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LABOR PAINS: ERISA AND THE EVOLVING DOCTRINE OF FEDERAL PREEMPTION OF STATE LAW RELATING TO EMPLOYEE BENEFIT PLANS

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Introduction

Recent history has experienced a rapid and substantial growth in the coverage, scope and numbers of employee benefit plans as well as a commensurate increase in plan assets.[1] Well over one-third of employee compensation now comes in the form of fringe and other employee benefits.[2] Billions of dollars are spent each year by employers and employees to provide millions of individuals with a vast array of health, retirement and death benefits.[3]

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The author wishes to note that all the views expressed herein are his alone, and not those of AT&T.

[1] Employee Retirement Income Security Act of 1974 (ERISA) § 2(a), 29 U.S.C. § 1001(a) (1976); all citations in this article are to ERISA as enacted, Pub. L. No. 93-406, 88 Stat. 829 (1974), unless otherwise indicated.

At the very onset of ERISA, in its findings and declaration of policy, Congress declared "that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial. . . ." ERISA § 2(a), 29 U.S.C. § 1001(a) (1976). Throughout the legislative proceedings on ERISA, statistics similar to the following are cited: four million employees were covered by private pension plans in 1940, with total assets near $2.4 billion. As of 1973, more than one-half of the United States work force—40 million workers—participated in private pension plans. There were about 34,000 private plans in 1970 with assets of almost $130 billion. It was estimated that about 42.3 million workers would participate in plans by 1980, with total plan assets exceeding $250 billion. III LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, Pub. L. No. 93-406, at 4811 (1976) (hereinafter cited as LEGIS. HIST.).

A recent survey shows that total employee benefits cost about $1.5 billion in 1929, about $43 billion in 1957, about $100 billion in 1967 and about $310 billion in 1977. CHAMBER OF COMMERCE OF THE UNITED STATES, EMPLOYEE BENEFITS— 1977 at 29 (1978).

[2] It is estimated that employee benefits represented about 31.5% of payroll in 1977. The percentage was estimated at 23.5% in 1967, at 18% in 1957, and at 3% in 1929. CHAMBER OF COMMERCE OF THE UNITED STATES, EMPLOYEE BENEFITS— 1977 at 29 (1978).

[3] *Id.*

Prior to 1974, there was no unified national policy regarding the governmental regulation of the provision of employee benefits. Ramshackle regulation, therefore, was accomplished primarily through the federal labor laws (*i.e.*, National Labor Relations Act,[4] the Labor Management Relations Act,[5] and the Labor Management Reporting and Disclosure Act[6]), the federal Welfare and Pension Plan Disclosure Act[7] and various state laws.[8] Generally, the national labor laws regulated collective bargaining where employee benefit plans were at issue,[9] but only incidentally regulated the operation of such plans.[10]

The Welfare and Pension Plan Disclosure Act required certain, but limited, reporting and disclosure regarding employee benefit plans.[11] State

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[4] 29 U.S.C. §§ 151-168 (1976).

[5] 29 U.S.C. §§ 141-187 (1976).

[6] 29 U.S.C. § 153 (1976).

[7] 29 U.S.C. §§ 301-309 (1973), *repealed by* ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1) (1976).

[8] *See, e.g.*, California Retirement Systems Disclosure Law, CAL. CORP. CODE §§ 28000-38305 (West 1977) (ch. 1443, § 4, 1970 Cal. Stats. 2809) (repealed by ch. 866, §§ 1, 3, 1969 Cal. Stats. 1650; ch. 1443, § 3, 1970 Cal. Stats. 2809 (operative Jan. 1, 1971); ch. 647, § 4, 1971 Cal. Stats. 1287; ch. 534, § 1, 1976 Cal. Stats.); An Act Concerning the Regulation of Private Pension Funds, CONN. GEN. STAT. ANN. §§ 38-352 to -370 (West 1973) (repealed by 1975, P.A. 75-382, § 3) (effective June 24, 1975.)

[9] Basic guidelines for the establishment and operation of pension funds administered jointly by a union and an employer are provided by the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5) (1976).

[10] Under the Internal Revenue Code, an employer acquires certain tax deductions for contributions made to a plan. There is also an exemption on the investment earnings of the plan. Int. Rev. Code of 1939, ch. 289, § 23(p), 52 Stat. 463 (now I.R.C. § 404).

To secure these benefits before ERISA, the plan must (1) be for the exclusive benefit of the participants, (2) exist solely for the purpose of distributing the corpus and income to participants, (3) be set up in such a manner that plan assets could not be diverted or used by employer/sponsors, and (4) not discriminate in favor of certain supervisory personnel, highly compensated employees, or officers and shareholders. Int. Rev. Code of 1939, ch. 289, § 165(a), 52 Stat. 518 (now I.R.C. § 401).

[11] 29 U.S.C. §§ 305 to 307 (1973) (repealed by ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1) (1976)). In its review of the existing law applicable to pension plans, the House Committee on Education and Labor gave the following summary of the Welfare and Pension Disclosure Act:

> After a comprehensive investigation of abuses in the administration and investment of private fund assets, Congress adopted the Welfare and Pension Plan Disclosure Act in 1958. The policy underlying enactment of this Act was purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans. The essential requirement of the Act was that the plan administrator compile, file with the Secretary of Labor, and send to participants and their beneficiaries upon written request, a description and annual report of the plan. It was expected that the knowledge thus disseminated would enable participants to police their plans. The Act was amended in 1962 to make theft, embezzlement, bribery, and kickbacks federal crimes if they occur in connection with welfare and pension plans. The 1962 amendments

laws attempted, but often unsuccessfully and inconsistently, to occupy the void which existed between bargaining over employee benefits and reporting and disclosing the operation of employee benefit plans.[12] Not surprisingly, numerous abuses with respect to the establishment, maintenance, and administration of employee benefit plans resulted from this lack of a cohesive national policy.[13]

Accordingly, Congress undertook a comprehensive study of employee benefit arrangements, the result of which was the passage of the Employee Retirement Income Security Act of 1974 (ERISA).[14] ERISA established

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also conferred limited investigatory and regulatory powers upon the Secretary of Labor, and required bonding of plan officials.

H.R. REP. NO. 93-533, 93d Cong., 1st Sess. 4 (1973), *reprinted in* II LEGIS. HIST. at 2351.

[12] *Id.* at 4-5, *reprinted in* II LEGIS. HIST. at 2351-52. Some of the states that dealt with abuses connected with pension plans passed laws which essentially were codifications of existing trust principles, principles used by most courts in the absence of any pension law. These laws also required disclosure similar to that under the federal disclosure statute, reporting that was often duplicative of federal effort. *Id. See* note 13 *infra* and accompanying text.

[13] Some of the areas of pension plan abuse which ERISA attempted to correct are loss of benefits due to termination of employment before retirement or due to plan termination, and the misuse of pension funds. Before ERISA, it was possible for a plan (other than H.R. 10) to terminate an employee shortly before the employee was eligible for retirement and cause the employee to forfeit his entire pension accrued under the plan. While most plans did not avail themselves of this possibility, several did. S. REP. NO. 93-383, 93d Cong., 1st Sess. 14 (1973), *reprinted in* I LEGIS. HIST. at 1082.

Before ERISA, if a pension plan terminated, employees covered under the plan were only entitled to receive a benefit from that plan if the funds contributed by the employer before the plan's termination were sufficient for that purpose. If a plan was thinly funded, plan assets might not have been sufficient to provide even long service or older employees with benefits. *Id.* at 17, *reprinted in* I LEGIS. HIST. at 1085.

Before ERISA, employees could use plan assets to invest heavily in their own securities, subject to certain minimal restrictions. Loans were made from plan assets without adequate security and/or without charging reasonable rates of interest to the creator of the plan, to his family, or to corporations under his control. Consequently, there were cases of extreme abuse of pension funds. *Id.*

None of the federal laws adequately protected the employees from manifest inequities with respect to their benefits. A plan could be in compliance with the federal laws, yet an employee could still lose his entire pension benefit after many long years of faithful service. The Labor-Management Relations Act was not intended to, nor did it, provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct. The Disclosure Act was weak in its limited disclosure requirements and lacking in substantive fiduciary standards. Its primary weakness was its reliance on the employees themselves to police the management of their plan. The Internal Revenue Code could control, and only to a limited extent, only those employers who sought to maintain plans which could qualify for favorable tax treatment. H.R. REP. NO. 93-533, 93d Cong., 1st Sess. 4 (1973), *reprinted in* II LEGIS. HIST. at 2351.

[14] Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 29 U.S.C. and the I.R.C.). A good summary of the legislative and executive activity leading to the enactment of ERISA was given by Sen. Jacob K. Javits in the Senate floor debate preceeding the final vote on ERISA. 120 CONG. REC. (1974).

certain minimum standards to safeguard employee benefit rights, primarily in the following areas:

(1) The participation and vesting standards of employee benefit plans,[15]
(2) the funding and coverage of such plans,[16]
(3) the fiduciary responsibilities pursuant to which such plans are to be operated,[17]
(4) the reporting and disclosing of various aspects of such plans,[18] and
(5) the termination of certain types of such plans.[19]

ERISA is a comprehensive and complex statutory scheme regulating a great number of technical and far-reaching subjects. ERISA was adopted not only to cure prior abuses but also to sponsor the sound growth and development of private employee benefits.[20] And, according to one of the sponsors of the Act, the "crowning achievement" of ERISA is its provision for the preemption of all state laws which relate to employee benefit plans.[21] Such a provision was thought desirable, if not necessary, to insure the intended growth and development of employee benefit plans, to stimulate the growth

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[15] ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1976); ERISA §§ 1011-1017, I.R.C. §§ 410-415; ERISA §§ 1021-1024, I.R.C. § 401 (scattered subsections); ERISA §§ 2001-2008 (codified in scattered sections of I.R.C.).

[16] ERISA §§ 301-306, 29 U.S.C. §§ 1081-1086 (1976); ERISA § 1013, I.R.C. § 412.

[17] ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1976).

[18] ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1976).

[19] ERISA §§ 4001-4009, 29 U.S.C. §§ 1301-1309 (1976); ERISA §§ 4021-4023, 29 U.S.C. §§ 1321-1323 (1976); ERISA §§ 4041-4048, 29 U.S.C. §§ 1341-1348 (1976 & Supp. II 1978); ERISA §§ 4061-4068, 29 U.S.C. §§ 1361-1368 (1976 & Supp. II 1978); ERISA §§ 4081-4082, I.R.C. § 404, 29 U.S.C. § 1381 (1976 & Supp. II 1978).

[20] In discussing the Conference Report on H.R. 2, Congressman Ullman commented that "[t]his legislation . . . continues the basic governmental policy of encouraging the growth and development of voluntary private pension plans. 120 CONG. REC. 29197 (1974). Mr. Ullman added "that the new [minimum] requirements [of ERISA] have been carefully designed to provide adequate protection for employees and, at the same time, provided a favorable setting for the growth and development of private pension plans." *Id.* In an earlier report on H.R. 2, the Committee on Education and Labor cited five primary goals of ERISA, one of which was to promote a reviewed expansion of private pension plans. H.R. REP. NO. 93-533, 93d Cong., 1st Sess. 2 (1973). The proposed ERISA Improvements Act of 1979 offered an amendment to ERISA's declaration of policy which would make it clear that ERISA is aimed at fostering, establishing and maintaining employee benefit plans. S.209, 96th Cong., 1st Sess. § 101, 125 CONG. REC. 561 (daily ed. Jan. 24, 1979).

[21] 120 CONG. REC. 29197 (1974) (statement by Rep. John H. Dent). *See* note 215 *infra* and accompanying text.

of a uniform body of law, and to preclude conflicting regulatory standards and piecemeal litigation.[22]

One unfortunate consequence of the ERISA preemption provision[23] is the dispute surrounding the continued jurisdiction and validity of state laws regulating employee benefit plans.[24] This evolving area of conflict also involves the extent to which the national labor laws displace state laws relating to employee benefit plans, specifically those that have been collectively bargained.

This article reviews recent issues and developments concerning ERISA and the national labor laws preempting state laws which relate to employee benefit plans. For purposes of background and clarity, the article will first discuss the historical development and current status of general federal labor preemption of state laws. A discussion of the application and interpretation of the ERISA preemption provision follows. The author has attempted to provide a compendium, through frequent and thorough footnotes, of most of the significant ERISA preemption cases so as to serve as a useful research tool for the practitioner who encounters a preemption issue and as a guide for further research by the legal scholar.

The Impact of Labor Preemption on State Regulation of Employee Benefit Plans

As early as 1949, pension benefits[25] and employee welfare plans[26] were held to be a mandatory subject of collective bargaining as part of "wages, hours, and other terms and conditions of employment"[27] under the National

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[22] *See* notes 211-215 *infra* and accompanying text.

[23] ERISA § 514, 29 U.S.C. § 1144 (1976).

[24] *See* notes 212-215 *infra* and accompanying text.

[25] Inland Steel Co., 77 NLRB 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[26] W.W. Cross & Co., 77 NLRB 1162, *enforced*, 174 F.2d 875 (1st Cir. 1949). The court rested its decision on the view that in using the term "wages" in the Act, Congress must have meant it "to comprehend more than the amount of remuneration per unit . . . of work produced." 174 F.2d at 878. Although it was reluctant to attempt to define the outer boundaries of the meaning of "wages," the court concluded that the term embraced "direct and immediate economic benefits flowing from the employment relationship" which encompassed the illness and accidental injury group insurance program at issue. *Id.*

[27] 29 U.S.C. § 158(d) (1976). This section defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976), makes the refusal of the employer to bargain collectively an unfair labor practice, and § 8(b)(3), 29 U.S.C. § 158(b)(3) (1976), makes a refusal of a labor organization to bargain collectively an unfair labor practice. For a discussion of the scope and nature of the collective bargaining obligation with respect to

Labor Relations Act (NLRA).[28] The inclusion of employee benefit plans within the scope of the duty to bargain raises questions of whether, and to what extent, federal labor law and policies govern the operation of such plans.[29]

As a logical corollary, this inclusion also questioned the concurrent authority of the states to regulate the form and substantive terms of such plans, for such state regulation may conflict with or tend to frustrate the aims of national legislation. The resolution of this question depends upon a consideration of the doctrine of labor law preemption.[30] Articulation of a legal issue in this matter is difficult. Even when articulated, the issue may still be misleading since labor law preemption has not evolved as a unitary concept. Instead of being based upon a doctrinally consistent approach to determining the parameters of state power to deal with conduct and relationships which are the subject of national labor law, the development of a preemption concept has been marked by vacillating and episodic attempts by the Supreme Court to announce workable rules for determining the extent of state authority to deal with labor relations and the substantive results of collective bargaining.[31]

Its constitutional basis in the supremacy clause of the Constitution,[32] labor preemption attempts to ascertain the extent to which basic national labor legislation displaces potentially conflicting or complementary state regulation of the same subject matter.

The general doctrine of federal preemption is invoked to exclude a state regulation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[33] Under the doctrine as developed by the Supreme Court, state action is preempted where Congress

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pension plans prior to the enactment of ERISA, *see* Goetz, *Pension Plans and Labor Law*, 1967 U. ILL. L. F. 738.

[28] 29 U.S.C. §§ 151-168 (1976).

[29] For a discussion of the development of certain phases of federal regulation of the administration of welfare and pension plans which are outside the scope of this article, *see* Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911 (1970).

[30] *See generally* Cox, *Labor Law Preemption Revisited*, 85 HARVARD L. REV. 1337 (1972) [hereinafter cited as Cox]; Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972).

[31] *See, e.g.*, Mr. Justice Harlan's recapitulation of the varying approaches which the Supreme Court has adopted and subsequently discarded in labor law preemption cases in Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 290-91 (1971).

[32] U.S. CONST. art. VI, § 3.

[33] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

has indicated an intent to occupy a particular field[34] or where state regulation is in actual conflict with national legislation.[35] In dealing with the preemptive effect of national labor legislation, the Supreme Court has had

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[34] Where Congress has legislated in a field which the states have traditionally occupied, a finding of Congressional occupation requires a showing that it is the "clear and manifest purpose of Congress" to do so. Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230 (1947). A Congressional purpose that a certain subject matter is to be exclusively regulated by federal authority may be manifested in a number of ways. Under the principle familiar since Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the regulated subject matter may be deemed so inherently national in character as to require uniformity of regulation by a single federal authority. *See. e.g.*, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) (local airport ordinance regulating time of aircraft takeoffs preempted by FAA and EPA legislation); Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines Inc., 405 U.S. 707 (1972) (local ordinance imposing $1 charge for each airline passenger to help defray cost of airport maintenance not in conflict with uniform regulation of air transportation); Campbell v. Hussey, 368 U.S. 297 (1961) (Federal Tobacco Inspection Act preempts field of classification and inspection of tobacco). Additionally, "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." Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). A paradigm of the "dominant federal interest" test is found in the field of foreign affairs. Thus, the Supreme Court has held that internal subversion is an area in which the federal interest is so dominant that the enactment of federal legislation precludes enforcement of state laws on the same subject. Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956). *See also* Hines v. Davidowitz, 312 U.S. 52 (1941) (the Federal Alien Registration Act preempts state regulation of the same subject matter). Where there is an explicit expression of Congressional purpose or evidence of a specific intent to occupy the field, the exclusion of state statutes on the same subject follows as a matter of course. Thus, where Congress amended the United States Warehouse Act to provide that the power, jurisdiction, and authority of the Secretary of Agriculture was to be "exclusive" with respect to all persons licensed under the Act, the Court found a specific intent to exclude supplementary state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 233-34 (1947). Such a specific intent to preempt may also be presumed where "[t]he scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Id.* at 230 (citations omitted).

[35] Under the conflict approach to preemption, the Court construes the state and federal statutes in issue as a preliminary matter in order to subsequently determine if, in fact, they conflict. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626 (1975) [hereinafter referred to as *Shifting Perspectives*]. *See* Perez v. Campbell, 402 U.S. 637, 644 (1971). Due to the variety of federal laws which have thus been construed and the interlacing state and federal interests involved, the Court has made use of a number of expressions in determining the validity of state laws, including: "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Professor Hirsch has suggested that these expressions may be grouped into two categories: "conflict and interference" cases and "occupying the field" cases. Hirsch, *Towards a New View of Federal Preemption*, 1972 U. ILL. L. F. 515, 526-33 [hereinafter referred to as Hirsch]. The clearest cases of preemption based on conflict between federal and state statutes is where one authority forbids action affirmatively protected by the other. Thus, it has been held that the state cannot forbid or restrain labor activities which the federal government guarantees. Hill v. Fla. *ex. rel.* Watson, 325 U.S. 538 (1945). However, as the extent of state interference with federally regulated activities diminishes, the presence and ramifications of conflict becomes increasingly difficult to differentiate. *Shifting Perspectives, supra*, at 626.

very little guidance from Congress.[36] Mr. Justice Frankfurter, reflecting on this issue, outlined the nature of the problem:

> The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme. The aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by judicial process.[37]

The doctrine of labor law preemption has thus necessarily developed on an *ad hoc* basis, for as Justice Frankfurter further stated, "[t]he statutory implications of what has been taken from the states and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation."[38]

The following discussion outlines the development of the Court's *ad hoc* approach in dealing with labor preemption issues.[39]

As the main battleground of labor preemption has been employee rights and unfair labor practices covered by sections 7[40] and 8,[41] respectively, of the NLRA, it is necessary to discuss the development of the labor preemption doctrine as it relates to activities protected by section 7, activities prohibited by section 8, and activities neither expressly protected by section 7 nor prohibited by section 8. Recurring litigation has refined the doctrine of labor preemption as it relates to the process and procedures of collective bargaining.[42] On the other hand, the doctrine of labor preemption as it

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[36] *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[37] *Id.* at 239-40.

[38] International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

[39] The conceptual framework for this section of this article was suggested by Professor Cox's excellent article on this subject. *See* Cox, note 30, *supra*.

[40] 29 U.S.C. § 157 (1976).

[41] 29 U.S.C. § 158 (1976).

[42] *See* notes 132-196 *infra* and accompanying text.

relates to the results of collective bargaining is not well-developed. Accordingly, it is not clear whether such doctrine is still in the germination stage or whether it has been harvested and essentially rejected.[43] In any case, a review of labor preemption concepts and interpretations should prove useful as background to a thorough understanding of ERISA preemption.

Labor Preemption as Formulated by the Supreme Court

Section 7 of the NLRA is the basic source of federal protection of the rights of employees in their dealings with their employers.[44] It guarantees to them the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[45] Section 8(a)(1)[46] defines an employer's interference with, restraint in or coercion of employees' exercise of their rights as an unfair labor practice. From the outset (of the federal legislation), the Court held that the states were preempted from restricting rights and conduct, including "concerted activities," which were clearly protected by section 7.[47] Such regulation by the states was found to conflict directly with the federal statute, and thus had to give way to paramount federal law.

Where an activity is prohibited by both the state and federal governments, the conflict is not as obvious. Nevertheless, in *Garner v. Teamsters Local 776*,[48] the United States Supreme Court held that the Pennsylvania state courts lacked jurisdiction to enjoin recognitional picketing which allegedly violated both state and federal labor laws.[49] The conflict perceived arose from the fact that:

> [a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.[50]

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[43] *See* note 31 *supra* and accompanying text.

[44] 29 U.S.C. § 157 (1976).

[45] *Id.*

[46] 29 U.S.C. § 158(a)(1) (1976).

[47] Thus, the Court invalidated state statutes which (a) prohibited strikes against public utilities, Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951), (b) established mandatory procedures for calling strikes and entering mediation, International Union of UAW v. O'Brien, 339 U.S. 454 (1950), and (c) prescribed qualifications necessary for holding union office, Hill v. Fla. *ex. rel.* Watson, 325 U.S. 538 (1945).

[48] 346 U.S. 485 (1953).

[49] *Id.* at 500-01.

[50] *Id.* at 490-91.

> . . .The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent.[51]

The *Garner* decision and its progeny[52] emphasize the "primary jurisdiction" of the NLRB as the basis for invalidating state regulation which parallels the prohibitions of the NLRA.[53] With little or no congressional indication of the extent to which state law was intended to be preempted, the Court has repeatedly emphasized the NLRB's position as they have interpreted and applied the provisions of the NLRA.[54]

Those activities which are neither clearly protected nor clearly prohibited by sections 7 and 8 have proven to be the most difficult to fit within the Court's preemption analysis. The Court has generally recognized as exceptions to the preemption doctrine state power to deal with union conduct marked by violence or threats to the public order[55] and with matters of only

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[51] *Id.* at 498-99.

[52] The cases decided subsequent to *Garner* reaffirmed the concept that the primary jurisdiction of the NLRB supersedes state regulation governing the same area of law. *See* Taggart v. Weinacker's Inc., 397 U.S. 223 (1970), Hanna Mining Co. v. Dist. 2, MEBA, 382 U.S. 181 (1965), Local 20, Teamsters v. Morton, 377 U.S. 252 (1964).

[53] The *Garner* decision emphasized that Congress did not merely prescribe substantive rules of law which might be enforced by any tribunal competent to adjudicate controversies generally between parties. Rather, it established a new regime and confided:

> primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.

Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1953). Professor Cox has suggested that the "diversities and conflicts" likely to result from concurrent jurisdiction are a duplication of effort resulting from simultaneous state and federal proceedings, the risk that the state tribunal may make different findings of fact, and the risk of differences in the timing and form of state and NLRB remedies and other divergencies. Cox, *supra* note 30, at 1342. While Cox concludes that most of these present only a minimal risk of interference with federal labor policy, he finds that the potential divergencies in the ultimate form of relief granted by a state tribunal could result in departures from federal policy serious enough to mandate preemption, even were state jurisdiction limited to conduct normally prohibited by the NLRA. *Id.* at 1342-45.

[54] *See, e.g.*, Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 290-91 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-46 (1959).

[55] The logical predicate of this exception is that the "compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959). Thus,

peripheral concern to federal labor policy.[56] Between these two extremes, however, the Court's approach has not been marked by doctrinal consistency.

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a state court has jurisdiction to award damages for malicious interference, by threats of violence, with one's lawful occupation, International Union, United Auto., Aircraft and Agricultural Implement Workers v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954). Likewise, a state court or administrative board is not divested of jurisdiction to issue an injunction against picketing which is conducted in a manner calculated to provoke violence and likely to do so unless promptly restrained, Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957), and which threatens the public order and the use of public streets and highways. International Union, UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); Allen-Bradley Local 111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942). However, the permissible scope of state remedial measures is strictly confined to the direct consequences of violent conduct, and does not include these consequences resulting from associated peaceful picketing or other peaceful union conduct. UMW v. Gibbs, 383 U.S. 715, 729 (1966). *See* New York Telephone Company v. New York Labor Department, 440 U.S. 519 (1979), for a recent pronouncement by the Supreme Court on labor law preemption. In that case, the New York Telephone Company (NYT) brought suit in the United States District Court for the Southern District of New York against the state officials responsible for the administration of the state unemployment compensation fund. NYT sought (1) a declaration that the New York statute authorizing the payment of benefits to strikers conflicts with federal law and is therefore invalid, (2) an injunction against the enforcement of N.Y. Labor Law § 592.1 (McKinney), and (3) an award recouping the increased taxes paid in consequence of the disbursement of funds to the striking employees. The District Court granted the requested relief concluding that the availability of unemployment compensation is a substantial factor in the employees' decision to remain on strike; thus, it had a substantial impact on the progress of the strike. Furthermore, the court held that the payment of such compensation by the state conflicted "with the policy of free collective bargaining established in the federal labor laws and is therefore invalid under the supremacy clause of the United States Constitution." 434 F. Supp. 810, 819 (S.D.N.Y. 1977).

The Court of Appeals for the Second Circuit reversed the District Court's decision, although the Circuit Court did not question the District Court's finding that the New York Statute "alters the balance in the collective bargaining relationship and therefore conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process." 566 F.2d 388, 390 (2d Cir. 1977). The Court of Appeals noted that Congress has not expressly forbidden state unemployment compensation for strikers; the court assumed, subsequent to a review of the National Labor Relations Act and Title IX of the Social Security Act, that this omission was deliberate. *Id.* at 392.

The Supreme Court later affirmed the Circuit Court's decision. 440 U.S. 519 (1979). The Supreme Court upheld the constitutionality of the New York law granting unemployment compensation benefits to strikers. By a 6-3 vote, the Justices rejected NYT's claim that the grant of employer-financed unemployment compensation to strikers conflicts with the national policy of free collective bargaining. The Supreme Court found that the legislative histories of the National Labor Relations Act and the Social Security Act reveal that Congress intended to leave the states free to authorize or prohibit the payment of unemployment compensation to strikers, which the Court felt was a statute of general applicability and thus of paramount interest to the state. The Court stated that no inference should be drawn that the states are powerless to act in such matters. Only an explicit Congressional direction would give rise to preemption of statutes of such general application as unemployment compensation statutes. *Id.* at 541-46.

[56] Thus, in Linn v. United Plant Guard Workers, 383 U.S. 53, 59-60 (1966), the Court held that the exercise of state jurisdiction to entertain a suit for malicious libel by a company manager against a union for statements made during a labor organization campaign was not preempted. Although the decision was predicated on the view that the availability of a state judicial remedy was a "merely peripheral concern" of national labor law, the court sought to minimize any potential interference with federal labor policy by defamation suits by imposing the "malice test" of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), as the controlling standard for recovery. 383 U.S. at 61, 65. Thus, in

While recognizing that state regulation of the economic weapons which might be available to labor and management could frustrate national labor policy, the Supreme Court has realized nonetheless that "[w]e cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions." [57] In an early encounter with this problem, the Court in the so-called *Briggs-Stratton*[58] case determined the status of the union conduct in issue (intermittent work stoppages) as being neither explicitly protected nor prohibited by the NLRA.[59] Perceiving the congressional failure to regulate this activity as a "gap" in the federal regulatory scheme which could be filled by the states, the Court reasoned that "[t]his conduct is governable by the states or it is entirely ungoverned." [60]

However, the holding in *Briggs-Stratton* was undermined by subsequent decisions which began to perceive, albeit unclearly at first, that state regulation of peaceful concerted activity not clearly protected nor prohibited by the NLRA could frustrate national labor policy as effectively as regulation of clearly protected activity.[61] Moreover, the Court was uncomfortable with the approach utilized in *Briggs-Stratton* of undertaking to determine for itself the status of the union conduct under the NLRA in light of the position of the NLRB as primary interpreter of federal labor law.[62] In a series of cases

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order to prevail, the plaintiff must establish that the defamatory statements were published with knowledge of their falsity or with reckless disregard of whether they were true or false. *Id.* at 65. In International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) the Court concluded that a state court was not preempted from ordering the reinstatement of a wrongfully expelled union member and from awarding him compensatory damages, since the possibility of conflict with enforcement of national policy was remote. *See also* Hanna Mining Co. v. District 2, MEBA, 382 U.S. 181, 187-88 (1965); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

[57] Amalgamated Ass'n of Street Employees v. Lockridge 403 U.S. 274, 289 (1971).

[58] International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

[59] *Id.* at 253.

[60] *Id.* at 254.

[61] *See* note 122 *infra* and accompanying text.

[62] In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), Mr. Justice Frankfurter, in noting the difficulty of attempting to demarcate the precise limits of state authority to deal with labor-management relations in particular fact situations, stated:

> The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress

in the 1950's, the Court attempted, with little success, to articulate a sound basis for the preemption doctrine. Some decisions suggested that the preemption issue turned on whether the state was applying general law, which was permissible,[63] or upon state law specifically regulating labor relations, which was proscribed.[64] Other cases looked to whether the state provided a remedy not available in the federal scheme,[65] while the *Briggs-Stratton* approach was to decide whether, in fact, the particular state regulation in issue encroached on federal interests.[66] However, "experience—not pure logic—. . .taught that each of these methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an

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must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration.

Id. at 242.

[63] *See, e.g.*, Int'l Union, United Auto., Aircraft and Agricultural Implements Workers v. Russell, 356 U.S. 634 (1958), in which the Supreme Court upheld the jurisdiction of a state court to entertain a common law tort suit by a non-union employee against a union for maliciously causing the plaintiff to lose time from his work, with resulting damages, by having pickets at the plaintiff's employer's plant threaten him with violence and thus prevent him from reaching the plant's gates. Although this case is often cited as an exception to the preemption doctrine based on the state's overriding interest in preventing violence, *see, e.g.*, U.M.W. v. Gibbs, 383 U.S. 715, 729 (1966); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959), the majority opinion in *Russell* also emphasized that the common law suit was instituted to redress a private wrong, while a proceeding before the NLRB would vindicate public, not private wrongs with a consequent disparity of remedies. 356 U.S. at 643. Although this distinction had previously been rejected in Garner v. Teamsters Local 776, 346 U.S. 485, 492-501 (1953), the court emphasized that a back-pay award by the Labor Board was an incidental discretionary remedy available only to effectuate the primary purpose of Congress of preventing unfair labor practices. 356 U.S. at 642-43. Many of the facts which could be determinative in the state court proceeding would be irrelevant to an unfair labor practice hearing before the Board because each proceeding considers a different substantive wrong. As "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct," *Id.* at 643, depriving the state court of jurisdiction would deprive the plaintiff of a remedy which would make him whole and, more importantly, "would in effect grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case." *Id.* at 645.

[64] *See, e.g.*, Garner v. Teamsters Local 776, notes 48-51 *supra* and accompanying text. *See also* Plankinton Packing Co. v. Wisconsin Employment Relations Bd., 338 U.S. 953 (1950); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947).

[65] *See, e.g.*, Weber v. Anheuser Busch, Inc., 348 U.S. 468 (1955), where the court emphasized the similarity of the state and NLRB remedies that could be brought to bear on the same conduct and held that state authority to enjoin allegedly unlawful picketing as a violation of a state antitrust law was preempted. *Id.* at 481. *Accord.* Capital Service, Inc. v. NLRB, 347 U.S. 501, 505 (1954) (United States District Court could properly restrain an employer from enforcing a state court injunction against picketing where the NLRB had sought an injunction in the federal court against the same conduct as "necessary in aid of its jurisdiction").

[66] International Union, UAW, Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

expert agency without yielding anything in return by way of predictability or ease of judicial application."[67]

These considerations led the Court to announce the rule embodied in *San Diego Building Trades v. Garmon.*[68] In *Garmon,* the employer rejected a union demand that the employer execute a closed shop agreement on the grounds that none of the employees wished to join the union and that no union had been selected by the employees as their collective bargaining agent.[69] Immediately thereafter, the union began to picket the employer's premises peacefully and to exert pressures on customers and suppliers in order to persuade them to cease dealing with the employer.[70] The employer sought relief in state court and was granted a decree restraining the picketing and awarding compensatory damages on the basis that, as an unfair labor practice, the union conduct constituted a tort under state law.[71] At the start of the state court suit, the union began a representation proceeding before the NLRB. The Board declined to assert jurisdiction.[72] The injunction and damage award were affirmed by the California Supreme Court,[73] and from that decision the United States Supreme Court granted *certiorari.*[74]

In reviewing the decision, the Court focused on the nature of the activities which the state sought to regulate rather than the particular mode of regulation adopted.[75] Arguably, the picketing at issue was subject to sections 7 and 8 of the NLRA, and indeed the state court predicated its decision on the finding that the conduct constituted an unfair labor practice under section 8.[76] The Court found that the multitude of activities covered

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[67] Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 291 (1971).

[68] 359 U.S. 236 (1959).

[69] *Id.* at 237.

[70] *Id.*

[71] 359 U.S. 236, 237-39 (1959).

[72] The Regional Director declined to assert jurisdiction presumably because the amount of interstate commerce involved did not meet the Board's discretionary monetary standards. *Id.* at 238.

[73] 45 Cal.2d 657, 291 P.2d 1 (1955).

[74] 351 U.S. 923 (1956). The case was twice before the United States Supreme Court. The decision of the state supreme court was reversed as to the injunction when the case was first before the court on writ of certiorari, but the Court vacated and remanded to the Supreme Court of California on the question of damages. 353 U.S. 26 (1957). On remand, the state supreme court sustained the award of damages, with three judges dissenting. 49 Cal.2d 595, 320 P.2d 473 (1958). The United States Supreme Court again granted certiorari to determine whether the California court had jurisdiction to award damages arising out of peaceful union conduct which it could not enjoin. 357 U.S. 925 (1958).

[75] 359 U.S. 236, 243 (1959).

[76] *Id.* at 238. At the time it was unclear whether picketing by a stranger union of an unorganized shop was protected activity under section 7, an unfair labor practice under section 8(b)(1) or (2), or activity neither protected nor prohibited by the NLRA. Cox, *supra* note, 30 at 1349. However, the court did not utilize the *Briggs-Stratton* technique of determining for itself the status of the challenged conduct

by sections 7 and 8 was of central concern to federal labor law, and concluded that allowing the states to regulate such conduct encroached too deeply on federal interests to be allowed.[77] Therefore, it held that:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.[78]

The *Garmon* decision thus divided activities outside the literal applications of sections 7 and 8 into two categories. Conduct arguably protected or prohibited by the NLRA was to be free from state regulation.[79] As to activity which was clearly outside the protections and prohibitions of the NLRA, the Court reserved decision.[80]

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under the NLRA and in a footnote stated that the approach taken in that case "is no longer of general application." 359 U.S. 236, 245 n.4 (1959). Besides the fact that such an approach would lead to endless adjudications before the court, Cox, *supra* note 30 at 1349, it would be inconsistent with the Congressional role of the NLRB, for as the Court noted, "the unifying consideration of our [labor law preemption] decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" 359 U.S. at 242.

[77] 359 U.S. 236, 244 (1959).

[78] *Id.* The *Garmon* rule mandates that when an activity is "arguably" protected by section 7 or "arguably" prohibited by section 8, the states as well as the federal courts must defer to the primary jurisdiction of the NLRB as the body most competent to determine its status under the NLRA. *Id.* at 245. "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts," no other tribunal can deal with arguably protected or prohibited activity by way of either damages or injunction. *Id.* at 246. The effect of this test for divesting state courts of jurisdiction is not vitiated by the fact that the NLRB fails to assert jurisdiction over a controversy, even though a regulatory hiatus results. *Id. See* Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957). However, shortly after the *Garmon* decision, Congress filled this gap by ceding jurisdiction to the states. 29 U.S.C. § 164(c)(2) (1976).

[79] 359 U.S. 236, 244 (1959). The Court emphasized the need for uniform regulation in industrial relations and concluded that state laws governing the same areas must be preempted. The Court stated that "to allow the states to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Id.*

[80] 359 U.S. 236, 245-46 (1959).

The *Garmon* rule was reaffirmed in 1971 in *Amalgamated Association of Street Employees v. Lockridge*[81] over vigorous dissents.[82] But, the imperfections of the rule as a guide for decision in labor preemption cases has since persuaded many members of the Court that a reexamination of this area of law is in order.[83] In a case announced in early 1978, *Sears Roebuck and Co. v. San Diego County District Council of Carpenters,*[84] the Court announced a significant retrenchment which may indicate the beginning of a major assault upon the *Garmon* rule. In *Sears Roebuck,* a local union set up a picket line on Sears' property in support of a demand that Sears pay prevailing union wages for certain non-union carpentry work being performed at the store.[85] The union rejected a demand by Sears' management to remove the picket line from Sears' property, stating that it would do so only under compulsion of legal process.[86] Thereafter, Sears obtained an injunction against the picketing as a continuing trespass under state law from the Superior Court of California.[87] The Supreme Court of California reversed,[88] reasoning that, as picketing is arguably protected by section 7 and arguably prohibited by section 8 of the NLRA, state jurisdiction is preempted under the *Garmon* rule.[89]

On appeal, the Supreme Court of the United States reversed in a six to three decision.[90] The Court's opinion proceeded from the assumption that

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[81] 403 U.S. 274 (1971).

[82] *See, e.g.,* the dissenting opinion of Justice White, concurred in by the Chief Justice, which canvasses the inadequacies of and exceptions to the *Garmon* rule. The dissenter's opinion called for a limitation of the rule. 403 U.S. 309-32.

[83] *See, e.g.,* International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 201-02 (1970) (Dissenting opinion of White, Burger and Stewart, disapproving the *Garmon* test); Taggart v. Weinacker's, Inc., 397 U.S. 223, 227-29 (Burger, C.J. concurring). *See also* Bryson, *A Matter of Wooden Logic; Labor Law Preemption and Individual Rights,* 51 TEX. L. REV. 1037 (1973); Cox, *supra* note 30, at 1368-77, for extensive criticisms of the *Garmon* rule.

[84] 436 U.S. 180 (1978).

[85] 52 Cal. App. 3d 690, 693, 125 Cal. Rptr. 245, 247 (Ct. App. 1975).

[86] 17 Cal.3d 893, 896, 132 Cal. Rptr. 443, 446 (1976).

[87] The preliminary injunction was granted on November 21, 1973. On appeal by the Union, the Court of Appeals upheld the decision of the lower court. 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (Ct. App. 1975).

[88] 17 Cal.3d 893, 132 Cal. Rptr. 443 (1976).

[89] *Id.* at 901, 132 Cal. Rptr. at 450.

[90] 436 U.S. 180 (1978). In reversing the Supreme Court of California, the United States Supreme Court indicated that:

> [a]s long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error . . . because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably pro-

the picketing is a trepass under state law and thus the state has a significant interest in protecting its residents from such conduct.[91] Moreover, it emphasized that the scope of the controversy in the state court was limited to the legality of the location of the picketing, not that of the picketing itself.[92] The opinion then considered the two branches of the *Garmon* rule. Under the arguably prohibited heading, the Court stated that "[t]he critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical . . . or different from . . . that which could have been, but was not, presented to the Labor Board."[93] As any unfair labor practice proceeding would have focused on the objective of the picketing, a matter which was irrelevant to the state court suit, the Court saw no realistic threat of interference with the NLRB's primary jurisdiction.[94]

The Court pointed out that the justification for the arguably protected branch of the *Garmon* rule was to protect the primary jurisdiction of the NLRB.[95] This jurisdiction implicates constitutional considerations of federal supremacy to a greater extent than with arguably prohibited activities, for allowing state jurisdiction over conduct arguably protected presents a significant threat of misinterpretation of federal laws by a state court; this misinterpretation could thus prohibit activity actually protected by federal law.[96] Yet, the Court was persuaded that this threat did not require preemption in this case because the aggrieved party in state court, Sears Roebuck, had no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the NLRB.[97] The Court maintained that the union could have filed an unfair labor practice charge with the NLRB, but noted that it refused to do so.[98] Thus, the only alternatives available to Sears were to allow the pickets to remain on their property, to evict the

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tected character of the union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action.

Id. at 207.

[91] *Id.* at 185.

[92] *Id.*

[93] *Id.* at 197.

[94] *Id.* at 198.

[95] *Id.* at 199 n.29.

[96] *Id.* at 199-200.

[97] The Court observed that "Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim." 436 U.S. at 198.

[98] It was Sears' demand that the pickets be removed which made possible a Union unfair labor practice charge. 436 U.S. at 201-02.

pickets forcefully or to seek the aid of the state court.[99] Only by choosing the third alternative could Sears obtain an adjudication of the issue of the protected status of the union conduct under the NLRA.[100] Although this presented the very threat of misapplication of federal law to which the *Garmon* rule was addressed, the Court concluded that the union retained meaningful protection against the risk of error on two practical considerations. The first is that trespassory union conduct is rarely considered protected activity under federal law.[101] The second is that if there are strong reasons for holding the particular trespassory conduct in question to be federally protected, the union can be expected to invoke the jurisdiction of the NLRB in order to obtain a determination of the matter which would preempt state jurisdiction.[102]

Sears Roebuck and other recent pronouncements by the Supreme Court[103] indicate a rejection of a mechanical application of the *Garmon* rule to activity

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[99] 436 U.S. at 202.

[100] *Id.*

[101] *Id.* at 205.

[102] *Id.* at 206.

[103] In Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977), the Court held that the NLRA did not preempt state court jurisdiction to hear a suit for intentional infliction of emotional distress brought by a union member against the union and its officials. The conduct sued upon was arguably prohibited by section 8 of the NLRA, and thus state jurisdiction was preempted under the *Garmon* rule. However, the Court did not agree that the logic of that case was to be so woodenly applied, and vacated the Court of Appeals' decision which reversed the state court judgment in favor of the aggrieved union member. The Court's opinion adopts an approach which makes the preemption inquiry turn on the nature of the federal and state interest in regulating the conduct in question and the potential for interference with federal regulation. *Id.* at 300; *Cf.* Vaca v. Sipes, 386 U.S. 171, 180 (1967) ("the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."). In analyzing the interests involved, the Court emphasized that the plaintiff Hill alleged only that "the defendants had engaged in 'outrageous conduct, threats, intimidation, and words' which caused Hill to suffer 'grievous mental and emotional distress as well as great physical damage.' " 430 U.S. at 301. The court concluded that the state's interest in protecting its citizens was substantial, and that allowing it to do so would not interfere with national labor policy because "[t]he state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members. . ." 430 U.S. 290, 304-05 (1977). The statement that the nature of the preemption issue requires consideration of whether the state, in regulating the conduct in question, is making an accommodation of various interests (which was the subject Congress considered in enacting federal labor law) has been addressed by Professor Cox:

> An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor

arguably protected or prohibited by federal law. The complexity and ambiguity of the rationales of these cases prove the truth of the *Garmon* opinion's concern for a rule which would be relatively simple and which would aid predictability in this area of the law.[104] Also apparent is a discernible aversion to *Garmon's* exclusive concern for the protection of federal policy, to the exclusion of legitimate state interests, in activity whose legality under federal law is questionable. The process of "litigation elucidation"[105] which has characterized the development of the federal labor law preemption doctrine has persuaded the Court that the interests of the states in protecting its residents from objectionable conduct need not be ignored as a precondition to a sound preemption doctrine.[106] Thus, there is now less reliance on easily applied, yet oftentimes unfair, shorthand labels in labor preemption cases in favor of a more intricate process of inquiring into the precise impact of the state regulation in question upon the paramount aims of federal law.[107] This process by necessity requires an articulation of what those often unexpressed aims are. In *Malone v. White Motor Corp.*,[108] the Court made reference to a repealed federal statute in making its determination.[109] Certainly, this would be true in any analysis of labor preemption as it re-

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> disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.

Cox, *supra* note 30, at 1352, *quoted in* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 n.4 (1976). *Accord*, 427 U.S. at 156n. (Powell, J. concurring).

[104] *Cf.* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 290 (1971) ("the federal system dictates that . . . [the issue of preemption] be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.").

[105] International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

[106] *See* Allen-Bradley, Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942), wherein the Court held that a state's cease and desist order preventing mass picketing of the employer's factory which threatened personal injury was not unconstitutional. *See also* United Constr. Workers v. Laburnum Contr. Corp., 347 U.S. 656 (1954) (the Court held that the NLRB does not have such exclusive jurisdiction over labor relations to preclude the state from hearing and determining common law tort actions for damages).

[107] The intricate process of determining the impact of state regulation upon the aims of federal law can be discerned from the Court's handling of the issue which the *Garmon* decision left unanswered, the status of conduct which is neither clearly protected nor prohibited by federal law. Malone v. White Motor Corp., 435 U.S. 497 (1978).

[108] 435 U.S. 497 (1978). See notes 132-168 *infra* and accompanying text for a more detailed discussion of the *White* case and its effects on collective bargaining.

[109] The Court refers to the Federal Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§ 301-309 (1973), *repealed by* ERISA § 111(a)(1), 29 U.S.C. §1031(a)(1) (1976). It should be noted that the Court substantiated its holding by reasoning that pension plans fall into the category of wages, hours, and other terms and conditions of employment which are not mandatory subjects of the NLRA. Malone v. White Motor Corp., 435 U.S. 497, 504-05 (1978).

lated to state laws inpacting on collectively bargained employee benefit plans. After *Garmon*,[110] the Court decided *Local 20, Teamsters v. Morton*,[111] where the issue presented for decision was whether a state court could award damages for peaceful union activity which was neither arguably protected nor prohibited by federal law, but which constituted a violation of state common law.[112] The conduct in question, noncoercive appeals to the management of a company not to do business with a struck employer, was one economic weapon which the union utilized in its dispute.[113] The Court concluded that, because this activity was not included in the specific enumeration of illegal union practices in Section 8 of the NLRA, it was a permissible economic weapon available to the union.[114] In the Court's opinion, allowing the states to proscribe a means of economic self-help which was meant to be available to employees would frustrate the congressional purpose,[115] and thus preemption of such state regulation was compelled by the *Garner* decision.[116]

The *Morton* opinion's reliance on *Garner* masks to a certain extent its significance. In *Garner*, the state had prohibited conduct which had been specifically addressed in federal legislation,[117] while *Morton* involved conduct which the Court assumed was meant to be permitted because not proscribed.[118] By not addressing itself to the distinction between the two cases, the *Morton* opinion fails to indicate the parameters of the rule it announced. However, in *Lodge 76, Machinists v. Wisconsin Employment Relations Commission*,[119] the Court articulated the assumption of the *Morton* rule as an independent ground of decision,[120] and overruled the *Briggs-Stratton*[121] case as

[110] The Supreme Court decided *Garmon* on April 20, 1959.

[111] 377 U.S. 252 (1964).

[112] *Id.* at 256-57.

[113] *Id.* at 255.

[114] *Id.* at 259. Self-help is central to the achievement of bargaining goals. The Court stated that "[a]llowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." *Id.*

[115] *Id.* at 259-60.

[116] *Id. See* Garner v. Teamsters Local 776, 346 U.S. 485 (1953). *See also* text accompanying notes 48-49 *supra*.

[117] *Garner* involved an equity court construing provisions of the Pennsylvania Labor Relations Act, which were similar to provisions of the National Labor Relations Act providing for review by the NLRB, so as to preclude as unfair picketing activities. 346 U.S. 485 (1953).

[118] 377 U.S. at 259-60.

[119] 427 U.S. 132 (1976).

[120] When economic self-help activity is engaged in by employer or employee and such activity is neither protected nor prohibited by the NLRA the activity is not regulable by either the States or the Board because such regulation could frustrate the purposes and objectives of Congress. *Id.* at 149-51.

[121] International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd., (Briggs-Stratton), 336 U.S. 245 (1949).

having been undercut by subsequent decisions.[122] In *Machinists,* the Wisconsin state labor board had enjoined a concerted refusal to work overtime by members of the union which was clearly neither arguably protected nor prohibited by federal law.[123] In deciding the preemption question, the Court reasoned that in prohibiting with particularity certain union and management activities, Congress meant other traditional means of economic pressure to be available to the parties free from state or federal regulation.[124] Such activities enjoy freedom from governmental regulation, although not from employer interference.[125]

It is noteworthy that almost all of the cases addressing the labor law preemption issue have involved regulation of the conduct of labor relations by management and labor, and not regulation of the substantive terms of collective bargaining agreements.[126] This fact reflects the nature of national labor relations policy, for freedom of contract is a fundamental premise of American labor law.[127] Within the arena of labor bargaining delimited by federal law, parties are free to make any agreement they wish, subject to certain limitations.[128] The expectation is that the contract eventually ag-

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[122] The process of undercutting the holding of *Briggs-Stratton* began as early as 1953, where the court stated, "[t]he detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint." Garner v. Teamsters Local 776, 346 U.S. 485, 499 (1953). In NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960), the Court, in denying the NLRB's authority to determine which economic devices of labor and management were unlawful, noted that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions." *Id.* at 498. Likewise, in NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), the Court noted that "[t]he federal regulatory scheme (1) protects some activities, though not violence, (2) prohibits some practice, and (3) leaves others to be controlled by the free play of economic forces." *Id.* at 144 (citations omitted). *See also* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); Hanna Mining Co. v. District 2, MEBA 382 U.S. 181 (1965).

[123] In Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), the Court quoted at length from its earlier opinion in NLRB v. Insurance Agents Union, 361 U.S. 477, 490 (1960). It said:

> [O]ur labor policy is not presently erected on a foundation of government control of the results of negotiations. *See* S. Rep. No. 105, 80th Cong., 1st Sess., p.2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

427 U.S. at 143.

[124] *Id.* at 141.

[125] It is in this sense that Professor Cox has suggested that the shorthand label "permitted activities" should be employed to describe employee conduct that is protected against state, but not employer conduct. Cox, *supra* note 30, at 1346.

[126] *See generally* Cox, note 30 *supra.*

[127] *See* Wellington, *Freedom of Contract and the Collective Bargaining Agreement.* 112 U. PA. L. REV. 467 (1964).

[128] For example, union and management may not agree on wages which are lower than the minimum set by Congress under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976).

reed upon will be the result of the relative economic strength of labor and management.[129] Although the Court has on numerous occasions recognized the central position of the NLRB in the federal regulatory scheme,[130] it has held that even the NLRB may not compel a party to enter collective bargaining or agree to a substantive term of a proposed contract.[131]

Labor Preemption and Substantive Terms of Collective Bargaining

In light of this principle of freedom of contract within and without the arena of collective bargaining, any attempt by a state to impose a substantive term on the parties would appear to be preempted as well. The Court of Appeals for the Eighth Circuit took this approach in *White Motor Corp. v. Malone*[132] in determining the permissibility of an attempt by the State of Minnesota to impose additional substantive provisions of a pension plan on the parties to a labor contract. In that case, White Farm Equipment Company, a wholly-owned subsidiary of White Motor Corporation, agreed to the continuation of a pension plan for its employees in contract negotiations with the United Auto Workers in 1971.[133] The plan provided for certain vesting requirements, allowed the employer to fund the plan on a deferred basis and empowered the employer to terminate the plan at any time.[134] In an

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[129] *See, e.g.*, Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 150 n.11 (1976); H.K. Porter Co. v. NLRB, 397 U.S. 99, 108-09 (1970). *See generally* Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467 (1964).

[130] *See, e.g.*, Sears, Roebuck & Co. v. Dist. Council of Carpenters, 436 U.S. 180 (1978); Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 288 (1971).

[131] H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). *See also* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-40 (1952); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

[132] 545 F.2d 599 (8th Cir. 1976), *rev'g* 412 F. Supp. 372 (D. Minn. 1976). *See generally* Note, *Federal Preemption*, 11 GA. L. REV. 715, 724-25 (1977).

[133] The pension plan was first established in 1950 by the predecessor of White Farm Equipment Company, Motec Industries, and subsequently was included in collective bargaining agreements negotiated with Motec in 1954, 1959, and 1962. After White Motor Corporation acquired the assets of Motec in 1963, and changed the subsidiary's name to White Farm Equipment Co., the plan was carried forward in labor contracts in 1962, 1968 and 1971. 545 F.2d at 602.

[134] The 1968 version of the pension plan introduced a provision, carried forward in the 1971 labor contract, requiring the funding of unpaid past service liability over a 35-year period. Unpaid past service liability is the excess of the accrued liability of the pension fund over the present value of the assets of the fund. *Id.* Deferred funding of past service liability is commonly utilized in pension plans, with the employer meeting the obligations of unfunded benefits with continued contributions made possible by continued business operations. White Motor Corp. v. Malone, 412 F. Supp. 372, 374 (D. Minn. 1976). The pension plan also provided that only the pension fund was liable for benefits under the plan, thus exempting the general assets of the employer from liability. *Id.* In addition, the plan provided that "[t]he Company shall have the sole right at anytime to terminate the entire plan." Malone v. White Motor

apparent trade-off with the union, White gave the union certain partial guarantees of benefit maintenance if the plan were terminated.[135]

Thereafter, White closed one of its factories, and on May 1, 1974, moved to terminate the employees' pension plan.[136] However, one month earlier, the Minnesota Legislature had enacted the Minnesota Pension Act[137] which imposed obligations on employers who terminated pension plans. These obligations were substantially larger than those negotiated under White's collective bargaining agreement.[138] Pursuant to the Act, the State Commissioner of Labor and Industry notified White that it owed a "pension funding charge" of more than $19,000,000.[139] White sought relief in federal district court, claiming that the state legislation impermissibly attempted to regulate matters within the exclusive jurisdiction of the NLRB.[140] The district court rejected White's challenge to the validity of the statute, holding that it did not interfere with the collective bargaining

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Corp., 435 U.S. 497, 501 (1978). Thus, if the employer terminated the plan, contributions would cease, and part of the unpaid liability would remain unfunded. 412 F. Supp. 372, 374 (D. Minn. 1976). The net result of such a situation would be that the benefits represented by the unpaid service liability would never be paid.

[135] 545 F.2d at 602-03. "By giving the Guarantees, White Motor assumed a direct liability of approximately $7,000,000." *Id.* at 603. This direct liability was sufficient to assure that the employees would receive pension benefits at a level approximately 60% of that specified in the plan. 435 U.S. at 501 n.4.

[136] 545 F.2d at 601.

[137] MINN. STAT. ANN. §§ 181 B.01-.17 (West Supp. 1979) (effective April 10, 1974).

[138] 545 F.2d at 602. The Court of Appeals noted the following conflicts between the provisions of the statute and White Motor's pension plan:

> (1) [t]he Act grants employees vested rights to pension benefits which are not available under the pension plan; (2) to the extent of any deficiency in the pension fund, the Act requires satisfaction of pension benefits from the general assets of the employer, while the pension plan provides that benefits shall be paid only out of the pension fund; and (3) the Act does not permit employers to escape liability for funding of pension rights, but the pension plan permits White Motor to terminate the plan at any time, and in so doing end any liability for future payments to the pension fund, save those specifically guaranteed.

Id. at 603. The pension plan provided that the right to benefits did not vest until retirement, and then only to the extent specified, *Id.* at 602. The Pension Act, in effect, provided that any employee who completed ten or more years of service under a plan has, upon the termination of his plan or place of employment, an automatically vested right to all benefits which he would have received had the plan not been terminated or the place of employment not been closed. *Id.* at 601. This was accomplished by imposing upon the employer a "pension funding charge," equal to the present value of the total amount of vested benefits for employees having completed ten years or more of service, which would be forfeited upon termination. *Id.* at 601 n.6. The pension funding charge is used to purchase an annuity payable to the employee upon retirement. *Id.* at 602.

[139] *Id.* The pension funding charge owed by White Motor under the Act was $19,150,053.

[140] White Motor Corp. v. Malone, 412 F. Supp. 372, 377 (D. Minn. 1976).

process[141] and that there was no potential conflict with federal labor policy.[142]

On appeal, the Court of Appeals for the Eighth Circuit reversed.[143] The court focused on the rationale that, where an area of conduct was intended to be left to the "free play of economic forces," the states may not attempt to influence the substantive terms of a collective bargaining agreement by regulating that conduct of the parties to collective bargaining in furthering their interests.[144] In the court's opinion, this rationale compelled reversal, because "[i]f states cannot control the economic weapons . . . at the bargaining table, *a fortiori*, they may not directly control the substantive terms of the contract which results from that bargaining."[145] The court considered a second argument of the Machinists, that is, that the Welfare

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[141] *Id.* at 381.

[142] *Id.* at 382.

[143] White Motor Corp. v. Malone, 545 F.2d 599, 610 (8th Cir. 1976).

[144] 545 F.2d at 605-06.

[145] *Id.* at 606. The court found additional support for this conclusion in Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959). There, a collective bargaining agreement between the Teamsters and a group of interstate motor carriers set wage scales and provided for minimum rental rates for owner-drivers to prevent evasion of the minimum wage rates by the carriers. Oliver, an owner-driver, challenged the minimum rental provisions in state court as violative of the state anti-trust statutes, and was granted injunctive relief against their enforcement. Oliver v. A.C.E. Transp. Co., 167 Ohio St. 299, 147 N.E. 2d 856 (1958). The Supreme Court reversed, holding that the labor contract provision dealt with wages, not price-fixing, and that the state could not regulate a matter which was a mandatory subject of the bargaining process. The Court stated:

> We believe that there is no room in this scheme [of federal law] for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. . . Since the federal law operates here, in an area where its authority is paramount to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

358 U.S. at 296 (citations omitted). The district court held *Oliver* inapplicable to the context of employee benefit plans presented in *White Motor* because "[t]he inherent conflict and delicate balance which exists between labor and antitrust policy does not exist between labor policy and the regulation of pensions." White Motor Corp. v. Malone, 412 F. Supp. 372, 377 (D. Minn. 1976). In Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975), the Court held that a union agreement with an employer is immune from state anti-trust legislation, and noted that "the accommodation between federal labor and antitrust policy is delicate." *Id.* at 636. While Congress and the Supreme Court carefully tailored federal antitrust statutes and remedies in order to avoid conflict with labor policy, state antitrust legislation has not generally been subject to such accomodation and "[i]f they take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies." *Id. See also* Weber v. Anheuser-Busch, 348 U.S. 468 (1955). Professor Cox has suggested a similar analysis predicated on the view that state antitrust "statutes are based upon a view of policy towards combinations and collective action in the market place which is the very subject addressed by Congress in the NLRA." Cox, *supra* note 30, at 1357.

and Pension Plan Disclosure Act[146] (Disclosure Act) expressly authorized substantive state regulation of benefit plans. This argument was also rejected.[147] After reviewing the pertinent legislative history,[148] the court decided that the Disclosure Act allowed the states to enact only protective legislation ensuring the proper discharge of the fiduciary obligations of pension plan administrators.[149]

On appeal, the Supreme Court reversed in a four to three decision.[150] Although the majority opinion framed the issue for decision as whether the Minnesota Pension Act was preempted by national labor policy, it essentially "preempted" the preemption issue and decided the case on another ground. The Court reasoned that as there was nothing in the NLRA which expressly foreclosed the states from regulating pension plans, federal preemption must be implied from the Act's provisions.[151] The Court indicated, without explanation, that such implication should not be made in this case because a clearer indication of congressional intent could be found in the Disclosure Act.[152] After an extensive review of the Disclosure Act's legislative history, the Court concluded that "Congress . . . recognized and preserved state au-

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[146] 29 U.S.C. §§ 301-309 (1976) (This chapter was repealed by the Employee Retirement Income Security Act of 1974, effective Jan. 1, 1975. The substance of the earlier act was incorporated into ERISA. See the table which precedes 29 U.S.C. § 301 (1976)).

[147] White Motor Corp. v. Malone, 545 F.2d 599, 609 (8th Cir. 1976). The attention of the court was focused on the interpretations to be given to the preemption disclaimer provision of the Act which, it was argued, expressly authorized substantive state regulation of pension plans. The Act states:

> The provisions of this chapter . . . 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.

29 U.S.C. § 209(b) (1976) (repealed and replaced by 29 U.S.C. § 1144 (1976)).

[148] S. REP. NO. 1440, 85th Cong. 2d Sess. 4, *reprinted in* [1958] U.S.CODE CONG. & AD. NEWS 4137. Examination of the Senate Report clarifies that complete disclosure in welfare rights would prevent abuses with a minimum of federal regulation of substantive plan provisions. 545 F.2d at 608-09.

[149] 545 F.2d at 609.

[150] Malone v. White Motor Corp., 435 U.S. 497 (1978). Mr. Justice Brennan and Mr. Justice Blackmun took no part in the consideration or decision of the case. The Chief Justice joined in both of the separate dissenting opinions of Mr. Justice Stewart and Mr. Justice Powell.

Subsequently, the plaintiff moved for summary judgment claiming that the Minnesota Private Pension Benefits Act was unconstitutional. Following ruling by the U.S. District Court for the District of Minnesota in favor of the plaintiff, the defendants appealed. The court of appeals, 599 F.2d 283 (8th Cir. 1979) affirmed the lower court's decision. The court of appeals relied upon the Supreme Court decision in Allied Structural Steel v. Spannaus, 488 U.S. 234 (1978) where it was determined that the application of Minnesota's Private Pension Benefits Protection Act to Allied, when Allied closed its office shortly after the Act became effective, violated the contracts clause of the United States Constitution.

[151] 435 U.S. at 504-05.

[152] *Id. See* note 146 *supra* and accompanying text.

thority to regulate pension plans, including those plans which were the product of collective bargaining." [153]

On a first reading, the Court's opinion seems to grant the states *carte blanche* authority to regulate the substantive terms of collectively bargained pension plans, free from the preemptive effect of national labor laws. Closer analysis, however, leads to the conclusion that the issue of federal preemption of state regulation of collectively bargained employee benefit plans under the NLRA is very much an open question.[154] Although the Court's opinion discusses labor law preemption, *White Motor* is, in reality, not a labor preemption decision.[155] The opinion readily discards federal labor law as an inadequate ground of decision, and proceeds to reverse the Court of Appeals on the basis of the Disclosure Act.[156] Since ERISA supersedes the Disclosure Act,[157] the statutory basis of *White Motor* is no longer authoritative. Although the express language of ERISA[158] (which clearly preempts the Minnesota law[159]) renders the precise issue in *White Motor* moot, the

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[153] *Id.* at 505. The Supreme Court held that the Senate Report on the Welfare and Pension Plans Disclosure Act of 1958 explained that "[t]he legislation proposed is not a regulatory statute. It is a disclosure statute and by design endeavors to leave regulatory responsibility to the States." *Id.* at 507 (quoting S. REP. NO. 1465 [sic], 85th Cong., 2d Sess. 18, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 4154). The Supreme Court recognized the congressional intent to subject to state regulation pension plans established through collective bargaining. 435 U.S. at 507-508. The Court rejected the argument that the States' authority was limited under the Act to dealing only with corruption and mismanagement of funds. *Id.* at 509. "Congress was concerned not only with corruption, but also with the possibility that honestly managed pension plans would be terminated by the employer, leaving the employees without funded pensions at retirement age." *Id.* In the Court's opinion, Congress left to the states the authority to establish mandatory standards. *Id.* at 510.

[154] The Supreme Court held that the Minnesota Pension Act was a state regulation of the type which Congress contemplated and intended as a necessary complement to the now repealed Disclosure Act of 1958. *Id.* at 504-05.

[155] This is because the Supreme Court failed to find the preliminary criteria for raising a preemption claim. Their examination of the Disclosure Act of 1958 failed to adduce conflict between it and the Minnesota statute or evidence of an intended federal occupation of the field to the exclusion of the States. *Id.*

[156] *Id.* at 505.

[157] ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1) (1976).

[158] As pointed out by the Supreme Court in *White Motor*, 435 U.S. at 499 n.1, ERISA § 514(a), 29 U.S.C. § 1144(a) (1976) expressly preempts all State laws relating to covered plans.

[159] A finding that the Minnesota Pension Act comes within the "relates to" prohibition of ERISA § 514(a), 29 U.S.C. § 1144(a) (1976) would be certain in as much as ERISA:

> granted employees vested rights not available under the pension plan; to the extent of any deficiency in the pension fund, it required payment from the general assets of the employer, while the pension plan provided that benefits shall be paid only out of the pension fund; and the Pension Act imposed liability for post termination payments to the pension fund beyond those specifically guaranteed.

435 U.S. at 503.

impact of labor law on substantive regulation of employee benefit plans by the states remains uncertain in those areas where the reach of ERISA is unclear.

Certain types of substantive state regulation may still be preempted under the logic and purpose of labor preemption even if left undistrubed by ERISA.[160] It is significant to note that the Minnesota law at issue in *White Motor* regulated only the effects of a pension plan's termination and not other aspects of its operation or funding.[161] Traditionally, regulation of insurance has been a matter of exclusive state concern.[162] This tradition would appear to hold true to some extent even in a labor-relations context.[163] The state's interest in such regulation is to protect its citizens from fraudulent or financially unsound insurance structures[164] and to control premium rates in light of *loss experiences which vary from state to state.*[165] (Emphasis added). Such regulation in a labor relations context would not impinge on federal labor law because it would not be the product of those considerations which have formed federal labor policy.[166] The same concerns and balancing of in-

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[160] This would appear so when "the fundamental policy of the national labor laws [is] to leave undisturbed the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving. . . ." 435 U.S. at 515-16, *citing* Local 24, Int'l Brotherhood of Teamsters v. Oliver, 385 U.S. 283, 296 (Stewart, J., dissenting). The two other dissenters, Mr. Chief Justice Burger and Mr. Justice Powell, examined the ramifications of the Minnesota Pension Act on the bargaining agreements of the parties. 435 U.S. at 516. The basis for finding preemption of state regulation of labor, they explained, is that "the States, because their concerns are distinct from the considerations that animate a national labor policy, are unlikely to weigh with perception and understanding—the relevant private and public interests." *Id.* at 517-18. (Powell, J., dissenting).

[161] *See* notes 137-138 *supra.*

[162] 15 U.S.C. §§ 1011 *et seq.; see* H.R. REP. No. 143, 79th Cong., 1st Sess. 1, *reprinted in* [1945] U.S. CODE CONG. SERV. 670.

[163] For the view that this is the only practical course to follow *see* Michelman, *State Power to Govern Concerted Employer Activities,* 74 HARV. L. REV. 641, 651 (1961).

[164] States protect their citizenry by scrutinizing the financial integrity of insurers or by requiring capitalization minimums. *See, e.g.,* CAL. INS. CODE § 717 (West 1972); DEL. CODE ANN. tit. 18, § 511 (1975); ILL. ANN. STAT. ch. 73, § 767.9 (Smith-Hurd Supp. 1980); N.J. STAT. ANN. § 17B:18-35 (West Supp. 1979); N.Y. INS. LAW § 79 (McKinney Supp. 1979).

[165] All States have statutes "to promote the public welfare by regulating insurance rates . . . to the end that they shall not be excessive, inadequate or unfairly discriminatory. . . ." CAL. INS. CODE § 1850 (West 1972); DEL. CODE ANN. tit. 18, § 2501 (1975); ILL. ANN. STAT. ch. 73, § 1065.1 (Smith-Hurd Supp. 1980); N.J. STAT. ANN. § 17:29A-11 (West 1970); N.Y. INS. LAW § 180 (McKinney 1966).

[166] *E.g.,* the Congressional purposes furthered by the Labor Management Relations Act of 1947 were:

> to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976).

terests may result in an opposite conclusion regarding state regulation of other aspects of employee benefit plans regardless of the application of ERISA preemption.[167] Nonetheless, it certainly is possible after *White Motor* that the issue of preemption of state labor laws impacting on employee benefit plans may be only an academic, rather than a practical, concern in light of the specificity and breadth of ERISA preemption and lack thereof in labor preemption.[168]

Efforts to reconcile the substantive regulation of employee benefit plans by the states with the doctrine of labor preemption have generated ambiguities because of the variety of terms in which the issue may be framed. The conceptual difficulty which this ambiguity presents is compounded by,

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[167] Whether federal law will preempt state legislation aimed at similar concerns or affecting the same interests is determinable by resort to the analysis used by the Supreme Court in Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947). The preemptive effect of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, will invalidate state law when

> [t]he scheme of federal regulation [is] so 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. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.

331 U.S. at 230 (citations omitted). The question "whether under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977), *citing* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) is more likely to be answered in the affirmative when state and federal lawmakers legislate with similar goals in mind.

[168] The totality with which ERISA § 514(a); 29 U.S.C. § 1144(a) (1976) displaces "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described . . . and not exempt" is a novel exception to the more common federal labor law policy of coexistence with state authority as the following examples illustrate.

The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976), allows state formulation and enforcement of minimum wages higher than those established by the Act. It also gives the States the option of establishing a work week of fewer hours than the federal maximum. 29 U.S.C. § 218(a) (1976).

The superseded Welfare and Pension Plans Disclosure Act, of 1958, 29 U.S.C. §§ 301-309 (1976), to a degree, permitted the regulation of plans. Malone v. White Motor Corp., 435 U.S. 497 (1978).

The Labor-Management Reporting and Disclosure Act of 1959, 25 U.S.C. §§ 401-531 (1976), saved all rights and remedies established by state law except for those "explicitly provided to the contrary." 29 U.S.C. § 523(a) (1976).

Except when suit is brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976), this Act specifically contemplates the concurrent jurisdiction of federal and state laws. 29 U.S.C. § 633(a) (1976).

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976), seeks to improve working conditions "by encouraging the States to assume the fullest responsibility. . . ." 29 U.S.C. 651(b)(11) (1976).

This cooperation of federal funding and state implementation can also be found in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976) and in the Comprehensive Employment and Training Act of 1973, 29 U.S.C. §§ 801-992 (1976).

and indeed is a function of, the different but equally legitimate interests of the federal and state governments in this issue. On the one hand, it can be argued that the fundamental core of national labor policy and the focus of almost all the labor preemption decisions of the Supreme Court is the enforcement of a uniform national consensus on the conduct of labor-management relations under federal law.[169] Congress, within the comprehensive regulatory regime of the NLRA, has provided a framework and series of mechanisms by which labor and management may adjust their often-competing interests peacefully and with a minimum of economic disruption.[170] An equally fundamental principle of that national policy is that the results of the conduct of labor-management relations are to be left to the relative economic strengths of the parties and the forces of the marketplace.[171] As labor policy is concerned almost exclusively with the processes of union organizing and collective bargaining and their more disruptive alternatives,[172] employee benefit plans and their substantive regulation by the states are only of peripheral concern to that policy.[173] As such, it can be argued that state authority to deal with this subject should not be preempted by federal labor laws regardless of preemption by ERISA.

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[169] Federal labor policy is intended

> to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b) (1976). The resulting federally-created balance between management and labor is maintained through the exclusive jurisdiction of the National Labor Relations Board, 29 U.S.C. §§ 158-160 (1976), and protected by decisions of the Court which invalidate or declare preempted state action affecting labor interests and disrupting the balance. *See, e.g.*, Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Unions v. Garmon, 359 U.S. 236 (1959), as opposed to state action directed at "conduct traditionally subject to state regulation." Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 188 (1978) (state not precluded from enforcement of trespass laws); Hanna Mining Co. v. Dist. 2 MEBA, 382 U.S. 181 (1965) (state action permissible in the absence of federal interests).

[170] 29 C.F.R. §§ 101.1 to 103.100 (1978).

[171] *See generally* Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467 (1964).

[172] *See* 29 U.S.C. § 158 (1976) (defining unfair labor practices); 29 U.S.C. § 160 (a) to (m) (1976) (empowering the NLRB to prevent unfair labor practices); 29 U.S.C. § 162 (1976) (creating penalties).

[173] One section of the NLRA that is concerned with state regulation of employee benefit plans is 29 U.S.C. § 157 (1976), which prohibits any interference with employees who collectively bargain. *See also* Cox, note 30 *supra* at 1353. *Accord*, Note, *Federal Preemption*, 11 GA. L. REV. 715, 724-25 (1977).

This conclusion is supported by the presence of substantial local interest in regulating an article of commerce which has traditionally been the subject of exclusive state control.[174] In articulating the nature of local interests in *White Motor,* the state emphasized that it was protecting workers from the severe hardships resulting from loss of pension benefits to which they had contributed over a period of years.[175] In addition, by preventing the loss of pension rights, the state is avoiding the public burden of supporting these individuals by way of state welfare payments and other services.[176] While the state statute in *White Motor* regulated the effects of a pension plan termination with the resulting loss of unfunded benefits,[177] analogous arguments based on state police power to protect the health and safety of its citizens may be made to support local laws mandating the inclusion of other types of benefits or services under collectively-bargained employee benefit plans. This is where the issue becomes most critical.

However compelling these considerations, the conclusion that the states have *carte blanche* to dictate the substantive terms of collectively-bargained employee benefit plans is clearly inconsistent with the logical predicate of those decisions holding such plans to be mandatory subjects of bargaining. Employee benefit plans have been included within the employer's federal bargaining obligations[178] because they are one means by which bargained-for wages are realized.[179] By establishing minimum substantive standards for such plans, the states are intruding into the substantive arena of collective bargaining to a greater extent than can be countenanced under federal law.[180] This intrusion does not, of course, threaten the primary jurisdiction

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[174] Congress, in its passage of the superseded Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§ 301-309 (1976), acknowledged the role of the States as regulators of pension benefit plans. *See* S. REP. NO. 1440, 85th Cong., 2d Sess. 17-18, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 4137, 4153-54.

[175] Brief for Appellant, at 41. The state urged that "[t]he [Minnesota Pension] Act was passed in recognition of the severe hardship that arises when workers devote much if not all of their working life to a company and then see their pension benefits extinguished or greatly reduced because of termination of the plan or some event of similar effect." *Id.*

[176] *Id.*

[177] MINN. STAT. ANN. §§ 181B.01-.17 (West Supp. 1979) (effective April 10, 1974).

[178] Section 8(a)(5) of the Labor Relations Management Act (LRMA), 29 U.S.C. § 158(a)(5) (1976) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" subject to LRMA § 9(a); 29 U.S.C. § 159(a) (1976) provides that those "[r]epresentatives designated or selected for the purpose of collective bargaining . . . shall be the exclusive representatives of all employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." *Id.*

[179] *See, e.g.,* W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949); Inland Steel Co. v. NLRB, 170 F.2d 247, 249 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949).

[180] This is the position taken by Mr. Chief Justice Burger and Mr. Justice Powell in Malone v. White Motor Corp., 435 U.S. 497, 516 (Powell, J., dissenting). *See* Cox, note 30 *supra* at 1355-56.

of the NLRB, but it does impinge on an area that Congress intended to be left to the free play of economic forces.[181] Indeed, the argument of the State of Minnesota in its brief[182] before the Supreme Court justifies this statement. By undertaking to protect its workers from the consequences of a plan termination, the state implicitly recognized that some unions could not compel this protection from their employer through collective bargaining by the use of their economic strength.[183] In enacting this legislation,[184] the state made a better contract for many of its workers than they could have made for themselves.[185] Although the statute in issue in *White Motor* did not mandate that employee benefit plans be provided for in labor contracts,[186] its provision to protect workers' accrued benefits[187] was found to violate the principle that "the state may . . . add to an employer's federal legal obligations in collective bargaining."[188] It is this intrusion by the state into an area of regulation that is forbidden to even the NLRB that presents the greatest potential threat of local interference with national labor policy. The *White Motor* decision can be viewed as consistent with the relative inviolability of federal labor law in both the procedural and substantive areas only because another federal act, the Welfare and Pension Plans Disclosure Act[189] seemed to reserve the matter for state regulation.[190] It is argued, however, that unless, in any case, there is specific federal recognition of reserved state powers rather than specific federal preemption of such state law, federal labor law preempts any state regulation of both the processes and results of collective bargaining.[191]

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[181] *See* Cox, note 30 *supra* at 1138-39.

[182] *See* note 175 *supra* and accompanying text.

[183] *Id.*

[184] The Private Pension Benefits Protection Act, MINN. STAT. ANN. §§ 181B.01-.17 (West Supp. 1979).

[185] It is arguable that the Minnesota law mandated what the employer already had a good faith obligation to do. Yet, the incurred cost of guaranteeing the accrued pension benefits, imposed after negotiations, was then a cost that the employer had to absorb without having an opportunity to rebalance the equities. Malone v. White Motor Corp., 435 U.S. 497, 517 (1968) (Powell, J., dissenting). The majority also recognized this. *Id.* at 514.

[186] MINN. STAT. ANN. §§ 181B.03-.06 (West Supp. 1979) imposed a "pension funding charge on any employer ceasing operation of either a place of employment or a pension plan within Minnesota."

[187] MINN. STAT. ANN. §§ 181B.02-13 to .02-14 (West Supp. 1979).

[188] Cox, *supra* note 30, at 1365.

[189] Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§ 301-309 (1976) (repealed 1975).

[190] Malone v. White Motor Corp., 435 U.S. 497, 505 (1968).

[191] This presumptive preclusion of state law from the core area of employer-employee relations is vital if federal labor policy and the balances struck by Congress are to be maintained. Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 476 (1972).

In order to eliminate, or at least to minimize, the threat of local interference, there must be a delicate balancing of the state and federal interests in the particular regulation at issue within the context of a limiting principle derived from the logic of the Supreme Court's labor preemption decisions.[192] However, the principle relied on in recent Court decisions that state laws which alter the balance struck by Congress of interests of labor, management and the public through a framework of "protection, prohibition and *laissez-faire*" [193] are preempted, is not entirely appropriate when applied in the context of pension benefits. This principle has been used to determine the preemptive effect of federal labor law on state regulation of the processes of union organization, collective bargaining and labor disputes,[194] and is not applied easily as a whole to local control over the results of such processes. Moreover, in some sense, almost every regulation of the states that in any way touches or concerns labor relations can be said to affect this balance. Certainly, the substantive control of employee benefit plans does so.

An alternative and more appropriate analysis would focus on the compelling nature of the state interests at issue. In other words, state statutes or administrative regulations establishing substantive minimum levels for welfare and pension plans would not be preempted where the state could establish a direct connection between the minimum standard and a concerete and compelling state interest. The statute at issue in *White Motor*, although now regulated entirely by ERISA,[195] could be considered such a case. In *White Motor*, the state could point to the hardships on employees and the resulting burden on the public treasury if an employer could terminate a pension plan without assuming liability for unfunded benefits.[196] At the same time, this rule would prevent a state from imposing a host of benefits which are unrelated to a legitimate and compelling state interest upon an employer who bargains over or agrees to an employee benefit plan. Without such a limiting principle, a state could add requirement on requirement to the point where the only

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[192] *Compare* Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) *and* Farmer v. Carpenters, 430 U.S. 290 (1977) *with* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

[193] Cox, *supra* note 30, at 1352 (quoted in Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 n.4 (1976). *Cf. id.* at 156n. (Powell, J., concurring) (state laws should not be regarded as neutral in such areas as employee self-organization, labor disputes, or collective bargaining).

[194] *See, e.g.*, Motor Coach Employees v. Lockridge, 403 U.S. 274 (1970); Hanna Mining Co. v. Marine Engineers, 382 U.S. 181 (1965); Local 20, Teamsters v. Morton 377 U.S. 252 (1964).

[195] ERISA § 514(a), 29 U.S.C. § 1144(a) (1976). Malone v. White Motor Corp., 435 U.S. 497, 499 (1978).

[196] *See* note 175 *supra* and accompanying text.

matter to be bargained for with respect to a welfare or pension plan is whether the employer will provide one, for once it agrees to do so, all the provisions of such a plan would be mandated by the state. Such a result would be the logical conclusion to the unfettered authority of the state to regulate an increasingly important subject of collective bargaining. Allowing such a result would be to deprive both union and management of the opportunity to adjust their interests with the flexibility and freedom that have been the hallmark of labor-management relations in this country. Accordingly, it is hoped that the Supreme Court's holding in *White Motor* will be given a narrow construction in future applications of the doctrine of labor law preemption to substantive state regulation of collectively bargained employee benefit plans.

ERISA Preemption

As discussed above, ERISA is a broad legislative enactment primarily intended to achieve a degree of uniformity in the standards applicable to the establishment, maintenance, administration, and regulation of various types of employee benefit plans and to accord a uniform system of protection to participants in and beneficiaries of such plans.[197] Of the many critical and complex legal issues involving the interpretation and application of various provisions of and regulations issued under ERISA,[198] perhaps one of the most significant involves the scope, intent, and application of the ERISA preemption provision, section 514 of the Act.[199]

Since its enactment in September of 1974, controversy has arisen over the extent to which ERISA supersedes state laws relating to employee benefit plans. This section of the article focuses on several key aspects of this controversy, reviews the legislative history and current judicial interpretations of the preemption provision, and summarizes proposed corrective legislation.

That ERISA was intended to apply a broad scope of federal supremacy regarding the regulation of employee benefit plans may be inferred from

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[197] *See* notes 15-20 *supra* and accompanying text.

[198] *See, e.g.*, Glanzer, *The Impact of ERISA on Collective Bargaining*, 52 ST. JOHN'S L. REV. 531 (1978), which deals with how ERISA provisions shape pension plans and create options for fulfilling collectively bargained duties; Junewicz, *Portfolio Theory and Pension Plan Disclosure*, 53 N.Y.U. L. REV. 1153 (1978), which discusses how ERISA's disclosure requirements fail as a means of participant evaluation of investment risks; *and* Lamon & Lee, *Pre-Retirement Qualified Plan Pay-Outs Under ERISA*, 9 CUMB. L. REV. 83 (1978) which examines the complexities of investiture and tax questions as they relate to ERISA participants. *See, e.g.*, Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23 (1978), and Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 IOWA L. REV. 57 (1976).

[199] ERISA § 514; 29 U.S.C. § 1144 (1976).

ERISA's legislative history,[200] the expanse of ERISA regulations,[201] and the plain meaning of section 514.[202] A question remains, though, as to how broadly the specific and directive preemptory language of ERISA[203] will be interpreted, and considering the scope given to the loose and ill defined preemption concept of federal labor law,[204] just where the balance will be struck between federal ascendancy and state interests.

Despite the scope and specificity of the ERISA preemption provision, the clause has generated a morass of litigation at both the state and federal level. The judicial and administrative disputes which have arisen with respect to the ERISA preemption provision have focused primarily on three areas: (i) state laws mandating the extension of certain substantive benefits under employee benefit plans if such plans are maintained by an employer or if certain other benefits are already provided under such plans,[205] (ii) conflicts involving varying interpretations of state anti-discrimination laws with respect to females and maternity benefits,[206] and (iii) the impact of specific ERISA requirements, such as the law's non-alienation provisions,[207] which may conflict or be partially inconsistent with generally applicable state laws not *directly* related to the establishment, operation or administration of employee benefit plans.[208] The central dispute in each of these controversies involves the extent to which ERISA supersedes state laws that are either directly or tangentially related to employee benefits plans. The current status

[200] The District Court found Congress paid considerable attention to the question of preemption. Both the House and Senate favored the idea although in different degrees. The broad language of section 514(a), however, came from conference committee and Congress enacted the bill from the ensuing conference report. "Congress comprehended the change [of scope of the bill] and intended the statute to occupy the entire field of employee benefit plan regulation." Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1299 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). Congress enacted section 514(a) with the "express purpose of summarily preempting state regulation of ERISA-covered employee benefit plans." 425 F. Supp. at 1300.

[201] *See, e.g.*, Treas. Reg. § 1.401(a)-13 (1978) which deals with prohibitions against assignment or alienations of benefits under qualified pension plans.

[202] *See* notes 221-231 *infra* and accompanying text.

[203] Section 514(a) of ERISA expressly provides that Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." ERISA § 514(a), 29 U.S.C. § 1144(a) (1976). Section 514(b) sets forth the specific exceptions to this broad preemptive policy. ERISA § 514(b), 29 U.S.C. § 1144(b) (1976). *See* notes 222 & 226-28 *infra* and accompanying text.

[204] The National Labor Relations Act does not specifically provide for any supersession of state laws; its preemptive superiority has developed through judicial interpretation. *See* notes 25-31 *supra* and accompanying text.

[205] *See* notes 235-254 *infra* and accompanying text.

[206] *See* notes 292-310 *infra* and accompanying text.

[207] ERISA § 206(d), 29 U.S.C. § 1056(d) (1976). ERISA § 1021(c), I.R.C. § 401(a)(13). *See* notes 320-373 *infra* and accompanying text.

[208] *See* notes 258-263 *infra* and accompanying text.

of judicial and administrative interpretation of issues related to these areas of controversy is unclear, oftentimes inconsistent, and decidedly in a state of flux. It should be kept in mind, though, that the ERISA preemption issue can arise in a full panoply of contexts, ranging from those enumerated above to more esoteric contexts such as the application of state escheat laws [209] and the validity of state laws prohibiting offsets of pension benefits by amounts paid under workers' compensation.[210] To provide background for an analysis of these matters, it would be helpful to review the legislative history and statutory language of section 514 and discuss the respective policy and conceptual arguments favoring and opposing a broad ERISA preemption.

Legislative History and Statutory Language

The legislative history of ERISA effectively confirms the intention of Congress to displace state laws and regulations which directly or indirectly relate to employee benefit plans. The ERISA preemption provision was given considerable attention by Congress. In fashioning the preemption provision, Congress recognized the problems inherent in the conflicting regulation of multi-state and multi-employer plans. Congress was also aware of the potential for a costly and confused litany of litigation if it had opted for piecemeal rather than broad preemption.[211]

Referring to an earlier version of section 514, Senator Jacob K. Javits, one of the Senate sponsors of ERISA, stated that:

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[209] Department of Labor, Precedent Opinion Letter [hereinafter DOL-P. OP.] 79-30A (May 14, 1979). *See* note 218 *infra.*

[210] *See* Buczynski v. General Motors, 616 F.2d 1238 (3d Cir. 1980), *pet. for cert. filed,* 49 U.S.L.W. 3053 (Aug. 8, 1980) (No. 80-193).

[211] While both houses favored federal preemption, each had a different viewpoint as to its scope. The preemption provision enacted into law, however, was broader in its sweep than the versions introduced by the House of Representatives or the Senate. The bill upon which ERISA was based, H.R. 2, 93d Cong., 1st Sess. (1973), *reprinted in* SUBCOMMITTEE ON LABOR SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, I LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, Pub. L. No. 93-406 (1976), would have preempted only those state laws which covered the same areas as the bill, namely, funding, reporting, disclosure, fiduciary responsibilities and benefit guarantees as applied to employee benefit plans. H.R. 2, 93d Cong., 2d Sess., § 514 (1974), *reprinted in* III LEGIS. HIST. at 4057-59. This version of the bill, as amended and passed by the Senate on March 4, 1974, was not as specific as the House's version. The Senate version preempted state regulations to the extent they dealt with the subject matter covered by the bill or by the Welfare and Pension Plans Disclosure Acts. H.R. 2, 93d Cong., 2d Sess., § 699 (1974), *reprinted in* III LEGIS. HIST. at 3820. The Joint Committee of Conference reconciled the Senate and House versions of H.R. 2 by enlarging the scope of the bill's preemption provision. H.R. REP. NO. 93-1280, 93d Cong., 2d Sess. 383 (1974), III LEGIS. HIST. at 4650. The Joint Committee of Conference made it clear that "the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." *Id.* at 5162. *See* DOL-P. OP. 75-22 (July 18, 1975).

> Both House and Senate bills provided for preemption of State law but . . . defined the perimeters of preemption in relation to the area regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
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> . . . [T]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private employee benefit programs.[212]

Similarly, Senator Harrison A. Williams, Jr., in introducing the Joint Committee of Conference Report[213] on ERISA, stated that:

> It should be stressed that with the narrow exceptions specified in 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, or any instrumentality thereof, which have the force or effect of law.[214]

Finally, Congressman John H. Dent, one of the House leaders of ERISA, stated:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] 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. . . .
>
> 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 decison of any State, subdivision thereof or any agency or instru-

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[212] 120 CONG. REC. 29942 (1974), *reprinted in* III LEGIS. HIST. at 4770-71.

[213] H.R. REP. NO. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* III LEGIS. HIST. 4277.

[214] 120 CONG. REC. 29933 (1974), *reprinted in*[1974] U.S. CODE CONG. & AD. NEWS 5188-89.

> mentality thereof . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).[215]

These and other explicit statements made by those involved in the drafting and enactment of ERISA clearly indicate that the preemption provision was intended to be broad. Decisions such as *Hewlett-Packard v. Barnes*[216] and *Standard Oil Co. v. Agsalud*[217] lend credence to the view that the intended expansion of federal authority in this area would be frustrated and any *ad hoc* approach taken by the judiciary to define the parameters of federal authority. Additionally, there are number of Department of Labor Opinion Letters which have expressed underlying support for such a position and which have articulated the Department's belief that the ERISA preemption provision is a broad and comprehensive one.[218] Nonetheless, the courts have fashioned a number of *ad hoc* exceptions to broad federal preemption, generally in order to give continued credence to long-standing state regulation of an area (such as family law)[219] or to fill what would otherwise be a regulatory void (as in the area of the substantive regulation of welfare benefits).[220]

Section 514[221] of ERISA is a detailed, complex, and broad preemptive provision. Section 514(a)[222] sets forth the general rule that state laws[223]

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[215] 120 CONG. REC. 29197 (1974), *reprinted in* III LEGIS. HIST. at 4670-71.

[216] 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978).

[217] 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, No. 78-1059, slip opinion (9th Cir. Oct. 15, 1980). The Circuit Court opinion upheld the lower court's decision.

[218] *See, e.g.*, DOL-P OP. 79-90A (Dec. 28, 1979) (advising that a collectively bargained vacation plan cannot honor state process seeking to levy for unpaid taxes or unemployment insurance of a plan beneficiary); Department of Labor Information Letter (May 15, 1979) (advising that California's unclaimed property statute is preempted under section 514 of ERISA where the method of notifying participants of deferred vested benefits under the California law is not the same as that prescribed by section 1032 of ERISA); DOL-P. OP. 79-30A (May 14, 1979) (advising that California's unclaimed property statute, which provides for escheat of employee benefit trust distributions unclaimed by the owner is preempted under section 514(a) of ERISA to the effect that it relates to covered plans); DOL-P. OP. 78-03 (Feb. 15, 1978) (advising that a state law regulating non-insured employee benefit plans would be preempted by ERISA); DOL-P.OP. 75-129 (June 26, 1975) (advising that ERISA precludes a state from requiring the filing of disclosure and reporting forms with respect to employee benefit plans after 1974); DOL-P. OP. 75-22 (July 18, 1975) (advising that ERISA preempts state regulation of self-insured health and medical plans).

[219] *See* notes 365-368 *infra* and accompanying text.

[220] *See* note 235-254 *infra* and accompanying text.

[221] ERISA § 514, 29 U.S.C. § 1144 (1976).

[222] Section 514(a) provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and

which "relate to" employee welfare and/or pension benefit plans,[224] established or maintained by employers engaged in, or employee organizations representing employees engaged in, commerce or some commerce-related activity or industry[225] are preempted. The exceptions to such preemption

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not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

ERISA § 514(a), 29 U.S.C. § 1144(a) (1976).

[223] "State law," for purposes of section 514, means "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States." ERISA § 514 (c)(1), 29 U.S.C. § 1144 (c)(1) (1976).

As defined by ERISA, "[t]he 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 subchapter." ERISA § 514(c)(2), 29 U.S.C. § 1144 (c)(2) (1976).

Note, however, that where ERISA and any other federal law conflict, the other law shall govern. ERISA § 514(d), 29 U.S.C. § 1144(d) (1976).

[224] "Employee welfare plan" is defined in ERISA as follows:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) 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, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

ERISA § 4(1), 29 U.S.C. § 1002(1) (1976).

"Employee pension benefit plan" is defined in ERISA to mean:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program
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> (A) provides retirement income to employees, or
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> (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA § 3(2), 29 U.S.C. § 1002(2) (1976).

"Employee benefit plan" is defined in ERISA to mean "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both. . . ." ERISA § 3(3), 29 U.S.C. § 1002(3) (1976).

[225] ERISA § 4(a) 29 U.S.C. § 1003(a) (1976). The only such plans excluded are governmental and church plans; plans maintained solely to comply with workers' compensation, unemployment compensation, or disability insurance laws; foreign plans covering primarily nonresident aliens; and unfunded excess benefit plans. ERISA § 4(b), 29 U.S.C. § 1003(b) (1976).

Note, however, that a state health insurance law has been construed not to be a disability insurance law. Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, No. 78-1059, slip opinion (9th Cir. Oct. 15, 1980). *See* notes 240-250 *infra* and accompanying text.

(*i.e.*, state laws which are saved from federal supersession) are clearly articulated in section 514 and limited to the following:

1. Causes of action which arose, and acts or omissions which occurred, prior to January 1, 1975;[226]

2. State laws which regulate insurance, banking, or securities;[227] and

3. Generally applicable state criminal laws.[228]

Section 514(b)(2)(b) states that an employee benefit plan shall not be deemed to be an insurance company, bank, trust company, or investment company or be engaged in the business of insurance or banking for purposes of any state law regulating insurance companies, banks, or trust or investment companies. This is the so-called "deemer" clause of the preemp-

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Note also that while plans maintained solely to comply with state workers' compensation laws are not preempted, a state statute prohibiting the reduction or offset of pension benefits by amounts received by the pensioner under workmen's compensation has recently been preempted by ERISA. Buczynski v. General Motors, 616 F.2d 1238 (3d Cir. 1980), *pet. for cert. filed*, 49 U.S.L.W. 3053 (Aug. 8, 1980) (No. 80-193); Alessi v. Raybestos-Manhattan, Inc., 616 F.2d 1238 (3d Cir. 1980), *cert. dismissed*, 65 L. Ed. 2d 1141 (1980).

[226] ERISA § 54(b)(1), 29 U.S.C. § 1144(b)(1) (1976). In Malone v. White Motor Corp., 435 U.S. 497 (1978), the United States Supreme Court mentioned, in passing, that ERISA preempted the Minnesota Pension Act as of January 1, 1975, but had no application to the facts of the case under consideration because they occurred before that date. *Id.* at 499 n.1. Buczynski v. General Motors Corp., 456 F. Supp. 867 (D.N.J. 1978), *reconsideration den.* 464 F. Supp. 133 (D.N.J. 1978), *vacated*, 616 F.2d 1238 (3d Cir. 1980), involved retired employees seeking to enjoin their employer from reducing their pension benefits by the amount of any workers' compensation benefits they might receive. In holding that the retiree class was entitled to reimbursement and a permanent injunction, Judge Lacey rejected the employer's preliminary argument that the claim was based on acts occurring before January 1, 1975 (some of the employees had retired before 1975 and the challenged offset provision had been lawful before ERISA became effective). *Id.* at 868 n.1., 874 n.25. In Azzaro v. Harnett, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd.* 553 F.2d 93 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977), the New York State Department of Insurance argued that its rights to regulate and investigate employee benefit plans were not susperseded by ERISA with respect to those situations in which most of the pension credits in controversy were accumulated before January 1, 1975. *Id.* at 474. The district court held that ERISA completely preempts the field of employee benefit plans. The limited exception of section 514(b)(1) was intended "to permit an orderly transition from state to federal regulation of employee benefit plans by permitting state agencies to dispose of matters pending before them prior to the effective date of the new law." *Id.* at 474-75.

[227] ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1976). This exception is limited by the following:

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

ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1976). *See* notes 261-291 *infra* and accompanying text.

[228] ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4) (1976).

tion provision and is generally applicable to all plans except those primarily established for the purpose of providing death benefits.[229]

The terms "state law" and "state" are broadly defined to include most legislative, judicial, and administrative actions by a state or political subdivision thereof.[230] Finally, Section 514(d) makes it clear that ERISA does not displace any other federal law, a factor which becomes important in some of the cases involving state civil rights and insurance laws.[231]

Judicial Interpretation Confirming Broad ERISA Preemption

The increased litigation over ERISA preemption has made, or will ultimately make, much of the labor preemption issue, as it relates to employee benefits, moot. Clearly, decisions such as *White Motor*[232] no longer have efficacy with respect to similar post-ERISA settings.[233] The ERISA preemption provision has been interpreted so broadly that labor preemption could only be considered cumulative rather than primary in most disputes in this area.[234]

ERISA has been held to preempt numerous state laws which directly impact on employee benefit plans. For example, in one of the leading cases on the subject, *Hewlett-Packard Co. v. Barnes*,[235] the Court of Appeals for the Ninth Circuit upheld the district court's judgment which permanently enjoined a California state agency from enforcing a state health care law, as it applied to employee benefit plans regulated by ERISA.[236] In affirming

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[229] Under the so-called "deemer" clause, an employee benefit plan cannot be deemed to be an insurance company, an insurer or in the business of insurance for purposes of state insurance laws. However, under section 514(b)(2)(B), plans established primarily for purposes of providing death benefits are exceptions to this rule, since Congress viewed such plans as more akin to traditional life insurance and which ERISA apparently leaves subject to state insurance regulation. Otherwise, the "deemer" clause has generally been interpreted to preclude state regulation of self-insured welfare plans, but has allowed regulation of insurance companies, which provide insurance benefits under employee welfare plans, and indirectly regulation of plans which purchase such insurance coverage. *See, e.g.*, Wadsworth v. Whaland, note 254 *infra* and accompanying text.

[230] ERISA § 514(c)(1) to 514(c)(2), 29 U.S.C. § 1144 (c)(1) to 1144(c)(2) (1976).

[231] ERISA § 514(d), 29 U.S.C. § 1144(d) (1976).

[232] 435 U.S. 497 (1978).

[233] *See* notes 157-159 *supra* and accompanying text.

[234] *See* note 168 *supra* and accompanying text.

[235] 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

[236] 425 F. Supp. 1294, 1302 (N.D. Cal. 1977). The plaintiffs in *Hewlett*, employers engaged in commerce and employee organizations representing employees engaged in commerce, maintained self-funded health benefit plans which reimbursed employees a percentage of certain health care expenses incurred by the employees and/or their dependents and the covered individuals independently contracted for the health services. The plaintiffs sought to enjoin the state from requiring their compliance with the California Knox-Keene Health Care Service Plan Act of 1975, CAL. HEALTH & SAFETY CODE §§ 1340-

the district court's decision in favor of ERISA preemption,[237] the Ninth Circuit expressed the opinion that "[t]he clear wording of section 514 and the relevant legislative history show that congress unmistakably intended ERISA to preempt a state law such as Knox-Keene [a minimum health care benefit law] that directly regulates employee benefit plans."[238] *Hewlett-Packard,* as the first and most important case which invalidated a significant state health insurance law because it related to employee benefit plans[239] seems to be the cornerstone of judicial recognition of ERISA preemption.

In *Standard Oil Co. of Calif. v. Agsalud*,[240] one of the progeny of *Hewlett-Packard*, a main issue was whether Hawaii's Prepaid Health Care Act[241] was preempted by ERISA.[242] The Hawaii Act required employers

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1399.64 (West Supp. 1979), a comprehensive health care statute. 425 F. Supp. at 1295.

Defendant Barnes posited three arguments: (1) neither the preemption language of ERISA (section 514) nor its legislative history clearly mandate preemption of state health care service laws such as Knox-Keene; (2) Knox-Keene is a state law regulating insurance and, as such, is expressly excluded from ERISA's preemption (section 514(b)(2)); and (3) if ERISA is construed to preempt Knox-Keene and similar laws, then section 514(a) is unconstitutional as violative of the Tenth Amendment to the Federal Constitution. *Id.* at 1296.

Judge Renfrew found the language of section 514 to express unequivocally Congress' intent to preempt state health care services statutes such as Knox-Keene. *Id.* at 1297. To dispel any doubt about Congressional intent, the court analyzed the legislative history and found it completely supportive of its own interpretation of section 514. *Id.* at 1297-1300. The court turned aside the defendant's "insurance law" exception argument by referring to section 514(b)(2)(B) of ERISA which provides that employee benefit plans are not to be considered as insurers for purposes of the insurance exception. *Id.* at 1300. The court also concluded that ERISA is a valid exercise of Congress' power under the Commerce Clause and is not violative of the Tenth Amendment. *Id.* at 1300-01.

[237] 571 F.2d at 505. The Court of Appeals accepted Judge Renfrew's decision and his rationale with one modification; it disavowed his use of the "plain meaning" rule of statutory construction. *Id.* at 504 n.4. The Court of Appeals dealt with one other contention raised by the defendant. The claim was that ERISA would impair other federal legislation, namely, the Health Maintenance Organization (HMO) Act, 42 U.S.C. §§ 300e to 300e-15 (1976) and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), and this impairment would violate section 514(d) of ERISA. The court found no merit in the arguments. *Id.* at 504-05.

[238] 571 F.2d at 504.

[239] 571 F.2d 502 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978). Of course the denial of certiorari could be construed as a reflection of the Supreme Court's reluctance to deal with the technical legal questions of ERISA. In the only case granted certiorari in which ERISA preemption was an issue, the Supreme Court held that ERISA was not involved. Malone v. White Motor, 435 U.S. 497, 499 n.1. (1978). *See* notes 150-156 *supra* and accompanying text. The Supreme Court denied certiorari in Azzaro v. Hartnett, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd,* 553 F.2d 93 (2d Cir.), *cert. denied,* 434 U.S. 824 (1977), and Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978). *See* note 254 *infra.*

[240] 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd,* No. 78-1095, slip opinion (9th Cir. Oct. 15, 1980).

[241] HAW. REV. STAT. §§ 393-1 to 393-51 (West Supp. 1978).

[242] 442 F. Supp. at 696. The other main issue was that if ERISA did preempt the Hawaii Act, the preemption was unconstitutional. *Id.* The State argued that the Due Process Clause of the Fifth Amendment or the limits placed by the Tenth Amendment on congressional authority under the Commerce

to provide comprehensive medical care for resident employees.[243] The state sought to enforce the Act against Standard Oil which in turn sought declaratory and injunctive relief from this section.[244] A preliminary argument raised by the state was that the ERISA preemption issue was inapposite to the statute in question because the Hawaii Act was a disability insurance law, and since Standard's benefit plan was maintained solely to comply with that law, it was therefore exempt from ERISA by virtue of section 4(b)(3) of ERISA.[245] The district court, however, determined that the plan was maintained for a number of reasons, some of which were not in response to a state disability law and thus Standard Oil's plan was subject to ERISA.[246]

Clause would be violated by a construction of ERISA in favor of preemption. *Id.* at 707. The district court held ERISA's preemption of the Hawaii Act to be constitutional *Id.*.

[243] *Id.* at 697. Section 4(b)(3) of ERISA exempts any employee benefit plan which is maintained solely to comply with disability insurance laws from the provisions of Title I of ERISA (the reporting, disclosing, vesting, funding, and fiduciary provisions). ERISA § 4(b)(3), 29 U.S.C. 1003(b)(3) (1976).

[244] 442 F. Supp. at 696. Standard contended that its benefit plan, voluntarily maintained for employees outside Hawaii, as well as for its Hawaiian employees, provided most of the features required by the Hawaii Act and was therefore not maintained "solely" for purposes of complying with the Hawaii Act. The court disagreed with this contention, indicating that such an approach would require a company-by-company inquiry to determine whether the company would have adopted a generally equivalent plan even if not required by law to do so. Congress intended an easier, all-or-none approach, with respect to employee benefit plans of interstate companies. Judge Renfrew, who rendered the district court decision in Hewlett-Packard, offered the following test:

> The test to determine whether ERISA applies to an employee benefit plan is whether employee benefit plans providing that general type of benefit are usually maintained solely to comply with state social insurance laws or generally maintained for other or additional reasons. Employee benefit plans meeting the carefully structured and comprehensive requirements of state workmen's compensation, unemployment compensation, and disability insurance laws clearly fall within the former category. In contrast, the Hawaii Act regulates a type of employee benefit plan generally and historically maintained for other reasons, and it requires a combination of features duplicated in many voluntary plans. By exempting only those plans "maintained solely" to comply with state social insurance laws, Congress intended to make ERISA reach all types of plans not generally required by state law. In other words, Congress intended to permit only traditional forms of state social insurance laws to continue to operate, and the Hawaii Act, the first state health insurance law in the country, is hardly a traditional state social insurance law.

442 F. Supp at 704.

[245] 442 F. Supp at 698-99. The court pointed out that health and disability insurance laws can be distinguished by the type of benefits they provide. The court further noted, however, that a more fundamental difference between these laws involves the type of contingency against which they issue. A health insurance law (like the Hawaii statute) requires insurance against all non-occupational illness and injury, whether or not disabling, while a disability insurance law requires insurance only against nonoccupational illness or injury that is, in fact, disabling. Disability insurance laws are also limited to replacement of wages; the Hawaii Act also covers medical and hospital expenses. *Id.* The court acknowledged that its reasons were rather technical, but indicated that ERISA was drafted by speciagists in the area of pension law and that if a term in ERISA had a technical meaning to these specialists, such meaning should be given to that term by the courts. *Id.* at 702.

[246] *Id.* at 704.

The court also determined that the Hawaii Act was not a disability insurance law, but a health insurance law,[247] and the ERISA's legislative history contained no unambiguous evidence as to Congress' intentions concerning the preemption of state health insurance laws.[248] However, the court felt that "the only sure guide to congressional intent is the language Congress used, and that language clearly means that ERISA preempts state health insurance laws."[249] The Court stated, however, that though ERISA preemption had apparently created a void with respect to the regulation of most health insurance plans, it was Congress' responsibility and not the courts to fill such a vacuum.[250]

In *National Carriers' Conf. Comm. v. Hefferman*,[251] the federal districts court in Connecticut held that ERISA preempts a state's power to tax benefits paid by an employee welfare benefit plan.[252] The court, relying on the statutory language of section 514 and ERISA's legislative history, specifically rejected a narrow reading of the preemption provision in favor of one that gave ERISA preemption its widest possible effect.[253]

Aside from the cases dealing with marital disputes and civil rights, most federal court decisions have construed the preemption provision to be very broad, even in those decisions not allowing the ERISA preemption's provision to operate.[254]

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[247] *Id.* at 702.

[248] *Id.* at 706.

[249] *Id.*

[250] *Id.* at 711.

[251] 454 F. Supp. 914 (D. Conn. 1978).

[252] *Id.* at 918. The statute in question, CONN. GEN. STAT. ANN. § 12-212C (West 1979), was not simply a general taxation provision which included employee benefit plans within its broad sweep, but specifically and exclusively taxed benefits paid by employee benefit plans. *Id.* at 915.

[253] *Id.* at 915-17. The court's logic was straightforward: section 514 preempts "any and all" state laws to the extent they relate to any employee benefit plan; the tax statute in question was aimed directly at employee benefit plans; the tax statute clearly "relates to" ERISA-covered plans; therefore, the statute is preempted by ERISA. *Id.* at 915-16.

The court further added that a narrow construction of section 514 which would exclude state taxation from preemption was undermined by Congress' very specific enumeration of areas of state legislation which were not to be preempted—insurance, banking, securities, and generally applicable criminal laws. *Id.* The court relied on, and summarized, the Legislative History of ERISA set forth in Hewlett-Packard to dispel any doubt concerning section 514's broad reach. *Id.* at 916. From the Legislative History, the court also drew a congressional intent "not to exempt state taxing power from ERISA's broad preemption of state law." *Id.* at 917.

[254] In Old Stone Bank v. Michaelson, 439 F. Supp. 252 (D.R.I. 1977) a state banking board, in the exercise of its regulatory authority, had rules that certain amendments to the bank's thrift plan which were made to meet ERISA funding and disclosure requirements were unacceptable because of a regulatory technicality. The bank claimed that this determination would result in its maintaining of a plan which failed to meet the minimum specifications of ERISA. The bank sought a declaratory judgment and injunctive relief from the board's regulation on the grounds that ERISA preempted the banking board's authority in this area. *Id.* at 253-54. While noting the broad preemptive language adopted by Congress,

On the basis of these decisions and formal Labor Department opinions, it appears that the states are clearly preempted from legislating or regulating in areas, such as mandating the provision of or taxing substantive employee benefits, that directly relate to employee benefit plans. In other areas, however, the issues are not so clearly defined and, in some cases, the states have been allowed to do by indirection what they are precluded from doing by direction. The evolving law in some of these beclouded areas is discussed below.

ERISA Preemption and State Insurance Regulation

Although section 514(b)(2)(A) exempts state laws regulating insurance from ERISA's general preemption,[255] section 514(b)(2)(B) provides that an employee benefit plan should not be deemed to be an insurance company or in the business of insurance for purposes of applying the insurance law exception to preemption.[256] Aside from the statutorily enumerated exceptions to preemption,[257] it seems clear that the intent of section 514(a) is to bring within its broad sweep any laws which relate directly to the establishment, maintenance or administration of employee benefit plans.[258] In this respect, it should be noted that (i) the meaning of "employee benefit plan," as defined in sections 3(1), (2) and (3) of ERISA, is very broad and inclusive,[259]

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the court relied on section 514(b)(2)(A) (which excludes any state laws regulating banking from ERISA preemption) to conclude that the banking board was not seeking to regulate the bank's plan as an employee benefit plan, but was attempting to regulate the bank in its corporate and trustee capacity pursuant to state banking laws. This regulation, the court held, was a legitimate exercise of state jurisdiction over a state-chartered bank and did not run afoul of the ERISA preemption provision. *Id.* at 255-56.

In Insurer's Action Council, Inc. v. Heaton, 423 F. Supp. 921 (D. Minn. 1976), portions of a comprehensive health insurance law were challenged on the grounds that they were preempted by ERISA. The district court held that where state regulation of insurance laws are concerned, any conflict between those laws and ERISA must be very clear to trigger ERISA's preemption provision. The court found that ERISA controls the reporting and disclosure requirements of health and accident insurance plans, but not their substance. *Id.* at 926. In Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978), administrators of various New Hampshire welfare funds argued that a New Hampshire statute "impermissably" regulated employee benefit plans by indirectly regulating the content of group insurance policies. The First Circuit recognized that Congress intended ERISA to preempt all state laws that related to employee benefit plans. However, the court affirmed the district court decision, stating that Congress had not intended to so restrain a state's authority to regulate insurance practices. *Id.* at 78.

[255] ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1976).

[256] ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1976). *See* note 227 *supra*.

[257] ERISA § 514(b)(1), -(b)(2), -(b)(4), 29 U.S.C. § 1144(b)(1), -(b)(2), -(b)(4) (1976). *See* notes 226-228 *supra* and accompanying text.

[258] *See* notes 211-220 *supra* and accompanying text. *See also* DOL-P.OP. 78-2A (Feb. 15, 1978) which holds that ERISA does not preempt state laws since it falls within the section 514(b)(2)(A) exception. *Contra*, DOL-P.OP. 79-06A (Jan. 16, 1979) which holds that ERISA does preempt state laws; the Labor Department notes that section 514(b)(2)(B) prevents a state from regulating a plan simply because it self-insures its benefits.

[259] ERISA § 3(3), 29 U.S.C. § 1002(3). *See* note 224 *supra* for the definition of "employee benefit plan."

and (ii) early (pre-enactment) drafts of section 514 contained preemption provisions that were significantly more limited than the one contained in the adopted provision.[260] A key issue left unresolved as a result of the relation between sections 514(b)(2)(A) and (B) is the extent to which state laws directly or indirectly may regulate or affect employee benefit plans under the rubric or guise of insurance regulation.

There is little or nothing in ERISA's legislative history which adequately explains or clearly elucidates the meaning and intended application of the insurance exemption to the preemption provisions and the related provision prohibiting an employee benefit plan from being deemed an insurance company or in the business of insurance.[261] There is no doubt that Congress left to the states that area of state regulation which neither relates to nor affects employee benefit plans.[262] Section 514 itself provides sufficient manifestation of congressional intent for leaving intact the longstanding primacy of the states with respect to the regulation of insurance. However, this intent cannot be allowed to undermine the equally clear and basic congressional concern of establishing federal ascendancy with respect to the regulation of employee benefit plans. If section 514(b)(2)(A) is interpreted to except from the application of section 514(a) all state laws which regulate any aspect of insurance or the insurance industry, such exception could ultimately emasculate the general preemption rule in light of the integral nature that insurance or insurance company services play in the provision of employee benefits.

It is difficult to imagine any significant area of the establishment, operation or administration of employee benefit plans which do not or could not involve some form of insurance, insurance company services, or insurance regulation.[263] If ERISA was indeed intended, as it appears from the legisla-

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[260] *See* note 211 *supra* and accompanying text.

[261] The earliest versions of ERISA introduced in both the House and Senate provided that state insurance laws would not be preempted by ERISA. H.R.2, 93d Cong., 1st Sess. § 114 (1973), *reprinted in* I LEGIS. HIST. at 50-51; S.4, 93d Cong., 1st Sess. § 609(a)(2) (1973), *reprinted in* I LEGIS. HIST. at 187. The concept that a benefit plan cannot be considered an insurance company first appears in a later version, H.R.2, 93d Cong., 2d Sess. § 514(b) (1974), *reprinted in* III LEGIS. HIST. at 4058, but no explanation is offered for its addition. The Joint Committee of Conference, in its Joint Explanatory Statement which gave many insights as to the rationale of several ERISA provisions, offered none for § 514(b)(2)(B). H. REP. NO. 93-1280, 93d Cong. 2d Sess. 383 (1974), *reprinted in* III LEGIS. HIST. at 4650.

[262] ERISA § 514(a), 29 U.S.C. § 1144(a). This statement is supported even without the insurance exemption of § 514(b)(2)(B).

[263] The legislative history of ERISA effectively confirms the Congressional intent to create a broad preemption provision. Rep. Perkins (D. Ky.), a leading supporter of the Act, described the preemption approach in very broad terms:

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of

tive history as well as the face of the statute, as a broad federal regulatory scheme of the employee benefit area, then it would be inconsistent with such intent to interpret section 514(b)(2)(A) as permitting the frequently conflicting regulation of employee benefit plans by the fifty states through the guise of insurance regulation. It is noteworthy that Congress clearly did save from preemption state insurance laws which relate to employee benefit plans established primarily for providing death benefits.[264] The absence of any other such "savings clause" seems to indicate that no other laws, whether insurance or otherwise, which, at least, directly relate to or affect employee benefit plans were intended to be rescued from ERISA preemption whether or not classified as insurance regulation.

There is, however, one consideration which operates against a narrow interpretation of the insurance exception to the ERISA preemption provision. The McCarran-Ferguson Act[265] states that: (a) insurance regulation and taxation should be a function of the individual states unless otherwise specifically regulated by federal law[266] and (b) silence by Congress shall not be construed to be a barrier to such regulation and taxation by the states.[267] Furthermore, where a state and a federal law deal with the same aspects of

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> 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.
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> . . . 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 which reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof . . . which would effect any employee benefit plan as described in § 4(a) and not exempt under § 4(b).

120 CONG. REC. 29197 (1974). *See, e.g.*, Standard Oil v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, No. 78-1095, slip opinion (9th Cir. Oct. 15, 1980). Hewlett-Packard v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978).

[264] ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1976). This point was emphasized by the Joint Committee of Conference. H.R. REP. NO. 93-1280, 93d Cong., 2d Sess. 383 (1974), *reprinted in* III LEGIS. HIST. at 4655.

[265] McCarran-Ferguson Act §§ 1-5, 15 U.S.C. §§ 1011-1015 (1976).

[266] *Id.* at § 2(b), 15 U.S.C. § 1012(b) (1976).

[267] *Id.* at § 15 U.S.C. § 1011 (1976). The purpose of the McCarran-Ferguson Act is to assure that activities of insurance companies in dealing with their policyholders remain subject to state regulations. The overriding purpose of ERISA is to assure that the relationship between employers and employees with respect to employee benefit plans conforms to minimum funding, administration, and disclosure requirements, for such plans remain subject to the overriding interests and regulations of the federal government. Accordingly, ERISA preemption should still apply in those areas that do not deal directly or indirectly with the relationship between insurance companies and policy holders. *See* McCarran-Ferguson Act §§ 1-5, 15 U.S.C. §§ 1011-1015 (1976). *See also* Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453 (1969).

insurance regulation, the two laws should be interpreted in a manner consistent with one another.[268] This appears to be the most reasonable and traditional manner of legal construction when two laws are subject to varying interpretations one of which would place them in conflict, while the other would view them as consistent.[269] This result can effectively be achieved in two different manners.

One interpretation of the impact of McCarran-Ferguson on ERISA preemption is that ERISA is a law which specifically relates to insurance and therefore displaces the states in the "limited" area encompassed by both ERISA and state insurance regulation. However, although such an interpretation appears facially attractive, it is somewhat disingeneous and really begs the ultimate issue. The real issue is the relation between ERISA, McCarran-Ferguson and state insurance laws and this can best be ascertained by analyzing the purposes of each and fashioning a methodology which gives maximum but non-conflicting application to each. The purposes of ERISA have been articulated elsewhere. The purposes of McCarran-Ferguson are essentially to allow for the retention by the states of the regulatory authority over insurance companies doing business therein. The basic intent of state insurance regulation is presumably to protect state residents from unsound or unfair insurance practices and insure some degree of fiscal integrity on the part of insurance companies. A balancing of these purposes and interests can be achieved, not by undermining the preemptive intent and effect of ERISA but by interpreting ERISA and McCarran-Ferguson consistently to allow the states primacy in the area of regulating insurance *qua* insurance and the federal government primacy over regulating employee benefit plans. This, though, could leave an area of either overlapping regulation or a void of any regulation. In the former case, preemption and federal supremacy clearly call for the primacy of federal regulation and the invalidation of any state regulation unless clearly inconsistent with McCarran-Ferguson. In the latter case, if such an interpretation would create a regulatory vacuum in matters such as substantive welfare benefits, this should be cured by Congress either through broadening ERISA substantive provisions or clearly narrowing ERISA preemption, but not by judicial legislation which effectively and by piecemeal application undermines the uniform national scheme of employee benefit regulation currently intended by ERISA.

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[268] *See generally* notes 33-35 *supra* and accompanying text.

[269] *Id.*

Insurance traditionally involves some form of risk assignment.[270] Traditional individual life insurance policies, for example, involve such risk assignment.[271] On the other hand, most employee welfare benefit plans providing some form of group medical coverage are experience-rated without any risk assumption by the insurance company.[272] In short, the employee benefit plan pays every dollar of every benefit paid plus a certain percentage fee for the basic services (*i.e.*, administrative services) provided by the insurance company.[273] Most group medical plans rely on the claims processing and payment systems developed by the insurance companies; the primary concern of the plans is not the assignment of risk to the insurance company but the administrative services provided.[274]

One interpretation of both McCarran-Ferguson and ERISA would be to limit section 514's insurance exception to the group life insurance area so that only those state laws which relate to employee benefit plans other than death benefit or life insurance plans would be preempted. This interpretation, however, may make the language in section 514(b)(2)(B) concerning death benefit plans surplusage. It is unlikely that courts, which have a general obligation to give effect to all provisions of a statute, would adopt this approach.[275] A second consistent and preferred construction would be that ERISA preempts any state insurance law which relates to an employee benefit plan except for those state laws regulating the provision of life insurance and other traditional "risk transference" policies (*i.e.*, group health,

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[270] S.S. HUEBNER & K. BLACK, JR., LIFE INSURANCE 2 (9th ed. 1976). "It is the function of insurance in its various forms to safeguard against such misfortunes [losses from fire, disability and premature death] by having the losses of the unfortunate few paid by the contribution of the many who are exposed to the same risk." *Id.*

[271] *Id.* Life insurance "may be defined as the social device for making accumulations to meet uncertain losses resulting from premature death. . . , which is carried out by the transfer of the risks of many individuals to one person or a group of persons." *Id.* (footnote omitted).

[272] *See, e.g.*, Wadsworth v. Whaland, 562 F.2d 70, 75 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

[273] *Id.* In effect, the welfare benefit plan fund is self-insured. The insurance companies are retained to provide the administrative service of processing claims. The annual claims amount is projected, subject to adjustment in light of actual experience. If the actual claims amount is higher than the projection, the premium is adjusted upward; if actual experience is lower than the projection, the premium is adjusted downward. Over the long run, the welfare fund reimburses the insurance companies for all claims. *Id.*

[274] *Id.*

[275] *See, e.g.*, Wadsworth v. Whaland, 562 F.2d 70, 78 (1st Cir. 1977); Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382, 394 (D. Kan. 1977).

disability, etc., policies where the insurer accepts the economic risks of future claims). However, the current judicial interpretation of the relation between section 514(b)(2)(A) and (B) has rejected both alternatives in favor of one which saves state authority over almost any type of insurance regulation, regardless of the direct or indirect nature of its impact on employee benefit plans.[276] Some of the issues generated by this relationship between the 514(a) preemption provision, the 514(b)(2)(A) savings clause for state insurance laws and the 514(b)(2)(B) "deemer" clause have been addressed by several courts, which have acknowledged the wide breadth of ERISA preemption while concurrently upholding state insurance regulation.[277]

In *Wadsworth v. Whaland*,[278] the Court of Appeals for the First Circuit addressed the issue of whether a state law requiring insurance companies to include certain substantive provisions in any group insurance policy were preempted by ERISA.[279] The plaintiffs were employee benefit plan administrators of plans which were effectively self-insured, but which used insurance companies for administrative services.[280] The court held that ERISA does not preempt application of state insurance laws to insurers issuing group insurance policies even when such policies are issued to or purchased by employee benefit plans.[281] The court held that section 514(b)(2)(B) does not preclude a state from indirectly affecting an employee benefit

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[276] *See* notes 281-290 *infra* and accompanying text. Only *Hewlett-Packard* and *Standard Oil Co.* have given the preemption provision of ERISA an expansive interpretation. *See* notes 235-250 *supra* and accompanying text.

[277] *See* notes 278, 285, 288 *infra* and accompanying text. One case, however, has given the ERISA preemption provision a very narrow scope, in holding that the conflict between state insurance law and ERISA must be clear in order for ERISA preemption to control. Insurer's Action Council, Inc. v. Heaton, 423 F. Supp. 921, 926 (D. Minn. 1976).

[278] 562 F.2d 70 (1st Cir. 1977), *cert. denied*. 435 U.S. 980 (1978).

[279] 562 F.2d at 72-73. The state law in question required insurers that issued or renewed group health insurance policies to extend insurance coverage for the treatment of mental illnesses and emotional disorders. *Id.* at 72.

[280] *Id.* at 74-75. The plaintiffs were administrators of employee welfare benefit plan funds which clearly fall within the scope of ERISA's coverage. The funds self-insured certain benefits under the plans, but approximately 90% were provided through group insurance policies. The policies were, however, experience-rated; *i.e.*, the welfare funds actually reimbursed the insurance companies for all claims. In effect, the insurance companies were used for the administration of claims processing. *Id. See* notes 272-274 *supra* and accompanying text.

[281] 562 F.2d at 78.

plan,[282] but merely prohibits a state from directly doing so by deeming a benefit plan to be an insurer for application of state insurance laws.[283] The court stated that its holding was reinforced by both the 514(b)(2)(A) savings clause and the section 514(d) provision which states that ERISA does not displace any other federal law, the most relevant of which in this respect was the McCarran-Ferguson Act.[284] The result of the *Wadsworth* holding is that a welfare benefit plan which does not do business at all with an insurer (*i.e.*, by purchasing either traditional risk transference insurance or insurance company administrative services only) is not subject to state regulation, while a plan which does contract with an insurance company is subject, at least indirectly, to state regulation, including requirements for the inclusion of certain substantive benefits.

In *Bell v. Employee Security Benefit Association*,[285] the court held that an insurance program marketed by a proprietary entrepreneur was not an employee benefit plan within the the meaning of ERISA and, accordingly, was not saved from state insurance regulation by the preemption provision.[286] In *Bell*, however, the court stated that "[i]n light of this legislative

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[282] *Id.*

> In order to accept plaintiff's construction [that the deemer provision forbids states from indirectly affecting employee benefit plans by regulating group insurance], we would have to construe § 514 without its saving clause pertaining to state regulation of insurance. This we cannot do; we must interpret the statute as written. Congress was fully aware of the functions and scope of employee benefit plans and, nonetheless, exempted state laws regulating insurance from preemption . . . . Such a construction would completely emasculate the saving clause. It is our duty when interpreting an act of Congress to construe it in such a manner as to give effect to all its parts and to avoid a construction which would render a provision surplusage. (citations and footnote omitted).

Id.

[283] *Id.* at 77.

[284] *Id.* at 78.

[285] 437 F. Supp. 382 (D. Kan. 1977).

[286] *Id.* at 396. The plaintiff in Bell, the Kansas Commissioner of Insurance, sought to enjoin defendant Employee Security Benefit Association (ESBA), an unincorporated association, from carrying on its business activities in Kansas until ESBA complied with the statutes and regulations governing insurance in Kansas. *Id.* at 384. ESBA, which was organized by individuals with significant insurance experience and affiliations, employed insurance agents to solicit working people to join what ESBA called an "employee benefit plan" established under ERISA. *Id.* The plan that ESBA offered (1) was substantially similar to major medical and death benefit coverage offered in general by insurance companies, *Id.*; (2) was, like an insurance program, intended "to be actuarially sound," *Id.* at 392; and (3) was offered virtually to anyone who was employed (membership was not limited to one employer, one industry, or one union). *Id.* at 396. ESBA's program provided profit making opportunities to the agency which marketed it and the corporation which provided related administrative services, both of which had substantial ties to ESBA's organizers. *Id.* at 392. Plaintiff's argument was that ESBA's program was one of

history, we conclude that federal preemption in the area of pensions and other employee benefit programs is virtually total. We are unable to agree with the decisions which apparently have applied a narrow interpretation of §1144."[287] A similar result was reached in *Wayne Chemical Inc. v. Columbus Agency Service Corp.*[288] In that case, the court held that the benefits at issue were not provided through an employee benefit plan subject to ERISA and thus state insurance regulation was still applicable.[289] In short, only

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insurance, subject to state regulation. *Id.* at 384. ESBA countered that its program was marketed as an employee benefit plan covered by ERISA and thus was exempt from state insurance regulation. *Id.* The court responded to ESBA's contention by stating that "just as a state cannot-regulate an 'employee benefit plan' by calling it 'insurance,' neither can defendants merchandise an insurance program, free of state regulation, by terming it an 'employee benefit plan'." *Id.* at 390. The court, after a thoughtful analysis of distinctions between insurance and employee benefit plans and after a review of ERISA's legislative history, concluded that when Congress passed ERISA's preemption provision, its concept of "employee benefit plan" involved certain characteristics:

> [sic] it was provided by an employer or homogeneous employee organization, such as a union; (b) it was non-commercial in nature; (c) it did not involve solicitation (d) it was not intended to be actuarially sound; (e) because the employees could look only to the fund, and not to the provider of that fund, the rates were substantially lower than insurance rates. *Id.* at 391.

Against these criteria, the ESBA program failed to qualify as an "employee benefit plan". The court approvingly cited a report, H.R. REP. No. 94-1785, 94th Cong., 2d Sess. 48 (1976), prepared by the House Committee on Education and Labor that had been charged with overseeing the operation of ERISA. The report indicated that the Committee had been made aware of entrepreneurial insurance programs (similar to ESBA's) which were designed to evade state regulation under the guise of being an employee benefit plan covered by ERISA. The report indicated that such plans were not established or maintained by appropriate parties to confer ERISA jurisdiction. 437 F.2d at 392. The court offered the findings of the Committee to support its conclusion, but perhaps the court's conclusion was intended to lend judicial support to these findings.

National Business Conf. Employee Benefit Ass'n v. Hewatt, [1978] PENS. REP. (BNA) No. 179 D-4 (1978), is the Oregon version of *Bell*. Relying on *Bell*, the Federal District Court here also concluded that the "benefit" program under consideration in the case was not an employee benefit plan and therefore not exempt from state regulation under section 514 of ERISA. *Id.* at D-6. National Business Conf. Employee Benefit Ass'n v. Anderson, 451 F. Supp. 458 (S.D. Iowa 1977), the Iowa version of *Bell*, reached a similar result. *Id.* at 462.

[287] 437 F. Supp. at 387. The court's reference here is to Insurer's Action Council, Inc. v. Hearon, 423 F. Supp. 921 (D. Minn. 1976), and Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977). *See* note 281.

[288] 567 F.2d 692 (7th Cir. 1977).

[289] *Id.* at 700. In *Wayne*, an employee's claim on behalf of his dependent son was denied under a group medical insurance policy purchased by the employee's employer, purportedly in accordance with a welfare plan established pursuant to a master-type of trust agreement intended to comply with ERISA. The insurance policy had been obtained through an insurance agency, which, in turn, used an intermediate insurance broker, the defendant, to place the insurance. Twenty-four days before the injury of the 18 year-old son, an injury which left the boy seriously and permanently disabled, the defendant changed insurance carriers on behalf of the employer. As it turned out, the new carrier's policy would not continue coverage for the son after his 20th birthday, a result contrary to the state's insurance law. Additionally the new carrier was not authorized to issue insurance in the state, which under state insurance law would make the agent liable if the insurer defaulted, as it ultimately did. *Id.* at 693-94.

the *Wadsworth* decision has directly held that an employee benefit plan which purchases only administrative services provided by insurance companies can be regulated, at least indirectly, by state insurance laws.[290] It is hoped that this issue ultimately will be resolved in a manner consistent with decisions such as *Hewlett-Packard*[291] and in such a manner that no premium is put upon a plan administrator's decision to contract or not with an insurance comapny in order to avoid state laws. Any other result glorifies form over substance and could effectively emasculate ERISA preemption and undermine Congressional intent.

State Maternity Benefits Legislation and ERISA Preemption

Another frequently litigated and inconsistently decided issue is whether ERISA preempts the application of state anti-discrimination laws with respect to employee benefit plans. The issue essentially involves the continued viability of state laws mandating benefits coverage for pregnancy and disabilities associated with pregnancy. The analysis of ERISA preemption with respect to maternity benefits is most probably moot in light of the 1978 amendments[292] to Title VII of the Civil Rights Act of 1964.[293] Nonethe-

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The issue here was whether or not Wayne Chemical, the employer, was a participant in a master plan/trust that was an "employee welfare benefit plan" under ERISA. If this were so, the defendant contended, then state insurance laws and regulations, to the extent they related to the plan/trust, would be preempted by section 514(a) of ERISA; and if state insurance law did not apply, the defendant agency would not be liable for the default of the new carrier. *Id.* at 694. The district court found that the plan in question was an "employee welfare benefit plan," but found the defendant liable as a matter of "federal common law." Wayne Chemical, Inc. v. Columbus Agency Service, Corp., 426 F. Supp. 316, 325-26 (N.D. Ind. 1977). The Court of Appeals for the Seventh Circuit affirmed the lower court decision, but on the basis that the master plan was not an "employee benefit plan" to which ERISA applied. 567 F.2d at 699-700.

In effect, the court viewed the insurance program as a proprietary insurance venture established and maintained by entrepreneurs for their own profit, relying in part, on the *Bell* case and the House Committee report referred to in *Bell*. *Id.* & n.9. See note 286 *supra*. The court added that even if the program qualified as an employee benefit plan, Wayne Chemical was not a participant because Wayne was never made aware of the existence of the plan. 567 F.2d at 699. The court went further—if Wayne was a valid participant in an employee benefit plan, the exemption of section 514(a) would neither apply to the insurer who issues the insurance policies nor, as found in *Wadsworth*, to insurance policies issued by the insurer to an employee benefit plan. *Id.* at 700. *See* text accompanying notes 281-282 *supra*.

[290] *See* notes 281-282 *supra* and accompanying text. However, the Wayne court was prepared to rely on the *Wadsworth* rationale in the right set of circumstances. *See* note 289 *supra*.

[291] *See* notes 235-239 *supra* and accompanying text.

[292] Act of October 31, 1978, 42 U.S.C. §§ 2000e, 2000e-2. This amendment effectively overrules General Electric Co. v. Gilbert, 429 U.S. 125 (1976). In that case, the United States Supreme Court held that Title VII did not mandate the inclusion of benefits for absence due to pregnancy in an employees benefit plan. The new amendment states:

> (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions shall be treated the

less, there are a significant number of pre-amendment disputes which necessarily must be resolved under the pre-existing law,[294] and, additionally, an analysis of this issue may prove fruitful when encountering other but similar disputes.

The federal and state courts which have addressed the relationship among ERISA, Title VII, and the state civil rights (non-discrimination) laws have reached varied and sometimes conflicting results. For example, one line of cases has held that ERISA preempts state civil rights laws which mandate maternity benefits coverage. Two leading cases in this group are *Pervel Industries, Inc. v. Connecticut*[295] and *Delta Airlines v. Kramarsky.*[296] In *Pervel,* Judge Newman relied on the broad preemption language in his earlier opin-

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same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. . . .

42 U.S.C. § 2000e (1978).

[293] 42 U.S.C. § 2000e to 2000e-16 (Supp. II 1978).

[294] *See* 42 U.S.C. § 2000e (Supp. II 1978). Any fringe benefit program or fund, or insurance program which is currently in effect, is not affected for 180 days. The rationale and further explanation are set forth in the House of Representatives report:

> As the *Gilbert* decision permits employers to exclude pregnancy-related coverage from employee benefit plans, H.R. 6075 provides for a transition period of 180 days to allow employees to comply with the explicit provisions of this amendment. It is the committee's intention to provide for an orderly and equitable transition, with the least disruption for employers and employees, consistent with the purposes of the bill. Since the bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts and as it now exists in many States, a protracted delay in implementation would not be appropriate. Six months was selected as that period which would be more than adequate to permit orderly implementation of new coverage and which would also recognize the pressing need to make nondiscriminatory coverage mandatory as soon as practicable.
>
> Section 2(a) provides for an immediate effective date insofar as the bill affects employment policies other than fringe benefits, including refusing to hire pregnant women, firing women who became pregnant, denying seniority, and forcing women to take mandatory maternity.

H.R. REP. No. 95-948, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 6515, 6522. *See, e.g.*, St. Vincent's Medical Center of Richmond v. State Human Rights Appeal Board, 398 N.Y.S. 2d 735, 59 A.D.2d 779 (App. Div. 1977), *cert. denied.* 47 U.S.L.W. 3404 (Jan. 9, 1979) (Employer's disallowance of benefits for pregnancy-related disabilities of employees violates New York Human Rights Law); Westinghouse Electric Corp. v. State Human Rights Appeal Board, 401 N.Y.S. 2d 597, 60 A.D.2d 943 (App. Div. 1978), *cert. denied.* 47 U.S.L.W. 3404 (Jan. 9, 1979) (New York's Human Right Law's prohibition against sex discrimination, as interpreted to prohibit employer's failure to provide in its employee disability benefits plan coverage of disabilities due to pregnancy, conflicts with neither Title VII nor ERISA); Minnesota Mining and Manufacturing Co. v. State, 289 N.W.2d 396 (Minn. 1979), *appeal dismissed.* 444 U.S. 1041 (1980) (ERISA does not preempt operation of Minnesota Human Rights Act, which prohibits as unfair employment practice discrimination in providing fringe benefits to women affected by pregnancy, childbirth or disabilities related to pregnancy or childbirth).

[295] 468 F. Supp. 490 (D. Conn. 1978), *aff'd,* 603 F.2d 214 (2d Cir. 1979), *cert. denied,* 48 U.S.L.W. 3451 (Jan. 15, 1980) (No. 79-107).

[296] 21 F.E.P. Cases 1429 (S.D.N.Y. 1980).

ion[297] and rejected the defendant's contention that a finding of federal preemption would impair the integrity or administration of Title VII of the 1964 Civil Rights Act.[298] The court in *Delta Airlines* arrived at a similar result. Both courts, in *Pervel* and *Delta Airlines,* effectively rejected the "double savings" clause argument tendered by the states, which contends that since ERISA, under 514(d), saves other federal laws and Title VII saves state anti-discrimination laws, such state laws are not preempted by ERISA. Both the *Pervel* and *Delta Airlines* cases rejected such interpretation in favor of one which limits the effect of section 514(d) to the saving only of federal laws and not state laws which may be directly or indirectly saved by or have their genesis under such federal laws. As the court in *Pervel* pointed out, Congress chose not to identify specific areas for preemption but rather to apply it with the broadest possible sweep, thus avoiding a piecemeal approach to the saving or preemption of state laws which relate to employee benefit plans.[299] There was, however, a further complicating factor in the *Delta Airlines* case in that one of the New York laws under scrutiny, in addition to a civil rights law, was a state disability law mandating maternity coverage. The court held that Delta's disability benefit plan was intended to comply with such state law and, with a little judicial legerdemain, held that such portions of the plan intended to so comply were not subject to ERISA, in accordance with section 4(b) of the Act, and, accordingly, the state disability law was not preempted.[300]

Other cases have found that section 514 does not preempt state discrimination laws mandating pregnancy coverage. These cases may be divided into two groups. The first group consists of those cases which find no preemption under section 514(a) because the state laws were construed as not relating to employee benefit plans. The second is the line of cases which have utilized the "double-savings clause," *viz.,* finding that state laws relating to or prohibiting discrimination in welfare benefit plans are excepted from preemption through 514(d) and Title VII of the 1964 Civil Rights Act.

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[297] National Carriers' Conference Comm. v. Heffernan, 454 F. Supp. 914 (D. Conn. 1978).

[298] 468 F. Supp. at 493.

[299] *Id.* at 492.

[300] 21 F.E.P. Cases at 1434, 1437. Section 4(b) exempts from ERISA coverage plans maintained *solely* for complying with applicable workers' compensation, unemployment compensation or disability insurance laws. (Emphasis supplied). Delta's disability plan was, of course, not maintained solely for complying with the New York disability law as evidenced by, among other things, the fact that Delta's plan contained numerous provisions which were broader or more liberal than the state law.

In *Gast v. Oregon*,[301] the court specifically rejected the double savings clause argument[302] but went on to hold that since Congress did not legislate on the substantive nature of health and welfare benefits, and the subject matter and nature of ERISA does not compel preemption, the states still retained the power to regulate the substance of health and welfare benefit plans.[303] Two hybrid cases in this area are *Bucyrus-Erie Co. v. Department of Industry, Labor, and Human Relations* and *Mountain States Telephone and Telegraph v. Montana Commissioner of Labor and Industry*.[304] In *Bucyrus-Erie*, the court held that the state anti-discrimination statute was indeed a law which relates, even if only indirectly, to employee benefit plans, that Section 514[305] was not intended to be limited to supersession of only those laws which specifically pertain to benefit plans as such and that the law would therefore be preempted but for the Title VII saving clause issue.[306] Accordingly, the court held that the state law in question was not preempted because such preemption would impair Title VII which specifically saves state civil rights laws and, thus, would be in contravention of Section 514(d) which directs that ERISA not "alter, amend, modify, invalidate, impair, or supersede"[307] any other federal law.[308]

Without specifically rejecting or accepting the double savings clause argument, the Montana Supreme Court, in the *Mountain States* case, saved the state's Maternity Leave Act from preemption on the basis that (i) Congress did not intend to preempt state anti-discrimination laws that only tangentially affect employee benefit plans and (ii) interpreting ERISA to preempt such laws would create a vacuum within which the subject of substantive employee welfare benefits would not be subject to any regulation.[309] The "double-savings clause" concept is explained clearly in *Goodyear Tire and Rubber Co. v. Department of Industry, Labor, and Human Rights*:

> The Attorney-General contends, and the circuit court held, that the fourth ERISA exception, sec. 1144(d), preserves intact

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[301] Gast v. Oregon, 36 Ore. App. 441, 585 P.2d 12 (1978), *aff'd*, 286 Or. 149, 585 P.2d 12 (Sup. Ct. 1979).

[302] 585 P.2d at 19.

[303] *Id.* at 22-23. *See also* Liberty Mutual Insurance Co. v. State Division of Human Rights, 61 App. Div. 2d 822, 402 N.Y.S.2d 218 (Sup. Ct. 1978).

[304] Bucyrus-Erie Co. v. Dept. of Industry, Labor & Human Relations, 453 F. Supp. 75 (E.D. Wis. 1978), *aff'd*, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); Mountain States Telephone and Telegraph Co. v. Montana Commissioner of Labor and Industry, 608 P.2d 1047 (Mont. 1979), *appeal dismissed*, 445 U.S. 921 (1980).

[305] ERISA § 514, 29 U.S.C. § 1144 (1976).

[306] 599 F.2d at 210.

[307] ERISA § 514(d), 29 U.S.C. § 1144(d) (1976).

[308] 599 F.2d at 210-13.

[309] 608 P.2d at 1057, 1058.

> Title VII of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e et seq. and that Title VII expressly preserves state laws, like the Wisconsin Fair Employment Act, which parallel the federal act in prohibiting employment discrimination.[310]

The issue of the continued application of state discrimination and related laws to employee benefit plans, though, should not be determined on the basis of each superficially appealing or facile analysis. Such a broad exception to the preemption standard could ultimately swallow the general rule through interpreting the few articulated statutory exceptions to section 514(a) as though they fixed the standard and 514(a) was the exception. For instance, it is not clear whether 514(d) also saves any state law which relates to an area not exclusively occupied by but also subject to federal regulation where the federal law does not address its relation to or the viability of state laws concerning the same subject. In any case, the ultimate denouement of the debate concerning the application of state human rights or other laws to employee benefit plans is still undecided and hopefully will be determined on a basis which assures the fulfillment of the federal purposes underlying ERISA preemption to the exclusion of those state laws which interfere with these purposes.

While it is true that ERISA does not directly mandate or even discuss many of the substantive provisions of employee welfare benefit plans, it does require employers to adhere to many complex and restrictive requirements when such benefits are provided.[311] The preemption argument with respect to state laws mandating certain substantive welfare benefits is weakened by the fact that ERISA does not address the issue of substantive welfare benefits and leaves a somewhat glaring gap of regulatory coverage if state laws are preempted. Yet the ERISA preemption provision is clear and unequivocal and it would appear to require, as a minimum, the supersedure of state laws which relate directly, if not indirectly, to employee benefit plans.[312] Such a construction of ERISA preemption is bolstered by both a retrospective glance at the legislative history and an analysis of the current case law.[313] Thus, the concepts of the "double-savings" clause and McCarran-Ferguson Act

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[310] Goodyear Tire & Rubber Co. v. Dept. of Industry, Labor & Human Relations, 87 Wis. 2d 853, 273 N.W.2d 786, 793 (Ct. App. 1978).

[311] ERISA §§ 101-110, 29 U.S.C. §§ 1021-1031 (1976).

[312] ERISA § 514(a), 29 U.S.C. § 1144(a) (1976).

[313] Hewlett-Packard Co. v. Barnes, 571 F.2d 502, 504 n.4. *see* note 216 *supra* for procedural history.

preemption exceptions, which may have some superficial appeal, appear inconsistent with the broad preemptive thrust of ERISA. Indeed, ERISA was specifically designed to create a uniform federal authority over employee benefit plans and to occupy completely the employee benefit field subject to specific, articulated exceptions. Theories drawing distinctions between "relate to" and "affect" or creating a patchwork analysis of "double savings" clauses should not be allowed to corrupt the intended federal scheme of uniform regulation. Perhaps, a different balance needs to be struck between the intended pervasive federal scheme and interests and related or conflicting state interests, but assuming *arguendo* that to be the case, it should be accomplished by Congress and not lawmaking or artifice of the courts.

Although the issue of pregnancy disability benefits may be partially or wholly mooted by the passage of the 1978 amendments to Title VII,[314] the reasoning of the courts in the double-savings clause cases and related analyses such as the preceding one that emanate therefrom could have future application in other types of disputes.

ERISA Preemption and Pension Plan Garnishments

An increasingly litigated issue generating untold headaches for pension plan fiduciaries and administrators is whether or not pension plan benefits may be garnished pursuant to state court orders for spousal and child support.[315] Closely related to this issue is the question of whether or not state marital property laws are preempted as they apply to the division of pension

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[314] 42 U.S.C. § 2000e-16 (Supp. II 1978).

[315] A substantial number of states recognize a family support exception to pension laws which exempt benefits from garnishment, alienation, or assignment. *See, e.g.*, Kendrick v. Kendrick, 271 Ala. 372, 124 So.2d 78 (1960) (alimony and child support are not "debts" within statutory exemption); City of Miami v. Spurrier, 320 So.2d 397 (Fla. App. 1975), *cert. denied*, 334 So.2d 604 (Fla. 1976); Mahone v. Mahone, 213 Kan. 346, 517 P.2d 131 (1973); McDonald v. McDonald, 351 Mich. 568, 88 N.W.2d 398 (1958); Thiel v. Thiel, 41 N.J. 446, 197 A.2d 354 (1964); Courtney v. Courtney, 251 Wis. 443, 29 N.W.2d 759 (1947); Central States, Southeast and Southwest Areas Pension Fund v. Parr, [1980] PENS. REP. (BNA) No. 276 A-18 (Feb. 4, 1980) (E.D. Mich. Dec. 13, 1979).

Contra. Ogle v. Heim, 69 Cal. 2d 7, 69 Cal. Rptr. 579 (1968), *appeal dismissed*, 393 U.S. 265 (1968) (ex-spouse's claim for alimony and child support viewed as creditor's claim barred by pension plan's statutory exemption from attachment or execution). *See* Phillipson v. Board of Administration of Public Employees' Retirement System, 3 Cal. 3d 32, 89 Cal. Rptr. 61 (1970) (payments into pension fund during marriage and the apportioned benefits derived therefrom are community property in which both husband and wife have interest) (literal readiness or exempting provisions have precluded suits for support); Utley v. Utley, 355 Mass. 469, 245 N.E.2d 435 (1969) (the legislature, not the court, must write in the exception); Fowler v. Fowler, 116 N.H. 446, 362 A.2d 204 (1976) (court's refusal to order support payments for four minors out of policeman's retirement benefits recognized exemptions from attachment as means of retaining productive public employees); General Dynamics Corp. v. Harris, 581 S.W.2d 300 (Tex. Civ. App. 1979).

benefits upon divorce or dissolution of marriage.[316] The latter issue has been most significantly litigated in California[317] and other community property states,[318] but is also of significance in common law states.[319]

The garnishment and related marital property disposition issues essentially revolve around ERISA sections 514[320] and 206(d),[321] and parallel sec-

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[316] A minority of courts have found federal preemption. Francis v. United Technologies, 458 F. Supp. 84 (N.D. Cal. 1978) (summary judgment for pension plan in non-employee spouse's suit for community property share of her husband's benefits holding California's community property laws preempted to the extent inconsistent with ERISA prohibitions against alienation or assignment of pension benefits and strictly construing "beneficiary" as a "person designated by a participant"); General Motors v. Townsend, [1978] PENS. REP. (BNA) No. 177 D-1 (E.D. Mich. 1976) (ERISA § 206(d) mandating that state plans prohibit the alienation or assignment of benefits preempts Michigan law which permits assignment); Leavitt v. Leavitt, [1979] PENS. REP. (BNA) No. 232 A-13 (wife's attempt to have a constructive trust imposed on her former husband's accumulated pension funds rejected by New York Supreme Court); Kerbow v. Kerbow, 421 F. Supp. 1253 (N.D. Tex. 1976) (ex-spouse claiming community property share of benefits is not a "beneficiary"; preemption noted as alternative basis for holding); *contra*. Carpenters Pension Trust for Southern California v. Kronschnabel, 460 F. Supp. 978 (C.D. Cal. 1978), *aff'd*, No. 79-3032, slip opinion (9th Cir. Sept. 29, 1980); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980); In re Marriage of Brown, 126 Cal. Rptr. 633, 544 P.2d 561 (1976) (pension plan ordered to comply with divorce order granting ex-spouse percentage of pension payments; ERISA § 514(a) does not preempt community property laws).

The reader should consult the *Stone* decisions for further analysis and explication of this issue.

[317] For a cogent analysis of California's community property laws as applied to state and federally created benefit plans, *see* Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*. 25 U.C.L.A. L. R. 417 (1978). *See also* Campa v. Campa, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (Ct. App. 1979), *appeal dismissed*. 444 U.S. 1028 (1980); In re Marraige of Lionberger, 97 Cal. App. 3d 56, 158 Cal. Rptr. 535 (Ct. App. 1979), *cert. denied*. 48 U.S.L.W. 3748 (1980); In re Marraige of Pilatti, 96 Cal. App. 3d 63, 157 Cal. Rptr. 594 (Ct. App. 1979), *cert. denied*. 48 U.S.L.W. 3569 (1980); In re Marraige of Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (Ct. App. 1978), *appeal dismissed*. 444 U.S. 1035 (1980); Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California v. Johns, 85 Cal. App. 3d 511, (Ct. App. 1978), *cert. denied*. 444 U.S. 1028 (1980).

[318] ARIZ. REV. STAT. ANN. § 25-211 (West 1976); CAL. CIV. CODE § 5105 (West Supp. 1978); IDAHO CODE § 32-906 (1963); LA. CIV. CODE ANN. art. 2399 (West 1971); NEV. REV. STAT. § 123.220 (1975); N. M. STAT. ANN. §§ 57-4A-1 to -11 (Smith Supp. 1975); TEX. CONST. art. 16, § 15, TEX. FAM. CODE ANN. tit. 1, § 5.01 (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (West Supp. 1978); P. R. LAWS ANN. tit. 31, § 3621 (1968).

[319] *E.g.*. Hunt v. Hunt, [1980] PENS. REP. (BNA) No. 272 A-29 (App. Ct. 1979) (upon dissolution of marriage, Illinois husband's interest in pension and profit-sharing plan is to be included as part of marital property); Operating Engineers Local No. 428 Pension Trust Fund v. Zamborsky, [1979] PENS. REP. (BNA) No. 243 D-8 (pension benefits reachable by court order to pay alimony and support); Ward v. Ward, 164 N.J. Super 354 (Ch. Div. 1978); Biles v. Biles, 163 N.J. Super. 49 (Ch. Div. 1978); In re M.H. v. J.H., 403 N.Y.S.2d 411 (N.Y. Fam. Ct. 1978) (permitting attachment for child support); Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978); Cody v. Riecker, 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd*. 494 F.2d 314 (2d Cir. 1979).

[320] ERISA § 514, 29 U.S.C. § 1144 (1976). This section, in its entirety, provides as follows:

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may

tion 401(a)13 of the Internal Revenue Code,[322] which prohibit the assignment or alienation of pension benefits. Sections 206(d) and 401(a)13, to-

now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

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

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) 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. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(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 subchapter. Alteration, amendment, modification, invalidation, impairment or supersedure of any law of United States prohibited.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

[321] ERISA § 206(d); 29 U.S.C. § 1056(d) (1976) mandates that:

[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated . . . there shall not be taken into account any voluntary and revocable assignment or alienation if benefits executed before September 2, 1974. 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 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

[322] I.R.C. § 401(a)(13) (1976), concerning the qualification requirements for pension, profit-sharing, and stock bonus plans, provides:

A trust shall not constitute a qualified trust under this section unless the plan of 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

gether with ERISA legislative history[323] and the IRS regulations,[324] appear to prohibit a plan from honoring a state court garnishment order[325] as well as other voluntary and involuntary alienations and assignments.[326] While the argument has been made that the statutory and Code provisions prohibit

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made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for 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 non-forfeitable benefit and is exempt from the tax imposed by section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

[323] The Conference Committee which reconciled differing House and Senate proposals explained ERISA's alienation provision:

> 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.

H. CONF. REP. NO. 93-1280, 93d Cong., 2d Sess. 280, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5038, 5061.

[324] The pertinent subsections of 26 C.F.R. § 1.401(a)(13) (1978) state:

> (b) No assignment or alienation—(1) General rule. Under section 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.
>
> (d) Exceptions to general rule prohibiting assignments or alienations.—
>
> (1) Certain voluntary and revocable assignments or alienations. Notwithstanding paragraph (b)(1) of this section, a plan may provide that once a participant or beneficiary begins receiving benefits under the plan, the participant or beneficiary may assign or alienate the right to future benefit payments provided that the provision is limited to assignments or alienations which—
>
> (i) Are voluntary and revocable;
>
> (ii) Do not in the aggregate exceed 10 percent of any benefit payment; and
>
> (iii) Are neither for the purpose, nor have the effect, of defraying plan administration costs. For purposes of this subparagraph, an attachment, garnishment, levy, execution, or other legal or equitable process is not considered a voluntary assignment or alienation.

[325] A state court order, as it would conflict with a federal statute, would be invalid under the Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

[326] As proposed by Senator Javits (R.-N.Y.) and Senator Williams (D.-N.J.), 125 CONG. REC. § 557 (daily ed. Jan. 24, 1979), the "ERISA Improvements Act of 1979" would amend the qualifications for a trust, ERISA § 1021(c); 26 U.S.C. § 401(a)(13)(1976). The amendment would remove from the blanket prohibition against assigned or alienated benefits

only voluntary assignment or alienation and, accordingly, do not preclude a plan from honoring a state garnishment order,[327] this interpretation has been rejected by both the Department of Labor and the Internal Revenue Service[328] as well as a number of courts.[329]

However, regardless of whether or not the statutory[330] and Code provisions[331] prohibit involuntary assignment or alienation such as garnishment, the argument has been made in a number of cases that any state laws or state court orders giving rise to such garnishment orders, or the enforcement procedures with respect thereto, are preempted by section 514(a).[332] Except for one or two early cases on this subject,[333] all federal courts which have addressed this issue have held that neither section 514(a) nor section 206(d) prohibit the garnishment of pension plan benefits to satisfy state court-

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any assignment or alienation of benefits under the plan required by a judgment, decree or order (including an approval of a property settlement agreement), pursuant to a State domestic relations law (whether of the common law or community property type), which—

(A) affects the marital property rights of any person in any benefit payable under the plan or the legal obligation of any person to provide child support or make alimony payments, and

(B) does not require the plan to alter the effective date, timing, form, duration or amount of any benefit payments under the plan or to honor any election which is not provided for under the plan or which is made by a person other than a participant or beneficiary.

S. 209, 96th Cong., 1st Sess. § 205(j) (1979), 125 CONG. REC. S. 567-68 (daily ed. Jan. 24, 1979).

[327] *See, e.g.*, Biles v. Biles, 163 N.J. Super. 49, 394 A.2d 156 (Ch. Div. 1978) (issue not dispositive; garnishment for alimony allowed); National Bank of North America v. International Brotherhood of Electrical Workers Local 3, 93 Misc.2d 590, 400 N.Y.S.2d 482 (Sup. Ct. 1977) (state garnishment statute compatible with ERISA provisions allowing creditor to satisfy judgment in installments of 10% of benefits).

[328] *See.* Brief for the United States as Amicus Curiae, American Telephone and Telegraph v. Merry, 592 F.2d 118, 121-23 (2d Cir. 1979) (citing favorably Cody v. Riecker, 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd.* 594 F.2d 314 (2d Cir. 1979); Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978); Cogollos v. Cogollos, 93 Misc.2d 406, 402 N.Y.S.2d 929 (Sup.Ct. 1978); Wanamaker v. Wanamaker, 93 Misc.2d 784, 401 N.Y.S.2d 702 (Fam. Ct. 1978); and *distinguishing* General Motors v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976) (as not having addressed the rationale enunciated in the cited cases).

[329] Cody v. Riecker, 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd.* 594 F.2d 314 (2d Cir. 1979) (dismissal of pension trustee's suit to enjoin enforcement of court ordered garnishment for support); Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978); Christ Hospital v. Greenwald, 82 Ill. App. 3d 1024 (1st Dist. 1980).

[330] ERISA § 206(d); 29 U.S.C. § 1056(d) (1976)

[331] I.R.C. § 401(a)(13) (1976).

[332] ERISA § 514(a); 29 U.S.C. § 1144(a)(1976). *See* note 320 *supra* for the provisions of the section in its entirety.

[333] General Motors v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976); Antal v. Boyle, *sub. nom.* U.M.W. v. Boyle, 567 F.2d 112 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 956 (1978).

ordered spousal or child support.[334] A relatively recent and significant decision on this issue is *American Telephone & Telegraph v. Merry*.[335]

In the *AT&T* case, the court, consistent with an amicus brief filed by the Department of Justice on behalf of the Department of Labor and concurred in by the Department of the Treasury,[336] held that there is an implied exception to both the preemption and non-alienation provisions for garnishments to effectuate state court-ordered spousal and child support.[337] The court stated that a strict, literal construction of section 514 "would necessarily lead to the unreasonable conclusion that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon pension plans."[338] Furthermore, the court stated that such a strict or literal interpretation of the preemption provision would include placing a limitation on state authority to enforce alimony and support orders where the monetary source to be garnished is a spouse's income derived from pension benefits.[339] The Court held that the more reasonable interpretation is that ERISA does not affect a state's preexisting authority in this area.[340]

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[334] Cody v. Riecker, 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd*, 594 F.2d 314 (2d Cir. 1979); American Telephone and Telegraph v. Merry, 592 F.2d 118 (2d Cir. 1979); Carpenters Pension Trust for Southern California v. Kronschnabel, 460 F. Supp. 978 (C.D. Cal. 1978); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980). The Department of Labor filed a brief, amicus curiae, in the appeal of *Stone*. While urging affirmance based upon an implied exception in the ERISA anti-assignment provisions for family support decrees the Secretary of Labor argues strongly for the position, contrary to the District Court, that "apart from the enforcement of such a decree, ERISA preempts state community property law insofar as it may relate to employee benefit plans covered by the Act." Brief of the Secretary of Labor, *Amicus Curiae*, [1979] PENS. REP. (BNA) No. 221 R-7, Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980). The positions advanced are that community property laws, if recognized, would expand the class of persons protected under ERISA; that community property settlements could interfere with the rights of the employee, and as immediate settlement payments in conformity with a state court order could affect the financial soundness of the plan, they "relate to" the plan within the terms of ERISA § 514(a) and are preempted. Brief of the Secretary of Labor, *Amicus Curiae*, [1979] PENS. REP. (BNA) No. 221 R-11 to -12, Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980). *See* DOL-P. OP. 80-3A (January 18, 1980) and Rev. Rul. 80-27, 1980-3 I.R.B., at (which articulated the Labor Department and IRS position, respectively, allowing for garnishment of pension benefits to effectuate spousal or child support orders).

[335] American Telephone and Telegraph v. Merry, 592 F.2d 118 (2d Cir. 1979).

[336] Brief for the United States as *Amicus Curiae* at 5-14 American Telephone and Telegraph v. Merry, 592 F.2d 118 (2d Cir. 1979).

[337] American Telephone and Telegraph v. Merry, 592 F.2d 118 (2d Cir. 1979).

[338] *Id.* at 121.

[339] *Id.*

[340] *Id.* at 122. Drawing from Stone v. Stone, 450 F. Supp. 919, 926 (N.D. Cal. 1978), *aff'd*, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980), the Second Circuit stated that "[t]he court [in the Stone case] reasoned that ERISA seeks to protect the families of employees as well as employees themselves, and noted that [i]t would be ironic indeed if a provision [§ 206(d)] designed in part to ensure that an employer's spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce." 592 F.2d at 122.

The Second Circuit, in the *AT&T* case, specifically rejected the holdings of *General Motors Corp. v. Townsend*[341] and *Francis v. United Technological Corp.*[342] which held that ERISA preempted state family support and property division laws respectively. The former case held that a pension plan was not subject to garnishment for family support obligations,[343] while the *Francis* court held that California's community property laws were preempted.[344] The Second Circuit criticized the *General Motors* decision for failing to consider family support obligations as a special type of debt[345] and for failing to refer to the strong public policy of requiring a spouse to fulfill his obligations.[346] The *Francis* decision was criticized as being too literal.[347]

With respect to the contentions by appellants in the *AT&T* case that honoring a garnishment order may subject fiduciaries to liability for breach of their obligations under ERISA section 404(a)(1),[348] the court held that such contentions were "unfounded in light of our [the court's] judicial determination that an implied exception exists under the statute's own terms solely for court ordered support payments to dependents.[349] Furthermore, the court held that "[i]t has long been the rule that fiduciary conduct is subject to judicial guidance and that a fiduciary acting pursuant to a court's instructions is protected from assertions of breach of duty."[350] This latter statement by the court presumably reflects an opinion that pension plan fiduciaries do not have an obligation to look beyond the face of a garnishment order when responding thereto, but raises a question as to whether a

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[341] 468 F. Supp. 466 (E.D. Mich. 1976).

[342] 458 F. Supp. 84 (N.D. Cal. 1978).

[343] 468 F. Supp. at 469-70.

[344] 458 F. Supp. at 86.

[345] American Telephone and Telegraph v. Merry, 592 F.2d 118, 123 (2d Cir. 1979).

[346] *Id.*

[347] *Id.*

[348] Subject to ERISA provisions governing trustee control of plan assets:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
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> (A) for the exclusive purpose of:
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> (i) providing benefits to participants and their beneficiaries; and
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> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1976).

[349] 592 F.2d at 125.

[350] *Id.*

plan should comply with a voluntary assignment of part or all of a participant's pension benefits to a separated or former spouse in recognition of child or spousal support obligations or an order as between the spouses but not involving the employer or plan.[351] The court also held that a plan would not lose its tax qualification, under Code Section 401(a), if it honored a garnishment in circumstances such as those at issue in the *AT&T* case.[352] In light of decisions such as *AT&T* and *Stone*,[353] another question arises as to what other areas are "impliedly" excepted from the ambit of ERISA preemption. A number of other federal and state court decisions address some of the issues raised in the *AT&T* case. In *Cody v. Riecker*,[354] the court held that "a Congressional intent to preempt state law [regarding a husband's duty to support his wife and children] is not lightly to be presumed in the absence of an unambiguous declaration of intent."[355] The court concluded that Congress intended no such "drastic encroachment on the enforceability of a retiree's family obligations"[356] when it passed ERISA.

As previously noted, the Department of Justice, on behalf of the Departments of Labor and the Treasury, filed *amicus curiae* briefs in the *AT&T* and *Stone* cases contending that there is an implied exception to the relevant ERISA provisions, respectively, for state court orders to effectuate family support obligations and for community property dispositions pursuant to divorce proceedings.[357] Presumably, the briefs filed by the Justice Department would preclude the Treasury and Labor Departments from taking contrary positions in cases involving similar facts and circumstances. However,

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[351] *See, e.g.*, Ward v. Ward, 164 N.J. Super. 354, 363, 396 A.2d 365, 370 (Ch. Div. 1978) (determining compliance with the federal garnishment statute, 15 U.S.C. § 1673 (1976), *as amended by* Tax Reduction Act of 1977, Pub. L. No. 95-30, tit. V, § 501(c)(1)-(3), 91 Stat. 161, 162). The issue as to whether an order running between the spouses, but with respect to which the employer or plan was not a party should be honored, is a difficult one which is beyond the scope of this article.

[352] 592 F.2d at 125 (reiterating amicus curiae assurance of implied family support obligation exception to anti-alienation and assignment sections).

[353] 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980).

[354] 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd*, 594 F.2d 314 (2d Cir. 1979).

[355] 454 F. Supp. at 24.

[356] *Id.* at 25. A similar result was reached in Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978). Interestingly, in the *Cartledge* case the court dealt with a "threshold issue" of whether federal jurisdiction was barred by the Anti-Injunction Act, 28 U.S.C. § 2283 (1976). The court determined that the jurisdictional provision of ERISA, § 502, 29 U.S.C. § 1132 (1976), is an exception to the Anti-Injunction Act prohibition against federal injunctions to stay state court proceedings. Reaching the substantive issue of a non-employee spouse's right to garnish the employee spouse's pension for support obligations, the court held that the anti-assignment and alienation as well as the preemption provisions of ERISA were "not sufficient to infer that Congress meant to preclude the ancient family law right of maintenance and support and the issuance of process to enforce that right." 457 F. Supp. at 1154.

[357] *Accord*, Brief for the United States as *Amicus Curiae*, at Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978).

even if a plan's tax qualified status[358] and resulting tax exemption[359] are not in jeopardy when a plan honors a state court family-related support or garnishment order,[360] a plan participant whose benefit was garnished could conceivably pursue an ERISA action for breach of fiduciary obligation[361] against the plan or its fiduciaries if the plan honored such an order without first contesting it in court (*e.g.*, ascertaining its fiduciary obligations). It is hoped that this is not the case both as a result of the *AT&T* decision and because of the possible preclusionary effect of any litigation between the spouses for a result requiring plans to contest every garnishment and attachment order would be costly and administratively burdensome.

As mentioned, several early federal court decisions ruled that the anti-alienation and assignment provisions were a bar to state court garnishment orders running against pension plans subject to ERISA.[362] However, these cases seem to run counter to the current weight of authority on this issue.[363] An anomaly of all of the family support cases, though, is that pension benefits may or may not be subject to garnishment depending upon whether the benefit takes the form of an installment payment, a lump sum distribution or an annuity.[364]

The state courts, though, have not been quiescent during this period of federal court decisions. Among the many state court cases[365] dealing with the issues of family support obligations and ERISA's preemption[366] and

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[358] I.R.C. § 401(a)(13) (1976).

[359] I.R.C. § 501(a)(1976).

[360] American Telephone and Telegraph v. Merry, 592 F.2d 118, 125 (2d Cir. 1979).

[361] ERISA § 404, 29 U.S.C. § 1104 (1976) (listing fiduciary duties) ERISA § 409, 29 U.S.C. § 1109 (1976) (imposing personal liability upon fiduciary breaching duty); ERISA § 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B) (1976) (creating civil action for recovery of benefits, enforcement of rights, and clarification of rights to future benefits).

[362] *See, e.g.*, General Motors v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976); Kerbow v. Kerbow, 421 F. Supp. 1253 (N.D. Tex. 1976).

[363] *See, e.g.*, Cody v. Riecker, 454 F. Supp. 22 (E.D.N.Y. 1978), *aff'd*, 594 F.2d 314 (2d Cir. 1979); Carpenters Pension Trust for Southern California v. Kronschnabel, 460 F. Supp. 978 (C.D. Cal. 1978), *aff'd*, No. 79-3032, slip opinion (9th Cir. Sept. 29, 1980).

[364] *See* Overman v. Overman, 570 S.W.2d 857 (Tenn. 1978) (in which the court held annuity contract payments were not subject to garnishment). The mechanics of enforcing support orders may not, in certain cases, be practicable when applied to lump sum distribution because of the timing of payment, nor permissible with respect to certain annuity contracts because of certain restrictive state laws regarding the inviolability of annuity benefits.

[365] *E.g.*, Campa v. Campa, 89 Cal. App. 3d 113 (Ct. App. 1979), *appeal dismissed*, 444 U.S. 1028 (1980); John v. Retirement Fund Trust of the Plumbing, Heating, and Piping Industries of Southern California, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (Ct. App. 1978), *cert. denied*, 444 U.S. 1028 (1980); Western Electric Company v. Traphagen, 166 N.J. Super. 418 (App. Div. 1978); In re Marriage of Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (Ct. App. 1978), *cert. denied*, 444 U.S. 1028 (1980).

[366] ERISA § 514; 29 U.S.C. § 1144 (1976).

non-alienation provisions,[367] are a series of New York cases which have held that, as ERISA does not specifically speak to the issue, it will not be interpreted to preclude the states' long-standing jurisdiction of family-related matters and the right of the states to regulate the affairs, including support obligations, of the family.[368] One of the problems that these cases have generated is that some courts have interpreted the anti-assignment and alienation provisions of ERISA to bar only voluntary assignments and not involuntary ones,[369] a result which seems to be in clear conflict with the statutory intent and which undermines the purpose of ERISA to insure that protected pension benefits are free from general debt obligations.[370] Regardless of the merits of the various family support cases, decisions allowing for general creditor garnishments[371] are troublesome, in conflict with the ERISA[372] and Code provisions,[373] and should be resisted by plan administrators and fiduciaries.

Another state court decision has raised an issue regarding the right of a state to order garnishment of an employee's welfare plan benefits. On its face, such issue could be considered a matter solely for state law as the anti-assignment and alienation restrictions of ERISA apply only to pension plans. The question, then, of whether a welfare plan provision which precludes assignment or alienation can be given effect under a permissive state judgment enforcement statute should normally be left to the states for determination. However, such a statute may be preempted by section 514, regardless of the inapplicability of the nonalienation provisions. In this regard, the Department of Labor has issued one opinion letter which precludes

[367] ERISA § 206(d); 29 U.S.C. § 1056(d) (1976); I.R.C. § 401(a) (1976).

[368] Cogollos v. Cogollos, 93 Misc.2d 406, 402 N.Y.S.2d 929 (Sup. Ct. 1978); In re M.H. v. J.H. 93 Misc.2d 1016, 403 N.Y.S.2d 411 (Fam. Ct. 1978); Wanamaker v. Wanamaker, 93 Misc.2d 734, 401 N.Y.S.2d 702 (1978); Sheehan v. Sheehan, 90 Misc.2d 673, 395 N.Y.S.2d 596 (Sup. Ct. 1977).

[369] National Bank of North America v. International Brotherhood of Electrical Workers Local 3, 9 Misc.2d 590, 400 N.Y.S.2d 482 (Sup. Ct. 1977) (trial court upholding judgment creditor's right to collect payment of business debt out of the debtor's pension); In re M.H. v. J.H. 93 Misc.2d 1016, 403 N.Y.S.2d 411 (Fam. Ct. 1978) (the court said that "[t]he situation of a judgment debtor is analogous to that of one who refuses to pay support, in that both require judicial enforcement to satisfy the debt, and is therefore not the voluntary type of transfer intended to be barred by ERISA.") 93 Misc. 2d at 1021, 400 N.Y.S.2d at 415 (dictum).

[370] ERISA § 206(d); 29 U.S.C. § 1056(d) (1976), which prohibits the assignment of alienation of benefits, allows "any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment . . . ." *Id.* *See* the Conference Committee's statement that "for purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment." H. CONF. REP. NO. 93-1280, 93d Cong., 2d Sess. 280, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5038, 5061.

[371] *See, e.g.*, National Bank of North America v. IBEW Local Number 3, 93 Misc.2d 590, 400 N.Y.S.2d 482 (Sup. Ct. 1977). *See, contra*, Christ Hospital v. Greenwald, *supra* note 329.

[372] ERISA § 206(d); 29 U.S.C. § 1056(d) (1976).

[373] I.R.C. § 401(a)(13)(1976).

general creditor type attachments of welfare benefits in accordance with the terms of sections 403(c)(1) and 404(a)(1), which require a plan to be operated for the exclusive purpose of providing benefits to plan participants and their beneficiaries. It is questionable, though, whether such opinion would withstand judicial scrutiny in light of the specific nature of section 206(d)(1) prohibiting the assignment or alienation of pension benefits only, the absence of any such provision with respect to welfare benefits and the fact that Congress apparently felt, in writing section 206(d)(1), that sections 514, 403(c)(1), and 404(a)(1) were not sufficient to preclude application of state garnishment and related statutes to pension benefits.

All the cases discussed above involving ERISA preemption and state family law still leave unresolved at least two substantial issues: (1) may a pension plan participant voluntarily assign part of his pension benefit as part of a divorce settlement; and (2) what portion, if any, of community property or common law marital property division laws are preempted by ERISA. The first issue has not been squarely faced by any of the definitive federal court decisions. At least, it would appear that in light of the position taken in the amicus briefs filed by the government in the *Cartledge*,[374] *Stone*[375] and *AT&T*[376] cases, a pension plan participant cannot voluntarily assign, as part of a divorce proceeding or settlement, a pension benefit which is not yet in pay status, that is, where the participant has not yet commenced to receive pension payments even though he may have a vested right thereto. Although there is some language in the *AT&T* case that could be interpreted to protect a plan fiduciary in honoring a state court marital dissolution order or property settlement agreement for the distribution of prospective pension benefits for an active employee or a former employee with a deferred vested pension,[377] the prudent course for an administrator or fiduciary to take would be to continue to resist any order for the current distribution of pension benefits which either have not yet vested or, regardless of vesting, are not yet in pay status (*i.e.*, benefits that are vested but the participant has not satisfied early or normal retirement conditions or has not left the service of the employer).

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[374] 457 F. Supp. 1146 (S.D.N.Y. 1978).

[375] 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980).

[376] 592 F.2d 118 (2d Cir. 1979).

[377] *See* note 350 *supra* and accompanying text.

With respect to the community property issue, the court in *Stone* based its holding that ERISA section 206(d)(1) does not preempt California community property laws on its belief that Congress did not *sub silentio* supplant or supersede the traditional authority of the states to regulate the entire subject of domestic relations.[378] The court in *Stone* further held that community property laws do not "relate to" employee benefit plans within the meaning of ERISA's supersedure provisions, apparently discerning a difference between "relate to" and "have an effect upon."[379] This analysis, though, was rejected in *Francis v. United Technologies*.[380] In deciding that California community property laws are preempted, the *Francis* court relied on the broader concept that Congress had not specifically excepted community property laws from the preemption provisions.[381]

In the recent *Stone* opinion handed down by the 9th Circuit Court of Appeals, the court regarded the U.S. Supreme Court's dismissal of the *Campa* case as substantive. Accordingly, the court assumed that it was precluded from examining the issue as to whether ERISA preempts the pertinent California community property laws.[382]

Possible Statutory Changes

The ERISA preemption cases have left a number of unanswered questions and created a number of difficult administrative and legal issues for those charged with responsibility for operating employee benefit plans. Issues dealing with matters as diverse as the viability of state family law rules,

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[378] "The strength of this rule of statutory construction is demonstrated by the willingness of courts to infer exceptions from statutory rules in order to avoid conflicts with state domestic relations laws." 450 F. Supp. at 924. For examples of different remedies, *see* Morton v. Morton, [1979] PENS. REP. (BNA) No. 229 A-8 (Ct. App. 1979), *appl. for stay denied*. 439 U.S. 1062 (court mandated a division of pension benefits to avoid multiple payments of the pension itself); Magrini v. Magrini, 398 A.2d 179, 182-83 (Pa. Super. 1979) (pension benefits reachable by court order to pay support). *Contra*. Mueller v. Mueller, 166 N.J. Super. 557 (Ch. Div. 1979) (fully vested pension benefits are not subject to division within the meaning of New Jersey's equitable distribution statute).

[379] That community property laws "affect" but do not "relate to" employee benefit plans within the meaning ERISA § 514(a), 29 U.S.C. § 1144(a) (1976) was an assessment that the state property laws did not impact on ERISA in a manner similar to the Hawaii Prepaid Health Care Act which mandated worker coverage and additional reporting. Judge Renfrew declared the Health Care Act preempted in Standard Oil Company of California v. Agsalud, 442 F. Supp. 695, 697 (N.D. Cal. 1977), *aff'd*, No. 78-1059, slip opinion (9th Cir. Oct. 15, 1980), but in *Stone* he rationalized that the general nature of ERISA § 514 would not preempt that which the very specific ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1976) permitted. 450 F. Supp. at 932.

[380] 458 F. Supp. 83, 86 (N.D. Cal. 1978).

[381] *Id.*

[382] Stone v. Stone, No. 78-2313, slip opinion (9th Cir. Sept. 29, 1980).

state anti-discrimination laws, state insurance regulations, state unclaimed property laws, state judgment enforcement provisions, and numerous other state statutes, regulations and cases have left large gaps in the safe harbor of known rules pursuant to which sponsors and administrators can operate plans. It is obvious, more than six years after the passage of ERISA, that the preemption provision needs to be reinforced or restructured by legislative action. In this regard, many of the ERISA preemption issues discussed in this article have not gone unnoticed by Congress. The ERISA Improvements Act of 1979[383] attempts to resolve at least several of these issues. Among other things, the Senate bill provides that:

> 1. a state insurance law which requires a particular benefit to be provided by an insurer issuing insurance coverage to employee benefit plans would be preempted by ERISA;[384]
> 2. Hawaii's progressive prepaid health care law, and other state laws substantially identical to Hawaii's, would be excluded from ERISA's preemption rules;[385]

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[383] S. 209, 96th Cong., 1st Sess., 125 CONG. REC. 560-70 (daily ed. Jan. 24, 1979).

[384] Section 155(1) of S.209 proposes to amend section 514 of ERISA by adding the following to the end of subsection (b)(2)(B):

> A State insurance law which provides that a specific benefit or benefits must be provided or made available by a contract or policy of insurance issued to an employee benefit plan is a law which relates to an employee benefit plan within the meaning of subsection (a) and is not a law which regulates insurance within the meaning of subparagraph (A). A provision of State Law which requires that a contract or policy of insurance issued to an employee benefit plan must permit a participant to convert or continue protection after it ceases to be provided under the employee benefit plan is a provision of a law described in subparagraph (A) and not a provision of law described in subsection (a).

S. 209, 96th Cong., 1st Sess., 125 CONG. REC. 564-65 (daily ed. Jan. 24, 1979). *See* 125 CONG. REC. 559 (daily ed. Jan. 24, 1979) (remarks of Sen. Williams) [hereinafter cited as Sen. Williams, remarks on S. 209]; 125 CONG. REC. 575 (daily ed. Jan. 24, 1979 (remarks of Sen. Javits) [hereinafter cited as Sen. Javits, remarks on S. 209]. *Cf.* notes 261, 262 *supra* and accompanying text (discussing current judicial application of section 514 of ERISA to state insurance laws).

[385] Section 155(1) of S. 209 proposes to add the following subsection to section 514(b) of ERISA:

> (5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Law, Haw. Rev. Stat. §§ 393-1 through 51, as in effect on January 1, 1979, and to any other State law which is determined by the Secretary to—
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> "(i) be substantially identical to such Hawaii law on such date, and
>
> "(ii) require benefits which are substantially identical in type and amount to those required or permitted under such Hawaii law on such date. (B) Subparagraph (A) shall not apply to any provision of a State law which the Secretary determines to be similar to any provision of parts 1 [reporting and disclosure], 4 [fiduciary responsibilities] and 5 [administration and enforcement] of this subtitle."

S. 209, 96th Cong. 1st Sess., 125 CONG. REC. 565 (daily ed. Jan. 24, 1979). *See* Sen. Williams, remarks on S. 209, 559; Sen. Javits, remarks on S. 209, 575. *Cf.* notes 240 to 250, 379 *supra* and accompanying text (discussing the *Agsalud* case which provided that ERISA supersedes the Hawaii Prepaid Health Care Law).

3. the antifraud provisions of the federal and state securities laws would not apply to ERISA-covered plans;[386] and
4. state court orders requiring alimony or child support payments would not be preempted by ERISA[387] and ERISA's prohibitions against assignment and alienation of benefits would not apply to such orders (provided the orders do not interfere with plan rules concerning commencement, timing, form, duration, or amount of benefit payments).[388]

The proposed legislation, if passed, along with the 1978 Title VII amendments, should significantly reduce litigation in the areas discussed herein. Hopefully, hearings on the bills will clarify any questions raised by the proposed amendments themselves; for example, whether state court orders concerning alimony and child support are valid for all payments under benefit plans, contingent or not, or only those actually currently due and payable to retired plan participants.

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[386] S. 209, 96th Cong., 1st Sess. §§ 153(7), 154, 155(e), 125 CONG. REC. 564-65 (daily ed. Jan. 24, 1979). S. 209 extends the *Daniel* decision to ERISA —covered plans in general; it does not limit the exemption from the antifraud provision of the securities laws to only non-contributory, compulsory pension laws. S. 209 proposes an antifraud rule of its own to supplement the existing ERISA protections available to employees, plan participants and their beneficiaries. *Id. See* Sen. Williams, remarks on S. 209, 558-59; Sen. Javits, remarks on S. 209, 574. *Cf.* note 227 *supra* (discussing the relationship of ERISA to Federal securities laws).

[387] Section 152(3) of S. 209 proposes to add to section 514(b) of ERISA that "(6) Subsection (a) shall not apply respecting any judgment, decree, or order pursuant to a State domestic relations law (whether of the common law or community property type), if such judgment, decree or order is described in section 206(d)(3)." S. 209, 96th Cong., 1st Sess. § 155(d), 125 CONG. REC. 565 (daily ed. Jan. 24, 1979). *See* Sen. Williams, remarks on S. 209, 559; Sen. Javits, remarks on S. 209, 575. *Cf.* notes 315 to 386 *supra* and accompanying text (discussing current judicial application of section 514 of ERISA to alimony and child support orders emanating from state courts).

[388] To conform to the changes proposed in the ERISA preemption rules relating to alimony and child support payments, changes are proposed for the assignment and alienation rules of ERISA. S. 209, 96th Cong., 1st Sess. §§ 128, 205(j), 125 CONG. REC. 567-68 (daily ed. Jan. 24, 1979). Section 128 proposes the following new paragraph be added to section 206(d) of Title I of ERISA:

> (3) Paragraph (1) shall not apply in the case of a judgment, decree or order (including an approval of a property settlement agreement), pursuant to a State domestic relations law (whether of the common law or community property type), which—
>
> (A) affects the marital property rights of any person in any benefit payable under a pension plan or the legal obligation of any person to provide child support or make alimony payments, and
>
> (B) does not require a pension plan to alter the effective date, timing, form, duration or amount of any benefit payments under the plan or to honor any election which is not provided for under the plan or which is made by a person other than a participant or beneficiary.

S. 209, 96th Cong., 1st Sess. § 128, 125 CONG. REC. 563 (daily ed. Jan. 24, 1979). Section 205(j) of S. 209, identified as a CONFORMING AMENDING FOR SECTION [128], provides a similar change to the I.R.C.'s assignment and alienation provisions, I.R.C. § 401(a)(13). *Id.* at 567-68.

Conclusion

While the ERISA Improvements Act or the House bill, the Simplification Act, if passed, will discourage litigation in certain areas, the broad scope of section 514 will continue to invite litigation in other areas. Senator Javits, one of the sponsors of both ERISA and the ERISA Improvements Act, acknowledged this situation when he introduced the bill:

> When the broad preemption language of the ERISA conference report was enacted, I realized that further attention to this area would be necessary as experience revealed the outer contours of the preemption doctrine. . . .
> . . . I believe that the Congress should review the relevant judicial decisions and clarify the boundaries of Federal preemption as problem areas come into focus.[389]

There is merit to Senator Javits' retrospective approach, but for it to be effective and responsive to the needs of employees, labor, management, and the employee benefit industry as well as society in general, the time period between recognition of the problems and corrective legislative action must be shortened. Over six years have elapsed since ERISA's enactment, and, as this article intimates, extended, costly, and often burdensome litigation has accumulated during this period. Congress must now take the initiative to review and re-analyze the relation between federal concerns and policies, articulated by ERISA, and state concerns and policies, regarding matters which the states have traditionally been left to regulate or over which they have asserted jurisdiction, and construct an appropriate and meaningful balance among all such competing concerns. No doubt, even if Congress or the Supreme Court acts, though, the subject of ERISA preemption will remain an important concern for the foreseeable future.

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[389] Sen. Javits, remarks on S. 209, 575.