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ERISA PREEMPTION

"[A]ny court forced to enter the ERISA preemption thicket sets out on a treacherous path."[1]

INTRODUCTION

Private employers currently spend more than twenty-five percent of their total compensation costs on employee benefits.[2] The steady growth in such benefits, which began as a post-World War II phenomenon, led to the requirement of a comprehensive scheme to govern benefit programs.[3] Historical misuse and mismanagement of pension and employee welfare plans, as well as lack of regulation, prompted the enactment of the Employment Retirement Income Security Act of 1974 (ERISA).[4]

This Survey[5] examines two ERISA preemption cases: *Fuller v. Norton*[6] and *Cannon v. Group Health Service, Inc.*[7] Part I of this Survey provides a background on ERISA preemption, including the statutory language and a brief chronology of key Supreme Court cases analyzing the scope of preemption. Part II examines *Fuller*, in which the Tenth Circuit held that a multiple employer welfare arrangement (MEWA) was subject to Colorado's workers' compensation regulations.[8] The court further held that a MEWA's partially-insured status allowed regulation by the state's insurance division, thereby

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1. Gonzales v. Prudential Ins. Co., 901 F.2d 446, 451-52 (5th Cir. 1990).

2. Charles S. Mishkind et al., *Employee Benefits Litigation, in* LITIGATING EMPLOYMENT DISCRIMINATION CASES 1996, at 223, 231 (PLI Litig. & Admin. Practice Course Handbook Series No. 542, 1996).

3. *Id.*

4. 29 U.S.C. §§ 1001-1461 (1994); *see* RONALD J. COOKE, ERISA PRACTICE AND PROCEDURE 1-2 (2d ed. 1989); STEPHEN J. KRASS, THE PENSION ANSWER BOOK 1-5 (6th ed. 1991) (stating that ERISA was implemented in response to inadequately funded pension plans, plans without retirement vesting provisions, and plans terminated prior to accumulation of sufficient payout amounts).

5. The survey period covers the Tenth Circuit Court of Appeals' decisions between September 1, 1995, and August 31, 1996.

6. 86 F.3d 1016 (10th Cir. 1996).

7. 77 F.3d 1270 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 66 (1996). Other ERISA cases decided by the Tenth Circuit during the Survey period include: Hawkins v. Commissioner, 86 F.3d 982 (10th Cir. 1996) (holding that a marital settlement agreement incorporated into a divorce decree was a qualified domestic relations order for purposes of determining tax liability); Thorpe v. Retirement Plan of Pillsbury Co., 80 F.3d 439 (10th Cir. 1996) (involving withholding of early retirement benefits); Herr v. Heiman, 75 F.3d 1509 (10th Cir. 1996) (identifying factors which determine "employee" (as opposed to versus contractor) status under ERISA); Reich v. Stangl, 73 F.3d 1027 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 48 (1996) (holding ERISA grants authority to the Secretary of Labor to seek equitable relief in an employee welfare benefit plan action); Zimmerman v. Sloss Equip., Inc., 72 F.3d 822 (10th Cir. 1995) (upholding district court's finding that an employer did not violate ERISA § 1140, governing protected rights, when terminating an employee); Resolution Trust Corp. v. Financial Inst. Retirement Fund, 71 F.3d 1553 (10th Cir. 1995) (holding ERISA does not allow a "receiver's cash withdrawal of actuarially determined surplus").

8. *See Fuller*, 86 F.3d at 1021-22.

taking it outside the boundaries of ERISA preemption.[9] Part III discusses *Cannon*, which reflects the broad scope of ERISA preemption over state common law claims, even when preemption eclipses any remedy to the plaintiff.[10]

I. GENERAL BACKGROUND

ERISA encompasses any employee pension[11] or welfare benefit[12] plan. ERISA health plans protect approximately 114 million Americans, or forty-four percent of the population.[13] A benefit program delivering non-wage benefits presumptively qualifies as an ERISA plan unless a specific exemption applies.[14] ERISA seeks to protect plan beneficiaries by requiring that "minimum standards be provided assuring the equitable character of such plans and their financial soundness."[15] ERISA impacts states and employers in different ways. For instance, states generally view ERISA as an impediment to their ability to provide consistent protection for their citizens.[16] Conversely, employers view ERISA as critical to cost containment of benefit plans because ERISA limits both administrative and litigation costs, while simultaneously alleviating state imposed insurance premium taxes.[17]

Within ERISA's administration and enforcement scheme,[18] civil enforce-

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9. *See id.* at 1026-27.

10. *See Cannon*, 77 F.3d at 1275.

11. "Employee pension benefit plan" is defined as:
any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (i) provides retirement income to employees; or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.
29 U.S.C. § 1002(2)(A).

12. "Employee welfare benefit plan" is defined as:
any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).
29 U.S.C. § 1002(1).

13. U.S. GENERAL ACCOUNTING OFFICE, EMPLOYER-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA 2 (1995) [hereinafter EMPLOYER-BASED HEALTH PLANS].

14. Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, SB31 ALI-ABA 511, 515 (1996).

15. 29 U.S.C. § 1001(a).

16. *See* EMPLOYER-BASED HEALTH PLANS, *supra* note 13. As more and more private employers opt to self-fund health plans, states find themselves with even less control, as ERISA does not treat self-funded plans as insurance, therefore exempting the employer from compliance with state regulation. *See id.* at 2.

17. *See id.* Self-funded plans are exempt from state insurance premium tax. *Id.*

18. ERISA is comprised of three subchapters. Subchapter I provides protection of employee benefits. 29 U.S.C. §§ 1001-1169. This subchapter is divided into a general provisions subtitle (§§

ment provides that a plan participant or beneficiary may sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[19] The Supreme Court has held that claims brought in state court against a plan sponsor or provider under this clause, pleading only state common law claims, can be removed to federal court.[20] The legislative intent of ERISA is to recharacterize such actions as federal in nature.[21] This is known as the "complete preemption doctrine."[22]

By comparison, conflict preemption occurs when both state law and ERISA provide a cause of action, in which case "due regard for the federal enactment requires that state jurisdiction must yield."[23] Conflict preemption in ERISA actions results from interpretation of ERISA's preemption clause.[24] The clause states that the federal law will "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."[25] This preemption clause, in conjunction with the Act's savings clause,[26] exempts state insurance, banking, and securities regulations,[27] and state criminal laws[28] from preemption. Finally, ERISA's deemer clause[29] excludes benefit plans and their trusts from state regulation identified by the savings clause.[30] Roughly half of the Supreme Court ERISA cases involve preemption issues, evidencing the confusion surrounding interpretation of the express preemption

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1001-1003) and a subtitle for regulatory provisions (§§ 1021-1169). The regulatory provisions are further broken down into six areas: reporting and disclosure (§§ 1021-1031), participation and vesting (§§ 1051-1061), funding (§§ 1081-1086), fiduciary responsibility (§§ 1101-1114), administration and enforcement (§§ 1131-1145), and group health plans (§§ 1161-1169).

19. 29 U.S.C. § 1132(a)(1)(B).

20. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67 (1987).

21. *See id.* at 65-66. ERISA preemption is an exception to the "well-pleaded complaint rule." *Id.* at 65. The Court indicated that the clear legislative intent of the civil enforcement provisions requires ERISA actions to be construed "as arising under the laws of the United States in similar fashion to those brought under . . . [the] Labor-Management Relations Act of 1947." *Id.* at 65-66 (quoting H.R. CONF. REP. NO. 93-1280, at 327 (1974)); *see also* Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 561-62 (1968) (holding that federal removal of an action brought in state court was proper under § 301 of the Labor Management Relations Act of 1947, whose preemptive force recharacterized the claim into one of federal question and, thus, completely displacing state action).

22. This terminology is widely used by circuit courts. *See, e.g.*, Schmeling v. Nordam, 97 F.3d 1336, 1338 (10th Cir. 1996); Custer v. Sweeney, 89 F.3d 1156, 1164 (4th Cir. 1996). For the substance of the doctrine, see *Metropolitan Life Ins. Co.*, 481 U.S. at 63-64 ("Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.").

23. Ingersoll-Rand v. McClendon, 498 U.S. 133, 145 (1990) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)) (holding that ERISA preempted a state claim for wrongful termination where employer allegedly attempted to avoid paying pension benefit through employment termination).

24. 29 U.S.C. § 1144(a).

25. *Id.*

26. *Id.* § 1144(b)(2)A) (stating that state laws regulating insurance, banking, and securities shall apply to people of that state).

27. *Id.* § 1144(b)(2)(A).

28. *Id.* § 1144(b)(4).

29. *Id.* § 1144(b)(2)(B). Under this clause, employee benefit plans governed by ERISA shall not be "deemed" to include insurance companies, other insureds, or an entity engaging in the business of insurance for the purposes of such state laws. *Id.*

30. *Id.*

clause, specifically the "relate to" language.[31]

The Supreme Court addressed ERISA's preemption clause and the meaning of its "relate to" language in *Shaw v. Delta Airlines, Inc.*[32] In *Shaw*, the Court found that New York's Human Rights and Disability Benefits Laws "relate to" an ERISA plan.[33] The Court, however, recognized a limit on ERISA preemption if the state law is "too tenuous, remote, or peripheral"[34] to the employee benefit plan.[35] Subsequently, the Supreme Court in *Metropolitan Life Insurance Co. v. Massachusetts Travelers Insurance Co.*[36] held that a state statute mandating minimum benefits for mental health regulated insurance and was not preempted by ERISA.[37] In this case, the Court urged that the savings and deemer clauses be read together with a "common-sense view."[38] For example, ERISA exempts state insurance laws from its scope but applies to state laws which regulate benefit plans or trusts.[39] Justice Blackmun's opinion recognized the confusing nature of ERISA preemption, which generally preempts state laws, yet simultaneously reserves to states the ability to regulate in certain narrow areas.[40]

In yet another preemption case, the Supreme Court examined these clauses and established that ERISA preempts state common law claims of bad faith and tortious breach of contract against a health plan insurer.[41] Because the Court concluded that a law regulating insurance must be "specifically directed toward that industry,"[42] ERISA preempts these common law claims because they may be brought against non-insurance defendants.[43] The Court emphasized that the underlying policy of ERISA's enforcement scheme supports comprehensive and exclusive enforcement.[44]

In 1990, the Supreme Court interpreted ERISA's deemer clause as ex-

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31. Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 59 (1996). The preemption clause is fundamentally ambiguous because the "relate to" language "requires a modifier in order to have a concrete meaning, and the wide spectrum of possible modifiers—directly, slightly, remotely—suggests a wide spectrum of possible meanings." *Id.* at 47.

32. 463 U.S. 85 (1983).

33. *See Shaw*, 463 U.S. at 100.

34. *Id.* at 100 n.21.

35. *Id.*

36. 471 U.S. 724 (1985).

37. *Metropolitan Life Ins. Co.*, 471 U.S. at 758.

38. *Id.* at 740.

39. *Id.* at 741.

40. *Id.* at 739-40 (stating that the preemption and savings clauses are "not a model of legislative drafting").

41. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987).

42. *Id.* at 50.

43. *Id.*

44. *Id.* at 54. The Court looked to the legislative history of ERISA:

> [T]he substantive and enforcement provisions . . . are intended to preempt the field . . . 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.

Id. at 46 (quoting 120 CONG. REC. S29933 (daily ed. Aug. 22, 1974) (statement of Sen. Williams)).

empting any self-funded employer plan from state insurance regulation.[45] Subsequently, however, the Court ruled that ERISA preempts state law involving worker's compensation regulation, an area usually statutorily excluded from ERISA when the state law "relates to" an employee welfare benefit plan.[46]

Two recent decisions by the U.S. Supreme Court may signal a subtle change in the trend of affording ERISA preemption the broadest possible interpretation. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*,[47] the Court held that ERISA does not preempt a state law where the law only indirectly influences an ERISA plan economically by affecting the cost of insurance policies.[48] However, in *Varity Corp. v. Howe*,[49] the Court allowed individuals to sue for benefit reinstatement when their employer, acting in a fiduciary capacity as plan administrator, made misrepresentations to its employees about plan benefits.[50] The Court stated that the purpose of ERISA is to protect plan participants and beneficiaries, and that it is "hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy."[51] Plaintiffs with denial of benefits claims may attempt to characterize them as breach of fiduciary duty claims in an attempt to obtain redress.[52]

The interplay between ERISA preemption and its exceptions is central to this line of Supreme Court cases. ERISA's preemption clause, specifically its "relate to" language, is decidedly ambiguous. Time and again the Court must analyze the extent to which a state law "relates to" an ERISA plan. In these cases the Court often affords preemption broad treatment. The narrow exceptions to ERISA's preemptive sweep include state insurance regulations as well as plans maintained solely to comply with workers' compensation, unemployment, or disability laws.

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45. FMC Corp. v. Holliday, 498 U.S. 52, 64-65 (1990).

46. *See, e.g.*, District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 126-27 (1992). The Washington D.C. law at issue required employers providing employee health insurance to also provide equivalent health insurance to injured, worker's compensation eligible employees. *Id.* ERISA language is clear that its provisions "shall not apply to any employee benefit plan . . . maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b)(3) (1994). Although this would seem to remove the law from the scope of ERISA preemption, the Court held that regardless of such statutory language, the sweep of the preemption clause is operative where the worker's compensation plan was set by reference to the ERISA employee health insurance plan. *Greater Washington Bd. of Trade*, 506 U.S. at 130-31.

47. 115 S. Ct. 1671 (1995).

48. *See Travelers*, 115 S. Ct. at 1679. New York state law imposes hefty 24% hospital surcharges on commercially-insured patients while exempting those insured with Blue Cross/Blue Shield from such surcharges because Blue Cross provides coverage to the commercially uninsurable. *Id.* at 1674, 1678.

49. 116 S. Ct. 1065 (1996).

50. *Varity Corp.*, 116 S. Ct. at 1074, 1079.

51. *Id.* at 1078.

52. *See* Jeffrey Lewis & Dan Feinberg, Varity Corp. v. Howe*: The Plaintiff's Perspective*, 5 ERISA LITIG. REP., June 1996, at 3, 8.

II. NO ERISA PREEMPTION FOR MEWAS OVER STATE LAWS REGULATING WORKERS' COMPENSATION & INSURANCE

A. *Background*

In *Shaw v. Delta Airlines, Inc.*,[53] employers attempted to avoid a state law requiring payment of disability benefits by claiming that the state law "relates to" employee welfare benefits and was, therefore, preempted by ERISA.[54] Although the Supreme Court held that a state may not regulate an employer ERISA multibenefit plan, the state may enforce regulatory laws.[55] An employer, therefore, can be required by a state to maintain a separate benefit plan for disability benefits providing the plan fails to comply with state disability law.[56] The *Shaw* holding prevents employers from circumventing state regulation by including disability benefits within a larger multibenefit plan.[57]

Subsequently, in *Contract Services Employee Trust v. Davis*,[58] the Tenth Circuit held that ERISA did not preempt Oklahoma's worker compensation regulations.[59] This holding was consistent with recent decisions of both the First and Ninth Circuits.[60] The Ninth Circuit held that an employer offering a multibenefit plan could not use preemption to circumvent state regulation.[61] When complying with a state regulation, an ERISA plan provider may experience burdensome economic implications. These implications, however, do not "relate to" the plan so as to trigger ERISA preemption.[62] Similarly, the court concluded that an employer may not "don the mantle of ERISA preemption simply by including workers' compensation benefits in its welfare benefit plan and thereby escape the requirements of Maine's law."[63]

ERISA defines a multiple employer welfare arrangement (MEWA) as "an employee welfare benefit plan, or any other arrangement . . . which is established or maintained for the purpose of offering or providing any benefit . . . to the employees of two or more employers . . . or to their beneficiaries."[64] The deemer clause excludes single-employer benefit plans from state regulation,[65] but MEWAs may not claim such exclusion.[66] Therefore, while a

53. 463 U.S. 85 (1983).
54. *Shaw*, 463 U.S. at 96.
55. *Id.* at 108.
56. *Id.* The Court examined the language of ERISA's § 1003(b)(3), which exempts plans maintained "solely" to comply with state disability law. *Id.* at 107. The multibenefit plans at issue did not exist "solely" to comply with state disability law, hence, appellee airlines' argument that exemption from ERISA was inapplicable. *Id.*
57. *Id.* at 108.
58. 55 F.3d 533 (10th Cir. 1995). This case involved an attempt by a multiemployer trade association to use ERISA preemption to alleviate their responsibility under Oklahoma worker's compensation regulation. *Id.* at 535.
59. *See Contract Serv. Employee Trust*, 55 F.3d at 534.
60. *See* Combined Management, Inc. v. Superintendent of Ins., 22 F.3d 1 (1st Cir. 1994); Employee Staffing Serv., Inc. v. Aubry, 20 F.3d 1038 (9th Cir. 1994).
61. *Employee Staffing Serv.*, 20 F.3d at 1040.
62. *Id.* at 1042.
63. *Combined Management*, 22 F.3d at 5.
64. 29 U.S.C. § 1002(40)(A) (1994).
65. 29 U.S.C. § 1144(b)(6)(A) (1994).
66. Employee plans operating as fully-insured MEWAs are subject to "any law of any State

MEWA delivers ERISA benefits to more than one employer, it is subject to state law. State law holds MEWAs accountable to prevent entrepreneurs from operating as profitable insurance ventures under the guise of an ERISA plan, without being subject to state insurance laws.[67] The legislative history of the MEWA amendment indicates a desire to end multiple employer organization abuse that uses ERISA preemption to avoid state insurance regulation.[68] A Second Circuit decision, *Atlantic Healthcare Benefits Trust v. Googins*,[69] determined that the MEWA clause operates as an exception to the deemer clause—MEWAs may be construed as insurance entities, thereby allowing state regulation.[70]

B. Fuller v. Norton[71]

1. Facts

The International Association of Entrepreneurs of America (IAEA), a nonprofit organization, sought to establish to offer its member employers participation in an employee welfare benefit plan.[72] This multiple employer welfare arrangement established a trust, funded by employer contributions, to provide employee benefits such as health, accident or disability insurance.[73] In response to an attempt by the IAEA's plan trustee to certify the trust, the Colorado Division of Insurance ordered the temporary cessation of business activity.[74] Once the trust complied with workers' compensation and other Division requirements, it could resume operation.[75] The trustee sought a declaratory judgment on two grounds. First, he claimed that because ERISA regulates MEWAs, the IAEA was exempt from state workers' compensation or insur-

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which regulates insurance." *Id.* § 1144(b)(6)(A)(i). Non-fully insured MEWAs are subject to "any law of any State which regulates insurance . . . to the extent not inconsistent with the preceding sections of this subchapter." *Id.* § 1144(b)(6)(A)(ii).

67. Roger C. Siske et al., *What's New in Employee Benefits: A Summary of Current Case and Other Developments*, CA62 ALI-ABA 1, 118 (1996). ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). The issue, therefore, is to distinguish between an ERISA plan established by such an association or group from for-profit insurance ventures attempting to circumvent state regulation. International Ass'n of Entrepreneurs of Am. Benefit Trust v. Foster, 883 F. Supp. 1050, 1057 (E.D. Va. 1995). The Ninth Circuit held that ERISA's definition of "employer" requires a "bona fide 'organizational relationship' among the members other than a mere association for the purpose of qualifying for benefits." Moideen v. Gillespie, 55 F.3d 1478, 1481 (9th Cir. 1995).

68. 128 CONG. REC. H30356 (daily ed. Dec. 13, 1982) (statement of Rep. Erlenborn) (proposing this amendment to close off any opportunity for MEWA operators to skirt state regulation).

69. 2 F.3d 1 (2d Cir. 1993).

70. *See Atlantic Healthcare Benefits Trust*, 2 F.3d at 5. This case sought declaratory judgment that ERISA preempts a MEWA from state insurance regulation. *Id.* at 2-3. The court construed the 1983 MEWA amendment to allow states to regulate MEWAs as insurance companies. *See id.* at 5.

71. 86 F.3d 1016 (10th Cir. 1996).

72. *Fuller*, 86 F.3d at 1019.

73. *Id.*

74. *Id.*

75. *Id.*

ance regulatory schemes.[76] Second, the trustee argued that Colorado MEWA regulation violated the Commerce[77] and Equal Protection[78] Clauses.[79] The district court dismissed the action and held that Colorado regulation of MEWAs under insurance and workers' compensation regulations were exceptions to ERISA preemption.[80]

2. Decision

In affirming the lower court decision, the Tenth Circuit held that non-fully insured MEWAs are subject to state insurance regulatory laws and exempt from ERISA preemption.[81] State workers' compensation regulations apply to benefits offered within a multibenefit plan.[82] The court concluded that although workers' compensation regulations may economically impact an employee benefit plan, the regulations do not therefore "relate to" an ERISA plan.[83] The court further held that a Colorado state statute extending Insurance Division jurisdiction over MEWAs for compliance purposes was consistent with the statutory interpretation of ERISA's MEWA amendment.[84]

C. *Analysis*

ERISA's statutory language excludes worker's compensation programs from its preemptive sweep. In some circumstances, however, the preemption clause will encompass such programs if they "relate to" an ERISA benefit plan.[85] When employers offer worker's compensation benefits as part of a multibenefit ERISA plan, ERISA will not preempt the state regulatory scheme.[86]

Further, the court construed the MEWA amendment to reserve regulation of non-fully insured MEWAs to the state. Here, Colorado's MEWA regulation requires certain reporting, disclosure and funding requirements. This state law does not foreclose the trust from operating in Colorado, which would be inconsistent with ERISA requirements. Instead, the law merely applies its insurance requirements to MEWAs as authorized by ERISA. Consequently, the IAEA trust failed in its attempt to escape Colorado insurance regulation on two grounds: the regulation involved worker's compensation and the trust

76. *Id.*
77. U.S. CONST. art. I, § 8, cl. 3.
78. U.S. CONST. amend. XIV, § 1.
79. *Fuller*, 86 F.3d at 1019.
80. *See* Fuller v. Norton, 881 F. Supp. 468, 471 (1995).
81. *Fuller*, 86 F.3d at 1019.
82. *Id.* at 1021-22.
83. *Id.* at 1021.
84. Treatment of Multiple Employer Welfare Arrangements Under Employee Retirement Income Security Act of 1974, Pub. L. No. 97-473, 96 Stat. 2612 (codified as amended at 29 U.S.C. §§ 1002, 1144(b) (1994)); *Fuller*, 86 F.3d at 1024-25. The relevant part of the Colorado statute at issue in this case provides that "[n]othing . . . shall . . . limit the ability of the division of insurance to regulate . . . multiple employer welfare arrangements." COLO. REV. STAT. § 10-3-903.5(2)(1994).
85. *See supra* note 25 and accompanying text.
86. *See* discussion *supra* Part II. A.

qualified as a MEWA.

D. *Other Circuits*

The Tenth Circuit is consistent with other circuits in its approach to worker's compensation regulation. Several circuits have entertained the same plaintiff seeking declaratory and injunctive relief from compliance with state insurance regulation.[87] None of these circuits found the IAEA trust exempt from state regulations.[88]

In the Eighth Circuit, the court did not even address ERISA preemption, stating that the threshold question is whether the trust was an ERISA plan.[89] Other circuits disposed of IAEA's ERISA claim using similar reasoning as the Tenth Circuit. The Seventh Circuit held that ERISA did not preempt workers' compensation regulations even when an employer offered the benefits within a multiple benefit plan.[90] Consequently, the state possessed the right to ensure the provision of workers' compensation benefits in accordance with the state workers' compensation regulations.[91] Similarly, the Fifth Circuit found that ERISA would not preempt provisions of the Louisiana workers' compensation regulations.[92] In this case, state workers' compensation regulations indirectly increased the cost of an ERISA plan but did not "relate to" that plan.[93]

III. STATE COMMON LAW CLAIMS PREEMPTED DESPITE LACK OF ALTERNATE REMEDY

A. *Background*

Case law supporting preemption of state law claims began with *Pilot Life Ins. Co.*[94] ERISA preempts claims for state tort or breach of contract actions—specifically bad faith for improper handling of a claim under the plan.[95] This preemption analysis examines whether the law "relates to" an ERISA plan. If so, ERISA will preempt the state claims.[96] The savings

87. *See* Fuller v. Skornicka, 79 F.3d 685 (7th Cir. 1996); Fuller v. Ulland, 76 F.3d 957 (8th Cir. 1996); International Ass'n of Entrepreneurs of Am. v. Angoff, 58 F.3d 1266 (8th Cir. 1995); Combined Management, Inc. v. Superintendent of Ins., 22 F.3d 1 (1st Cir. 1994); International Ass'n of Entrepreneurs of Am. Benefit Trust v. Foster, 883 F. Supp. 1050 (E.D. Va. 1995).

88. *See infra* notes 89-98 and accompanying text.

89. *See Fuller*, 76 F.3d at 960, 960 n.4 (remanding case to state court to determine if IAEA Trust is an ERISA-covered plan and noting that IAEA trust has been found by one district court not to be an ERISA plan); *International Ass'n of Entrepreneurs of Am.*, 58 F.3d at 1269 (concluding that concurrent jurisdiction exists to determine ERISA status of IAEA's trust).

90. Fuller v. Skornicka, 79 F.3d at 687.

91. *Id.*

92. Martco Partnership v. Lincoln Nat'l Life Ins. Co., 86 F.3d 459, 463 (5th Cir. 1996).

93. *Id.* at 463. The offset provisions of Louisiana worker's compensation law only determines the employer's obligation to the beneficiary. *Id.* The fact that the insurance provider chose to reference the state law in its policy is not sufficient to trigger preemption. *Id.*

94. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

95. *See generally id.* (holding ERISA preempted a state claim for improper processing of benefit claims under an ERISA-regulated plan because state common law did not regulate insurance as defined by ERISA's savings clause).

96. *Id.* at 47.

clause[97] prevents ERISA preemption only when the law is "specifically directed toward [the insurance] industry."[98]

In *Pilot Life Insurance*, the Supreme Court focused on the language of the McCarran-Ferguson Act[99] in reaching its decision.[100] The Court articulated three criteria which identify the "business of insurance," triggering ERISA's savings clause: (1) the law effects a spreading of risk; (2) the law is an integral part of the relationship between the insurer and insured; and (3) the law is limited to insurance industry entities.[101] The narrow exception carved out in ERISA's language, to allow state regulation in certain areas, does not apply in lawsuits brought against insurers operating as claims processors for a benefit plan.[102] There is no state tort liability against an insurance company for processing claims because ERISA's exclusive enforcement scheme provides a remedy for denial of benefits.[103]

B. Cannon v. Group Health Service, Inc.[104]

1. Facts

The plaintiff was a group plan beneficiary who filed a claim against Group Health Service, Inc. and GHS Health Maintenance Organization, Inc. for: (1) negligence and bad faith refusal to authorize an autologous bone marrow transplant (ABMT) treatment in a timely fashion; (2) breach of contract; and (3) breach of fiduciary duty.[105] Blue Lincs HMO insured the plaintiff's wife, Mrs. Cannon. She was diagnosed and treated for leukemia.[106] While in remission, her physician sought approval for ABMT as a course of treatment,[107] but the insurer promptly refused the treatment as experimental.[108] The physician requested a reconsideration and provided literature to support his contention that ABMT treatment was not experimental.[109] The insurer again denied approval of the ABMT but authorized the treatment after a third request.[110] The plaintiff's wife, however, received notice of this approval after suffering a recurrence of cancer, rendering any ABMT treatment ineffective.[111] Mrs. Cannon died approximately six weeks after she received

97. *See supra* notes 26-28 and accompanying text.
98. *Pilot Life Ins. Co.*, 481 U.S. at 50.
99. 15 U.S.C. §§ 1011-15 (1994). That Act states, "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *Id.* § 1012(a).
100. *Pilot Life Ins. Co.*, 481 U.S. at 50.
101. *Id.* at 48-49 (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982)).
102. Fisk, *supra* note 31, 101, at 51.
103. *See supra* text accompanying note 19. ERISA, however, does not provide for punitive or compensatory damages. Fisk, *supra* note 31, 101, at 51.
104. 77 F.3d 1270 (10th Cir. 1996).
105. *Cannon*, 77 F.3d at 1272.
106. *Id.* at 1271.
107. *Id.* The physician emphasized to the insurer that the transplant, to be effective, must be administered while a patient is in remission. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

the approval letter.[112]

Defendant removed the claim to federal court under ERISA preemption.[113] After denying plaintiff's motion for remand, the district court granted summary judgment to the insurer, finding that the plaintiff's claims "related to" an ERISA health plan.[114]

2. Decision

The plaintiff appealed the lower court decision on three grounds: (1) ERISA does not preempt a claim for which ERISA provides no remedy; (2) preemption of the claim without a remedy violated plaintiff's fundamental right of access to justice; and (3) that the federal common law equitable estoppel allowed his claim.[115]

On appeal, the Tenth Circuit affirmed the lower court decision.[116] The court held that ERISA preemption applies to common law state tort and contract actions and, further, that the absence of an ERISA remedy fails to impact preemption.[117] Interpreting ERISA's savings and deemer clauses,[118] the court found that an insurance provider of ERISA plan benefits cannot be deemed an insurance company subject to state insurance regulation.[119]

Plaintiff argued that ERISA preemption violates a constitutional "right to access justice."[120] The Tenth Circuit concluded that the Supreme Court has not defined such a broad fundamental right to access justice, and dismissed this claim.[121]

Finally, the court dismissed plaintiff's claim for equitable estoppel under federal common law.[122] In so doing, the court identified the elements for a claim of common law equitable estoppel: (1) misrepresentation of material facts; (2) which is intentional; (3) when the party to be estopped was aware of the true facts; and (4) an ignorant party relied on the misrepresented facts; (5) to his or her detriment.[123] The court stated that the delay in the ABMT procedure resulted from plan interpretation rather than misrepresentation.[124] Consequently, the Tenth Circuit dismissed this claim without adopting or rejecting the common law claim of equitable estoppel for use in ERISA cases.[125]

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112. *Id.*
113. *Id.* at 1272.
114. *Id.*
115. *Id.*
116. *Id.* at 1274.
117. *See id.*
118. *See supra* text accompanying notes 26-29, 30.
119. *Cannon*, 77 F.3d at 1275. The court found that the deemer clause contradicted plaintiff's argument because it specifically excludes ERISA benefit plans from state regulation. *Id.*
120. *Id.* Plaintiff claimed this right was conferred by the Fifth Amendment's Due Process Clause and the Ninth Amendment. The latter amendment, he argued, and the Magna Carta, guarantee a right to redress through access to the courts. *Id.*
121. *Id.* at 1276.
122. *See id.* at 1277.
123. *Id.* at 1276-77.
124. *Id.* at 1277.
125. *Id.*

C. *Analysis*

The Tenth Circuit recognized that a plaintiff may be left without recourse if ERISA preempts state law claims but ERISA provides no remedy.[126] Although sound reasons exist for creating an exception to ERISA to address this, the court indicated that Congress, and not the judiciary, is the appropriate forum for such policy choices.[127]

Mr. Cannon claimed a state tort action of negligence or bad faith against the insurer for its failure to timely authorize the ABMT.[128] This case falls within a growing body of ERISA benefit claims called "betrayal without remedy" cases.[129] In these cases, the insurer promised the plan participant a benefit, or the insurer made a representation regarding a benefit, which is not in accordance with the plan.[130] Where, as in this case, the insurance coverage "relates to" an ERISA benefit plan, ERISA preempts the claim.[131] Once ERISA preempts, no remedy exists under the Act's statutory scheme because enforcement is limited to benefits defined under the plan or expenses actually incurred.[132]

The Tenth Circuit addressed the equitable estoppel argument advanced by plaintiff.[133] Some circuits have allowed a claim for federal common law equitable estoppel in cases where a plan beneficiary detrimentally relies on an ambiguous plan provision.[134] In these cases, a provider is estopped from denying liability because of an intentional misrepresentation of a material fact.[135] Because ERISA requires maintenance of a written plan, informal plan modifications are not subject to equitable estoppel.[136] When an ambiguous plan provision exists and a plan representative interprets such a provision, common law equitable estoppel may be invoked.[137] The fight in *Cannon* regarded interpretation of the ABMT provision of Mrs. Cannon's plan. Here, the court found that the requisite equitable estoppel elements of misrepresentation and detrimental reliance were absent.[138] Consequently, the court dismissed

126. *Id.* at 1274.
127. *Id.*
128. *Id.* at 1272.
129. *Preemption—The Inconsistent Oral Promise to Pay Benefits*, ERISA LITIG. REP., Feb. 1993, at 9. The Fifth Circuit first coined the phrase "betrayal without remedy" in Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989).
130. *Cannon*, 77 F.3d at 1271-72. The insurer approved the procedure notwithstanding the language of the rider to the plaintiff's health plan excluding ABMT benefits to treat acute leukemia in first remission. *Id.* at 1272.
131. *See supra* text accompanying note 25.
132. *See supra* text accompanying note 19.
133. *See id.* at 1276-77.
134. *See, e.g.*, National Cos. Health Benefit Plan v. St. Joseph's Hosp., Inc., 929 F.2d 1558, 1572 (11th Cir. 1991) (identifying the elements of federal common law equitable estoppel). *Compare* Kane v. Aetna Life Ins., 893 F.2d 1283, 1285 (11th Cir. 1990) (applying equitable estoppel where ERISA plan provision interpretation is ambiguous and insured detrimentally relies on such interpretation), *with* Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (holding equitable estoppel not applicable to enforce oral modification of ERISA plan).
135. *National Cos. Health Benefit Plan*, 929 F.2d at 1572.
136. *Nachwalter*, 805 F.2d at 960.
137. *Kane*, 893 F.2d at 1286.
138. *Cannon*, 77 F.3d at 1277.

this claim for relief without adopting the equitable estoppel cause of action.[139]

D. *Other Circuits*

During this survey period, the federal circuit courts continued the trend of broad application of ERISA preemption involving state law claims. The Sixth Circuit supported ERISA preemption for state common law tort actions brought against an insurer.[140] The Eleventh Circuit has expressed its concern that ERISA's broad reach leaves plaintiffs without a remedy.[141] In that case, ERISA preempted a fraudulent misrepresentation claim against an insurer because plaintiff tied the claim to a denial of benefits claim.[142]

Two vicarious liability claims brought in the Seventh Circuit against ERISA plan administrators for the alleged negligence of their provider physicians proved unavailing. In *Rice v. Panchal*,[143] the court analyzed federal question jurisdiction in ERISA cases conferred via complete preemption, as distinguished from the defensive posture of conflict preemption arising in ERISA cases.[144] Because the claim did not enforce any rights under the plan and did not require interpretation of an ERISA plan, removal to federal court was inappropriate under complete preemption.[145] The court left open the possibility that "conflict preemption" may provide the vehicle for removal.[146] In *Jass v. Prudential Health Care Plan, Inc.*,[147] the claim involved vicarious liability against an ERISA plan administrator for the negligence of a provider physician and nurse.[148] The court held that ERISA preemption applied because the claim involved interpretation of the plan.[149] This claim was distinguished from the Tenth Circuit's holding in *Pacificare of Oklahoma, Inc. v. Burrage*,[150] because this physician's negligence was tied to the benefits determination and because he was not an HMO employed physician but, rather an independent contractor.[151]

Other circuits addressed equitable estoppel claims against ERISA plan providers but provided no relief to plaintiffs.[152] The Ninth Circuit heard two

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139. *See id.*

140. *See* Schachner v. Blue Cross and Blue Shield, 77 F.3d 889, 898 (6th Cir. 1996) (holding that ERISA preempts Ohio law of bad faith, breach of contract and negligence against insurer).

141. *See* Morstein v. National Ins. Servs., Inc., 74 F.3d 1135, 1138 n.3 (11th Cir. 1996) (expressing regret that "the reach of ERISA preemption too often undermines the stated purpose of the Act: to protect employees and beneficiaries of employee benefit plans").

142. *See id.* at 1137-38.

143. 65 F.3d 637, 646 (7th Cir. 1995).

144. *Rice*, 65 F.3d at 639-40.

145. *Id.* at 646.

146. *See id.*

147. 88 F.3d 1482, 1495 (7th Cir. 1996).

148. *Jass*, 88 F.3d at 1484.

149. *Id.* at 1489. The vicarious liability claim for the nurse's negligence was a denial of benefits invoking ERISA preemption. *Id.* The vicarious liability claim of negligence against the plan for the physician required examination of the plan. *Id.* at 1493.

150. 59 F.3d 151 (10th Cir. 1995) (holding that ERISA does not preempt a vicarious liability claim against an HMO for the negligence of its physician).

151. *See Jass*, 88 F.3d at 1494.

152. *See* Fink v. Union Cent. Life Ins. Co., 94 F.3d 489 (8th Cir. 1996); Pisciotta v. Teledyne

cases seeking equitable estoppel relief for alleged violation of ERISA plan provisions,[153] and articulated its requirements for a bona fide claim: (1) material misrepresentation; (2) reasonable detrimental reliance; (3) extraordinary circumstances; (4) ambiguous plan term; and (5) misrepresentation based on an oral plan interpretation.[154] In both cases before the Ninth Circuit, the equitable estoppel claims were unsuccessful because the ERISA plan provisions were unambiguous.[155]

The Eighth Circuit held equitable estoppel inapplicable against an insurer where the beneficiary was ineligible for the plan benefit.[156] The Second Circuit adheres to "principles of estoppel" in ERISA cases only under "extraordinary circumstances."[157] The court articulated this requirement as well as promissory estoppel elements in a severance benefits dispute.[158]

CONCLUSION

In *Fuller*, the Tenth Circuit supported state regulation of workers' compensation benefits notwithstanding that an ERISA plan structure encompasses these benefits.[159] Although states may not regulate an ERISA plan, compliance with regulatory laws to ensure worker protection enables the state to require a separate plan for purposes of compliance with state law.[160] Non-

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Indus., 91 F.3d 1326 (9th Cir. 1996); Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 511 (1996); Marx v. Loral Corp., 87 F.3d 1049 (9th Cir. 1996); *In re* Ionosphere Clubs, Inc., 85 F.3d 992 (2d Cir. 1996); Jenkins v. Montgomery Indus., 77 F.3d 740 (4th Cir. 1996).

153. *See Pisciotta*, 91 F.3d at 1326; *Marx*, 87 F.3d at 1049.

154. *Pisciotta*, 91 F.3d at 1331.

155. In *Pisciotta*, a retiree class alleged an ERISA violation when a former employer modified its health plan after promising to pay the full amount of retiree medical premiums for life. *Id.* at 1329. Retirees relied on an insurance booklet, but the plan controlled and was held not ambiguous. *Id.* at 1330-31. The second equitable estoppel case, *Marx*, involved a retiree class action that alleged misrepresentations made to beneficiaries that plan provisions would not change when the company was sold. *Marx*, 87 F.3d at 1051-52. The *Marx* court held that if a plan sufficiently outlines a procedure to amend benefits, then no ambiguity exists in the plan provisions. *Id.* at 1056.

156. *See Fink*, 94 F.3d at 492 (restricting equitable estoppel where a dispute over payout of death benefit involved decedent's eligibility for group life policy and decedent was not an active, full-time employee at the time of death).

157. Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993); *see also* Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1319 (3d Cir. 1991) (holding equitable estoppel only available with showing of "extraordinary circumstances" in ERISA disputes going beyond ordinary elements of equitable estoppel); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1165 n.10 (3d Cir. 1990) (finding practice of paying severance benefit to employees, beyond plan terms, may be implied representation of continuation of the benefit to other employees, but does not qualify as an extraordinary circumstance). *But see* Rosen v. Hotel & Restaurant Employees & Bartenders Union, 637 F.2d 592, 598 (3d Cir. 1981) (holding that extraordinary circumstances exist and pension plan trustee was estopped from denying pension payout where trustee advised employee that employer contributions to the fund were in arrears and employee subsequently deposited money to fund to cover arrearage).

158. *See Schonholz*, 87 F.3d at 72 (holding that genuine issues of material fact existed on estoppel claim). The court relied on the language of ERISA and the RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979), to determine that employer's letter constituted a sufficiently definite promise to the terminating employee such that employer reasonably should have expected "to induce action or forbearance on the [plaintiff's] part." *Id.* at 79.

159. *See* Fuller v. Norton, 86 F.3d 1016, 1021-22 (10th Cir. 1996).

160. *Id.* at 1021.

fully insured multiple employer welfare arrangements are subject to Colorado regulatory law irrespective of ERISA's broad preemptive sweep.[161]

In *Cannon*, the court found preemption operative over state common law claims.[162] Plan beneficiaries may, as the *Cannon* case demonstrates, find themselves victims of the "betrayal without a remedy" dilemma.[163] The Tenth Circuit rejected plaintiff's equitable estoppel claim, but stopped short of adopting or rejecting equitable estoppel in ERISA cases.[164] Should the Tenth Circuit decide to adopt equitable estoppel in future ERISA actions it may, in certain instances, provide a sorely needed vehicle for relief to "betrayal without remedy" plaintiffs.

Historically, ERISA preemption has been broadly applied, while the remedies available to beneficiaries are few.[165] Indeed, as Justice Birch stated in his dissent in *Sanson v. General Motors Corp.*,[166] the purpose of ERISA is to protect plan beneficiaries, but an overbroad reading of ERISA preemption case law may allow an employer to "hoodwink a long time employee and leave him stranded without any recourse whatsoever" and "[that] result stands the entire statutory scheme on its proverbial head."[167]

ERISA preemption continues to be a highly litigated area because of the complex nature of this federal law. Meanwhile, interpretation of ERISA's preemption, savings, and deemer clauses frustrates the courts.[168] Congress wanted ERISA to provide a broad and exclusive framework for the administration of employee benefits.[169] Consequently, it is likely that ERISA preemption will continue unabated.

Jane D. Bailey

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161. *Id.* at 1024.

162. *See* Cannon v. Group Health Serv., Inc., 77 F.3d 1270, 1274 (10th Cir. 1996).

163. *See id.*

164. *Id.* at 1277.

165. Lewis & Feinberg, *supra* note 52, at 3.

166. 966 F.2d 618 (11th Cir. 1992) (holding that a retiree's claim that the former employer had fraudulently misrepresented availability of benefits was preempted by ERISA).

167. *Sanson*, 966 F.2d at 623 (Birch, J., dissenting).

168. *See, e.g.*, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1676 (1995) (discussing ERISA's "relate to" and "connection with" language as "unhelpful text" and "frustrating" while "look[ing] instead to the objectives of the ERISA statute as a guide").

169. *See supra* note 44.