The Breadth of Section 514 of ERISA and the Preemptibility of State Antisubrogation Laws

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THE BREADTH OF SECTION 514 OF ERISA AND THE PREEMPTIBILITY OF STATE ANTI-SUBROGATION LAWS

INTRODUCTION

The value of employee benefit plans and the number of beneficiaries under such plans have been growing at a startling rate. Unfortunately, this progression has been accompanied by a parallel rise in the level of abuse and mismanagement of these plans.

1 29 U.S.C. § 1002(3) (1982). An "employee benefit plan" includes both pension and welfare plans. Id. An employee welfare plan is one established or maintained by an employer or employee organization which provides, inter alia, medical, surgical or hospital benefits in the event of sickness, accident or disability as well as death, unemployment or vacation benefits. 29 U.S.C. § 1002(1) (1982). An employee pension plan is a similarly established or maintained fund which provides retirement income or deferral of income. 29 U.S.C. § 1002(2) (1982).

Prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), the definition of employee benefit plans was narrower in that it did not include pension plans. Note, Insurance Regulation - Employee Benefit Plans, 28 Ark. L. Rev. 515, 515 n.1 (1975). "Employee benefit plans are arrangements through which employees are provided hospital, surgical, death and disability benefits as a fringe benefit by the employer." Id. at 515.

2 See H.R. Rep. No. 533, 93d Cong., 1st Sess. 3 (1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4641. In 1950, an estimated 10 million employees were covered by private pension plans, while in 1979 that number had increased to nearly 30 million participants. Id.

The increase in the number of employee participants has led to a dramatic rise in the funds allocated to employee benefit plans. Id. In 1973, that amount totalled $150 billion. Id. In 1940, the amount of private pension assets was only $2.4 billion. See Williams, Development of the New Pension Reform Law, 26 Lab. L.J. 135, 135 (1975). See also Kaiser, Labor's New Weapon: Pension Fund Leverage - Can Labor Legally Beat Its Plowshares into Swords?, 34 Rutgers L. Rev. 409, 409 (1982) (pension plans "represent the world's largest identifiable source of private wealth"); Note, An Employer's Implied Cause of Action For Restitution Under Section 403 of ERISA, 54 Fordham L. Rev. 225, 225 (1985) (noting startling expansion of pension plan coverage). See generally L. Litvak, Pension Funds and Economic Renewal (1981) (describing the significant impact pension funds have on the national economy).

3 B. Coleman, Primer on ERISA, at xi (2d ed. 1985). "The major impetus for the enactment of the Employee Retirement Income Security Act of 1974 was abuse and mismanagement in the private pension system." Id. See also Turza & Halloway, Preemption of State Laws Under the Employee Retirement Income Security Act of 1974, 28 Cath. U.L. Rev. 163, 164 (1979) (ERISA was designed to protect employee benefit plans from abuse); Gregory, The Scope of ERISA Preemption of State Law: A Study In Effective Federalism, 48 U. Pitt. L. Rev. 427, 443-
Accordingly, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA),\(^4\) intending to protect the interests of employees in both welfare benefit and pension plans through a comprehensive overhaul of existing private employee benefit systems.\(^6\) Recognizing employee benefit plans to be national in scope,\(^6\) Congress desired to set minimum federal standards by imposing a uniform regulatory scheme.\(^7\) Section 514\(^8\) of ERISA was there-

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\(^6\) See 29 U.S.C. § 1001(a) (1982). Congress appropriately noted that employee benefit plans were “affected with a national public interest.” Id. Given the large impact such plans have on the entire population, Congress noted the increasingly interstate nature of employee benefit plans and the effect that the security of such plans have on covered employees. See Turza & Halloway, supra note 3, at 165-66; see generally Coleman, supra note 3, passim (broad discussion of ERISA).

\(^7\) 29 U.S.C. § 1001(b) (1982). This section states:

It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.

Id.

Congress further declared that it is “the policy of this Act . . . to meet minimum standards of funding . . . .” 29 U.S.C. § 1001(c) (1982).

\(^8\) The preemption provisions of ERISA are codified at 29 U.S.C. § 1144(a)-(d) (1985). Section 1144(d) asserts that, although broad, ERISA does not supersede federal law. See also infra notes 30-39 and accompanying text (setting forth in detail the statutory scheme
fore implemented to grant the federal government control of the field by preempting the states' authority with respect to employee benefit plans.\textsuperscript{9} Despite the broad language of the preemption clause itself (section 514(a)),\textsuperscript{10} much litigation has resulted concerning the breadth of section 514 as a whole.\textsuperscript{11} Courts have been called upon to set guidelines for applying section 514 in areas of traditional state concern which nonetheless impact on employee benefit plans.\textsuperscript{12} One frequently litigated issue over which courts are divided involves whether state antisubrogation laws are preempted by ERISA.\textsuperscript{13} This division is highlighted by two recent
court of appeals decisions where the Third and Eighth Circuits drew contrary conclusions.\textsuperscript{14}

This Note will argue that since congressional intent clearly supports a broad interpretation of ERISA’s preemption clause, the correct view is that adopted by the Eighth Circuit which held that ERISA should preempt state law governing an employee’s right to avoid subrogation to the employee benefit plan program. Further, it will be submitted that a contrary finding would conflict with the legislative purpose behind ERISA, while simultaneously impeding the voluntary participation of employers in the formation of employee benefit plans.

Part I of this Note will discuss the statutory scheme of the preemption clause contained within ERISA;\textsuperscript{16} Part II will set forth the common law based test for determining the applicability of ERISA’s preemption provision;\textsuperscript{16} Part III will discuss the most recent circuit court decisions and how they applied this test to state antisubrogation laws;\textsuperscript{17} Part IV will evaluate the appropriate breadth to be given the preemptive measure of ERISA in light of the legislative history and how the United States Supreme Court has interpreted the congressional intent;\textsuperscript{18} finally, Part V will suggest that the imposition of state antisubrogation laws upon employee benefit plans will serve to diminish the willingness of employers to create these plans.\textsuperscript{19}

I. THE PREEMPTION CLAUSE OF ERISA

A. History of Preemption

Pursuant to the supremacy clause of the United States Constitution, any statute which is enacted by Congress automatically becomes “the supreme Law of the Land.”\textsuperscript{20} Where Congress has

\begin{footnotes}
\item[14] Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989); FMC Corp. v. Holliday, 885 F.2d 79 (3d Cir. 1989).
\item[16] See infra notes 20-38 and accompanying text.
\item[16] See infra notes 39-65 and accompanying text.
\item[17] See infra notes 66-110 and accompanying text.
\item[18] See infra notes 111-146 and accompanying text.
\item[19] See infra notes 147-155 and accompanying text.
\item[20] U.S. Const. art. VI, § 2. See also infra note 21 (discussing supremacy clause).
\end{footnotes}
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validly enacted legislation in a given area, conflicting state law within that area is generally held to be preempted. There are two tests the Court utilizes in order to determine whether the federal law will preempt state law: (1) whether Congress intended to "occupy the field" in passing the legislation, and (2) whether state law directly conflicts with the federal law. Thus, a valid federal

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21 See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (state regulation cannot be "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

"[T]he Court generally infers that supplementary state regulations are to be preempted either because of an inference that the federal [law's] failure to establish similar regulations represents an agency judgment that they are not needed or because of the operation of other presumptive conditions such as the need for national uniformity."


The Court in Pennsylvania v. Nelson, 350 U.S. 497 (1956), set forth three different theories, the application of any one of which would require that federal law prevail over state law:

First, "[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 . . . ."

Second, the federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement on the same subject . . . ."

Third, enforcement of [the state act] presents a serious danger of conflict with administration of the federal program.

Nelson, 350 U.S. at 502-05 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. at 230); see Hirsch, supra note 21, at 530 (discussing requirement for preemption where need for national uniformity demands it).

"When the Court has encountered a federal act in the . . . category . . . of 'occupying the field' regarding a particular subject, it has regularly declared that the states are precluded from regulating that subject in any way." Hirsch, supra, at 529.

Generally, however, the courts are "guided by respect for the separate spheres of governmental authority preserved in our federalist system." Alessi v. Raybestos-Manhattan, 451 U.S. 504, 522 (1981); See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (if field has traditionally been regulated by the states, preemption of state laws requires express congressional intent); Rice 331 U.S. at 230 ("historic police powers of the States were not to be superseded by Federal Acts unless that was the clear and manifest purpose of Congress") (citing Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 611 (1926)); Florida Lime & Avocado Growers, 373 U.S. at 142 (federal regulation should not preempt state regulation unless nature of subject matter or Congress so requires); Turza & Halloway, supra note 3, at 176 ("In all cases, the Court looks for evidence of congressional intent to preempt."). But see Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288
law which explicitly prohibits state regulation in a particular field presents no difficulty.\textsuperscript{23} Problems do arise, however, when the federal statute at issue is not clear and concise in the breadth or scope of its preemptive intent;\textsuperscript{24} the preemption clause contained in ERISA falls into this category.

\section*{B. The Statutory Scheme}

As previously noted, in enacting ERISA Congress sought to achieve strict uniformity among laws regulating employee benefit plans.\textsuperscript{25} ERISA's comprehensive preemption provision serves to

\textsuperscript{23} Hines v. Davidowitz, 312 U.S. at 67 ("there can be no one crystal clear distinctly marked formula"); Note, \textit{Preemption As a Preferential Ground: A New Canon of Construction}, 12 STAN. L. REV. 208, 209 (1959) ("by framing the preemption question in terms of specific congressional intent \{the Court\} manufactured difficulties for itself").

\textsuperscript{24} Hewlett-Packard v. Barnes, 425 F. Supp. 1294, 1297 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (1978), cert. denied, 439 U.S. 831 (1978). "When Congress exercises a granted power in a field which states have traditionally occupied, and unmistakably evinces its intent to exclude states from exerting their police power in that field, the federal legislation may displace state law under the Supremacy Clause." \textit{Id. See supra} note 21 (broad discussion of federal power to preempt).

\textsuperscript{25} Rice, 331 U.S. at 230-31. "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." \textit{Id. (citing Townsend v. Yeomans, 301 U.S. 441 (1937)).

\textsuperscript{26} Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1147 (4th Cir. 1985) ("[A] major policy objective of ERISA [is] uniformity in employee benefit laws.") (emphasis omitted)); Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382, 386 (D. Kan. 1977) ("[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.") (quoting 120 CONG. REC. at 29,942 (1974) (Statement of Sen. Javits)); Engel, \textit{ERISA: To Preempt or Not to Preempt, That Is a Question!}, 22 TORT & INS. L.J. 431, 431-32 (1987) (ERISA "has as a primary objective complete uniformity in employee welfare benefit plan laws through the ouster of all state laws relating to such plans.") (emphasis in original); see 120 CONG. REC S15,737 (reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 5188-89) ("It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the [bill] 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.") (Statement of Hon. Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, upon introducing the conference report on H.R. 2, August 22, 1974); 120 CONG. REC at 29,942 (1974) ("With the preemption of the field [of employee benefit plans], we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state laws.") (Statement of Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor & Education Committee in floor debate prior to passage of ERISA)); Activity Report of Committee on Education and Labor of the U.S. House of Representatives, H.R. REP. 94-1785 at 47 (1977) ("[T]he Federal interest and the need for
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drastically curtail state regulatory authority within this area. Characterized as "the most sweeping federal preemption statute ever enacted by Congress," the intent was to supplant all pertinent state law, including those which are consistent with ERISA's provisions. Section 514 is divided into three clauses: the preemption clause (§ 514(a)), the savings clause (§ 514(b)(2)(A)), and the deemer clause (§ 514(b)(2)(B)). These will be discussed in greater detail below.

ERISA's preemption provision is embodied in section 514(a) of the Act. This section expressly states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan . . . ." As such, any state legislation found to "relate to" an employee benefit plan is invalid.

national uniformity are so great that enforcement of state regulation should be precluded.


Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). See Fitzgerald v. Codex Co., 882 F.2d 586, 588 (1st Cir. 1989) (intent of Congress to displace common law and state law remedies with ERISA); Helms v. Monsanto Co., Inc., 728 F.2d 1416, 1419-20 (11th Cir. 1984) ("Congress intended to preempt the entire field of law involving employee benefit plans subject to ERISA."); Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977) ("The legislative history manifests that Congress intended to preempt all state laws that relate to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA." (emphasis in original)).

ERISA § 514(a), 29 U.S.C. § 1144(a) (1982), states: Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Id.

Id.

See infra notes 40-44 and accompanying text (discussing first prong of court-employed
This broad preemptive measure, however, must not be read independently, for the second part of the preemption provision qualifies the sweeping effect of section 514(a).\footnote{Note, \textit{ERISA and the Preemption of State Law}, \textit{6 Fordham Urb. L.J.} 599, 603-04 (1978).} This provision, frequently referred to as the "savings clause,"\footnote{ERISA $\S$ 514(b)(2)(A), 29 U.S.C. $\S$ 1144(b)(2)(A) (1982), provides: "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." Id.} states that nothing contained within the preemption clause of section 514(a) "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities."\footnote{Id.} For example, a state regulation of premium payments under an insurance contract would be exempt from ERISA's preemptive effect because of the savings clause.

The third clause of this preemption provision triad, the "deemer clause,"\footnote{ERISA $\S$ 514(b)(2)(B), 29 U.S.C. $\S$ 1144(b)(2)(B) (1982), provides: Neither an employee benefit plan described in section $\S$ 1003(a) of this title, which is not exempt under section $\S$ 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 for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.} which serves to materially limit the savings clause,\footnote{Note, \textit{supra} note 32, at 604.} provides that "[n]either an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . for purposes of any law of any State purporting to regulate insurance . . . ."\footnote{ERISA $\S$ 514(b)(2)(B), 29 U.S.C. $\S$ 1144(b)(2)(B).} The deemer clause, therefore, prevents a state from circumventing ERISA's preemption provisions by asserting that an employee benefit plan constitutes insurance within the meaning of the savings clause.\footnote{Hewlett-Packard Co. v. Barnes, 571 F.2d 502, 504 (9th Cir.), cert. denied, 439 U.S. 831 (1978). "Although section 514(b)(2)(A) exempts from preemption state regulation of insurance, section 514(b)(2)(B) provides that employee benefit plans may not be considered to be in the business of insurance for purposes of exception to preemption." Id. (citing Barnes, 425 F. Supp. at 1300 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (1978), cert. denied, 439 U.S. 831 (1978)). "In seeking to regulate plaintiff's plans pursuant to [the state insurance regulation] under the theory that the statute applies to and that such plans constitute 'insurance,' the defendant contravenes the clear intent of $\S$ 514(a) and (b) of ERISA that}
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II. TEST OF APPLICABILITY OF ERISA SECTION 514

In determining whether a state law is preempted by section 514(a), courts have followed a three-prong test laid down by the Supreme Court in *Metropolitan Life Insurance Co. v. Massachusetts.*

Initially, a court will determine if the state law in question "relates to" an employee benefit plan. This occurs, for example, where a state legislates minimum coverage requirements for all employees. In making this initial determination, the majority of jurisdictions have viewed congressional intent broadly and found that such intent explicitly required a preemptive effect. Likewise, it has been noted that the presence of the savings and deemer clauses would have been unnecessary had Congress intended for the preemption clause to be narrowly construed.

In applying this first prong, courts have consistently suggested that employee benefit plans, so dubbed or under any other name, be free of state regulation. See *Barnes,* 425 F. Supp. at 1300. See *Lanam,* supra note 26, at 315 (exceptions to preemption are limited in that employee benefit plans may not be "deemed" insurance plans for purposes of state regulation); *Turza & Halloway,* supra note 3, at 187 n.136. "In determining whether a particular state statute is preempted, the courts have generally avoided the question of whether a state statute regulates insurance. Instead they have focused on whether a plan is an employee benefit plan which is free of state regulation." *Id.*

Many legal scholars have written on the preemption clause of ERISA and the applicable test. See, e.g., Gregory, supra note 3, at 450 n.71. See also Note, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation An Exclusively Federal Concern,* 42 VAND. L. REV. 607, 622-29 (1989) (discusses *Metropolitan Life* and *Pilot Life* cases).


[Congress used the words "relate to" in § 514(a) in their broad sense. To interpret § 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes from preemption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans. *Id.* See also *Northern Group Servs.,* Inc. v. *Auto Owners Ins. Co.,* 833 F.2d 85, 89 (6th Cir. 1987) (asserting that "'savings' clause would not be necessary at all if it only saves state laws that do not 'relate to' ERISA plans.").
that a law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." As a caveat, however, some state actions may affect employee benefit plans too remotely to warrant a finding that the state law "relates to" the plan. As a result, while the preemption clause is generally interpreted broadly, courts retain some limited discretion in their decision making.

Upon determining that a state law does relate to employee benefit programs, a court would then proceed to evaluate whether or not the state law "regulates insurance" within the meaning of the savings clause exception contained in section 514. In recognition of the federal policy articulated in the McCarran-Ferguson Act of providing the states with exclusive regulatory control over insurance, those laws that are specifically directed toward the in-


The meaning to be given to the preemption clause, and in particular the "relates to" language contained therein, is determinative of the scope of the clause itself. See Note, supra note 39, at 616. A narrow interpretation would serve to preempt only those state laws that directly impinge upon a traditional area of ERISA, i.e. disclosure, reporting or fiduciary duties. Id. at 615. In contrast, a broad and sweeping construction would serve to preempt virtually all state regulation of ERISA employee benefit plans. See Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1297-98 (N.D. Cal.) (broad interpretation of preemption clause based on legislative history), aff'd, 571 F.2d 502 (9th Cir. 1977), cert. denied, 439 U.S. 831 (1978). See generally Note, Regulation of Employee Welfare Benefit Plans: The Scope of ERISA's Preemption and the State Power to Regulate Insurance, 4 U. DAYTON L. REV. 177, 185-93 (1979) (conflicting interpretations of preemption clause).

45 FMC Corp. v. Holliday, 885 F.2d 79, 85 (3d Cir. 1989) ("some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.") (quoting Shaw, 463 U.S. at 100 n.21 (1982)).

46 See supra notes 40-45 and accompanying text. While generally interpreted broadly, the preemption provision may be construed to exempt from preemption state regulation too remotely related to ERISA. Id. As such, an inference of limited judicial discretion is warranted. Id.

47 See supra notes 33 and 34 and accompanying text (setting forth statutory language of "savings clause").


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insurance industry are exempt from ERISA preemption.\(^{50}\)

In Metropolitan Life, the United States Supreme Court enunciated a three-prong subtest,\(^{51}\) pursuant to the McCarran-Ferguson Act, to determine whether a state law regulates insurance.\(^{52}\) The court should analyze: (1) whether the state law has the effect of transferring or spreading the policyholder's risk;\(^{53}\) (2) whether the state law is an integral part of the relationship between the insurer and insured;\(^{54}\) and (3) whether the state law is limited to entities within the insurance industry.\(^{55}\) If the court concludes

\(^{50}\) See Note, supra note 39, at 620. "The insurance savings clause, drafted in order that ERISA be consistent with the McCarran-Ferguson Act, reasserted that state governments, and not the federal government, would be primarily responsible for the regulation of insurance and insurance companies." Id.; supra notes 48-49 and accompanying text (relationship between McCarran-Ferguson Act and the ERISA preemption provision).


\(^{52}\) See id. at 743. The Metropolitan Life Court noted that those cases which have interpreted the breadth of the McCarran-Ferguson Act have demarcated three relevant factors in determining whether a state law regulates insurance. Id. These factors are "first, whether the practice [law] has the effect of transferring or spreading a policyholder's risk; second whether the practice [law] is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." Id. (emphasis in original). See also Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (applying same three factors); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979) (establishing these three relevant criteria as test).

Numerous courts have applied this three-pronged McCarran-Ferguson Act subtest in determining whether the state law regulates insurance, not merely in a general sense, but rather within the meaning of the savings clause in particular. See, e.g., cases cited supra note 9 (all examining breadth of preemption clause). See generally Note, supra note 39, at 620 (discussing application of McCarran-Ferguson Act).

\(^{53}\) See supra note 52 (discussing scheme of McCarran-Ferguson subtest).

The origin of the first prong evolves from the primary elements of an insurance contract: underwriting and spreading the policyholder's risk. See G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1:3 (2d ed. 1984). "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." Id. See also R. KEETON, BASIC TEXT ON INSURANCE LAW § 1.2(a) (1971) (insurance is an arrangement for transferring or spreading risk).

\(^{54}\) See supra note 52 (discussing scheme of McCarran-Ferguson subtest).

The origin of the second prong of the subtest stems from another common aspect of the "business of insurance" wherein the relationship of the insurer and insured is essential. See Group Life, 440 U.S. at 215. In discussing the intent of Congress in passing the McCarran-Ferguson Act, the Supreme Court has noted that "whatever the exact scope of the statutory term, it is clear where the focus was - it was on the relationship between the insurance company and the policyholder." SEC v. National Sec., Inc., 393 U.S. 453, 460 (1969).

\(^{55}\) See supra note 52 (discussing scheme of McCarran-Ferguson subtest).
that any of these subprongs have not been satisfied, then the state law will fail the second part of the preemption inquiry and will not escape preemption via the savings clause.\(^6\)

In the event that the court determines that the state law does regulate insurance within the meaning of the savings clause, then the third and final prong of the *Metropolitan Life* test must be applied.\(^7\) Under this part of the test, the court must determine whether the employee benefit plan in dispute is deemed an insurance fund.\(^8\) This is when the deemer clause, upon which the final prong is based, may effectuate the congressional effort to prevent a state from labeling any ERISA plan as insurance so that it will be subject to state regulation.\(^9\)

While agreeing as to the purpose of the deemer clause,\(^6\) courts have differed in its application.\(^6\) In *Metropolitan Life*, the Supreme

The origin of the final prong of the subtest evolves from the holding in *Group Life* where the Court interpreted the McCarran-Ferguson Act as not including "entities outside the insurance industry." *Group Life* 440 U.S. at 224.

\(^{6}\) See, e.g., Baxter v. Lynn, 886 F.2d 182, 186 (8th Cir. 1989). In *Baxter*, the court determined that the subrogation law at issue did not transfer the risk from the policyholder to the insurer, nor did the court feel that the state law was limited to the insurance industry. *Id.* Accordingly, the court held that the state subrogation law was preempted by ERISA. *Id.* See also infra notes 86-98 and accompanying text (providing detailed examination of *Baxter*).

\(^{7}\) See supra note 35 and accompanying text (setting forth statutory language of deemer clause).

\(^{8}\) Id. Prior to the enactment of ERISA, employers who established employee benefit plans were subject to the same state insurance regulations as were insurance companies. See Note, supra note 39, at 633. That is, states were able to regulate self-funded employee benefit plans under the premise that "the plans were underwriting the spreading of employee risk" and thus were subject to state insurance regulation. *Id.* at 633 n.160.


\(^{10}\) See supra note 59 and accompanying text (discussing purpose of implementation of deemer clause). See also supra note 35 (laying out statutory language of deemer clause, which serves to prevent a state from wrongfully declaring an employee benefit plan to be insurer within meaning of savings clause). See generally Note, ERISA and the Preemption of State Law, 6 *Fordham Urb. L.J.* 599 (1978) (discussing statutory scheme of ERISA's preemption provision).

\(^{11}\) See, e.g., Baxter v. Lynn, 886 F.2d 182, 186 (8th Cir. 1989) (dicta asserting deemer clause prevented application of savings clause to state subrogation law); *Holliday*, 885 F.2d
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Court articulated a standard using the deemer clause to distinguish solely between employee benefit plans that are insured by outside sources and those which are self-funded. Plans which purchase insurance are subject to state regulation regardless of the deemer clause, while self-funded plans are exempt from the savings clause through the deemer clause and regulated only by federal law. Yet, despite this clearly articulated standard, various courts have chosen to implement a different application which purports to grant greater deference to congressional intent. This approach applies the deemer clause only where the state law is deemed to be an attempt by the state to impinge upon ERISA in such exclusively federal areas as reporting, disclosure and nonforfeitability.

III. RECENT JUDICIAL DECISIONS CONSIDERING ERISA PREEMPTION OF STATE ANTISUBROGATION LAWS

A. Origin and Nature of Subrogation

The principle of subrogation is an equitable one, independent at 90 (with respect to state subrogation laws, “the savings clause applies while the deemer clause does not”).

In addition, numerous state laws have been held to fall under the savings clause despite the presence of the deemer clause. See, e.g., Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985) (state-mandated benefit law not preempted by ERISA); Wadsworth v. Whaland, 562 F.2d 70, 78 (1st Cir. 1977) (concluding that ERISA does not preempt application of state insurance regulations to independently insured employee benefit plans), cert. denied, 435 U.S. 980 (1978).

Metropolitan Life, 471 U.S. at 747. The Supreme Court recognized that their “decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not.” Id.

Id. See also Baxter, 886 F.2d at 186. Here, the court suggests that if the employee benefit plan purchased insurance independently, then a subrogation clause in the insurance contract could be subject to state insurance regulation. Id. However, where the fund is completely self-insured, it is not subject to state regulation. Id.

See FMC Corp. v. Holliday, 885 F.2d 79, 86-90 (3d Cir. 1989). Here, the court relies on legislative history to conclude that “Congress intended the deemer clause to protect core ERISA concerns within the context of the insurance regulation exception to preemption.” Id. at 88. The court rejects the language of the Supreme Court in Metropolitan Life, instead suggesting that the deemer clause was meant to protect ERISA plans from being deemed an insurer by regulation that was merely a pretext for impinging on ERISA employee benefit plans. Id. at 86-87.

Holliday, 885 F.2d at 88. “[T]he deemer clause guards against any insurance regulation that infringes on such ERISA areas as reporting, disclosure and nonforfeitability.” Id.

Western Casualty & Sur. Co. v. Meyer, 301 Ky. 487, 491, 192 S.W.2d 388, 390 (1946)(“[T]he principle of subrogation is a principle of equity . . . .”); 6A J. Appleman,
of statutory law and similar in nature to the equitable principles of restitution and unjust enrichment. Fundamentally, subrogation is the substitution of an individual in the place of a creditor so that the individual who is substituted succeeds to the rights of the other in relation to the debt or claim. Since the concept of subrogation rests on principles of equity, its object is to promote justice while simultaneously preventing injustice.

A subrogation issue most frequently arises when an insurer indemnifies an insured pursuant to an insurance agreement. The


See Ex rel Nelson v. Phillip State Bank & Trust Co., 307 I11. App. 464, 463, 30 N.E.2d 771, 773 (1940) ("subrogation originated in equity"); Burks v. Packer, 143 Neb. 373, 374, 9 N.W.2d 471, 473 (1943) (doctrine of subrogation "did not originate in statute or custom but was invented by equity courts to do complete justice."); see also Western Casualty & Sur. Co. v. Meyer, 301 Ky. 487, 492, 192 S.W.2d 388, 391 (1946) ("[T]he law of subrogation is as settled as it is universal.").

See Berdie v. Kurtz, 88 F.2d 158, 159-60 (9th Cir. 1937) (compelling justice and affording adequate remedy is objective of equity); St. Paul Fire & Marine Ins. Co. v. Petroleum Nav. Co., 35 F. Supp. 350, 351 (W.D. Wash. 1940) (subrogation should prevent injustice); see also Home Owners Loan Corp. v. Baker, 299 Mass. 158, 159, 12 N.E.2d 199, 201 (1937). "Subrogation is the substitution of one person in place of another . . . so that he who is substituted succeeds to the rights of the other in relation to the debt or claim." Id. (quoting Jackson Co. v. Boyleson Mut. Ins. Co., 139 Mass. 508, 510, 2 N.E. 103, 104 (1885)).

insurer is then subrogated to any rights that the insured may have had against a third party.\textsuperscript{72}

Because subrogation rights originate by operation of law,\textsuperscript{73} there is no need for an insurance contract to expressly state that such rights exist.\textsuperscript{74} In fact, if the parties wish to modify or eliminate subrogation rights they must expressly state this intention in the insurance agreement.\textsuperscript{75}

Most recently, pursuant to the enactment of the McCarran-Ferguson Act which effectively granted to the states full regulatory authority over insurance,\textsuperscript{76} the subrogation doctrine has been statutorily defined by many states.\textsuperscript{77} Some state legislatures have

\begin{itemize}
\item \textit{In re Lauer}, 38 F. Supp. 691, 696 (D.N.J. 1941).
\item \textsuperscript{73} See Turner Constr., 442 F. Supp. at 552; Brown & Goode, supra note 72, at 21.
\item \textsuperscript{74} See City Stores Co. v. Lerner Shops of D.C., Inc., 410 F.2d 1010, 1011 (D.C. Cir. 1969) (right of subrogation is "independent of any contractual relations between the parties") (quoting Pearlman v. Reliance Ins. Co., 371 U.S. 132 n.12 (1962)). "[I]t is generally recognized . . . that the insurer is subrogated to claims of its insured against others . . . if neither the insurance contract nor the agreement made in settling the claim under the insurance policy contains any reference to subrogation . . . ." R. Keeton, supra note 53, at 147. \textit{See also supra} note 73 (discussing origination of subrogation as being by operation of law).
\item \textsuperscript{75} 83 C.J.S. Subrogation \S 3(b) at 585 (1955). "A right of true legal subrogation may be provided for in a contract, but the exercise of the right will, nevertheless, have its basis in general principles of equity rather than in the contract, which will be treated as merely a declaration of principles of law already existing." \textit{Id.} "[T]he insurer may waive all or part of its subrogation rights by stipulation in the policy or by other means." R. Keeton, \textit{supra} note 53, at 147.
\item \textsuperscript{76} 15 U.S.C. \S\S 1011-1015 (1976).
\item Section 2 of the McCarran-Ferguson Act provides in pertinent part:
\begin{itemize}
\item \textbf{(a) State Regulation.} The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
\item \textbf{(b) Federal Regulation.} No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .
\end{itemize}
\item \textsuperscript{77} See, e.g., DEL. CODE ANN. tit. 21, \S 2118(f) (1985) ("Insurers providing benefits . . . shall be subrogated to the rights . . . of the person for whom the benefits are provided . . . ."); ILL. ANN. STAT. ch. 17, para. 375 (Smith-Hurd 1981) (requiring subrogation of insurers of financial institutions to rights of depositors); N.J. STAT. ANN. \S 17.36.5.20 (West 1985)
\end{itemize}
passed laws in areas where they have deemed subrogation rights to be inappropriate. This has resulted in a conflict between these antisubrogation laws and an individual's equitable right to subrogation.

B. Recent Case Law

Courts have been struggling with the question of whether state antisubrogation laws are preempted by section 514 of ERISA. Two circuits addressed this issue in September of 1989 and reached different conclusions.

In Baxter v. Lynn, the Court of Appeals for the Eight Circuit held that ERISA preempts state restrictions on subrogation with

("[The Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company."). See generally Comment, supra note 66, at 101, 109. "In standard insurance policies, statutory approval or denial of the insertion of a subrogation provision determines an insurance carrier's right to subrogation." Id. at 109.

The laws of different jurisdictions may be summarized in five different rules. R. Keeton, supra note 53, at 160. First, "[t]he insurer is the sole beneficial owner of the claim against the third party and is entitled to the full amount recovered, whether or not it exceeds the amount paid by the insurer . . . ." Id. at 160-61. Second, "[t]he insurer is to be reimbursed first out of the recovery from the third party, and the insured is entitled to any remaining balance." Id. at 161. Third, "[t]he recovery from the third person is to be prorated between the insurer and the insured in accordance with the percentage of the original loss for which the insurer paid the insured under the policy." Id. Fourth, "[t]he recovery from the third party, the insured is to be reimbursed first, for the loss not covered by insurance, and the insured is entitled to any remaining balance, up to a sum sufficient to reimburse the insurer fully, the insured being entitled to anything beyond that." Id. Fifth, "[t]he insured is the sole owner of the claim against the third party and is entitled to the full amount recovered, whether or not the total thus received . . . exceeds his loss." Id. at 162. The fourth rule has the greatest precedential support. Id. at 164.


"In relation to life and accident insurance, it is generally recognized that the insurer is not subrogated to claims of its insured . . . in the absence of contract stipulations so providing." Keeton, supra note 53, at 149.

See supra notes 66-78 (discussing policies and objectives of subrogation, and state regulation of subrogation law).

Compare Baxter v. Lynn, 886 F.2d 182, 186 (8th Cir. 1989) (holding that ERISA does preempt state antisubrogation laws) with FMC Corp. v. Holliday, 885 F.2d 79, 90 (3d Cir. 1989) (holding that ERISA does not preempt antisubrogation laws).

81 886 F.2d 182 (8th Cir. 1989).
respect to self-funded employee benefit plans. Less than two weeks earlier, the Court of Appeals for the Third Circuit held in *FMC Corp. v. Holliday* that a Pennsylvania antisubrogation statute was not preempted. Although the holdings of these cases conflict, both courts applied the same preemption test as outlined in Part II of this Note.

1. *Baxter v. Lynn*

In *Baxter*, an employee benefit plan covered injuries incurred by the son of an employee in an automobile accident. The plan paid medical expenses totaling $23,305 on behalf of the child. The Baxters then filed suit against the driver of the other vehicle involved in the collision. The trustee of the employee benefit plan sought a declaratory judgment on the issue of whether the plan had a subrogation right for money recovered by the Baxters in their negligence action against the other driver. The Baxters claimed that state precedent had prohibited subrogation in motor vehicle accident actions. The plan asserted that ERISA preempts any state law which operates to regulate ERISA benefit plans, in which case the plan would be the sole party entitled to bring suit against the other driver and the Baxter’s suit would be precluded.

Before applying the preemption test set forth in Part II of this Note, the *Baxter* Court noted that section 514 of ERISA is “deliberately expansive, and it is designed to establish pension plan regulation as exclusively a federal concern.” The court then proceeded to apply the three-prong preemption test promulgated by

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82 Id. at 186.
83 885 F.2d 79 (3d Cir. 1989).
84 Id. at 90.
85 See supra notes 40-65 and accompanying text (stating appropriate applicability test of ERISA section 514).
86 Baxter v. Lynn, 886 F.2d 182, 184 (8th Cir. 1989).
87 Id.
88 Id.
89 Id.
90 Id. at 185. The Baxters argued that subrogation is inappropriate since there is a contractual obligation, independent of the insurer’s obligation to pay for the medical expenses arising from the accident. Id.
91 Baxter v. Lynn, 886 F.2d 182, 184 (8th Cir. 1989).
92 Id. at 185.
the Supreme Court in *Metropolitan Life*. Initially determining that the state antisubrogation law "related to" employee benefit plans, the court then utilized the McCarran-Ferguson subtest to determine if the state law "regulated insurance" within the meaning of ERISA's savings clause. The *Baxter* court determined that the state law did not regulate insurance, finding that the antisubrogation law neither transferred or spread the risk of the Baxters nor was limited solely to entities within the insurance industry. As such, two of the three prongs of the McCarran-Ferguson subtest were not met by this particular state regulation, thus removing the law from the protection from preemption offered by the savings clause. Finally, though not necessary, the *Baxter* court proceeded to the third prong of the *Metropolitan Life* test and asserted that even if the state law had survived the savings clause, it still would have been preempted since the deemer clause prevents the application of the savings clause to self-funded employee benefit plans.

2. *FMC Corp. v. Holliday*

In *Holliday*, the respondent was injured in an automobile acci-

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83 471 U.S. 724 (1985). The elements of the test set forth in *Metropolitan Life* are: (1) whether the state law "relates to" employee benefit plans; (2) whether the state law regulates insurance; (3) whether the employee benefit plan is an insurance plan or is just deemed to be an insurance plan for purposes of state regulation. *Id.* at 739-47. See also Note, supra note 39, at 622-26 (discussing elements of preemption test and their application in *Metropolitan Life*); *supra* notes 39-40, 47, 51-55, 58 and accompanying text (describing test of applicability of Section 514, incorporating the *Metropolitan Life* standard).

84 *Baxter v. Lynn*, 886 F.2d 182, 185 (8th Cir. 1989). The court stated that a law "relates to" an employee benefit plan if it "has a connection with or reference to" an employee benefit plan. *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). In *Baxter*, the court of appeals agreed with the district court's finding that any state law which attempted to limit the Fund's subrogation rights has a connection with the employee benefit plan and thus "relates to" the plan. *Id.*

85 *Baxter v. Lynn*, 886 F.2d 182, 185-86 (8th Cir. 1989).

86 *Id.* at 186. In addition, the court stated that "the law of subrogation, while generally applicable to insurance contracts, is not specifically directed toward the insurance industry." *Id.* Furthermore, the "[a]pplication of differing state subrogation laws to plan providers throughout the United States would frustrate ERISA's uniform treatment of benefit plans." *Id.*

87 *Id.*

88 *Baxter v. Lynn*, 886 F.2d 182, 185-86 (8th Cir. 1989). Basing this decision on dicta from *Metropolitan Life*, the court found that if the fund had purchased insurance from an independent company, it would have been subject to state insurance regulations. *Id.* Since it was self-insured, the fund could not be subject to even indirect state regulation. *Id.*
dent sustaining injuries which were covered by her father’s employee benefit plan. The employer, FMC Corporation, sought a declaratory judgment entitling it to subrogation of Holliday’s right to recover for personal injuries incurred in the accident. Holliday claimed that Pennsylvania law expressly prohibited such subrogation. FMC asserted that the state law was preempted by ERISA.

The Holliday court, like the court in Baxter, utilized the three-prong test of Metropolitan Life. The court found that the statute satisfied the first prong of the test since it “related to” an employee benefit plan, as “[a] law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.” Proceeding to the next prong, the court found that the state antisubrogation law met the requirements of the McCarran-Ferguson test, and thus “regulated insurance” within the meaning of the savings clause. The court then applied the third prong of the test which examines whether the employee benefit plan is “deemed” an insurance fund. In employing this part of the test, the Holliday court expressly rejected the distinction between self-funded plans and those plans funded by independent insurance companies set forth in Metropolitan Life. Instead, the court interpreted the deemer clause narrowly, holding that the Pennsylvania law regulated a legitimate state con-

99 FMC Corp. v. Holliday, 885 F.2d 79, 80 (3d Cir. 1989).
100 Id.
101 Id. at 81.
102 Id. The Pennsylvania antisubrogation law provides in pertinent part that “[i]n actions arising out of the . . . use of a motor vehicle, there shall be no right of subrogation . . . from a claimant’s tort recovery . . . or benefits in lieu thereof paid or payable under section 1719 (relation to coordination of benefits).” 75 Pa. Cons. Stat. Ann. § 1720 (Purdon 1988).
103 FMC Corp. v. Holliday, 885 F.2d 79, 81 (3d Cir. 1989).
104 Id. at 84-90. See supra note 93 (detailing Metropolitan Life test).
106 Id. at 85-86. The court found that the Pennsylvania “statute’s coordination of benefits and antisubrogation provisions directly contro[led] the terms of insurance contracts” and was, therefore, saved from preemption by the savings clause. Id. at 86.
107 Id. at 86-90.
108 Id. at 89. Furthermore, the court rejected the findings of the ERISA oversight report, infra note 120, claiming that it “conflicts with a reasonable interpretation of statutory text and legislative history.” Holliday, 885 F.2d at 88 n.5 (quoting Northern Group Servs. v. Auto Owners Ins., 833 F.2d 85, 92 (6th Cir. 1985)).
cern and did not apply to any area which ERISA intended to reserve solely for federal regulation. Thus, the court concluded that the deemer clause did not serve to remove the anti-subrogation law from the scope of the savings clause, and the law was therefore not preempted by section 514.

IV. THE BROAD INTERPRETATION OF BAXTER: THE RIGHT CHOICE

The Holliday and Baxter holdings illustrate the breadth of the preemptive scope of ERISA, exemplifying two diametrically opposed viewpoints on the spectrum of preemptive prerogative utilized by the judiciary. It is submitted that a simple balancing of congressional intent and public policy necessitates a finding that state anti-subrogation laws are preempted by ERISA.

A. THE BREADTH OF PREEMPTION: CONGRESSIONAL INTENT

With the enactment of the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA), Congress preserved state authority to regulate employee benefit plans. ERISA repealed the WPPDA by creating a uniform scheme of regulation of employee benefit plans with sole power reserved to the federal government. This

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109 FMC Corp. v. Holliday, 885 F.2d 79, 88 93d Cir. 1989). The court reads the deemer clause narrowly, stating that it guards only "against any insurance regulation that infringes on such ERISA areas as reporting, disclosure and nonforfeitability." Id. The court goes on to say that "[a]ny reading [of the deemer clause] other than one confined to the central aspects of ERISA would either have the deemer clause swallow the savings clause or read into the statute other distinctions that are not there." Id. at 90.

110 Id.


114 See supra notes 7 and 25 and accompanying text (suggesting that primary objective of Congress in enacting ERISA was to formulate strict uniformity in laws regulating employee benefit plans). See also Comment, Regulation of Employee Welfare Benefit Plans: The Scope of ERISA's Preemption and The State Power to Regulate Insurance, 4 U. DAYTON L. REV. 177, 181
uniformity was to be achieved through the enactment of the section 514 preemption clause. However, the Baxter and Holliday decisions illustrate that judicial interpretation of the breadth of this scope has been far from uniform.

A review of the legislative history of ERISA indicates quite clearly that Congress intended to create “a body of Federal substantive law . . . to deal with issues involving rights and obligations under private welfare and pension plans.” In light of this goal, the sponsors of ERISA indicated that section 514 was created to impose a broad sweep of state law regulating employee benefit plans. Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee and Floor Manager for ERISA in the House of Representatives, while speaking of ERISA’s preemption clause stated:

(1979) “Through ERISA, Congress intended to establish a single, uniform regulatory scheme for employee benefit plans.”

The Welfare Pension Plan Disclosure Act proved to be woefully inadequate. See Comment, The Employee Retirement Income Security Act of 1974: Policies and Problems, 26 Syracuse L. Rev. 539 passim (1974). One objective of the WPPDA was to enable employee plan participants to police their own plans by obtaining plan descriptions and financial data from the Secretary of Labor. Id. at 553-54. However, the complexity of the plans themselves rendered this goal virtually impossible. See House Committee on Education and Labor, Employee Benefit Security Act of 1973, H.R. Rep. No. 533, 93d Cong., 1st Sess. 8, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4646. To remedy this, ERISA provides that a plan description is to be “written in a manner calculated to be understood by the average plan participant.” 29 U.S.C § 1022 (a)(1) (1982).

See supra notes 7-9 and 25 and accompanying text (discussing uniformity goal of Congress in enacting section 514). For a description of the statutory scheme of the ERISA preemption clause, see supra notes 25-38 and accompanying text.

See supra note 11. The recent split in the circuits is a prime example of this unsuccessful uniform interpretation. See supra note 14 and accompanying text (noting contrary decisions reached by Baxter and Holliday courts).

The statute states that “the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary or fiduciary.” 29 U.S.C. § 1132 (e)(1) (1980). This exclusive jurisdiction does not include “actions by a participant or beneficiary to recover benefits due, to enforce rights under the terms of a plan, or to clarify rights to future benefits, over which state courts have concurrent jurisdiction.” Franchise Tax Bd. of Cal., 463 U.S. at 24 n.26.

See e.g., 120 Cong. Rec. 29,942 (1974) (Sen. Jacob Javits, ranking minority member of Senate Committee on Labor and Public Welfare, suggesting that the enacted legislation is to have a broad preemptive scope); 120 Cong. Rec. 29,933 (1974) (Sen. Harrison Williams, Chairman of Senate Committee on Labor and Public Welfare, suggested that section 514 “is intended to apply in its broadest sense to all actions of State or local governments . . . ”). See generally Gregory, supra note 3, at 454-55 (discussing legislative intent of section 514).
I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans . . . . [We], with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans.\textsuperscript{119}

While this contemporaneous legislative history is strong evidence of congressional intent for a broad preemptive interpretation, subsequent post-enactment findings are similarly supportive. The Joint Pension Task Force, reporting its conclusions based on studies conducted during the two years following the enactment of ERISA, stated that "the legislative scheme of ERISA is sufficiently broad to leave no room for effective state regulation within the preempted field. Similarly it is our finding that the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded."\textsuperscript{120} Clearly the congressional intent was to provide for sole regulation of the field.\textsuperscript{121} Moreover, the manner in which this intent was meant to manifest itself is equally clear: federal preemption in the broadest sense.\textsuperscript{122}

**B. The Breadth of Preemption: Supreme Court Interpretations**

In recent years, the United States Supreme Court has entertained five ERISA preemption cases.\textsuperscript{123} The underlying disputes are largely the result of the Reagan Administration's policy of deference to state regulation,\textsuperscript{124} coupled with the rapid growth of

\textsuperscript{119} 120 CONG. REC. 29,197 (1974).
\textsuperscript{121} See id.
\textsuperscript{122} See infra notes 126-146 and accompanying text. From the year ERISA was implemented (1974) to the present, the Supreme Court has heard five ERISA preemption cases. Id. All of those cases were heard between 1981 and 1988, with the last three being decided between 1985 and 1988. Id.
\textsuperscript{123} See supra note 3, at 430 n.3. Professor Gregory, in his discussion on ERISA preemption and federalism, alludes to the political ideology of the Reagan Administration as exemplifying deference to state regulation. Id. Professor Gregory also cites numerous other works of legal scholars discussing the role of federalism in the Reagan Administra-
employment benefit plans in the 1980s.\textsuperscript{126}

Of the five ERISA preemption cases heard by the Supreme Court,\textsuperscript{126} the earliest three were decided by the Burger Court.\textsuperscript{127} Despite this Court's historic deference afforded state regulation,\textsuperscript{128} a broad interpretation of the ERISA preemption provision permeates these three opinions.\textsuperscript{129}

In the first of these cases, \textit{Alessi v. Raybestos-Manhattan, Inc.},\textsuperscript{130} the Court was reluctant to provide a broad preemption rationale.\textsuperscript{131} Nonetheless, the Court found that the state law was indeed preempted by section 514.\textsuperscript{132}

In \textit{Shaw v. Delta Air Lines, Inc.},\textsuperscript{133} the second Burger Court deci-
sion interpreting the scope of ERISA's preemption section, the Court expanded the Alessi holding, expressly rejecting prior interpretations of section 514 which limited the preemptive scope to only those state laws dealing with subject matters at the core of ERISA such as funding, reporting and disclosure.\textsuperscript{134} Despite the breadth of the Shaw Court's decision, the determination as to which state laws were not preempted became more difficult, as it was no longer sufficient to merely discern whether the state law regulated subject matter expressly covered by ERISA.\textsuperscript{135}

The Metropolitan Life decision, the final ERISA preemption case heard by the Burger Court,\textsuperscript{136} established a clear standard to determine whether state law was preempted.\textsuperscript{137} Although the Court found that the state law in dispute in Metropolitan Life was an insurance regulation and thus exempt from the preemption provision of ERISA,\textsuperscript{138} it nonetheless reaffirmed the broad scope of the preemption clause, as delineated in Shaw.\textsuperscript{139}

\textsuperscript{134} Id. at 98. Relying on extensive legislative history to glean congressional intent, the Court acknowledged that the preemptive scope of section 514 was as broad as its sweeping language. \textit{Id.}

Despite the clear language of section 514, prior to the Shaw decision, many courts held that ERISA did not preempt state law. \textit{See, e.g.}, Bucyrus-Erie Co. v. Dep't of Indus., Labor & Human Relations of Wis., 599 F.2d 205, 213 (7th Cir. 1979) (Congress did not intend to preempt state fair employment laws by enacting ERISA), \textit{cert. denied}, 444 U.S. 1031 (1980); Minnesota Mining & Mfg. Co. v. State, 289 N.W.2d 396, 400-01 (Minn. 1979) (state anti-discrimination laws are not preempted), \textit{appeal dismissed}, 444 U.S. 1041 (1980); Mountain States Tel. & Tel. Co. v. Comm'r of Labor & Indus., 187 Mont. 22, \_, 608 P.2d 1047, 1050 (1979) (Montana Maternity Leave Act not preempted by ERISA), \textit{appeal dismissed}, 445 U.S. 921 (1980).

\textsuperscript{135} \textit{See supra} note 3, at 467. "After Shaw, it was no longer sufficient to ascertain whether the state law intruded upon specific substantive fields regulated exclusively by ERISA. . . . Obviously, the Shaw inquiry is much broader and more difficult . . . ." \textit{Id.}


\textsuperscript{137} \textit{See supra} notes 52-65 and accompanying text (outlining three-prong test set forth by Supreme Court in Metropolitan Life); \textit{Metropolitan Life}, 471 U.S. at 738-47. \textit{See generally} Note, \textit{supra} note 39 (discussing Metropolitan Life case in detail).

\textsuperscript{138} \textit{Metropolitan Life}, 471 U.S. at 758. The Supreme Court upheld the Massachusetts mandated-benefit law as an insurance regulation, and as such, "a valid and unexceptional exercise of the Commonwealth's police power." \textit{Id.} As an insurance regulation, it fell within the scope of the savings clause. \textit{Id.} at 746-47.

\textsuperscript{139} \textit{See id.} at 739 (preemption provision "intended to displace all state laws that fall within its sphere . . . .") In \textit{Metropolitan Life}, the Court noted that "Shaw held that ERISA's broad pre-emption provision was intended to pre-empt any state law that 'relate[d] to' an employee-benefit plan, not merely those state laws that directly conflicted with a substantive provision" in ERISA. \textit{Id.} at 737. \textit{See also supra} notes 134-135 and accompanying text (discussing Shaw decision in detail).
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In *Pilot Life Ins. Co. v. Dedeaux*, the Rehnquist Court continued to apply the broad interpretation of section 514. In *Pilot*, the Court observed that the "pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" Referring to the legislative history of ERISA, the Court noted that, contrary to the limited preemption clause of the original bill, the Congressional Conference Committee indicated that the preemptive scope of the current law "was as broad as its language."

The most recent Supreme Court decision focusing on the ERISA preemption provision is *Mackey v. Lanier Collections Agency & Service, Inc.* In *Mackey*, the Court, in holding that a state antigarnishment statute which explicitly covered benefit plans subject to ERISA was preempted by section 514, broadly interpreted the preemption clause to find that the state law "related to" employee benefit plans. It is submitted that the United States Supreme Court recognized the strong congressional intent behind ERISA and has made its opinion clear: ERISA federal preemption is to be broad and sweeping. It is further submitted that it is the Eighth Circuit in *Baxter* that is most closely aligned with this opinion.

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141 See id. at 45-47. The Supreme Court observed that past decisions have recognized that the provisions of section 514 are deliberately expansive and designed to grant full control to the federal government. Id. at 46-47. Relying on its decisions in *Shaw* and *Metropolitan Life*, as well as legislative history, the Court affirmed the broad sweep of the ERISA preemption provision. Id. at 47.

142 Id. at 45-46 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

143 Id. at 46 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). The Court went on to note that the preemption provision has been described as the "crowning achievement" of ERISA. *Id.* (quoting 120 CONG. REC. 29,197 (statement of Senator Williams) (1974)).

144 486 U.S. 825 1988).

145 Id. at 839. See also id. (Kennedy, J., dissenting). Joined by Justices Blackmun, O'Connor and Scalia, Justice Kennedy asserted that the scope of ERISA's preemption provision, as shaped by prior cases, is broad enough to encompass a state's general garnishment statute and not solely a state antigarnishment statute expressly designed to regulate ERISA employee benefit plans. Id. at 842.

146 Id. at 829. Here, the state antigarnishment statute was specifically designed to apply solely to ERISA employee benefit plans. Id. As such, the Supreme Court reaffirmed prior holdings "that state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans within the meaning of § 514(a)." *Id.*
V. SUBROGATION: IMPERATIVE FOR THE VOLUNTARY CREATION OF EMPLOYEE BENEFIT PLANS

Although ERISA is highly regulatory with respect to those employee benefit plans that are already in existence,\(^\text{147}\) it does not mandate that an employer create such a plan.\(^\text{148}\) Absent state mandated-provider laws,\(^\text{149}\) the enactment of employee benefit programs is entirely voluntary.\(^\text{150}\)

Given the significant impact that employee benefit plans have on the lives of most employees,\(^\text{151}\) the continuance of these plans is required to sustain the health, safety and welfare of the populace.\(^\text{152}\) It is submitted that the failure to preempt state antisubrogation laws will deter employers from establishing benefit

\(^{147}\) See supra note 5 and accompanying text (discussing comprehensive nature of ERISA).

With very few exceptions, ERISA covers all existing employee benefit plans. See 29 U.S.C. § 1003(a) (1985). This provision suggests that ERISA applies to all employee benefit plans other than those excluded within the statute. Id. Plans that are governmental, church-related, maintained solely to comply with applicable worker's compensation laws, unemployment compensation laws or disability insurance laws, unfunded excess benefit plans, or plans maintained outside the United States for nonresidents, are expressly excluded. See 29 U.S.C. § 1003(b) (1985).

\(^{148}\) See H.R. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4639 ("committee has been constrained to recognize the voluntary nature of private retirement plans"). Since Congress deliberately chose to retain a voluntary system of participation by employers, it could not impose costly minimum benefit standards for fear of discouraging employers. Id. at 5, 1974 U.S. CODE CONG. & ADMIN. NEWS 4643. See also Note, The Employee Retirement Income Security Act of 1974: Policies and Problems, 26 SYRACUSE L. REV. 539, 555-57 (1975). "As long as the private system remains voluntary in nature, the level of retirement income security provided will depend upon the willingness of employers to create plans . . . ." Id. at 555.

\(^{149}\) See generally Note, ERISA Preemption of State Mandated-Provider Laws, 1985 DUKE L.J. 1194 passim (1985). Discussion of state mandated-provider laws is beyond the scope of this Note.

\(^{150}\) See supra note 148 (discussing voluntary nature of employer participation in employee benefit systems).

\(^{151}\) See supra note 2 and accompanying text (detailing tremendous growth in number of employee benefit plan beneficiaries as well as amount of assets involved).

\(^{152}\) See SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, S. REP. NO. 634, 92d Cong., 1st Sess. 13 (1971). The private pension system, social security benefits, as well as any individual savings form the basis for post-retirement income. Id.

Several factors influenced congressional enactment of ERISA. As noted previously, one such factor was the tremendous growth in employee benefit plans. See supra notes 1-2 and accompanying text. Another major factor was the increasingly interstate nature of these plans and their impact upon the national economy, as well as the reliance on these plans by millions of employees and their families. See 29 U.S.C. § 1001(a) (1985). Further, pension plans constitute the largest lump sum of private capital in the United States. See Gregory, supra note 3, at 435.
The creation of employee benefit plans requires a substantial outlay of capital by an employer. Subrogation serves as the sole method of potential defrayal of a portion of the employer's cost, and will decrease the amount of money needed from the employer to revitalize a depleted fund.

States impede the congressional purpose of ERISA by disallowing the equitable remedy of subrogation in ERISA employee benefit plans. In other words, through antisubrogation laws, states hinder voluntary participation in employee benefit plans. It is submitted that the increase in cost to the employer resulting from the state-imposed bar from subrogation will render some previously

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153 See Rothstein, Refusing To Employ Smokers: Good Public Health or Bad Public Policy?, 62 NOTRE DAME L. REV. 940, 954 (1987) (construing U.S. Chamber of Commerce, 1984 Employee Benefits, Table 6-2 (1985)). According to the United States Chamber of Commerce, 'employee benefits comprise 36.6% of total payroll costs.' Id.

154 See Note, The Employee Retirement Income Security Act of 1974: Policies and Problems, 26 SYRACUSE L. REV. 539, 558 (1975). It is asserted that Congress was very much interested in defraying an employer's cost of creating an employee benefit plan:

[T]he committee is aware that . . . unduly large increases in costs could impede the growth and improvement of the private retirement system. For this reason, in the case of those requirements which add to the cost of financing retirement plans, the committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits.


155 See supra note 148 and accompanying text (discussing voluntary nature of employer creation of employee benefit plans).

It can be inferred that Congress refused to consider the implementation of a compulsory private pension system, since no committee reports or other legislative history disclose serious discussion of anything other than a voluntary system. See, e.g., H.R. REP. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639 passim (no discussion of compulsory system reported).

Encouraging employer participation in employee benefit plans was a primary objective of ERISA. See Note, supra note 154, at 558. "The dilemma facing Congress was to rid the private pension system of its inequities without discouraging employers from establishing plans because of overly stringent governmental controls." Id. It is further asserted that there are several policy reasons for avoiding a compulsory system:

First, the costs of providing minimum compulsory pension benefits may produce excessive financial strain on certain employers, and on the economic system as a whole. Second, a compulsory private system might deprive specific plans of the flexibility required to develop benefits which reflect the needs and desires of different social and occupational groups in the population . . . . Finally, it has been suggested that a compulsory system has serious "welfare state" implications in terms of individual initiative, limited government, collective bargaining and the private enterprise economic system.

Id. at 557 n.131.
willing participants incapable of meeting their increased obligation. It is further suggested that the voluntary creation of employee benefit plans will likely decrease.

CONCLUSION

As exemplified by the recent circuit split in Baxter and Holliday, the scope of the preemption clause of ERISA is far from conclusively determined. Despite the clear and convincing legislative intent of a broad preemptive sweep, and despite United States Supreme Court interpretations recognizing this intent, some federal courts still insist on a narrow application of section 514. By utilizing this limited interpretation to uphold state antisubrogation laws which impact upon ERISA employee benefit plans, the Third Circuit in FMC Corp. v. Holliday rejected the contemplation of both Congress and the Supreme Court. In the process, the continued voluntary formation of employee benefit programs by employers is threatened. As stated by Congressman Dent, the broad preemptive force of section 514 of ERISA was created to eliminate "the threat of conflicting and inconsistent State and local regulation . . . ."15 Surely there is no greater threat than the extinction of employee health and welfare benefit plans.

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