951. *But cf.* 29 C.F.R. § 2510.3-2(c) (1975) (bonus plans are pension plans if some payments are systematically deferred until termination of employment, which suggests a profit-sharing plans permitting in-service distributions of all benefits is not an ERISA plan).

952. *State of New York v. Saxton*, 907 N.Y.S.2d 316 (N.Y. App. Div. 2010).

953. *Id.* at 757, n.2.

954. *Baker v. Caravan Moving Corp.* 561 F. Supp. 337 (N.D. Ill. 1983).

955. *Id.* at 341.

956. *Id.*

957. *Id.* at 342.

958. *State of New York v. Art Steel Co. Inc.*, 133 Misc. 2d 1001 (N.Y. Bronx Crim. Ct. 1986).

959. *Id.* at 1008.

rules have to do with determining whether the law is a generally applicable criminal law.

Second, the *Art Steel* Court cited *Aberdeen*, *Federico* and *Sforza* for the proposition that “laws aimed specifically at benefit plans cannot stand.”⁹⁶⁰ However, like the *Aberdeen* court the *Art Steel* court did not explain why N.Y. Lab L. § 198-c, which has greater breadth of coverage than the laws in *Federico* and *Sforza*, is such a law. As discussed, *supra*, unlike those statutes more than 85% of the compensation addressed by N.Y. Lab L. § 198-c did not go to ERISA plans. Instead, the court dismissed the *Goldstein* argument with the following example:

For example, under the People’s interpretation a State could enact a law making it a misdemeanor for an employer to contribute to an employee pension fund in compliance with a collective bargaining agreement at a time that the employer is delinquent in the payment of any State tax. Such a statute would probably be preempted.⁹⁶¹

However, as discussed, *supra*, generally applicable criminal laws may, as Senator Javits described, be defined in a manner that includes laws such as N.Y. Lab. L. § 198-c, which is part of a law to enforce the payment of all compensation that treats all compensation alike, but excludes such laws targeted specifically at pension plans, which are primarily ERISA plans.⁹⁶²

Third, the *Art Steel* court turned the *Goldstein* decision upside down and declared that if as the Supreme Court held in *Gilbert* New York may not impose a civil liability for failing to pay a plan contribution obligation, New York may not impose a criminal penalty for such failure.⁹⁶³ The court seemed to find this a due process violation although it conceded that if the statute only imposed criminal penalties, as it did in this case, there was no due process issue.⁹⁶⁴

In 1986 a New Jersey court held, in *New Jersey v. Burten*,⁹⁶⁵ that ERISA preempted a statute criminalizing the failure to meet the obligation of a collective bargaining agreement to pay wages, contributions to an employee benefit plan, or other compensation.⁹⁶⁶ The statute was not limited to wage supplements but applied to wages and wage supplements.⁹⁶⁷ However, the *Burten* court cited and repeated much of the analysis of *Aberdeen*, which presumed that the similar NY law was “aimed specifically at employee benefit plans.” The *Burten* court also did not explain

960. *Id.* at 1009.

961. *Id.* at 1009 (citations omitted).

962. 29 C.F.R. § 2510.3-3(b) (pension plans covering only owner-employees are not ERISA plans).

963. *Art Steel*, 133 Misc. at 1010-1011.

964. *Id.* at 1011, n.13.

965. *New Jersey v. Burten*, 530 A.2d 363 (N.J. Sup Ct. Union Cty 1986).

966. *Id.* at 370.

967. *Id.* at 367.

how this could be the case if as discussed, *supra*, more than 85% of the compensation addressed by the New Jersey law⁹⁶⁸ did not go to ERISA plans, but used similar conclusory language:

It is clear from the cases cited above that N.J.S.A. 2A:170-90.2 does not fall within the exception to ERISA urged upon this Court and found in 29 U.S.C. § 1144(b)(4) [for generally applicable criminal laws]. N.J.S.A. 2A:170-90.2 is a criminal statute that was specifically promulgated to deal with employee benefit plans; as such it is not a “generally applicable” criminal law. If this Court were to hold otherwise then any time the State decided to regulate employee benefit plans, the Legislature could simply enact a statute imposing penal sanctions.⁹⁶⁹

Finally, in 1988 the Massachusetts Supreme Judicial Court explicitly held, in *Massachusetts v. Morash*,⁹⁷⁰ that ERISA preempts the application of the criminal provisions of wage collection statutes to the failure to contribute ERISA plans. In particular, the issue was whether the general wage collection statute was applicable to the failure to pay vacation pay from the employer’s general assets.⁹⁷¹ The Court accepted the argument that the generally applicable criminal law exception:

applies to laws such as those prohibiting larceny and embezzlement, which apply to all persons in any context, and not to criminal laws limited to the employer-employee relationship, and specifically aimed at requiring the payment of employee compensation.⁹⁷²

There are three flaws with this argument, none of which the *Morash* court discussed. First, ERISA is no more related to the application of a criminal law to a person who steals from an ERISA plan than to the application of state contract law to compel a person to provide agreed goods to an ERISA plan. In both cases, the relation to the employee benefits aspects of the ERISA plan is so tenuous as to prevent ERISA preemption. Thus, if the generally applicable criminal law exception is limited to such laws, it is a nullity. Second, employee compensation collection statutes are the only statutes that make the failure to contribute to an ERISA plan a crime that are not limited primarily to ERISA plan contributions. These statutes satisfy the cited explanation by Senator Javits of the purpose of this exclusion from ERISA preemption. Third, as discussed *supra* on average more than 85% of employee compensation does not go to ERISA benefits, thus

968. *See generally id.* (illustrating that the courts often present no finding that the compensation covered by the statute was not primarily from ERISA plans).

969. *Id.* at 370.

970. *Massachusetts v. Morash*, 522 N.E.2d 409 (Mass. 1988) overruled on other grounds by *Massachusetts v. Morash*, 490 U.S. 107 (1989) (holding that unfunded vacation plans are not ERISA plans).

971. *Id.* at 410-14.

972. *Id.* at 415.

wage collection laws are generally applicable laws because non-ERISA claims far outweigh ERISA claims in values. On the other hand, if the wage collection statute treats contribution obligations to ERISA funds differently than other compensation claims, such as imposing different penalties, the generally applicable law exception from ERISA preemption may be inapplicable to such a statute.

D. ERISA Does Not Preempt a Criminal Law Not Primarily Affecting ERISA Plans which Requires the Payment of Fines, Reimbursements to Crime Victims, or Reimbursements to States for the Costs of Imprisoning an ERISA Plan Participant

Only one court appears to have discussed whether generally applicable state criminal laws for purposes of the exclusion from ERISA Express Preemption include those laws, which do not primarily affect ERISA plans, but enforce against a participant's assets and income, including but not limited to pension income, requirements to pay (1) criminal penalties, (2) the state for the cost of the participant's imprisonment, or (3) the state for restitution to crime victims.⁹⁷³ There is extensive commentary on the issue of prisoner reimbursements, such as thoughtful articles by Ms. Meghan L. Brower⁹⁷⁴ and Prof. Alan K. Ragan.⁹⁷⁵ Both discuss the extensive case law,⁹⁷⁶ which focuses on the conditions under which a state may obtain a prisoner's pension without violating the Alienation Prohibition.⁹⁷⁷ Ms. Brower recommends

973. *Cf.* Thomas v. Bostwick, 2013 U.S. Dist. LEXIS 134370 (N.D. Cal. Sept. 19, 2013) (dismissing a claim that plan could rely on employer's civil judgment against former employee to justify payment of Spousal Survivor Benefit Plan benefit to employer, but disregarding whether employer could have relied on criminal restitution order to obtain benefit, although in this case the order was issued after the plan payments to the employer).

974. Meghan L. Brower, *Prisoners with Pensions Pay Their Own Way: An Examination of the Michigan State Correctional Facility Reimbursement Act*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139 (2011) [hereinafter "Brower's Michigan Prisoners"].

975. Alan K. Ragan, *Balancing ERISA'S Anti-alienation Provisions Against Garnishment of a Convicted Criminal's Retirement Funds*, 39 U. BALT. L. REV. 63 (2009) [hereinafter "Ragan's Prisoners' Balance"].

976. Brower's Michigan Prisoners, *supra* note 978, and Ragan's Prisoners' Balance, *supra* note 979, at 87-89.

977. *See e.g.*, U.S. v. Smith, 47 F.3d 681 (4th Cir. 1995) (holding that state may wrest a portion of pre-retirement payments but not retirement annuity payments from payments deposited to prisoner accounts in order to compensate their crime victims); Wright v. Chase Riveland, 219 F.3d 905 (9th Cir. 2000) (holding that state law may be used to wrest a portion of ERISA pension benefits from payments deposited to prisoner accounts in order to compensate their crime victims); State Treasurer v. Abbott, 660 N.W.2d 714, 717 (Sup. Ct. Mich. 2003) (holding that a state may direct pension plan to send payments to prisoner account rather than his credit union account so it is easier to obtain funds); Daimler-Chrysler Corp v. Cox, 447 F.3d 967 (6th Cir. 2006) (holding that state may wrest a portion of ERISA pension benefits from

that in order to advance “ERISA’s foundational objectives,”⁹⁷⁸ ERISA be clarified to prevent the state from obtaining the prisoner’s pension benefits at any time,⁹⁷⁹ while Prof. Ragan recommends that ERISA be clarified to allow the state to obtain the prisoner’s pension benefits so that “victims of criminal activity deserve to recover from the pension plans of those who have harmed them.”⁹⁸⁰ There is also an extensive commentary on the issue of victim reimbursements under federal law, such as Prof. Ragan’s article⁹⁸¹ and a thoughtful article by Prof. Susan Reece,⁹⁸² which also mentions reimbursements under state law including a decision discussed, *infra*, in which the generally applicable criminal law exception was found to be applicable.⁹⁸³ Prof. Reece recommends that ERISA be amended to permit the garnishment of pension assets from participants who have committed crimes or torts.⁹⁸⁴

In 1992 a New Jersey court held in *State of New Jersey v. Pulasty*,⁹⁸⁵ that the generally applicable criminal law exception permitted the enforcement against ERISA pension benefits of a restitution agreement that was part of a plea bargain involving charges by the participant of embezzling \$600,000 from the New Jersey Fireman’s Association.⁹⁸⁶ The only income sources that were available to make the agreed \$531 month payments were the combined Social Security the participant receives with his wife in the amount of \$1,581.00, a \$558.00 per month Fireman’s Association pension, and a \$123.00 per month pension from the Foster Wheeler Corporation.⁹⁸⁷ The decision did not describe why enforcement of the agreement would necessarily be applicable to the ERISA pension rather than the government pension or non-pension assets, in short why there was an ERISA issue.

payments deposited to prisoner accounts in order to compensate their crime victims but may not compel pension plan to send ERISA pension benefits to prison).

978. Brower’s Michigan Prisoners, *supra* note 978, at 157.

979. *Id.* See also *Bennett v. Arkansas*, 485 U.S. 395 (1988) (holding for similar reasons that there is no implicit exception to the prohibition on the attachment of social security payments to pay the costs of incurred by a state prison holding a beneficiary).

980. Ragan’s Prisoners’ Balance, *supra* note 979, at 101.

981. Ragan’s Prisoners’ Balance, *supra* note 979, at 64-65, 85-99.

982. Sharon Reece, *The Gilded Gates of Pension Protection: Amending the Anti-Alienation Provision of ERISA Section 206(d)*, 80 OR. L. REV. 379 (2001) [hereinafter “Reece’s Gilded Gates”].

983. *Id.* at 406-07 (quotes the holding in *State v. Pulasty*, 612 A.2d 952, 956-57 (N.J. Super. Ct. App. Div. 1992)).

984. *But see* RESTATEMENT (THIRD) OF TRUSTS § 59 CMTS. A-A(2) at 395, 399-400 (2003) (explaining why no general exception for tort claims against a spendthrift trust was adopted).

985. *State of New Jersey v. Pulasty*, 612 A.2d 952 (N.J. Super. Ct. App. Div. 1992).

986. *Id.* at 958.

987. *Id.* at 953.

The *Pulasty* court first distinguished *Guidry v. Sheet Metal Workers National Pension Fund*,⁹⁸⁸ which was not a preemption case. The Supreme Court therein held that the Alienation Prohibition permitted no equitable exceptions; thus, it prevented a pension plan from responding to a federal action by placing in a constructive trust the benefits of a participant, who had embezzled from the plan's union sponsor.⁹⁸⁹ The *Pulasty* court thus observed:

The criminal misconduct element of *Guidry* was mere happenstance. What was at issue there was a civil suit by a victim which resulted in a judgment which the victim sought to enforce through the debtor's pension. *This situation is exactly what ERISA was intended to prohibit and is wholly distinct from what is before us: restitution ordered as part of a criminal penalty which resulted from a plea bargain in which Pulasty gained the benefit of his agreement with the prosecutor . . .*

In short, the very different ends served by the criminal justice system and the civil system substantially distinguish criminal restitution from the civil judgment collection mechanisms which are the aim of ERISA's anti-alienation provision. The goal of ERISA is to protect the "spendthrift" pension beneficiary from squandering his pension by outspending his benefits, and suffering assignment of those benefits to creditors. It is not to eliminate a legitimate sentencing tool of the state criminal court.⁹⁹⁰

The *Pulasty* court then cited the generally applicable criminal law exclusion from the ERISA Express Preemption Rule, which permits the state law to disregard the Alienation Prohibition, and the requirement that plan terms determine benefit rights. In particular, the court declared after quoting the *Burten* decision that "the restitution provision of N.J.S.A. 2C:44-2 [which is part of the New Jersey Code of Criminal Justice] is a generally applicable criminal law and does not 'relate to' an employee benefit plan; thus, it is not preempted by ERISA."⁹⁹¹ However, this statement is somewhat misleading. If a criminal law does not "relate to" an ERISA Plan, there is no need to invoke the generally applicable criminal law exception. On appeal the decision was affirmed, but on different grounds, *viz.*, which the Alienation Prohibition does not protect distributed benefits.⁹⁹² As discussed, *infra*, this is an incorrect basis for the correct holding.

Reasoning similar to that of the lower court would apply to a similar generally applicable criminal law that was enforcing either (1) a fine imposed on a participant who violated a criminal law not directed at ERISA plans, or (2) a requirement that prisoners

988. *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990). See generally *Feuer ERISA Myths*, *supra* note 25, at 717-18.

989. *Id.* at 376.

990. *Pulasty*, 612 A.2d at 957-58 (emphasis added).

991. *Id.* at 958.

992. *State of New Jersey v. Pulasty*, 642 A.2d 1392 (N.J. 1994).

reimburse the state for the cost of imprisonment for a violation of a criminal law not directed at ERISA plans, such as Michigan's State Corrections Facility Reimbursement Act,⁹⁹³ which is discussed in Ms. Brower's article.⁹⁹⁴ In both cases the state law is a generally applicable criminal law because the law is implementing a criminal sanction, *i.e.*, the criminal is being forced to pay a fine or the cost of imprisonment, respectively, respectively. The argument would not, however, apply to a civil claim separate and apart from the criminal conviction, such as the civil action in *Guidry*.

E. The Preemption Results are Unaffected by Travelers and Its Progeny Which Confirm That ERISA Preempts State Laws That Provide Enforcement Mechanisms

Travelers and its progeny do not affect the ERISA preemption of criminal laws. Laws criminalizing the failure to satisfy ERISA plan obligations are enforcement mechanisms and remain preempted under the ERISA Express Preemption unless they are generally applicable criminal laws. *Travelers* reaffirmed the general rule that state laws that provide enforcement mechanisms are preempted. Thus, *Travelers* does not change the ERISA Express Preemption Rule or its exclusions. Similarly, civil laws to enforce ERISA plan obligations are enforcement mechanisms and remain preempted under the ERISA Express Preemption, which has no generally applicable exclusion for any civil laws. However, there have been a number of lower court holdings that *Travelers* added such an exception to the ERISA Express Preemption.⁹⁹⁵

XVI. ERISA ONLY PREEMPTS STATE TAX LAWS THAT SEEK TO BE ERISA ENFORCEMENT MECHANISMS, TO AFFECT PARTICIPANT'S BENEFIT RIGHTS (SUCH AS IMPOSING TAX LEVIES OR WITHHOLDINGS ON PLAN DISTRIBUTIONS), OR TO IMPOSE BENEFIT MANDATES, REPORTING AND DISCLOSURE MANDATES, FIDUCIARY MANDATES, OR FUNDING MANDATES EXCEPT TO THE EXTENT NEEDED TO IMPLEMENT A TAX LAW THAT IS NOT OTHERWISE PREEMPTED OTHER THAN GENERALLY APPLICABLE CRIMINAL LAWS

By describing tax law as a state law that ERISA preempts, but not exempting ERISA plans, their participants or beneficiaries

993. MICH. COMP. LAWS SERV., §§ 800.401-407 (LEXIS 2013).

994. Brower's Michigan Prisoners, *supra* note 978.

995. *See e.g.*, EMPLOYEE BENEFITS LAW, *supra* note 13, at 11-81—11-83.

from state taxation, Congress balanced two concerns: (1) state laws may not enhance or diminish any of the three fundamental ERISA benefit protections, but (2) states must have the right to tax plans, participants and beneficiaries. Three basic tax preemption principles result. First, ERISA plans need not be treated in *pari materia* with non-ERISA persons, and may be treated more or less severely than those other persons. Thus, ERISA plans may be exempt from some, all, or no state taxes. Second, ERISA preempts those state tax laws that add ERISA enforcement mechanisms, prevent the exercise of a participant or beneficiary's rights under the plan, or is an ERISA General Mandate unless the report or disclosure is needed to enforce a permissible state tax, such as filing a tax return. In particular ERISA preempts (1) state tax levies and mandatory withholdings on the benefits of the participant unless the ERISA plan authorizes such actions, or (2) state taxes that compel an employer to institute an ERISA plan or include a specified benefit or benefits. Third, ERISA does not preempt any other tax laws, including those imposing taxes based on the amount of plan benefits or contributions that have none of the effects resulting in preemption. Thus, ERISA preempts taxes that mandate (1) the selection of an insurer to provide health benefits rather than permit the plan to self-insure benefits, or (2) that pension plans be funded in a specified fashion.

However, to the extent *Boggs*, *Egelhoff*, and *Hillman* do not overrule *Mackey II* with respect to state tax levies, ERISA permits tax levies on the benefits of participants and beneficiaries of all ERISA plans other than Spousal Survivor Benefit Plans. Moreover, to the extent, the *Mackey I* principle, that ERISA preempts state laws that treat ERISA plans more favorably than other entities, is viable, ERISA also preempts tax laws that exempt or treat ERISA plans, contributions, or benefits more favorably than other entities or income.⁹⁹⁶ Under the same reasoning, ERISA preempts any tax laws that treat ERISA plans, contributions, or benefits less favorably than other entities or income. Finally, to the extent the *Travelers* Preemption by Reference Rule is viable, tax laws that refer to ERISA plans are preempted regardless of their effect on such plans. However, for the rest of the section this article will assume these principles have been overruled, unless otherwise specified.

A. *ERISA and Its Draftsmen Explicitly Address the Preemption of State Tax Laws*

As discussed, *supra*, Congress rejected an Administration proposal to exempt the following aspects of state tax law from the ERISA Express Preemption when ERISA was enacted:

996. See e.g., LANGBEIN PENSION LAW, *supra* 13, at 834.

a state shall have the authority to prescribe rules and regulations concerning the tax qualification and taxation of contributions, distributions or income, of an employee pension benefit plan (including a trust forming a part of such plan) as defined in the Welfare and Pension Plans Disclosure Act (House bill).⁹⁹⁷

Under this proposal ERISA, would still have preempted a state tax law that adds ERISA enforcement mechanisms, prevents the exercise of a participant or beneficiary's rights under the plan, or is an ERISA General Mandate. In particular, even with this proposal a state may not impose a substantial tax on plan sponsors who terminate pension plans that are not fully funded, such as one adopted by New Jersey immediately before the adoption of ERISA,⁹⁹⁸ which was a funding mandate. Moreover, the proposal would not have affected the taxation of ERISA welfare plans. However, even though the Administration proposal was not included in ERISA, *Travelers* and *De Buono* recognized that the law would be interpreted as though it included such a provision applicable to all ERISA plans. In particular, the failure to include any state tax exemptions in ERISA appears to leave the states free to decide how to tax plans, plan contributions, and plan distributions, if the tax is not otherwise preempted.

As discussed, *supra*, when Congress in 1983 provided the Hawaii Prepaid Health Act with a limited exclusion from the ERISA preemption,⁹⁹⁹ it also added the following provision addressing the preemption of state tax law:

(A) Except as provided in subparagraph (B), subsection (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 plans¹⁰⁰⁰

Although the accompanying committee report is silent about the purpose of this provision,¹⁰⁰¹ the provision may have been added to emphasize that characterizing a benefit terms mandate as a state tax, does not permit the state law to avoid preemption. In 1981, the Supreme Court had rejected such an attempt when in a decision without an opinion in *Agsalud v. Standard Oil Company of California*¹⁰⁰² it affirmed a holding that ERISA

997. Administration Recommendations to the House and Senate Conferees on H. R. 2 to Provide for Pension Reform at 109 (April 1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 5047, 5147.

998. ERISA POLITICAL HISTORY, *supra* note 164, at 204.

999. ERISA § 514(b)(5)(B)(i), 29 U.S.C. § 1144(b)(5)(B)(i) was added by Pub. L. No. 97-47 § 301(a), 96 STAT. 2605, 2611-12 (1983).

1000. ERISA §§ 514(b)(5)(A) and (B), 29 U.S.C. §§ 1144(B)(5)(A) and (B) (2012).

1001. H.R. REP. NO. 97-984 (1982).

1002. *Agsalud v. Standard Oil Co. of Cal.* 454 U.S. 801 (1981) *aff'g*, *Standard*

preempted the Hawaii Prepaid Health Care Act.

As discussed, *supra*, draftsmen of that amendment and of the initial version of ERISA intended to preempt laws that taxed ERISA plans on their contributions or benefit payments. REACT was adopted by the 98th Congress that followed the 97th that had adopted the Hawaii exclusion in 1983. The 98th Congress expressed the desire not to undermine the tax preemption provisions only in a committee report rather than in the ERISA amendment. In particular, the House Report pertaining to REACT declared:

In making these amendments to Section 514, the Committee emphasizes that, except as expressly provided, nothing in the bill is intended to limit or otherwise change the original broad intent behind ERISA's rule of preemption. That intent is always been to preempt state or local government laws or actions of any type which directly or indirectly relate to any employee benefit plan subject to ERISA. Thus, for example, the Committee reasserts that a state tax levy on employee welfare benefit plans is preempted by ERISA (see the holding of the 9th Circuit in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 679 F. 2d 1307 (9th Cir. 1982), vacated and remanded (on jurisdictional grounds) 103 S. Ct. 2841 (1983)).¹⁰⁰³

As was the case with the Hawaii exclusion the focus was on tax issues similar to the preemption exclusion issue under consideration. The Hawaii exclusion concerned the interaction between healthcare expense-reimbursement plans and state regulations of such plans. Thus, the specific tax laws that were presented by that Congress were those that related to the regulation of healthcare insurers, namely taxes on a self-insured plan's benefits and contributions. In contrast, REACT was concerned with the extent to which state domestic relations laws that violated plan terms were preempted, such as one seeking to compel a plan to pay a participant's benefits to his former spouse. Thus, the example presented of a specific tax law preempted was of a tax levy violating a plan's terms. The Committee did not mention the DOL advisory opinion reaching the same conclusion,¹⁰⁰⁴ which mentioned the decision, *Construction Laborers Vacation Trust for Southern California* ("CLVT"),¹⁰⁰⁵ cited in the House report.

Oil Co. of Cal. v. Agsalud, 633 F.2d 760 (9th Cir. 1980).

1003. H.R. REP. NO. 98-655, pt. 1, 98th Cong., 2d Sess., 42 (1984).

1004. Richman, U.S. Dep't of Labor Advisory Opinion 79-90A (Dec. 28, 1979), 1979 ERISA LEXIS 1.

1005. Cf. *Franchise Tax Board of State of Cal. v. Construction Laborers Vacation Trust for Southern California* T679 F.2d 1307, 1312 (9th Cir. 1982) vacated, 463 U.S. 1 (1983) [hereinafter "CLVT"] (The DOL did not explain the basis for its opinion which, unlike the court holding, was based on the administrative burden of tax levies).

*B. The Alienation Prohibition Regulations Address the
Preemption of State Tax Laws*

In February 1978, the Department of Treasury issued Treasury Regulation § 1.401(a)-13 pertaining to the Alienation Prohibition.¹⁰⁰⁶ The regulation included two provisions pertaining to state tax law.

First, the regulation addressed the enforcement of tax levies and judgments as follows:

(2) Federal tax levies and judgments. A plan provision satisfying the requirements of subparagraph (1) of this paragraph [the Alienation Prohibition] shall not preclude the following:

(i) The enforcement of a Federal tax levy made pursuant to section 6331 [26 U.S.C. § 6331].

(ii) The collection by the United States on a judgment resulting from an unpaid tax assessment.¹⁰⁰⁷

This provision recognizes that the Code supersedes all federal law exemptions from tax levies other those set forth in a list that does not include any ERISA benefits.¹⁰⁰⁸ This provision does not describe the extent to which federal tax levies supersede the ERISA requirement that plan terms determine benefit entitlements. Tax levies give the IRS the ability to exercise the ERISA plan benefit withdrawal rights of the participant or the beneficiary with the unpaid tax liability even if the participant or the beneficiary has not exercised such right.¹⁰⁰⁹ Thus, if the taxpayer has no such withdrawal rights, the IRS has no such rights. In contrast, the provision's silence about state tax levies and the collection of state tax judgments confirms that ERISA preempts both.¹⁰¹⁰

Second, the regulation addressed federal and state tax withholdings as follows:

1006. 43 Fed. Reg. 6943 (Feb. 17, 1978).

1007. Treas. Reg. §1.401(a)-13(b)(2) (as amended in 1988).

1008. Code §§ 6334(a), (c) (2012).

1009. *See* U.S. v. National Bank of Commerce, 472 U.S. 713, 724-25 (1985) (explaining why and how the IRS levy gives the IRS the same withdrawal rights as the taxpayer with respect to bank accounts). *See also* I.R.S. Chief Counsel Advice Memo 200032004 (May 10, 2000) *available at* <http://www.irs.gov/pub/irs-wd/0032004.pdf> (last visited March 19, 2014) (holding IRS may levy on plan benefits to the extent that the participant may withdraw benefits, which means if a taxpayer requires spousal consent for lump sum withdrawal under plan terms, IRS requires a similar consent to obtain a lump sum rather than the default joint and survivor benefit).

1010. *Northwest Airlines v. Roemer*, 603 F. Supp. 7 (D. Minn. 1984) (holding ERISA preempted state tax levies and state mandatory tax withholding laws pertaining to the Spousal Survivor Benefit Plan benefits of ERISA plan participants and beneficiaries); *Retirement Fund Trust of the Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1283-84 (9th Cir. 1990) (holding that ERISA preempted state tax levies pertaining to the Spousal Survivor Benefit Plan benefits of ERISA plan participants and beneficiaries).

(c) (2) Specific arrangements not considered an assignment or alienation. The terms “assignment” and “alienation” do not include, and paragraph (e) of this section [permitting voluntary assignments of 10% of pension payments] does not apply to, the following arrangements: . . .

(i) Any arrangement for the recovery of amounts described in section 4045(b) of the Employee Retirement Income Security Act of 1974, 88 Stat. 1027 (relating to the recapture of certain payments),

(ii) Any arrangement for the withholding of Federal, State or local tax from plan benefit payments,

(iii) Any arrangement for the recovery by the plan of overpayments of benefits previously made to a participant, . . .¹⁰¹¹

This provision recognizes that the Code provides for mandatory federal withholding from deferred compensation payments, including payments of pension benefits, although payees may elect out of withholding.¹⁰¹² This provision does not make clear that federal tax withholdings, like federal tax levies, also supersede the ERISA requirement that plan terms determine benefit entitlements. In contrast, while state tax withholdings do not violate the Alienation Prohibition, like overpayment recoveries, they are permissible only if the plan terms permit benefit payments to be so diverted from the participant or beneficiary.

C. ERISA Permits State to Tax Plans or Participants for Contributions Made to ERISA Plans

In 1987, the Sixth Circuit held in *Firestone v. Neusser* (“*Neusser*”),¹⁰¹³ that Akron may include the contributions residents make to a health care reimbursement plan or to an ERISA pension plan in the Akron income tax on the compensation of residents.¹⁰¹⁴ The *Neusser* court considered the tenuousness of the relation.¹⁰¹⁵ The participants argued that the relation was not tenuous because their decisions about the amount to contribute are affected by the tax on the contribution.¹⁰¹⁶ The court did not observe this was the consequence of not exempting plan contributions from state tax, which would have encouraged contributions. The court, however, responded to the relevant question, did the tax otherwise affect the ERISA plan in a non-tenuous fashion. Instead, the *Neusser* court referred to a state regulation of hospital rates that was not

1011. Treas. Reg. §1.401(a)-13(c)(2) (as amended in 1988).

1012. Code § 3405.

1013. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987).

1014. *Id.* at 551 (although the statute also required the tax to be withheld from the wages of the employees, the permissibility of this withholding was not before the court).

1015. *Id.* at 553-54.

1016. *Id.* at 554.

preempted even though the regulation increased plan costs because it did “not affect the structure, the administration, or the type of benefits provided by an ERISA plan.”¹⁰¹⁷ The court also distinguished the Akron law from a preempted tax on an ERISA plan measured by the amount of the plan’s total benefit distributions¹⁰¹⁸ because the Akron tax law was of “general application” which is unaffected by whether the compensation is contributed to the plan.¹⁰¹⁹ Moreover, the tax differs from a preempted law that sought to impose civil liability on plan sponsors who failed to pay severance pay because those laws affect plan administration, namely whether plan benefits are paid.¹⁰²⁰ The court also observed that the tenuousness of the relation was supported by the fact that the law did not affect relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries—but rather relations between one of these entities and an outside party.¹⁰²¹ In particular, the law affected the relation between plan beneficiaries and an outside party, the Akron taxing administration. Finally, the court concluded that:

We hold only that where, as here, a municipality enacts a neutral income tax of general application which applies to employees without regard to their status as ERISA participants, that tax is not preempted by ERISA.¹⁰²²

In 1996, the Sixth Circuit held in *Thiokol Corp. v. Roberts* (“*Thiokol*”),¹⁰²³ that the employee compensation used to compute the Michigan business tax may include the employer contributions to employee benefit plans.¹⁰²⁴ The court applied an analysis similar to that in *Neusser* to find that the tax law’s effects on the ERISA plan were tenuous. In particular, the tax law was also one of general applicability that did not affect the relation among the principal ERISA entities.¹⁰²⁵

The *Thiokol* court held that the preemption by ERISA reference rule apparently presented in Greater Washington was inapplicable even though the statute had a similar reference to ERISA plans for two reasons. First, the tax statute, which was a value-added tax could be computed without any reference to employee compensation, and in tax matters substance rules over

1017. *Id.* at 555.

1018. *Id.* at 554 (referring to Nat’l Carriers’ Conference Comm. v. Heffernan, 454 F. Supp. 914, 915-16 (D. Conn. 1978)).

1019. *Id.*

1020. *Id.* at 554-55.

1021. *Id.* at 555.

1022. *Id.* at 556.

1023. *Thiokol Corp. v. Roberts*, 76 F.3d 751 (6th Cir 1996).

1024. *Id.* at 753.

1025. *Id.* at 755.

form.¹⁰²⁶ Second, such an ERISA rule of form ignores the underlying purpose of ERISA preemption, which is to prevent impermissible effects, not references.¹⁰²⁷ Greater Washington does not hold that ERISA preempts all state laws with references to ERISA plans because: (a) the Court therein failed to use the unambiguous language of the court below to make such a dramatic change when the Court showed the change was unneeded therein because of the statute's non-tenuous effects the Court described;¹⁰²⁸ (b) both "refer to" and "connected with" approximate the phrase "relate to, and there is no reason to treat only one as requiring a tenuous connection";¹⁰²⁹ (c) the Court definition of "relates to" shows that the concern is the effect of a statutory reference rather than the reference *per se*;¹⁰³⁰ and (d) the *Mackey I* Court reference language shows that the Court reference concern was only with statutes "specifically designed to affect" a covered plan.¹⁰³¹ The *Thiokol* court summarized its conclusions as follows:

Nevertheless, we decline to in effect adopt Justice Stevens's interpretation of the majority opinion [that it was simply based on a preemption by reference rule]. A *per se* rule for pre-emption based on mere reference would affect such a huge change in ERISA pre-emption doctrine, and have such a massive and indiscriminate impact on state laws throughout the nation, that in the interest of federalism we would expect a clearer statement from the Court before embarking on this path. In *Thiokol* [lower court decision being reversed], Judge Hillman found 432 state laws that use the words ERISA or Employee Retirement Income Security Act; as he noted, many more contain language describing pension or health benefit plans that "refer to" ERISA without using the word ERISA. *If mere reference alone, without any impermissible effect on a covered plan, is enough to pre-empt a state law, then all these laws are pre-empted. Such a rule would lead to patently absurd results. As the Third Circuit noted, such a rule would mean that a state law providing that "No employer, including an ERISA plan, shall discriminate on the basis of race or gender" would be pre-empted. See United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hosp., 995 F.2d 1179, 1192 n.6 (3rd Cir. 1993). A final example suffices to show that there must necessarily be an analysis of a state law's effect and that mere reference is not enough: under a *per se* reference test that did not concern itself with whether a law had only a tenuous, remote, or peripheral effect or even had no effect, ERISA would pre-empt a non-binding resolution passed by a town board declaring February 1996 as "ERISA Awareness Month." Surely Congress did not intend such a broad*

1026. *Id.* at 756.

1027. *Id.* at 760.

1028. *Id.* at 757-58, 760-61.

1029. *Id.* at 758-59.

1030. *Id.* at 759.

1031. *Id.* at 759-60.

and unreasonable pre-emption doctrine.¹⁰³²

The difficulty with this correct and well-reasoned analysis is that one year earlier in *Travelers*, the Supreme Court analyzed the law at issue before it by first finding that such law was not preempted under the *Travelers* Preemption by Reference Rule, which the Court attributed to its *Greater Washington Board of Trade* statement that the law “specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted,”¹⁰³³ although as discussed the specific reference therein included but was not limited to ERISA plans. The *Thiokol* court disregarded this point, but instead distinguished the decisions that the *Travelers* Court cited to support the *Travelers* Preemption by Reference Rule.¹⁰³⁴ Moreover, the *Travelers* Preemption by Reference Rule was reaffirmed in both *De Buono* and *Dillingham Constr.*, although in none of the cases was a statute found to have been preempted as a result.

D. A Circuit Court Held That ERISA Permits (1) State Tax Levies on Benefit Payments from ERISA Plans other Than Spousal Survivor Pension Plans, and (2) Mandatory State Tax Withholdings for All Plans, But These Holdings Preceded, and Are Not Tenable After Boggs, Egelhoff, and Kennedy

In 1990, the Ninth Circuit held in *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California v. Franchise Tax Board* (“*Plumbing Retirement Fund Trust*”),¹⁰³⁵ that regardless of plan terms to the contrary, ERISA does not preempt (1) state tax levies of ERISA vacation benefit payments;¹⁰³⁶ (2) mandatory state tax withholdings from ERISA vacation payments;¹⁰³⁷ or (3) mandatory state tax withholdings of Spousal Survivor Benefit Plan benefit payments if participants and beneficiaries do not opt out of the withholding.¹⁰³⁸

The reasoning for those holdings does not withstand much scrutiny. Moreover, after *Boggs*, *Egelhoff*, and *Kennedy*, which confirm that there is a core requirement that ERISA benefits be paid in accord with plan terms, there can be little question that ERISA preempts state law provisions to the contrary, such as state tax levies and mandatory state withholdings not authorized by plan terms. Thus, a preemption holding with respect to Spousal Survivor Benefit Plans, such as the one in *Northwest*

1032. *Id.* at 760 (emphasis added).

1033. *Travelers*, 514 U.S. at 656 (citing *Greater Washington*, 506 U.S. at 130).

1034. *Thiokol*, 76 F.3d at 758.

1035. *Ret. Fund Trust of the Plumbing, Heating and Piping Ind. of S. Cal. v. Franchise Tax Bd.*, 909 F.2d 1266 (9th Cir. 1990).

1036. *Id.* at 1281.

1037. *Id.* at 1282.

1038. *Id.* at 1286.

Airlines v. Roemer,¹⁰³⁹ is good law.

Plumbing Retirement Fund Trust reversed a 1982 Ninth Circuit decision in *CLVT*¹⁰⁴⁰ that was reversed by the Supreme Court for jurisdictional reasons.¹⁰⁴¹ The 1982 holding that ERISA preempted a state tax levy seemed to be based on two premises. First, the court asserted without explanation that a state tax levy relates to the ERISA plan; thus, the ERISA Express Preemption preempts it.¹⁰⁴² Second, there is conflict preemption because while

ERISA does not in so many words protect vacation trusts from creditors' claims, as it does protect pension plans. 29 U.S.C. § 1056(d)(1). Extending similar protection to vacation funds is consistent with the statute, however, if not demanded by it. Both types of ERISA plans have the same goal: to provide accumulated money to a worker for future beneficial use. The worker's money deserves trust protection from dissipation regardless of the purpose for which the money has been set aside under ERISA.¹⁰⁴³

The conclusion is correct, but it would be more convincing if it had been more clearly linked to the prohibition on the alienation of benefits in the plan terms, which were discussed in the immediately preceding paragraphs of the decision.¹⁰⁴⁴ Thus, the state levy violated the requirement that plan terms determine a participant's benefit rights. However, the conclusion, as discussed *infra*, would remain the same if the plan terms did not prohibit, but simply failed to authorize such alienation of benefits. This is because as discussed, *supra*, the Supreme Court later held in 2009 in *Kennedy* plan terms determine who is entitled to receive plan benefits. Thus, if those plan terms do not authorize state tax levies on plan benefit payments, the plan participants and beneficiaries are entitled to their benefits, and the levies are preempted.

The *Plumbing Retirement Fund Trust* court, which held that the state tax levy was not preempted, began its substantive discussion by citing the *Mackey I* holdings that (1) ERISA does not preempt state law garnishments of welfare benefits, and (2) the correct proposition that there is no distinction between a garnishment procedure and a levy.¹⁰⁴⁵ The court then discussed how the initial version of ERISA preempted state tax laws,¹⁰⁴⁶ and how such preemption was reaffirmed when ERISA was amended

1039. *Northwest Airlines v. Roemer*, 603 F. Supp. 7 (D. Minn. 1984).

1040. *CLVT*, 679 F.2d, at 1307.

1041. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983) (held there was no removal jurisdiction for the action originally brought by a taxing authority to enforce state tax law).

1042. *CLVT*, 679 F.2d at 1309.

1043. *Id.*

1044. *Id.* at 1308.

1045. *Plumbing Retirement Fund Trust*, 909 F.2d at 1276.

1046. *Id.* at 1276-77.

to exclude partially from preemption the Hawaii Prepaid Health Care Act.¹⁰⁴⁷

The *Plumbing Retirement Fund Trust* court rejected the assertion that Congress codified the *CLVT* preemption holding, which was issued in June of 1982 before the January 1983 adoption of the Hawaii bill that reaffirmed the ERISA preemption of tax laws. The court asserted that at the time of the bill's adoption there was no consensus about the *CLVT* preemption holding that state tax levies violated the ERISA prohibition on the alienation of benefits.¹⁰⁴⁸ However, as discussed, *supra*, the *CLVT* preemption holding had not been solely based on a tax levy violating the ERISA prohibition on the alienation of benefits. Moreover, the cited district court held a state non-tax levy was not preempted, without considering whether the levy was consistent with the plan terms, as the *CLVT* court had done, as discussed, *supra*.¹⁰⁴⁹ The *Plumbing Retirement Fund Trust* court also rejected the relevance of the REACT committee report's endorsement of *CLVT* holding in 1984 because (a) subsequent Congresses do not determine the intent of enacting Congresses, particularly when the report is from a committee that did not prepare the initial legislation; (b) no other committee reports include such a reference; (c) the subject was not debated in the REACT Congressional discussions; (d) the unsettled state of the law was shown by another circuit reaching an opposite decision (albeit on the validity of liens in general); and (e) no amendment explicitly adopted the interpretation.¹⁰⁵⁰ However, these arguments, which are similar to those made in *Mackey* fail to recognize that as discussed, *supra*, the case reference in the committee report is consistent with the REACT focus on the ineffectiveness of state court orders, albeit domestic relations orders, that, like the tax levies, are inconsistent with the plan terms on a participant's rights to plan benefit payments.

The *Plumbing Retirement Fund Trust* court held that the alienation prohibition in the plan terms did not prohibit tax levies. The court observed that the Supreme Court had previously declared that plan terms may not be interpreted to "excuse ERISA trustees from their duties under ERISA and the documents must be construed in light of ERISA's policies."¹⁰⁵¹ The cited decision held that ERISA multi-employer plan trustees have an ERISA

1047. *Id.* at 1277-78.

1048. *Id.* at 1279.

1049. *Local 212 International Brotherhood of Electrical Workers Vacation Trust Fund v. Local 212 IBEW Credit Union*, 549 F. Supp. 1299 (S.D. Ohio 1982) (holding that a credit union is permitted to garnish a participant's payments from an ERISA vacation plan without checking the plan terms).

1050. *Plumbing Ret. Fund*, 909 F.2d at 1279-1280.

1051. *Id.* at 1280.

duty to enforce employer contribution obligations.¹⁰⁵² The *Plumbing Retirement Fund Trust* court held there is comparable duty of ERISA trustees to facilitate the enforcement of any state laws, including tax laws, but there is no ERISA policy to facilitate such enforcement. In contrast, there is an ERISA policy to enforce plan contribution obligations. In fact, the issue before the court was whether ERISA preempted such enforcement. After observing that the ERISA fiduciary provisions were derived from common-law principles, the *Plumbing Retirement Fund Trust* court declared:

Under the law of trusts, a spendthrift trust cannot insulate a beneficiary from a claim by the state based on income or other tax obligations. See 2 A. Scott, *Law of Trusts* § 157.4 at 1222-24 (3d ed. 1967); G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 224 at 464 (2d rev. ed. 1980); RESTATEMENT (SECOND) OF TRUSTS § 157(D) at 328, 331 (1959).¹⁰⁵³

This argument has two serious weaknesses. First, the argument makes no attempt to explain why the identical spendthrift language in Spousal Survivor Benefit Plans prevents tax levies on plan payments, but fails to do the same for non-pension plans. Second, the statement fails to describe accurately spendthrift law at such time, *i.e.*, in 1990, as shown by the following comment to the RESTATEMENT (THIRD) OF TRUSTS (2003), which refers to the state of the law at such time with virtually the same references:

Taxes and governmental claims. The relocation of this exception and the changed manner of expressing it here are intended to avoid either overstating or unduly narrowing it, and to state the true rationale as simply as possible. Although Restatement Second, Trusts § 157(d), states simply that the beneficiary's interest "can be reached . . . by the United States or a State," Fratcher, Scott on Trusts, *supra* at § 157.4 [4th ed. 1987], states that "whether the United States or a state can reach the interest of a beneficiary of a spendthrift trust to satisfy a claim other than a claim for unpaid taxes is not so clear." In fact, although the cases on federal taxes are clear (e.g., *United States v. Dallas Nat'l Bank*, 152 F.2d 582 (5th Cir. 1945), and *LaSalle Nat'l Bank v. United States*, 636 F. Supp. 874 (N.D.Ill.1986) (despite Illinois's spendthrift statute)), *even the cases on state taxes are divided and seem mostly to depend on statute*, such as *Ky. Rev. Stat. § 381.180(6)(c)*. See particularly *State v. Caldwell*, 181 Tenn. 74, 178 S.W.2d 624 (1944), 151 A.L.R. 1410 (common-law immunity from state claims changed by 1943 statute permitting collection of those claims from spendthrift interests on a "retroactive" basis; held unconstitutional).

On governmental claims in general, see Griswold, *supra* §§ 342-345,

1052. *Id.* (citing *Cent. States Pension Fund v. Cent. Transp., Inc.* 472 U.S. 559 (1985)).

1053. *Plumbing Ret. Fund*, 909 F.2d at 1280.

and Bogert & Bogert [Rev. 2d ed. 1992], supra § 24 (especially cases and statutes in note 31, pp. 474-477).¹⁰⁵⁴

Moreover, examination of the cited sources, including the cited *Bogert & Bogert* edition, shows the spendthrift exceptions are established not by common-law policies but by statutes as described above. Thus, contrary to the court's statement the vacation trust's anti-alienation provision may not be disregarded as inconsistent with either ERISA or long-standing principles of trust law.¹⁰⁵⁵

The *Plumbing Retirement Fund Trust* court then analyzed whether state tax levies "relate to" ERISA welfare plans by distorting the *Mackey* inaccurate description of the *Shaw* analysis:

A "neutral" state law of general application with a "tangential" impact on a plan does not "relate to" ERISA and is not preempted. *Shaw*, 463 U.S. at 100 n.21. California's tax levy procedure does not single out ERISA trusts. It is a neutral law of general application authorizing the attachment of funds of delinquent taxpayers. General state attachment procedures do not "relate to" ERISA welfare plans and are not preempted by ERISA. *Mackey*, 486 U.S. at 834 . . .

The California's tax levy procedure does not affect the calculation of benefits or otherwise "purport to regulate" the vacation trust. Like the garnishment in *Mackey*, the funds are attached "after a plan determines the amount of benefits the employee [is] eligible to receive. It does not affect the plan's initial calculation of an employee's benefits." *Borges*, 869 F.2d at 147 n. 3. That the levy procedure may result in a lower actual payment to the beneficiary is irrelevant. *Mackey*, 486 U.S. at 831-32, 835.¹⁰⁵⁶

However, the *Shaw* Court never asked whether a state law is of "general application," or "neutral," or whether the law singled out ERISA plans, when it considered whether ERISA preempted a state law. Instead, the *Shaw* Court held correctly that preemption is determined by whether the law affects an ERISA plan tenuously in the cited footnote 21. *Mackey II* did not use the phrase "general application," although it described the law at issue as a general garnishment statute, which it concluded did not relate to the welfare plan.¹⁰⁵⁷ Rather than considering whether the garnishments "regulated" the plan, *Mackey II* concluded that because ERISA did not preempt garnishments of vacation plan assets it could not preempt the garnishment of the participant's plan benefits because the "relate to" concept, which pertains to ERISA plans permits garnishments, must pertain to ERISA

1054. RESTATEMENT (THIRD) OF TRUSTS § 59 COMMENTS A-A(2) at 395, 398-99 (2003) (emphasis added) (preceding a discussion of the Uniform Trust Code proposal that state tax claims supersede spendthrift provisions).

1055. *Plumbing Retirement Fund Trust*, 909 F.2d at 1280.

1056. *Id.* at 1280-1281.

1057. *Mackey*, 486 U.S. at 831-35.

benefits except to the extent there is a specific prohibition of such benefit garnishments. However, the *Mackey II* court asserted that the only such prohibition, the Alienation Prohibition, is inapplicable to vacation plans.

The *Plumbing Retirement Fund Trust* court then concludes that ERISA does not preempt mandatory state tax withholding from the vacation plan by rephrasing *Mackey*:

ERISA does not guarantee the receipt of welfare plan benefits, but protects only welfare plans. *Mackey*, 486 U.S. at 831-32; see also *Fort Halifax*, 482 U.S. at 7, 19 . . .

California's tax withholding procedures do not otherwise "relate to" the vacation trust. The statutes do not single out ERISA trusts. See *Mackey*, 486 U.S. at 830. The procedures have no impact on funds while held in trust and only a tangential impact on the administration of the plan.¹⁰⁵⁸

This repeats the same distinction without a difference used in *Fort Halifax* between benefits and benefit plans. Again it leads to the wrong result, *viz.*, ERISA permits tax levies of welfare plan payments. The *Plumbing Retirement Fund Trust* court rejected the assertion that because tax withholding was based on percentage of the benefit payments it was preempted the same manner as the preempted plan tax on benefit payments in *Heffernan II*.¹⁰⁵⁹ The Court asserted that the withholding was in fact based not on the participant's plan income but on the participant's total income,¹⁰⁶⁰ which is a little disingenuous since the withholding amount is generally a percentage of the benefit payment.

The *Plumbing Retirement Fund Trust* court also held that the Alienation Prohibition preempted state tax levies on Spousal Survivor Benefit Plan benefit payments.¹⁰⁶¹ The court also held that ERISA did not preempt mandatory tax withholdings from pension plan payments in which participants could opt within thirty days to have no withholding.¹⁰⁶² First, the court relied on the provisions in the Alienation Prohibition for a voluntary assignment of up to 10% of the pension payments.¹⁰⁶³ The difficulty with this argument is that the relevant ERISA provisions require an opting in to the assignment,¹⁰⁶⁴ rather than the opting out procedure of the tax withholding rules. Second, the court relied on the exemption of tax withholdings from the Alienation Prohibition in the accompanying regulations.¹⁰⁶⁵ The

1058. *Plumbing Ret.Fund Trust*, 909 F.2d at 1282.

1059. *Id.* at 1281-82.

1060. *Id.* at 1282.

1061. *Id.* at 1284.

1062. *Id.* at 1284-86.

1063. *Id.* at 1284.

1064. ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2) (2012).

1065. *Plumbing Ret.Fund Trust*, 909 F.2d at 1284-86.

difficulty with this argument is that it implies ERISA does not prohibit state tax withholding *per se*. However, without a plan provision authorizing such withholding plan participants would still have the right to obtain their entire benefit from the plan. Thus, the mandatory state tax withholding would remain preempted.

E. ERISA Permits States to Impose Taxes, Which Refer to or are Directed Primarily at ERISA Plans, if the Tax is Not a General ERISA Mandate, Does Not Prevent the Exercise of Benefit Rights, and is Not an ERISA Enforcement Mechanism, Although Some Courts Have Disagreed

Despite the *Traveler's* Preemption by Reference rule, which some courts have broadened to include preemption of tax laws directed primarily at ERISA, it seems more prudent to adopt a more modest preemption approach that shows a greater deference for state law. It is advisable to presume that state taxes are not preempted unless there is a showing that they prevent the exercise of the benefit rights of participants or beneficiaries under the terms of an ERISA plan, supplement, enhance or diminish an ERISA enforcement mechanism, or impose a General ERISA mandate. This approach is consistent with the federalist goal of the draftsmen of ERISA and its amendments, namely to preempt the state laws that would affect any of the three basic ERISA benefit protections, but not to interfere with any other laws.

In 1978, a Connecticut District Court held in *Heffernan II*,¹⁰⁶⁶ that ERISA preempted a state tax applicable only to employee welfare plans, in which the tax equaled a fraction of the plan's benefit payments.¹⁰⁶⁷ The court holding was based on three arguments. First, ERISA preemption is not limited to state laws regulating ERISA plans,¹⁰⁶⁸ but includes laws related to ERISA plans, such as the one at issue, which was apparently focused on ERISA welfare plans. However, there is no discussion about whether a significant portion of the plans covered may not have been ERISA plans because they were church plans¹⁰⁶⁹ or plans restricted to owner-employees.¹⁰⁷⁰ Second, when enacting ERISA Congress rejected an Administration proposal to exempt state taxation from the ERISA Express Preemption,¹⁰⁷¹ which does not show why the tax provision at issue is preempted. Third, the tax regulated employee plans by encouraging insured plans, which are

1066. *Heffernan II*, 454 F. Supp. at 914.

1067. *Id.* at 918.

1068. *Id.* at 917.

1069. ERISA 4(b)(2), 29 U.S.C. 1003(b)(2)(2012) (church welfare plans are not ERISA plans, the 410(b) election is applicable only to pension plans).

1070. *See* 29 C.F.R. § 2510.3-3(b) (2013) (providing that pension plans covering only owner-employees are not ERISA plans).

1071. *Heffernan II*, 454 F. Supp. at 917.

taxed at 2% of total premiums, rather than self-insured plans, which are subject to a 2.75% tax on benefit payments,¹⁰⁷² presumably smaller than the premiums that would be paid to an insurer, who would deduct a profit before making the same benefit payments. *Heffernan II* was cited favorably as discussed, *supra*, in the *Chicago Preemption Review*. Its predecessor, *Heffernan I*, was cited favorably by one of the principal ERISA draftsman, Senator Jacob Javits in support of the unadopted ERISA Improvement Act of 1979, S. 209.

In 1987, the Ninth Circuit held, in *General Motors Corp. v. California State Board of Equalization*,¹⁰⁷³ which ERISA preempted a premium tax on stop-loss insurers for employee welfare plans, which tax was based in part on benefits paid by the plans. The court described the relation of the tax to ERISA plans as follows:

The Court's broad reading of the preemption clause leads us to conclude that the tax at issue "relate[s] to" benefit plans. The tax is computed on the basis of benefits paid by the plans; *reference to plan activities in computing the tax is unavoidable*. In its broadest sense, therefore, ERISA applies, and further analysis is required.¹⁰⁷⁴

In contrast, the *Heffernan II* court focused on whom the tax was directed at rather than how it was computed.¹⁰⁷⁵ There appeared to be no *Heffernan II* issue whether the tax unduly discouraged self-insurance. However, because the inclusion of the plan benefits paid in the tax basis is consistent with the tax being a premium tax, the court found the tax was not preempted because it was eligible for the insurance regulation exclusion from the ERISA Express Preemption.¹⁰⁷⁶

Two courts held that ERISA preempted a Texas tax on administrative service providers to employee plans, which tax (the "ASTA") was a fraction of the sum of the administrative fees and the benefits paid by the plan. In 1989, a Texas district court made such a holding in *Birdsong v. Smith*.¹⁰⁷⁷ The court focused on the cost burden imposed by the tax:

While there has been much hubbub over whether the plans or the first administrators are the taxpayers under ASTA, it is the plans or their sponsors or participants that will eventually bear the burden of the tax, not the administrators. Tax measures which are aimed

1072. *Id.* at 918. *Cf.* Gordon, *supra* note 356, at 28-29 (opining that the ERISA Express Preemption, with its deemer clause, was adopted in part to prevent states from imposing premium-like taxes on non-insured health care reimbursement plans).

1073. *General Motors Corp. v. Cal. State Bd. of Equalization*, 815 F.2d 1305, 1310-11 (9th Cir. 1987).

1074. *Id.* at 1309 (emphasis added).

1075. *Heffernan*, 454 F. Supp. at 914.

1076. *General Motors Corp.*, 815 F.2d at 1310-11.

1077. *Birdsong v. Smith*, 708 F. Supp. 792, 801 (D.C. W.D. Tex. 1989).

specifically at employer contributions do not differ in substance from taxes imposed on the income of such plans; and one should not escape preemption where the other would not. Unlike other forms of state regulation that may affect the costs of these plans in an incidental fashion, *state taxation directly depletes the funds otherwise available for providing benefits. To permit this to occur would fly in the face of ERISA's goal of assuring the financial soundness of such plans.*¹⁰⁷⁸

Thus, the court correctly focused on the effects of the law, rather than whom the law focused on, or whether it depended on plan benefit characteristics, although the court observed that the plans contemplated by the law “are virtually identical to those covered by ERISA.”¹⁰⁷⁹ The Fifth Circuit also held ERISA preempted the same tax in *E-Systems, Inc. v. A.W. Pogue*,¹⁰⁸⁰ for the same reasons.¹⁰⁸¹ Neither court clarified whether preemption would occur if the taxes were not confined to ERISA plans. In such case the conclusion would seem to be the same, which implies that even though ERISA does not make ERISA plans tax-exempt, ERISA nevertheless preempts any tax on ERISA plans because a tax diminishes plan assets. This issue arose in the next decision.

In 1992, the highest New York State Court held in *Morgan Guaranty Trust Co. v. Tax Appeals Tribunal* (“*Morgan Guaranty*”),¹⁰⁸² that ERISA preempted the New York State gains tax, which was a fraction of the gain on the sale of real property.¹⁰⁸³ The court asserted that the gains tax would affect the plan’s investment policies by discouraging New York real estate investments.¹⁰⁸⁴ However, it is not clear why if ERISA plans are not entitled to a state tax exemption, ERISA plan investments should be taxed differently than the same investments by other investors. The court pointed to the administrative burden of having to apply different asset disposition procedures in different states.¹⁰⁸⁵ The court cited *Birdsong* and its depletion of assets argument.¹⁰⁸⁶ The court correctly held the gains tax law was not saved from preemption simply by being a generally applicable law.¹⁰⁸⁷ The majority declared without explanation that because the gains tax was a profits tax rather than a transfer tax, ERISA

1078. *Id.* (emphasis added).

1079. *See id.* at 796 (stating that some of these plans may qualify as non-ERISA plans, such as church or government plans).

1080. *E-Systems, Inc. v. A.W. Pogue*, 929 F.2d 1100 (5th Cir. 1991).

1081. *Id.* at 1101 (describing ERISA plan coverage). *See also id.* at 1103 (discussing asset depletion).

1082. *Morgan Guaranty Trust Co. v. Tax Appeals Tribunal*, 599 N.E.2d 656 (N.Y. 1992).

1083. *Id.* at 662.

1084. *Id.* at 660.

1085. *Id.*

1086. *Id.* at 661.

1087. *Id.* at 661-62.

should only preempt the gains tax, although both impose administrative and cost burdens on the disposition of plan assets.¹⁰⁸⁸ Perhaps the difference is that a profits tax imposes a greater the administrative burden than a transfer tax. A transfer tax requires the computation of the proceeds, but a profits tax also requires the computation of the basis of the property.

The *Morgan Guaranty* dissent correctly observed that the majority did not explain how to distinguish those state taxes on plans that were preempted from those that were not.¹⁰⁸⁹ However, the dissent proposed an alternative that also failed to distinguish the effects of a plan tax that were preempted from one that was not. Instead, the dissent cited *Ingersoll-Rand* and *Mackey* for the principle that a generally applicable law is not preempted “if it is being applied to a covered plan in the same way, and for the same reasons, as it would be applied to any other entity, even though application of the law may, in fact, burden the plan.”¹⁰⁹⁰ This principle is flawed because as *Egelhoff* observed, *supra*, it disregards whether such law affects a core requirement, such as whether plan benefits must be paid pursuant to plan terms. This flaw with a focus on generally applicable laws should have been quite apparent in 1992 because REACT, which was enacted in 1984 specifically prohibited Spousal Survivor Benefit Plans from following state orders generated under generally applicable domestic relations law, if they were not QDROs.¹⁰⁹¹

There is an excellent summary of the state of the preemption of state tax laws prior to *Travelers* and *De Buono* in a 1992 law review article by Kevin Matz.¹⁰⁹² Those two decisions presented a rule that answered the *Morgan Stanley* question of how to determine which tax laws ERISA preempts. In particular, ERISA preempts any state law to the extent the law refers to ERISA plans (the *Travelers* Preemption by Reference Rule) and perhaps targets such plans, mandates benefit structure or benefit administration, or provides an enforcement mechanism, but permits state law that affects benefit amounts indirectly without any of the above features. Thus, there would be no change in the holdings of preemption absent an insurance exception in *Heffernan II*, *General Motors*, *Birdsong*, and *E-Systems, Inc.* with respect to laws that seemed to target ERISA welfare plans without using the word ERISA, although the decisions did not mention evidence of this targeting. In contrast, *Morgan Stanley* would be reversed, and the tax would be preempted. The tax at issue therein had no

1088. *Id.* at 661.

1089. *Id.* at 662.

1090. *Id.* at 663.

1091. Ret. Equity Act of 1984, Pub. L. No. 98-397 § 104, 98 Stat. 1426, 1433-36 (1984).

1092. Kevin Matz, ERISA's Preemption of State Tax Laws, 61 FORDHAM L. REV. 401 (1992).

ERISA reference or other feature described above, and did not satisfy the rule later set forth in *Boggs* and *Egelhoff* that ERISA preempts laws that affect ERISA core requirements by violating plan terms or imposing ERISA General Mandates.

The *Travelers/De Buono* analysis is flawed because it includes the *Travelers* Preemption by Reference Rule, and perhaps the expansion to state laws targeting ERISA plans. As discussed in *Thiokol*, an ERISA reference or a targeting of ERISA plans is irrelevant if the tax does not affect the plan in a non-tenuous manner, such as by imposing a benefit terms mandate (including a benefit structure mandate or a benefit provider mandate).¹⁰⁹³ However, if the *Travelers* Preemption by Reference Rule were discarded, the laws in *General Motors*, *Birdsong*, and *E-Systems, Inc.* would have not been preempted regardless of the insurance exception because none had a prohibited effect. It is not clear if *Heffernan II* would be preempted because the later *Travelers* decision does not provide the tools to analyze whether, imposing a higher tax on a self-insured plan's benefit payments than on an insured plan's premiums, results in a preempted insurer benefit provider mandate rather than merely a permissible encouragement of the use of such a provider.¹⁰⁹⁴ On the other hand, a payroll tax, which was payable, only if an employer's health benefit plan expenditures failed to exceed a threshold would be preempted even if the *Travelers* Preemption by Reference Rule were discarded.¹⁰⁹⁵ In contrast, for *Morgan Stanley*, the *Travelers* holding of no preemption is not affected if the *Travelers* Preemption by Reference Rule were discarded.

1093. Cf. Edward Zelinsky, *Employer Mandates and ERISA Preemption: A Critique of Golden Gate Restaurant Association v. San Francisco*, State Tax Notes (2008) available at <http://ssrn.com/abstract=1299128> (last visited March 5, 2014) (arguing that ERISA preempts the San Francisco requirement that an employer who fails to make minimum health care benefit expenditures must make a payment to San Francisco to provide the benefits because the requirement mandates the employer's ERISA benefits) with Samuel C. Salganik, *What the Unconstitutional Conditions Doctrine Can Teach Us about ERISA Preemption: Is it Possible to Consistently Identify "Coercive" Pay-or-play Schemes?*, 109 COLUM. L. REV. 1482, 1507-08 and 1515-28 (2009) (arguing that ERISA does not preempt the San Francisco requirement because the requirement gives employers a meaningful alternative to changing their ERISA plans and moreover, ERISA does not preempt generally applicable health reform laws). Prof. Zelinsky's position, as discussed *supra*, is more consistent with ERISA prohibition on state law benefit mandates.

1094. See e.g., LANGBEIN PENSION LAW, *supra* note 13, at 844-46 (discussing the distinction between a *Travelers* inducement and a *Travelers* mandate, and whether ERISA preempts state mandates that employers make minimum health care expenditures).

1095. See generally *id.* at 846-48. See e.g., Retail Industry Leaders Ass'n v. Fielder, 475 F.3d. 180 (4th Cir. 2007) (holding a payroll tax that would be reduced to the extent of the employer's health care expenditures was preempted because it mandated a benefit structure).

In 2006, the Second Circuit held in *Hattem v. Schwarzenegger* (“*Hattem*”),¹⁰⁹⁶ that ERISA did not preempt the application of the California unrelated business tax, based on the federal unrelated business tax, to an ERISA pension plan.¹⁰⁹⁷ The court essentially repeated *Travelers* with an explanation of the word “reference,” which seems to include targeting such plans. The court first observed that singling out ERISA plans for special treatment is considered a “reference” that results in ERISA preemption, although simply mentioning the word “ERISA” in the statute is not such a reference.¹⁰⁹⁸ The statute did not specifically refer to ERISA plans, but was a generally applicable law which applied to a broad range of tax exempt entities, even though ERISA plans may have constituted 80% of the tax base.¹⁰⁹⁹ The *Hattem* court observed that the part of the statute referencing ERISA plans, namely the exemption from the tax for plans exempt under Code § 401(a) (as discussed, *supra*, such plans include non-ERISA plans, such as owner-employee plans¹¹⁰⁰ and profit-sharing plans primarily providing for in-service distributions)¹¹⁰¹ was not being challenged.¹¹⁰² The tax did not compel a specific investment or impose a substantial administrative cost,¹¹⁰³ just as the *Travelers* insurance surcharge did not compel a choice of insurer or represent a substantial cost. Finally, the tax did not govern an area governed by ERISA, such as establishing a benefit terms mandate.¹¹⁰⁴

As a result of the *Hattem* decision New York State decided that ERISA did not preempt the application of the New York State unrelated business tax to ERISA pension plans.¹¹⁰⁵ This was a reversal of a New York Tax Tribunal decision in 2003 in *McKinsey Master Retirement Plan Trust*.¹¹⁰⁶ The Tribunal had found that the

1096. *Hattem v. Schwarzenegger*, 449 F.3d 423 (2d Cir. 2006).

1097. *Id.* at 426.

1098. *Id.* at 432.

1099. *Id.* at 434-435. ERISA does not preempt generally applicable criminal statutes. Thus, there is a similar question about the proportion of compensation that must be non-ERISA compensation covered by a generally applicable criminal statute.

1100. 29 C.F.R. § 2510.3-3(b)(1975) (pension plans covering only owner-employees are not ERISA plans).

1101. *Cf.* ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (plans providing retirement income or income after the termination of employment are ERISA plans).

1102. *Hattem*, 449 F.3d at 435.

1103. *Id.* at 432. *But see* Mark F. Sommer, Mark A. Loyd, & Jennifer Y. Barber, *O Preemption, Where Art Thou—ERISA’s Lost State and Local Tax Preemption* 64 TAX LAW. 783, 797-98 (2011) (discusses the cost of compliance, although the court holding fails to consider such cost).

1104. *Hattem*, 449 F.3d at 433.

1105. New York State Dep’t of Fin. and Taxation TSB-M-06(6)C (Nov. 9, 2006).

1106. *McKinsey Master Ret. Plan Trust*, DTA NO. 817551, 2003 N.Y. Tax LEXIS 112 (May 8, 2003).

statute expressly referred to ERISA plans by the reference to plans exempt under Code § 401(a).¹¹⁰⁷ The Tribunal did not ask whether the tax was generally applicable. The decision below had observed that the tax discouraged the ERISA required diversification of investments by subjecting only certain investments to tax.¹¹⁰⁸ The tribunal was able to distinguish *Travelers* and *De Buono* because the tax had nothing to health care regulation, an area of traditional state regulation.¹¹⁰⁹ Finally, the tribunal described the significant administrative burdens imposed by the tax:

The State's UBIT gives rise to filing and payment duties which involve estimation and timing issues, all of which militate against the congressional aim of achieving a uniform body of pension law with minimal financial and administrative burdens and conflicts between the various state and Federal jurisdictions.¹¹¹⁰

In 2012, a Michigan district court similarly held in *Self Insurance Institute of America v. Snyder*, ("*SIIA*"),¹¹¹¹ that ERISA did not preempt a state tax of 1% on the value of all claims paid by every carrier or third party administrator for medical services that are rendered in Michigan.¹¹¹² The court followed *Thiokol* and disregarded the fact that the statute specifically referred to ERISA by taxing "commercial insurers and health maintenance organizations, nonprofit health care corporations, specialty prepaid health plans, and ERISA plans" that pay medical claims in Michigan.¹¹¹³ Thus, the court held that there was no preemption because the statute did not mandate employee benefit structures or affect the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit.¹¹¹⁴ It would, however appear that under the *Travelers* Preemption by Reference rule the statute would be preempted.¹¹¹⁵

Mr. Yonathan Gelblum raised very thoughtful criticisms of

1107. *Id.* at 28-30.

1108. *Id.* at *21 (implying that ERISA permits the states to tax either all or none of the ERISA plan's investments. Any other policies would favor certain investments).

1109. *Id.* at *18.

1110. *Id.* at *28-*29.

1111. *Self-Insurance Institute of America v. Snyder*, 2012 U.S. Dist. LEXIS 124405 (E.D. Mich. Sept 7, 2012).

1112. *Id.* at *29.

1113. *Id.* at *21-*22.

1114. *Id.* at *24-*25.

1115. THE SELF INSURANCE INSTITUTE OF AMERICA, Legal Fight Continues While Tax Could Rise Significantly on Self-Insured Employers, (Nov. 12, 2012) (last visited Jan. 30, 2014) <http://www.siaa.org/i4a/pages/index.cfm?pageid=6243> (announcing that they were appealing the preemption ruling).

Hattem and presumably would be similarly critical of *SIAA*,¹¹¹⁶ although Mr. Gelblum described the *Hattem* result as correct.¹¹¹⁷ Mr. Gelblum characterized the *Hattem* analysis as follows:

[T]he court's application of the Supreme Court's ERISA jurisprudence was flawed in four ways, which lead to an overly broad holding. First, the court wrongly assumed that a high degree of deference is due to state tax laws when deciding ERISA preemption cases. Second, it specifically extended its holding to all state UBIT schemes (regardless of whether they mirrored the federal scheme) despite the fact that the California law's minimal impact on ERISA plans is probably due to its similarity to federal UBIT. Third, it failed to explain why reducing risk through diversification of plan assets is not a core area of ERISA concern potentially impacted by the tax. Lastly, the court conflated the connection prong of ERISA preemption with the separate, and much stricter, reference prong by partially basing its holding on the fact that California UBIT did not apply exclusively to ERISA plans. Because of these flaws, *Hattem*'s holding is too broad, and following its logic in other cases could improperly terminate ERISA based challenges to various state measures, particularly taxes, that may effectively regulate ERISA plans.¹¹¹⁸

However, these good points don't fully address fundamental ERISA preemption principles.

Mr. Gelblum is correct that state tax law deserves no more deference than other state laws, and that the *Travelers* Court spoke of giving more respect for taxes used to implement traditional state regulation, such as health care regulation than taxes used solely to raise revenue.¹¹¹⁹ However, as discussed, *supra*, the fundamental ERISA preemption principles should not consider the particular category of state law except to the extent, Congress provided the category with a preference that prevents the exercise of a participant's benefit rights, adds an enforcement mechanism, or imposes an ERISA General Mandate.

Mr. Gelblum is correct that the *Hattem* court failed to consider the administrative burden of tax compliance, which could be more significant for taxes that do not mirror a federal tax.¹¹²⁰ However, as discussed, *supra*, the fundamental ERISA preemption

1116. Yonatan Gelblum, *Hattem v. Schwarzenegger—Terminating Preemption Challenges To State Taxation Of ERISA Plans' UBTI*, 60 TAX LAW. 215 (2006).

1117. *Id.* at 222-225 (the similarity of the tax to the federal UBTI, which it mirrored at a much lower rate, implied that the administrative burdens and effects on investments were tenuous). Mr. Gelblum also mentioned that such laws existed prior to ERISA so there is a presumption in favor of their validity. However, the earlier Boggs decision that ERISA preempted community property law, disregarded the fact that community property preceded by many years the enactment of ERISA and of the federal UBTI.

1118. *Id.* at 220-21.

1119. *Id.* at 226-28.

1120. *Id.* at 228-29.

principles do not take account the administrative burden of compliance with a state law, but rather whether they prevent the exercise of a participant's benefit rights, add an enforcement mechanism, or impose an ERISA General Mandate.

Mr. Gelblum is correct that the *Hattem* court failed to consider whether there was a core ERISA requirement to diversify investments.¹¹²¹ However, unless the states are precluded from taxing ERISA plan investments, which they are not, it is inevitable that the state tax will favor some investments and disfavor other investments. The *De Buono* holding that ERISA did not preempt the imposition of fees imposed on medical care providers, whether or not they are ERISA plans, suggests that if ERISA plans may be subject to state taxes, ERISA plans should similarly not expect any more favorable tax treatment than similarly situated investors.

Mr. Gelblum is correct that the *Hattem* court improperly confounded the reference and connection tests for preemption.¹¹²² However, as discussed, *supra*, the fundamental ERISA preemption principles do not make such a distinction and simply ask whether the state law affects benefits plans in a non-tenuous manner, *i.e.*, does the law prevent the exercise of a participant's benefit rights, add an enforcement mechanism, or impose an ERISA General Mandate.

Mr. Gelblum is correct that the *Hattem* holding of no preemption has an excessive reach because of the above flaws.¹¹²³ Mr. Gelblum's article received considerable support from a recent TAX LAWYER article by Mark F. Sommer, Mark A. Loyd, and Jennifer Y. Barber, *O Preemption, Where Art Thou—ERISA's Lost State and Local Tax Preemption*,¹¹²⁴ which provides an excellent review of the current state of such law and recommends that ERISA preempt only those state laws that either *prima facie* relate to ERISA plans or were adopted with the purpose of affecting an ERISA plan (effects would be disregarded).¹¹²⁵ However, much of the above complexity of the preemption analysis may be avoided with the modest approach proposed in this article. In particular, the effects of the state law determines whether ERISA preempts it. These principles are consistent with the intentions of the ERISA draftsmen. They apparently wished to

1121. *Id.* at 229-30.

1122. *Id.* at 230-31.

1123. *Id.* at 231.

1124. Mark F. Sommer, Mark A. Loyd, and Jennifer Y. Barber, *O Preemption, Where Art Thou—ERISA's Lost State and Local Tax Preemption* 64 TAX LAW. 783, 797-800 (2011).

1125. *Id.* at 802-805. See also Kilberg and Inman *Preemption, supra* note 350, at 1332 n.93, 1334-36 (1984) (proposing that ERISA preemption be based on whether the purpose of the state law is to regulate ERISA plans and arguing that ERISA preempts mandatory state tax withholding or taxes measured by the benefit amounts paid by ERISA plans).

establish a system in which state laws could not affect any of the three basic ERISA benefit protections, but had no intention of overturning any other state laws.

XVII. ERISA PREVENTS A STATE LAW CREDITOR OF A
PARTICIPANT OR A BENEFICIARY OF AN ERISA PLAN
FROM REDUCING THE PLAN BENEFIT PAYMENT
RIGHTS OF THE PARTICIPANT OR THE BENEFICIARY
UNLESS THE CREDITOR IS A BENEFICIARY UNDER THE
PLAN TERM, OR THE PLAN PERMITS THE
ATTACHMENT OF BENEFITS

ERISA substantially reduces the ability of state law creditors to obtain payments from ERISA plan participants and beneficiaries. The only persons ERISA permits to bring actions for benefit payments are plan participants and beneficiaries.¹¹²⁶ State law creditors of a plan participant or beneficiary must rely on the terms of the plan to obtain any rights to plan benefits. The terms of any plan may permit a participant or beneficiary to direct the plan to make the benefit payments to a third party. The only ERISA provision that could prevent such directions is the Alienation Prohibition, which does not apply to revocable third party payment directions.¹¹²⁷ Moreover, the terms of a plan, other than a Spousal Survivor Benefit Plan, may permit a participant or beneficiary either to assign benefits to a creditor and thereby make the creditor a beneficiary, or to permit creditors to attach the benefits. In these three cases, because the creditor will receive the payment pursuant to the plan terms, the participant or beneficiary may not seek a second payment of those benefits, since plan terms determine benefit rights.¹¹²⁸ For Spousal Survivor Benefit Plans, the Alien Prohibition prohibits plans from making benefit payments to a person other than a plan participant or a beneficiary, unless the plan terms provide for such payments, and such payments are within one of the statutory or regulatory exceptions, such as for voluntary revocable assignments of at most 10% of the benefit payment,¹¹²⁹ state withholding tax payments,¹¹³⁰ direct bank deposits,¹¹³¹ or at the direction of the participant or

1126. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012).

1127. Treas. Reg. § 1.401(a)-13(e) (as amended in 1988) (permitting Spousal Survivor Benefit Plans to follow revocable payment directions from their participants and beneficiaries if designee acknowledges in writing that it has no enforceable right to the planned payments).

1128. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012).

1129. ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2) (2012).

1130. Treas. Reg. § 1.401(a)-13(c)(2)(ii) (as amended in 1988).

1131. Treas. Reg. § 1.401(a)-13(c)(2)(v) (as amended in 1988).

beneficiary,¹¹³² and the plan terms provide for such payments.

The Supreme Court has thoroughly superseded the *Campa Sup. Court* and *Mackey II* decisions that persons other than participants or beneficiaries may otherwise rely on state law to obtain plan benefits.

Campa Sup. Court as discussed, *supra*, held that ERISA permitted community property law to provide for pension plan payments to persons other than plan beneficiaries and participants. *Boggs* explicitly overruled that holding largely on the basis that

The axis around which ERISA's protections revolve is [sic] the concepts of participant and beneficiary. When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA.¹¹³³

Mackey II as discussed, *supra*, held that ERISA permitted state law garnishments to provide for non-pension plan payments to persons other than plan beneficiaries and participants regardless of the plan terms. *Egelhoff* implicitly overruled this holding by holding that ERISA preempted a state statute revoking upon the participant's divorce, the participant's spousal designation for an ERISA life insurance plan. The *Egelhoff* holding largely rested on "the [revocation] statute at issue here directly conflict[ing] with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents."¹¹³⁴ Moreover, the *Egelhoff* Court left doubt about its impact on state law garnishments when it distinguished generally applicable laws, which regulate "areas where ERISA has nothing to say," such as state minimum wage and benefit for apprentices, which are not preempted because they only incidentally affect ERISA plans,¹¹³⁵ from a statute, such as the statute revoking ERISA designations at issue, which is preempted because it "governs the payment of benefits, a central matter of plan administration."¹¹³⁶ The *Kennedy* Court stressed the importance of the principle of making benefit payments consistent with the plan terms by stating, "[t]he Estate's claim therefore stands or falls by 'the terms of the plan,' § 1132(a)(1)(B), a straightforward rule of hewing to the directives of the plan documents that lets employers 'establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits."¹¹³⁷

1132. Treas. Reg. § 1.401(a)-13(e) (as amended in 1988).

1133. *Boggs*, 520 U.S. at 854 (emphasis added).

1134. *Egelhoff*, 532 U.S. at 150.

1135. *Id.* at 148 (citing *Dillingham Constr.*, 519 U.S. at 330).

1136. *Id.*

1137. *Kennedy*, 555 U.S. at 300 (citations omitted).

The Alienation Prohibition serves a very useful purpose under this interpretation.¹¹³⁸ The Prohibition leaves no question that the terms of a Spousal Survivor Benefit Plan may not permit payments of benefits to persons other than plan participants or beneficiaries except as specified in ERISA and its associated regulations. Those rules, as discussed *supra*, permit sponsors to choose the conditions, if any, under which to permit payments to third parties at the direction of participants or beneficiaries. Similarly, the Spousal Survivor Benefit Mandate leaves no question that Spousal Survivor Benefit Plans must provide the spousal benefits set forth in ERISA and its associated regulations. In contrast, sponsors of ERISA plans other than Spousal Survivor Benefit Plans, as discussed *supra*, may choose the conditions, if any, under which to permit (1) benefit assignments,¹¹³⁹ (2) payments to third parties at the direction of participants or beneficiaries, or (3) the attachment of plan benefits.

XVIII. ERISA PREVENTS A STATE LAW CREDITOR OF A
SPOUSAL SURVIVOR BENEFIT PLAN PARTICIPANT OR
BENEFICIARY FROM WRESTING THE PLAN BENEFIT
FROM THE PARTICIPANT OR BENEFICIARY

Congress used the Alienation Prohibition to further the ERISA dominating general purpose of protecting plan participants and beneficiaries by severely limiting the ability of creditors to obtain benefits from participants and beneficiaries of Spousal Survivor Benefit Plans. Before the enactment of ERISA, state law often limited the ability of creditors to (1) garnish the pension benefit payments to participants and beneficiaries, or (2) wrest benefit distributions from pension plan participants or beneficiaries. The ERISA limitation of benefit claims to participants and beneficiaries protects ERISA plan participants and beneficiaries from any state law claim that arises from a participant's or beneficiary's right to an ERISA plan benefit, *i.e.*, a claim which would disappear if the participant or beneficiary did

1138. For purposes of this paragraph, we disregard the discussion, *infra*, showing how the Prohibition prevents creditors from wresting distributed benefits from participants and beneficiaries in Spousal Survivor Benefit Plans. Cf. LANGBEIN PENSION LAW, *supra* note 13, at 281-84 (discussing and questioning the wisdom of this policy).

1139. See Kevin Wiggins, *Medical Provider Claims: Standing Assignments and ERISA Preemption*, 45 J. MARSHALL L. REV. 861, 879-884 (2012) (discussing when health provider has been assigned a claim under an ERISA health care reimbursement plan), RESTATEMENT (THIRD) OF TRUSTS § 58 CMTS. A-A(2) at 395, 398-99 (2003) (restraints on alienation of trust interests are generally valid) and *Med. Univ. Hosp. Auth./Med. Cen. of Med. Univ. of S.C. vs. Oceana Resorts, LLC*, 2012 U.S. Dist. LEXIS 27897 (D.S.C. March 2, 2012) (a description of the recent case-law re assignability of medical claims).

not have the benefit right, by preempting such claimants from depriving the participant or beneficiary of plan benefits before or after their distribution. The Alienation Prohibition similarly protects participants and beneficiaries in Spousal Survivor Benefit Plans from any state law creditor claims that would otherwise deprive a participant or beneficiary of plan benefits before or after their distribution. However, plan terms may permit plan administrators to follow revocable directions of plan participants and beneficiaries to pay their benefits, in whole or in part, to another party. Again, there would have to be the same exception for state-law tax claims that arise from a participant's or beneficiary's right to a Spousal Survivor Benefit Plan's benefits to permit state-law tax claims to be used to wrest tax amounts from participants or beneficiaries. Otherwise, the states would be unable to tax participants and beneficiaries on their benefits, which, as discussed *supra*, is not the case.

This broad protection is consistent with the statutory language, the evolution of that language in the legislative process, similar federal protection for other retirement payments, the pre-ERISA state law protection of pension benefits, the regulation pertaining to the Alienation Prohibition, and how the Supreme Court interprets the ERISA protection of plan participants and beneficiaries. Nevertheless, many lower courts have issued unconvincing decisions to the contrary.

As discussed, *supra*, a person with a state law claim arising from a participant's or beneficiary's right to an ERISA plan benefit, other than a claim arising under a generally applicable criminal law,¹¹⁴⁰ may not compel the plan to pay it such benefit or wrest the benefit or the amount of the benefit from the participant or beneficiary. A state law claim arises from a participant's or beneficiary's right to an ERISA plan benefit if such claim would disappear, if the participant or beneficiary had not obtained the benefit. The Spousal Survivor QDRO Benefit Mandate, as discussed, *supra*, requires Spousal Survivor Benefit plans to incorporate QDROs as plan benefit terms, and thus make such state law claimants plan beneficiaries. The Alienation Prohibition prevents the terms of a Spousal Survivor Benefit Plans from permitting deference to any non-QDRO state law claims other than those arising under a generally applicable criminal law.¹¹⁴¹ The terms of a plan, other than a Spousal Survivor Benefit Plan, may provide for deference to any state law claim by treating the claimant as a plan beneficiary, such as by authorizing benefit

1140. ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4)(2012) (generally applicable criminal laws are excluded from the ERISA Express Preemption, thus, they may override plan terms).

1141. *But see* ERISA § 514(b)(8), 29 U.S.C. § 1144(b)(8) (2012) (state law claims for Medicaid recoveries, which are excluded from the ERISA Express Preemption, may also be enforced).

assignments, and thereby eliminate any preemption issue.

The Alienation Prohibition, as discussed, *infra*, protects participants and beneficiaries in Spousal Survivor Benefit Plans from claims not arising from a participant's or beneficiary's right to a benefit. The Prohibition prevents any person compelling a Spousal Survivor Benefit Plan to pay it the benefit of a participant or a beneficiary or from wresting the benefit from the participant or beneficiary with the exception of a person with a state law claim arising under a generally applicable criminal law.¹¹⁴²

A. *The Evolution of the Alienation Prohibition in the Development of ERISA Implies that Congress Intended to Prevent a State Law Creditor of a Participant or of a Beneficiary of a Spousal Survivor Benefit Plan from Wresting the Plan Benefit From the Participant or Beneficiary*

The Alienation Prohibition made at least two major changes to the pre-ERISA law. First, it reversed a long-standing federal tax policy. In 1956, many years before Congress considered ERISA and its precursors, the IRS had ruled that tax-qualified pension plans could permit the creditors of participants and beneficiaries of such plans to attach the plan interests of such persons.¹¹⁴³ The tax qualification counterpart of the Alienation Prohibition that has always been part of ERISA prohibits such provisions. Second, it dramatically enhanced the federal protections against the alienation of pension benefits. In 1968, six year before adopting ERISA, Congress had limited the ability of creditors to garnish a person's disposable earnings, which included periodic pension payments.¹¹⁴⁴ However, Congress did not limit the garnishment of non-periodic pension payments. The Alienation Prohibition replaced the wide variety of state laws that restricted the transfer of pension benefits, but as discussed *infra*, often permitted creditors to attach or be assigned such benefits, with a much more wide-ranging protection for participants and beneficiaries of Spousal Survivor Benefit Plans.

The precursor of the Alienation Prohibition seemed to have first appeared on May 11, 1972, in a bill that Senators Harrison Williams and Jacob Javits introduced and was included within the vesting requirements of S. 3598¹¹⁴⁵ as follows:

Section 202(a)(2): *the pension benefits provided under the terms of a pension plan, and the interest in a profit-sharing- retirement plan referred to in subparagraph (B) of paragraph (1) [vested benefits of*

1142. *Id.*

1143. Rev. Rul. 56-432; 1956-2 C.B. 284 rendered obsolete by Rev. Rul. 80-27; 1980-1 C.B. 85.

1144. Consumer Credit Protection Act, Pub L. No. 90-321, § 302(a), 82 Stat. 146 at 163 (1968).

1145. S. 3598, 92nd Cong. Title II—Vesting and Funding Requirements, Part A—Vesting Requirements, (2d. Sess. 1972).

profit-sharing plan] *shall not be capable of assignment or alienation* and shall not confer upon an employee, personal representative, or dependent, or any other person, any right or interest in such pension benefits or profit-sharing-retirement plan, capable of being assigned or otherwise alienated except that where a plan fails to make appropriate provisions therefor, the Secretary shall, by regulation, provide for the final disposition of plan benefit or interests when beneficiaries cannot be located or ascertained within a reasonable time.¹¹⁴⁶

The report that accompanied the bill as reported in September of 1972 by the Senate Committee on Labor and Public Welfare¹¹⁴⁷ described it as follows:

Vested plan benefits acquired under the Act may not be assigned or alienated, except that where a plan fails to make such provision, the Secretary shall be required to provide for final disposition of such benefits.¹¹⁴⁸

However, although, the bill restriction does not appear to have been limited to vested benefits,¹¹⁴⁹ such a characterization continues to describe the similar provision in the Senate bill considered by the Conference Committee staff in 1974.¹¹⁵⁰

No change was made to the alienation prohibition when it was presented on January 4, 1973 as part of the Senate bill S.4.¹¹⁵¹ The outline of the major provisions of the bill referred to the alienation prohibition using the same words¹¹⁵² that had been used in Senate Report No. 92-1150 and were quoted *supra*. Those words were again repeated in the report issued when the Senate Committee on Labor and Public Welfare reported out the bill with amendments not affecting the alienation prohibition on April 18, 1973.¹¹⁵³

On September 19, 1973, the Senate approved without any nay votes H.R. 4200, which had an amalgamation of S.4 and S.1179 together with tax provisions pertaining to spousal survivor

1146. Id. § 202(a)(2) at 25-26 (emphasis added).

1147. S. REP. NO. 92-1150, 92nd Cong., 2d Sess., (1972) (the provision became § 202(a)(4)).

1148. S. REP. NO. 92-1150, at 18 (1972) (emphasis added).

1149. However, there is such limitation on the protection for the benefits of a profit-sharing plan but not for the benefits of other pension plans. See S. 3598, § 202(a)(4) (1972).

1150. Summary of Differences Between the Senate and the House Versions of H.R. 2 to Provide for Pension Reform, Part One—Participation Vesting, Funding, Actuaries, Jurisdiction and Portability at 25 (May 15, 1974) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5151, 5178.

1151. Retirement Income Security for Employees Act, S.4, 93d Cong. § 202(a)(4) at 27 (1st Sess. 1973), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 93, 119.

1152. ERISA LEG. HISTORY, *supra* note 165, at 190, 193.

1153. S. REP. NO. 93-127, 93rd Cong., 1st Sess., 39 (1973) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 587, 625.

pension benefits for members of the military.¹¹⁵⁴ However, in that bill, the alienation prohibition was no longer an independently enforceable obligation, but only the following simplified plan tax qualification requirement:

A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that *benefits provided under the plan may not be assigned or alienated* unless the beneficiary thereof cannot be located or ascertained within such reasonable period of time as the Secretary or his delegate may prescribe by regulation.¹¹⁵⁵

This provision remained unchanged in the H.R. 2 bill approved by the Senate on March 4, 1974¹¹⁵⁶ and sent to the Conference Committee. The same provision also appeared in the tax qualification provisions of, H.R. 10470, which was introduced on September 24, 1973 and had copied almost all of H.R. 4200 as passed by the U.S. Senate on September 19, 1973, and as discussed, *supra*, was a starting point for discussion of pension reform in the House and Ways Committee.¹¹⁵⁷ The following day, September 25, 1973, a rephrasing of the original S.4 proposal appeared in H.R. 10489,¹¹⁵⁸ which was introduced by the ranking Republican on the House Committee on Education and Labor, but forwarded to the House Ways Committee. As was the case with the Senate bill, the bill included the following independent obligation, which was among the bill's vesting protections:

The benefits provided under the terms of a pension plan shall not be capable of assignment or alienation and shall not confer upon an employee, personal representative, or dependent, or any other person, any right, or interest in such benefits, capable of being assigned or otherwise alienated: except that where a plan fails to make appropriate provisions therefor, the Secretary shall, by regulation, provide for the final disposition of plan benefits or interests when beneficiaries cannot be located or ascertained within a reasonable time.¹¹⁵⁹

This bill was never reported out of the House Ways and Means Committee, but as discussed, *infra*, similar provisions appeared in the bill reported out by the House Committee on Education and Labor.

On February 5, 1974, House Ways and Means reported out

1154. ERISA LEG. HISTORY, *supra* note 162, at 1881-82. See generally ERISA POLITICAL HISTORY, *supra* note 164, at 212-16.

1155. H.R. 4200, 93d Cong., § 261(a) (1st Sess. 1973) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 1947 (emphasis added).

1156. Retirement Income Security for Employee Act, H.R. 2, 93d Cong. § 261(a) (2d Sess. 1974), ERISA LEG. HISTORY, *supra* note 165, at 3664.

1157. ERISA POLITICAL HISTORY, *supra* note 164, at 224.

1158. H.R. 10489, 93d Cong. (1st Sess. 1973).

1159. ERISA POLITICAL HISTORY, *supra* note 164, at 75 (emphasis added).

H.R. 12481,¹¹⁶⁰ which contained the following tax-qualification requirement:

A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that *benefits provided under the plan may not be assigned or alienated*. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment for the purpose of paying premiums on life, medical, or hospital insurance or for any noncommercial and nonprofit purpose specified under regulations prescribed by the Secretary or his delegate.¹¹⁶¹

The only difference from the corresponding Senate bill provision is the inclusion of an exception for small voluntary and revocable assignments rather than for dispositions of benefits of missing participants or beneficiaries.

The first description of the purpose of the prohibition appears in the House report that accompanied H.R. 12481. This explanation was part of the explanation of the vesting provisions of the bill, and followed the explanation of the provision requiring that benefits not be reduced on plan mergers. In particular, the prohibition is “[t]o further insure that the employee’s accrued benefit is actually available to retirement purposes.”¹¹⁶² Moreover, the report describes the 10% exception as intended to reinforce this purpose as follows:

Nevertheless, a plan will be permitted to provide for *voluntary and revocable assignments* (not to exceed 10 percent of any benefit payment) for the purpose of paying premiums on his life insurance, on medical or hospital insurance, or for any noncommercial and nonprofit purposes specified under Treasury regulations. Your committee understands that many plans provide for payments of premiums for supplemental hospital benefits (under the Social Security Act) and this provision is intended to specifically permit such an alienation. Your committee dealt specifically with life, medical, and hospital insurance premiums because such premiums are in many cases already paid by plans out of pension benefits for the convenience of the plan retirees. Your committee determined to permit reasonable flexibility to extend this practice to other types of payments in the future, concluding that *the safeguards* (revocability, 10-percent limit, and Treasury regulations) *would be sufficient to prevent abuses which might endanger the right of future retirees to be secure in their retirement incomes*.¹¹⁶³

1160. H.R. 12481, 93d Cong. (1st Sess. 1973) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2394-2583.

1161. H.R. 12481, 93d Cong. § 1021(c) at 77-78 (2d Sess. 1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2394, 2470-71 (emphasis added).

1162. Private Pension Tax Reform, H. REP. NO. 93-779 at 66 (2d Sess. 1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2584, 2655.

1163. Private Pension Tax Reform, H. REP. No. 93-779 at 67 (1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2584, 2656 (emphasis added)

There was no indication that the purpose of the prohibition was to permit a plan administrator to get rid of benefits, which are due and payable, simply by paying them over to the participant or beneficiary entitled to those benefits, and thereby protect such person from being harassed or obstructed by the imposition of a duty to determine at his peril the validity of assignments, third party orders, executions or any kind of document purporting to constitute legal process.

On February 21, 1974, the Ways and Means Committee committed to the House a substitute, H.R. 12855, as discussed, *supra*. The report that accompanied the bill, like the one accompanying H.R. 12481, also described the purpose of the prohibition as “[t]o further insure that the employee’s accrued benefit is actually available to retirement purposes.”¹¹⁶⁴ This bill simplified the 10% exception by omitting the language limiting the use of the voluntarily assigned pension benefit.¹¹⁶⁵

The House Education and Labor Committee took a different approach. On February 13, 1974, Representative John Dent introduced H.R. 12781,¹¹⁶⁶ which was referred to the House Committee on Education and Labor. Like H.R. 10489 discussed *supra*, the vesting part¹¹⁶⁷ required pension plans to prohibit assignments, albeit in this case in the section governing the distribution of benefits.¹¹⁶⁸ In particular, the section provided that:

Section 204(d). Each pension plan to which this part [the vesting requirements for pension plans] or part I of this subtitle [the fiduciary responsibility requirements for all plans] applies shall provide that *benefits provided under the plan may not be assigned or alienated*. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment.¹¹⁶⁹

Although quite similar to the provision in the final House Ways and Means proposed bill, H.R. 12855, it differs in two substantial manners. First, it is unaffected by whether the pension plan is tax-qualified. Second, a participant has the right to prevent the assignment or alienation, which is not the case if the

(omitting a discussion at the end describing the provision permitting plan benefits to be used to secure loans) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2584, 2656 (emphasis added) (discussing at the end the provision permitting plan benefits to be used to secure loans).

1164. Private Pension Tax Reform, H.R. REP. NO. 93-807 at 68 (2d Sess. 1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 3115, 3188.

1165. H.R. 12855, 93d Cong. § 1021(c) at 79 (2d Sess. 1974) *reprinted in* ERISA LEG. HISTORY, *supra* note 165, at 2924, 3002.

1166. H.R. 12781, 93d Cong. (2d Sess. 1974).

1167. *Id.* at Part 2 of Subtitle B-The Regulatory Provisions of Title I - REGULATION OF EMPLOYEE BENEFIT PLANS, *i.e.*, the bill sections with numbers in the 200s.

1168. *Id.* at Sec 204(d).

1169. *Id.*

prohibition is a requirement for tax qualification.

On February 20, 1974, Representative John Dent introduced and submitted to the House Committee on Education and Labor, H.R. 12906,¹¹⁷⁰ which as discussed *supra*, replaced H.R. 12781,¹¹⁷¹ and was presented to the whole House in the same manner as H.R. 12855 was presented by the Ways and Means Committee. In this revision the substantive requirement prohibiting the alienation of benefits was moved in an unchanged form to the section setting forth fiduciary responsibilities.¹¹⁷² Representative Carl Perkins presented a summary of the bill to the House on February 25, 1974.¹¹⁷³ Representative Perkins did not explain why the provision was moved away from the vesting section but described the purpose and substance of the provision as follows:

To further insure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring that plan to provide that benefits may not be assigned or alienated. (Of course, this provision is not intended to prevent transfer of benefit rights from one qualified plan to another.)

Nevertheless, a plan will be permitted to provide for voluntary and revocable assignments (not to exceed 10 percent of any benefit payment).

Your committee understands that many plans provide for payments of premiums for supplemental hospital benefits (under the Social Security Act) and this provision is intended to specifically permit such an alienation. Your committee determined to permit reasonable flexibility to extend this practice to other types of payments in the future, concluding that the safeguards (revocability, 10% limit, and regulations) would be sufficient to prevent abuses, *which might endanger the right of future retirees to be secure in their retirement income.*¹¹⁷⁴

This is quite similar to the description of the similar tax qualification provision in the House report that accompanied H.R. 12481 discussed, *supra*. Again, there was no indication that the purpose of the prohibition was to permit a plan administrator to get rid of benefits, which are due and payable, simply by paying them over to the participant or beneficiary entitled to those benefits, and thereby protect such person from being harassed or

1170. Employee Benefit Security Act, H.R. 12906, 93d Cong. (2d Sess. (1974) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 2761-2923.

1171. ERISA POLITICAL HISTORY, *supra* note 164, at 237.

1172. Employee Benefit Security Act, H.R. 12906, 93d Cong. § 111(I) at 59 (2d Sess. 1974) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 2761, 2819.

1173. 120 CONG. REC. 3977-4001 (Feb 25, 1974), reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3293-3350.

1174. ERISA LEG. HISTORY, *supra* note 165, at 3332 (omitting the discussion at the end about permitting plan benefits to secure plan loans).

obstructed by the imposition of a duty to determine at his peril the validity of assignments, third party orders, executions or any kind of document purporting to constitute legal process.

The H.R. 2 bill, which was approved by the House and sent to the Conference Committee on February 28, 1974¹¹⁷⁵ included both approaches, the substantive prohibition in Title I and the tax qualification prohibition in Title II as discussed, *supra*.¹¹⁷⁶ The Administration in its comments to the Conference Committee, as discussed, *supra*, expressed no view with respect to the different approaches to the alienation prohibition within the House bill or between those approaches and the Senate's tax-qualification approach with no 10% exception. The Committee staff as discussed, *supra*, recommended acceptance of the 10% voluntary payment exception to the alienation prohibition.¹¹⁷⁷

The Conference Committee proposed language,¹¹⁷⁸ which it described after a description of the spousal survivor pension provisions as follows:

Under the conference substitute, *a plan must provide that benefits under the plan may not be assigned or alienated*. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for purposes of defraying the administrative costs of the plan. For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment. Vested benefits may be used as collateral for reasonable loans from a plan, where the fiduciary requirements of the law are not violated.¹¹⁷⁹

There was no mention of the prohibition in the floor discussion for either the House or the Senate.

Congress accepted the Conference Committee's recommended language for the substantive requirement in Part 2—Participation of Subtitle B—Regulatory Provisions of Title I—Protection of Employee Rights of ERISA. The language follows:

Section 206(d)(1): *Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.*

(2) For the purposes of paragraph(1) of this subsection, there shall

1175. Employee Benefit Security Act, H.R. 2, 93d Cong. (2d Sess. 1974) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3898-4250.

1176. Employee Benefit Security Act, H.R. 2, 93d Cong. §§ 111(I), 1021(c) (2d Sess. 1974) reprinted in ERISA LEG. HISTORY, *supra* note 165, at 3898, 3956, 4136.

1177. Summary of Differences, Part I at 25-26 reprinted in ERISA LEG. HISTORY, *supra* note 165, at 5151, 5178-79.

1178. ERISA Conference Report at 45 reprinted in ERISA LEG. HISTORY, *supra* note 165, at 4277, 4320 (emphasis added).

1179. ERISA Conference Report at 280 reprinted in ERISA LEG. HISTORY, *supra* note 165, at 4277, 4547 (emphasis added) (omitting a footnote about the effective date).

not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1).¹¹⁸⁰

The statute and its precursors consistently use the phrase "benefit payment" in the only exception to the prohibition, which applies to the more general term "benefits." This distinction suggests that Congress may have intended that the prohibition applies not only to benefit payments by the plan, but to the benefit distributions that have been received by a plan participant or beneficiary of a Spousal Survivor Benefit Plan.

Post-distribution protection is further supported by the Congressional reports, which used identical words to describe the Alienation Prohibition and the similar tax qualification provision which were both incorporated into ERISA. Those reports describe the prohibition as intended to "insure [that] to the *employee's accrued benefit is actually available to retirement purposes.*" This would be meaningless insurance if ERISA merely prevents a creditor from obtaining the benefit from the plan administrator. In such case, the benefit payment, which is almost always deposited into an account in the name of the participant or beneficiary with an American financial institution, could be immediately garnished by the creditor. Thus, the participant or beneficiary would be prevented from using such benefits for retirement purposes.

Finally, there is not a scintilla of evidence that Congress included the prohibition to permit a plan administrator to get rid of benefits, which are due and payable, simply by paying them over to the participant or beneficiary entitled to those benefits, and thereby protect such person from being harassed or obstructed by the imposition of a duty to determine at his peril the validity of assignments, third party orders, executions or any kind of document purporting to constitute legal process.

Thus, there seems no logical basis for denying the obvious conclusion that Congress intended to protect participants and beneficiaries in Spousal Survivor Benefit Plans with the Alienation Prohibition. Nor is there any reason to believe that Congress would have intended to provide the meaningless protection that would result from not protecting distributed

¹¹⁸⁰ Pub. L. No. 93-406, § 206(d)(1), 88 Stat 829, 864-65 (1974) (emphasis added).

benefits.

B. Justice Cardozo's Analysis of the Alienation Prohibition Provisions of the New York Workers Compensation Law Regulation Implies that the ERISA Alienation Prohibition Prevents a State Law Creditor of a Participant or of a beneficiary of a Spousal Survivor Benefit Plan from Wrestling the Plan Benefit From the Participant or Beneficiary

Justice Benjamin Cardozo's analysis of the purpose of the alienation prohibition of the New York workers compensation law may be applied *mutatis mutandis* to show that the Alienation Prohibition protects participants and beneficiaries in Spousal Survivor Benefit Plans from their creditors or others trying to alienate their benefits before and after the payment of their plan benefits. In particular, Justice Cardozo relied on the purpose of workers compensation benefits to conclude in 1928 in the majority opinion of *Surace v. Danna*,¹¹⁸¹ that a creditor could not wrest the benefit payments from a former worker under a statute protecting "benefits due under this [workers compensation] chapter" from creditors.¹¹⁸² In this case, the creditor obtained a judgment after the worker received the payment of a lump sum award of workers compensation.¹¹⁸³

The dissent cited a Supreme Court decision pertaining to veterans' benefits, *McIntosh v. Aubrey*,¹¹⁸⁴ for the proposition that the creditors could wrest away the workers compensation benefit payments. However, the veterans' benefit statute at issue therein prohibited the attachment of the "the sum of money due, . . . whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto."¹¹⁸⁵ Justice Cardozo easily distinguished the veteran's statute attachment prohibition as intended to be limited to the government payment of the benefit.¹¹⁸⁶

Justice Cardozo's majority opinion rejected the dissent's argument¹¹⁸⁷ that the purpose of the exemption was to

direct[] a mode of procedure by which the State or the employer may be enabled to get rid of compensation, which is due and payable, simply by paying it over to the person to whom it has been awarded or to whom it is payable under the statute. The agent, public or private, who makes the disbursement shall not be harassed or obstructed by the imposition of a duty to determine at his peril the validity of assignments, third party orders, executions or any kind of

1181. *Surace v. Danna*, 161 N.E. 315 (N.Y. 1928).

1182. *Id.* at 317.

1183. *Id.* at 315.

1184. *McIntosh v. Aubrey*, 185 U.S. 122 (1902).

1185. *Id.* at 124.

1186. *Surace*, 161 N.E. at 317.

1187. *Id.* at 318.

document purporting to constitute legal process.¹¹⁸⁸

Justice Cardozo then declared in words applicable to the Alienation Prohibition, whose purpose is to secure pension income in a statute whose dominating general purpose is the protection of plan participants and beneficiaries:

So narrow a construction thwarts the purpose of the statute. The Workmen's Compensation Law was framed to supply an injured workman with a substitute for wages during the whole or at least a part of the term of disability. He was to be saved from becoming one of the derelicts of society, a fragment of human wreckage. . . .

The [creditor claim] exemption must have a meaning consistent with the policy behind it. Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension. The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity. Adherence to the letter will not be suffered to "defeat the general purpose and manifest policy intended to be promoted". . . .

. . . At the root of the exemption is something more benignant than bureaucratic formalism, a dislike of complicating documents. *The exemption like the compensation is for the protection of the man.*¹¹⁸⁹

Justice Cardozo observed that a contrary interpretation renders the exemption "next to futile" because a creditor may easily enforce claims immediately after the benefit payments are made.¹¹⁹⁰ Justice Cardozo also referred to an earlier holding of the New York Court of Appeals.¹¹⁹¹ In 1890, that court used the same reasoning to hold, in *Yates County National Bank v. Carpenter*,¹¹⁹² that an exemption from execution for veteran's pensions applied to the veteran's home purchased with such payments.¹¹⁹³

An Indiana federal district court, however, reached an opposite conclusion in 1998 in *In re Weaver*,¹¹⁹⁴ with respect to Indiana workers compensation payments because of (1) that statute's focus on the duty of the employer to make such payments, and (2) the state case-law requirements of explicit protections for payments to be exempted from the enforcement of creditor claims.¹¹⁹⁵ The Indiana court made no reference to *Surace*, but made a McIntosh-like observation, without citing that decision, that an employer's compensation obligation ceased

1188. *Id.* at 317-18 (emphasis added).

1189. *Id.* at 315-16 (citations omitted) (emphasis added).

1190. *Id.* at 315.

1191. *Id.* at 317.

1192. *Yates County National Bank v. Carpenter*, 23 N.E. 1108 (N.Y. 1890).

1193. *Id.* at 1109. The court also declared that the exemption would cease if the proceeds were used for "trade, commerce, or speculation, and become mingled with other funds so as to be incapable of identification, or separation." *Id.*

1194. *In re Weaver*, 93 B.R. 172 (D. Ind. 1988).

1195. *Id.* at 174-75.

following its compensation payments.¹¹⁹⁶

C. The Alienation Prohibition Regulation is Consistent with the Alienation Prohibition Preventing a State Law Creditor of a Participant or of a Beneficiary of a Spousal Survivor Benefit Plan From Wresting the Plan Benefit From the Participant or Beneficiary

There are no DOL regulations on the Alienation Prohibition, but there is a Treasury regulation on the corresponding tax qualification section. Although, the Treasury decided not to address any preemption issues therein, the Treasury view of the wide-ranging effect of the similar tax qualification provisions designed to protect participants and beneficiaries of Spousal Survivor Benefit Plans implies that the Alienation Prohibition prevents creditors or others trying to alienate those benefits from wresting benefit payments from such participants or benefits. If not, those wide-ranging ERISA protections would be rendered nugatory except for those few pensioners, who could frustrate their creditors by not depositing their retirement income in accounts in their name with American financial institutions.¹¹⁹⁷

In February 1978, the Department of Treasury issued Treasury Regulation § 1.401(a)-13 pertaining to the tax-qualification provision similar to the Alienation Prohibition.¹¹⁹⁸ The Treasury regulations described the statutory prohibition for the alienation and assignment of benefits as follows:

General rule. Under section 401(a)(13) [26 U.S.C. § 401(a)(13)], a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.¹¹⁹⁹

Although the Treasury regulation does not define the

1196. *Id.*

1197. Susan Burhouse and Yazmin Osaki, FDIC National Survey of Unbanked and Underbanked Households 3 (September 2012) available at http://www.fdic.gov/householdsurvey/2012_unbankedreport_execsumm.pdf (last visited Jan. 30, 2014) (describing that in September of 2012 the Federal Deposit Insurance Corporation determined that 8.2 per cent of households had no checking or savings account).

1198. 43 Fed. Reg. 6943-44 (Feb. 17, 1978). The final regulations added, without explanation or statutory basis, a provision, Treas. Reg. § 1.401(a)-13(e) (amended 1988), permitting a participant or beneficiary to direct in a revocable fashion that all or part of his benefit payments be made to another person. *Cf.* Initial draft at 41 Fed. Reg. 56334 (Dec. 28, 1976). As discussed, *infra*, spendthrift trusts could permit such directed payments, but it appears that Congress wished to limit such directed payments to at most 10% of the benefit payment. *See* ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2) (first sentence sets forth such a limit).

1199. Treas. Reg. § 1.401(a)-13(b)(1) (as amended in 1988).

statutory phrase “assignment and alienation,” the regulations encompass almost any benefit payment to a party other than the plan participant or beneficiary, not otherwise permitted, with the following language:

(1) In general. For purposes of this [tax-qualification] section, the terms “assignment” and “alienation” *include*—

(i) Any arrangement providing for the payment to the employer of plan benefits which otherwise would be due the participant under the plan, and

(ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.¹²⁰⁰

The Treasury declared when it issued this regulation

As the Internal Revenue Service does not have the authority to prescribe regulations under Title I of ERISA, which includes section 514 [preemption], these regulations do not address this issue.¹²⁰¹

At such time the Treasury similarly lacked authority to address section 206 of Title I of ERISA, *i.e.*, the Alienation Prohibition.¹²⁰² Thus, the impact of the regulation on determining which state laws are preempted by the Alienation Prohibition would appear to be uncertain.¹²⁰³ The Supreme Court, however, mooted the issue by describing, without any discussion, the regulations as applicable to the Prohibition.¹²⁰⁴ It would, however, seem reasonable to conclude that whether the regulation governs or merely casts light on the interpretation of the Alienation Prohibition, the Prohibition would prohibit all the transfers

1200. *Id.* § 1.401(a)-13(c)(1) (as amended in 1988) (emphasis added).

1201. 43 Fed. Reg. 6942 at 6942 (Feb. 17, 1978).

1202. Such authority would not seem to rest on 29 C.F.R. § 2509.75-10, (issued on January 22, 1976), which permitted plan sponsors to rely on Tax Information Release 1411 (issued in December of 1975) in drafting plans that complied with ERISA because the issue is not the requisite plan terms, but the implications of those plan terms. The Service obtained the responsibility for issuing regulations with respect to the Alienation Prohibition, while the DOL retained jurisdiction over the preemption sections in Title III of ERISA under Sections 101(a) and 104 of Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Oct. 17, 1978), respectively. Although, under Section 109 this reorganization was not effective until December 31, 1978, reliance of the Reorganization Plan may be based on the amendment to the regulations that took into account the enactment of REACT. *See* 53 Fed. Reg. 31, 850 (August 22, 1988). *See also* *Guidry v. Sheet Metal Worker Local Unions*, 10 F.3d 700, 709 (10th Cir. 1993) [hereinafter “*Guidry II*”] for a discussion of the government’s authority to issue the regulation pertaining to the Alienation.

1203. This could explain the Justice Department’s disregard of the regulation’s position in their *Stone* DOL Brief described, *supra* note 480, pertaining to the ERISA effects of a state domestic relations order.

1204. *Guidry*, 493 U.S. at 371-72.

described in the regulations so that the Prohibition provides protections for participants and beneficiaries at least as extensive as the regulation.

The regulation is a Treasury regulation for the tax qualification section corresponding to the Alienation Prohibition. Thus, the regulation only addresses plan behavior. As discussed *supra*, the regulation does not address the right of a plan participant or beneficiary to keep benefit payments. The regulation is nevertheless useful in determining the extent of those protections under the Alienation Prohibition.

The purpose of the Alienation Prohibition is, as discussed *supra*, to assure that Spousal Survivor Benefit Plan benefits are “actually available to retirement purposes.” Therefore, the tax regulation implies that the Alienation Prohibition prohibits any additional transactions that would put the participant’s benefits at risk, but are not pertinent to the regulation focus on plan qualification, and thus not mentioned in the regulation. In particular, the Alienation Prohibition bans attempts to wrest benefit payments from plan participants and beneficiaries, which would prevent the benefits from being used for retirement purposes.

D. The Federal Protection of Other Retirement Benefits Implies that the Alienation Prohibition Prevents a State Law Creditor of a Participant or of a beneficiary of a Spousal Survivor Benefit Plan From Wresting the Plan Benefit From the Participant or Beneficiary

There is little basis for believing that in 1974, the year ERISA was enacted, Congress, which had secured potent protection for rights to social security retirement benefits, veterans’ pension benefits, civil service retirement benefits,¹²⁰⁵ and railway worker retirement benefits, did not do the same for private retirement benefits under an act that Congress entitled the Employee Retirement Income Security Act. The customary state law creditor enforcement tools, such as attachments, garnishments, and levies, which are mentioned in the regulation associated with the Alienation Prohibition, may not override those benefit rights. None of the federal statutes may be distinguished from ERISA on

1205. Pension benefits from the Civil Service Retirement System are provided only in the form of annuity benefits. 5 U.S.C. § 8345. Congress increased the amount of those benefits in April of 1974. Pub. L. No. 93-273, 88 Stat 993 (1974). However, the Federal Employees’ Retirement System adopted in 1986 gave federal employees the right to contribute part of their compensation plan to the Federal Thrift Saving Plan and the right to obtain their benefits in the form of a lump sum payment or in the form of annuity payments. Federal Employees’ Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat 514 (1986). *See generally* Your TSP Account A Guide for Beneficiary Participants (August 2013) available at <https://www.tsp.gov/PDF/formspubs/tspb33.pdf> (last visited Jan. 30, 2014).

the basis that they add words to the Alienation Prohibition phrase “not be assigned or alienated,” because none use the term “alienation.”¹²⁰⁶ However, in 1974, it was reasonable for Congress to believe that each prevented creditors from wresting retirement benefit payments from a debtor if the benefit payments had been retained in readily withdrawable form.¹²⁰⁷

In 1974, the Social Security Act (“SSA”) protected social security benefits from alienation as follows:

The right of any person to any future payment under this title [42 U.S.C. §§ 401 et seq.] shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable or rights existing under this title* [42 U.S.C. §§ 401 et seq.] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.¹²⁰⁸

The same language was in the initial 1935 enactment, whose prohibition also included “attachments,” but did not mention “alienations.”¹²⁰⁹ In 1973, before the enactment of ERISA, the Supreme Court, in *Philpott v. Essex County Welfare Board*,¹²¹⁰ emphasized the extent of the SSA protection of social security distributions by holding that social security payments retained the quality of money by remaining in “readily withdrawable” form.¹²¹¹ In particular, the Court held social security benefits on deposit in a bank account were not subject to attachment by the local welfare board.¹²¹² However, the SSA statutory language is very similar,

1206. *But see* Lisa M. Smith, *ERISA Qualified Pension Plans as Part of the Bankruptcy Estate after Patterson v. Shumate*, 21 CARDOZO L. REV. 2119, 2149 (2000) (arguing that the statutes governing social security, veteran’s benefits and railway retirement benefits, unlike ERISA, explicitly protected benefit distributions).

1207. This article will not discuss the extent to which the Alienation Prohibition protects benefit payments that do not remain in readily withdrawable form. This is more of an issue with ERISA than with the other retirement benefits. ERISA benefits, unlike those other benefits are often not paid in an annuity form. It is reasonable to expect that annuity payments will be used immediately for retirement expenses. Instead, ERISA benefits are often paid in a lump sum, which a recipient is expected to invest to provide for his or her retirement or for other purposes. Thus, recipients are permitted to defer taxes on such lump sums until and to the extent these amounts are distributed, if they are rolled over into an appropriate account. Code § 402(c)(2012).

1208. 42 U.S.C. § 407 (2012), SSA § 207 (2012).

1209. The section number was changed to the current section number on August 10, 1939, by ch. 666, Title II, § 207, 53 Stat. 1372. The original section number was § 208 of the SSA enacted on August 14, 1935, by ch. 531, Title II, § 208, 49 Stat. 625.

1210. *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973).

1211. *Id.* at 416.

1212. *Id.* at 415-16. However, in 1974 Congress amended the law to permit localities to recoup any payments the localities had made on behalf of SSI recipients. Pub. L. 93-368 § 5, (2d. Sess. 1974), 88 Stat. 420 (codified 42 U.S.C. § 1383).

but much narrower, than the language in the regulations for the Alienation Prohibition discussed, *supra*. In particular, *infra*, ERISA protection is not limited to benefit payments, or to traditional concepts of legal process or assignment.¹²¹³

In 1974, the Veteran's Benefit Act protected veterans' benefits, including pension benefits, as follows:

Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and *such payments made to, or on account of, a beneficiary* shall be exempt from taxation, *shall be exempt from the claim of creditors*, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, *either before or after receipt by the beneficiary*. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this *title* [38 U.S.C. §§ 1901 et seq.], or of servicemen's indemnity.¹²¹⁴

This language is similar to that used in its 1935 predecessor, whose prohibition also included "attachments," but did not mention "alienations."¹²¹⁵ In 1937, the Supreme Court, which included Justice Cardozo, held unanimously, in *Lawrence v. Shaw*,¹²¹⁶ that the explicit post-payment creditor protection for a veteran's benefit payments applied to those bank deposits that were not treated as investments.¹²¹⁷ Chief Justice Hughes declared therein:

We cannot conceive that it was the intent of Congress that the veteran should lose the benefit of this immunity, which would attach to the moneys in his hands, by depositing the government warrants or checks in bank to be collected and credited in the usual manner. *These payments are intended primarily for the*

1213. *Cf.* Washington State Department of Social and Health Services v. Keffeler, 537 U.S. 371 (2003) (permitting state to use SSI payments to reimburse itself for the cost of providing foster care for children on SSI because such usage was achieved without constituting an "execution, levy, attachment, garnishment, or other legal process.")

1214. 38 U.S.C. § 5301(a)(1) (2012).

1215. Act August 23, 1935 (c. 510, 49 Stat. 607, 609; 38 U.S.C. § 454a). Prior to such amendment the statute was in the form discussed, *supra* in McIntosh v. Aubrey, 185 U.S. 122 (1902).

1216. *Lawrence v. Shaw*, 300 U.S. 245 (1937).

1217. *Id.* at 250. The Court distinguished Trotter v. Tennessee, 290 U.S. 354 (1933) (holding that real estate purchased with benefit payments was not tax exempt under the predecessor statute, which the Lawrence Court described as having the same substantive terms, although that statute did not explicitly declare that (1) property purchased with such payments was not exempt from tax, or (2) payments received by beneficiaries were protected). *Id.* at 248.

*maintenance and support of the veteran. To that end neither he nor his guardian is obliged to keep the moneys on his person or under his roof.*¹²¹⁸

In 1939, the Supreme Court held in *Carrier v. Bryant*,¹²¹⁹ that the explicit post-payment creditor protection for a veteran's benefit payments did not apply to negotiable notes and United States bonds purchased with the benefit payments.¹²²⁰ On the other hand, in 1962, the Supreme Court held in *Porter v. Aetna Casualty & Surety Company*,¹²²¹ which the *Philpott* Court cited in its SSA analysis, that because "legislation of this type should be liberally construed . . . to protect funds granted by the Congress for the maintenance and support of the beneficiaries,"¹²²² investments of veteran's benefits in certain readily available bank accounts by members of savings and loan associations were protected, but the Court suggested that time deposits would be unprotected investments.¹²²³

In 1974, the Railway Retirement Act ("RRA") protected railway workers' retirement benefits as follows:

Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, *no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever*, nor shall the payment thereof be anticipated.¹²²⁴

This language, whose prohibition also included "attachments," but did not mention "alienations," was introduced when the legislation was enacted in 1935.¹²²⁵ Many courts held the statute implicitly protected benefits paid from creditor claims. For example, in 1978, an Illinois appellate court held in *Shrader v. Maultz*,¹²²⁶ that a default tort judgment arising from a car accident could not be enforced against a bank account whose assets consist solely of funds derived from the debtor's RRA pension payments.¹²²⁷

1218. *Id.* at 249-50 (emphasis added).

1219. *Carrier v. Bryant*, 306 U.S. 545 (1939).

1220. *Id.* at 550.

1221. *Porter v. Aetna Casualty & Surety Company*, 370 U.S. 159 (1962).

1222. *Id.* at 162.

1223. *Id.* at 161-62. *But see id.* at 162-63 (Douglas, J., concurring) (the funds, which may be readily liquidated, should be protected regardless of whether they were investments).

1224. 45 U.S.C. § 231m (2012) (emphasis added).

1225. Act of Aug. 29, 1935, ch. 812, § 14, as restated Act of Oct. 16, 1974, Pub. L. 93-445, Title I, § 101, 88 Stat. 1345.

1226. *Shrader v. Maultz*, 374 N.E.2d 819 (Ill. App. Ct. 1978). *But cf.* *Commonwealth of Pennsylvania v. Berfield*, 51 A.2d 523 (Pa. Super. Ct. 1947) (presuming the sole purpose of the creditor restraints was to relieve the federal govt. of dealing with legal process as was the case in *McIntosh*; thus creditor protections for paid out benefits were rejected).

1227. *Shrader*, 374 N.E.2d at 820.

The court relied on the *Philpott* analysis that if the benefit payments are kept in “readily withdrawable form,” the funds are protected from creditors.¹²²⁸ The correctness of the analysis was confirmed the following year by the Supreme Court in *Hisquierdo v. Hisquierdo*.¹²²⁹ The Court concluded that the provision not only prevented a former spouse from garnishing benefits paid to a participant but prevented her from wresting from the participant property, other than the benefit payments, whose value was equivalent to those payments.¹²³⁰

In 1974, the Civil Service Retirement (“CSR”) Act protected civil service retirement benefits as follows:

*The money mentioned by this subchapter [entitled Civil Service Retirement] is not assignable, either in law or equity, or subject to execution, levy, attachment, garnishment, or other legal process.*¹²³¹

This language, whose prohibition also included “attachments,” but did not mention “alienations,” was virtually identical to its predecessor, which was enacted in 1920,¹²³² and which has applied to members of Congress since 1946.¹²³³ Shortly after the enactment of ERISA, a 1978 Senate report declared that “Under existing law 5 U.S.C. § 8346(a), *payments under the civil service retirement system are not assignable or subject to . . . garnishment.*”¹²³⁴ However, there was some division in the pre-ERISA court decisions about this implicit exemption. On the one hand in 1938, a New York Court held without explanation in *In re Dickerson’s Estate*,¹²³⁵ that the protection extended not only to benefit payments to the former employee, but to payments to the former employee’s estate.¹²³⁶ On the other hand, in 1971, a Pennsylvania court held in *In re Estate of McGreevy*,¹²³⁷ that a retiree’s guardian must use the retiree’s accumulated civil service retirement payments to reimburse the state for the cost of caring for the guardian’s ward.¹²³⁸ The court asserted without explanation that the statutory language showed a Congressional intent to protect the retiree’s funds only “until the funds reach the

1228. *Id.* at 821.

1229. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

1230. *Id.* at 588.

1231. 5 U.S.C. § 8346(a) (2012) (emphasis added).

1232. Civil Service Retirement Act of 1920, Pub. L. No. 66-215 § 14, chap. 195, 614, 620 (1920).

1233. Katelin P. Isaacs, Retirement Benefits for Members of Congress, Cong. Res. Serv. RL30631, 1 (Nov. 30, 2012).

1234. S. REP. No. 95-1084, 95th Cong., 2d Sess., 2 (1978) reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1379, 1380 (emphasis added).

1235. *In re Dickerson’s Estate*, 5 N.Y.S.2d 86, 168 Misc. 54 (N.Y. New York Cty. Surr. Ct. 1938).

1236. *Id.* at 87 and 55.

1237. *In re Estate of McGreevy*, 286 A.2d 355 (Pa. 1971).

1238. *Id.* at 357.

hands of the recipients.”¹²³⁹ The court failed to consider Justice Hughes’s *Lawrence* point or Justice Cardozo’s *Surace* point, *i.e.*, the court interpretation thwarts the statutory intent of the exemption, *i.e.*, to protect a retiree’s benefits. Moreover, unlike *Surace*, there was no apparent disagreement that this was the purpose of the civil service attachment prohibition. After the 1974 enactment of ERISA, there seemed, as described in *In re Anderson*,¹²⁴⁰ to have been only one easily distinguished decision permitting creditor claims to be enforced against distributed civil service retirement benefits.¹²⁴¹

E. The Pre-ERISA State Law Protection of Retirement Benefits From Creditors Implies that the Alienation prohibition Was Intended to Prevent a State Law Creditor of a Participant or of a Beneficiary of a Spousal Survivor Benefit Plan From Wresting the Plan Benefit From the Participant or Beneficiary

The Alienation Prohibition, like other ERISA sections, addressed deficiencies in the protections the state laws provided to participants and beneficiaries of pension plans. The Alienation Prohibition gave those participants and beneficiaries more protection from creditors and others seeking to alienate their benefits.

Before the enactment of ERISA, three distinct kinds of state laws gave a pension plan participant or beneficiary limited protection from his or her creditors when the plan was funded with a trust.¹²⁴² First, the enforcement of money judgment provisions of the civil practice law permitted judgment creditors to obtain the beneficiary’s benefits from the plan’s trustees, but only if the beneficiary could obtain the benefit.¹²⁴³ Second, the spendthrift provisions of the law of trusts permitted the settlor of a trust to limit the ability of a creditor of a trust beneficiary to obtain the beneficiary’s benefits from the plan’s trustees.¹²⁴⁴ Third, the exemption provisions of the enforcement of money judgment provisions of civil practice law, limited the ability of a judgment

1239. *Id.* at 356.

1240. *In re Anderson*, 410 B.R. 289 (W.D. Mo. 2009).

1241. *But see* *In re Prestien*, 427 F. Supp. 1003 (S.D. Fl. 1977) (holding of no protection after benefit payments was based on *McIntosh*, although the language at issue may be distinguished as described in *Waggoner v. Game Sales Co., Inc.*, 702 S.W. 2d 808, 809 (Ark. 1986)).

1242. Similar protections applied to plans funded by insurance policies, which were subject to rules similar to those of spendthrift trusts. *See e.g.*, N.Y. EST., POWERS & TRUSTS LAW § 7-1.5(a)(1)(2) (as of January 1, 1974, LEXIS 2013) (insurance proceeds may not be transferred or subject to legal process except for necessities).

1243. *See e.g.*, N.Y. C.P.L.R. § 5201(a)-(b) (McKinney 2011) (describing the property subject to enforcement of a creditor’s claim as of January 1, 1974).

1244. *See e.g.*, Tex. Prop. Code § 112.035 (2013) entitled “Spendthrift Trusts” (excluding beneficial interests to the extent created by a settlor).

creditor of a trust beneficiary to obtain the beneficiary's benefits from either the trust¹²⁴⁵ or the beneficiary¹²⁴⁶ unless the creditor became entitled to the debt payments under the trust terms. There were often extensive exceptions to the protective features of these laws for fraudulent transfers, and for particularly worthy claims, such as those based on domestic relations, tort, or fraud, discussed *infra*.

The above protections, as discussed *infra*, do not fully apply to self-settled trusts, *i.e.*, those in which the beneficiary contributed the trust funds. There were questions, as discussed *infra*, about the extent to which pension plan trusts could be characterized as self-settled trusts since the pension benefits resulted from payments for the participant's services, and also about the extent to which creditors could obtain benefits when participants and beneficiaries had the right to demand benefit payments. These questions remain for pension plans not subject to ERISA, such as those restricted to owner-employees.¹²⁴⁷

A spendthrift trust is one in which the following two restrictions on alienation are valid: (1) the beneficiary may not alienate his or her interest, and (2) the beneficiary's creditors may not reach that interest in satisfaction of their claims.¹²⁴⁸ Life insurance policies may provide similar protections,¹²⁴⁹ although they are not trusts, and thus cannot be spendthrift trusts. However, under some state laws spendthrift trusts do not protect a beneficiary's interest, to the extent the beneficiary exercises the right to postpone taking a benefit distribution, to which he is immediately entitled.¹²⁵⁰ Thus, spendthrift trusts often give the trustee the discretion to decide when and to which beneficiaries to distribute income, or to pay only specified creditors on behalf of the beneficiary.¹²⁵¹

1245. *See e.g.*, N.Y. C.P.L.R. 5205(c) (McKinney 2011) (preventing creditors as of January 1, 1974 from enforcing a claim against beneficiary's interest while interest is in trust).

1246. *See e.g.*, N.Y. C.P.L.R. 5205(d) (McKinney 2011) (preventing creditors as of January 1, 1974 from enforcing a claim against beneficiary's interest after interest is distributed).

1247. 29 C.F.R. § 2510.3-3(b) (1975) (providing that pension plans covering only owner-employees are not ERISA plans).

1248. ERWIN GRISWOLD, SPENDTHRIFT TRUSTS: UNDER THE NEW YORK STATUTES, AND ELSEWHERE-INCLUDING INSURANCE PROCEEDS 2-3 (2d ed. 1947) ("GRISWOLD SPENDTHRIFT TRUSTS").

1249. *Id.* at 13. (Chapter III is entitled "Life Insurance Proceeds" for the state of law in 1947). *Cf.* N.Y. EST., POWERS & TRUSTS LAW § 7-1.5(a)(1)(2) (McKinney 2013) (as of January 1, 1974 insurance proceeds may not be transferred or subject to legal process except for necessities, while other interest is not given any spendthrift protections from legal process).

1250. *See e.g.*, RESTATEMENT (THIRD) OF TRUSTS §58 CMT. (B)(1) (2003) ("absence of ownership equivalence").

1251. *See* GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252, at 449. *See e.g.*, Stephen G. Gilles, The Judgment-Proof Society, 63 WASH. & LEE L. REV.

Spendthrift trusts protect beneficiaries from their judgment creditors in three distinct ways, which even if they were applicable, provided far more limited protection to participants and beneficiaries of retirement plans than Congress intended to provide with the Alienation Prohibition. This is because as the author of the standard spendthrift trust reference, Dean Erwin N. Griswold of the Harvard Law School wrote, “The *essence of the spendthrift trust lies in the inalienability of income to accrue in the future.*”¹²⁵² Thus, spendthrift trusts do not protect benefits from judgment creditors once the benefits have been distributed to a beneficiary.¹²⁵³ In contrast, the *essence of the Alienation Prohibition is the inalienability of retirement benefits*, so that benefit payments may be used to pay the retirement expenses of plan participants and beneficiaries. Thus, the Prohibition should protect the benefit payments from judgment creditors before and after their distribution.

The first spendthrift trust protection is the prohibition of transfers of benefit interests by beneficiaries to any person, including a creditor. If applicable, this feature is of limited utility to many of the participants and beneficiaries the Alienation Prohibition was designed to protect, namely those who cannot make such transfers because they need to use their distributions from Spousal Survivor Benefit Plans to pay their retirement expenses or to invest to produce sufficient funds to pay such expenses. On the other hand, this protects those people who may be attempted to sell their pension benefits to third parties at excessive discounts.¹²⁵⁴ This would seem to discourage lending to a beneficiary based on the beneficiary’s trust interest because such lender may not secure the loan by getting an interest in the trust. Thus, the lender would have to compete with other creditors to obtain its payments. The spendthrift prohibition prevents

603, 637 (2006). See also Barbara Hauser, *English Trusts from an American Perspective*, 9(1) TRUSTS & TRUSTEES 15, 19 (Nov. 2002) (describing how in England, which does not permit spendthrift trusts, settlors seek to protect beneficiaries from creditors with both distribution conditions and trustee discretion); SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 37-38, 199 (2d ed. 2002) (English settlors use “protective trusts,” which provide a beneficiary with a fixed interest until bankruptcy when trustee has discretion whether to give funds to other beneficiaries).

1252. GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252, at 449.

1253. See GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252, at 452-54. See also RESTATEMENT (SECOND) OF TRUSTS §152 CMT. (J) (1959) (“Income paid to beneficiary”) (pre-ERISA law). See also RESTATEMENT (THIRD) OF TRUSTS §58 CMT. (D) (2003) (“Effect of spendthrift restraint”) (post-ERISA law).

1254. This is a real risk as shown by pension-based loan abuses. See e.g., Jessica Silver-Greenberg, *Loans Borrowed Against Pensions Squeeze Retirees*, N.Y. TIMES, Apr. 27, 2013 at A1 (describing pension-based loans made at very high rates by pensioners seeking funds to pay their living expenses in exchange for commitments to pay lenders future pension payments often from accounts they established to give lenders easy access to those payments).

transfers of beneficial interests that are either voluntary—the debtor did not realize he was making such an assignment, or the debtor did not realize such assignments are prohibited—or involuntary—the creditor is trying to enforce his claim. However, this protection is “next to futile,” to use Justice Cardozo’s phrase, if there are creditors who may enforce claims after the trust distribution has been made.

The second spendthrift trust protection is the requirement that, unless otherwise directed by a beneficiary, spendthrift trusts may pay a beneficiary’s benefits only to the trust beneficiary, or to the extent specified in the trust on behalf of the beneficiary to a person, such as a provider of necessary goods to the beneficiary.¹²⁵⁵ If applicable, this feature is of limited utility to the participants and beneficiaries the Alienation Prohibition was designed to protect, namely those who needed to use their distributions from Spousal Survivor Benefit Plans to pay their retirement expenses, including many who receive and invest lump sum distributions to fund those expenses as was the case with the *Surace* debtor who received a workers’ compensation award in the form of a lump sum. In contrast, in one of the earliest spendthrift decisions a Massachusetts court held in 1882 in *Broadway National Bank v. Adams*,¹²⁵⁶ that a creditor could not enforce a claim against the semiannual income distributions from a trust until the money was distributed to his debtor.¹²⁵⁷ Perhaps in the 19th century it was difficult to identify and garnish funds from a person’s accounts with an American financial institution, but this was not the case in 1974 nor as is it now the case.

The third spendthrift trust protection is the prohibition on the attachment of beneficial interests that is not available for distribution. If applicable, this feature is of limited utility to many of the participants and beneficiaries the Alienation Prohibition was designed to protect, namely those who need to use their distributions from Spousal Survivor Benefit Plans to pay their retirement expenses. The feature is, however, quite useful to those persons who have no need for the trust income and can wait to obtain their income until they have no creditors, such as after a

1255. See e.g., GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252, at 377-79; RESTATEMENT (THIRD) OF TRUSTS §58 CMT. (D)(1) (2003) (“Rights of beneficiary’s purported transferees”). See also Treas. Reg. § 1.401(a)-13(e) (as amended in 1988) (incorporating this principle by exempting revocable payment directions from the Alienation Prohibition). ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012) would not appear to let ERISA fiduciaries choose whether to make such payments on behalf of a participant or beneficiary independent of a direction by such person. Plan terms determine the conditions, if any, under which a trustee must follow a beneficiary’s directions to pay a third person their interest. However, the trustee must follow the revocation of such authority.

1256. *Broadway National Bank v. Adams*, 133 Mass. 170 (1882).

1257. *Id.* at 174.

bankruptcy as was the case in the earliest Supreme Court decision in 1875 in *Nichols v. Eaton*,¹²⁵⁸ which endorsed spendthrift trusts in dicta.¹²⁵⁹ Such trusts with the addition of discretionary income features and friendly trustees are often used by the wealthy to help a beneficiary avoid the beneficiary's creditors, and are often called asset protection trusts.¹²⁶⁰ This feature could be of some assistance to those participants or beneficiaries of Spousal Survivor Benefit Plans who go bankrupt and wish to preserve their undistributed retirement assets. The major difficulty for pensioners, other than the possible inapplicability of the spendthrift trust rules, as discussed *infra*, is that this approach gives no protection to funds that have been distributed to the beneficiaries.

Moreover, the spendthrift protection is further limited as discussed, *supra*, by the allowance of the enforcement of claims for worthy obligations a thrifty person could incur. The Alienation Prohibition permits little such enforcement. In short, spendthrift trusts prevent the enforcement of judgments for claims that would be incurred by a wastrel. However, the trusts permit the enforcement of worthy claims to achieve the traditional purpose for a spendthrift trust, having the beneficiary spend his interest prudently.¹²⁶¹ Thus, before the enactment of ERISA creditors of a beneficiary of a spendthrift trust could enforce worthy claims against the beneficiary's interest in the trust, although different states defined worthy claims differently. For example, in 1947, Dean Erwin N. Griswold described the worthy claims to include obligations, such as domestic relations claims,¹²⁶² torts,¹²⁶³ federal and state claims,¹²⁶⁴ tax claims,¹²⁶⁵ trustee claims,¹²⁶⁶ or physician and attorney claims.¹²⁶⁷ Similarly, in 1959 the Second Restatement of Trusts described the following worthy claims allowable against spendthrift trusts: (1) claims based upon domestic relations; (2) claims for necessary supplies or services to the beneficiary; (3) claims for supplies or services that benefit the beneficiary; and (4) claims for federal or state obligations.¹²⁶⁸ Thus, Dean Griswold

1258. *Nichols v. Eaton*, 91 U.S. 716 (1875).

1259. *Id.* at 724-27.

1260. See generally Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

1261. GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252, at 387-88 (emphasis added).

1262. *Id.* at 388-403 (explaining such claims are often exempted from spendthrift restrictions by statute).

1263. *Id.* at 442-44.

1264. *Id.* at 403-04.

1265. *Id.* at 407-09.

1266. *Id.* at 412-16.

1267. *Id.* at 409-12.

1268. RESTATEMENT (SECOND) OF TRUSTS §157 CMT. (J) (1959) ("Particular Classes of Claimants"). The RESTATEMENT (THIRD) OF TRUSTS (2003) did not appear until many years after the 1974 enactment of ERISA.

described the state of the New York spendthrift law in 1947 as follows:

It thus appears that the New York statutes have now reached a very reasonable state of balance. A [spendthrift] trust may be created in which the proper requirements of the beneficiary and his family may be protected, but any further income (taking into account income from other sources as well) may be applied to the beneficiary's debts, as the court may deem proper.¹²⁶⁹

Creditors may collect their debts using the enforcement of judgment provisions of civil practice law. Thus, the relevant pre-ERISA question for pension participants and beneficiaries was the extent to which they were protected by exceptions to the enforcement of judgment provisions of civil practice law. State trust law determines whether a beneficiary has assigned any portion of his or her interest to a creditor, in which case the creditor may make a claim as a trust beneficiary, and the effect of a beneficiary's direction to pay his interest to a creditor. In some states, such as Texas, the trust law may override the civil practice rules and prevent the enforcement of judgments against interests in spendthrift trusts,¹²⁷⁰ although in such cases there may be common-law exceptions to the spendthrift trust protection. However, in other states, such as New York, which provided the model for much spendthrift legislation,¹²⁷¹ the exemptions from the legal process for the enforcement of judgments applicable to trusts are set forth in the civil practice sections.¹²⁷² For example, in 1974 New York had the following exemptions to the enforcement of judgments against interests in trusts before and after their distribution:

(d) Trust exemption. Any property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

(e) Income exemptions. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:

1. ninety per cent of the income or other payments from a trust the principal of which is exempt under subdivision (d);¹²⁷³

1269. GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252, at 59.

1270. *Cf.* Tex. Prop. Code § 112.035(b), (d) (protecting beneficiaries of spendthrift trusts from legal process and declaring that there is no such protection to the extent the beneficiary is the settlor of his interest).

1271. GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252, at 60.

1272. *Cf.* N.Y. C.P.L.R. 5205(c), (d) (McKinney 2011) (providing that as of January 1, 1974 trust beneficiaries are protected except to the extent the funds come from the beneficiary).

1273. 1 McKinneys 1962 Session Laws of New York at 774-76 (McKinney) (the last pre-ERISA amendment to the CPLR sections were enacted in 1962).

This is consistent with Dean Griswold's description of the New York law in 1947. Moreover, the emphasis on the support of the family was confirmed in 1963 in a decision by the New York Court of Appeals in *In the Matter of Knauth*,¹²⁷⁴ permitting a former spouse to enforce an assignment of an interest in a spendthrift trust.¹²⁷⁵ Moreover, the limitations of the spendthrift protections under predecessors of this legislation, were illustrated by the New York Court of Appeals holding in 1936, in *Sand v. Beach*,¹²⁷⁶ that the spendthrift trust rules do not prevent a creditor of a beneficiary from enforcing the judgment against the beneficiary's interest from the trust when the amount is due and owing to the beneficiary.¹²⁷⁷

Before the enactment of ERISA there were considerable distinctions within and among the states about the characterization of pension interests as self-settled interests, and the conditions under which creditors could enforce their claims against such interests. The issues are considered in detail in an article by Donald P. Young that discusses the distinctions that arose with respect to the characterization of pension trusts as spendthrift trusts, primarily in order to be eligible for a bankruptcy exception before the Supreme Court mooted such distinctions¹²⁷⁸ by holding in 1992, in *Patterson v. Shumate*,¹²⁷⁹ that the Alienation Prohibition provided the requisite protection for Spousal Survivor Benefit Plans.¹²⁸⁰ One issue applicable to self-settled trusts is that even if recognized, fraudulent transfers to trusts are not recognized,¹²⁸¹ which may be relevant to the extent, pension plans are treated as self-settled trusts, as discussed *infra*.

For example, in 1974 in *Fordyce v. Fordyce*,¹²⁸² the court characterized pension contributions by Pan American World

1274. *In the Matter of Knauth*, 189 N.E.2d 482 (N.Y. 1963) (upholding the assignment because the aim of the spendthrift provisions was to support beneficiary and his family, even though at time of action beneficiary remarried and was supporting another family).

1275. *Id.* at 485.

1276. *Sand v. Beach*, 200 N.E. 821 (N.Y. 1936) (permitting garnishment of interest in a testamentary spendthrift trust when trustee exercises discretion to make interest payable for benefit of beneficiary).

1277. *Id.* at 823.

1278. David B. Young, *The Pro Tanto Invalidity of Protective Trusts: Partial Self-settlement and Beneficiary Control*, 78 MARQ. L. REV. 807, at 825-36 (1995). See also Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355, 377-87 (1999) (discussing the interaction among pensions, bankruptcy, spendthrift trusts, and ERISA).

1279. *Patterson v. Shumate*, 504 U.S. 753 (1992).

1280. *Id.* at 760.

1281. See generally GRISWOLD SPENDTHRIFT TRUSTS, *supra* note 1252 at 538-39 (pre-ERISA principles). See e.g., N.Y. C.P.L.R. §§ 5201(c) .5, 5225(a) and N.Y. Est., Powers & Trusts Law § 7-3.1(b)(4). (McKinney 2013) (fraudulent conveyances not subject to creditor protections, and transferor may be ordered to convey assets to creditor) (post-ERISA principles).

1282. *Fordyce v. Fordyce*, 365 N.Y.S.2d 323 (N.Y. Sup. Ct. Nassau Co. 1974).

Airways and on behalf of a pilot those by the pilot pursuant to a collective bargaining agreement as not self-settled.¹²⁸³ Thus, they were not subject to attachment when paid by the trust under the civil practice provisions.¹²⁸⁴ By contrast, amounts that had been voluntarily contributed to a Pan Am plan and invested therein are subject to attachment when paid by the trust, but not while in the trust and unavailable to the pilot.¹²⁸⁵ On the other hand, because the creditor was a former spouse seeking alimony, such income when distributed is allocable to the former spouses in accord with their needs.¹²⁸⁶ The distributions from the voluntary contribution are available in full to the former spouse because the limitations on distributions are inapplicable to self-settled trusts.¹²⁸⁷

Similar fine distinctions are apparent in three Texas decisions. First, in 1958 it was held in *Hines v. Sands*,¹²⁸⁸ that when contributions were made voluntarily by an employer to a profit-sharing plan on behalf of its rank and file employees, the benefits were not subject to garnishment by a creditor before the plan made any benefits available to the participant.¹²⁸⁹ However, the court suggested that as in *Sand* garnishments would be permissible when the participant could obtain the plan benefits.¹²⁹⁰ This was confirmed in 1960 in *Highland State Bank v. Gonzales*.¹²⁹¹ The court therein permitted garnishment of funds that could be withdrawn, but not those that could not be withdrawn from a settlor trust.¹²⁹² Unlike the *Fordyce* court, the *Highland* court made no attempt to distinguish the pension benefits attributable to participant voluntary contributions from required employer contributions, although under a matching formula rather than a collective bargaining agreement.¹²⁹³ Finally, in 1988 in *In the Matter of Brooks*,¹²⁹⁴ the court held that a pension plan trust is not a spendthrift trust to the extent benefits are attributable to one of thirty-two owners of a professional association of radiologists.¹²⁹⁵ The contribution for each owner was fixed at the statutory maximum of \$30,000 per year by the association's executive committee, which has a rotating group of members, including the

1283. *Id.* at 328.

1284. *Id.* at 328-29.

1285. *Id.*

1286. *Id.* at 329-331.

1287. *Id.* at 329-330.

1288. *Hines v. Sands*, 312 S.W.2d 275 (Tex. Ct. Civ. App. 1958).

1289. *Hines*, 312 S.W.2d at 278.

1290. *Id.* at 279.

1291. *Highland State Bank v. Gonzales*, 340 S.W.2d 828 (Tex. Civ. App. 1960).

1292. *Id.* at 829-830.

1293. *Id.* at 829.

1294. *In the Matter of Brooks*, 844 F.2d 258 (5th Cir. 1988).

1295. *Id.* at 263-64.

participant.¹²⁹⁶ The court held that the trust was not a spendthrift trust because Dr. Brooks, like all participants, had extensive access and control to his plan benefits, such as the ability to control his plan investments, borrow against his plan assets, and obtain his plan assets if he terminated his employment; moreover, he had an ownership and management role in maintaining and funding the trusts.¹²⁹⁷ There do not seem to have been cases where a court held that similar access and control by a non-owner participant, which is customary in self-directed pension plans, prevented the participant from taking advantage of the spendthrift protections for such a plan.

New York amended its civil practice rules after the adoption of ERISA so that tax-qualified pension plans are not treated as self-settled plans for the purpose of the exemptions from the enforcement of civil judgments.¹²⁹⁸ Similarly, Texas changed its law to treat all tax-qualified plans as spendthrift trusts for bankruptcy purposes, but not for other purposes after the effective date of the events in *Brooks*.¹²⁹⁹

The Alienation Prohibition plays a substantial role in securing retirement income before and after the distribution of such income with or without those state amendments for at least three reasons. First, state laws may not protect all undistributed retirement benefits. For example, Texas does not protect pension benefits that are immediately distributable in any manner from the enforcement of creditor claims against such benefits while in the plan. Second, as discussed, *supra*, there are many decisions permitting certain creditors of participants to collect judgments from benefit distributions to participants. Third, the state laws, even as amended, may protect less plans than the Alienation Prohibition. ERISA protections are not restricted to tax-qualified plans, as is the case for aforementioned New York law. Thus, participants and beneficiaries of an ERISA benefit plan do not lose creditor protections if the plans violate the tax-qualification rules.

The tax-qualification rules limit the state law creditor protections available to the highly compensated. This is because those rules limit contributions that highly compensated employees may make to pension plans both in absolute terms,¹³⁰⁰ and relative to the non-highly compensated employees.¹³⁰¹ However, these rules do not only limit protections for highly compensated employees. All employees are deprived of any state law creditor protections for their plan assets, if the plan is not tax-qualified even though most employees lack the ability to affect the plan's qualification. ERISA

1296. *Id.* at 259-60.

1297. *Id.* at 263-64.

1298. N.Y. C.P.L.R. 5205(c), (d) (McKinney 2011).

1299. *In re Brooks*, 844 F.2d at 261.

1300. Code § 415 (2012).

1301. Code § 401(a)(4) (2012).

and the Alienation Prohibition were enacted to secure the retirement income of participants and beneficiaries, so they could pay retirement expenses. This goal will not be achieved if retirement plan distributions are subject to a creditor's claims either before or after their plan distribution. The people most in need of such protection depend upon their retirement plan distributions to pay their current living expenses. The Prohibition was not intended to assure that ERISA plan administrators "may be enabled to get rid of compensation, which is due and payable, simply by paying it over to the person to whom it is payable under terms of the plan." This is a paraphrase of the position that Justice Cardozo correctly rejected in *Surace* as contrary to the purpose of the alienation prohibition for the workers compensation benefits at issue, which the court held protected distributed plan benefits. Chief Justice Charles Evans Hughes's unanimous Supreme Court opinion in *Lawrence*, which Justice Cardozo joined, similarly later held that veteran's benefits deposited in bank accounts were protected from creditors.

F. The Supreme Court Decisions Imply That the Alienation Prohibition Prevents a State Law Creditor of a Participant or of a Beneficiary of a Spousal Survivor Benefit Plan from Wresting the Plan Benefit From the Participant or Beneficiary

The Supreme Court has reaffirmed again and again that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."¹³⁰² One of the ways that ERISA does this is by its core requirement that ERISA benefit rights be determined by plan terms,¹³⁰³ which as discussed *supra*, applies to all ERISA plans. Thus, as discussed *supra*, in *Egelhoff* the Court ruled that a state revocation upon divorce statute could not be used to deprive the beneficiary named pursuant to a life insurance plan's terms of those benefits.¹³⁰⁴ Similarly in *Boggs* the Court ruled that a state community property law could not be used to deprive the beneficiary named pursuant to a pension plan's terms of those benefits.¹³⁰⁵ In both cases, as the captions suggested the Court ruled that the ERISA protection of benefit entitlement continued after the benefits were paid out by the plans. The *Boggs* Court declared that if the protection of the benefit entitlement did not continue after the benefit was distributed, the "[ERISA] award of title would be rendered meaningless."¹³⁰⁶ As discussed *supra*, these results prevent a person with a state law claim arising from a

1302. *Boggs*, 520 U.S. at 845 (quoting *Shaw*, 463 U.S. at 90) (internal quotations omitted).

1303. *Egelhoff*, 532 U.S. at 147.

1304. *Id.*

1305. *Boggs*, 520 U.S. at 833.

1306. *Id.* at 853 (quoting *Free*, 369 U.S. at 669).

participant's or a beneficiary's right to an ERISA plan benefit from wresting the benefit or the amount of the benefit from the participant or beneficiary. The Alienation Prohibition, as discussed *infra*, addresses the effects of other claims, such as unrelated creditor claims.

The Supreme Court held in *Guidry* that the Alienation Prohibition prevented a union from using a federal labor law to impose a constructive trust against an ERISA collectively bargained pension plan and directed the plan to pay plan benefits to an individual who had embezzled substantial funds from the union.¹³⁰⁷ The Court stated:

Section 206(d) [the Alienation Prohibition] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), *even if that decision prevents others from securing relief for the wrongs done them.*¹³⁰⁸

Others would not be prevented from securing relief if they could enforce a judgment against the benefits paid by the plan to the participant. In fact, the union sought to do so following *Guidry*, but failed because the court below decided that the relevant state civil practice rules for the enforcement of judgments protected the distributed plan benefits.¹³⁰⁹ The Supreme Court declined to review that lower court decision.¹³¹⁰

The *Guidry* Court noted *Mackey II* contained dictum that the Alienation Prohibition prohibited the garnishment of ERISA pension plans.¹³¹¹ The *Guidry* Court said nothing about the application of the Alienation Prohibition to benefits paid by a pension plan and did not cite the following from *Mackey II*:

Where Congress intended in ERISA to preclude a particular method of state-law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute. Specifically, ERISA § 206(d)(1) bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA *pension* benefit plans. 29 U.S. C. § 1056(d)(1). Congress did not enact any similar provision applicable

1307. *Guidry*, 493 U.S. at 375-76. *See generally* Feuer *ERISA Myths*, *supra* note 25, at 717-18 (discussing the decision in more detail). *But see* Lisa M. Smith, *ERISA Qualified Pension Plans as Part of the Bankruptcy Estate after Patterson v. Shumate*, 21 CARDOZO L. REV. 2119, 2140-57 (2000) (suggesting that *Guidry* may permit state courts to order participants to withdraw and pay plan benefits to creditors, particularly if the state law treats the underlying contribution as fraudulent transfers because made while the participant was insolvent, and recommending ERISA be amended to explicitly permit the reversal of contributions that are fraudulent transfers).

1308. *Guidry*, 493 U.S. at 376 (emphasis added).

1309. *Guidry v. Sheet Metal Workers National Pension Fund*, 39 F.3d 1078 (10th Cir. 1994)

1310. *Guidry, cert. den'd*, 514 U.S. 1063 (1995).

1311. *Guidry*, 493 U.S. at 371.

to ERISA *welfare* benefit plans, such as the one at issue in this case. Section 206(d)(1) is doubly instructive.

First, § 206(d)(1) expressly includes a distinction that the United States would have us read into § 514(a). Section 206(d)(1) bars the assignment or alienation of pension plan *benefits*, and thus prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants. As discussed above, § 514(a), by contrast, deals with state laws as they relate to *plans*. The United States asks us to read § 514(a) as protecting only benefits—but not plans as a whole—from state-law attachment orders (recognizing the numerous problems that would arise if we were to conclude that welfare benefit plans could in no way be subjected to state-law attachment). But by adopting § 206(d)(1), Congress demonstrated that it could, where it wished to, stay the operation of state law as it affects only benefits and not plans. The United States asks us to imply a limitation on a pre-emption provision in one portion of the statute that Congress made express in another portion of ERISA (§ 206(d)(1)). We see no basis for construing the statute in this manner and therefore, in light of § 206(d)(1), reject the United States' suggested interpretation of § 514(a).¹³¹²

The statement referring to the limited nature of the Alienation Prohibition in the second paragraph is a dictum.¹³¹³ Thus, it is not binding.¹³¹⁴ Moreover, as discussed, *infra*, it is an obiter dictum rather than a considered dictum. The latter, not the former, is entitled to considerable but still non-binding deference.¹³¹⁵

The *Mackey II* dictum is obiter dictum for five reasons. First, the Court fails to explain why the Alienation Prohibition has such a limited effect. Second, the Court never describes the purpose of the Alienation Prohibition, which could be examined for consistency with such a limited effect. Third, there was no need for the Court to declare whether the Alienation Prohibition had such a limited effect in the second paragraph. The point being made in the paragraph is that the Alienation Prohibition prevents enforcement mechanisms pertaining to plans rather than benefits, which is why those words are italicized. Fourth, the Court

1312. *Mackey*, 486 U.S. at 836 (emphasis in original).

1313. See e.g., Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1257 (2006) (describing dictum as any statement that, if its opposite were instead stated, would have no effect on the court's reasoning or judgment).

1314. *Id.* at 1274. Cf. Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1416-17 (2000) (stating that the Supreme Court has consistently held that dictum do not have the force of law).

1315. See e.g., *U.S. v. Bell*, 524 F.2d 202 (2d. Cir. 1975) (reversing conviction for firearms possession on basis of lack of showing of sufficient interstate nexus). See also Charles A. Wright, *LAW OF FEDERAL COURTS* § 58, at 396 (4th ed. 1983) (making similar statement with respect to treatment of dicta from highest state courts).

presents the limited effects in no other places although it makes many other references to attachment orders and the Alienation Prohibition. Finally, the paragraph deserves little deference because it disregards the kind of relation that determines whether a state law is preempted. State laws are preempted if there is a non-tenuous relation between the state law and an ERISA benefit protection, as occurs when a state law, such as the garnishment at issue, prevents a participant from exercising his benefit right to receive the benefit payment to which he is entitled under the plan terms. Thus, if the welfare plan at issue did not include state law garnishments in its benefit terms, ERISA preempts such garnishments. However, the Court never considered that issue as discussed, *supra*.

In short, the only Supreme Court decisions that have carefully considered post-distribution benefit rights of participants and beneficiaries have concluded that ERISA protections would be meaningless unless ERISA prevents a person with a state law claim arising from a participant's or beneficiary's right to an ERISA plan benefit from compelling the plan to pay it such benefit or from wresting the benefit or the amount of the benefit from the participant or beneficiary. The only decision of the Court that carefully considered the Alienation Prohibition described the prohibition as preventing the enforcement of state law judgments that did not arise from the participant's or beneficiary's right to a Spousal Survivor Benefit Plan benefit, against the plan's benefit payment regardless of the equity of the underlying obligation against plan benefit payments. Such protection would be similarly meaningless if the Alienation Prohibition did not protect the benefit from the same sympathetic judgment creditors after its distribution.

The only apparent Congressional legislation relating to *Guidry* sheds little light on this interpretation because it addressed plan offsets against plan benefits rather than the ability of a state law claimant to obtain any recourse. In particular, the Tax Relief Act of 1997¹³¹⁶ added a provision two years after the *Guidry* decision to permit the offset of a participant's benefit against the amount the participant owed to a plan as a result of the participant breaching his fiduciary duty to the plan or committing a crime against the plan.¹³¹⁷ The only relevant committee report does not discuss offsets for any other bad behavior, such as criminal activity, fraudulent activity, theft from a plan sponsor (as occurred in *Guidry*) or intentional torts.¹³¹⁸ Thus, ERISA prevents victims of such bad conduct from enforcing state law judgments against a participant's pension benefit

1316. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1502, 111 Stat. 788 at 1058-61 (1997).

1317. ERISA §§ 206(d)(4)-(5), 29 U.S.C. §§ 1056(d)(4)-(5) (2012).

1318. H.R. REP. NO. 105-20(1997).

payments,¹³¹⁹ although as discussed *infra* those victims may be permitted to enforce such judgments against the distributed benefits.

*G. The Lower Court Case-Law Holdings and the Commentators
Who Argue That the Alienation Prohibition Fails to Protect
Participants or Beneficiaries in Spousal Survivor Benefit Plans
from Their Creditors after They Receive Plan Benefit
Distributions are Unconvincing*

Citations to each of the federal circuit courts that have ruled on whether the Alienation Prohibition applies to benefits distributed from a Spousal Survivor Benefit Plan may be found by combining those in the 2011 Northern District of Illinois decision in *Securities and Exchange Commission v. Moskop*,¹³²⁰ with those in the 2012 Third Circuit decision in *Estate of William Kensinger, Jr. v. URL Pharma*.¹³²¹ Many commentators and almost all the decisions hold that the Alienation Prohibition does not apply to benefits paid out by a Spousal Survivor Benefit Plan. None dispute the Supreme Court statement that “Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners.”¹³²² Under the interpretation of these commentators and courts, civil judgments may be used to deprive participants of such stream of income, albeit only after the benefits have been paid to the participants. However, none give any reason why Congress would have provided and did provide such futile protection to retirement income, when as its title suggests, the Employee Retirement Income Security Act of 1974 was designed to secure the retirement income of employees.

In 1994, the 10th Circuit, in *Guidry v. Sheet Metal Workers National Pension Fund*¹³²³ (“*Guidry III*”), presented the three major arguments used to support the proposition that the Alienation Prohibition permits the enforcement of judgments against benefits that have been paid to participants or beneficiaries of Spousal Survivor Benefit Plans.¹³²⁴ The court concluded that ERISA did

1319. However, as discussed *supra*, ERISA does not preempt penalties under generally applicable criminal laws.

1320. *Sec. and Exch. Comm. v. Moskop*, 2011 U.S. Dist. LEXIS 68780 (N.D. Ill. June 27, 2011) (holding that the Alienation Prohibition did not prevent implementing a freeze on the pension benefits deposited into the bank account of a person who had committed securities fraud).

1321. *Estate of William Kensinger, Jr. v. URL Pharma, Inc.* 674 F.3d 131 (3rd Cir. 2012) (holding that 401(k) benefits could be wrested from beneficiary whose divorce decree included a waiver of such benefits after observing that Supreme Court concluded that such a waiver was not a prohibited alienation).

1322. *Guidry*, 493 U.S. at 376.

1323. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994) (“*Guidry III*”).

1324. *Cf. LANGBEIN PENSION LAW*, *supra* note 13, at 338-40 (questioning this decision on different grounds).

not preempt the state enforcement of a judgment by a union against the pension benefits of a former union official who had embezzled funds from the union, which sponsored the pension plan.¹³²⁵ However, the court also concluded that under *Mackey II* the Colorado statute law exempting a portion of retirement benefits from the enforcement of civil judgments is not preempted because (1) the statute does not “reference” ERISA plans or benefits, even though it mentions “pension benefits,” and (2) the statute affects benefit payments rather than benefit plans.¹³²⁶ Thus, the statute protects the distributed benefits.

First, the *Guidry III* court asserted that the legislative history is inconclusive about “whether ERISA protection [of benefits] extends past the mere availability of funds within the plan.”¹³²⁷ The court failed to explain why Congress would give such futile protection to the benefit rights of the very participants and beneficiaries whom ERISA was intended to protect. This interpretation implies that the participant’s ability to keep the benefit payments may depend upon whether the relevant state law protects the payments as did occur in this case.

The Indiana Supreme Court took a stronger position than the agnosticism of *Guidry III* about the legislative history in 1990, in *Brosamer v. Mark*,¹³²⁸ and declared that permitting the Alienation Prohibition to protect distributed benefits “would run contrary to the legislative history and the weight of the relevant case law and stretch ERISA beyond the purposes declared by Congress in the statute itself.”¹³²⁹ The *Brosamer* court asserted that a major purpose of ERISA is to reduce administrative burdens on plan sponsors and administrators,¹³³⁰ the same argument used with respect to the *McIntosh* statute that Justice Cardozo distinguished in *Surace*. The *Brosamer* court described the purpose of ERISA as “the protection of ERISA plan integrity” because:

Subsection (a) [of the section entitled “Congressional findings and Declaration of Policy”] points out the extensive problems existing in private pension programs and states that the Act *is intended to promote* the setting of “minimum standards . . . assuring the equitable character of such [pension] plans and their financial soundness.”²⁹ 29 U.S.C. § 1001(a).¹³³¹

1325. *Guidry III*, 39 F. 3d at 1080.

1326. *Id.* at 1084-86.

1327. *Id.* at 1082.

1328. *Brosamer v. Mark*, 561 N.E.2d 767 (Ind. 1990) (holding a claim for unpaid rent could be enforced against a participant’s bank deposit of pension benefit payments).

1329. *Id.* at 769 (the “relevant case law” included the dictum discussed, *supra*, in *Mackey II*).

1330. *See generally* Feuer’s *ERISA Myths*, *supra* note 25 (seeking to dispel such plan administration myth).

1331. *Id.* (emphasis added).

Moreover, the court points to the summary of the areas in which standards will be set in sections (b) and (c). If the court had presented a bit more of the statute, it would have been clear that these standards were a means of implementing ERISA's dominating general purpose, the protection of plan participants and beneficiaries as set forth in the title of Title I, Protection of Employee Benefit Rights, which contains all these protective features. In particular, Paragraph (b) begins as follows:

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries *it is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto.*¹³³²

This focus on the protection of employee benefit rights is confirmed by the events following the extensive hearings in 1979 about legislation entitled the ERISA Improvements Act of 1979, which, as discussed *supra*, would have added the following paragraph to the Congressional findings and Declaration of Policy:

(d) It is hereby further declared to be the policy of this Act to foster the establishment and maintenance of employee benefit plans sponsored by employers, employee organizations, or both.¹³³³

Congress failed to adopt this legislation or the proposed addition, which would have required more consideration in ERISA for "plan integrity."

The *Brosamer* court's discussion of the ERISA legislative history is no more convincing. As is often the case, the cited history is limited to Congressional reports in the United States Code Congressional and Administrative News. The court cited incorrectly an October 1973 House report,¹³³⁴ which accompanied a bill without any alienation prohibition provisions¹³³⁵ for the proposition that "pension rights are to be protected through regulation of the plans."¹³³⁶ The Court also cited incorrectly an April 1973 Senate report,¹³³⁷ which accompanied a bill with an

1332. ERISA § 2(b), 29 U.S.C. § 1003(b) (bold in original but emphasis added).

1333. ERISA Improvements Act of 1979, S. 209, 96th Cong. § 102 at 5-6 (1st Sess. 1979) reprinted in 1979 Senate ERISA Review, *supra* note 406, at 9, 13-14.

1334. *Brosamer*, 561 N.E.2d at 769 (H.R. REP. NO. 93-533 was from the first session not the second session of the 93rd Congress).

1335. Employee Benefit Security Act of 1973, H. 2, 93d Cong. (1st Sess. 1973) as reprinted in ERISA LEG. HISTORY, *supra* note 165, at 2181-2347.

1336. *Brosamer*, 561 N.E.2d at 769.

1337. *Id.* (The report was cited incorrectly because S. REP. NO. 93-127 was from the first session not the second session of the 93rd Congress).

alienation prohibition for a similar proposition.¹³³⁸ In both cases, the *Brosamer* court fails to discuss why these statements imply that benefit protection ceases after an ERISA plan distributes the benefits. Instead, the *Brosamer* court declared:

The legislative history specifically describing § 1056(d)(1) [setting forth the Alienation Prohibition] follows the same theme. It focuses on protecting the pension funds in the plans to ensure their actual availability for distribution:

To further ensure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated. H.R. Rep. No. 807, 93d Cong., 2d Sess. . .¹³³⁹

As discussed *supra*, the cited statement confirms that the Alienation Prohibition was intended to, and does, implement ERISA's dominating general purpose, protecting plan participants and beneficiaries. Using the common meaning of words the Alienation Prohibition achieves that goal by insuring that participants may pay for their retirement with the plan benefits they receive from the plan. That goal may not be achieved if the participant may be deprived of those benefits by a creditor, as the court permitted to occur in this case.

Second, the *Guidry III* court asserted that the relevant regulations provide that "[t]he terms 'alienation' and 'assignment' are meant only to cover those arrangements that generate a right enforceable against a plan."¹³⁴⁰ Those regulations do not limit the terms "assignment" and "alienation" to plan transactions. Instead, they describe those terms as *including* any arrangements for the transfer of benefit payments away from plan participants and beneficiaries not subject to a specific exemption.¹³⁴¹ Thus, those terms may include other arrangements. The cited regulations consist of the Treasury regulation for the tax qualification section corresponding to the Alienation Prohibition. Thus, the regulation only governs plan behavior and not the treatment of payments made by the plan. However, the purpose of the Alienation Prohibition is the protection of retirement income. Therefore, the tax regulation implies that the Alienation Prohibition prohibits any additional actions that would put the participant's benefits at risk, such as attempts to wrest benefit payments from plan participants and beneficiaries. Such actions would have no effect on the plan's tax qualification. Thus, they are not and should not be mentioned in a regulation that is limited to tax qualification issues.

Third, the *Guidry III* court asserted that ERISA, unlike two

1338. *Brosamer*, 561 N.E.2d at 769.

1339. *Brosamer*, 561 N.E.2d at 769-70 (omitting full citation to report).

1340. *Guidry*, 39 F.3d at 1082-83.

1341. Treas. Reg. § 1.401(a)(13)(c) (as amended in 1988).

other income protection statutes, the Social Security Act and the Veteran's Benefit Act, does not expressly provide for protection after the benefits are paid.¹³⁴² The court, however, presents no reason why Congress would have intended to give futile protection to private pension benefits in a law entitled Employee Retirement Income Security Act of 1974. Nor did the court mention the two other federal retirement protection laws, the Railway Retirement Act and the Civil Service Retirement Act, which as discussed *supra*, like ERISA did not explicitly provide for protection after the benefits are paid, but have been interpreted to provide such protection.

A similar statutory argument was made in 2004 by the First Circuit in *Hoult v. Hoult*.¹³⁴³ The Court observed that the general rule of the Alienation Prohibition consists of the following sentence, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The court then observes that this sentence on its face applies only to plans and contains no explicit language pertaining to post-distributions.¹³⁴⁴ These statements are not too surprising. The Supreme Court in *Fort Halifax and Mackey II* had similarly focused on the use of the word plan rather than the phrase plan benefits, although, as discussed *supra*, this was a distinction without a difference in the issues before the Court. Moreover, the Supreme Court held in *Boggs, three years later, in 1997*, that similar statutory ERISA language referencing "rights under the terms of the plan,"¹³⁴⁵ results in the preemption of a person's state community property law claim arising from a participant's or beneficiary's right to an ERISA plan benefit.¹³⁴⁶ In *Boggs*, the claimants sought to wrest the benefit or the amount of the benefit from the participant or beneficiary.¹³⁴⁷ Thus, under the same reasoning,¹³⁴⁸ ERISA, which uses the Alienation Prohibition to protect the right of participants and beneficiaries in a Spousal Survivor Benefit Plan to benefits under the terms of the plan, also supersedes a person's state law claim not arising from a participant's or beneficiary's right to a

1342. *Guidry III*, 39 F.3d at 1083.

1343. *Hoult v. Hoult*, 373 F.3d 47 (1st Cir. 2004) (holding that a daughter may enforce against her father's ERISA pension payments, a federal judgment for damages resulting from the abuse her father inflicted on her).

1344. *Id.* at 54.

1345. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012).

1346. *Boggs*, 520 U.S. at 853-54.

1347. *Id.* at 836-37.

1348. *Boggs* was not decided on the basis of the Alienation Prohibition, thus it is not controlling authority on that point. See generally Feuer ERISA Myths, *supra* note 25, at 720-725. Cf. *Wright v. Chase Riveland*, 219 F.3d 905, 921 (9th Cir. 2000) (*Boggs* is not controlling because Court reserved judgment on the effect of state law on benefits distributed before the participant's death, which disregards the fact that the *Boggs* issue was whether ERISA permits a distributed benefit to be wrested away from the rightful recipient).

Spousal Survivor Benefit Plan benefit which claim is being used either to compel the plan to pay it such benefit or to wrest the benefit from the participant or beneficiary.

In 1995, the year after *Guidry III*, the Fourth Circuit in *United States v. Smith*,¹³⁴⁹ held that the Alienation Prohibition protected some but not all benefit distributions. The court distinguished pre-retirement distributions, which it asserted were not protected by the Alienation Prohibition, from post-retirement annuity payments, *i.e.*, the stream of income described in *Guidry*, which were protected.¹³⁵⁰ However, as the dissent noted, there was no support in the regulations and statute for such a distinction.¹³⁵¹ The dissent nevertheless concluded that no distributed benefits were protected by the Alienation Prohibition because “ERISA’s statutory language and regulations *make clear* that the benefits, once distributed, may be attached.”¹³⁵² As discussed, *supra*, both the statute and regulations support the opposite principle. The absurdities that result from permitting such attachments are demonstrated by a well-written note by Meghan L. Brower,¹³⁵³ which reviews the intellectual gymnastics the courts have engaged in to justify how easily Michigan may wrest pension benefits from those in state correction facilities to compensate the state for the costs of imprisonment, such as forcing prisoners to have pension payments deposited in prison accounts so they may be most easily garnished.¹³⁵⁴ Ms. Brower correctly observes that all of these actions violate the purpose of the Alienation Prohibition, *viz.*, to safeguard a stream of retirement income,¹³⁵⁵ although she does not discuss whether the generally applicable criminal law exclusion from the ERISA Express Preemption Rule supersedes the Alienation Prohibition, as discussed, *supra*.

XIX. SPOUSAL SURVIVOR BENEFIT PLANS MAY DEFER
ONLY TO QDROS, WHEREAS SPONSORS OF OTHER
PLANS MAY CHOOSE THE EXTENT, IF ANY, TO WHICH
THOSE PLANS MUST DEFER TO DOMESTIC RELATIONS
ORDERS

ERISA negates a state domestic relations law claim arising from a participant’s or a beneficiary’s right to a benefit under the

1349. *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995) (holding a participant who defrauded others may not be forced to pay portion of pension benefit annuity payments as compensation to his victims).

1350. *Id.* at 683.

1351. *Id.* at 687.

1352. *Id.* (emphasis added).

1353. Brower’s Michigan Prisoners, *supra* note 978.

1354. *Id.* at 146-51.

1355. *Id.* at 151-157.

terms of an ERISA plan. ERISA prohibits such a claim from being used to (1) compel the plan to pay the claimant such benefit, or (2) wrest the benefit or the amount of the benefit from the participant or beneficiary, respectively.

The Spousal Survivor QDRO Benefit Mandate requires a Spousal Survivor Benefit Plan to treat a QDRO as a beneficiary designation and prohibits such a plan from deferring to any other domestic relations order. The Alienation Prohibition and the Spousal Survivor QDRO Benefit Mandate prevent a person using any state domestic relations law claim, other than one based on a QDRO, to (1) compel a Spousal Survivor Benefit Plan to pay it such benefit, or (2) wrest the benefit or the amount of the benefit from the participant or beneficiary.

Sponsors of ERISA plans other than Spousal Survivor Benefit Plans, such as Top-Hat Plans, disability plans, and life insurance plans, may draft such plans to determine the extent, if any, to which a domestic relations order determines beneficiary entitlements. However, persons with a state domestic relations law claim not arising from a participant's or beneficiary's right to an ERISA plan benefit under such a plan's terms, such as a claim for unpaid alimony that could be paid from any source, may wrest the benefit from the participant or beneficiary. An article entitled, *Determining the Death Beneficiary under an ERISA Plan and the Rights of such a Beneficiary* ("Feuer's Beneficiary Article")¹³⁵⁶ discusses many of these issues.

A. The Disclosure and the Substantive Requirements of the Spousal Survivor QDRO benefit Mandate

Under the Spousal Survivor QDRO Benefit Mandate, Spousal Survivor Benefit Plans must (1) treat persons designated to receive a benefit under a domestic relations order that is a QDRO as a beneficiary under the terms of the plan;¹³⁵⁷ and (2) disregard any other domestic relations order (other than one waiving a benefit) seeking to establish a benefit right.¹³⁵⁸ Waivers are discussed in Section XIX.

A domestic relations order ("DRO") that is a QDRO must disclose four distinct items: (1) the name and address of the plan

1356. Albert Feuer, *Determining the Death Beneficiary under an ERISA Plan and the Rights of Such a Beneficiary*, 54 TAX MGMT. WEEKLY MEMORANDUM 323, 331-33 (Aug. 26, 2013) ("Feuer's Beneficiary Article") available at <http://ssrn.com/abstract=2315889> (last visited Jan. 30, 2014). See also Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession* 89 N.Y.U. L. REV. (forthcoming 2014) available at <http://ssrn.com/abstract=2263234> (last visited Jan. 30, 2014). See also David A. Pratt, *State Laws Rush in Where ERISA Fears to Tread*, 18 J. PENSION 3 (2012) (both discussing issues with respect to designations for ERISA plans and IRAs).

1357. ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J) (2012).

1358. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A) (2012).

participant and each person entitled to benefit payments under the terms of the DRO; (2) the plan name; (3) the benefit entitlement established by the DRO; and (4) the number of payments or the period to which the DRO applies.¹³⁵⁹ Requiring that these items be disclosed to the participant is similar to the requirement that a Spousal Survivor Benefit Mandate consent by the participant's spouse to the participant's waiver of spousal benefits must include an acknowledgment of the effect of the spouse's consent.¹³⁶⁰ There is considerable division of authority regarding the required specificity of such information.¹³⁶¹ Many courts have incorrectly held that QDROs may require a participant to designate a person as a beneficiary.¹³⁶²

There are substantive limits on the benefit rights that a QDRO may create. The benefits must be consistent with the pension plan's terms without considering the QDRO,¹³⁶³ and may not increase the plan's actuarial costs.¹³⁶⁴ However, a QDRO may provide the following two benefits even if they are not consistent with the pension plan's terms without considering the QDRO: (a) separate benefit interests in certain circumstances, so that payments may be made if the participant is not collecting pension benefits, and is still employed by the plan sponsor,¹³⁶⁵ and (b) spousal treatment of former spouses in certain circumstances as spouses for purposes of spousal survivor benefits.¹³⁶⁶ The courts do not always require satisfaction of the prerequisites for separate interest payments,¹³⁶⁷ and thereby fail to disregard DROs that are

1359. ERISA §206(d)(3)(C), 29 U.S.C. §1056(d)(3)(C) (2012).

1360. ERISA §205(c)(2)(A)(iii), 29 U.S.C. §1055(c)(2)(A)(iii) (2012).

1361. *See generally* Feuer's ERISA Myths, *supra* note 25, at 758-59.

1362. *Id.* at 745-48. *See also* Yale-New Haven Hospital v. Nicholls, 2013 U.S. Dist. LEXIS 171325 (D. Conn. Dec. 5, 2013) (holding a DRO requiring a participant to transfer a portion of his retirement plan assets is a QDRO, but not considering the later *nunc pro tunc* DROs which may have conformed to the DRO requirements that the order require no further action by participant to create plan benefit rights for another person).

1363. ERISA § 206(d)(3)(D)(i), 29 U.S.C. § 1056(d)(3)(D)(i) (2012).

1364. ERISA § 206(d)(3)(D)(ii), 29 U.S.C. § 1056(d)(3)(D)(ii) (2012).

1365. ERISA § 206(d)(3)(E), 29 U.S.C. § 1056(d)(3)(E) (2012).

1366. ERISA § 206(d)(3)(F), 29 U.S.C. § 1056(d)(3)(F) (2012).

1367. *See e.g.*, Files v. ExxonMobil Pension Plan, 428 F.3d 478 (holding that a separate interest QDRO was created after participant had separated from service, although the participant had died before asking that plan benefits begin to be paid); *In re Marriage of Thomas*, 789 N.E.2d 821, 832 (Ill. App. Ct. 2003) (holding that a QDRO may provide an alternate payee "all or a portion" of pension benefits under ERISA § 206(d)(3)(B)(i)(I); 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2000)). In both cases, the alternate payee did not need to wait for the participant to request pension payments to begin from his former employer's plan. Neither court discussed how this is a form of payment otherwise provided by the plan. It would appear that both plans only permit participants to decide on timing of the payment. The separate interest rules were inapplicable because the participant was no longer employed by either plan sponsor when the separate pension was permitted to be elected.

not QDROs. There are a number of very good discussions of the QDRO requirements.¹³⁶⁸

In order to prepare a DRO that satisfies the QDRO requirements, a party needs considerable information about the ERISA plan in which the participant participates and the participant's benefits. *Feuer's ERISA Myths*¹³⁶⁹ describes this information. To the extent the *Campa Sup. Ct.* holding permitting joinder of ERISA plans in domestic relations actions remains viable, ERISA may not preempt actions by state courts to compel ERISA plans to provide the information needed to prepare a QDRO.¹³⁷⁰

B. ERISA Requires Only Spousal Survivor Benefit Plans to Follow the Spousal Survivor QDRO Benefit Mandate

The only apparent basis for believing that the Spousal Survivor QDRO Benefit Mandate applies to ERISA plans, rather than only to Spousal Survivor Benefit Plans, is a set of policy arguments that Congress should have drafted ERISA in such a manner, which arguments have been presented by distinguished commentators,¹³⁷¹ and courts.¹³⁷² A careful review of the statutory language shows that Congress intended to so limit the Spousal Survivor QDRO Benefit Mandate to Spousal Survivor Benefit Plans and did so limit the mandate.¹³⁷³ However, if *Mackey II* remains viable in the domestic relations context, plans other than Spousal Pension Benefit Plans must defer to all DROs that require that benefits be paid to a person other than a participant or beneficiary at the time when such benefit payments are due to

1368. See e.g., Terrence Cain, *A Primer on the History and Proper Drafting of Qualified Domestic-Relations Orders*, 28 T.M. COOLEY L. REV. 417 (2011); DAVID C. CARRAD, *THE COMPLETE QDRO HANDBOOK* (3d ed. 2009) ("THE COMPLETE QDRO HANDBOOK"); GARY SHULMAN, *THE QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK* (3d ed. 2006 & Supp. 2012).

1369. See generally Feuer's *ERISA Myths*, *supra* note 25, at 755-57.

1370. *Id.* at 751-52. This is also consistent with the principle that ERISA does not preempt state-law reporting mandates that are needed to implement a state law that is not otherwise preempted by ERISA.

1371. See e.g., Elizabeth M. Wells, *State Domestic Relations Orders Under ERISA and the Code—An Unfortunate Hodgepodge*, N.Y.U. REV. EMP. BEN. 15-7, 15-12-15-15 (2011) (showing how legislative materials and policy arguments may be used to advocate broad application of the Spousal Survivor QDRO Benefit Mandate). See also DAVID C. CARRAD, *THE COMPLETE QDRO HANDBOOK* 92 (3d ed. 2009).

1372. *Metro. Life Ins. v. Wheaton*, 42 F.3d 1080, 1083-84 (7th Cir. 1994). See generally JAMES F. JORDEN, WALDEMAR J. PFLEPSEN, JR., STEPHEN H. GOLDBERG, *HANDBOOK ON ERISA LITIGATION* 5-109 n. 417 (3d ed. 2012) (listing cases with such holdings).

1373. See generally Feuer's *ERISA Myths*, *supra* note 25, at 741-45. See also Albert Feuer, *The Effects of Marital Property Rights, Alimony, Child Support, and Domestic Relations Orders on Top-Hat Plans, Excess Benefit Plans, and Bonus Plans*, 38 COMP. PLAN. J. 319, (Dec. 3, 2010) available at <http://ssrn.com/abstract=1719787> (last visited March 20, 2014).

participants or beneficiary, regardless of the plan terms or whether the DRO satisfies QDRO-like requirements.¹³⁷⁴

The ERISA language, the ERISA legislative history, and the Supreme Court case law all support the principle that only Spousal Survivor Benefit Plans must defer to DROs that are QDROs. As discussed, *supra*, ERISA as initially enacted, and the bills that were the precursors to ERISA did not explicitly address DROs. As discussed, *supra*, there were major Congressional proposals in 1978 and 1979 setting forth the DROs that ERISA would not preempt. All those proposals were limited to DROs applicable to Spousal Survivor Benefit Plans. The provisions in the ERISA Improvements Act of 1979, as discussed, *supra*, seem to have been the basis for Spousal Survivor QDRO Benefit Mandate that were introduced by REACT in 1984. There is no indication in REACT or its legislative history that Congress intended in REACT, which is entitled the Retirement Equity Act of 1984, to exempt from preemption those DROs that attempted to govern the benefits of a plan other than a retirement plan that is a Spousal Survivor Benefit Plan. The 1986 technical corrections to REACT that confirmed that the provisions were limited to Spousal Pension Benefit Plans, discussed, *supra*, show the contrary.¹³⁷⁵

Four questions show the unlikelihood of an ERISA requirement that all plans, not merely Spousal Survivor Benefit Plans, defer to a DRO meeting the QDRO requirements, if *arguendo*, those requirements applied to all plans. First, the reasons for protecting spousal benefits on a participant's divorce for all ERISA plans would seem to justify protecting spousal benefits during the participant's marriage. Why did Congress then limit such marital protections to a subset of pension plans, which are described as Spousal Survivor Benefit Plans and are required to provide spousal survivor benefits?¹³⁷⁶ Second, the reasons for setting forth procedure, by which ERISA plans must determine whether a DRO is a QDRO would seem to apply to all plans required to defer to a DRO that meets the QDRO requirements. Why did Congress then set forth such procedures only for Spousal Survivor Benefit Plans?¹³⁷⁷ Third, the reasons for protecting plans from double payment liabilities for plans that

1374. *But see* Feuer's ERISA Myths, *supra* note 25, at 739-40 (explaining why Mackey II is not viable in the domestic relations context).

1375. *See also* Watson's Broken Promises, *supra* note 229, (denouncing the weaknesses of the spousal protections provided by ERISA, even after the adoption of REACT). Prof. Watson, however, writes nary a word about the need or existence of spousal protections for plans other than Spousal Survivor Benefit Plans. *Id.*

1376. *See e.g.*, *Dickerson v. United Way of New York City*, 351 Fed. Appx. 506 (2d Cir. 2009) (holding a Top-Hat Plan need not provide spousal survivor benefits).

1377. ERISA §§ 206(d)(3)(G) and (H), 29 U.S.C. §§ 1056(d)(3)(G) and (H) (2012).

reasonably determine if DROs are QDROs would seem to apply to any plan required to defer to a DRO that meets the QDRO requirements. Why did Congress then limit such protections to Spousal Survivor Benefit Plans?¹³⁷⁸ Fourth, a requirement that a participant to specify a life insurance beneficiary may be of no value if the participant need not maintain the policy, because group life insurance unlike retirement plans, often provides no life benefits. Why then did Congress not provide that a QDRO may direct an employee to assign the incidents of ownership of the policy to another person, the way that Congress did for federal life insurance for civilian employees?¹³⁷⁹

It is thus necessary to review the terms of Top-Hat Plans, disability plans or life insurance plans to determine the extent, if any, those terms require deference to DROs.¹³⁸⁰ The relief provisions that prevent a plan from having a double payment obligation if the plan administrator satisfied its fiduciary responsibilities when it paid the plan benefits to the wrong person are applicable only to a Spousal Survivor Benefit Plan.¹³⁸¹ If such provisions are inapplicable, the plan is required to pay the participant or beneficiary regardless of whether it has been able to recover the wrongful payment.¹³⁸² However, there may be circumstances in which the person entitled to a benefit under a DRO may be prevented from obtaining the benefit from the plan because such person may be responsible for the wrongful payment. There appears to be no such case-law, although courts may look to case-law that in effect treats participants as directing payment to a spouse or former spouse, if the participant's actions permit such persons to access the participant's benefits wrongfully.¹³⁸³ It is doubtful if simply failing to file the DRO with a plan prior to the

1378. ERISA § 206(d)(3)(I), 29 U.S.C. § 1056(d)(3)(I) (2012).

1379. Act to Amend Payment of Life Ins. Benefits, Pub. L. No. 105-205 § 2, 112 Stat 683, 683-84 (1998).

1380. Treas. Reg. § 1.409A-2(b)(4) (2007)(such provisions do not usually create issues with respect to the deferral of income under Code § 409A for Top-Hat Plans).

1381. The relief provisions of ERISA §§ 206(d)(3)(H) and (I), 29 U.S.C. §§ 1056(d)(3)(H) and (I)(2012) are only applicable to Spousal Survivor Benefit Plans.

1382. *See e.g.*, *Milgram v. The Orthopedic Assoc. Defined Contribution Pension Plan*, 662 F.3d 187 (2d Cir. 2011) (holding plan liable to pay \$750,000 to participant even though plan had not been able to recover the sum improperly paid to the participant's former spouse).

1383. *Cf. Foster v. PPG Indus., Inc.* 693 F.3d 1226 (10th Cir. 2012) (holding plan not responsible for second benefit payment when plan followed its procedures, but permitted former spouse, who used participant's identifying information, to obtain participant pension benefits). *See also* *Gatlin v. Nat'l Healthcare Corp.*, 16 Fed. Appx. 283 (6th Cir. 2001) (holding plan responsible for second benefit payment when plan violated procedures and thereby permitted former spouse to obtain participant pension benefits by wrongfully changing the participant's address and forging the participant's signature).

plan's payment would result in a similar relief because then there would be little need for the relief provision for Spousal Survivor Benefit Plans.

If the terms of life insurance plans, Top-Hat Plans, or disability plans do not permit any deference to DROs, parties seeking payments from a beneficiary based on a state domestic relations law claim arising from a beneficiary's right to benefit from the plan would have no recourse with respect to those benefits. In general, persons with a domestic relations law judgment against a participant, rather than the beneficiary, may not enforce the judgment against the beneficiary of the death benefits because such judgments are only enforceable against property that the participant could obtain,¹³⁸⁴ and a participant could never have obtained his or her death benefits.

Parties seeking payments from a plan participant based on a DRO may enforce such a claim against the benefits a participant has received from a Top-Hat Plan or a disability pay plan, if their claim does not arise from a participant's right to a benefit under the terms of an ERISA plan, such as an order pay a fixed sum of alimony. However, ERISA offers plan participants in such situations a protection not always available under state law to the beneficiaries of spendthrift trusts. If they can defer making benefit withdrawals, creditors may not enforce claims against the pension plan until the benefits are distributed. A creditor has no right to step into the shoes of the participant and direct the plan to make a benefit payment. Plans must only respond to payment directions from plan participants and beneficiaries. Life insurance plans, often permit the deferral of the payment of survivor benefits. Thus, beneficiaries of such ERISA plans may similarly frustrate their creditors. Most Top-Hat Plans are subject to the tax deferral rules of Code Section 409A.¹³⁸⁵ Such plans may permit the participants to defer payments for at least five years after the date the payments are otherwise available, without adverse tax consequences.¹³⁸⁶

1384. *See e.g.*, N.Y. Civ. Prac. L. & Rules 5201(a) and (b) (LEXIS 2013) (describing the property subject to enforcement of a creditor's claim).

1385. *See generally* REGINA OLSHAN AND ERICA F. SCHOHN, 409A HANDBOOK, 461-538 (2010).

1386. Treas. Reg. § 1.409A-2(b)(1)(ii) (2007).

XX. COMMON LAW WAIVERS AND PRENUPTIAL AGREEMENTS DO NOT AFFECT A BENEFICIARY'S BENEFIT RIGHTS UNLESS THE PLAN TERMS PROVIDE FOR SUCH DEFERENCE, BUT A PRENUPTIAL AGREEMENT MAY NOT AFFECT A BENEFICIARY'S BENEFIT RIGHTS FROM A SPOUSAL SURVIVOR BENEFIT PLAN UNLESS INCORPORATED INTO A QDRO

Waivers by beneficiaries of ERISA plans, whether common-law or as part of prenuptial agreement, do not affect the beneficiary's benefit rights except to the extent, if any, that the plan terms provide for such deference. ERISA prohibits prenuptial agreements from having any such effect for Spousal Survivor Benefit Plans unless the agreements are incorporated into a QDRO.

Participants in Spousal Survivor Benefit Plans may change the default spousal designations required under the Spousal Survivor Benefit Mandate only with the written consent of the participant's spouse, which document acknowledges the effect of the consent, and is witnessed by a third party.¹³⁸⁷ An effective consent to the participant's waiver of spousal benefits may not be part of a prenuptial agreement, but must be executed while the spouse in question is married to the participant.¹³⁸⁸ Even if the prenuptial is executed a second time after the marriage it will not be valid if it does not satisfy the terms of the Spousal Survivor Benefit Mandate.¹³⁸⁹ ERISA would preempt any attempt to use a prenuptial agreement to wrest the survivor benefits from a widow who did not consent after the marriage to the participant's waiver of the spouse's survivor benefit.¹³⁹⁰ In particular, ERISA would

1387. ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2) (2012). *See generally* Feuer's Survivor Benefits, *supra* note 90, at 958-62.

1388. Treas. Reg. § 1.401(a)-20 Q & A-28 (as amended in 2006). *See also* Hagwood v. Bellsouth Sav. Plan, 282 F.3d 285 (4th Cir. 2002) (holding that Section 205 consents must be executed while the individual is a spouse). *But see* In re Estate of Hopkins, 574 N.E.2d 230 (1991) (finding that a widow waived survivor rights in prenuptial agreement, and the Treasury Regulation was dismissed as being interpretative and thus deserving little respect without any consideration of the deference required to be given to interpretative regulations by Chevron USA v. Nat'l Res. Def. Council, 467 U.S. 837 (1984)). *Cf.* LANGBEIN PENSION LAW, *supra* note 13, at 289-90 (questioning the wisdom of this policy).

1389. *See e.g.*, MidAmerican Pension and Emp. Benefits Plans Admin. Com. v. Cox, 720 F.3d 715 (8th Cir. 2013) (holding such an agreement not effective because it lacked an acknowledgment by the spouse of the spousal benefits to whose waiver she had consented).

1390. *See e.g.*, Nat'l Auto. Dealers and Assoc. Ret. Trust v. Arbeitman, 89 F.3d 496 (8th Cir. 1996) (finding that a prenuptial agreement does not establish a constructive trust in the survivor benefits paid to the participant's

preempt any state court order that a spouse comply with a prenuptial agreement, and execute a consent to a waiver by the participant of such survivor benefits that complies with the ERISA requirements.¹³⁹¹ On the other hand, a prenuptial agreement may be a basis for a QDRO that as discussed *supra*, determines benefit entitlements. Many of the issues pertaining to permissible waivers of the benefit required under the Spousal Survivor Benefit Mandate are discussed in *Feuer's Beneficiary Article*.¹³⁹²

The *Kennedy* Supreme Court held that a third party could not enforce a beneficiary's benefit waiver against a Spousal Survivor Benefit Plan because the waiver was not consistent with the terms of such plan.¹³⁹³ The Court explicitly stated that it did not address whether the default designee would have been able to enforce the waiver against the plan if the waiver had been consistent with those terms.¹³⁹⁴ It would appear that the plan terms determine the conditions, if any, under which the waiver may be revoked. If those revocation conditions are satisfied, then the plan must pay the designated beneficiary. If the conditions are not satisfied, the revocation is not permitted, then the plan must pay the default designee. No decisions appear to have addressed this matter.

There are conflicting Post-*Kennedy* decisions on whether persons may use a state law waiver that does not comply with the plan terms to wrest benefits from an ERISA designated beneficiary. Two circuits and a Texas federal district court have held that such wresting is permitted.¹³⁹⁵ A Massachusetts federal

widow by a pension plan). *Cf. Mattei v. Mattei*, 126 F.3d 794, 809 (6th Cir. 1997) (finding ERISA § 510 prohibited self-help by decedent's estate to enforce prenuptial that did not expressly refer to any pension plan interests but permitted state court enforcement of prenuptial) and LANGBEIN PENSION LAW, *supra* note 13, at 290 (observing that *Boggs*, 520 U.S. 833, prevented state law enforcement of prenuptial)

1391. *See e.g.*, *Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992) (holding that a spouse may not be ordered to comply with prenuptial and waive pension interest after death of participant, although the plan appeared to have no employee participants and thus was not an ERISA plan); *accord Arbeitman*, 89 F.3d at 501. *But cf. Greenbaum Doll & McDonald PLLC v. Sandler*, 458 F.Supp.2d 420 (W.D. Ky. 2006) *aff'd* 256 Fed. Appx. 765 (6th Cir. 2007) (rejecting a challenge to a surviving spouse's survivor benefits under Section 205, but in dicta pointing to the lack of a claim that the spouse breached a prenuptial agreement to execute a plan consent to a new beneficiary designation); *Callahan v. Hutsell, Callahan & Buchino P.S.C Revised Profit Sharing Plan*, 1993 U.S. App. LEXIS 34005 (6th Cir. 1993) (remanding to determine if spouse breached a prenuptial agreement to execute a plan consent to a new beneficiary designation). Neither of the Sandler courts (appellate or district), nor the Callahan court, simply declared that if the participant failed to execute a new beneficiary designation the existence of consent was irrelevant because consents are not beneficiary designations.

1392. *Feuer's Beneficiary Article*, *supra* note 1360, at 329-31.

1393. *Kennedy*, 555 U.S. at 300.

1394. *Id.* at 300.

1395. *See Estate of William Kensinger, Jr.*, 674 F.3d 131 (401(k) benefits

court and a Massachusetts state appellate court have held to the contrary.¹³⁹⁶

Neither circuit decision nor the Texas district decision mentions the ERISA dominating general purpose of protecting plan participants and beneficiaries. None gives any convincing basis¹³⁹⁷ for disregarding the *Boggs* conclusion:

Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. *It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits.* Their state-law claims are pre-empted.¹³⁹⁸

After *Hillman*, as discussed *supra*, there seems little basis for such disregard by the federal circuits or any other courts.

Describing the waiver claims as federal common law claims avoids state law preemption, but does not avoid the fact that those claims are based on the "theory that the claimant has an interest in the undistributed pension plan benefits." *Kennedy* decided that federal common-law waiver claims do not create such an interest if the plan terms do not provide for such waivers. Thus, there is no basis for any federal or state post-distribution claims.¹³⁹⁹

may be wrested from beneficiary whose divorce decree included a waiver of such benefits when plan terms did not permit such a waiver); *Andochik*, 709 F.3d at 296 (401(k) and life insurance benefits may be wrested from beneficiary whose divorce decree included a waiver of such benefits when plan terms did not permit such a waiver); and *Flessner v. Flessner*, 845 F. Supp. 2d 791 (S.D. Tex. 2012) (life insurance benefits may be wrested from beneficiary whose divorce decree included a waiver of such benefits when plan terms did not permit such a waiver).

1396. *See* *Staelens v. Staelens*, 677 F. Supp.2d 499 (D. Mass. 2010) and *Langevin v. Marmorow*, 2011 Mass. App. Unpub. LEXIS 810 (Mass. App. Ct. June 10, 2011) (§401(k) benefits may not be wrested from beneficiary whose divorce decree included a waiver of such benefits when plan terms did not permit such a waiver).

1397. *See* generally Feuer's *ERISA Myths*, *supra* note 25, at 729-33 (refuting the arguments in favor of honoring state law waivers).

1398. *Boggs*, 520 U.S. at 854 (emphasis added).

1399. *See* generally Feuer's *Misguided Offspring*, *supra* note 862.

XXI. ERISA PREEMPTS STATE DESIGNATION MANDATES SUCH AS COMMUNITY PROPERTY LAWS, RIGHTS OF ELECTIONS, OR REVOCATIONS OF DESIGNATIONS UPON DIVORCES, BUT PERMITS PLAN TERMS TO USE STATE LAW TO MAKE BENEFICIARY DESIGNATIONS IN WHOLE, OR IN PART IF STATE LAW IS CONSISTENT WITH THE TWO ERISA STATUTORY DESIGNATION MANDATES

The ERISA requirement that plan terms determine ERISA benefit rights substantially reduces the ability of states to exercise their traditional police power to determine how property is transferred at death, although plan sponsors often draft plans that defer in some manner to those powers. Many of these state laws are described in *Feuer's Beneficiary Article*.¹⁴⁰⁰

The Spousal Survivor Benefit Mandate requires Spousal Survivor Benefit Plans to provide spouses with survivor benefits unless the spouse consents to a waiver of such benefit, but such plans may provide spouses with more than the statutory required benefit. Sponsors of other ERISA plans, such as Top-Hat Plans, disability plans and life insurance plans, may decide the extent, if any, to which such plans provide spousal benefits, and, if so, whether they wish to require spouses to consent to the waiver of those benefits. ERISA preempts state designation mandates that would affect plan benefit rights before or after the plan distributes the benefits. Such mandates may arise from community property statutes, right to election statutes, or revocation of designation statutes. This preemption conclusion is buttressed by the reasoning of the Supreme Court's recent *Hillman* decision that the Federal Employee Group Life Insurance Act preempted a Virginia revocation upon divorce statute.¹⁴⁰¹

Sponsors of all ERISA plans, may choose, however, to rely on state law to make beneficiary designations, such as by making the participant's estate the default designee, or to clarify benefit designations that use terms that may depend on state law. Such practices are described extensively in *Feuer's Beneficiary Article*.¹⁴⁰²

Supreme Court case law, ERISA and the corresponding legislative history all support the ERISA preemption of state designation mandates, which are designed to protect current spouses (community property and elective share laws) and future spouses (revocation of designations upon divorces). As discussed *supra*, both *Boggs* and *Egelhoff* held that ERISA preempted such

1400. Feuer's Beneficiary Article, *supra* note 1360, at 324-25.

1401. See generally Feuer's Hillman Article, *supra* note 867.

1402. Feuer's Beneficiary Article, *supra* note 1360, at 334-35.

laws with respect to any ERISA plans. Congress made no attempt to overrule either Court decision. In 2013 the Court in *Hillman* confirmed the principle with respect to federal employee benefit plans, which supports the ERISA preemption of these statutes. As discussed *supra*, the bills that were the precursors to ERISA and ERISA as initially enacted had provisions to protect spouses, namely the default joint and survivor annuity provisions. In all cases those provisions were limited to those plans, which are described herein as Spousal Survivor Benefit Plans. As discussed *supra*, there were major Congressional ERISA reform proposals in 1978 and 1979, which included greater ERISA protections for spouses, although none were enacted. All those proposals were again limited to Spousal Survivor Benefit Plans. REACT and its precursors included enhanced spousal protections for participants in Spousal Survivor Benefit Plans. There is no indication in REACT, or its precursors, or any other ERISA provision, or their legislative history, that Congress thereby intended to exclude from the ERISA Express Preemption any of the state designation statutes either for Spousal Survivor Benefit Plans, which must have ERISA spousal protection provisions, or for other ERISA plans, which may choose whether to have some or no spousal protection provisions.

Thus, an ERISA amendment would be needed to reconcile ERISA with any of the above state designation laws discussed, which as described, often act on distributed plan benefits rather than plan distributions. The Uniform Probate Code comment pertaining to revocations of designations upon divorces provides the usual justification for such an amendment.¹⁴⁰³ The comment disregards the ERISA dominating general purpose of protecting the benefit rights of participants and beneficiaries under the terms of an ERISA plan, while focusing on a participant's presumed intent rather than his or her expressed intent. In particular, the comment treats ERISA as interested primarily in encouraging smooth plan administration, as follows:

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if *an unintended beneficiary* were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.¹⁴⁰⁴

1403. UNIF. PROBATE CODE § 2-804 cmt. (1969) (amended 2010).

1404. *Id.* (emphasis added). See generally John Langbein, Major Reforms of

Similar arguments may be made in favor of permitting elective share laws and community property law to govern ERISA benefit distributions. However, in those cases the state laws are designed to achieve the intent the draftsmen believe a participant should have rather than the one the participant expressed pursuant to the plan terms (which include default designations).

A. The Spousal Survivor Benefit Mandate Requires Spousal Survivor Benefit Plans to Provide Each Participant's Spouse with a Default Spousal Benefit of at Least 50% of the Value of the Participant's Benefit

The Spousal Survivor Benefit Mandate requires Spousal Survivor Benefit Plans to (1) offer each participant's spouse survivor benefits both before the participant begins to receive plan benefits, and when the participant would begin to receive benefits;¹⁴⁰⁵ (2) designate the participant's spouse as the beneficiary of specified survivor benefits for any participant, who is married;¹⁴⁰⁶ and (3) to require that all waivers by a participant of the spousal benefit be accompanied by a written consent of the participant's spouse witnessed by a third party.¹⁴⁰⁷ The minimum required spousal benefit is generally 50% of a participant's accrued benefit¹⁴⁰⁸ regardless of how much of the benefit was earned during the marriage.¹⁴⁰⁹ Relief provisions prevent Spousal Survivor

the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, 38 ACTEC 1, 1 at 19-21 (2012) available at <http://ssrn.com/abstract=2285582> (last visited March 24, 2014) (arguing that the same policy considerations that persuaded the Uniform Law Provisions to include statutory designations overriding individual non-ERISA designations should apply to ERISA participant designations because Congress failed to consider those particular statutory designations). However, Congress set forth only two statutory ERISA designations the Spousal Survivor Benefit Mandate Spousal Survivor and the QDRO Benefit Mandate (the QMSCO could be considered a third one), neither of which was a UPC suggestion. Thus, it is most reasonable to conclude that Congress intended that plan sponsors be free to adopt or disregard the UPC policies, or any other policies Congress did not mandate or prohibit.

1405. ERISA § 205(a), 29 U.S.C. § 1055(a) (2012).

1406. ERISA §§ 205(c)-(e), 29 U.S.C. §§ 1055(c)-(e) (2012). The required default benefit is generally: (1) at retirement is a joint and fifty percent survivor benefit at retirement, with the spouse entitled to the survivor benefit; and (2) before retirement, an annuity for the spouse's life. Profit-sharing plans that offer no annuities may instead provide that the surviving spouse is entitled to the full account balance if the participant dies before withdrawing his benefits. ERISA § 205(b)(1)(C), 29 U.S.C. § 1055(b)(1)(C). Many profit-sharing plans choose to provide the surviving spouse with only 50% of the participant's account balance if the participant dies before retiring, by offering them annuities of such value. ERISA § 205(e)(2), 29 U.S.C. § 1055(e)(2) (2012).

1407. ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2) (2012).

1408. ERISA §§ 205(d), (e) 29 U.S.C. §§ 1055(d), (e) (2012).

1409. See generally Heather Rose, *Boggs v. Boggs: Creating Real-Life Cinderellas*, 33 J. MARSHALL L. REV. 271 (1999) (criticizing the statutory allocation, analogizing it to the interests acquired by Cinderella's step-

Benefit Plan from having a double payment obligation if the plan administrator pays spousal plan benefits to the wrong person despite meeting fiduciary responsibilities.¹⁴¹⁰ However, as with the Spousal Survivor QDRO Benefit Mandate, there is no similar protection for plans other than Spousal Survivor Benefit Plans, which choose to provide spousal survivor benefits, but pay such benefits to the wrong person.

B. ERISA Preempts State Community Property Laws to the Extent that They Seek to Affect the Benefits That Beneficiaries May Obtain From An ERISA Plan or Retain Without Making Any Offsetting Payment

Community property laws treat marriage as an economic partnership in which both spouses, by operation of law, acquire and have equal ownership in property acquired by their efforts during the marriage, but separate ownership in other property.¹⁴¹¹ Thus, the participant's spouse thereby obtains an interest in only the portion of the pension earned by the participant during the marriage. This interest, unlike the Spousal Survivor Benefits, becomes available to the spouse's estate on the spouse's death rather than on the participant's death.¹⁴¹² This interest is more difficult for a pension plan to determine than the Spousal Survivor Benefit because the plan must keep track of the time during which each participant was married, and if there was more than one marriage, the time for each spouse.

Boggs held that ERISA preempts the application of community property law to determine the spouse's share of a participant's pension benefits before their distribution by the plan.¹⁴¹³ The decision contained the customary reservation that the Court did not consider a question not before the Court, *viz.*, would the post-distribution protection have continued if the distributions were made when both the participant and his spouse were alive, *i.e.*, when the two had a community.¹⁴¹⁴ This reservation may be readily dismissed. ERISA preempts, *mutatis mutandis*, the

mother). *Cf. Watson's Broken Promises*, *supra* note 229, at 438, 85-86, 93-500 (criticizing the inequities created by the ERISA provision requiring a spouse to be married for at least a year to obtain spousal survivor benefits).

1410. ERISA §§ 205(c)(1), (2) and (6), 29 U.S.C. §§ 1055(c) (1), (2) and (6) (2012).

1411. *See e.g.*, Caroline Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women*, 11 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 9-10 (2011).

1412. *But see Stone* DOL Brief, *supra* note 480, at R-11 (arguing that community property law if not preempted might also provide a means for the non-participant spouse to interfere with an employee's rights under his plan, such as beneficiary choices or benefit form choices).

1413. *Boggs*, 520 U.S. at 854.

1414. *Id.* at 845.

application of community property law to determine the spouse's share of a participant's pension benefits after their distribution by the plan, while the spouse is alive.¹⁴¹⁵ This implication is reinforced by the recognition that the arguments in favor of protecting distributed retirement benefits are far stronger if they are paid to the participant, *i.e.*, the retiree, than if they are paid as death benefits as occurred in *Boggs*.¹⁴¹⁶

Furthermore, *Boggs* concluded that claimants could not compel plan beneficiaries to make payments to them from property they owned in addition to the plan distributions.¹⁴¹⁷ The Supreme Court declared that it had rejected the requirement of such offsetting payments in *Free*.¹⁴¹⁸

Boggs did not depend on the benefits being pension benefits, but rather on (1) the benefits being ERISA benefits, and (2) the rejected state claim arising from a participant's or beneficiary's right to an ERISA plan benefit (*i.e.*, the claim would have disappeared if the participant or beneficiary had not obtained the benefit). The Supreme Court confirmed this as discussed *supra*, by making a similar holding in *Egelhoff* with respect to a state claim arising from a beneficiary's right to life insurance benefits and to pension benefits. Thus, community property laws may not be applied to determine the right to retain any ERISA benefit distribution or the amount of such distribution. It is irrelevant whether the benefits come from a Spousal Survivor Benefit Plan, a Top-Hat Plan, a life insurance plan or a disability benefit plan.¹⁴¹⁹

C. *ERISA Preempts State Elective Share Laws that Seek to Affect the Benefits that Beneficiaries May Obtain From an ERISA Plan or May Retain Without Making Any Offsetting Payment, Thus Such Statutes Must Disregard ERISA Benefits*

Boggs implies that ERISA preempts the state non-community law approach to determine spousal benefit entitlements for any ERISA plans, *i.e.*, elective share statutes, which like the Spousal Survivor Benefits become payable to the participant's spouse when the participant passes away. Elective share statutes give surviving spouses the right to elect to obtain one third to one half

1415. *See generally* Albert Feuer, A Misguided Kennedy Offspring from the Third Circuit, 31 TAX MGMT. WEEKLY J. 564, 566-67 (April 23, 2012) available at <http://ssrn.com/abstract=2047238> (last visited March. 30, 2014) and Feuer's ERISA Myths, *supra* note 25, at 749.

1416. *See generally* Feuer's ERISA Myths, *supra* note 25, at 736-37.

1417. *Boggs*, 520 U.S. at 853 (citing *Free*, 369 U.S. at 669).

1418. *Id.*

1419. *See e.g.*, *Orr v. Prudential Ins. Co. of America*, 2012 U.S. Dist. LEXIS 82022 (D. Idaho June 12, 2012) (holding that "a plaintiff cannot use a constructive trust to make an end-run around ERISA requirements;" thus, a participant's widow could not use state community property law to impose a constructive trust on the life insurance benefit payment received by the participant's son and designee).

of the participant's elective estate.¹⁴²⁰ The elective estate augments the participant's probate estate with assets that do not pass by means of a will, such as pension plan assets.¹⁴²¹ As with ERISA spousal benefit rights, spouses may waive these rights.¹⁴²² Unlike the ERISA spousal benefit rights or community property rights, the right to an elective share is personal, and it may not be exercised by a representative of the estate of the surviving spouse.¹⁴²³

ERISA prevents state elective share statutes from being used to determine who is entitled to receive or retain ERISA benefits.¹⁴²⁴ Moreover, if *Mackey I* is still viable with respect to these statutes, then ERISA will preempt these statutes to the extent those statutes reference ERISA plans.

As with community property statutes, state elective share statutes may not be used to force recipients of ERISA benefits to transfer other property of equivalent value to another person on the basis that the other person was entitled to the value of the ERISA benefits.¹⁴²⁵ For example, suppose a participant's friend was entitled to the participant's \$1,200,000 death benefit from a Top-Hat Plan, while the surviving spouse (a widow) was entitled to the probate assets of \$300,000. Let the relevant elective share statute entitle the surviving spouse to one-third of the elective estate. If the elective estate includes the Top-Hat Plan assets, the widow would be entitled to one-third of \$1,500,000, *i.e.*, \$500,000. She, however, only received \$300,000. ERISA would prevent the widow from obtaining the \$200,000 from the non-spouse. ERISA would benefit the widow if she had been entitled to the participant's \$1,200,000 death benefit from a Top-Hat Plan, while a participant's friend was entitled to the probate assets of \$300,000. If the elective estate includes the Top-Hat Plan assets, the widow would again be entitled to \$500,000, so she would be entitled to no further assets. ERISA would, however, give her an entitlement to one third of \$300,000, *i.e.*, \$100,000.

More generally, ERISA prevents the elective share statutes from considering the ERISA benefits in elective share computations because such consideration can decrease the ERISA benefits a beneficiary obtains. In both examples, the recipient of the ERISA plan benefits would have received a smaller elective share as a result of receiving those benefits. Nevertheless, state courts often act to the contrary, as occurred in the *Estate of Aubrey*

1420. See generally Feuer's ERISA Myths, *supra* note 25, at 644-45.

1421. *Id.*

1422. See *e.g.*, N.Y. EST., POWERS & TRUSTS LAW § 5-1.1-A. (e) (McKinney 2013).

1423. See *e.g.*, N.Y. EST., POWERS & TRUSTS LAW § 5-1.1-A. (c)(3) (McKinney 2013).

1424. Feuer's ERISA Myths, *supra* note 25, at 749-51.

1425. *Id.* at 750.

Cohen.¹⁴²⁶

D. ERISA Preempts State Laws That Seek to Revoke a Spousal Designation Following the Divorce of a Plan Participant

The Supreme Court in *Egelhoff*,¹⁴²⁷ as discussed *supra*, held that ERISA preempted a state statute revoking plan designations of a spouse following a participant's divorce from such spouse unless the plan terms provide otherwise, even if the law acted on benefits distributed by the plan.¹⁴²⁸ Such decision was followed by the Pennsylvania Supreme Court in *In the Estate of Paul J. Sauers, III*,¹⁴²⁹ which held that ERISA preempted a revocation after divorce statute that provided that the plan would be subject to no sanctions for distributing benefits in accord with plan terms unless restrained by a state court order.¹⁴³⁰ The recent Supreme Court holding in *Hillman*, that a provision in the program for federal group life insurance for civil servants preempted a Virginia statute that imposed no obligation on the plan, confirms the viability of this holding.¹⁴³¹ There is a question whether the Alienation Prohibition prevents the inclusion of revocation upon divorce provisions in the terms of a Spousal Survivor Plan, and if not, whether it is prudent to have such a provision.¹⁴³²

1426. Estate of Aubrey Cohen, 2001 N.Y. Misc. LEXIS 1347 (N.Y. Sur. Ct. N.Y. County. Jan. 22, 2001) (discussing the extent to which ERISA plans are included in elective estate under New York law).

1427. *Egelhoff*, 532 U.S. at 141.

1428. *Id.* at 150.

1429. *In the Estate of Paul J. Sauers, III*, 32 A.3d 1241 (Pa. 2011) (reversing the lower court post-*Egelhoff* contrary decision pertaining to distributed life insurance proceeds).

1430. *Id.* at 1245.

1431. See generally Feuer's Hillman Article, *supra* note 867.

1432. See generally Albert Feuer, *Did a Unanimous Supreme Court Misread ERISA, Misread the Court's Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?*, 37 COMP. PLAN. J. 247, at 261-64 (2009), available at <http://ssrn.com/abstract=1485204> (last visited Jan. 30, 2014) (discussing the arguments presented about such provisions). Cf. IRS, *Automatically Revoking Beneficiary Designations on Legal Separation Can Lead to Plan Errors*, last reviewed or updated on 9/13/2013, (IRS declares in web site statement about the applicability of tax-qualification counterpart of the Spousal Survivor Benefit Mandate, which statement is not part of a regulation, that "Retirement plans may continue to provide that if participants get a divorce, their designation of their former spouse as plan beneficiary is automatically revoked") available at <http://www.irs.gov/Retirement-Plans/Automatically-Revoking-Beneficiary-Designations-on-Legal-Separation-Can-Lead-to-Plan-Errors> (last visited Jan. 30, 2014).

E. ERISA Preempts State Laws That Seek To Revoke the Designation of a Person Who Slays the Plan Participant Except to the Extent the Law Automatically Revokes the Designation if the Slayer is Convicted of a Specified Homicide

The Supreme Court in *Egelhoff*,¹⁴³³ declined to decide whether slayer laws, which revoke a designation of a person who slays an ERISA plan participant are preempted.¹⁴³⁴ Nevertheless, it would appear that under the same reasoning applicable to revocations following divorce statutes, ERISA preempts such non-criminal statutes and similar state common-law on the benefit rights of a beneficiary who slays the participant who designated such person as the beneficiary,¹⁴³⁵ unless, as discussed *supra*, for automatic revocations for specified homicide convictions. However, there are certain circumstances in which the objectives of a slayer statute may be achieved consistent with the ERISA Express Preemption. For example, in *Mack v. Kuchenmeister*,¹⁴³⁶ the beneficiary slew the participant, his spouse, and shot the judge presiding at their divorce hearing. A QDRO was issued *nunc pro tunc* following the slaying which deprived the participant of the ERISA benefits.¹⁴³⁷ Moreover, as discussed, *supra*, the ERISA Express Preemption permits criminal law to compel the person to make restitution for his crime by paying the benefit to the default beneficiary. Federal common law may not be used to deprive the slayer of the benefit because there is no statutory gap to be filled; ERISA gives the duly designated beneficiary the right to the benefit.¹⁴³⁸

1433. *Egelhoff*, 532 U.S. 141.

1434. *Id.* at 152. For a good recent analysis of slayer decisions see Cadel v. Shelton, 2013 U.S. Dist. LEXIS 42766 (S.D. Ohio March 26, 2013) (holding that participant's default designees entitled to proceeds from participant's ERISA insurance on spouse who he had killed before committing suicide). See also xtremErisa, *Slayer!* (May 6, 2011, 3:30 PM) available at <http://xtremErisa.blogspot.com/2011/05/slayer.html?m=1> (last visited Jan. 30, 2014) (discussing IRS private letters holding that the application of slayer principles do not adversely affect plan tax qualification).

1435. See generally Feuer's Survivor Benefits, *supra* note 90, at 1048-1056. See also Katherine A. McAllister, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, at 1507-08, 1513-14 (2011) (agreeing with the current state of the law, but arguing that Congress should respond by changing ERISA).

1436. *Mack v. Kuchenmeister*, 619 F.3d 1010 (9th Cir. 2010).

1437. *Id.* at 1014.

1438. See generally Feuer's Survivor Benefits, *supra* note 90, at 1056-1059 and Albert Feuer, *Questions of Justice and Law Raised When an Employee Benefits Plan Beneficiary Strangles His Grandmother, the Participant, to Death*, 32 TAX MGMT WEEKLY. J. 1756 (Dec. 23, 2013) available at <http://ssrn.com/abstract=2372847> (last visited Jan. 30, 2014) (reviewing the implications of a slayer case discussed in the New York Daily News). Cf. LANGBEIN PENSION LAW, *supra* note 13, at 340-43 (arguing that if state slayer laws are preempted, then federal common law would prevent the slayer from obtaining the proceeds) referring to *Mitchell v. Robinson*, 2011 U.S. Dist.

Contrary to my earlier writings it is appropriate to permit civil courts to use slayer principles to deprive slayers of the victim's ERISA death benefits if, and only if, the deprivation occurs automatically as a result of specified homicide criminal conviction, and the deprivation applies to death benefits most of which are not ERISA benefits. This approach recognizes (1) that automatic such deprivations have precisely the same effect on the killer as if they were part of the sentence for the homicide as discussed *supra*, (2) the historical reason why slayer principles are not traditionally explicitly included in state criminal laws described *infra*; and (3) the rule is generally applicable because it applies to all death benefits that are not primarily ERISA death benefits. In other cases, ERISA preempts the civil law deprivation of the slayer's death benefits because such deprivations are not automatic consequences of the criminal conviction, but require the court to make an independent determination affecting the killer's rights, *viz.*, whether he is entitled to the death benefits. Under this approach, ERISA would not preempt wrongful death civil judgments against the killer, and other civil judgments for damages by victims of crimes. Such judgments, which are not based on the death benefit, differ from the proposed slayer rule because they would not vanish if there had been no ERISA benefit. Thus, the claims do not arise from the victim's ERISA benefit right. Therefore they may be collected from the death benefits received by the slayer.

The U.S. Constitution prohibition on bills of attainders¹⁴³⁹ led to the development of the slayer rules as described *infra*. Bills of attainder provide that a person convicted of a capital offense is deprived of all his property, which goes to the state under the attainder.¹⁴⁴⁰ In order to avoid being characterized as bills of attainder state criminal laws do not explicitly deprive slayers of the victim's death benefits.¹⁴⁴¹ It is not readily apparent why

LEXIS 147226 (E.D. Mo. Dec. 22, 2011) (holding ERISA preempts state slayer law but its principles may be applied as federal common law, which "encompasses the equitable principle that a person should not benefit from his wrongs.")

1439. U.S. CONST. art. I, sec. 10.

1440. Robert F. Hennessy, *Property - the Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts "Slayer Statute,"* 31 W. NEW ENG. L. REV. 159, at 162 (2009).

1441. *Id.* at 162-64 and 187-88 (2009) (stating that the American rejection of criminal forfeiture "attainder, forfeiture, corruption of blood and escheat" eliminated the criminal statutes depriving killers of death benefits, and asking whether the civil forfeiture statutes violate the same prohibitions). See generally Alison Reppy, *The Slayer's Bounty-History of Problem in Anglo-American Law*, 19 N.Y.U. L Q. REV. 229 (1942) (reviewing the development and rejection of those doctrines and criticized much cited decisions used to justify the slayer rules, such as *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)(depriving a boy, who killed his grandfather, to prevent a will change, of death benefits) and *Mutual Life Insurance Co. v. Armstrong*, 117 U.S. 591

deprivations limited to the death benefits of the killer's victim would be characterized as bills of attainder, when non-excessive fines are permitted. However, the more serious objection to having criminal courts administer slayer rules, which, unlike bills of attainder, do not give the death benefits to the sovereign, is that civil courts customarily decide how to dispose of death benefits. Furthermore, they are made explicit parts of civil laws for the following reason:

The slayer rule occupies an important but limited place in the law. *The slayer rule is not punitive, that being the function of the criminal law.* Nor is it compensatory, that being the function of tort law in an action for wrongful death (see Comment q). Thus, the slayer rule does not cause the killer to forfeit any of his or her own property (see Comment o), but prevents the killer from benefitting from the wrong that he or she has committed.¹⁴⁴²

The statement correctly recognizes that the deprivation is not the payment of a criminal fine. Fines, like traditional attainders, are paid to the state. Nor is the deprivation a payment of a reparation. The victim of the killing is the decedent, so the reparation for the killing is the wrongful death damages. However, neither relief appears to make any allowance for the fact that the killing deprived the decedent of the right to change the designation. The proposed slayer approach punishes the killer for this deprivation by depriving him of the ERISA death benefit if this is an automatic consequence of the killing.

Finally, all the states and the District of Columbia use slayer principles to deprive killers of the death benefits of their victims, although they differ in the conditions under which such deprivation occur, how to determine whether the conditions have occurred and who is entitled to the death benefits.¹⁴⁴³ Many states provide that a felonious and intentional murder results in the deprivation of the death benefits.¹⁴⁴⁴ Thoughtful commentators

(1886)(depriving a participant's spouse of death benefits when the participant was murdered by his business partner).

1442. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. a (amended 2003) (emphasis added).

1443. Carla Spivack, *Killers Shouldn't Inherit from Their Victims--or Should They?*, 48 GA. L. REV. 145 at 156 (2013). *See generally*, Bradley Myers, *The New North Dakota Slayer Statute: Does It Cause A Criminal Forfeiture?*, 83 N.D. L. REV. 997, 1002-20 (2007) (discussing the different state slayer approaches).

1444. Spivack, *supra* note 1447, at 156, and UNIF. PROB. CODE § 2-803(b) and (g) (amended 2010) (criminal conviction is conclusive proof of felonious and intentional killing otherwise clear and convincing proof of such killing is needed).

have argued that the deprivation (1) should only occur if the killing was with intent of obtaining the death benefits or part of domestic abuse,¹⁴⁴⁵ (2) should also occur if beneficiary abused but did not kill the decedent,¹⁴⁴⁶ and (3) should be given special consideration if the killer was insane at the time of the slaying.¹⁴⁴⁷ If the first two conclusions are made by a civil court rather than a criminal court, the deprivations do not automatically follow from the criminal conviction. Thus, the civil decisions would not qualify for the generally applicable criminal exclusion from the ERISA Express Preemptions Rule. If the deprivation automatically followed, they would qualify for the exclusion.

XXII. CONCLUSIONS

The article used standard statutory interpretation principles to determine the extent of ERISA benefit rights. ERISA's dominating general purpose, protecting the benefit rights of participants and beneficiaries under the terms of an ERISA plan, was identified. The ERISA statute was reviewed in its entirety. The committee reports and floor discussions pertaining to the legislation that became ERISA, including its amendments, were reviewed. Congressional reports about how ERISA worked, and did not work, in practice were reviewed. The state of the law, including the case law, at the time of the enactment of ERISA and of its amendments was reviewed. The works of other commentators were also considered.

The article draws six general conclusions about the extent to which ERISA preempts state criminal, tax, debtor-creditor, domestic relations, and transfer-on-death laws pertaining to the benefit rights of plan participants and beneficiaries. All arise from the fundamental ERISA preemption principle that state laws may not enhance or diminish any of the three ERISA basic benefit protections: (1) ERISA gives ERISA plan participants and beneficiaries the right to exercise benefit rights under the terms of an ERISA Plan; (2) ERISA imposes ERISA General Mandates, *i.e.*, reporting or disclosure mandates, benefit terms mandates, funding mandates, or fiduciary mandates, and (3) ERISA provides mechanisms for enforcing benefit rights and ERISA mandates. Thus, ERISA preemption is determined by the effect of a state law on the ERISA basic benefit protections, which is the relevant

1445. Spivack, *supra* note 1447, at 216-19. The author made an alternative proposal for an exclusions for killers who were either insane or victims of domestic abuse. *Id.* at 219-25.

1446. Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 802-03 (2012).

1447. Jennifer Piel & Gregory B. Leong, *The Slayer Statute and Insanity*, 38 J. AM. ACAD. PSYCHIATRY LAW 258 (2010) (discussing a Washington decision that a person held not guilty by reason of insanity could be deprived of the decedent's death benefits).

relation to ERISA benefit plans. ERISA permits non-tenuous effects on these protections only to the extent they are needed to implement a law that ERISA does not otherwise preempt. For example, ERISA permits slayer laws to implement automatically a criminal homicide law, which is explicitly excluded from the ERISA Express Preemption. Congress indicated such implicit exclusions are quite rare by deciding in REACT to eliminate the judicially recognized exclusion from preemption for domestic relations orders, was discussed *supra*. Instead, plans must only defer to those orders that qualify as QDROs, and only Spousal Survivor Benefit Plans must defer to such orders.

First, ERISA preempts a state law (other than a generally applicable criminal law, which is not preempted) if, and only if, the law (1) prevents a participant or beneficiary of an ERISA plan from exercising a benefit right under the plan's terms other than a state-law tax which may diminish the value of a distributed plan benefit; (2) supplements, diminishes or enhances an ERISA enforcement mechanism, or (3) imposes an ERISA General Mandate, *i.e.*, a reporting or disclosure mandate, a benefit terms mandate, a funding mandate, or a fiduciary mandate other than one that is needed to implement a state law that ERISA otherwise permits, such as a mandate to file an annual plan return for a state-law tax that ERISA permits, or a benefit restriction to comply with law regulating health care providers that ERISA otherwise permits.

Second, ERISA does not preempt (1) generally applicable state criminal laws that do not relate to ERISA plans, such as theft laws, (2) generally applicable criminal laws that relate to ERISA plans, such as wage and wage supplement collection laws, or usury laws, (3) laws to implement generally applicable criminal sanctions that explicitly refer to ERISA benefits, such as fine or restitution collection laws, and (4) slayer laws that automatically implement specified homicide convictions.

Third, ERISA preemption depends only upon whether a state law as a non-tenuous effect on any of the ERISA basic benefit protections, including the right to exercise benefit rights. Preemption does not depend upon whether a law, which affects any of the basic ERISA benefit protections, is generally applicable (other than a generally applicable criminal law, which is not preempted), is directed at ERISA plans, or refers to ERISA plans or ERISA benefits. Any state law that conflicts with one of the benefit protections will have a non-tenuous effect and be preempted unless an exclusion, described *infra*, is applicable.

ERISA preempts a state law, if and only if, the law has a tenuous effect on any of the three benefit protections except to the extent a state-law is not related to ERISA plans because of an (1) explicit exclusion from the ERISA Express Preemption, such as a law regulating insurance providers, which may have a non-

tenuous effect on the funding of an ERISA plan's benefits, or (2) an implicit exclusion because of the structure of ERISA, such as a state-law regulating the provision of health care, which may have non-tenuous effect on the benefits an ERISA plan may offer. Thus, ERISA does not preempt generally applicable theft laws and contract laws, which have none of the prohibited effects on any benefit protections, but may affect plan interactions with third parties.

Fourth, it appears ERISA permits tenuous direct effects on the three ERISA basic protections. This is more lenient than conflict preemption, which does not permit *de minimis* conflicts from state laws. It would appear any direct effects on enforcement mechanisms are considered tenuous. Thus, they are preempted. The only direct effect on the exercise of a benefit right that would appear to be tenuous, and thus is not preempted by ERISA, is a non-confiscatory state-law tax on participant or beneficiaries for their benefits, which diminishes the benefit which the participant or beneficiary may retain. Thus, ERISA preempts a state levy not provided for under the plan terms, which would otherwise prevent a participant from obtaining the benefit payment to which he is entitled under the plan terms. The only direct effect on ERISA General Mandates that appears to be tenuous, and thus is not preempted is one that is limited to what is needed to implement a law that is not otherwise preempted. ERISA preempts any other state law that directly affects any of the benefit protections, no matter how small the burdens, such as a requirement that all tax exempt entities, which entities include but are not limited to ERISA pension plans, send copies of annual tax returns to the secretary of state so that copies of the returns may be made available to the public.

Fifth, the extent of the administrative or cost burden imposed by a state law on ERISA plans is only relevant to ERISA preemption if the state law indirectly affects one of the three benefit protections. There is no preemption if the only effect of a state law is to reduce indirectly the benefit payments to which participants and beneficiaries are entitled under the plan terms, such as an annual fee on an ERISA plan, unless the fee would (1) prevent the plan from providing benefits, or (2) compel a plan to (a) use an insurer or other benefit provider, (b) maintain an ERISA plan, or (c) include a certain benefit or level of benefits.

Sixth, ERISA protections of the benefit rights of participants and beneficiaries are not limited to title protection. Otherwise, contrary to its title and substantive terms, the Employee Retirement Income Security Act of 1974, would be primarily about protecting plan sponsors and administrators by minimizing their plan burdens rather than primarily about achieving ERISA's dominating general purpose of securing the benefits of employees (participants) and their beneficiaries.

Thus, ERISA prevents a person, with a state-law claim that arises from a participant's or beneficiary's right to any ERISA plan benefit, from compelling the plan to pay the person such benefit or from wresting the benefit or the amount of the benefit from the participant or the beneficiary, unless the claim (1) arises under a generally applicable criminal law or (2) is a state-law tax claim, which may be used to wrest the tax amount from a plan participant or beneficiary, but not to compel the plan to pay the state such amount. A state-law claim that arises from a participant's or beneficiary's right to an ERISA plan benefit, is one that would disappear, if the participant or beneficiary did not have the benefit right. A claim based on a beneficiary's waiver of the benefit in a domestic relations order that is not consistent with the plan terms would arise from a beneficiary's benefit right, but a claim based on a debt that arises from a consumer purchase would not so arise. If the plan terms provide for deference to a state-law claim, the claimant would thereby become a plan beneficiary, and there be no preemption issue.

The Alienation Prohibition prevents a person with a state law claim, regardless of whether it arises from a participant's or beneficiary's right to an ERISA plan benefit, from (1) compelling a Spousal Survivor Benefit Plan to pay the person the benefit of a participant or beneficiary, or (2) wresting the benefit from the participant or beneficiary. However, this prohibition does not apply to a (1) claim that arises under a generally applicable criminal law (2) a state-law tax claim, which may be used to wrest the tax amount from a plan participant or beneficiary, but not to compel the plan to pay the state such amount, or (3) a state domestic relations claim that is part of the plan terms under the Spousal Survivor QDRO Benefit Mandate.

The ERISA Express Preemption significantly reduces, but does not eliminate, the ability of the states to exercise each of these five traditional powers with respect to ERISA plans, participants and beneficiaries. The ERISA Express Preemption gives the states considerable leeway to affect benefit operations and protections at the plan level, while strictly limiting their ability to affect the ERISA basic benefit protections, particularly the right of every ERISA plan participant or beneficiary to exercise all his or her benefit rights under the plan terms. Thus, the ERISA Express Preemption preserves, but does not expand, the three ERISA basic benefit protections by which ERISA achieves its dominating general purpose, the protection of ERISA plan participants and beneficiaries. Consequently, ERISA preemption represents both a broad and modest approach to federalism.

As discussed, *supra*, the full implementation of the article's conclusions, particularly those applying to the exercise of benefit rights, would require the Supreme Court to repudiate, in whole or in part, some of its decisions, such as

(1) *Fort Halifax*, which held that ERISA did not preempt a Maine severance-pay mandate. The Court therein described ERISA as being focused on, the administrative integrity of plans.¹⁴⁴⁸ The Court therein stated “Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations.¹⁴⁴⁹ However, ERISA’s dominating general purpose is the protection of plan participants and beneficiaries, rather than the protection of plan administrators. Moreover, the ERISA Express Preemption does, and was intended to assure the integrity of the three ERISA basic benefit protections. As a consequence employee benefit rights and ERISA plans are governed by uniform federal regulation, rather than disparate state rules. The Court should have found that the state-law severance requirement was a requirement for an ERISA plan that ERISA preempted.

(2) *Mackey I*, which held that ERISA preempted a state law that would have exempted ERISA plan funds and benefits from most levies. The holding was based on the principle that ERISA preempts state laws that would treat ERISA plans differently than other entities. However, ERISA permits states to treat ERISA plans differently, if the different state treatment has only tenuous effects on them ERISA basic benefit protections. In particular, because there was no non-tenuous effect on any of the protections, the Court should have held that ERISA did not preempt the state-law levy exemption.

(3) *Travelers*, which held that a state could require hospitals to impose surcharges on the fees they charged patients without Blue Cross health care insurance. The Court therein presented the proposition that ERISA preempts any state law that “refer[s] to” ERISA plans regardless of the state law’s effects on the plans or benefit entitlements thereunder. However, ERISA is not a sacred text. ERISA does not prohibit references to ERISA plans. ERISA permits state law references to ERISA plans if the law has only tenuous effects on them ERISA basic benefit protections. In particular, because there was no non-tenuous effect on any of the protections, the Court correctly held that ERISA did not preempt the state surcharges. *Travelers* correctly recognized that ERISA does not preempt (1) all state laws that increase ERISA plan benefit costs or increase plan administrative burdens and (2) state laws that regulate the provision of health care. However, *Travelers* failed to recognize that ERISA preempts state laws that diminish benefit rights directly.

(4) *Mackey II*, which held that state-law levies may be applied to benefit payments from all ERISA plans other than Spousal Survivor Benefit Plans. This decision was based on the principle that state laws may determine who obtains benefits from ERISA plans other than Spousal Survivor Benefit Plans. However, ERISA prohibits state law from preventing the exercise of benefit rights, including,

1448. *Fort Halifax Packing Co.*, 482 U.S., at 15.

1449. *Id.* at 11.

but not limited to, the right of a participant or a beneficiary to obtain benefits due under the plan terms. In particular, because the state-law levy prevented participants from obtaining their plan benefits, the Court should have held that ERISA preempted the levy against payments from an ERISA vacation plan.

(5) *Mackey*, which contained the dictum that the Alienation Prohibition has no effect after a Spousal Survivor Benefit Plan distributes the benefit. Claimants may often easily attach distributed benefits, which would prevent a participant from using those benefits to pay for the participant's retirement. Thus, such an interpretation would render the Alienation Prohibition protection of a participant's retirement benefits meaningless.

The full implementation of the article's conclusions, particularly those applying to the exercise of benefit rights, would also require several of the highest state courts to repudiate their decisions that ERISA permits a state-law claim, that arises from a beneficiary's right to an ERISA plan benefit, to be used to wrest the benefit from the beneficiary. These decisions include *Appleton v. Alford*¹⁴⁵⁰ in Georgia, *Sweebe* in Michigan, *Silber v. Silber*¹⁴⁵¹ in New York, *Pardee v. Pardee*¹⁴⁵² in Oklahoma, and *Strong v. Omaha Construction Co. Pension Plan*,¹⁴⁵³ in Nebraska. Otherwise, to paraphrase Justice Cardozo, contrary to the intent of the ERISA draftsmen, the protections they fashioned for the benefit rights of all ERISA plan participants and beneficiaries would be almost futile.

1450. *Appleton v. Alford*, 728 S.E.2d 549 (Ga. 2012) (holding that survivor benefits from a 401(k) plan and life insurance plan may be wrested from participant's spouse because of waiver in separation order).

1451. *Silber v. Silber*, 786 N.E.2d 1263 (N.Y. 2003) (holding that survivor benefits from a pension plan may be wrested from participant's former spouse because of waiver in divorce decree).

1452. *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2004) (holding that participant's widow was required to give half of a survivor benefit from a pension plan to his former spouse in accord with the terms of a domestic relations order that was not a QDRO).

1453. *Strong v. Omaha Constr. Co. Pension Plan*, 701 N.W.2d 320 (Neb. 2005) (holding that survivor benefits from a pension plan may be wrested from participant's former spouse because of waiver in divorce decree).