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PREFEMPTION OF STATE LAWS UNDER THE
EMPLOYEE RETIREMENT INCOME
SECURITY ACT OF 1974

Peter H. Turza* and Lorraine Halloway**

The Employee Retirement Income Security Act of 1974 (ERISA)\(^1\) was signed into law, appropriately, on Labor Day of that year. Many people considered the Act to be the most significant social legislation since the passage of the Social Security Act in 1935.\(^2\) Others labeled ERISA a "monster\(^3\) and called for its immediate repeal or redrafting. The Act was criticized by those who believed it went too far in providing unnecessary regulation, as well as by those who felt it did not go far enough\(^4\) in curing those problems of employee pension\(^5\) and welfare

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4. N. LEVIN, supra note 2, at 8.

5. ERISA defines an employee pension benefit plan as:

any plan, fund, or program which heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent
ERISA is intended to protect working men and women against abuses related to employee benefit plans and to improve the equitable nature and soundness of such plans. In furtherance of these goals, Title I of ERISA, that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or
(B) results in 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 benefits under the plan or the method of distributing benefits from the plan.


The assets of a pension plan are generally held in trust by one or more trustees. Contributions may be made to a plan or trust by the employer, by the employee, or by both. Pension plans may be employer-initiated or set up pursuant to the terms of a collective-bargaining agreement. See Comment, supra note 1, at 541 n.2. In 1972, approximately one-third of all private pension plans were negotiated and 25 percent of these plans accepted employee contributions. Landau, Merholtz & Perkins, Protecting a Potential Pensioner's Pension—An Overview of Present and Proposed Law on Trustees' Fiduciary Obligations and Vesting, 40 BROOKLYN L. REV. 521, 526 (1974) (citing statistics from BNA PERSONNEL POLICIES FORUM, SURVEY NO. 103, PENSION & OTHER RETIREMENT BENEFITS 5 (1973)).

ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A) (1976). They may also include "any benefit described in section 186(c) of this title (other than pensions upon retirement or death and insurance to provide such pensions)." ERISA § 3(1)(B), 29 U.S.C. § 1002(1)(B) (1976). Benefits described in § 186(c) include payments for medical or hospital care, compensation for injuries or illness resulting from occupational activities, and accident insurance. 29 U.S.C. § 186(c) (1976).

In 1970, welfare plans covering hospitalization numbered about 150,000 and those covering surgery numbered about 138,000. Eighty percent of the population had health or hospitalization and surgical coverage, and millions of pensioners enjoyed ancillary health benefits. N. LEVIN, supra note 2, at 18-19. For statistics on prepaid legal services plans, see notes 238-41 infra.

Although ERISA covers employee welfare plans as well as (but not to the same extent as) pension plans, Congress' primary concern was regulating the pension field, and much commentary on ERISA continues the emphasis on pension plans. See, e.g., Comment, supra note 1; Note, The Pension Reform Act of 1974: Brave New World of Retirement Security, 27 U. FLA. L. REV. 1044 (1975). Historically, there has been more interest in and regulation of pension plans than welfare plans. See Pfennigstorf & Kimball, Employee Legal Service Plans: Conflicts Between Federal and State Regulation, 1976 AM. B. FOUNDATION RESEARCH J. 787, 790 nn.11 & 12. Most of the material in the congressional hearings and reports leading to passage of ERISA concerned pension plans. Id. at n.21.

ERISA defines the term "employee benefit plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." ERISA § 3(3), 29 U.S.C. § 1002(3) (1976).
administered and enforced by the Secretary of Labor, sets forth a five-part regulatory scheme. Part one establishes reporting and disclosure requirements for all employee benefit plans subject to the Act. Parts two and three apply only to pension plans and establish minimum standards in areas such as participation, vesting, benefit accrual and funding. Part four, applicable to welfare and pension plans alike, establishes standards and specific prohibitions governing the conduct of plan fiduciaries. Part five contains a broad scheme for public and private enforcement of Title I. Part five also contains ERISA’s preemption provisions.

Several considerations influenced the Congress to enact ERISA. First was the enormous growth in the size, scope, and number of employee benefit plans. Second, Congress noted the increasingly interstate nature of the plans’ operations and economic impact, as well as the effect of the security of such plans on millions of employees and their families, thereby

<table>
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<tr>
<th>YEAR</th>
<th>MILLIONS OF EMPLOYEES COVERED</th>
<th>BILLIONS OF DOLLARS IN ASSETS</th>
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<tr>
<td>1940</td>
<td>4.1</td>
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<td>1950</td>
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<td>21.2</td>
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<td>1970</td>
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<td>1974</td>
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creating a "national public interest" in such plans.\textsuperscript{15} Moreover, despite the importance of employee benefit plans to American labor relations, Congress found an absence of adequate safeguards governing plan establishment, administration, and termination.\textsuperscript{16} Inadequate funding and overly stringent eligibility provisions had resulted in the loss of anticipated retirement benefits by thousands of employees who had long service records.\textsuperscript{17}

These concerns did not surface overnight. Government study of the employee benefit field dates back to 1962, when President John F. Kennedy appointed a special cabinet-level task force to study the reasons for lost employee benefits and to assess the resulting impact on the economy.\textsuperscript{18} Although the task force noted the ineffectiveness of current federal legislation,\textsuperscript{19} it was not until 1967 that concrete legislation on the subject was introduced in Congress.\textsuperscript{20}

Passage of comprehensive pension reform legislation, however, did not come until 1974, when the Senate and House adopted differing versions of ERISA.\textsuperscript{21} Originally, both bills contained limited preemption provisions,

\begin{footnotesize}
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\item ERISA § 2(a), 29 U.S.C. § 1001(a) (1976).
\item ERISA § 2(a), 29 U.S.C. § 1001(a) (1976). For example in 1964, the Studebaker plant in South Bend, Indiana was closed, its employees were discharged, and the corporation's pension plan was terminated. More than 4,000 participants between ages 40 and 60 lost $14 million, or 85% of the current value of their vested benefits. Workers under age 40 lost an unspecified amount of vested increases. This highly publicized case underscored the need for regulation of pension plans. See Chadwick & Foster, \textit{Federal Regulation of Retirement Plans: The Quest for Parity}, 28 Vand. L. Rev. 641, 668-69 & n.196 (1975).
\item Brummond, \textit{supra} note 20, at 59. The Senate version of what became ERISA was passed on September 19, 1973, and the House version was passed five months later. \textit{Id. at} 59-60. After six weeks of intensive discussion, debate and redrafting in the Conference Committee, differences between the two versions were resolved. Chadwick & Foster, \textit{supra}
\end{enumerate}
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superseding only that state regulation of subject matter expressly covered in each version.\textsuperscript{22} In response to organized labor's concern over state regulation of prepaid legal services plans and both business' and organized labor's concern about the increasing state regulation of interstate plans, however, the conference committee on the legislation expanded ERISA's preemptive effect. Accordingly, the broad preemption language finally adopted by Congress in 1974 provides for the displacement of all state laws, with certain exceptions, relating to pension and welfare plans.\textsuperscript{23} This approach was hailed as more consistent with congressional intent that ERISA's requirements replace inadequate and conflicting state standards for pension and welfare plans.\textsuperscript{24}

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\item There was no real conflict between the two narrowly focused preemption provisions originally adopted by the House and the Senate. \textit{Compare} H.R. 2, 93d Cong., 2d Sess., § 699(a) (1974) (as amended by the Senate):

\begin{quote}
PREEMPTION OF STATE LAWS—It is hereby declared to be the express intent of Congress that, except for actions authorized by section 694 of this title, the provisions of this Act . . . \textit{shall supersede any and all laws of the States and of political subdivisions thereof} insofar as they may now or hereafter relate to the subject matters regulated by this Act . . . except that nothing herein shall be construed—

(1) to exempt or relieve any employee benefit plan not subject to this Act . . . from any law of any State;
(2) to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities . . . or
(3) to alter, amend, modify, invalidate, impair, or supersede any law of the United States other than the Welfare and Pension Plans Disclosure Act or any rule or regulation issued under any law except as specifically provided in this Act. (emphasis added)

\end{quote}

with H.R. 12906, 93d Cong, 2d Sess., § 514 (1974):

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

\end{quote}

\item The language of ERISA's preemption provisions is discussed in text accompanying notes 90–95 \textit{infra}. The provision is codified at 29 U.S.C. § 1144 (1976).
\item Senator Javits explained why Congress rejected the selective approach to preemption:

\begin{quote}
[Preemption defined in relation to the specific areas regulated in the Act] raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with
\end{quote}
As commentators correctly predicted, however, a myriad of unanswered questions about ERISA's preemption language were left to the courts. Recent decisions and commentary on the preemption language have heightened the uncertainty in important areas of state concern. Regulation of health care plans, provision of legal services, division of property upon divorce, protection of workers from discrimination, and imposition of taxes on welfare plans have all been affected by ERISA. Although there is still strong support for Congress' choice of broad preemption, a significant number of critics now argue that Congress' initial approach—favoring narrow preemption—may have been the wiser course. As a result, just five years after ERISA's passage, six bills have been introduced into Congress to amend and narrow the preemption provision.

This article will survey the problems caused by ERISA's present pre-
eminent provision, focusing on judicial interpretations as well as possible legislative solutions.

I. FEDERAL AND STATE REGULATION: SEEDS OF CONFLICT

A. Federal Regulation Prior to ERISA

Pension and welfare benefit plans are relatively recent developments, first appearing in this country during the nineteenth century. Legislation affecting such plans has generally encouraged their growth. The first law

30. See text accompanying notes 99–282 infra.

32. The first pension plan in the United States was established in 1818 for veterans of the War of 1812. N. Levin, supra note 2, at 13. The first private pension plan was established by the American Express Company in 1875, and the second private pension plan, that of the Baltimore and Ohio Railroad Company, followed in 1880. E. Allen, J. Melone, & J. Rosenbloom, Pension Planning 1 (3d ed. 1976).

Welfare plans developed more informally as employers occasionally paid health and hospital bills for their workers. About 1910, insurance companies started to sell group coverage for life, accident and sickness, and temporary disability. N. Levin, supra note 2, at 15.

Although by 1920 there were almost 250 private pension plans, welfare plans did not begin to mushroom until the 1930's when Blue Cross and Blue Shield were developed. Id. at 14-15.

33. The tax, labor-management and other federal statutes mentioned in this article are discussed at greater length in Landau, Merholtz & Perkins, supra note 5, at 534-48. See also Chadwick & Foster, supra note 17, at 642-668.
dealing with employee benefits, the Revenue Act of 1921,34 provided a tax exemption for earnings and contributions to profit-sharing or stock bonus trusts, encouraging more employers to establish those plans. Favorable tax treatment was extended to contributions to pension funds in 1926.35

Although generous tax laws fostered the growth of private pension plans,36 they also provided fertile ground for corporate abuses.37 Congress reacted to these abuses in 1942 by restricting tax preferences to plans that met statutory standards.38 This measure, while correcting some of the structural inequities in the employee benefit plans, did not treat the serious problems of mismanagement which had developed in the absence of any other state and federal regulation.39 It was not until after World War II that Congress passed the first of three major remedial measures regulating this aspect of pension and welfare plans. The first of these laws, the Labor-Management Relations Act of 1947 (LMRA),40 attempted to eliminate the extortion, bribery and mismanagement plaguing union pension and

34. Revenue Act of 1921, ch. 136, § 219 (f), 42 Stat. 247 (1921) (current version at IRC §§ 402 to 403)
35. Revenue Act of 1926, ch. 27, § 219(f), 44 Stat. 33-34 (1926) (current version at IRC §§ 401 to 402). See J. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX, 1938-1861, 604-05 (1938). Three main tax breaks were given for all such funds until 1942: employers could deduct their contributions when made; income earned on accumulated contributions was exempt from taxation; and employees' tax liability for amounts contributed arose only when the benefits were received after retirement, generally resulting in the application of lower tax rates. Note, supra note 7, at 1051. Regulation of pension plans through the tax laws has been more substantial than has been regulation of other benefit plans. Pfennigstorf & Kimball, supra note 7, at 790 n.12.
36. Note, supra note 7, at 1051. Other factors generating growth of pension and welfare plans include the New Deal's emphasis on social/welfare programs, the passage of Social Security and the wage freeze during World War II which forced employers to seek other fringe benefits. N. LEVIN, supra note 2, at 15. In 1940, assets of pension plans alone totaled $2.4 billion. See note 14 supra.
37. For example, high-ranking corporate officials often set up tax deductible plans for themselves and barred other employees from participation. See 88 CONG. REC. 6378 (1942) (remarks of Rep. Disney).
38. The amendments required employee benefit trusts to either cover at least 70% of all employees with five years of service or cover employees according to classifications which did not discriminate in favor of officers, shareholders, supervisors, or other highly compensated employees. Revenue Act of 1942, ch. 619, § 162(a), 56 Stat. 862 (1942) (current version at I.R.C. § 401). See J. SEIDMAN, supra note 35, at 2099-104.
39. By the mid-1940's welfare and pension plan trusts contained large amounts of unregulated funds, most of which were at least partly controlled by labor unions whose practices were coming under congressional scrutiny. There were no guidelines for establishment and operation of plans administered jointly by management and unions and hence little to prevent employer contributions from becoming disguised payoffs to union officials. Comment, supra note 1, at 636. See Landau, Merholtz & Perkins, supra note 5, at 534-48, for an excellent discussion of pre-ERISA regulation of pensions.
Preemption Under ERISA

welfare funds by strictly controlling their establishment and operation.\textsuperscript{41} Although the LMRA was a significant first step by Congress toward imposing administrative and fiduciary duties upon trustees of welfare and pension funds,\textsuperscript{42} those interested in misusing these funds soon found ways to circumvent the Act and continued to mismanage money intended for the plans' participants and beneficiaries.\textsuperscript{43} In an effort to close those loopholes, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA),\textsuperscript{44} which imposed additional fiduciary requirements on labor union officers and others with access to plan funds or property.\textsuperscript{45}

By this time, approximately 84 million Americans relied on benefits from welfare and pension funds,\textsuperscript{46} and pension abuses became a matter of tremendous concern. Senate investigations of the corrupt practices connected with welfare and pension funds\textsuperscript{47} led to enactment of a third piece of remedial legislation, the Welfare and Pension Plan Disclosure Act of

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\item See Landau, Merholtz & Perkins, supra note 5, at 535-41. Congress became concerned that union officials might convert the already vast resources of welfare and pension plans to their own use rather than for the intended beneficiaries of the trusts. This concern was stimulated by the abuses revealed during the United Mine Workers' strike of 1946 and the resultant federal takeover of the mines. \textit{Id. See also} H. MILLIS & E. BROWN, \textit{FROM THE WAGNER ACT TO TAFT-HARTLEY} 564-66 (1950). The LMRA made it illegal to set up a pension plan administered solely by a union. Union officials could only participate in the management of such funds as members of a board of trustees on which both labor and management are equally represented. Moreover such trust funds could only be established for the exclusive benefit of employees and their dependents. \textit{See} LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5) (1976).
\item Landau, Merholtz, & Perkins, supra note 5, at 541.
\item \textit{Id. Under LMRA, there were no rules or enforcement machinery to guarantee that agreements establishing the plans were sound, fair and equitable, nor was there any assurance that beneficiaries would receive all the benefits to which they were entitled. Pfennigstorf & Kimball, supra note 7, at 791. Other shortcomings of the LMRA are discussed in Landau, Merholtz, & Perkins, supra note 5, at 536-41; and Comment, supra note 1, at 637-39.
\item 29 U.S.C. §§ 401 to 531 (1976).
\item The new act made it a federal offense to deal with union funds in a manner inimical to the interests of union members as a group. \textit{See} 29 U.S.C. § 501 (1976). \textit{See also} Landau, Merholtz, & Perkins, supra note 5, at 541-44.
\item Landau, Merholtz & Perkins, supra note 5, at 544. The federal courts had given impetus to the growth of pension plans in the late forties by ruling that employers must bargain with unions on pensions. Inland Steel v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).
\end{enumerate}
1959 (WPPDA). This Act required disclosure of information relating to employee benefit plan operations to participants and beneficiaries. The WPPDA required plans to submit names and other information regarding plan administrators and trustees to the Department of Labor, and to disclose schedules of benefits, sources of financing, and fiscal management matters. Larger plans had to comply with more extensive requirements, including annual disclosures of assets, salaries paid, employer contributions, as well as liabilities, the number of employees covered, and the amount of benefits paid. In 1962, after the WPPDA's reliance on private enforcement had proven ineffective, Congress amended the Act to authorize the Secretary of Labor to write regulations, conduct inquiries, and seek injunctions against violators.

The LMRA, the LMRDA, and the WPPDA established fiduciary as well as reporting and disclosure standards, thus making it more difficult for individuals to loot welfare and pension funds. The laws were limited in their scope and effectiveness, however, and they did not address all of the problems which afflicted employee benefit plans.

B. State Regulation Prior to ERISA

If pre-ERISA federal regulation of pension and welfare plans was less than satisfactory, state regulation of the field was virtually nonexistent.

51. Id. at § 6, as amended by Pub. L. No. 87-420, § 9(a), 76 Stat. 36 (1962).
53. See Landau, Meholtz & Perkins, supra note 5, at 545-46.
54. Id. at 562. The pre-ERISA laws did not protect participants if they did not receive payment due to underfunding, termination of the plan, or insolvency of the sponsor. Nor did they require any systematic disclosures to participants. See H. Rep. No. 93-533, supra note 16, at 3-5.
55. For more detailed discussions of state regulation in this area, see E. Patterson, supra note 49, at 188-215; Pfennigstorf & Kimball, supra note 7, at 792-96; Goetz, Regulation of Uninsured Employee Welfare Benefit Plans Under State Insurance Laws, 1967 Wis. L.
It was not until 1955 that the public outcry against mismanagement and corruption produced the first state statute expressly regulating the field.\(^{56}\) Within three years, five additional states enacted similar laws.\(^{57}\) State regulatory legislation generally was limited to plans entered into pursuant to collective bargaining agreements\(^{58}\) and any application to plans covering beneficiaries outside the state was restricted.

Direct legislation of pension and welfare plans, however, was not the only approach taken by states to regulate the field. Some states attempted to bring employee benefit plans under existing legislation by characterizing plans as insurers or insurance companies.\(^{59}\) States had special reasons for adopting this approach. Many employers found it cheaper to insure employees through a welfare and pension fund than through traditional insurance policies.\(^{60}\) Accordingly, these self-insurance schemes threatened a major source of state revenue, state insurance premium taxes.\(^{61}\)

In spite of this threat, only a few state insurance commissioners took affirmative regulatory action against employee benefit plans.\(^{62}\) Those who did, however, sometimes took extreme measures. In *State ex rel. Farmer v.*
Monsanto Co., 63 the Missouri Insurance Department sought an injunction against a self-insured plan, 64 alleging that Monsanto was conducting the business of insurance without a license and thus illegally depriving the state of premium taxes. 65 The lower court agreed with state officials and not only enjoined operation of the plan, but also assessed severe penalties against the corporation totalling $185 million. 66 The Supreme Court of Missouri reversed the decision a year later, finding that Monsanto-type plans, which were not marketed commercially, did not constitute an “insurance business” as contemplated by Missouri law. 67 However, the preposterous assessment of penalties by the lower court, as well as the lack of judgment shown by state officials bringing the suit, generated opposition to state regulation and support for federal standards among both labor and management. 68

II. The ERISA Preemption Problem

A. General Preemption Principles

The potential for preemption problems exists whenever the federal government and state governments regulate the same field or enact legislation affecting the same spheres. 69 With the minimal regulation existing prior to ERISA’s passage, preemption of state pension and welfare benefit laws was not a serious problem. 70 Because of its comprehensive nature, how-

63. 517 S.W.2d 129 (Mo. 1974).
64. The plan provided medical, surgical, hospital, and temporary disability benefits. It began in 1964 and was a minimal premium arrangement whereby Monsanto paid all welfare benefits up to a specified amount with the balance insured by a commercial carrier. Between 1964 and 1971, the carrier had paid no benefits, but Monsanto had paid out over $114 million. Comment, supra note 55, at 345.
65. 517 S.W.2d at 130.
66. Pfennigstorf & Kimball, supra note 7, at 796 (citing State v. Monsanto Co., No. 259774 (St. Louis County Cir. Ct. Jan 4, 1973)).
67. 517 S.W.2d at 132-33.
68. See Pfennigstorf & Kimball, supra note 7, at 796. For criticism of the circuit court’s decision, see Comment, supra note 55, at 346-51. The $114 million in benefits paid out by Monsanto may have produced a loss in revenue to Missouri of $2.3 million between 1967 and 1971. See Pfennigstorf & Kimball, supra note 7, at 796 n.49.
69. Preemption problems mainly arise when a state law becomes unenforceable because of a clash with a federal law. Examples include state laws which command conduct prohibited by federal law, and state regulation of a field which Congress has subjected to federal governance. See Hirsch, Toward a New View of Federal Preemption, 1972 U. ILL. L. F. 515, 516.
70. Nevertheless, as soon as the first state statutes regulating pension and welfare plans were passed, the possibility of conflict with federal legislation had been considered. See Pfennigstorf & Kimball, supra note 7, at 793-94. See also Goetz, supra note 55, at 329, 330, 332, 333 (noting potential conflict between state insurance law application and federal remedial legislation).
ever, ERISA impacted on a wide segment of state law, ranging from tax and insurance to trusts and banking, and also including securities and criminal law, thus increasing the likelihood of eventual conflict.

The case law on the subject of preemption employs several conflicting tests to determine if a state law is preempted.\(^7\) The two most commonly-used standards for determining whether a state statute unconstitutionally obstructs "the accomplishment and execution of the full purposes and objectives of an Act of Congress,"\(^7\) and is thereby preempted, are: first, whether the state law conflicts or interferes with the federal law; and second, whether the federal law occupies the field.\(^7\) Under the conflict or interference test, a court construes both the state and federal statutes at issue and then decides whether actual conflict exists.\(^7\) The clearest conflict cases are those in which either the federal law mandates action forbidden by the state law, or the state law calls for action clearly prohibited by federal law.\(^7\) The existence of conflict becomes more difficult to detect, however, as state interference with the federal legislation decreases.\(^7\)

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71. The Supreme Court and scholars alike have recognized the confusion generated by the cases. See Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DEPAUL L. REV. 630, 631-32 (1972). In Hines v. Davidowitz, 312 U.S. 52 (1941), the Court observed:

> This Court, in considering the validity of state laws in light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

312 U.S. at 67. For additional analysis of the preemption issue, see Hirsch, *supra* note 69; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) (noting that the Supreme Court has taken a seemingly ad hoc and unprincipled approach to preemption cases and analyzing the Burger Court approach).


73. Note, *supra* note 71, at 624. See also Hirsch, *supra* note 69, at 526-33. Although Hirsch separates the conflict and interference standard into two distinct categories, he notes that the Supreme Court has used the two tests interchangeably. *Id.* at 528 & n.59.


75. See, e.g., Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954) (federal law permitting national banks to receive "savings deposits" and to advertise for business precluded enforcement of New York law prohibiting banks from using the word "savings" in advertisements because enforcement of the state statute would interfere with the banks' attraction of depositors).

76. See, e.g., Perez v. Campbell, 402 U.S. 637 (1971) (conflict between federal regulation of bankruptcy and state limitations on automobile negligence judgment debtors); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (federal maritime safety requirements and municipal pollution regulation). The most difficult cases are those involving federal and state statutes applying to entirely different subject matter but meeting at a common point. See Note, *supra* note 71, at 626 n.22.
Under the second test for preemption—occupying the field—a court focuses primarily on the scope of the federal law, and looks at the state law only to determine whether it falls within these boundaries.\textsuperscript{77} If a court finds that federal law occupies the field on a given subject, state law regulating that subject will be displaced, regardless of whether the state regulation impairs operation of the federal law.\textsuperscript{78} Occasionally courts begin their analysis in a preemption case without categorizing the case, thereby failing to articulate the standard employed.

Regardless of the test used, however, the Supreme Court has articulated subsidiary guidelines for deciding when state laws should be preempted.\textsuperscript{79} In all cases, the Court looks for evidence of congressional intent to preempt. If the federal statute does not expressly bar state regulation or is silent with respect to preemption, other factors may be examined.\textsuperscript{80} The Court has outlined several methods for ascertaining whether Congress has evinced a "clear" and "manifest" intent to override state law. For example, the scheme of federal regulation may be so pervasive that it would be reasonable to infer Congress left no room for the states to supplement it; likewise, the federal act may touch a field in which federal interest is so dominant that the federal system will be assumed to preclude state enforcement on the same subject. Additionally, the object sought to be obtained by federal law and the nature of the obligations imposed could reveal a purpose to preclude state enforcement on the same subject, or the state policy may produce results which would be inconsistent with the federal objective.\textsuperscript{81}

\textsuperscript{77} Hirsch, \textit{supra} note 69, at 529.
\textsuperscript{78} See, e.g., Campbell v. Hussey, 368 U.S. 297 (1961) (Federal Tobacco Inspection Act preempted state statute requiring type labelling of tobacco held for auction); Hines v. Davidowitz, 312 U.S. 52 (1941) (federal statute requiring registration of resident aliens with federal authorities precluded enforcement of state alien registration law); New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917) (FELA precluded enforcement of nonconflicting state workmen's compensation remedies).
\textsuperscript{80} These factors were articulated in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), in which the court considered amendments to the U.S. Warehouse Act, 7 U.S.C. §§ 241 to 273 (1976). Although the original act made federal regulation of warehouses and warehousemen subservient to state regulation, the amendments called for exclusive federal regulation. 331 U.S. at 222-23, 233. The court stated that when a federal statute is amended to eliminate dual regulation in order to achieve "fair and uniform business practices," the test was whether the matter on which the state asserts the right to act is in any way regulated by the federal act. \textit{Id.} at 236.
\textsuperscript{81} \textit{Id.} at 230. The Court cited Pennsylvania R.R. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919) and Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942) for the first method; Hines v. Davidowitz, 312 U.S. 52 (1941) for the second; several cases, including New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917) for the third; and Hill v. Florida \textit{ex rel.} Watson, 325 U.S. 538 (1945) for the fourth.
Most preemption cases have involved federal statutes with no clear expression of the intent to preempt. Even in cases involving statutes containing express preemption or savings provisions, however, courts still must determine how much state law is to be affected by the specific language.

In deciding preemption cases, the Burger Court has embraced the concept of accommodation and complementary state/federal regulation. At least one observer has suggested that the current Court will permit potentially conflicting state legislation to stand when Congress has not made clear its intent to preempt or when the conflict is peripheral to the purpose of the federal law. Recent decisions support that assessment. In *Jones v. Rath Packing Company*, the Court reiterated the principle that when the field is one traditionally occupied by the states, the courts should assume that those "historic police powers . . . were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Similarly, in *De Canas v. Bica*, the Court asserted that state regulation consistent with federal laws in an area would be permitted unless it could be shown that the "complete ouster of state power was . . . the clear and manifest purpose of Congress."

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83. See Hirsch, supra note 69, at 538-49. It is unrealistic to assume that Congress, in enacting a general preemption or saving clause, actually considered all possible state laws touching on a particular state-regulated field. Therefore, when Congress expresses or implies an intention concerning preemption, the proper application of that intention calls for judicial inquiry into the state laws considered by Congress as grounds for that intention. Id. at 540-41.

84. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 135 (1973) (upholding a state law found to be peripheral to the federal act's main purpose); New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 423 n.29 (1973) (to merit judicial resolution rather than cooperative federal-state resolution, conflicts should be of substance).

85. Note, supra note 71, at 653.


87. Id. at 525 (quoting from Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Accord, Douglas v. Seacoast Prod., Inc., 431 U.S. 265, 272 (1977). In *Jones*, however, the Court found the challenged California weight-labelling statutes preempted by: 1) the express supersession clause of the Wholesome Meat Act since the state laws varied from the federal standard; and 2) the Fair Packaging and Labeling Act, because although the federal act did not expressly supersede the state law, enforcement of the state law interfered with the federal act's purpose. See 430 U.S. at 530, 543.

88. 424 U.S. 351 (1976) (finding no preemption by the Immigration and Nationality Act of that portion of the California Labor Code prohibiting employers from knowingly employing aliens not entitled to lawful residence in the U.S. if such employment would adversely affect lawful resident workers).

89. Id. at 357.
B. **ERISA's Preemption Provisions**

Unlike the many statutes which are silent as to their preemptive effect, ERISA's section 514\(^9\) expressly indicates congressional intent to occupy the employee benefit plan field and thereby displace a large part of state regulation affecting employee benefit plans.

The general preemptive language of section 514(a) provides that ERISA shall supersede "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.\(^9\) State laws regulating insurance, banking and securities are saved from preemption.\(^9\) The savings clause is modified, however, by the so-called "deemer clause" which provides that an employee benefit plan shall not "be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of state laws purporting to regulate insurance companies [or] insurance contracts."\(^9\) For purposes of the general preemption section, ERISA defines state law to include "all laws, decisions, rules, regulations, or other state action having the effect of law."\(^9\) As used in this section, the term "state" includes "a state, any political division thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions" of ERISA-covered plans.\(^9\)

The legislative history of the preemption provision has generated some confusion on the subject. Although congressional remarks generally describe the preemption provisions as sweeping in scope,\(^9\) statements by cer-

\(^9\) The preemption provisions of ERISA are codified at 29 U.S.C. § 1144(a)-(d) (1976). Section 1144(d) provides that ERISA does not supersede federal laws.

\(^9\) Excluded from ERISA coverage are governmental and most church plans, plans maintained solely for the purpose of complying with applicable workmen's compensation laws, unemployment compensation laws or disability insurance laws, plans maintained outside of the U.S. mainly for the benefit of nonresident aliens, and unfunded excess benefit plans. ERISA § 4(b), 29 U.S.C. § 1003(b) (1976).


\(^9\) ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1976). The section also specifies that benefit plans shall not be considered banks or investment companies either.


\(^9\) Congressman Dent noted "the crowning achievement of [ERISA], [is] 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." 120 CONG. REC. 29197 (1974). See also the following remarks of Sen. Williams:

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. Consistent with this principle, State professional associations acting under the guise of
tain members of Congress indicate that there is room for some state regulation which touches upon an employee benefit plan under specific state statutes. Additionally, there is no evidence that Congress considered the full impact of preemption on a variety of state laws which do not directly regulate employee benefit plans, but whose enforcement affects the form, content, or operation of such plans. Hence, although the plain language of the statute indicates congressional intention to occupy the employee benefit plan field, the legislative history of ERISA is not conclusive in discerning the outer limits of that field.

III. ERISA Preemption of State Statutes Impacting on Employee Pension Benefit Plans

A. State Employee Benefit Plan Laws

One of the earliest court decisions interpreting the reach of ERISA's preemption provision was *Azzaro v. Harnett*, a case involving state attempts to regulate pension plans directly. In *Azzaro*, the United States District Court for the Southern District of New York held that ERISA completely occupies or preempts the field of employee benefit plans and therefore prohibits state efforts to supervise them. The state supervision at issue in *Azzaro* consisted of requests for information made by the New York Department of Insurance about the pension benefit status of a pension plan participant. The plaintiffs refused to supply the information, claiming that the state's jurisdiction had been displaced by that of the United States Department of Labor pursuant to ERISA section 514.

State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized—for example, prepaid legal services programs.

97. For example, there are extensive remarks on ERISA's preemptive effect on state bar rules. See text accompanying notes 250-51 infra. These remarks indicate that although state law cannot dictate the form of prepaid legal services plans, states may regulate the conduct of lawyers participating in the plans. However, no guidelines for drawing the line on preemption are provided.

98. An example of such state laws are anti-discrimination statutes. See text accompanying notes 256-82 infra.


100. 414 F. Supp. at 474.

101. Id. at 473. The suit was brought by the trustees of Bakery Drivers Local 802 Pension Fund who sought to enjoin inquiries by the state superintendent of insurance into the present pension benefit status of a plan participant. They also sought a declaration of their rights and obligations with respect to state efforts to supervise their plan. Id.

102. Id. at 473-74. When plaintiffs first challenged the basis of the department's jurisdiction, state officials asserted that there was no supersession under ERISA because most of the participant's pension credits were earned prior to the January 1, 1975, effective date of ER-
Relying on the legislative history of the 1974 Act, the court held that Congress intended to preempt absolutely the employee benefit plan field. The court saw the purpose of this preemption as the uniform regulation of such plans and found that ERISA provides full protection in the area of employee benefit plans. The court narrowly construed the section 514(b)(1) savings clause, in order to avoid creating "a chaotic condition" in the preempted field, thereby violating ERISA's purpose. In this manner, the court limited permissible state regulation to controversies existing prior to ERISA regarding employee benefit plans.

B. Marital Property and Support Laws

Although most of the ERISA preemption litigation since Azzaro has involved welfare plans, an increasing number of cases have focused on state court divorce and support orders relating to pension benefits. States traditionally have exercised control over and provided the primary protection for the family. State statutes determine, for example, the age at

ISA. Plaintiffs contended this reasoning would lead to perpetual control of their plan by the State Insurance Department, resulting in their subjection to concurrent state and federal regulation. Id. at 474.

103. The court cited Senator Williams' introduction to the conference report. See note 96 supra. The court also cited House report language stressing the interstate nature of employee benefit plans. See 414 F. Supp. at 474.

104. 414 F. Supp. at 475. While this may be true of pension plans, it is questionable with respect to employee welfare plans.

105. 414 F. Supp. at 475.

106. Id.

107. See text accompanying notes 136-282 infra.

108. See, e.g., In re Burrus, 136 U.S. 586, 593-94 (1890) in which the Court stated: "The whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States."

It is important to recognize that the Supreme Court generally permits federal preemption of marital property and support laws only if Congress has with "force and clarity" unmistakably ordered state law to yield. See Reppy, supra note 26, at 483. The reluctance of the courts to infer congressional intent to subject such state laws to federal rules can be explained, at least in part, by the fact that there is no developed federal system to fill the void if state law is not applied. Id. at 484. Professor Reppy points out that the absence of a federal marital property law has led the Court to find no preemption even where the state rule directly frustrated a strong federal interest. In United States v. Yazell, 382 U.S. 341 (1966), the federal government sued the wife after a couple had defaulted on a government loan. The wife claimed that under Texas law her power to bind her separate property was limited. Despite the fact that legislation creating the Small Business Administration provided that federal law of capacity to contract was to govern such transactions, the Court upheld the wife's defense. In doing so, the Court held that state family law rules "should be overridden by federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." Id. at 352. See Reppy, supra note 26, at 484-85. In Yazell, the Court found "no 'federal interest' which justifies invading the peculiarly local jurisdiction of these States . . . and of the subtleties reflected by the differences in the laws
which one may marry and the grounds for divorce. The state courts determine how property should be divided when a marriage ends. Until recently, it was rare that the value of a future pension was considered in a divorce settlement.\textsuperscript{109} There is a growing awareness, however, that the pension due the working member of a couple is one of the richest assets a husband and wife possess. In our debt-financed society, the pension is frequently the only significant asset of the family which is not mortgaged.\textsuperscript{110} Accordingly, it has become increasingly common for divorce settlements to allocate a share of the pension to the nonworking spouse.\textsuperscript{111} Courts in two community property states have held already that the spouse of a pension plan participant has a community interest in the payments received upon retirement.\textsuperscript{112} Those states also extended community property status to nonvested pension interests in 1976.\textsuperscript{113}

Most of the litigation concerning ERISA preemption of marital property

of the various states which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes." 382 U.S. at 353. Arguably the federal interest in uniform pension standards embodied in ERISA would justify such an intrusion into an admittedly state domain.

Of particular significance to the issue of preemption of marital property and support laws is the Supreme Court's recent declaration in Jones v. Rath Packing Co., 430 U.S. 519 (1977), that when a federal statute affects an area traditionally regulated by the states, no preemption will be presumed and the burden will be on the party claiming preemption to prove clearly and plainly that Congress intended to preempt. See text accompanying notes 86-87 supra.


110. Pensions Land in Divorce Court, BUS. WEEK, Nov. 7, 1977, at 104. The house, a couple's major asset, is usually subject to a mortgage.

111. Even as recently as five years ago, the value of a future pension was rarely considered in divorce settlements unless one spouse was a high corporate executive with prospects of a six-figure retirement income. Today, however, pensions are routinely considered "as part of the kitty subject to distribution." Id.

112. The two states are Texas and California. The law governing existence of marital property rights in retirement benefits is rapidly developing, especially in community property states. See Taggart v. Taggart, 552 S.W.2d 422, 423 (Tex. 1977); In re Marriage of Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (listing additional cases); French v. French, 17 Cal.2d 775, 112 P.2d 235 (1941) (overruled in Brown). The California Supreme Court upheld a malpractice verdict of $100,000 against a divorce attorney who had failed in 1967-68 to assert community property interests in a military pension on behalf of his client, the wife. Smith v. Lewis, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

In a strong dissent, Judge Clark pointed out the uncertainty of this area of the law in 1967-68. Id. at 369-70, 530 P.2d at 602-06, 118 Cal. Rptr. at 634-35 (1975).

113. See In re Marriage of Brown, 15 Cal.3d 838, 851 n.14, 544 P.2d 561, 569 n.14, 126 Cal. Rptr. 553, 641 n.14 (1976). Accord, Clearly v. Clearly, 544 S.W.2d 661 (Tex. 1976). However, California's "terminable interest rule," which limits the rights of the nonparticipant spouse to pension interest received during the joint lives of the divorcing partners, has been severely criticized and is not followed in other community property states such as Texas and Louisiana. See Fattiz, supra note 26, at 207.
and support laws has centered on two specific provisions of the federal statute: 114 section 206(d)(1), 115 which states that a pension plan “shall provide that benefits provided under the plan may not be assigned or alienated;” and section 514(a), which generally preempts all state laws relating to employee benefit plans, without exempting domestic relations laws. 117 The cases involving these statutory sections emerge from a variety of factual situations and claims for relief. A nonemployee spouse may assert community or common law property rights. The right to support may

114. For detailed discussions of other facets to this problem, see Reppy, supra note 26; Pattiz, supra note 26. Although most of the litigation on this issue has arisen in the community property states of California and Texas, the preemption issue is also a problem in common law property states and involves state support orders as well as orders dividing marital property upon divorce. See, e.g., Cogollos v. Cogollos, 93 Misc. 2d 406, 402 N.Y.S.2d 929 (Sup. Ct. 1978) (involving state order for alimony payments).


116. Anti-assignment or spend-thrift clauses of similar scope are included in laws regulating military benefits, 38 U.S.C. § 3101 (1976), Railroad Retirement benefits, 45 U.S.C. § 231m (Supp. V 1975), and Civil Service benefits, 5 U.S.C. § 8346 (1976). Some state court decisions have held that these clauses do not preempt state law and the argument has been made that the anti-assignment clause in ERISA should have no greater effect. See Reppy, supra note 26, at 516. But see Wissner v. Wissner, 338 U.S. 655 (1950) (provision in National Service Life Insurance Act that proceeds of policy go to named beneficiary preempts community property law entitling spouse to one-half proceeds of policy). Reppy distinguishes the anti-assignment clause involved in Wissner on the basis of its breadth and the fact it was tied to a provision empowering servicemen to name beneficiaries of federally-created National Service Life Insurance (NSLI) Act proceeds. Reppy, supra note 26, at 516 n.350. A recent federal district court decision rejected the distinction between the NSLI and ERISA anti-assignment clauses and relied on Wissner in finding that ERISA prohibits involuntary transfers, including those resulting from California community property laws. See Francis v. United Tech. Corp., 458 F. Supp. 84 (N.D. Cal. 1978). The Supreme Court recently considered the relation between anti-assignment clauses and community property settlements and barred the assignment of Railroad Retirement Act benefits pursuant to a California divorce decree in Hisquierdo v. Hisquierdo, 47 U.S.L.W. 4141 (U.S. Jan. 23, 1979).

117. 29 U.S.C. § 1144 (1976). Among the other sections raising potential preemption problems for marital property and support laws are § 3(6) and (7) of ERISA, which define, respectively, “employee” and “participant” as the person who is working for the employer providing the pension plan, with no reference to the person’s spouse. 29 U.S.C. § 1002(6) & (7) (1976). Only an employee may participate in the qualified plan. Therefore an attempt to enroll the spouse as a participant violates ERISA. In addition § 3(8) of ERISA, defines “beneficiary” as “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” 29 U.S.C. § 1002(8) (1976). ERISA does not mention the extent of benefits the designee may receive or the circumstances under which he or she is entitled to benefits. Commentators have taken the view that since ERISA is silent on the extent to which a beneficiary may take under the plan, there is no term or condition of an ERISA-covered plan with which a state law on the subject can conflict. See Reppy, supra note 26, at 517-527. See also Comment, The Relationship of Community Property and Forced Heirship to Employee Retirement Plans, 51 Tul. L. Rev. 645, 645-68 (1977).
be asserted by a nonemployee spouse or other dependent. The plan participant may be currently employed, retired or deceased. The employee spouse's interest may be vested or forfeitable, or may be in pay status or a future expectancy. Suit may be filed against the plan, employer, union, insurance carrier, or plan administrator. In each case, however, a court order must be sought requiring the plan or the other defendant to pay benefits directly to the nonemployee spouse or other dependent in satisfaction of that individual's right to family support or marital property.

Questions have therefore arisen concerning the state courts' authority to order direct payment of plan benefits to the participant's former spouse or other dependents upon divorce, and whether payments made by a trustee pursuant to a state court decree would either breach a fiduciary obligation, or cause the plan to lose its tax-exempt status. Alternatively, should a trustee fail to make the payment, arguably such an action could be in contempt of court.

In view of the competing interests, it would be easy to envision a split between state and federal courts on the preemption issue. State courts would be expected to uphold local court divisions of property despite ERISA, and federal courts would be presumed to uphold preemption of these same state actions. State courts have fulfilled this expectation, but the federal courts that have considered the issue have not ruled uniformly. A

118. The anti-alienation requirement is a condition of tax qualification under I.R.C. § 401(a)(13). Several consequences flow from a plan's loss of qualified tax exempt status: (1) contributions made under I.R.C. § 404 would no longer be deductible by the employer; (2) any earnings of the plan's trust would be taxable immediately to the trust; and, (3) of more immediate consequence to the plan participant, all employer contributions to the plan would be taxable to the participant as wages. Brief for Defendant in Support of Motion for Summary Judgment, at 19, Francis v. United Tech. Corp., 458 F. Supp. 84 (N.D. Cal. 1978).

119. The state courts have uniformly found ERISA no bar to their direction that a pension plan pay benefits to the nonemployee spouse. See, e.g., Cogollos v. Cogollos, 93 Misc. 2d 406, 402 N.Y.S.2d 929 (Sup. Ct. 1978) (ERISA anti-assignment section does not bar wife as an alimony creditor). The Cogollos court directed the National Maritime Union to deduct $100 per month from the pension due a husband who had defaulted on his support payments. The pension plan sought reargument to consider the effect of ERISA on the ruling, maintaining that compliance with the court's order might constitute an assignment or alienation in violation of the federal act and thus subject the plan to possible loss of its tax exempt status. Relying on state precedent rejecting a similar argument with regard to the New York pension statute, N.Y. RETIRE. & SOC. SEC. LAW § 110 (McKinney 1971), the court refused to hold that ERISA protects a spouse from his or her familial support obligations. There being no conflict between state and federal law the court found no preemption of the support decree by ERISA. Other state cases upholding enforcement of support judgments against an employee's pension benefits or direct deduction of support payments from such benefits include Johnston v. Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978) (distribution of community property); Biles v. Biles, 394 A.2d 153 (N.J. Super. Ct. Ch. Div. 1978) (enforcement of alimony order); Wanamaker v. Wanamaker, 93 Misc.2d 764, 401 N.Y.S.2d 702 (Sup. Ct. 1978).
A federal case typifying a broad preemptive approach is *Kerbow v. Kerbow*, in which the employer, General Motors Corp., had refused to honor the judgment of the state domestic relations court and did not pay or withhold for the plaintiff-spouses any of the employee-spouses' accrued pension payments. The case had been removed to federal court but was remanded because the district court found that it lacked jurisdiction over the claim. In reaching this conclusion, the court held that plaintiffs, who were nonemployee spouses, were neither participants nor beneficiaries entitled to bring suit under ERISA, and that the state divorce decree did not alter the terms of the plan to make plaintiffs beneficiaries, but merely gave them a right to any money their defendant husbands might receive from the plan. The court declared that Congress intended ERISA "to supersede any and all state laws regulating employee benefit plans," so that any cause of action against the corporation under the terms of the pension plan would be barred by the federal court decision.

In *Stone v. Stone*, however, a federal district court presented with a similar fact pattern reached the opposite conclusion on the issue of preemption. Considering the same jurisdictional question at issue in *Kerbow*, the court stated that a nonemployee spouse with a colorable interest in pension plan benefits must be able to sue the plan to enforce that interest in order to prevent the loss of a remedy for any wrongful failure by plan

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121. *Id.* at 1259.
122. *Id.* at 1260. *See also* General Motors Corp. v. Townsend, No. 6-72159, slip op. at 6 (E.D. Mich. Dec. 16, 1976). In *Townsend*, the court granted plaintiff's request for a permanent injunction against a divorce court's writ of garnishment of a pension plan because the state garnishment law conflicted with and was preempted by ERISA's restriction on alienation and assignment of benefits. *See* ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1976). The court refused, however, to find the state law superseded under § 514(a).
123. 450 F. Supp. 919 (N.D. Cal. 1978), *appeal docketed*, No. 78-2313 (9th Cir. June 21, 1978). In *Stone*, a California divorce decree had awarded the nonemployee wife direct payment of a share of her former husband's pension. The pension plan filed a petition for removal; the parties subsequently filed cross-motions for summary judgment, and the federal district court granted judgment against the plan, remanding the wife's action against her husband to state court. 450 F. Supp. at 920.

The court in *Stone* declined to follow the holding of the earlier decision of *In re Marriage of Pardee*, 408 F. Supp. 66 (C.D. Cal. 1976), in which another federal court had taken a less well-reasoned and stronger stand against preemption of community property laws by ERISA. In *Pardee*, Judge Ferguson expressed doubt that ERISA supersedes community property laws, warning that if courts find such preemptive intent in ERISA "the federal judiciary will have been granted a roving commission to delineate family property law with little assistance from the Congress as to how to proceed." *Id.* at 669. Concluding that there was no separate and independent cause of action upon which to base federal jurisdiction, Judge Ferguson declined to decide "[w]hether the Congress has introduced such a system of legalized chaos" into an area "so traditionally the preserve of the states." *Id.*
trustees to pay benefits.\textsuperscript{124} In its analysis, the court weighed the two preemption theories under which ERISA might invalidate a state divorce decree. First, it considered the decree's conflict with the anti-reassignment and anti-alienability provisions of section 206(d)(1).\textsuperscript{125} Emphasizing the traditional state dominion over domestic relations law, the court cited examples of judicial reluctance to intervene in this area.\textsuperscript{126} Finding that section 206(d)(1) neither explicitly prohibited transferring pension benefits under state community property laws nor prevented the inclusion of such a transfer in the plain meaning of "assignment" and "alienation," the court turned to policy considerations. It compared the interest in benefits of the nonemployee spouse under community property laws with the interests of other parties such as business creditors, and it held payment of plan benefits to the nonemployee spouse consistent with the purposes of section 206(d)(1) since families of employees were included in the class protected by the statute.\textsuperscript{127} That factor, according to the court, distinguished community property claims of nonemployee spouses from claims of business creditors who were excluded from the family unit protected by ERISA.\textsuperscript{128}

\textsuperscript{124} Stone v. Stone, 450 F. Supp. 919, 922 (N.D. Cal. 1978), \textit{appeal docketed}, No. 78-2313 (9th Cir. June 21, 1978). The court felt that conditioning the nonemployee spouse's right to sue on the reason for the plan's failure to pay had several negative effects, including the court's inability to determine federal jurisdictional questions based on the complaint and the nonemployee spouse's dependency on the willingness of her/his spouse to sue the plan or trustees on his/her behalf. \textit{Id.}


\textsuperscript{126} Stone v. Stone, 450 F. Supp. 919, 924 (N.D. Cal.), \textit{appeal docketed}, No. 78-2313 (9th Cir. June 21, 1978). Judge Renfrew relied heavily on Jones v. Rath Packing Co., 430 U.S. 519 (1977) (preemptive intent must be clear and manifest), and the federal policy of noninterference with the traditional state domain of domestic relations law. He rejected the significance of characterizing the nonemployee spouse's claim as an ownership or creditor interest. See \textit{450 F. Supp.} at 924.

\textsuperscript{127} 450 F. Supp. at 925-26. It has been argued, however, that the equities are not so heavily on the side of those against preemption of community property laws. With respect to ERISA's prohibition against assignment or alienation, it is only a court order requiring direct payment of benefits from the benefit plan to the participant's former spouse that conflicts with ERISA's explicit terms and is preempted by § 514(a). ERISA does not inhibit the courts in making any other equitable division of community property, including, for example, ordering the employee spouse to pay one-half the pension benefits to his or her spouse upon receipt. See \textit{Brief of Defendant in Support of Motion for Summary Judgment} at 7, Francis v. United Technologies Corp., 458 F. Supp. 84 (N.D. Cal. 1978). In granting the motion, Judge Poole disagreed with \textit{Stone}'s analysis of legislative intent concerning ERISA's preemptive effect. He found no exception to ERISA's anti-assignment clause for community property laws. Francis v. United Technologies Corp., slip op. at 3-4.

\textsuperscript{128} Stone v. Stone, 450 F. Supp. 919, 927 (N.D. Cal.), \textit{appeal docketed}, No. 78-2313 (9th Cir. June 21, 1978). According to Judge Renfrew, business creditors also, unlike the nonemployee spouse, have only themselves to blame for not thoroughly investigating the debtor's assets before extending credit to one whose interest in an employee benefit plan has been put beyond their reach. \textit{Id.} See also Cody v. Riecker, 454 F. Supp. 22, 24 (E.D.N.Y.)
Turning to the second and more general preemption theory based on the language of section 514(a), the court concluded that, despite its broad preemptive effect, the law was not designed to preempt "any state law with even the most tangential relation to ERISA."  

In the court's analysis, community property laws came within the narrow category of laws affecting employee benefit laws but remained outside the ambit of section 514(a).  

Thus, although the court found congressional intent to occupy the field under ERISA, it also found community property laws beyond the occupied field.  

In thereby deferring to the state's role in domestic relations law, Stone follows Jones v. Rath Packing Co. and other recent accommodation cases.  

The Department of Labor filed an amicus brief in the appeal of Stone, arguing that the "implied exception" under section 206(d) applies to


130. As the author of the decisions in Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1978), appeal docketed, No. 78-1095 (9th Cir. Jan. 16, 1978) and Hewlett-Packard v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir. 1978), cert. denied, 99 S. Ct. 108 (1978) (both finding broad preemption under ERISA, see text accompanying notes 144-51 and 214-24 infra), Judge Renfrew was constrained to distinguish his opinion that ERISA preempts Hawaii's Prepaid Health Care Act. Besides the distinction he found as to the persons protected under the challenged statute, Renfrew found significant the fact that state regulation of benefit plans is far less established than is state control of community property. Stone v. Stone, 450 F. Supp. 919, 932 (N.D. Cal. 1978), appeal docketed, No. 78-2313 (9th Cir. June 21, 1978).  


132. 450 F. Supp. at 932. See text accompanying notes 86-89 supra.  

133. The notion of an "implied exception" to ERISA's section 206(d) anti-assignment and alienation provision had been put forth by the government in an earlier case involving compliance with a state court family support order. See Brief for the United States as Amicus Curiae at 4-10, Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978). In Cartledge, the Department of Justice argued that pension plans must comply with familial support orders because Congress intended an implied exception to the anti-alienation provision for such orders. Id.  

Lawyers for plan administrators and other interested parties were quick to point out the inconsistency between the government's position as articulated by the Department of Justice in Cartledge and positions taken by IRS on the issue. IRS had issued a general information letter to Union Carbide indicating that a plan which honors a state court order in a marital dispute could lose its tax qualification status. See Memo to the File, Treatment of Marital
Preemption Under ERISA

Although the government's Stone brief supported affirmance of the lower court decision, it urged the Ninth Circuit to clarify that the exception is limited to enforcement of state decrees ordering payment of benefits based on community property claims to the spouse or former spouse of a participant whose pension is in pay status.

IV. ERISA Preemption of State Statutes Impacting on Employee Welfare Benefit Plans

A. State Regulation of Health Care

1. The Insurance Exception Cases

ERISA provides an exception from its general preemption rule for state statutes regulating insurance. The scope of this saving clause is limited,


134. See Brief of the Secretary of Labor, BNA PENSION REP., Jan 8, 1979, at R-8. Interestingly, one or two months earlier, Department of Labor officials had indicated that there were serious questions whether the analysis used by the federal agencies in Cartledge, which involved a common law family support order, would be applicable in an action based upon a community property law. See BNA PENSION REP., Nov. 6, 1978, at A-25.

135. Brief of the Secretary of Labor, BNA PENSION REP., Jan, 8, 1979, at R-14. In Cartledge, the pension benefits were also in pay status. In most cases, benefits have not yet reached pay status. See Memo to File, supra note 133, at 4.

136. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A)(1976). Section 514(b)(2)(A) provides that state insurance laws shall not be preempted but does not say what constitutes a law which regulates insurance. See 29 U.S.C. § 1144(b)(2)(A) (1976). Although definitions of insurance have been advanced, writers in the field have not been able to agree upon a single definition. See Brummond, supra note 20, at 68-69. 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 (insurance or otherwise). See Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir.), cert. denied, 99 S. Ct. 108 (1978); Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316 (N.D. Ind.), aff'd as modified, 567 F.2d 692 (7th Cir. 1977); Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977).

In the Brummond article, supra note 20, the author delineated five types of state statutes with at least some insurance aspects. These categories are: (1) employee benefit plan legislation establishing registration requirements, reporting and disclosure guidelines, and fiduciary standards; (2) legislation regulating self-insured employee benefit plans; (3) legislation

state community property orders as well as familial support orders.
however, in that ERISA-covered employee benefits plans or any trust arising under them are neither "deemed" to be an insurance company or other insurer, nor are they considered to be engaged in the business of insurance for purposes of any state law purporting to regulate insurance companies or insurance contracts. Only plans established primarily for the purpose of providing death benefits are specifically excluded from this so-called deemer clause.138

Courts have differed in their interpretations of the saving and deemer clauses. Some courts have expansively construed the deemer clause, thereby reducing the scope of the saving clause and expanding the reach of federal preemption. These cases have determined that when the plan or entity at issue qualifies as an employee benefit plan, the state insurance statute is inapplicable since the plan can not be "deemed" insurance within the scope of such a statute. Other courts have narrowly construed the deemer clause so as to give the saving clause greater effect. Regardless of the approach, the cases consider state statutes which either provide for health care services directly or do so indirectly through insurance or insurance-type arrangements. Additionally, several decisions focus upon the application of state insurance statutes to uninsured multiple employer wel-

regulating group insurance arrangements, including regulation of the group insurer (solvency, ability to pay claims, competency of management), regulation of certain aspects of transacting the group insurance business (claim handling, reasonable rates, mass marketing requirements), and regulation of the content of group policies; (4) legislation regulating pre-paid professional service plans including health maintenance organizations, dental service corporations and prepaid legal service plans; and (5) legislation imposing a tax on group insurance or Blue Cross/Blue Shield premiums as well as on self-insured employee benefit plans. Brummond, supra note 20, at 97-111. Brummond predicted that direct employee benefit plan regulation (category 1) would be the most likely to be preempted and that provisions on pre-paid professional plan legislation (category 4) and group insurance legislation (category 3) dealing with the regulation of the insurer or the organization would least likely be preempted. See id. at 111-113.

138. Id.


A case typifying the expansive approach is \textit{Hewlett-Packard Co. v. Barnes}.\footnote{144}{Hewlett-Packard Co., Standard Oil Co., and Wells Fargo sponsored plans which reimbursed employees for 80\% or more of certain health care expenses. The Pacific Lumber Company Employee Benefits Organization, a nonprofit Delaware corporation maintained similar benefit plans for the employees of the Pacific Lumber Company, another plaintiff in the case. The Joint Benefit Trust and the Drug Benefit Fund, jointly administered health and welfare trust funds, offered comparable coverage for employees of the drug and canning industries. The Joint Benefit Trust offered as alternatives to the self-funded indemnity plans, the option of participating in Kaiser Health Plan, Inc., and in a prepaid dental plan arranged with contracting doctors. 425 F. Supp. at 1295. Judge Renfrew did not discuss extensively why the plaintiff's plans were considered to be employee benefit plans.}

\footnote{145}{The \textit{Knox-Keene Act}, \textit{Cal. Health & Safety Code} §§ 1340 to 1345 (West Cum. Supp. 1971-77), which became effective July 1, 1976, regulates the delivery of health care services to California residents who participate in "health care service plans." Section 1345 defines a health care service plan as:

\begin{quote}
any person who undertakes to arrange for the provision of health care services to subscribers and enrollees, or to pay for or to reimburse any part of the cost for such services, in return for a prepaid or periodic charge paid by or on behalf of such subscribers or enrollees, and who does not substantially indemnify subscribers or enrollees for the cost of provided services.
\end{quote}

\textit{Id. at § 1345(f)}.}

Section 1342 indicates that the Knox-Keene Act was intended to promote the delivery of low cost, quality health care through financially sound plans to participants well informed about the benefits of various available plans. \textit{Id. at § 1342}. In the words of the court:

\begin{quote}
[Knox-Keene] regulates such areas as funding, disclosure, sales practices, and quality of services, and requires that any such plan be licensed by the state Commissioner of Corporations. Although primarily concerned with entities, plans or contracts which directly deliver health care services, the statute seeks to regulate as well those which provide insurance-type coverage, including self-funded plans
\end{quote}


\footnote{146}{425 F. Supp. at 1300.}
the extent that it regulated ERISA-covered employee benefit plans. The court reasoned that each of the plaintiffs' health care plans qualified as an employee welfare benefit plan, and that ERISA's section 514(a) clearly expressed congressional intent to preempt state statutes like Knox-Keene to the extent they regulated employee benefit plans covered by ERISA. The court observed:

The fact that the state considers employee benefit plans to be a unique variety of insurance arrangement, and subjects them to specialized regulation under Knox-Keene rather than generalized regulation under the entire panoply of law addressed to traditional insurers, makes no difference under ERISA. In seeking to regulate plaintiffs' plans pursuant to Knox-Keene under the theory that the statute applies to and that such plans constitute "insurance," defendant contravenes the clear intent of Section 514(a) and (b) of ERISA that employee benefit plans, so dubbed

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147. Such employee benefit plans would be those "established or maintained [1] by any employer engaged in commerce or in any industry or activity affecting commerce or [2] by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce or [3] by both." ERISA § 3(a), 29 U.S.C. § 1003(a) (1976).

The Ninth Circuit affirmed on the grounds relied upon by the lower court. See Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir.), cert. denied, 99 S. Ct. 108 (1978). With minimal discussion, the Ninth Circuit affirmed the district court's rejection of appellant's contentions that: (1) § 514(a) ERISA was not intended to preempt Knox-Keene; (2) that Knox-Keene is a state insurance law exempted by § 514(b) from ERISA's otherwise broad preemption; and (3) that ERISA is unconstitutional if construed to preempt Knox-Keene. 571 F.2d at 503-04 (footnotes omitted). In making the last contention, the appellant argued that full federal preemption is unconstitutional because the Tenth Amendment precludes such a broad substitution of national for local regulation. The court's constitutional analysis in Hewlett-Packard as well as constitutional discussions in other cases will not be discussed because the focus of this article is statutory construction.


149. 425 F. Supp. at 1297. The court found that congressional intent to occupy the field could not have been expressed more precisely. Id. Even though Judge Renfrew analyzed the legislative history of § 514(a), he alternatively relied on the "plain meaning" rule of statutory construction which precludes inquiry into the legislative history if the statutory language unequivocally expresses its meaning. See United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940). Because the Supreme Court in Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976), had expressed dissatisfaction with the "plain-meaning" rule, the Ninth Circuit on appeal looked exclusively to Judge Renfrew's examination of the legislative history. Hewlett-Packard Co. v. Barnes, 571 F.2d 502, 504 n.4 (9th Cir.), cert. denied, 99 S. Ct. 108 (1978). See notes 96-97 and accompanying text, supra, for a discussion of the legislative history of § 514.
or under any other name, be free of state regulation.\textsuperscript{150} The court thus interpreted the deemer clause so broadly as to preempt the state insurance statute anytime it related to an ERISA-covered employee benefit plan. Accordingly, the \textit{Hewlett-Packard} test for determining whether a state statute is preempted turns on whether the plan regulated by state statute is an employee benefit plan under ERISA.\textsuperscript{151}

In \textit{Wayne Chemical, Inc. v. Columbus Agency Service Corp.},\textsuperscript{152} the Seventh Circuit adopted the analytical approach of \textit{Hewlett-Packard} in applying the definition of employee benefit plan. The case involved a suit by a plan beneficiary who had suffered serious physical injuries when he was eighteen years old. The youth filed a claim under a group medical insurance policy purchased by his father's employer.\textsuperscript{153} Just before the accident, however, the employer's insurance agency had changed carriers from a conventional insurance company to a purported multiple employer welfare trust.\textsuperscript{154} Under the new policy and contrary to Indiana law,\textsuperscript{155} plaintiff's benefits would have ended on his twentieth birthday. The key question became whether state statutory provisions favorable to the plaintiff were preempted by ERISA.

Taking an expansive view of the deemer clause similar to that in \textit{Hewlett-Packard},\textsuperscript{156} the district court held that since the plan in question was

\textsuperscript{150} 571 F.2d at 504.

\textsuperscript{151} Judge Renfrew did not go into great detail in analyzing whether the plaintiffs' plans were employee benefit plans. Such detail was absent not because the determination is unimportant, but rather because such plans were clearly employee benefit plans. Contrast this situation with the facts, for example, of Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977), and Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977).

\textsuperscript{152} 567 F.2d 692 (7th Cir.), modifying 426 F. Supp. 316 (N.D. Ind. 1977).

\textsuperscript{153} 567 F.2d at 693.

\textsuperscript{154} \textit{Id.} at 694. Wayne Chemical, Inc. had purchased group medical insurance coverage for several of its employees and their families from Columbus Agency Service Corp. (CASCO). CASCO is an insurance and health plan brokerage company which acts as agent for entities such as Association Life Insurance Company, the conventional insurer, and National Multiple Employers Foundation (NMEF), the purported trust.

CASCOr placed the insurance with Association Life until, in July 1, 1975, coverage was changed to NMEF. Although CASCO informed Wayne that a new carrier would continue coverage, Wayne was not advised of the identity of the new carrier or of any adverse change in the terms of coverage until months after the changeover. \textit{Id.} at 694-95.

\textsuperscript{155} Under IND. CODE § 27-8-5-10(B)(4) (Burns 1975), group health insurance coverage of an employee's dependent may not terminate on attainment of a limiting age if that dependent is disabled when he reaches the limiting age.

\textsuperscript{156} Chief Judge Eschbach stated that courts should be spared the task of deciding which state laws governing an employee benefit plan may be enforced concurrently with federal law. The preemption question, he said, should be resolved simply by determining whether the plan involved is an ERISA-covered plan. Since the judge concluded the benefit plan was a covered plan, he found that no state law could govern any aspect of the plan. 426 F. Supp. at 321.
an ERISA-covered employee benefit plan, the pertinent Indiana law on insurance was not applicable. Nevertheless, the court granted relief to the plaintiff by holding that federal common law governing employee benefit plans did not permit the termination of the plaintiff's insurance benefits.

On appeal, the Seventh Circuit Court of Appeals affirmed the lower court's order, but on different grounds. In the Seventh Circuit's view, if the employer were a participant in an ERISA-covered employee benefit plan issuing the insurance in question, then the state laws relating to that plan would be preempted. The court, however, found no indication in the record that any plan or trust was ever involved in the transactions between the employer and the insurance agency or the multiple employer welfare arrangement. Moreover, even assuming that the alleged welfare arrangement was the insurer and was maintained by some employers, ERISA preemption was inapplicable because the employer was not a plan participant. The Seventh Circuit additionally observed that ERISA's

157. Wayne Chem., Inc. v. Columbus Agency Service Corp., 426 F. Supp. 316, 320, 321 (N.D. Ind.), modified, 567 F.2d 692 (7th Cir. 1977). The district court did not clarify what the "plan in question here" was. Arguably, it could have been the National Multiple Employers Foundation Plan, the CASCO Insurance Trust, or Wayne Chemical's health insurance program for its employees. The Seventh Circuit interpreted the phrase to refer to the NMEF Plan. See 567 F.2d at 698.

158. 426 F. Supp. at 322-326. In concluding that Congress has invested the courts with a duty to create law governing aspects of employee benefit plans not specifically regulated by ERISA, the district court cited the House Conference Report on ERISA, a statement by Senator Javits on the ERISA conference report, and the ERISA statutory scheme itself. Id. at 321, 322.

159. Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692, 698 (7th Cir. 1977). The appellant-insurance agency argued that the NMEF Plan was an employee benefit plan and that the employer had participated in the plan. Id. at 698. See Brummond, The Legal Status of Uninsured Noncollectively-Bargained Multiple-Employer Welfare Trusts Under ERISA and State Insurance Laws, 28 SYRACUSE L. REV. 701, 717 (1977). Based on the facts of the case, however, the court concluded that the NMEF plan was not an employee benefit plan. It did not analyze in detail the nature of the multiple employer welfare arrangement.

The NMEF Plan presumably was the unsigned "National Multiple Employers Foundation Plan and Trust Agreement" reproduced in the opinion and which provided the new health coverage when the first insurer was dropped. This "Trust Agreement," which had never been seen by the employer or the other plaintiffs until after the suit commenced, purported to establish a fund which was intended to comply with ERISA, although the provisions of the plans were not set forth. 567 F.2d at 696-98.

160. 567 F.2d at 698-99.

161. Id. at 699. Wayne Chemical had no knowledge of the plant's existence until long after the date the new insurance allegedly was obtained by the agency, and the company never entered into an agreement to establish a plan. The court noted that:

An employer does not become a participant in, or establish or maintain, a plan by applying for insurance and paying premiums for what it understands to be insurance without any knowledge that the plan exists. Establishing, maintaining, or
preemption of state insurance statutes relating to employee benefit plans extends to insurance statutes which directly affect such plans but not to statutes which affect the insurer or a policy purchased by a plan from an insurer.\textsuperscript{162}

Other cases broadly construing the deemer clause have involved multiple employer trusts (METs) established by independent parties to provide welfare benefit programs to employees of small employers. METs have had significant appeal to employers with ten or fewer employees who frequently have difficulty in finding an insurance company willing to provide group health insurance or other types of benefits at an economically viable cost.\textsuperscript{163} Although MET assets can be used to purchase insurance policies for covered employees,\textsuperscript{164} some METs only pay benefits out of trust assets generated by employer contributions.\textsuperscript{165}

MET-type arrangements are used in a variety of situations. Although jointly-administered Taft-Hartley welfare plans are not considered METs, METs may be collectively bargained or noncollectively bargained.\textsuperscript{166} Entities described as METs have sold memberships directly to employees without involving employers.\textsuperscript{167} Common usage of the term "MET" has extended its scope to multiple employer welfare arrangements which involve entities other than trusts, such as unincorporated associations.\textsuperscript{168}

The financial failure of certain large METs\textsuperscript{169} as well as their potential participating in a plan requires an intent, which presupposes an awareness of the existence of the plan. Wayne was therefore not among the 'participants' in the NMEF plan, if indeed there were any.

\textit{Id.}


163. \textit{See} Brummond, \textit{supra} note 159, at 702.

164. \textit{Id.} at 700.


169. On February 2, 1977, a California-based MET, the National Multiple Employers' Foundation, filed a petition in bankruptcy. Two months later, the Hospital Welfare Association Trust, another California-based MET, filed an action alleging it was insolvent and requesting the appointment of a federal receiver. Brummond, \textit{supra} note 159, at 717. National Multiple Employers' Foundation was also the trust involved in Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977). It is estimated that three million people are currently receiving welfare benefits from uninsured METs. The number of uninsured METs that have become insolvent is substantial, and the effects on individuals
for deception and abuse\textsuperscript{170} have led state insurance commissioners to attempt to regulate these entities.\textsuperscript{171} These attempts have raised the question of whether ERISA preempts the application of state insurance statutes to METs.\textsuperscript{172}

\textit{Bell v. Employee Security Benefit Association}\textsuperscript{173} is a representative case. In \textit{Bell}, the Kansas district court found first that ERISA occupied the entire field of employee benefit plans.\textsuperscript{174} However, it went on to hold that Kansas' insurance law was not preempted by ERISA as it applied to the defendant's health care program. In reaching this conclusion, the court took a broad view of the deemer clause\textsuperscript{175} and, as in \textit{Hewlett-Packard},\textsuperscript{176} focused on whether the health care arrangement in question was an ERISA-covered employee benefit plan.\textsuperscript{177} The defendant, Employee Security Benefit Association (ESBA), an unincorporated association, offered what it termed a "Major Medical Expense and Graded Death Benefit Plan who have lost promised benefits are dramatic. See 1978 Oversight Hearings, supra note 27, at 658-60 (statement of NAIC).

\begin{itemize}
\item \textsuperscript{170} \textit{Id.} at 715-717.
\item \textsuperscript{171} \textit{Id.} at 704.
\item The Department of Labor helped somewhat to answer the preemption question involving uninsured multiple employer welfare arrangements in its amicus curiae brief for Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977), reprinted in BNA \textit{PENSION REP.}, Aug. 15, 1978, at R-1. Ian Lanoff, Administrator of Pension and Welfare Benefit Programs at the Labor Department, has represented the Department's view to be that any diversion of plan assets to pay commissions to persons soliciting new employers or employees by a welfare or pension plan covered by ERISA would be improper. BNA \textit{PENSION REP.}, July, 7 1977, at A-20. Additionally, according to Administrator Lanoff, the Department has concluded that the activities of brokers or agents who solicit new employers and employees for METs are not preempted from state regulatory authority by ERISA. \textit{Id.} at A-21. Moreover, an agent selling to a nonparticipating employer or employee is subject to state authority even if the MET involved would be legally considered an employee benefit plan. \textit{Id.}
\item \textsuperscript{173} 437 F. Supp. 382 (D. Kan. 1977).
\item \textsuperscript{174} \textit{Id.} at 385-88.
\item \textsuperscript{175} \textit{Id.} The court stated:
\begin{quote}
In light of this legislative 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 to § 1144. See Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. 921 (D. Minn. 1976); Dawson v. Whaland, No. 76-266 (D.N.H. 1976).
\end{quote}
\item Rather, we subscribe to the view announced by the court in \textit{Hewlett-Packard Co. v. Barnes}, 425 F. Supp. 1294, 1300 (N.D. Cal. 1977).
\item \textsuperscript{176} 437 F. Supp. at 387.
\item \textsuperscript{177} \textit{See} text accompanying notes 144-51 \textit{supra}.\end{itemize}
for Members and Members' Families." ESBA referred to its program as a "Self-funded, Self-adjusting Employee Benefit Plan" established under ERISA and marketed the plan directly to employees through insurance agents.

Finding that most employee benefit plans meet standard definitions of insurance, the court isolated five pre-ERISA characteristics of employee benefit plans which the ESBA program did not have. The court also examined the ERISA definition of an employee benefit plan and found that the defendant's program did not come within its limits. In terms of the statute, ESBA was not an "employer," since it did not employ the members of the ESBA program and did not act directly or indirectly for the employers of the ESBA members.

The court did, however, experience some difficulty in deciding whether ESBA was an "employee organization," maintaining a benefit plan for its members. An "employee organization" is generally any labor union or employee representation committee in which employees participate and which exists for the purpose of dealing with employees concerning an employee benefit plan. An "employee organization" also includes any "employees' beneficiary association" organized for the purpose of establishing a plan. With respect to the first element of the definition, the court concluded that ESBA was not a labor union but rather was a third party entrepreneur which did not exist for the purpose of dealing with employees concerning an employee benefit plan. Relying heavily upon the

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178. Id. at 384.
179. Id. D.M.A., Inc., an agency organized by two of ESBA's officers, marketed the ESBA program for a fee based upon member contributions, and Benefit Services Corporation, which was organized by individuals having substantial ties to ESBA, provided administrative services for a contribution-based fee. Id. at 384-85.
180. Id. at 391-92. The court stated:

Clearly, the [employee benefit plan] concept as it existed when Congress passed the preemption provisions of ERISA involved the following characteristics: (1) [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.
181. See note 6 supra.
182. 437 F. Supp. at 392.
183. Id. at 393.
Labor Department's amicus curiae brief, the court dealt with the second element by stating that an essential ingredient of an "employees' beneficiary association" is a commonality of interests among its employee members and that this commonality was lacking in the ESBA program.

b. Cases Narrowly Construing the Deemer Clause

In contrast to decisions broadly construing the deemer clause, courts reading its language more narrowly have held challenged state statutes to be within the saving clause, thereby precluding preemption. In Wadsworth v. Whaland, the United States District Court for New Hampshire held that ERISA did not preempt a New Hampshire insurance statute requiring insurers to provide coverage for treatment of mental illnesses and emotional disorders in group health policies. With one exception, all of the plaintiffs were administrators of collectively bargained health and welfare funds. Approximately ninety percent of the benefits paid by the plans were provided through group insurance policies purchased with trust funds. The district court refused to hold that the New Hampshire insurance statute which directly regulated group insurance policies and

188. The Secretary of Labor argued that ESBA was not an employee welfare benefit plan under Section 3(1) of ERISA. ESBA did not claim to be a labor union, and because in ESBA there is little or no employee participation and no dealing with employers, the government concluded that ESBA was not an employee representation committee. The Secretary also contended that ESBA was not an employees' beneficiary association because the members did not share a commonality of interest with respect to their employment relationships. See Brief for Dep't of Labor as Amicus Curiae, Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977), reprinted in BNA PENSION REP., Aug. 15, 1977, at R-1.

189. Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382, 394-96 (D. Kan. 1977). Finding little help in the statutory description of employees' beneficiary association or the definition of an employee benefit plan, the court drew upon prior definitions of the term "'employees' beneficiary association" which were developed under the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed by ERISA), and I.R.C. § 501(c)(9). The court found that the definitions under these two statutes embodied the concept of commonality of interests among employees. Id. at 395, 396.

Section 201(b)(1) of the Williams-Javits ERISA Improvements Act of 1978, S. 3017, 95th Cong., 2d Sess. (1978), 124 CONG. REC. S6592 (daily ed. May 1, 1978), would have codified a definition of employees beneficiary association which included a commonality of interest element. Section 266 of the bill also required that uninsured multiple employer welfare arrangements which are employee benefit plans be subject to such solvency and reserve standards as set by the Secretary of Labor. 124 CONG. REC. at S6596.


192. As such, the plans were administered by a joint board composed of union and employer representatives as required by the Labor Management Relations Act, 29 U.S.C. § 186(c) (1976). See note 41 supra.

rectly regulated insured plans was preempted by ERISA, relying primarily on the saving clause exception to ERISA preemption for state regulation of insurance.194

The First Circuit affirmed, finding that the deemer clause on its face did not prohibit a state from indirectly affecting employee benefit plans by regulating the contents of group insurance policies purchased by such plans.195 Nonetheless, the court intimated that even indirect regulation of employee benefit plans could be preempted under ERISA's section 514(a).196 Because the New Hampshire statute at issue was an insurance statute, the court found it exempted from preemption by the saving clause.197 Central to this conclusion was the accommodation made between section 514(a) and the saving clause by the deemer clause. By construing the deemer clause narrowly, the court permitted an insurance statute to affect an employee benefit plan indirectly.198 The court found its interpretation of the deemer clause to comport with the federal policy of deference to state insurance regulation199 and dismissed plaintiff's interpretation as leading to an untenable restriction of state governance of group insurance.200

In considering Wadsworth, however, it is important to note that the state statute under examination indirectly affected employee benefit plans. De-
spite statements about the breadth of the deemer clause and the freedom of employee benefit plans from any state regulation, the rulings in Hewlett-Packard, Wayne Chemical, Inc., and Bell v. Employee Security Benefit Association applied only to state statutes which directly affected employee benefit plans or entities claiming to be such plans. It is thus possible to reconcile the rationales of Wadsworth and Hewlett-Packard, as did the Seventh Circuit in Wayne Chemical, Inc. 201

A case which is clearly inconsistent with the broad construction cases, however, is Insurers' Action Council, Inc. v. Heaton.202 At issue in Heaton was the Minnesota Comprehensive Health Insurance Act of 1976, 203 a statute requiring that employers who offer health care plans to their employees include certain types of coverage.204 Rejecting plaintiffs' contention that ERISA preempted that portion of the Minnesota Act relating to employee benefit plans, the district court refused to grant the declaratory and injunctive relief requested.205

Stating that, with very narrow exceptions, ERISA should not be construed to relieve any person from any state law regulating insurance, the court concluded that the conflict between the challenged state insurance law and ERISA must be very clear to trigger the preemption provision.206 The court noted that ERISA's welfare plan provisions had little to do with the substantive requirements of the Minnesota statute and presumably did not create a sufficiently clear conflict in order to trigger preemption.207 It also observed that ERISA does not supersede existing federal statutes, in-

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204. Insurers Action Council, Inc. v. Heaton 423 F. Supp. 921, 923 (D. Minn. 1976). The statute requires each employer who provides a plan of health care coverage to make available to employees in the state a plan which is certified by the Commissioner of Insurance as a number two, qualified plan. Such a plan provides minimum benefits equal to at least 80% of the cost of specified covered services in excess of an annual deductible which does not exceed $500 per person. A plan can provide coverage through self-insurance, individual policies, group policies, nonprofit health service plans or health maintenance organizations or any combination of these. MINN. STAT. ANN. §§ 62E.02 to .03, .06 (West Cum. Supp. 1978).
206. Id. at 926.
207. Id.
cluding the McCarran-Ferguson Act which mandates that the business of insurance shall be regulated by the states.\textsuperscript{208} 

\textit{Heaton} took a very limited view of the deemer clause and an expansive view of the saving clause,\textsuperscript{209} adopting in effect a preemption rule that had been clearly rejected by the Congress.\textsuperscript{210} It is interesting to note that in \textit{Wadsworth}, a case in which the State of Minnesota participated as \textit{amicus curiae}, the First Circuit rejected the argument that section 514(a) preempts only those state statutes which purport to regulate an area expressly covered by ERISA.\textsuperscript{211}

\section*{2. ERISA's Disability Insurance Plan Exemption}

Section 514(a) preempts any and all state laws insofar as they relate to any employee benefit plan described in ERISA section 4(a) and not exempt under section 4(b).\textsuperscript{212} Section 4(b)(3) exempts from Title I coverage a plan which is "maintained solely for the purpose of complying with applicable . . . disability insurance laws."\textsuperscript{213} Accordingly, if a state enacts a disability insurance statute and an employer maintains a plan solely to comply with that statute, the plan will be regulated entirely by the state law rather than by ERISA.

\textit{Standard Oil Co. v. Agsalud}\textsuperscript{214} illustrates the difficulties in applying the disability insurance plan exemption. In \textit{Agsalud}, the plaintiff-employer sought declaratory and injunctive relief to exempt its employee welfare benefit plan\textsuperscript{215} from compliance with the Hawaii Prepaid Health Care

\textsuperscript{208}. \textit{Id.} at 926 (citing 15 U.S.C. §§ 1011 to 1015 (1976)). For a discussion of McCarran-Ferguson, see note 199 and accompanying text \textit{supra}. 

\textsuperscript{209}. Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. 921, 926 (D. Minn. 1976). Presumably the reference to "a very narrow exception" is to the deemer clause. 


\textsuperscript{211}. \textit{Wadsworth} v. Whaland, 562 F.2d 70, 76, 77 (1st Cir. 1977), \textit{cert. denied}, 435 U.S. 980 (1978). In referring to the \textit{Heaton} decision, the ERISA Industry Committee's \textit{amicus curiae} brief in \textit{Wadsworth} stated that \textit{Heaton} "was limited in its discussion of preemption to a single paragraph, failed to consider the relevant legislative history, and should, in our view, be weighted accordingly as authority addressing the preemption issue herein." \textit{Brief for Amicus Curiae} at 20, n.10. 

\textsuperscript{212}. \textit{ERISA} § 514(a), 29 U.S.C. § 1144(a) (1976). 


\textsuperscript{215}. 442 F. Supp. at 697. Some of plaintiff's Hawaiian employees, annuitants, and their dependents elected to participate in the company's self-funded health care plan which reimbursed 80% or more of covered medical expenses incurred by the participants. The plaintiff's plan, however, did not provide all the benefits required by the Hawaii statute, including alcohol and drug abuse coverage. Moreover, the plan failed to comply with certain reporting requirements of the Hawaii statute. \textit{Id.} at 696.
Act,216 arguing that ERISA preempted the Hawaii statute in this instance. The state contended, however, that since its statute was a disability insurance law, ERISA's preemption provision was inapplicable.217 The district court held that the Hawaii statute was not a disability insurance law and was therefore preempted by ERISA.218

The parties agreed that a disability insurance law replaces wages lost because of nonoccupational illness and injury. They differed, however, over whether disability insurance laws provide for the payment of medical expenses in addition to the payment of lost wages. Examining the laws of other states, the court noted that disability insurance laws generally deal only with disabling nonoccupational illness and injury.219 Since Hawaii's law required insurance against all nonoccupational illness or injury, disabling or not, the court concluded that it was not a disability insurance law.220 Moreover, the court noted that while the benefits available under disability insurance laws are limited basically to replacement of wages, the benefits required by the Hawaii statute cover medical and hospital expenses.221 The court further observed that the legislative history of ERISA disclosed no explicit congressional decision to exempt state health insurance laws.222 Faced with the absence of legislative history addressing this issue, the court concluded that the preemption of state health insurance laws was mandated by the clear language in the statute.223 The court also found no merit in the defendant's contention that because the Hawaii stat-

216. The Hawaii Prepaid Health Care Act requires employers in the state to offer a comprehensive prepaid health care plan to their employees. HAW. REV. STAT. §§ 393-1 to 393-51 (1976). In 1976, the Act was amended to require that plans cover diagnosis and treatment of alcohol and drug abuse. 1976 Haw. Sess. Laws ch. 25, § 2 (codified at HAW. REV. STAT. § 393-7(c)(6) (1976)). Administrative regulations adopted pursuant to the Hawaii Act include certain reporting requirements differing from those of ERISA. See Standard Oil Co. v. Agsalud, 442 F. Supp. 695, 696 (N.D. Cal. 1977), appeal docketed, No. 78-1095 (9th Cir. Jan. 16, 1978).

217. 442 F. Supp. at 697-98.
218. Id. at 697-702.
219. Id. at 698.
220. Id.


222. 442 F. Supp. at 705.
223. Id. at 706.
ute regulates matters other than those regulated by ERISA, there could be no preemption under section 514(a). Instead, the court held that Congress had rejected such a limited approach to preemption, despite the arguable wisdom of that approach.\textsuperscript{224}

\textbf{B. State Taxation of Self-Funded Welfare Plans}

Preemption challenges have also been raised in conjunction with state efforts to levy special taxes on plan benefits. In \textit{National Carriers' Conference Committee v. Heffernan},\textsuperscript{225} the plaintiffs\textsuperscript{226} sought to enjoin the imposition of a state tax\textsuperscript{227} on benefits paid out to state residents under the Railroad Employees National Dental Plan.\textsuperscript{228} The plaintiffs claimed that the plan was an ERISA-covered employee welfare benefit plan and that ERISA preempted the Connecticut tax statute regulating such plans.\textsuperscript{229}

At the court’s invitation, the United States Secretary of Labor filed a memorandum as amicus curiae also contending that the Connecticut tax statute was preempted by ERISA.\textsuperscript{230} Maintaining that Congress had preempted the field of plan regulation,\textsuperscript{231} the Secretary argued that the Con-
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Connecticut statute related to an employee benefit plan within the language of ERISA's section 514(a) and that section 514(b) did not save it. Citing Wadsworth v. Whaland and Hewlett-Packard v. Barnes, the Secretary contended that the deemer clause overrode the saving clause regardless of whether Connecticut deemed a welfare plan to be an insurance company subject to insurance law or implemented a parallel legislative scheme to the same effect. The Secretary also maintained that the state statute impermissibly inhibited ERISA-covered plans because the higher rate of tax imposed on self-funded plans discouraged self-insurance and favored the purchase of insurance from a carrier.

Apparently swayed by the government's arguments, the court held the Connecticut statute preempted insofar as it related to employee benefit plans. It concluded that the language of the federal statute, its legislative history, and the subsequent judicial interpretations supported a broad construction of the preemption provision. The court rejected the state's efforts to distinguish taxation from regulation and to read the preemption provision narrowly. Dismissing the argument that preemption of the state taxing power was unnecessary to accomplish ERISA's goal of protecting plans from conflicting state requirements, the court ruled that Congress chose not to exempt the taxing power from ERISA's broad preemption provision.

232. Id. The Secretary noted that in preparing the conference report, Congress was well aware that a number of states had undertaken in varying degrees regulation of employee benefit plans in general, and self-funded plans in particular. Id. at 13-14.

233. See text accompanying notes 144-51 and 190-201 supra.

234. Memorandum of Secretary of Labor as Amicus Curiae at 16. The Secretary stated:

Although the State of Connecticut has not brought its entire body of insurance laws to bear on self-funded employee welfare benefit plans, it may be viewed as having deemed such plans to be insurance companies for purposes of taxation. But whether the state deems employee benefit plans to be insurance companies, or constructs a parallel legislative scheme directed at plans without utilizing the fiction that such plans are actually insurance companies, ERISA § 514(b)(2)(B) will still bar application of the state law to ERISA-covered plans.

Id. The Secretary noted in a footnote to the preceding quote that at the time of enactment of Conn. Gen. Stat. § 12-212(c), the tax rate for self-funded plans and for net premiums received by domestic insurance companies was the same. Also, this tax provision makes the assessment, payment, appeal and other mechanisms used for collection of premium taxes on insurance companies equally applicable to self-insured welfare plans. Memorandum of Secretary of Labor as Amicus Curiae at 16.

235. Id. at 17.


237. Id. at 917-18.
C. Regulation of Legal Services Plans

One of the more recent types of welfare plans to become popular is the legal services plan.\(^{238}\) It was not until 1973 that the Taft-Hartley Act was amended to allow jointly-administered legal services plans.\(^{239}\) Although there were only 600 group legal services plans in operation in 1969, by 1977 the number had risen to around 5,000.\(^{240}\) It is estimated that group legal services now cover several million people.\(^{241}\)

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238. Legal services plans are designed to meet the needs of middle income Americans. The top 10% of our society can pay for traditional legal services and is sophisticated enough to use them effectively. The bottom 20% of our society is unable to pay any amount for legal services but is served by free legal services programs for the poor. Because legal services have not been available to them, the vast middle group—accounting for 70% of our society—have limited perceptions concerning legal problems and effective use of lawyers. Kirby, *Prepaid Legal Services and the Insurance Industry*, 12 FORM 324, 324 (1976).


239. Pub. L. No. 93-95, 87 Stat. 314 (1973) (amending 29 U.S.C. § 186 (1976)). Passage of the amendment was supported by a coalition including the AFL-CIO, the United Auto Workers, the International Brotherhood of Teamsters, the American Bar Association, major insurance companies, and consumer groups. DeMent, *Pre-Paid Legal Service Plans: Past Developments, Present Status and Future Prospects*, PENSION WORLD, July 1978, at 17. Contributions by employers to a legal services plan and benefits received from a plan were taxable income to employees until 1976. In the Tax Reform Act of 1976, Congress added an exemption for legal service trust funds established by employers either on their own or through collective bargaining. Pub. L. No. 94-455, § 2143(b), 90 Stat. 1520 (1976) (codified at I.R.C. § 501(c)(20)). Congress also granted an exclusion from employee gross income for both amounts contributed to legal services funds by an employer on behalf of his employees as well as the value of the benefits received by employees. Id. at § 2134(a) (codified at I.R.C. § 120).


Group legal services plans were first established for union members, but they are now available for other employee groups as well as a variety of associations. Among those benefiting from group legal services are: the Alaska Teamsters; an association of San Francisco prostitutes; the Texas Classroom Teachers Association; and the Ohio Buckeye Potato Chip employees. Broadman, *supra*, at 21. For more information on the operation of group legal services plans, see Baron, de Fuentes, Gustin, Marangi & Slate, *Group Legal Services: A Concept Whose Time Has Come*, 51 L.A. B.J. 581 (1976).

241. See Broadman, *supra* note 240, at 21 (citing an estimate by the Center for Consumers Legal Services). The failure of legal services plans to spread even more since the change in Taft-Hartley can be explained by two factors: (1) the inflation/recession state of the economy which has not only put a premium on more take-home wages but also has caused an increase in the costs of more traditional benefits such as health care; (2) unfamiliarity with prepaid systems and the use of lawyers in nonlitigation or counseling roles. Kirby, *supra* note 238, at 324-25. See also N. LEVIN, *supra* note 2, at 451-52 (editor’s note) suggesting that three ingredients were needed for legal services plans to increase: first, IRS regulations must
ERISA coverage in this area is limited to prepaid legal services plans.\textsuperscript{242} Although one state court has held that legal services plans are not generally considered to be insurance or subject to regulation by state insurance commissioners,\textsuperscript{243} other states may attempt to regulate such plans under insurance laws.\textsuperscript{244} Hence, legal services plans encounter the same potential preemption conflicts as do other welfare benefit plans with regard to state insurance regulation.\textsuperscript{245} They also have problems common to other types of benefit plans in which employers contract with insurance companies to provide services.\textsuperscript{246}

Legal services plans, however, also present unique preemption problems stemming from the fact that their terms and conditions, at least indirectly, are regulated or affected by rules of professional conduct adopted by state courts and bar associations. Various bar rules "relate to" employee benefit plans by imposing conditions on cooperation of attorneys with legal service providers.

The variety of plans is great. The possibilities can be analyzed according to the providers of the service (fully open, in which a member may select any lawyer anywhere for legal services covered; partly open, in which a member may select any lawyer within a geographical area or from a panel; partly closed, in which a member may select a lawyer from a small number of lawyers/law firms available to the group; and fully closed, in which only lawyers on the full-time staff of the plan serve members), the benefits offered (ranging from only advice, plus possibly some office work, prepaid in full to any and all legal problems with no exclusions); and the sponsor or administering organization (consumer groups, bar associations, insurance companies, or others). See Murphy, \textit{A Vision of the Future}, reprinted as Appendix F in N. Levin, \textit{supra} note 2, at 441, 444-46.

\textsuperscript{242} See 29 U.S.C. § 1002(1) (1976). Prepaid legal services plans are those in which a prepayment or premium is given by a person(s) on their own behalf for provision of specialized or scheduled legal services at some future date. Kirby, \textit{supra} note 238, at 324. Many group legal services plans are not prepaid, including group consultation and referral plans (the most common type of existing group legal services plans) which involve: first, agreement between an organized group of potential clients and one or more attorneys; and second, some fee consultation with provision of legal services at individual fees based on a predeter- mined fee schedule that is usually lower than the normal rate. \textit{Id.}

\textsuperscript{243} See Feinstein v. Attorney General, 36 N.Y.2d 199, 326 N.E.2d 288, 290, 366 N.Y.S.2d 613 (1975). A recent survey of state insurance departments revealed that in nine states insurance companies are not permitted to write legal expense insurance. In an additional seven states, no position has been taken. See DeMent, \textit{supra} note 239, at 24.

\textsuperscript{244} See Pfennigstorf & Kimball, \textit{supra} note 7, at 797-98.

\textsuperscript{245} The preemption problems confronting legal services plans are discussed thoroughly in Pfennigstorf & Kimball, \textit{supra} note 7, at 812-28. In a February 27, 1978 letter to the Arkansas Insurance Department, the Dept. of Labor stated that a prepaid legal services plan administered by the National Employee Benefit Program is not covered by ERISA because the plan does not meet the statutory definitions of employer or employee organization. BNA \textit{PENSION REP.}, June 12, 1978, at A-5.

\textsuperscript{246} See Pfennigstorf & Kimball, \textit{supra} note 7, at 812-25.
In fact, the sweeping preemption provision adopted by the ERISA conference committee was, at least in part, a reaction to the recent American Bar Association amendments to the Code of Professional Responsibility favoring open panel plans. The preemptive language was supported by the consumer and labor lobbies, both of which wanted experimental legal services plans to develop in an environment free from excessive regulation.

Floor debate on the issue of section 514(a)'s effect on professional codes shows that Congress intended some, but not complete, preemption of those rules:

Mr. Javits: Section 514 of the Act does not preempt state bar associations from adopting and enforcing ethical rules or guidelines generally and/or from disciplining its members or acting to discipline members of the bar, which bar associations often do.

Section 514 does preempt state law with respect to any employee benefit plan described in Section 4(a) and not exempted in Section 4(b).

Since plans subject to federal supervision would include plans providing prepaid legal services, it is intended that state regulation—but not bar association ethical rules, guidelines or disciplinary actions—in regard to such plans be preempted. But the state, directly or indirectly through the bar is preempted from regulating the form and content of a legal service plan, for example, open versus closed panels, in the guise of disciplinary or ethi-

247. The potential preemptive effect on several bar rules is discussed thoroughly in Pfennigstorf & Kimball, supra note 7, at 835-46. Among those rules are ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D) which states: “A lawyer shall not knowingly assist a person or organization that furnishes, or pays for legal services to others, to promote the use of his services or those of his partner, or associate or any other lawyer affiliated with him or his firm, except as permitted in DR 2-101(B).”

The general rule is followed by exemptions and organizations with which the lawyer may cooperate without violating the rule. id.

248. An “open panel” plan is one which is open to participation by all attorneys in a jurisdiction and in which members choose their own attorney. In contrast, under a “closed panel” plan the plan administrators select several attorneys to serve members. Closed plans may use one or more law firms, a list of attorneys, or salaried staff attorneys. The ABA amended ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 and 2-103 in February 1974 and again, after much controversy over discrimination against closed panel plans, in February 1975. Pfennigstorf & Kimball, supra note 7, at 798 n.62. In addition to the ERISA preemption problems it generated, the February 1974 vote of the ABA House of Delegates on those Code sections also created antitrust problems. See, e.g., Broadman, supra note 240, at 22. See also Meeks, Antitrust Aspects of Legal Services Plans, 1976 AM. B. FOUNDATION RESEARCH J. 855. Two votes reportedly taken in the conference committee on the specific issue of whether state law should be preempted as it relates to legal services plans supported preemption. Pfennigstorf & Kimball, supra note 7, at 802 n.71.

249. Pfennigstorf & Kimball, supra note 7, at 828-29.
cal rules or proceedings. That statement was followed by a colloquy between Senators Javits and Williams, two of ERISA's floor managers, in which Senator Williams concurred in Senator Javits' views on preemption with respect to state regulation of the form or content of prepaid legal services plans. The colloquy recognized a legitimate state interest in regulating the conduct of lawyers participating in prepaid plans. The sweeping language of section 514(a), however, is not so accommodating. The courts have not yet been presented with a case in which the preemption of bar association rules is at issue. The one reported case involving ERISA's preemption of a state law regulating legal practice merely noted in dictum that ERISA "may . . . preempt the regulation of union prepaid legal services plans, qua plans, but does not reach professional licensure and regulation of lawyers, qua lawyers, who render legal services under the plans." To the extent that a bar association or other rule regulates both employee benefit plans and the conduct of attorneys, the dictum begs the question. Litigation over

251. Mr. Javits: I would just like the Senator from New Jersey to confirm my interpretation. Does the Senator from New Jersey confirm his agreement with my view?
   Mr. Williams: Basically, I do. It, perhaps, could have more amplification as such rules might affect the substance of the operation of prepaid legal services plans. Certainly the substance or operation of such plans is preempted and will not be disturbed by what this colloquy is raising. Am I right on that?
   Mr. Javits: That is right.
   Mr. Williams: Right now.

This is an area that will not give to bar associations the authority to undo what we, in Congress, have permitted to be done, that is, giving employers and unions the freedom to develop and operate legal service plans of their choice.

252. Feinstein v. Attorney-General, 36 N.Y.2d 199, 205-06, 326 N.E.2d 288, 292, 366 N.Y.S.2d 613, 618 (1975). In Feinstein, a union and a local bar association had been denied court approval for two prepaid legal services plans. Application of Feinstein, 45 App. Div. 2d 440, 357 N.Y.S. 516 (1974). The New York Court of Appeals reversed, holding, inter alia, that in considering such applications a court should not be concerned with fiscal forecasts or actuarial soundness. The court viewed its function in such cases as determining whether plans were responsible and not fraudulent, and would not become involved in the open versus closed panel controversy as long as there was no disguised form of solicitation or barratry involved or unreasonable interference between lawyer and client. 36 N.Y.2d at 204-05, 326 N.E.2d at 291, 366 N.Y.S.2d at 617-18.

253. Pfennigstorf & Kimball emphasize that in such cases of overlap between regulation of employee benefit plans and regulation of attorney conduct, Congress is not as much overriding state regulation of the legal profession as forbidding state regulation of plans affecting interstate commerce. Thus, Congress is clearly exercising legitimate power. It is quite possible, however, that the preemption provision may remove obstacles to the development of
the preemption issue as it affects bar rules may be avoided by Supreme Court decisions relating to attorney conduct which have invalidated some of these same rules on other grounds and by increased acceptance by bar associations of the legal services movement.

D. Applicability of State Anti-discrimination Statutes to Welfare Plans

In 1945, New York became the first state to enact enforceable fair employment legislation. By 1963, twenty-eight states and sixty municipalities had passed anti-discrimination laws related to employment. Only ten states did not have some form of fair employment legislation by 1972. The state/local regulation of fair employment practices is a developing area of the law and one that has been encouraged by the federal government and the public interest bar alike. Some local and state statutes are broader than federal legislation on the subject.

legal services plans and at the same time interfere with regulation of the legal profession by removing disciplinary rules and providing no alternative regulatory framework. Their solution for limiting the reach of the preemption clause is to read Congress' intention as only eliminating disciplinary rules dealing with certain issues which were problematic in 1974 or earlier. They conclude that only artificial and unjustifiable restrictions on legal services plans were of concern to the Congress which drafted the preemption language. See Pfennigstorf & Kimball, supra note 7, at 833-35.


255. See Broadman, supra note 240, at 24-25.

256. Ch. 118, 1945 N.Y. Laws 457 (codified at N.Y. EXEC. LAW §§ 290 to 301 (McKinney 1972)). Since 1945, many states have patterned their fair employment legislation after the New York statute. T. KHEEL, GUIDE TO FAIR EMPLOYMENT PRACTICES 32 (1964).

257. T. KHEEL, supra note 256, at 31.

258. See BUREAU OF NATIONAL AFFAIRS, THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 66 (1973). North Carolina's law was limited to public employment. Although Tennessee and South Dakota have no fair employment practice laws, they have commissions to promote equal employment opportunity. The state laws vary widely in type of administration, enforcement and coverage. As of 1972, 41 states (including the District of Columbia) had some type of legislation outlawing employment discrimination on the basis of race and religion, see id. at 82-83; 32 states also outlawed age discrimination in employment, id., at 67-68; and 38 states (including the District of Columbia) prohibited sex discrimination in employment. Id. at 85-86.

259. See EQUAL EMPLOYMENT OPPORTUNITY—RESPONSIBILITIES, RIGHTS, REMEDIES 5 (J. Pemberton ed., 1975). The Equal Employment Opportunity Commission favors such state and local regulation because it alleviates a portion of the complaint load from the federal agency. Id.

Under a state fair employment statute, public and private employers may be required to include coverage of pregnancy within their disability or other employment welfare plans. The Supreme Court, however, has held that failure of employers to provide disability benefits for pregnancy-related leave violates neither the equal protection clause nor Title VII of the Civil Rights Act of 1964. Hence, whether state or federal law governs has been a crucial question in an action alleging sex discrimination based on denial of maternity leave benefits.

A few of the courts have already considered preemption issues related to

261. Some states expressly prohibit employers from denying employees disabled as a result of pregnancy any compensation to which they are entitled as a result of the accumulation of benefits under employee plans. See Montana Maternity Leave Act, MONT. REV. CODES ANN. § 41-2602 (Supp. 1977). Other state anti-discrimination statutes have been construed as requiring coverage by benefit plans of pregnancy-related leave. See, e.g., Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976). In that case, the state human rights statute (which had previously been judicially construed as requiring public employers to treat pregnancy the same as other physical impairments) was held to render "dormant" the New York Disability Benefits Law (which excepts pregnancy-related disabilities from those disabilities for which employers must pay workers a portion of their salary for a 26 week period) whenever the two statutes interact. See BNA PENSION REP., Jan. 3, 1977, at A-18. Other cases construing state anti-discrimination laws include: Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n, 268 N.W.2d 862 (Iowa 1978) (exclusion of pregnancy-related disabilities from Iowa employer's disability income plans violates municipal ordinance barring sex discrimination in employment); Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 N.E.2d 1192 (Mass. 1978) (exclusion of temporary disabilities related to pregnancy from employer's comprehensive disability plan constituted unlawful sex discrimination in violation of state anti-discrimination statute); cf. Wisconsin Tel. Co. v. Department of Indus., Labor & Human Relations, 68 Wis.2d 345, 366-67, 228 N.W.2d 649, 661 (1975) (dicta) (sex discrimination may be found if employer has treated temporary disability due to pregnancy differently from other temporary disabilities).


Even after the Supreme Court pronouncements in Gilbert and Geduldig, the overwhelming majority of state courts that have considered whether exclusion of pregnancy-related disabilities violates state or local anti-discrimination statutes have concluded that it does. For example in Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa. Commw. Ct. 103, 373 A.2d 126 (1977), the court did not feel compelled to construe the state statute in the same way the Supreme Court construed Title VII in Gilbert. It determined that a school's refusal to apply a teacher's sick leave to time she was absent from employment as a result of pregnancy was discriminatory under the Pennsylvania Human Relations Act. See cases cited at note 261 supra. But see Narragansett Elec. Co. v. Rhode Island Comm'n for Human Rights, 374 A.2d 1022 (1977) (holding that exclusion of pregnancy-related benefits does not violate state anti-discrimination law).

anti-discrimination statutes and most have upheld the state statute in the face of ERISA's preemption language. In order to sustain the state anti-discrimination statutes against challenges based on ERISA's section 514, the courts have generally used two different approaches. The first approach distinguishes between statutes which are of "peripheral concern" to ERISA and other statutes. In Time Insurance Co. v. Department of Industry, Labor and Human Relations, the state court refused to find ERISA preemption of a state fair employment law which required employers to pay disability benefits to pregnant workers on the same basis as temporary disability benefits were paid to other employees. The court conceded that the ERISA preemption issue was a close one and acknowledged legislative intent that ERISA preempt a broad range of laws. It emphasized, however, that the Wisconsin Fair Employment Law was not a specialized statute dealing with a particular aspect of employee benefit plans, but rather was a broad statute grounded in the state's police powers. Since the state law was found "in no way to impinge on federal regulation of employee benefit plans" and therefore was "merely of peripheral concern"

1978). Hence, the differences in state and federal law may not be as significant a factor in future sex discrimination cases.


265. 16 Fair Empl. Prac. Cas. 391 (Dane County Wis. Cir. Ct. 1978).

266. WIS. STAT. ANN. § 111.31-37 (West 1974 & Cum. Supp. 1977-78). An employee of the insurance company had taken a three-month pregnancy-related leave. Although the company paid disability benefits to employees who were temporarily unable to work due to medical disability, it did not include pregnancy within that category. The employee thus received no disability benefits during her leave. The defendant department directed the company to pay the complaining employee the same disability benefits for her leave as it paid to other employees for non-pregnancy-related disabilities. The employer petitioned for court review of the department's order. 16 Fair Empl. Prac. Cas. at 392.

The Wisconsin State Supreme Court had previously construed the state statute as requiring that pregnancy-related disabilities be treated the same as other disabilities. See Ray-O-Vac, Div. of E.S.B., Inc. v. Department of Indus., Labor & Human Relations, 70 Wis. 2d 919, 236 N.W.2d 209 (1975); Wisconsin Tel. Co. v. Department of Indus., Labor & Human Relations, 68 Wis. 2d 345, 228 N.W.2d 649, (1975).


268. Id. at 396.
to ERISA,” it was sustained. The peripheral concern test adopted by the court in Time Insurance has been followed by at least one other court considering ERISA preemption in the context of other types of state statutes.

In Goodyear Tire and Rubber Co. v. Department of Industry, Labor and Human Relations, another Wisconsin state court rejected the peripheral concern test and instead relied on ERISA’s nonimpairment clause, section 514(d), to uphold the same state anti-discrimination statutes. Once again, the issue involved coverage of pregnancy-related disabilities. The court read section 514(d) as saving not only federal statutes, such as Title VII of the Civil Rights Act of 1964, but also any state and local statutes preserved by non-ERISA federal legislation. The court saw no conflict between this interpretation of section 514(d) and the congressional goals of eliminating potentially inconsistent state regulation and developing a body of

269. Id. Judge Currie refused to displace the state statute “[u]ntil the United States Supreme Court rules to the contrary” and as long as there “exists a rational doubt that preemption exists.” Id.


271. 16 Empl. Prac. Dec. ¶ 8163 (Dane County Wis. Cir. Ct. 1978), aff’d, No. 77-650 (Wis. Ct. App. Nov. 2, 1978). Goodyear Tire provided its employees with weekly disability benefits for the duration of a disability, up to 52 weeks. Pregnancy-related disabilities, however, were limited to only six weeks for each pregnancy. The state Department of Industry, Labor, and Human Relations ordered the company to cease and desist its policy pending a determination as to whether the policy of treating pregnancy-related disabilities differently from other disabilities constituted sex discrimination. Goodyear contested the order in state court. Id. at 4796-97, 4801.

272. Section 514(d) of ERISA provides that the 1974 Act shall not be construed to supersede other federal laws, with minor exceptions irrelevant to this discussion. See 29 U.S.C. § 1144(d) (1976).


Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of an act which would be unlawful employment practice under this subchapter.

of substantive federal law. Rather, the court viewed ERISA as responsive to employer and union abuses of employee benefit plans but silent on the issue of sex discrimination.275

Nevertheless, the section 514(d) approach and reasoning used in Goodyear to except a state fair employment statute from ERISA preemption has been rejected on the floor of the Senate:

Mr. Javits: . . . [I]t is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws are not to interfere with ERISA. The ADEA itself . . . does not preempt such State age discrimination laws. However, there should be no question that the preemption rules of § 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which directly or indirectly establish requirements relating to employee benefit plans. ERISA's preemption of State age discrimination laws shall be determined without regard to § 514(d) of ERISA or the fact that the ADEA does not itself preempt State Law.

Mr. Williams: I concur . . . . Federal Law will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in 4(a) of ERISA and are not exempt under 4(b) of ERISA.276

The Goodyear approach has also been rejected by a Montana court. Finding congressional statements and debates of relatively low value as tools for statutory construction, the First Montana Judicial District Court in Mountain States Telephone and Telegraph Co. v. Commissioner of Industry and Labor277 used another approach to discount the reasoning in Goodyear. The court relied on the enacted language set forth in the ERISA findings and declaration of policy278 to conclude that Congress' intention to occupy the entire field of employee benefit plan regulation was unmistakable.279

ERISA's preemption of state anti-discrimination laws could involve pension plans as well as welfare plans. For example, if a state age discrimi-


ination statute like California's contains no upper age limit for protection of employees, could a pension plan in that state provide for mandatory retirement at age seventy (the new upper limit for private sector and state employees under the federal Age Discrimination in Employment Act)? And, if a state age discrimination statute contains no exemption for bona fide employee benefit plans, may it require pension benefit accruals after the pension plan's normal retirement age, even though the federal age discrimination act would allow the plan to freeze accruals at that point?

V. OPTIONS FOR DEALING WITH ERISA PREEMPTION

There is wide disagreement on whether ERISA's preemption provision should be clarified or revised. Similarly, among those favoring revision of the section 514 language, there is no consensus on whether the change should broaden or restrict section 514's effect on state regulation.

Four amendments were introduced during the Ninety-fifth Congress relating to ERISA's preemption provisions. Two congressional members from Hawaii introduced bills to specifically overrule the Agsalud decision by excluding from ERISA's reach employee benefit plans maintained for the purpose of complying with state health insurance laws.

Another


284. Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), appeal docketed, No. 78-1095 (9th Cir. Jan. 16, 1978). In the Agsalud case, the Hawaiian health care law was found preempted by ERISA. See text accompanying notes 214-24 supra. The Hawaiian amendment would not overrule Hewlett Packard, see text accompanying notes 143-51 supra; nor would it sustain Wadsworth, see text accompanying notes 190-201 supra.

amendment, S. 2018, contained language restricting preemption of state law relating to welfare benefit plans to instances in which such plans are actually subject to ERISA.\textsuperscript{286} The fourth proposed amendment to ERISA addressed section 206(d)(1) and the conflict between ERISA’s prohibition against assignment or alienation of pension benefits and state court decrees of divorce, separate maintenance, or child support.\textsuperscript{287} This amendment would have permitted pension benefit attachment by court order for family support.\textsuperscript{288} None of the proposed amendments generated noticeable support from concerned interest groups. In the Ninety-sixth Congress, one bill attempts to balance the federal and state interests in the various aspects of employee benefit plans. The bill, S. 209, specifically deals with state stat-

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

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(3) maintained solely for the purpose of complying with applicable workmen’s compensation laws, or unemployment compensation laws or disability or health insurance laws.


That § 514(b) of [ERISA] is amended by—

(1) inserting “pension” after “employee” in paragraph (2)(B), and

(2) adding at the end thereof the following new paragraph:

(5) Subsection (a) shall not apply to an employee welfare benefit plan to the extent such plan is not subject to the provisions of this title and title IV.

A similar modification was urged by NAIC during oversight hearings held by the House Committee on Labor Standards. \textit{See} 1978 Oversight Hearings, supra note 27. As NAIC noted, this change retains federal occupation of the pension plan field, but narrows preclusion of state law regulating employee welfare plans to those matters addressed by the federal statute. For a discussion of this approach, see notes 305-09 and accompanying text \textit{infra}.

287. \textit{See} text accompanying notes 107-35 \textit{supra}.


(b) Subsection (d) of section 206 of [ERISA] is amended by adding at the end thereof the following new paragraph:

(3) Paragraph (1) shall not apply to any assignment or alienation of benefits under the plan if—

(A) Such assignment or alienation is pursuant to a decree of divorce or separate maintenance, or any other order of a court which requires an individual to contribute to the support of his children;

(B) Such decree or order does not affect the time when benefits are payable under the plan, and

(C) A copy of such decree or order is submitted to the Secretary at such time and in such manner as he may by regulations prescribe.

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utes related to health care, insurance, and marital property and support.\textsuperscript{289}

Regardless how precisely a federal law is drafted, there will always be problems surrounding preemption of state law by the federal statute. Nonetheless, ERISA's language on the subject can be improved. As previously discussed, the case law to date has yielded conflicting interpretations of the 1974 statute's preemptive effect. These varying interpretations have resulted in confusion for plan administrators, state officials, and numerous other parties affected by the Act. Accordingly, it may be desirable to clarify ERISA's preemption provision through legislation. The available alternatives can be classified into several general categories: (1) minimize the state role in regulating employee benefit plans; (2) allow the states some role in regulating the employee benefit plan field; or (3) postpone the decision of how to amend ERISA pending further study.

\textbf{A. Minimizing the State Role}

After several year's experience under ERISA, the House Committee on Education and Labor reiterated its judgment that ERISA's legislative scheme leaves "no room for effective state regulation" within the preempted field of employee benefit plans.\textsuperscript{290} The Committee also reaffirmed the belief that federal interest in the field and "the need for uniformity are so great that the enforcement of state regulation should be

\textsuperscript{289} S. 209, 96th Cong., 1st Sess. (1979) (introduced by Senators Williams and Javits on January 24, 1979). The bill saves from preemption the Hawaii Prepaid Health Care Law (as in effect on January 1, 1979) as well as any other state law the Secretary of Labor determines: 1) to be substantially identical to the Hawaii law; and 2) to require benefits that are substantially identical in type and amount to those required or permitted by the Hawaii statute. The bill's saving of Hawaii-type statutes would not, however, include those provisions which the Secretary of Labor determines to be similar to ERISA's reporting and disclosure, fiduciary, and enforcement provisions. The effect of such a proposal essentially would be to overrule \textit{Agaalud} and \textit{Heaton} while affirming \textit{Hewlett-Packard}.

S. 209 also contains a provision overruling \textit{Wadsworth} by holding that state laws requiring provision of specific benefits in insurance policies or contracts are preempted insofar as they relate to employee benefit plans. The bill, however, does save state insurance laws that give plan participants the option of purchasing policies issued to a plan should the plan terminate.

With regard to state marital property and support laws, S. 209 would save from preemption judgments, decrees and orders (including approvals of property settlement agreements) pursuant to state common law or community property domestic relations laws which: 1) affect either marital property rights to pension benefits or legal obligations to provide child support or alimony payments; and 2) do not require a pension plan to alter the effective date, timing, form, duration, or amount of payments under the plan or to honor elections provided under the plan which is made by a person other than a participant or beneficiary. The bill also precludes application of ERISA's anti-assignment and alienation of benefits rule to such judgments, decrees, or orders.

\textsuperscript{290} H.R. REP. NO. 94-1785, \textit{ supra} note 283, at 47.
precluded."291 The Committee, however, suggested that some refinement to limit the exceptions to the preemption provision might be in order.292

Several changes, or a combination of changes, could implement this recommendation. Parts (a) and (c) of section 514 could be reworded to eliminate any doubt that state regulation affecting employee benefit plans is precluded, except as specified in section 514(b)(1). The revised sections would resemble the following:

514(a) ... the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter directly or indirectly relate, affect, or impact upon any employee benefit plan ...

514(c)

(3) The salutary effect and equitable principles behind the State law as well as the degree of conflict between the State law and this enactment shall be immaterial to the determination of federal supersession of State law.

The major advantage of the foregoing changes is the degree of certainty and uniformity they would establish. Any state law which even tangentially touched employee benefit plans would be preempted.293 Rules of conduct regulating lawyers but also affecting prepaid legal services plans would likewise be preempted.

As has been pointed out elsewhere, however, certain gaps exist in the federal regulatory scheme, and absolute preemption could permit plan abuses to grow in a regulatory vacuum.294 For example, ERISA does not

291. Id. at 47.
292. The Committee was particularly concerned with efforts to construe the deemer clause so that plans which contain characteristics of insurance remain subject to state regulation. The Committee stated that the deemer clause was intended as an "irrebutable presumption" that such plans are not insurance. The irrebuttable presumption would not be overcome even if the plan engages in activities generally regulated by the state. Id. at 47.

Another Committee concern was the construction narrowing § 514 by reading the phrase "terms and conditions" of § 514(c) into § 514(a). See, e.g., Brummond, supra note 20, at 97-122. In the Committee's view, such a restrictive construction is unwarranted. See H.R. Rep. No. 94-1785, supra note 283, at 47-48. The Committee also mentioned the MET problem, see text accompanying notes 163-89 supra, but noted that such plans fail to meet the definition of "employee benefit plan" in 29 U.S.C. § 1003(3) and thus continue to be subject to state regulation. H.R. Rep. 94-1785, supra note 283, at 48-49.

293. Thus, the proposed amendment would overrule those cases which used peripheral impact as a reason for saving state laws. See, e.g., Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), appeal docketed, No. 78-2313 (9th Cir. June 21, 1978); Time Ins. Co. v. Department of Indus., Labor & Human Relations, 16 Fair Empl. Prac. Cas. 391 (Dane County Wis. Cir. Ct. 1978), aff'd, No. 77-650 (Wis. Ct. App. Nov. 2, 1978) (using the peripheral impact test to exclude state community property and anti-discrimination statutes, respectively, from ERISA's preemptive effect).

294. Pfennigstorf & Kimball have outlined two major regulatory omissions from ERISA. First, the federal statute does not provide for regular examinations of employee benefit
contain minimum standards for welfare plans. The statute is less concerned with the nature and funding of welfare plans than with their prudent administration. If parts (a) or (c) of section 514 were rewritten, the establishment of federal welfare plan standards to fill this regulatory void would be desirable. For example, protections like those of California's Knox-Keene Act could be placed in the federal statute. In addition, passage of national health insurance would help allay concerns stemming from decisions like *Agsalud*, which upheld displacement of Hawaii's statute mandating health insurance coverage of employees in the state.

Broad preemption also can be accomplished by specifically preempting those types of state laws which have proven troublesome. Under this approach, a new preemption provision could be substituted for section 514(a), which would retain the existing provision in section 514(a)(1) and add a new section—514(a)(2)—providing:

(2) State laws relating to employee benefit plans which are superseded shall include but shall not be limited to the following: fair employment laws; marital property and support laws; escheat laws; tax laws; health care service laws, whether or not insurance is involved; and codes of professional conduct.

In addition to the problems inherent in rewriting sections 514(a) or (c), however, this option could be criticized for eliminating confusion only in those areas now known to be problematic. Just as Congress apparently failed to foresee present problem areas, this option would not deal with state and federal conflicts relating to employee benefit plans which will undoubtedly surface in the future. Hence, any amendment attempting to proscribe specific state statutes can only amount to a piecemeal approach, one which likely will necessitate further revisions. It should be added that any attempt to minimize the state regulatory role in the employee benefit plan field also should be accompanied by clear legislative language as to the role of the courts in developing federal common law to fill in the statutory gaps.
Alternatively, the Secretary of Labor or his delegate, rather than the trial courts, could be designated to decide whether a particular statute is preempted under ERISA. The major advantage of this transfer of responsibility would be the uniformity of decision-making achieved. Rather than hundreds of judges making determinations about ERISA's preemption of state statutes, Labor Department officials, with their specialized expertise, would be responsible for the decision-making. On the other hand, although those federal officials making the determination would perhaps be more familiar with the operation of pension and welfare plans, they may be less familiar with the workings of a particular state law and less cognizant of the effects of preemption. Moreover, it could be argued that the Department of Labor does not have sufficient staff resources to handle this added responsibility. Given the Department's current difficulty in enforcing the existing provisions of ERISA and the problems inherent in developing necessary regulations, a solution providing an exclusively administrative determination could be impractical. As with the other alternatives stressing broad preemption, this option would lead to a regulatory vacuum each time the Department of Labor found a particular statute preempted. The Department, unlike the courts, however, could not create a "federal common law" to fill the gap unless Congress explicitly vested it with that authority.

It may be desirable to combine any broad preemption amendment with provisions aimed at multiple employer trusts. One alternative would be to both affirm broad preemption and amend ERISA's coverage provisions to include all METs as well as provide minimum standards for such entities. The expertise and enforcement machinery at the state level in addition to the Labor Department's staff limitations argue, however, against exclusive federal regulation of METs.

As the Activity Report of the House Committee on Education and Labor noted, certain entrepreneurs marketing insurance products to employers and employees are claiming erroneously that the packages are ERISA-covered plans. The claims of such entrepreneurs are aided by the ambiguity and the role of state law in the process are discussed in the district court's decision in Wayne Chem. Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316, 325 (N.D. Ind.), aff'd as modified, 567 F.2d 692 (7th Cir. 1977).

298. Although this alternative is included under options for broad preemption, it could also be used to permit selective state regulation.

299. See Pfennigstorf & Kimball, supra note 7, at 850.

300. H.R. REP. 94-1785, supra note 283 at 48. The report concluded that such plans are not employee benefit plans as defined by ERISA because: 1) they are established and maintained by entrepreneurs for marketing insurance products/services to others; 2) they are not established or maintained by the appropriate parties to result in ERISA coverage; 3) the purpose of the plans' establishment is insufficient to meet ERISA jurisdictional require-
guity of existing definitions of “employee organization” and “employee beneficiary association” in ERISA. Between January 1, 1975, and June 1, 1978, twenty-eight suits against uninsured METs were filed. The litigation is expensive and time-consuming for state insurance commissioners. However, the commissioners ultimately have been successful since courts have uniformly upheld state regulation of METs. It may be desirable to specify that METs which are employee benefit plans are protected from state insurance regulation and to provide guidance in determining which METs are covered by ERISA. Such an approach, of course, would preserve some state regulation of METs but, in light of the Department of Labor’s staff limitations, this would be reasonable even under a broad preemptive scheme.

B. Provision for Some State Role in the Regulation of Employee Benefit Plans

There are numerous ways to amend section 514 in order to provide for varying degrees of state regulation of employee benefit plans. Some of these approaches have been used in the amendments introduced in the Ninety-fifth and Ninety-sixth Congresses.

As many have noted, the primary emphasis of ERISA’s drafters concerned pension plans. Accordingly, ERISA is more detailed in its regulation of pension plans than welfare plans. This emphasis argues in favor of a two-pronged approach to preemption: reaffirming broad preemption

ments; and 4) the plans are no more ERISA plans than are any other insurance policies sold to employee benefit plans. Id.

See 1978 Oversight Hearings, supra note 27, at 652-53. The definitions are both overbroad and circular in nature. Id. See also Bell v. Employee Security Benefit Ass’n, 437 F. Supp. 382, 394 (D. Kan. 1977), discussed in notes 173-189 and accompanying text supra. Employee organization is defined as:

any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships or any employees’ beneficiary association organized for the purpose . . . of establishing such a plan.

ERISA § 3(4), 29 U.S.C. § 1002(4) (1976). However, an employee benefit plan is defined in ERISA § 3(1) in terms of who provides it. 29 U.S.C. § 1002(1) (1976) “Thus a plan is an employee benefit plan if it meets certain requirements and is provided by an employee organization. An entity is an employee organization if it is organized to provide an employee benefit plan.” 437 F. Supp. at 394.


Id. at 661.

See notes 163-89 and accompanying text supra.

See Brummond, supra note 20, at 126.
regarding pension plans but limiting preemption of state laws relating to welfare plans. There are several ways to implement this two-pronged approach. One is to preempt all pension-related state statutes and only those state welfare plan statutes that relate to matters covered by ERISA.306

Under this approach, however, welfare plans would be subject to a variety of state laws regulating plan content (Wadsworth type307) and coverage (Agsalud type308). For example, a participant in a multistate plan who

306. Not surprisingly, the National Association of Insurance Commissioners (NAIC) has called for broad preemption of pension plan-related state laws but for exception from preemption for all welfare plan related state laws which do not conflict with ERISA. Under its proposal, NAIC also recommended the following changes to the definition of an “employee welfare benefit plan”:

3(1) The terms “employee welfare benefit plan” and “welfare plan” mean any plan, fund, or program:

(A) which is established or maintained:

(i) by a single employer, an employee organization, or both; or
(ii) by a controlled group of corporations as defined in title 26, section 1563(a) of this code which function as a common control employer; or
(iii) as a “multi-employer plan” within the meaning of section 1002(37) of this title; and

(B) which provides [was heretofore or is hereafter established or maintained by an employer or by an employee or 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 on their beneficiaries, through the purchase of insurance or otherwise.

(i) [(A)] medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or unemployment, [sic] vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or
(ii) [(B)] any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

1978 Oversight Hearings, supra note 27 at 673-74 (statement of NAIC). NAIC proposes similar changes in the definition of pension plans. Id., at 674-75. The Association also recommends refinements of the definition of employer and employee organization. Id. at 675.

NAIC’s preemption recommendations also appear in Brummond, supra note 20, at 125. Brummond also offers a variation on the proposed revision of § 514(a) to eliminate the preemption of state laws relating to employee welfare benefit plans altogether. Id. at 124.

At least one state has called on Congress to adopt limited preemption of welfare plans. In a joint resolution, the California State Legislature urged Congress to amend ERISA to preempt state laws relating to welfare plans only to the extent that they conflict with ERISA. The resolution also called on Congress to clarify the definition of multiple employer trusts. See S.J. Res. No. 43, Cal. Gen. Ass., 1978 Sess., reprinted in 1978 Oversight Hearings, supra note 27, at 1303. Limited preemption was a feature of one of the bills introduced into the 95th Congress to amend ERISA. S. 2018, 95th Cong., 1st Sess. (1977). See note 286 supra.307. See text accompanying notes 191-200 supra.

308. See note 215 supra.
lives in New Hampshire, where mental health benefits are mandated pursuant to state law for group insurance contracts, probably would not receive vision and dental coverage because the fund would have to discontinue these benefits to provide statutorily required benefits. If a participant in the same plan moved to Maine, however, he or she could receive vision and dental coverage, but might have to forego mental health coverage. It was congressional concern with the problems emerging from conflicting state regulation of interstate plans which in part led to the adoption of the present preemption language. In addition, problems could arise in deciding what welfare plan matters were not covered by ERISA and therefore subject to state regulation.

One way to minimize preemption of state laws while minimizing problems for interstate employee welfare plans is to preempt only state laws relating to interstate plans. Under this approach, it would probably be necessary to define an "interstate" plan as one which has participants in more than one state. Effectively, this approach would not preempt state laws relating to intrastate welfare plans. This dichotomy of state/federal jurisdiction depending on the interstate nature of a plan, however, could lead to situations in which neither the state nor the federal government would regulate a particular plan, each assuming the other had jurisdiction. Periodic reporting on the intra/interstate character of plans would be necessary. This scheme also would leave open the possibility that a plan could become subject to different standards overnight if it changed from intrastate to interstate and vice versa. The dual regulation scheme thus might prove unpredictable for both plan participants and administrators.

The original House and Senate versions of ERISA would have preempted only those subject areas covered by ERISA. On its face, this approach treats pension and welfare plans alike. Its effect, however, would be to preempt more state laws relating to pension plans since these are more extensively covered by the Act. Under this method, for example, states would be prohibited from enacting laws requiring reporting and disclosure by either type of employee benefit plan since this is specifically addressed in the Federal statute. States could, however, enact and enforce welfare plan laws concerning content of group health plans, pregnancy coverage in disability plans or lawyers' conduct vis-à-vis prepaid legal services plans.

Another method for narrowing the scope of ERISA preemption and permitting some state regulation calls for amending section 514(a) to preempt

309. See 1978 Oversight Hearings, supra note 27, at 545.
310. Id.
311. See note 22 supra.
state laws affecting plan form, content, terms, or conditions.\footnote{312}{The revised language might read as follows:}
\begin{quote}
(a) ... the provisions of this title and title IV shall supersede any and all State laws so far as they may now or hereafter directly or indirectly relate, affect or impact upon the form, content, terms, or conditions of any employee benefit plan or reporting and disclosure with respect to such matters. ... \end{quote}
\footnote{313}{450 F. Supp. 919 (N.D. Cal. 1978), appeal docketed, No. 78-2313 (9th Cir. June 21, 1978).}
\footnote{314}{Time Ins. Co. v. Department of Indus., Labor & Human Relations, 16 Fair Empl. Prac. Cas. 391 (Dane County Wis. Cir. Ct. 1978).}
\footnote{315}{See Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), appeal docketed, No. 78-2313 (9th Cir. June 21, 1978); and notes 125-34 and accompanying text supra.}
\footnote{316}{Insurer's Action Council, Inc. v. Heaton, 423 F. Supp. 921 (D. Minn. 1976) (Minnesota's Comprehensive Health Insurance Act requiring employee benefit plans to offer specified forms of group health coverage held not preempted by ERISA). See notes 202-11 and accompanying text supra.}
\footnote{317}{Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir.), cert. denied, 99 S. Ct. 108 (1978) (Knox-Keene Health Care Service Plan Act cannot be applied directly to ERISA-covered employee benefit plans). See notes 202-11 and accompanying text supra.}
\footnote{318}{Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), appeal docketed, No. 78-1095 (9th Cir. Jan. 16, 1978). (Hawaii's Prepaid Health Care Act, requiring mandatory coverage of all injuries, disabling or not, held preempted by ERISA).}
This change would help eliminate some of the current ambiguity and guard against the imposition of inconsistent state standards in those important areas. Under this revision, a professional code rule which discouraged closed panel legal service plans would be invalidated because of the relationship between rule content and the terms of the plan. There would be little doubt, however, that other professional rules not affecting the form, content, terms, and conditions of plans would not be preempted. Similarly, state anti-discrimination statutes requiring pregnancy benefits would be preempted as would the statutory sections challenged in \textit{Agsalud} and \textit{Wadsworth}. California's Knox-Keene Act would likely be enforceable.

Building on the approach taken in \textit{Stone v. Stone}\footnote{313} and \textit{Time Insurance Co.}\footnote{314} Congress could amend section 514(a) to preempt state laws which relate substantially and directly to employee benefit plans. Although this approach may present an attractive and flexible solution permitting a sizeable amount of state regulation now thought to be preempted, a close examination reveals several defects. For example, courts would be required to interpret the terms "substantial" and "direct," thus increasing the likelihood of conflicting constructions. State court orders awarding the employee's benefits to the nonemployee spouse arguably are substantially and directly related to employee benefit plans, yet the test has essentially been used to exclude community property laws from preemption.\footnote{315} This amendment effectively would overrule only \textit{Heaton}\footnote{316} and leave standing \textit{Hewlett-Packard},\footnote{317} and \textit{Agsalud}.\footnote{318}
A final alternative for allowing some state role in regulating employee benefit plans would amend ERISA to deal with identifiable areas in which preemption problems have arisen. Most of the preemption litigation to date has been limited to legislation governing the operation or content of health care service plans, anti-discrimination statutes, and marital property laws. The two Hawaiian proposals were designed to prevent preemption of state health care service legislation.\(^{319}\) Congressman Seiberling's proposed amendment dealt exclusively with the preemption problems related to domestic relations laws.\(^{320}\) Commentators and courts alike have put forth compelling arguments why Congress should not include marital property laws within the reach of section 514(a).\(^{321}\) Instead of forcing courts to invent legal fictions for justifying the nonapplicability of preemption to domestic relations laws, Congress could deal with the problem specifically and add such laws to section 514(b)(1)'s list of exceptions. Similarly, should the policy and practical reasons for excluding anti-discrimination laws from those which are preempted be found equally persuasive, they, too, could be added to section 514(b)(1). With regard to state bar rules, a qualified exception might be provided.\(^{322}\)

In the area of health care laws, several options are available: first, legislation could affirm Hewlett-Packard and Agsalud while overruling Heaton and Wadsworth by providing that health care legislation, including insurance legislation, is preempted; second, legislation could affirm Hewlett-Packard, Agsalud, and Wadsworth but overrule Heaton by retaining the indirect/direct impact test with respect to preemption of state health care legislation; third, legislation could, as one of the Hawaiian bills\(^{323}\) does, overrule Agsalud while leaving Wadsworth and Heaton unchanged; fourth, legislation could save statutes like those regulating plan funding and disclosure in Hewlett-Packard, or mandating coverage of workers, inclusion of specific disabilities, or specific types of plans as in Agsalud, Wadsworth, and Heaton.

Dealing separately with each area of state/federal conflict would subject plans to nonuniform standards in a minimum of plan-related areas and only when state regulation is deemed preferable. The approach is tailored to those problems encountered to date and not to hypothetical problems.

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322. Bar rules related to the form, content or operation of employee benefit plans might be preempted while other disciplinary measures would remain under local control.
Moreover, the approach permits Congress to treat the various problematic types of state regulation differently for preemption purposes.

A major disadvantage of this approach, of course, is its limited scope. There is no assurance that Congress will not be back at the drawing board in several years to deal with new problem areas. Also, gradual granting of exceptions to ERISA's preemption provision arguably flies in the face of congressional intent in 1974.

C. Postponing the Decision

Another alternative for dealing with ERISA's preemption difficulties would be to avoid any final solution. ERISA established a Joint Pension Task Force and ordered it to study the preemption problem. No report has been produced by that congressional task force, and it does not appear likely that such a report will be issued in the near future. It may be time to admit that the task force is not the appropriate group to conduct such a study and that the Department of Labor or another body should be directed by Congress to study the problem and make recommendations. This approach would have the obvious drawback of continuing the confused situation which now exists.

On the other hand, further study of the problem may be justified because the case law on preemption is by no means fully developed. Most of the decisions have dealt with laws related to state regulation of health care service plans. There are few decisions squarely facing ERISA preemption of state anti-discrimination statutes, and the cases are almost all related to welfare plans and sex discrimination. Additional cases are pending in this important area as well as in other areas involving ERISA preemption, and new cases are being decided on the ERISA preemption issue with great frequency.

The Supreme Court has yet to rule squarely on the scope of ERISA preemption, and arguably any legislative change should await judicial construction by the Court. Those who criticize the present preemption scheme note that it was hastily devised. That criticism could also be aimed at amendments adopted without in-depth study of the many facets of the

325. See text accompanying notes 136–224 supra.
326. In dicta, the Court has said, "ERISA . . . expressly preempts all state laws regulating covered plans." Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716, 2725 n.21 (1978). The Minnesota Act at issue in Allied was the same statute considered by the Supreme Court in Malone v. White Motor Corp., 435 U.S. 497 (1978). In Malone the Court found ERISA inapplicable because the events at issue transpired prior to ERISA's effective date. However, the court acknowledged ERISA's comprehensive federal regulation of pension plans and its express preemption of "all state laws regulating covered plans." Id. at 487 n.1.
conflicts between ERISA and various state laws. For these reasons, one could argue for appointment of a group to replace the originally-mandated congressional task force. Congress could direct the Department of Labor to assist the group's study of the problems caused by the current language, possible solutions, and their potential effect on a wide range of state laws. The group could be required to report back to Congress at set intervals and to consult with state officials and interest groups familiar with the affected laws.

VI. CONCLUSION

The basic question ERISA preemption poses is what role states should play in the regulation of employee benefit plans. By enacting ERISA's broad preemption provision, Congress decided that the states' role should be limited. In reaching this conclusion, Congress apparently acted without full knowledge of the implications of its choice. Had Congress been aware of the long reach of the preemption provision, it might have framed section 514 of ERISA differently. The courts have generally made fairminded attempts to do justice in determining the outer limits of federal preemption. Although not entirely clear and consistent, the case law as a whole has given ERISA preemption a scope less sweeping than the statutory language and legislative history arguably support.

As Congress readdresses the ERISA preemption question, it will have a choice between reaffirming broad preemption or giving the states an expanded role in employee benefit plan regulation. Each of the options previously discussed for implementing these two basic alternatives has advantages and disadvantages. No solution is ideal. Reaffirmation of broad preemption would, for example, encourage uniformity of regulation but could result in reduced protection of plan participants and beneficiaries by entirely removing the states from the regulatory scheme.

In deciding which path to follow, Congress should ascertain the federal and state interests in regulating the various aspects of employee benefit plans and decide which interest predominates. The respective interests and their importance will vary, depending upon the plan aspect involved. For example, the state interest in promoting effective health care service plans is of course different from the state interest in assuring that its married citizens and their children are provided for upon divorce or desertion. The federal interest, which includes the uniform regulation of plans, should be weighed against each of these state interests. The balancing process should take into account additional pertinent factors such as the possibility of national health insurance and the fact that few states have engaged in the social experimentation of Hawaii, California and Minne-
sota with respect to health care plans, whereas all states have long estab-
lished domestic relations laws.

“Big business” and “big labor” generally support broad federal preemp-
tion under ERISA and can be expected to pressure Congress to reaffirm
the breadth of section 514. However, these groups likely will oppose ef-
forts to combine broad preemption with the establishment of new federal
standards aimed at plugging the present regulatory gap with respect to
welfare plans. Thus, while it may be conceptually appealing both to reaf-
firm federal preemption and to adopt federal substantive standards for
welfare plans, it may not be politically feasible to do so. Representatives
of states like Hawaii and California can be expected to oppose reaffirma-
tion of broad preemption in so far as those states’ new health care statutes
would be superseded. The fact, however, that few other states have such
statutes will undercut the political force behind this anti-preemption posi-
tion, although there will likely be strong sympathy for the efforts of these
states to better protect their citizens. Another political force which will
affect congressional decisionmaking on the issue of ERISA’s preemption
of marital property and support laws will be women’s groups which view
such state regulation as necessary protection.

Congress has begun to confront some of the difficult questions raised by
implementation of section 514 of ERISA, and, as the House and Senate
proceed, the practical solutions will not be found without debate and disa-
greement. Further development of the case law will assist in sharpening
the ERISA preemption issues, as will further study and administrative in-
terpretation. Whether Congress will successfully harmonize the counter-
vailing policy concerns at the heart of ERISA preemption remains to be
seen.