1991

ERISA: Nonwaivability of Preemption

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Congress has attempted to encourage the growth of private employee benefit plans[1] by insuring national uniformity through the development of a federal common law for employee benefit plans[2] through the Employment Income Retirement Security Act of 1974 (ERISA).[3] ERISA contains an explicit provision to safeguard this goal of uniformity which provides that federal law takes precedence over state law. This preemption provision states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[4]

There is, however, a serious threat to this goal. Some confusion remains as to whether ERISA applies to disputes over certain types of employee benefit plans.[5] In the presence of ERISA preemption, some state courts cannot determine if they have subject matter jurisdiction,[6] that is, power to entertain an action relating to an

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1. *See infra* notes 345-48 and accompanying text.

2. *See, e.g.*, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) (quoting 129 CONG. REC. S29,942 (1974) (remarks of Sen. Javits: "It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.")); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55-57 (1987); *infra* notes 349-61 and accompanying text.

3. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. & 29 U.S.C.).

4. 29 U.S.C. § 1144(a) (1988). *See infra* note 223 and accompanying text for the complete text.

5. *See, e.g.*, Denton v. First Nat'l Bank, 765 F.2d 1295 (5th Cir. 1985) (The trial court heard the case twice because the parties were initially unaware of ERISA's application to denial of a lump sum payment from a defined benefit plan.).

6. One trial judge lamented:

> I have not gone and read these cases, this multitude of cases that you've cited in this thing. But, just for the record, and this is worth zero, I think it's absolutely ridiculous that this question appears to be so unclear, even to federal courts, as to what state courts can and cannot do. And, the matter to me, and this may be a serious oversimplification of the problem, is that they probably need to state that state courts cannot hear any matter regarding Employee Retirement Income Security Act cases, period. But, I don't know whether I have jurisdiction or not.

Ames v. Ames, 757 S.W.2d 468, 480-81 (Tex. Ct. App. 1988) (quoting the transcript of

ERISA plan. State courts generally possess residual subject matter jurisdiction and may entertain any action not expressly forbidden.[7] Federal courts, on the contrary, may only consider those matters expressly permitted by Congress or the Constitution.[8] In the presence of this confusion, many courts have held that ERISA preemption is waived if not timely raised in the trial court.[9]

This result frustrates the purpose of ERISA preemption. If appellate courts permit state actions involving employee benefit plans as a result of these procedural errors waiving preemption, then, rather than the nationally uniform federal common law which Congress desired, bodies of state common law will emerge which would govern employee benefit plans in those jurisdictions. The existence of state common law, which specifies varying fiduciary duties and plan interpretations, will deter some multistate employers from adopting new plans or continuing old ones.[10] The potential for state extracontractual damages in connection with employee benefit plans will similarly discourage other employers.[11] This double jeopardy of expanded liability and expanded damages could undermine Congress's attempt to place the cost of private employee benefit plans on private employers by encouraging voluntary plan growth.

This Article first examines the problem currently facing the appellate courts as to whether a party may initially raise ERISA preemption after trial or on appeal. The Article then reviews the various approaches to the problem by the appellate courts. Next, the Article examines the preemption principle enunciated by the Supreme Court under the National Labor Relations Act (NLRA)[12]

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the trial court) (a case involving wrongful conversion of funds that the administrator should have paid as a liquidation distribution from a terminated profit-sharing plan), *aff'd & modified*, 776 S.W.2d 154 (Tex. 1989), *cert. denied*, 110 S. Ct. 1809 (1990); *see also* Hughes v. Blue Cross, 215 Cal. App. 3d 832, 848, 263 Cal. Rptr. 850, 859 (1989), *cert. dismissed*, 110 S. Ct. 2200 (1990); Van De Hey v. United States Nat'l Bank, 90 Or. App. 258, 262-263, 752 P.2d 848, 850 (1988).

7. *See, e.g.*, TEX. CONST. art. 5, § 8.

8. *See* U.S. CONST. art. III, cl. 2. *See generally* 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 60 (2d ed. 1985).

9. *See infra* notes 106-15, 152-82 and accompanying text.

10. *See* Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 TEMP. L.Q. 51, 51 (1979) (suggesting that "plan administrators, faced with hopelessly inconsistent federal and state regulations and contradictory judicial pronouncements," will terminate employee benefit plans).

11. *See infra* notes 64-67 and accompanying text.

12. Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-69 (1988)).

To determine the procedural effect of preemption of a particular statute requires exam-

that some appellate courts regard as dispositive. The Article then explores the failure of the appellate courts to follow the ERISA mandate. Finally, the Article outlines the analysis appellate courts should conduct relating the legislative intent to the procedural effect of ERISA preemption in answering the question of whether a party can waive the preemption.[13]

This Article asserts that ERISA preemption is jurisdictional and, therefore, may be raised for the first time on appeal. This approach gives ERISA preemption the same procedural effect as NLRA preemption and preserves a uniform federal common law with respect to employee benefit plans, thereby encouraging the growth of private employee benefit plans.

I. THE PROBLEM

There are two types of employee benefit plans—single-employer plans in which a firm sponsors plans for its employees only, and multiple-employer plans in which several firms sponsor one plan for all of their employees.[14] Most multiple-employer plans are "multiemployer plans" maintained pursuant to a collective bargaining agreement designed to benefit the labor union members of several employers.[15]

A. Nongovernmental Civil Actions and Jurisdiction

Government regulation for multiemployer plans and single-employer, union-negotiated plans began with the Labor Management Relations Act of 1947 (LMRA).[16] This Act primarily regulates collective bargaining agreements. LMRA resembles NLRA in that both lack an express preemption provision.[17] Section 302(c)(5) of

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ination of the legislative intent. NLRA, however, possesses no express preemption provision. Therefore, NLRA preemption rests solely on implication by the Supreme Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), based on the theory that the congressional Act so occupies the field as to preclude state regulation. *See also* Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 481 (1955); Garner v. Teamsters Local 776, 346 U.S. 485, 500 (1953); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 776-77 (1947).

13. In other contexts, the Supreme Court has criticized the circuit courts for not examining legislative history where so directed. United Mine Workers Health & Retirement Funds v. Robinson, 455 U.S. 562, 573-74 (1982) (circuit court ignored the text and legislative history of the Taft-Hartley Act and relied on case law to apply reasonableness to review a trustee's nondiscretionary finding under a collective bargaining agreement).

14. J. LONGBEIN & B. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 48 (1990).

15. 29 U.S.C. § 1002(37) (1988).

16. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-87 (1988)).

17. Allis-Chalmers v. Lueck, 471 U.S. 202, 208 (1985).

LMRA requires the trustees of multiemployer plans to operate them for the sole and exclusive benefit of the employee-beneficiaries.[18] Under this Section the courts have implied a number of nongovernmental, civil actions, such as lawsuits by employers, employee-beneficiaries, or trustees to enforce fiduciary duties,[19] or by employee-beneficiaries for benefits due.[20] Section 301(a) of LMRA provides specific causes of action to enforce collective bargaining agreements,[21] thereby affecting both multiemployer and single-employer, union-negotiated employee plans. Under this provision trustees have sued employers for contributions,[22] and employee-beneficiaries have sued for benefits due.[23] Both state and federal courts have jurisdiction for lawsuits under Section 301 or Section 302.[24]

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18. 29 U.S.C. § 186(c)(5) (1988) (prohibiting employer payments to labor unions except for payments to employee trust funds for the sole and exclusive benefit of their employees and beneficiaries).

In the employee benefit area, LMRA attempted to eliminate the extortion, bribery, and mismanagement plaguing union pension and welfare plans by controlling their establishment and operation. Landau, Menholtz & 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, 535-41 (1974). Congress also became concerned that union officials might convert plan resources to their own use, and, through LMRA, made it illegal to set up a pension plan administered solely by a union. *Id.* at 535. Union officials could only participate in plan administration and fund management as members of a board of trustees on which both labor and management were equally represented. *See* § 186(c)(5)(B).

As a result, labor unions have developed two types of pension plans: (1) plans jointly administered by both union and management, exempted from the LMRA provisions proscribing payments to union officials, *id.*; and (2) plans, resulting from collective bargaining administered unilaterally by employers, and subject to the proscription. *See*, Schneider, *Surviving ERISA Preemption: Pension Arbitration in the 1980's*, 16 COLUM. J.L. & SOC. PROB. 269, 271 (1980). Both settled disputes through arbitration prior to ERISA. *Id.* at 276.

19. *See, e.g.*, Nedd v. United Mine Workers, 556 F.2d 190 (3d Cir. 1977) (employees sued trustees for damages for failure to get employer to contribute), *cert. denied*, 434 U.S. 1013 (1978); Haley v. Palatnik, 509 F.2d 1038 (2d Cir. 1975) (new trustees sued old trustees to invalidate a self-dealing contract); Employing Plasterers' Ass'n v. Journeymen Plasterers' Protective & Benevolent Soc'y Local 5, 279 F.2d 92 (7th Cir. 1960) (employers sued to enjoin plan administrator's misuse of funds, primarily for political contributions).

20. *See, e.g.*, Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964).

21. 29 U.S.C. § 185(a) (1988) (may bring suit in federal court without meeting diversity requirements).

22. *See, e.g.*, Calhoun v. Bernard, 359 F.2d 400 (9th Cir. 1966).

23. *See, e.g.*, Rehmar v. Smith, 555 F.2d 1362 (9th Cir. 1976).

24. The LMRA provision for collective bargaining agreements states that these suits "may be brought" in federal court, 29 U.S.C. § 185(a) (1978), but a litigant may also bring the lawsuit in state court. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507 (1962). Litigants have brought suits in state court to enforce contribution requirements in

The more comprehensive regulation of these collectively bargained plans and most of the remaining single-employer plans began with ERISA. For these plans ERISA specifies reporting and disclosure requirements,[25] participation and vesting requirements,[26] funding requirements,[27] and fiduciary standards.[28] Each plan generally possesses three fiduciaries—the employer who sponsors the plan for his employees[29] and appoints the other fiduciaries,[30] the trustee who manages the assets of the plan,[31] and the plan administrator who operates the plan.[32]

ERISA differs from LMRA by specifically providing for preemption of state law and for express actions with jurisdictional limits. Section 502(a) of ERISA authorizes several types of express, nongovernmental, civil lawsuits by the plan's fiduciaries and employee-beneficiaries, for example: (1) an employee-beneficiary suit for information;[33] (2) an employee-beneficiary or fiduciary suit to enjoin violations of ERISA or to obtain other equitable relief to redress such violations, or enjoin violations of the plan or enforce its provisions;[34] and (3) an employee-beneficiary lawsuit for benefits due.[35] Unlike LMRA practice, the non-benefits-due litigant must

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collective bargaining agreements. *See, e.g.*, Local 552, Journeymen Barbers v. Sealey, 368 Mich. 585, 118 N.W.2d 837 (1962); List Indus. v. Gelber, 11 Misc. 2d 735, 175 N.Y.S.2d 800 (Sup. Ct. 1958).

The LMRA provision for employee plans states that federal courts "shall have jurisdiction . . . to restrain violations of this section." 29 U.S.C. § 186(e) (1988). Congress drafted this provision, however, to avoid the anti-injunction requirements of the Norris-Laguardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1988)). *See* 93 Cong. Rec. S4678 (daily ed. May 7, 1947) (statement of Sen. Ball). As a result, courts have claimed that state jurisdiction also exists for restraining violations. *See, e.g.*, Nixon v. O'Callaghan, 392 F. Supp. 1081, 1085 (S.D.N.Y. 1975) (removal case for benefits due where the removal statute required state jurisdiction for removal). *But see* 28 U.S.C. § 1441(e) (1988) (state jurisdiction no longer required); Cox v. Superior Court of San Bernadino Co., 52 Cal. 2d 855, 346 P.2d 15 (1959) (writ of prohibition against employer's enforcement of breaches of fiduciary duties).

25. 29 U.S.C. §§ 1021-31 (1988).

26. *Id.* §§ 1051-61.

27. *Id.* §§ 1081-86.

28. *Id.* §§ 1101-14.

29. *Id.* §§ 1002(16)(B), (21)(A).

30. *See, e.g.*, H.R. CONF. REP. No. 1280, 93d Cong., 2d Sess. 272, 323 (1974) ("fiduciaries includes officers and directors of a plan, members of a plan's investment committee and persons who select these individuals), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5103 [hereinafter H.R. CONF. REP. No. 1280].

31. 29 U.S.C. §§ 1002(14)(A), 1002(21)(A), 1103(a) (1988).

32. *Id.* §§ 1002(14)(A), (16)(A), (21)(A).

33. *Id.* §§ 1132(a)(1)(A), 1132(c).

34. *Id.* § 1132(a)(3).

35. *Id.* § 1132(a)(1)(B).

bring suit in federal court under the jurisdictional provision of ERISA, Section 502(e).[36] The preemption provision, Section 514, preempts all state law relating to employee benefit plans.[37]

B. Preemption

1. Implied Preemption

The express preemption provision raises the question of what standard to use in determining whether a specific state law is preempted under the Constitution's supremacy clause.[38] In the absence of an express preemption provision, courts commonly imply preemption by using one of two standards to determine whether a state law unconstitutionally obstructs the purposes of a congressional act. First, does the state law conflict or interfere with federal law,[39] and, second, does federal law occupy the field?[40] Under both of these standards, the court must seek evidence of congressional intent to preempt.[41]

When dealing with implied preemption, the court should choose the interpretation which creates the least possible displacement of state law.[42] The Supreme Court under Chief Justice Burger developed a tendency to find no implied preemption of state law by fitting state laws into federal enactments rather than finding a conflict or federal occupation of the field.[43]

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36. *Id.* § 1132(e)(1); *see also infra* note 225.

37. *Id.* § 1144(a); *see also infra* notes 223-24 and accompanying text.

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

39. *See, e.g.*, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 686 (1965). Even if conflict theory applied to a statute with an express preemption provision, however, it would not be useful for ERISA preemption purposes because Congress also intended to exclude state laws that were *consistent* with ERISA. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (citing Shaw v. Delta Air Lines, 463 U.S. 85, 98-99 (1983)); Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1316 (1984).

40. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 8-18 (1824); *see also* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (pre-ERISA; NLRA does not preempt the Minnesota Private Pension Benefit Protection Act); Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 526-33. Occupancy theory does not apply to ERISA due to the express preemption provision. Kilberg & Inman, *supra* note 39, at 1315-16.

41. *See, e.g.*, City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 87-89 (1958).

42. Kilberg & Inman, *supra* note 39, at 1316.

43. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 295-300 (3d ed. 1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-25 to 6-29 (2d ed. 1988); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism & the Burger Court*, 75 COLUM. L. REV. 623 (1975); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

2. Express Preemption

In contrast, an express preemption provision limits the judicial inquiry to consideration of the text of the preemption provision.[44] For express preemption the court's goal is to prevent subtle or incremental encroachment into a field Congress has chosen expressly to reserve for federal law.[45]

Even when a statute has an express preemption provision, the court must still determine the extent to which state law is affected because it is unlikely that Congress contemplated preemption of all state laws potentially touching on a particular state-law-related field.[46] Therefore, the judicial inquiry focuses on the type of state laws Congress actually considered.[47] Unfortunately, courts considering ERISA preemption have failed to rigorously apply the text of the ERISA preemption provision to the facts of a particular case.[48]

C. Avoiding State Causes of Action

The ERISA preemption issue typically arises in the context of benefits-due lawsuits. Employee-beneficiaries desiring benefits from employee benefit plans normally apply to plan administrators or their designees,[49] who rule on the application.[50] If the plan administrator denies the application, the employee-beneficiary must first appeal the decision to the plan administrator.[51] If the plan administrator does not reverse the decision,[52] the employee-beneficiary

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44. *See* Kilman & Inman, *supra* note 39, at 1316.

45. *Id.*

46. Hirsch, *supra* note 40, at 538-49.

47. *Id.* at 540-41.

48. *Id.*

49. Any designee of a plan administrator is also a fiduciary. 29 U.S.C. § 1002(21)(A) (1988); 29 C.F.R. § 2560.503-1(g)(2) (1988); McLaughlin v. Connecticut Gen. Life Ins. Co., 565 F. Supp. 434, 442-43 (N.D. Cal. 1983) (insurer with authority to deny or grant claims was a fiduciary under ERISA); Schulist v. Blue Cross, 553 F. Supp. 248, 252 (N.D. Ill. 1982) (same), *aff'd*, 717 F.2d 1127 (7th Cir. 1983).

50. ERISA provides that the plan administrator must have a procedure for making a claim, communicating the denial to the employee-beneficiary, and appealing the decision. 29 U.S.C. § 1133 (1988); 29 C.F.R. § 2560.503-1 (1988).

51. 29 U.S.C. § 1133 (1988); 29 C.F.R. § 2560.503-1 (1988).

52. The employee-beneficiary must exhaust the plan's appeal procedure before bringing the benefit denial to a court. *See, e.g.*, Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan, 713 F.2d 247, 254 (7th Cir. 1983); Amato v. Bernard, 618 F.2d 559, 568 (9th Cir. 1980). *But see* Anderson v. Alpha Portland Indus., Inc., 727 F.2d 177 (8th Cir. 1984) (an exception to exhaustion for retirees who are not owed a duty of fair representation by the union), *cert. denied*, 471 U.S. 1102 (1985).

may sue for recovery of benefits due under the plan.[53] The employee-beneficiary may file a benefits-due action in either state court or federal court under ERISA's jurisdictional provision.[54]

There are several drawbacks to using an ERISA lawsuit to recover benefits due to employee-beneficiaries. Notably, the court will review the plan administrator's discretionary decision under the favorable arbitrary and capricious standard,[55] and the employee-beneficiary must prove that the decision was arbitrary and capricious.[56] Once the employee-beneficiary meets this burden of proof, the court will uphold the plan administrator's decision if it finds substantial evidence and a rational reason to support the decision.[57] Most plan administrators can easily satisfy this burden of proof.

To avoid this deferential standard,[58] some advocates for employee-beneficiaries have recast the lawsuits as arising under state law, frequently as bad-faith claims-processing.[59] A lawsuit over a

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53. 29 U.S.C. § 1132(a)(1)(B) (1988).

54. *Id.* § 1132(e)(1); *see also infra* note 225 and accompanying text.

55. *See, e.g.*, Flint, *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. L. REV. 133 (1989) (note especially the cases cited in the article).

56. *See, e.g.*, Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1304 (9th Cir. 1983).

57. *See, e.g.*, Flint, *supra* note 55, at 139-43.

58. *See, e.g.*, Taylor v. Blue Cross/Blue Shield, 684 F. Supp. 1352, 1359 (E.D. La. 1988) (preemption where the state statute's standard for denial of benefits was "just and reasonable," rather than "arbitrary and capricious").

59. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 43-44 (1987) (long-term disability plan paid benefits irregularly); Ramirez v. Inter-Continental Hotels, 890 F.2d 760, 761-62 (5th Cir. 1989) (group medical plan denied reimbursement of medical and hospitalization expenses for a prolonged illness); Kelley v. Sears, Roebuck & Co., 882 F.2d 453, 454-55 (10th Cir. 1989) (long-term disability plan refused to pay medical bills incurred after settlement); Moon v. American Home Assurance Co., 888 F.2d 86, 87 (11th Cir. 1989) (group travel accident insurance issued pursuant to an employee benefit plan denied the death benefit for a death on a non-business trip); Dueringer v. General Am. Life Ins. Co., 842 F.2d 127, 129 (5th Cir. 1988) (disability plan denied payments for reconstructive surgery because employee was not totally disabled without it); Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 491 (9th Cir. 1988) (medical plan delayed paying airline, physician, and hospital bills), *cert. denied*, 109 S. Ct. 3216 (1989); Hughes v. Blue Cross, 215 Cal. App. 3d 832, 846, 263 Cal. Rptr. 850, 857-58 (1989) (group medical plan used a standard of medical necessity that departed significantly from community standards and failed to properly investigate the claim), *cert. dismissed*, 110 S. Ct. 2200 (1990); Goodrich v. General Tel. Co., 195 Cal. App. 3d 675, 241 Cal. Rptr. 640 (1987) (long-term disability plan delayed payment of benefits), *rev. granted*, 44 Cal. 3d 231, 746 P.2d 871, 242 Cal. Rptr. 732 (1987); Drummond v. McDonald Corp., 167 Cal. App. 3d 428, 430, 213 Cal. Rptr. 164, 165 (1985) (same); *see also* Mandel, *Must Claims Denials Be Upheld Under Arbitrary and Capricious—What Standard of Review Applies to Group Policies Issued to ERISA Plans?*, 19 FORUM 457 (1984) (suggesting insurance companies convert state bad-faith claims-processing cases into federal ERISA claims to take advantage of the arbitrary and capricious rule).

state cause of action also provides the employee-beneficiary with advantages otherwise unobtainable under an ERISA action. For example, state constitutions generally permit jury trials for state actions in state court.[60] An ERISA action brought in federal court, however, generally does not involve a jury trial.[61] A few state courts permit a jury trial when an ERISA action is before them.[62]

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60. *See, e.g.*, CAL. CONST. art. I, § 16 (right to jury trial shall remain inviolate); N.Y. CONST. art. I, § 2 (same); TEX. CONST. art. I, § 15 (same); *see also* Egelko, *Losing Faith in Bad Faith: Suing Insurers for Handling Claims in Bad Faith was a Popular Pastime—Until Last Spring*, 7 CAL. LAW Oct. 1987, at 27, 28.

61. Federal courts generally find no right to a jury trial for benefits-due suits under ERISA, 29 U.S.C. § 1132(a)(1)(B) (1988), because the ERISA suit is an equitable action or may involve legal questions only. *See, e.g.*, Cox v. Keystone Carbon Co., 894 F.2d 647, 649-50 (3d Cir. 1990) (equitable); Pane v. RCA Corp., 868 F.2d 631, 636 (3d Cir. 1989) (equitable); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988); Nevill v. Shell Oil Co., 835 F.2d 209, 213 (9th Cir. 1987) (following equitable precedent); Chilton v. Savannah Foods & Indus., Inc., 814 F.2d 620, 623 (11th Cir. 1987) (following Bayles v. Central States, S.E. & S.W. Areas Pension Fund, 602 F.2d 97 (5th Cir. 1979)); Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan, 797 F.2d 521, 527 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); Turner v. CF & I Steel Corp., 770 F.2d 43, 47 (3d Cir. 1985) (equitable), *cert. denied*, 474 U.S. 1058 (1986); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985) (not a fact question); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984) (following equitable precedent), *cert. denied*, 474 U.S. 865 (1985); *In re* Vorpahl, 695 F.2d 318, 319-20 (8th Cir. 1982) (equitable); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980) (not a fact question); Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980) (equitable), *cert. denied*, 449 U.S. 1112 (1981). *Contra* Puz v. Bessemer Cement Co., 700 F. Supp. 267, 268 (W.D. Pa. 1988) (contractual in nature); Abbarno v. Carborundum Co., 682 F. Supp. 179, 181-82 (W.D.N.Y. 1988) (legal question); Bower v. Bunker Hill Co., 114 F.R.D. 587, 597-98 (E.D. Wash. 1986) (contractual in nature); Paladino v. Taxicab Indus. Pension Fund, 588 F. Supp. 37, 39 (S.D.N.Y. 1984) (legal question); Pollack v. Castrovinci, 476 F. Supp. 606, 609 (S.D.N.Y. 1979) (legal question), *aff'd without op.*, 622 F.2d 575 (2d Cir. 1980); Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745, 747 (E.D. Mich. 1977) (legal question). *See generally* Comment, *The Right to Jury Trial in Enforcement Actions under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737 (1983) (explaining the two grounds for denial as: (1) viewing the arbitrary and capricious review standard as a legal question and not a fact question; and (2) viewing the matter as an equitable one because it involves a trust).

62. Some state courts will grant a jury trial under a state constitutional provision despite ERISA preemption. *See, e.g.*, Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 613-14, 381 S.E.2d 330, 338 (1989). In other cases, the parties do not question the right. *See, e.g.*, Herbst v. Humana Health Ins., Inc., 105 Nev. 114, 114, 781 P.2d 762, 763 (1989); Felts v. Graphic Arts Employee Benefit Trust, 680 S.W.2d 891, 892-93 (Tex. Ct. App. 1984).

Other state courts follow the federal district court decisions permitting jury trials. *See, e.g.*, Walker v. Sperry & Hutchinson Co., Inc., 144 Misc. 2d 308, 308-10, 544 N.Y.S.2d 958, 959-60 (Sup. Ct. 1989); Fuller v. INA Life Ins. Co., 141 Misc. 2d 464, 466-69, 533 N.Y.S.2d 215, 217-18 (Sup. Ct. 1988). *Contra* Pfeiffer v. Roux Labs., Inc., 547 So. 2d 1271, 1272 (Fla. App. 1989).

Moreover, the employee-beneficiary can recover extracontractual damages for delays in benefit payment and infliction of emotional distress in a state action,[63] but not in an ERISA action.[64] The most considerable advantage of the state action is the possibility of punitive damages.[65] In a benefits-due ERISA action by an employee-beneficiary, the courts generally prohibit recovery of punitive damages.[66]

Unfortunately for the employee-beneficiary, ERISA preempts state lawsuits for bad-faith claims-processing.[67] The plan administrator should timely raise the ERISA preemption issue to insure that the arbitrary and capricious standard applies and to avoid the risk of jury trials, extracontractual damages, or punitive damages.[68]

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63. Egelko, *supra* note 60; *see also, e.g.*, Kanne v. Connecticut Gen. Life Ins. Co., 607 F. Supp. 899, 906 (C.D. Cal. 1985) (ERISA group medical plan insurer liable for payment delays of nine months and emotional distress damages), *rev'd*, 867 F.2d 489 (9th Cir. 1988) (preempted by ERISA), *cert. denied*, 109 S. Ct. 3216 (1989). *See generally* Kornblum & Olson, *California Leads the Way in Bad Faith, But No One Wants to Follow—Recent Trends in California First Party Bad Faith Law*, 14 WEST. ST. U. L. REV. 37 (1986).

64. *See, e.g.*, Johnson v. District 2 Marine Eng'rs Beneficial Assoc., 857 F.2d 514, 518 (9th Cir. 1988) (infliction of emotional distress); Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 825 (1st Cir.) (same), *cert. denied*, 488 U.S. 909 (1988); Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986) (same); Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 424 (4th Cir. 1985) (same), *cert. denied*, 476 U.S. 1170 (1986). *See generally* Comment, *Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages after Massachusetts Mutual Life Insurance Co. v. Russell*, 71 CORNELL L. REV. 1014 (1986) (arguing that courts should permit extracontractual damages).

65. *See, e.g.*, *Kanne*, 607 F. Supp. at 910 (insurer under an ERISA group medical plan liable for punitive damages); *see also* Egelko, *supra* note 60.

66. *See, e.g.*, *Johnson*, 857 F.2d at 518; *Drinkwater*, 846 F.2d at 825; Varhola v. Doe, 820 F.2d 809, 817 (6th Cir. 1987); Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 627 (7th Cir. 1987); Hancock v. Montgomery Ward Long-Term Disability Trust, 787 F.2d 1302, 1306-07 (9th Cir. 1986); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1464-65 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Powell*, 780 F.2d at 424; Dependahl v. Falstaff Brewing Co., 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968, 1084 (1981); *see also* Comment, *ERISA: Punitive Damages for Breach of Fiduciary Duty*, 35 CASE W. RES. L. REV. 743 (1984-85); Comment, *supra* note 64 (arguing against recovery of punitive damages).

67. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50-51 (1987); *see also* Egelko, *supra* note 60; Barnes, *Pilot Life v. Dedeaux: ERISA Preempts Bad Faith Claims Against Insurers*, 61 WIS. B. BULL. Feb. 1988, at 17.

68. Raising the preemption issue as an affirmative defense avoids the current problem in some appellate courts concerning ERISA preemption in relationship to subject matter jurisdiction. *See, e.g.*, HECI Exploration Co. v. Holloway, 862 F.2d 513, 520 (5th Cir. 1988) (to prevent waiver of ERISA preemption the respondent must plead it as an affirmative defense); Dueringer v. General Am. Life Ins. Co., 842 F.2d 127, 130 (5th Cir. 1988) (same); Hughes v. Blue Cross, 215 Cal. App. 3d 832, 851, 263 Cal. Rptr. 850, 861 (1989) (same), *cert. dismissed*, 110 S. Ct. 2200 (1990); Castillo v. Neely's TBA Dealer Supply, Inc., 776

Some plan administrators' counsel, however, have failed to raise this issue until appeal,[69] perhaps confused about the application of ERISA to a lawsuit.[70] The question then is whether the plan administrator has waived ERISA preemption. If so, the court may treat the case as a state action regardless of the ERISA provisions designed to encourage uniform treatment of voluntary private employee benefit plans.[71]

Some employee-beneficiary lawyers have charged that the problem arises from an "appellate ambush" by the plan administrator who intentionally raised no objections in trial court only to raise ERISA preemption on appeal after losing at trial with state law defenses.[72] This charge may have some validity for actions brought in federal court and those state actions not involving benefits due. The appellate court will dismiss these actions if it determines the employee-beneficiary should have alleged an ERISA cause of action at trial, and the statute of limitations may bar refiling these lawsuits.[73] The charge has less validity for benefits-due actions in state court because some state courts permit amendment of the petition on finding a lack of subject matter jurisdiction.[74] Even when the plan administrator succeeds in forcing the employee-beneficiary to drop the lawsuit, the ambush will result in the plan administrator or the employer incurring liability for additional expenses.

As a fiduciary, the plan administrator's duty is solely to all employee-beneficiaries and includes protecting plan funds.[75] One

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S.W.2d 290, 292, 294 (Tex. Ct. App. 1989) (same); *see also Kanne*, 607 F. Supp. at 902 (pled ERISA preemption as an affirmative defense); Lambert v. Pacific Mut. Life Ins. Co., 211 Cal. App. 3d 456, 463-64, 259 Cal. Rptr. 398, 402 (1989) (same). *Contra* Calhoon v. Bonnabel, 560 F. Supp. 101, 105 (S.D.N.Y. 1982) (ERISA preemption is not an affirmative defense as ERISA provides the plaintiff with an express cause of action); Cathey v. Metropolitan Life Ins. Co., 764 S.W.2d 286, 292 (Tex. Ct. App. 1989) (writ granted) (ERISA preemption unsuccessfully attacked as not pled as an affirmative defense), Gorman v. Life Ins. Co., 752 S.W.2d 710, 713 (Tex. Ct. App. 1988) (writ granted) (same).

69. *See infra* notes 82-182 and accompanying text.

70. *See supra* notes 5-6 and accompanying text.

71. *See infra* notes 345-48 and accompanying text.

72. *See, e.g.*, Reply Brief for Writ of Error at 39, Great N. Am. Stationers, Inc. v. Ball, 770 S.W.2d 631 (Tex. Ct. App. 1989).

73. Federal courts will dismiss actions if subject matter jurisdiction is not clear from the pleadings. FED. R. CIV. P. 12(h)(3); *see* 13 C. WRIGHT, *supra* note 8, § 3522, at 73. Also, the federal statute of limitations period is not tolled by the erroneous filing. 4 C. WRIGHT, *supra* note 8, § 1056, at 187 (a dismissal without prejudice has the same effect as if the petition were never filed).

74. *See, e.g.*, Peek v. Equipment Serv. Co., 779 S.W.2d 802 (Tex. 1989) (The trial court is required to give the plaintiff an opportunity to amend in order to establish jurisdiction before granting a motion to dismiss, unless the amendment would be useless.).

75. 29 U.S.C. § 1104(a) (1988).

of the fiduciary's duties is to insure that the plan only incurs reasonable expenses.[76] The fiduciary is liable to reimburse the plan for any unreasonable expenses incurred, such as those generated by the proposed additional litigation.[77] Moreover, if the fiduciary pays these expenses, the plan cannot reimburse the fiduciary because, under ERISA, the fiduciary is entitled to reimbursement only for reasonable expenses properly and actually incurred, not unreasonable attorney's fees.[78]

The fiduciary may be indemnified by the employer, however. Department of Labor regulations permit indemnity agreements to the extent that insurance is available.[79] ERISA permits plans to purchase insurance for a fiduciary, if the insurer has recourse against the fiduciary for breach of fiduciary duty.[80] The employer is permitted to purchase insurance for the fiduciary without the recourse limitation.[81] Therefore, either the fiduciary or the employer will bear the cost of the proposed additional litigation. As a result, it is generally in the best interest of the fiduciary and the employer to resolve the dispute quickly by discouraging frivolous state lawsuits through consistent use of ERISA preemption.

II. COURT RULINGS ON WAIVER OF ERISA PREEMPTION

Several appellate courts have considered whether a plan administrator has waived ERISA preemption by not raising the issue before the trial court. Courts use two basic approaches to review federal preemption. First, preemption is an affirmative defense that a respondent must raise in the trial court or forever waive.[82] Second, preemption is a challenge to the court's subject matter jurisdiction that a party may raise at anytime.[83] As jurisdiction

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76. *Id.* § 1104(a)(1)(A)(ii).

77. *Id.* § 1109. *See generally* Cornell & Little, *Indemnification of Fiduciary and Employee Litigation Costs under ERISA*, 25 B.C.L. REV. 1, 32 (1983) (specifying the situations for which the fiduciary may be indemnified for attorney's fees as a proper expense, but declaring that incurring unreasonable attorney's fees is a breach of fiduciary duty).

78. 29 U.S.C. § 1108(c)(2) (1988).

79. 29 C.F.R. § 2509.75-4 (1990).

80. 29 U.S.C. § 1110(b) (1988).

81. *Id.*

82. International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 382-86 (1986).

83. *Id.* For a state court, federal preemption would constitute a challenge to the court's subject matter jurisdiction in those cases where federal courts have exclusive jurisdiction, such as bankruptcy proceedings, patent and copyright cases, forfeitures under the laws of the United States, admiralty and maritime cases, and violations of the federal anti-trust laws, securities acts, and the natural gas act. *See* Hughes v. Blue Cross, 215 Cal.

differs for each of the two types of ERISA nongovernmental civil lawsuits,[84] some courts have reached conflicting results over ERISA preemption as subject matter jurisdiction which depend on the type of ERISA action.[85] Despite the conflict between the courts over ERISA preemption,[86] most courts have determined that ERISA preemption is nonwaivable in non-benefits-due lawsuits. Courts have split, however, over benefits-due lawsuits.

A. Non-Benefits-Due Litigation

Six state courts have decided non-benefits-due cases involving ERISA preemption initially raised after trial or on appeal. Four courts determined that the litigant had not waived the preemption; two found the litigants had waived ERISA preemption. Only three of these courts confronted the issue squarely, and all three concluded in favor of nonwaivability.

1. Nonwaivable

The primary argument advanced by two courts for the nonwaivability of the ERISA preemption in non-benefits-due lawsuits is that jurisdiction lies exclusively with the federal courts.[87] An

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App. 3d 832, 848-50, 263 Cal. Rptr. 850, 859-60 (1989) (an ERISA case), *cert. dismissed*, 110 S. Ct. 2200 (1990); C. WRIGHT, LAW OF FEDERAL COURTS § 10, at 36 (4th ed. 1983). Under ERISA, federal courts have exclusive jurisdiction of non-benefits-due lawsuits, suggesting ERISA preemption for these lawsuits may be nonwaivable. *See Hughes*, 215 Cal. App. 3d at 849, 263 Cal. Rptr. at 860 (making a distinction between the two types of ERISA civil actions).

84. The two types, of course, are benefits-due and non-benefits-due lawsuits. *See supra* notes 36 & 54 and accompanying text.

85. *See, e.g.*, *Hughes*, 215 Cal. App. 3d at 849, 263 Cal. Rptr. at 860.

86. *See* HECI Exploration Co. v. Holloway, 862 F.2d 513, 520 (5th Cir. 1988).

87. *See* Young v. Sheet Metal Workers' Int'l Ass'n, 112 Misc. 2d 692, 700-01, 447 N.Y.S.2d 798, 803 (Sup. Ct. 1981); Richland Hosp., Inc. v. Ralyon, 33 Ohio St. 3d 87, 93, 516 N.E.2d 1236, 1241 (1987); *accord* Guthrie v. Dow Chem. Co., 445 F. Supp. 311, 315 (S.D. Tex. 1978) (in employee action to have benefit reduction for worker's compensation declared illegal, removal was denied because state court lacked jurisdiction); Time Ins. Co. v. Roberts, 191 Ga. App. 766, 768-69, 382 S.E.2d 718, 719-20 (1989) (in employee suit to enforce fiduciary's duty to plan, dicta described ERISA preemption for non-benefits-due lawsuits as relating to subject matter jurisdiction); *see, e.g.*, Terrell v. Life Ins. Co., 174 Ga. App. 753, 753, 331 S.E.2d 609, 610 (1985) (widow's suit for death benefit); Peick v. Murray, 141 Ill. App. 3d 1081, 1084, 491 N.E.2d 100, 102 (1986) (trustee action to recover improperly paid benefits); Prestridge v. Shinault, 552 So. 2d 643, 648 (La. App. 1989) (trustee lawsuit against the employer), *cert. denied*, 559 So. 2d 131 (La. 1990); McMartin v. Central States, S.E. & S.W. Areas Pension Fund, 159 Mich. App. 1, 3-4, 406 N.W.2d 219, 221 (1987) (employee lawsuit for benefit, not by terms of plan, but by estoppel); Goldberg v. Caplan, 277 Pa. Super. 47, 52-54, 419 A.2d 653, 656-57 (1980)

analogous argument for NLRA preemption has been successfully made where exclusive jurisdiction lies with the National Labor Relations Board (NLRB).[88] For purposes of determining jurisdiction only, two courts recast each lawsuit in its proper ERISA form and concluded that it did not involve benefits due under ERISA.[89] In *Young v. Sheet Metal Workers' International Association*, a New York trial level court found that it lacked jurisdiction to consider a non-benefits-due case although the plaintiff urged a recasting under LMRA.[90] The court determined that the ERISA jurisdictional provision eliminated the court-created LMRA jurisdiction which would have otherwise provided the court with jurisdiction.[91] In *Richland Hospital, Inc. v. Ralyon*, the Ohio Supreme

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(employer lawsuit to remove trustee); Duffy v. Brannen, 148 Vt. 75, 84-86, 529 A.2d 643, 648-49 (1987) (employee lawsuit for violation of fiduciary duties).

In *Young*, an employer sought to enjoin termination of participation of its employees by a union-negotiated welfare plan. *Young*, 112 Misc. 2d at 692-93, 447 N.Y.S.2d at 799. The fiduciary's action for relief from a breach of fiduciary duty arises under 29 U.S.C. § 1132(a)(2) (1988). The plan raised ERISA preemption initially in a posttrial brief. *Young*, 112 Misc. 2d at 694, 447 N.Y.S.2d at 800. As recast, the lawsuit did not involve benefits due, and the court held that it lacked subject matter jurisdiction. *Id.* at 697, 447 N.Y.S.2d at 801. The court properly verified this "plain-meaning" interpretation by examining the congressional statements of the Conference Committee Report, Senator Javits, and Representative Dent. *Id.* at 699-700, 447 N.Y.S.2d at 802-03; *see infra* notes 332, 335 & 353 and accompanying text.

In *Ralyon*, a hospital sued an employee-beneficiary for unpaid medical bills where the employee-beneficiary cross-claimed misrepresentation of coverage prior to a denial of benefits against the employer and its welfare plan. *Ralyon*, 33 Ohio St. 3d at 88, 516 N.E.2d at 1238. The fiduciary raised ERISA preemption initially on appeal. *Id.* To the extent the claim involved a breach of fiduciary duty, the state court determined that it lacked subject matter jurisdiction because ERISA's preemption provision eliminates all state causes of action and its jurisdictional provision permits this type of ERISA lawsuit only in federal court. *Id.* at 90, 92, 516 N.E.2d at 1239, 1241. The misrepresentation action for breach of fiduciary duty also arises under 29 U.S.C. § 1132(a)(2). The court felt so strongly about this construction under the plain-meaning canon that it did not consider *any* legislative history or prior case law.

88. *See, e.g.*, International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 391-92 (1986).

89. *See Young*, 112 Misc. 2d at 700, 447 N.Y.S.2d at 803 ("A resolution of this motion to dismiss rests then upon whether plaintiffs' action may properly be characterized as one" stating an ERISA cause of action.); *Ralyon*, 33 Ohio St. 3d at 89, 516 N.E.2d at 1239 n.5 (Because the claims concern fulfillment of plan duties and reconsideration of plan terms, the claims relate to the administration of the plan and fall within ERISA's scope.).

90. *Young*, 112 Misc. 2d at 701-02, 447 N.Y.S.2d at 804.

91. *Id.* The court's LMRA analysis is incorrect. ERISA explicitly provides for the continuation of employee benefit regulation under LMRA. 29 U.S.C. § 1144(d) (1988) (repealing only the Welfare and Pension Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (1958)). *See* 29 C.F.R. § 2560.503-1 (1989) (exempting only unilaterally administered, collectively bargained plans from Department of Labor claims-procedure requirements if the plan contains an arbitration procedure); Schneider, *supra* note 18, at 280-81, 311 (expressing concern that ERISA may modify traditional labor dispute arbitration).

Court found that it similarly lacked jurisdiction although it retained jurisdiction for the associated benefits-due lawsuit.[92]

A second argument for nonwaivability of ERISA preemption in non-benefits-due lawsuits was advanced in *Cadillac Insurance Co. v. L.P.C. Distributing Co.*[93] by a Texas appellate court. The court observed that only ERISA confers jurisdiction over any type of ERISA-related lawsuit.[94] Therefore, if any petition related to an ERISA plan fails to allege an ERISA cause of action, the plaintiff has not invoked the jurisdiction of the court.[95] Rather than recast the lawsuit as an ERISA action and conclude that it lacked subject matter jurisdiction, this court noted that the petition alleged an ERISA-related cause of action but failed to state an ERISA claim.[96] The court concluded that, because a state court can only assert jurisdiction over a claim relating to an ERISA plan through ERISA, this petition failed to invoke state court jurisdiction.[97]

In *Molina v. Retail Clerks Union and Food Employers Benefit Fund*,[98] a California appellate court dealt with ERISA preemption raised initially on appeal and found no waiver.[99] The court con-

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92. *Ralyon*, 33 Ohio St. 3d at 90, 516 N.E.2d at 1239. Although the court had recast the petition as an ERISA cause of action to determine jurisdiction, it did not recast the petition for substantive review and remanded the benefits-due action for reconsideration under ERISA's arbitrary and capricious standard. *Id.* at 93, 516 N.E.2d at 1242; *see infra* note 137.

93. 770 S.W.2d 892 (Tex. Ct. App. 1989). In *Cadillac*, an employer sued an insurance carrier for wrongful termination of a group insurance policy under a welfare plan. *Id.* at 893. The insurance carrier raised ERISA preemption for the first time on appeal to defeat a default judgment. *Id.* at 895. The court dismissed the action for lack of subject matter jurisdiction. *Id.* at 896.

94. *Id.* at 895 (the plaintiff failed to allege an ERISA cause of action or a preemption exception. Therefore, the petition did not confer subject matter jurisdiction on the trial court.).

95. *Id.* at 895.

96. *Id.*

97. *Id.* The court relied solely on benefits-due case law for support. *See* Barry v. Dymo Graphic Sys., Inc., 394 Mass. 830, 835, 478 N.E.2d 707, 711 (1985) (disapproved by Massachusetts v. Morash, 109 S. Ct. 1668 (1989)); Gorman v. Life Ins. Co., 752 S.W.2d 710, 713 (Tex. Ct. App. 1988) (writ granted). This approach avoids the bifurcation of ERISA preemption. *See infra* notes 161-62 and accompanying text.

98. 111 Cal. App. 3d 872, 168 Cal. Rptr. 906 (1980).

99. *Id.* at 878-79, 168 Cal. Rptr. at 909-10. The *Molina* court affirmed a judgment granting reimbursement to a union welfare plan from an employee-beneficiary where the plan initially raised ERISA preemption on appeal. *Id.* Although correctly recognizing that ERISA had eradicated state law and jurisdiction could only be asserted through ERISA, the court erred in treating this as a benefits-due lawsuit. *See* Hughes v. Blue Cross, 215 Cal. App. 3d 382, 852, 263 Cal. Rptr. 850, 862 (1989), *cert. dismissed*, 110 S. Ct. 2200 (1990). Because the fiduciary sued as the assignee of the employee-beneficiary to receive insurance proceeds, *Molina*, 111 Cal. App. 3d at 876-77, 168 Cal. Rptr. at 908, the suit was one by the fiduciary to recover amounts wrongly paid to an employee-beneficiary arising under 29 U.S.C. § 1132(a)(3) (1988), not one by a beneficiary for benefits due.

sidered the ERISA preemption issue, however, only because the trial court found that the plan was subject to LMRA.[100]

The error in the reasoning advanced in *Young* and *Ralyon* can be demonstrated by applying it in a hypothetical federal diversity action. Relying on ERISA's preemption and jurisdictional provisions to eliminate all state causes of action, the *Young-Ralyon* theory would recast the lawsuit as a non-benefits-due action under ERISA for which the state court lacks subject matter jurisdiction. Unlike a state court, after recasting the action as an ERISA action,[101] the federal court would continue to have subject matter jurisdiction.[102] Therefore, ERISA preemption in the federal court does not involve subject matter jurisdiction and is waivable. Under *Young* and *Ralyon*, state courts would find no waiver where federal courts would, and a disparity in ERISA preemption would result.

The reasoning in *Cadillac* yields a different result because it uses a broader preemption than the *Young-Ralyon* theory. Because the lawsuit is not recast, a federal court applying *Cadillac* in a diversity action involving a non-benefits-due lawsuit would act as a local state court.[103] Therefore, as in state court, preemption would be nonwaivable. Although federal courts would also have federal question jurisdiction, the result would be the same. Under the federal pleading rules, a court would recast the claim under ERISA and could assert subject matter jurisdiction.[104] This recasting would not occur, however, unless the defendant raised ERISA preemption before trial.

This potential disparity between filing in state or federal court could adversely affect plans and fiduciaries in two situations. First, fiduciaries that are in a federal court using the *Young-Ralyon* reasoning would have to raise ERISA preemption before trial or waive it. Second, fiduciaries that remove the lawsuit to a federal court using the *Young-Ralyon* reasoning on the basis of diversity rather than federal question jurisdiction,[105] presumably unaware

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100. *Molina*, 111 Cal. App. 3d at 879, 168 Cal. Rptr. at 909-10.

101. *See* 14A C. WRIGHT, *supra* note 8, § 3722, at 243; *cf.* Avco Corp. v. Aero-Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968) (state action converted to a claim under LMRA Section 301 following the preemption exception to the well-pleaded complaint doctrine); Williams v. Caterpillar Tractor Co., 786 F.2d 928, 932 (9th Cir. 1986) (removal to federal court for federal question jurisdiction), *cert. granted*, 479 U.S. 960 (1986).

102. *See* 29 U.S.C. § 1132(e)(1) (1988).

103. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

104. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66-67 (1987) (state claims may be converted into ERISA claims for purposes of removal).

105. 28 U.S.C. § 1441 (1988) (permitting removal with diversity of citizenship as the

that ERISA applies to the non-benefits-due lawsuit, will discover that they have waived ERISA preemption. Federal courts relying on the *Cadillac* reasoning, however, would find no waiver of ERISA preemption in either case.

2. Waivable

Not all state courts have agreed with the Ohio, New York, Texas, and California courts. Two other state courts dealt with non-benefits-due lawsuits and held that the defendants had waived ERISA preemption on other grounds.[106] In both cases, the result was the same whether the court recognized or refused to recognize the nonwaivability of ERISA preemption in the non-benefits-due lawsuit.[107]

In *Amalgamated Cotton Garment & Allied Industries Fund v. Dion*,[108] a Pennsylvania superior court refused to consider an ERISA preemption claim raised initially on appeal because the defendant had not preserved that point and, therefore, had waived it.[109] The court noted, however, that the Third Circuit had held that ERISA did not preempt the state statute in question,[110] thereby indicating that the appellant would have lost had the issue been preserved. As a result, the court was not required to pass on the question, and the waivability language is only dicta.

In *Castillo v. Neely's TBA Dealer Supply, Inc.*,[111] a second Texas appellate court retracted its own dictum from two prior

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basis for federal jurisdiction provided that no defendant is a citizen of the state in which plaintiff brought the action, even if the state court lacks jurisdiction); *see also* 14A C. WRIGHT, *supra* note 8, § 3722, at 231.

106. These were, then, multipoint opinions, or ones in which there was more than one reason given for the holding.

107. *See* K. LLEWELLYN, THE BRAMBLE BUSH 46-47 (1960) (describing the multipoint decision as having a force of authority falling between a single-point holding and dicta); *see also* National Metalcrafters v. McNeil, 784 F.2d 817, 822-23 (7th Cir. 1983) (Posner, J.) (refusing to fragment further a multipoint decision to avoid weakening the holding more).

108. 341 Pa. Super. 12, 491 A.2d 123 (1985).

109. *Id.* at 15, 491 A.2d at 124. In *Dion*, a plan trustee sued an employer for contributions to a union-negotiated welfare plan. *Id.* at 14, 491 A.2d at 124. The employer, having lost at trial court, initially raised preemption on appeal. *Id.* at 14-15, 491 A.2d at 124. This recast action is by a fiduciary to enforce an obligation under ERISA. *See* May v. Interstate Moving & Storage Co., 739 F.2d 521, 522 (10th Cir. 1984); 29 U.S.C. § 1132(a)(3)(B)(ii) (1988). The *Dion* court cited no authority for determining the waiver of ERISA preemption. *Dion*, 341 Pa. Super. at 15, 491 A.2d at 124.

110. *Dion*, 341 Pa. Super at 15, 491 A.2d at 124 (citing Carpenters Health & Welfare Fund v. Kenneth Ambrose, Inc., 727 F.2d 279 (3d Cir. 1983)).

111. 776 S.W.2d 290 (Tex. Ct. App. 1989). In *Castillo*, an employee sued an employer for negligently causing the failure to inform the employee about coverage under a welfare plan. *Id.* at 291. After trial, the employer obtained a judgment-notwithstanding-the-verdict on the ground that the jury's finding of negligence was unsupported. *Id.* at 292.

holdings on nonwaivability for benefits-due lawsuits.[112] On the basis of Fifth and Ninth Circuit benefits-due opinions,[113] the court held that the defendant could not raise ERISA preemption after trial.[114] The Texas court also noted that no evidence supported plaintiff's case,[115] and therefore, if the court had recognized the nonwaivability of ERISA preemption, the result would have been the same.

B. Benefits-Due Litigation

Twelve courts have decided benefits-due cases in which the litigants initially raised ERISA preemption after trial or on appeal. Six state courts determined the litigant had not waived the preemption, and six state and federal courts found that the litigants had waived ERISA preemption. Only four of these courts confronted the issue squarely. Of these, the three state courts concluded in favor of nonwaivability, and the federal circuit court found waiver.

1. Nonwaivable

The primary argument advanced by two state courts for the nonwaivability of ERISA preemption in benefits-due lawsuits is a non-benefits-due argument. Because ERISA exclusively governs jurisdiction over an ERISA-related lawsuit, any ERISA-related petition that fails to allege an ERISA cause of action does not invoke the court's jurisdiction.[116] The courts noted, however, that

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112. Cathey v. Metropolitan Life Ins. Co., 764 S.W.2d 286, 292 (Tex. Ct. App. 1989) (writ granted); Gorman v. Life Ins. Co., 752 S.W.2d 710, 713 (Tex. Ct. App. 1988) (writ granted).

113. HECI Exploration Co. v. Holloway, 862 F.2d 513 (5th Cir. 1988); Dueringer v. General Am. Life Ins. Co., 842 F.2d 127 (5th Cir. 1988); Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986). These federal opinions, however, apply to benefits-due lawsuits and not to the non-benefits-due lawsuit at issue in Texas. The reasonings developed by appellate courts for waivability differ in the two situations because of the jurisdictional difference.

114. *Castillo*, 776 S.W.2d at 292-93 (raised initially in an objection to the jury charge). The dictum retraction adheres to the principle that Texas courts must follow federal courts' construction of federal statutes. *See, e.g.*, Holmes v. Olson, 587 S.W.2d 678 (Tex. 1979) (following a Fifth Circuit opinion).

115. *Castillo*, 776 S.W.2d at 296 (no evidence of negligence).

116. *See* Providence Hosp. v. National Labor Union Health & Welfare Fund, 162 Mich. App. 191, 412 N.W.2d 690 (1987); Hepler v. CBS, Inc., 39 Wash. App. 38, 696 P.2d 596, *cert. denied*, 474 U.S. 946 (1985).

In *Providence*, a hospital sued a plan to recover fees as the assignee of the employee-beneficiary. *Providence*, 162 Mich. App. at 192-93, 412 N.W.2d at 691. Having lost at

if the plaintiff had brought the lawsuit in its proper ERISA form, the lawsuit would involve benefits due under ERISA for which the state court had subject matter jurisdiction.[117]

In *Providence Hospital v. National Labor Union Health and Welfare Fund*,[118] the Michigan Court of Appeals remanded the case to the trial court for reconsideration under ERISA.[119] In *Hepler v. CBS, Inc.*,[120] the Washington Court of Appeals neglected to recognize that the plaintiff's petition did not establish subject matter jurisdiction. Instead of dismissing or remanding the case for lack of subject matter jurisdiction, the court directly applied ERISA to the case.[121] It concluded that a lower court would reach the same liability result under ERISA's arbitrary and capricious standard and modified damages to exclude those which ERISA does not permit.[122] The court's direct approach fails to permit the litigants or the trial court a chance to examine the dispute or develop a record based on the applicable ERISA standard.

The disparity between these two treatments would make the attempt to avoid ERISA costly to the employee-beneficiary in the

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trial, the defendant first raised ERISA preemption in a motion to amend the judgment. *Id.* at 193, 412 N.W.2d at 691. The court held the defendant had not waived ERISA preemption and remanded the case for reconsideration under ERISA. *Id.* at 200, 412 N.W.2d at 694.

In *Hepler*, an employee sued for breach of contract resulting from wrongly calculating disability benefits with an undisclosed formula. *Hepler*, 39 Wash. App. at 839-43, 696 P.2d at 598-600. The fiduciary raised ERISA preemption for the first time on appeal. *Id.* at 843, 696 P.2d at 600. Agreeing that the employer had not waived ERISA preemption, the court proceeded to apply ERISA to the judgment, primarily the arbitrary and capricious standard, and upheld the liability finding and modified damages. *Id.* at 844-48, 696 P.2d at 600-02.

117. *Providence*, 162 Mich. App. at 199-200, 412 N.W.2d at 694; *Hepler*, 39 Wash. App. at 845, 696 P.2d at 601.

118. 162 Mich. App. at 191, 412 N.W.2d at 690.

119. *Id.* at 194-95, 412 N.W.2d at 692, 694 (plaintiff correctly argued that his claim was ERISA-based, but he relied impermissibly on Michigan law to enforce his claim). Michigan follows the procedural rule under which, if the appellate court reverses because the plaintiff alleged the wrong legal theory, the court should afford the plaintiff an opportunity to retry his case rather than dismiss the action (the "retrial opportunity rule"). *See, e.g.*, Husted v. McIntosh, 313 Mich. 507, 509, 21 N.W.2d 833, 834 (1946) (overturning a directed verdict based on an erroneous theory of imputed negligence); Bricker v. Green, 313 Mich. 218, 236, 21 N.W.2d 105, 111 (1946) (same). This procedural point is of greatest significance when the statute of limitations has already run, preventing ordinary refiling.

120. 39 Wash. App. at 838, 696 P.2d at 596.

121. *Id.* at 846-47, 696 P.2d at 601-02.

122. *Id.* The Washington court erred in not remanding. Washington also follows the retrial opportunity rule, *supra* note 119. *See, e.g.*, Haugen v. Central Lutheran Church, 58 Wash. 2d 166, 169-70, 361 P.2d 637, 639 (1961) (overturning a trial court dismissal of a negligence action based on the fellow servant rule where the employee relationship did not exist).

latter jurisdiction. The employee-beneficiary has the burden under ERISA to show that the fiduciary's decision is arbitrary and capricious.[123] Proof of the state cause of action often does not include proof necessary for an ERISA cause of action.[124] As a result, when ERISA is applied initially at the appellate level, the employee-beneficiaries will lose for failure to carry their burden.

A second argument, advanced in *Barry v. Dymo Graphic Systems, Inc.*[125] by the Massachusetts Supreme Judicial Court, hinges on legislative history suggesting that ERISA preemption should be as broad as possible.[126] The court compared ERISA preemption to NLRA preemption for unfair labor practices.[127] Created by judicial fiat,[128] NLRA preemption relates to subject matter jurisdiction, which is not waivable.[129] This limits all NLRA disputes to resolution

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123. *See, e.g.*, Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1304 (9th Cir. 1983).

124. *See* Gorman v. Life Ins. Co., 752 S.W.2d 710, 714 (Tex. Ct. App. 1988) (writ granted) (a favorable jury verdict on the state claim resulted in no evidence of fiduciary's decision being arbitrary and capricious).

125. 394 Mass. 830, 478 N.E.2d 707 (1985).

In *Barry*, an employee sued for severance pay and vacation benefits. *Id.* at 832, 478 N.E.2d at 709. The fiduciary raised ERISA preemption for the first time in a supplemental brief before the appellate court. *Id.*

126. *Id.* at 836, 478 N.E.2d at 711 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98-99 (1983) (quoting 120 CONG. REC. 29,197 (remarks of Rep. Dent))).

Barry involved two welfare plans: a severance-pay plan and a vacation-pay plan. *Id.* at 832, 478 N.E.2d at 709. Employers had frequently decided that severance-pay plans were not ERISA plans. *See, e.g.*, Firestone Tire & Rubber Co. v. Bruch, 109 S. Ct. 948, 951 (1989) (employer unaware in 1980 that termination-pay plan was subject to ERISA and had not complied with ERISA's disclosure requirements); *see also* Blau v. Del Monte Corp., 748 F.2d 1348, 1353 (9th Cir. 1984) (employer intentionally did not disclose written separation-allowance policy), *cert. denied*, 474 U.S. 865 (1985).

Department of Labor regulations, however, make it clear that a severance-pay plan is a welfare plan. 29 C.F.R. § 2510.3-1(a)(3) (1990). Lawyers had doubted that plans for paying unused vacation time out of the employer's general assets were subject to ERISA. *Compare* Holland v. National Steel Corp., 791 F.2d 1132, 1135-36 (4th Cir. 1986) (holding that these vacation-pay plans constitute welfare plans) *and* Blakeman v. Mead Containers, 779 F.2d 1146, 1149 (6th Cir. 1985) (same) *with* Shea v. Wells Fargo Armored Serv. Corp., 810 F.2d 372, 376 (2d Cir. 1987) (holding that vacation-pay plans do not constitute welfare plans under 29 C.F.R. § 2510.3-1(b)(3)) *and* California Hosp. Ass'n v. Henning, 770 F.2d 856, 859-61, *modified*, 783 F.2d 946 (9th Cir. 1986), *cert. denied*, 477 U.S. 904 (1986) (same) *and* Golden Bear Family Restaurants, Inc. v. Murray, 144 Ill. App. 3d 616, 621-25, 494 N.E.2d 581, 584-87 (1986) (same). The issue was finally settled in favor of the Department of Labor regulations in Massachusetts v. Morash, 109 S. Ct. 1668, 1671-75 (1989).

127. *Barry*, 394 Mass. at 835, 478 N.E.2d at 711 (citing Tosti v. Ayik, 386 Mass. 721, 725, 437 N.E.2d 1065-66 (1982) (construing NLRA), *cert. denied*, 484 U.S. 964 (1987)).

128. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959).

129. International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 382, 394 (1986).

by the NLRB rather than state or federal courts.[130] Subsequent courts have used NLRA preemption to dismiss state causes of action brought by employees challenging various labor practices under NLRA.[131] Despite the alternative forum (the NLRB versus federal or state court) and the implied versus express preemption provisions distinguishing NLRA and ERISA, the Massachusetts court reasoned that NLRA offered the broadest possible preemption and concluded that ERISA preemption would be at least as extensive as NLRA preemption.[132] The court concluded that ERISA preemption was also related to subject matter jurisdiction,[133] and, therefore, a litigant cannot waive preemption.[134] The court remanded the case for reconsideration as an ERISA lawsuit.[135]

Three courts have indirectly indicated that ERISA preemption is nonwaivable. In *Ralyon*, the Ohio Supreme Court handled ERISA preemption equally for both non-benefits-due and benefits-due, permitting the fiduciary to raise the matter for the first time on appeal.[136] The court dismissed the non-benefits-due claim for

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130. *Id.* at 391; *see also* Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1400 (9th Cir. 1988); Brooks v. A.S. Abell Publishing Co., 635 F. Supp. 118, 119 (D. Md. 1986); Hotel Employees & Restaurant Employees, Local 8 v. Jensen, 51 Wash. App. 676, 679, 754 P.2d 1277, 1280 (1988).

131. *See, e.g.*, Clayton v. Gold Bond Bldg. Prods., 679 F. Supp. 637, 638-39 (E.D. Mich. 1987) (wrongful discharge during strike); Level I Sportswear, Inc. v. Chaikin, 662 F. Supp. 535, 537-38 (S.D.N.Y. 1987) (employer prevented the establishment of labor union through the tort of fraud and deceit); *Brooks*, 635 F. Supp. at 118-19 (tort action against employer); Missouri Portland Cement Co. v. United Cement Workers, 153 Ill. App. 3d 1046, 1048-49, 506 N.E.2d 620, 622-23, *appeal denied*, 113 Ill. 303, 515 N.E.2d 112 (1987) (discrimination against striking employees, bad faith negotiations); *Jensen*, 51 Wash. App. at 689, 754 P.2d at 1280, 1285 (tortious interference with employment contract on sale of business). All of these cases involved motions to dismiss for lack of jurisdiction.

132. Barry v. Dymo Graphics Sys., 394 Mass. 830, 835-36, 478 N.E.2d 707, 711 (1985); *see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 105 (1983); *infra* notes 332 & 335 and accompanying text.

133. *Barry*, 394 Mass. at 835-36, 478 N.E.2d at 711; *accord* Barnick v. Longs Drug Stores, Inc., 203 Cal. App. 3d 377, 379, 250 Cal. Rptr. 10, 11 (1988) (employee suing employer for wrongful discharge to prevent vesting of retirement benefits); Hagler v. J.F. Jelenko & Co., 719 S.W.2d 486, 487 (Mo. App. 1986) (employee suing employer for severance benefits). *Contra* Porter v. Buckeye Cellulose Corp., 189 Ga. App. 818, 820, 377 S.E.2d 901, 904 (1989) (trial court erred in concluding it lacked subject matter jurisdiction because of ERISA preemption); Van De Hey v. United States Nat'l Bank, 90 Or. App. 258, 262-63, 752 P.2d 848, 850 (1988) (ERISA preemption did not divest state courts of subject matter jurisdiction).

134. *Barry*, 394 Mass. at 835-36, 478 N.E.2d at 711.

135. *Id.* at 840, 478 N.E.2d at 714. Massachusetts follows the retrial opportunity rule, *supra* note 119. *See, e.g.*, Tosti v. Ayik, 386 Mass. 721, 723, 437 N.E.2d 1062, 1064 (1982) *cert. denied*, 484 U.S. 964 (1987).

136. Richland Hosp., Inc. v. Ralyon, 33 Ohio St. 3d 87, 88, 516 N.E.2d 1236, 1238 (1987).

lack of jurisdiction and remanded the benefits-due claim for reconsideration under ERISA rules.[137]

In *Soniat v. Travelers Insurance Co.*,[138] a multipoint opinion, the Louisiana Supreme Court found that the fiduciary had not waived ERISA preemption.[139] The court also held, however, that ERISA did not preempt the state insurance law involved.[140] Therefore, the result was the same as if the court had recognized the waivability of ERISA preemption for the benefits-due lawsuit.

The Texas Fourteenth Court of Appeals addressed preemption three times, twice in dicta. In *Gorman v. Life Insurance Co. of North America*,[141] the fiduciaries urged ERISA preemption in pretrial motions and objections to evidence at trial, but neglected to plead it as an affirmative defense.[142] Following the Massachusetts Supreme Judicial Court in *Barry*,[143] the Texas court stated that ERISA preemption related to subject matter jurisdiction and was nonwaivable.[144] The court recast the petition as one alleging an ERISA action because the fiduciaries had raised ERISA preemption before trial. The employee-beneficiary had not submitted proper jury instructions under ERISA's arbitrary and capricious standard, and the court entered judgment for the fiduciary.[145]

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137. *Id.* at 93, 516 N.E.2d at 1242 (the trial court had not applied ERISA previously). Ohio follows the retrial opportunity rule, *supra* note 119. *See, e.g.*, Peltz v. City of S. Euclid, 11 Ohio St. 2d 128, 132, 228 N.E.2d 320, 323 (1967).

138. 538 So. 2d 210 (La. 1989).

139. *Id.* at 212-15. In *Soniat*, an employee-beneficiary sued an insurer for denying coverage for pregnancy benefits under a welfare plan. *Id.* at 211. For a discussion of the reduced authority of the multipoint opinion see *supra* note 107.

140. *Id.* at 212-14.

141. 752 S.W.2d 710 (Tex. Ct. App. 1988) (writ granted).

142. *Id.* at 712-13. In *Gorman*, an employee-beneficiary sued under a death-benefit plan alleging only state causes of action and denied making any claims under ERISA. *Id.* The trial court awarded judgment for the plan. *Id.* at 713.

143. Barry v. Dymo Graphics Sys., Inc., 394 Mass. 830, 835-36, 478 N.E.2d 707, 711 (1985). *See supra* notes 125-35 and accompanying text.

144. *Gorman*, 752 S.W.2d at 713.

145. *Id.* at 712, 714. Texas follows the retrial opportunity rule, *supra* note 119. *See, e.g.*, Peek v. Equipment Serv. Co., 779 S.W.2d 802 (Tex. 1989) (before granting a motion to dismiss the trial court is required to give the plaintiff an opportunity to amend to establish jurisdiction, unless amendment would be useless). The plaintiff in *Gorman*, however, was alerted to the ERISA cause of action by the fiduciary's pretrial discussions. *Gorman*, 752 S.W.2d at 713.

In addition, Texas follows the rule that matters not specifically pled cannot be proved. *See, e.g.*, Vallone v. Vallone, 644 S.W.2d 455, 459-60 (Tex. 1982). Because the plaintiff effectively refused to amend to plead the ERISA cause of action, the court had no alternative other than to construe the petition as if it had stated an ERISA cause of action and affirm a judgment which, in essence, dismissed the action for failure to prove an ERISA cause of action. *Gorman*, 752 S.W.2d at 714.

In *Cathey v. Metropolitan Life Insurance Co.*,[146] the employee-beneficiary urged that the fiduciaries had waived ERISA preemption by not pleading it as an affirmative defense although it was pled in the answers.[147] Again the court related ERISA preemption to subject matter jurisdiction and upheld the summary judgment for the fiduciaries on the basis that ERISA preempted the state cause of action.[148]

Castillo v. Neely's TBA Dealer Supply, Inc.[149] involved a non-benefits-due lawsuit. The court noted that its two earlier opinions were dicta and retracted its comments on ERISA preemption as subject matter jurisdiction. It followed the Fifth and Ninth Circuit opinions,[150] deferring to federal court interpretations of federal statutes.[151]

2. Waivable

In contrast to the state courts, the Ninth Circuit, in *Gilchrist v. Jim Slemons Imports, Inc.*,[152] seized upon the jurisdictional difference between a benefits-due and a non-benefits-due lawsuit. Because the federal court has subject matter jurisdiction of the recast ERISA lawsuit, the fiduciary can waive ERISA preemption if it was not raised before trial.[153]

The Ninth Circuit observed that the Supreme Court had held that NLRA preemption was nonwaivable[154] and, in *International Longshoremen's Association v. Davis*,[155] had determined that because NLRA preemption involved a choice-of-forum question, as the preempting statute specified the NLRB as the exclusive forum, it was nonwaivable.[156]

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146. 764 S.W.2d 286 (Tex. Ct. App. 1988) (writ granted).

147. *Id.* at 292.

In *Cathey*, an employee-beneficiary sued for medical benefits due solely under state causes of action and refused to plead ERISA causes of action when directed by the trial court. *Id.* at 289.

148. *Id.* at 293.

149. 776 S.W.2d 290 (Tex. Ct. App. 1989).

150. *Id.* at 293. *See supra* notes 111-15 and accompanying text.

151. *See, e.g.*, Holmes v. Olson, 587 S.W.2d 678, 679 (Tex. 1979).

152. 803 F.2d 1488 (9th Cir. 1986).

153. *Id.* at 1496-98.

In *Gilchrist*, a terminated employee sued his employer for breach of the implied covenant of good faith and fair dealing with respect to, among other items, lost medical benefits. *Id.* at 1492. The employee obtained a favorable judgment in trial court. *Id.* The fiduciary raised ERISA preemption initially on appeal. *Id.* at 1496.

154. *Id.* at 1497.

155. 476 U.S. 380, 391 (1986).

156. *See* Hughes v. Blue Cross, 215 Cal. App. 3d 832, 849, 263 Cal. Rptr. 850, 860 (1989), *cert. dismissed*, 110 S. Ct. 2200 (1990).

The Supreme Court held that NLRA preemption was not a choice-of-law question in which a state court with jurisdiction must apply federal law.[157] From this rule that a choice-of-forum question is nonwaivable, the circuit court inferred an inverse rule that a litigant may waive preemption when only a choice-of-law question is implicated.[158] In *Gilchrist*, the Ninth Circuit found that ERISA preemption involved a choice-of-law question because the federal district court would retain jurisdiction even if the suit were recast from a state cause of action to an ERISA claim.[159] Because ERISA preemption involves only a choice-of-law question, it is waived unless raised before trial.[160]

Therefore, the *Gilchrist* rationale creates another bifurcation of ERISA preemption law. Either, in an employee-beneficiary benefits-due lawsuit, preemption is waivable because litigants may bring the suit in state or federal court rather than in an exclusive forum,[161] or, in a non-benefits-due lawsuit, preemption is not waivable because litigants are limited to federal court as an exclusive forum.[162]

The Fifth Circuit has followed the *Gilchrist* decision twice.[163] In *Dueringer v. General American Life Insurance Co.*,[164] the court found that the fiduciary had waived ERISA preemption when initially raised on appeal because it had not pled preemption as an affirmative defense.[165] The court held that litigants must plead preemption as an affirmative defense because ERISA preemption involves a choice of law.[166] In *In re HECI Exploration Co. v.*

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157. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55 (1987) (employee-benefit action under ERISA must apply federal law and not state law); Local 174, Int'l Bd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 102-03 (1962) (state court in an action by an employee under LMRA must apply federal law and not local law).

158. *Gilchrist*, 803 F.2d at 1497.

159. *See supra* note 54 and accompanying text.

160. *Gilchrist*, 803 F.2d at 1497.

161. *See supra* note 54 and accompanying text.

162. *See supra* note 36 and accompanying text.

163. HECI Exploration Co. v. Holloway, 862 F.2d 513, 520 (5th Cir. 1988); Dueringer v. General Am. Life Ins. Co., 842 F.2d 127, 130 (5th Cir. 1988). *But see* Hayden v. Texas-U.S. Chem. Co., 681 F.2d 1053, 1056-57 (5th Cir. 1982) (trial court's neglect of ERISA preemption, first raised at trial without notice to defendant, resulted in a remand to consider the application of ERISA for benefits due under total disability plan).

164. 842 F.2d 127 (5th Cir. 1988).

In *Dueringer*, an insurer under a group medical plan was sued for denying an employee coverage. *Id.* at 130. The fiduciary initially raised preemption unsuccessfully on appeal. *Id.* at 130-31.

165. *Id.* at 130.

166. *Id.*

Holloway,[167] the Fifth Circuit again held that ERISA preemption was waived because it involves a choice of law and not a choice of forum.[168] The court, however, determined that even if ERISA's arbitrary and capricious standard were applied the fiduciary would lose.[169] Therefore, the result would have been the same if the court had recognized the nonwaivability of ERISA preemption in a benefits-due lawsuit.

Four state courts have decided in a manner consistent with *Gilchrist*: Indiana,[170] Texas,[171] and California appellate courts,[172] and the Minnesota Supreme Court.[173] All four held that a fiduciary who initially raised ERISA preemption after trial or on appeal waived it because it relates to a choice of law.[174]

The California court also determined that the evidence was insufficient to establish an ERISA plan.[175] If the court had held

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167. 862 F.2d 513 (5th Cir. 1988).

In *Holloway*, an employee-beneficiary sued for benefits due. *Id.* at 520. The fiduciary removed the matter to its bankruptcy proceeding. The bankruptcy court neglected to apply the arbitrary and capricious standard to determine the employee-beneficiary's right to recover against the plan. *Id.* at 515-16. The fiduciary raised preemption initially on appeal. *Id.* at 517.

168. *Id.* at 520. For the reduced authority of the multipoint opinion, see *supra* note 107.

169. *Holloway*, 862 F.2d at 523-25.

170. Associates Inv. Co. v. Claeys, 533 N.E.2d 1248 (Ind. App. 1989) (without attribution).

In *Claeys*, an employee-beneficiary sued for profit-sharing benefits that the fiduciaries had wrongly paid to a third party. *Id.* at 1249. The fiduciaries initially raised ERISA preemption in their motion for a new trial (motion to correct errors). *Id.* at 1250. The trial court entered judgment against the fiduciaries. *Id.*

171. Great N. Am. Stationers, Inc. v. Ball, 770 S.W.2d 631 (Tex. Ct. App. 1989).

In *Ball*, employee-beneficiaries sued for profit-sharing benefits under state law. *Id.* at 632. The trial court entered judgment against the fiduciary. *Id.* The fiduciary raised ERISA preemption for the first time on appeal. *Id.*

172. Hughes v. Blue Cross, 215 Cal. App. 3d 832, 263 Cal. Rptr. 850 (1989), *cert. dismissed*, 110 S. Ct. 2200 (1990).

In *Hughes*, an employee-beneficiary sued for denied medical reimbursement. *Id.* at 852, 263 Cal. Rptr. at 865. The fiduciary raised ERISA preemption initially in its appellate reply brief. *Id.* at 848, 263 Cal. Rptr. at 859-60.

One California court of appeals distinguished *Hughes* on its facts, however, and considered ERISA preemption raised for the first time on appeal. Faria v. Northwestern Nat'l Life Ins. Co., 216 Cal. App. 3d 1129, 1134 n.2, 265 Cal. Rptr. 309, 312 n.2 (1989) (reversing a bad faith insurance processing claim against an employee benefit plan).

173. Hubred v. Control Data Corp., 442 N.W.2d 308 (Minn. 1989).

In *Hubred*, an employee-beneficiary sued for benefits denied under a health plan. *Id.* at 309. The fiduciary obtained a favorable judgment from the trial court, *id.*, but did not raise ERISA preemption until the appeal in support of the judgment. *Id.* at 310 n.1.

174. *Hughes*, 215 Cal. App. 3d at 851, 263 Cal. Rptr. at 861; *Claeys*, 533 N.E.2d at 1252; *Hubred*, 442 N.W.2d at 310 n.1; *Ball*, 770 S.W.2d at 632.

175. *Hughes*, 215 Cal. App. 3d at 857-59, 263 Cal. Rptr. at 865-67. For the reduced authority of the multipoint opinion see *supra* note 107.

ERISA preemption nonwaivable, the fiduciary would have lost because it failed to prove that the plan was an ERISA plan.

The Minnesota Supreme Court cited an LMRA case[176] and a non-benefits-due decision.[177] Because LMRA does not have a statutory preemption provision,[178] LMRA waivability arises from different principles than the waivability of ERISA's express preemption provision.[179] Under currently recognized principles, the waivability in a non-benefits-due lawsuit differs from the waivability of a benefits-due lawsuit in that jurisdiction lies in federal court, an exclusive forum, and not both in federal and state court.[180] The fiduciary won under state law,[181] and the result would have been the same if the court had recognized the nonwaivability of ERISA preemption for a benefits-due lawsuit.

Although these state courts speak to ERISA preemption's waivability, their determinations do not constitute an independent confirmation of the federal decisions arriving at the same conclusion. Through case law, many states provide that decisions of federal courts on federal law bind state courts.[182] Therefore, these state courts recognized the Ninth Circuit's holding in *Gilchrist* as binding.

III. THE PREEMPTION PRINCIPLE

In *International Longshoremen's Association v. Davis*,[183] an NLRA preemption case, the Supreme Court reemphasized that

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176. *Hubred*, 442 N.W.2d at 310 n.10 (citing Johnson v. Armored Transport of Cal., Inc., 813 F.2d 1041, 1043-44 (9th Cir. 1987)).

The authority of *Johnson* is doubtful because its waivability conclusion is based on an ERISA case, Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1497 (9th Cir. 1986), which does not recognize the differences between LMRA, which lacks a statutory preemption provision, and ERISA, which does have a statutory preemption provision. *See supra* notes 38-48 and accompanying text.

177. *Hubred*, 442 N.W.2d at 310 n.1 (citing Amalgamated Cotton Garment & Allied Indus. Fund v. Dion, 341 Pa. Super. 12, 15, 491 A.2d 123, 124 (1985)).

178. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985).

179. *See supra* notes 38-48 and accompanying text.

180. *See supra* notes 87-110 and accompanying text.

181. *Hubred*, 442 N.W.2d at 312. For the reduced authority of a multipoint opinion see *supra* note 107.

182. *See, e.g.*, Voelkel v. Tohulka, 236 Ind. 588, 594, 141 N.E.2d 344, 347 (1957), *cert. denied*, 355 U.S. 891 (National Service Life Insurance Act of 1940); Propper v. Chicago, R.I. & Pac. R.R., 237 Minn. 386, 394, 54 N.W.2d 840, 846 (1952) (Federal Employers' Liability Act); Holmes v. Olson, 587 S.W.2d 678, 679 (Tex. 1979) (Truth in Lending Act). *But see* People v. Bradley, 1 Cal. 3d 80, 87, 460 P.2d 129, 132, 81 Cal. Rptr. 457, 460 (1969) (*lower* federal courts are not binding on federal questions, only persuasive).

183. 476 U.S. 380 (1986); *see supra* notes 155-56 and accompanying text.

courts should use congressional intent to resolve federal preemption disputes. The Supreme Court had discussed NLRA preemption in an earlier case disputing an injunction granted under a state statute.[184] The Court determined that NLRA preemption was jurisdictional because the NLRB was the exclusive forum which extinguished state jurisdiction and left the state court without subject matter jurisdiction.[185] In dicta, the Court noted that NLRA preemption did not involve a choice of law, as did a claim under Section 301 of LMRA,[186] but it made no statement concerning nonwaivability of LMRA preemption.[187]

Davis is the source of the choice-of-forum/choice-of-law distinction in ERISA preemption decisions. In *Davis*, however, the Supreme Court also held that this distinction resulted from congressional intent for the NLRA as delineated in the Supreme Court's prior opinions.[188] The Court limited its decision to those preemption claims that went to a state's actual adjudicatory power.[189] The Supreme Court was not deciding nonwaivability for other types of preemption. In fact, the Supreme Court went on to state that preemption under any other statute rested on the congressional intent in enacting that statute.[190] Therefore, the *Davis* holding does not resolve preemption issues outside of a state's adjudicatory power or under a statutory preemption provision.

In *Davis*, a stevedoring company fired a salaried supervisor for trying to unionize the longshoremen. *Id.* at 382, 384. The union allegedly had told the supervisor that, if his employer fired him, they would get his job back with back pay. *Id.* Legal precedent, however, indicated that it is not an unfair labor practice to fire supervisors for union activity. *See* Florida Power & Light Co. v. International Bhd. of Electrical Workers, 417 U.S. 790, 812 (1974). The supervisor then sued the union for fraud and misrepresentation in Alabama state court. *Davis*, 476 U.S. at 386. The union defended under state law, not raising NLRA preemption until its motion for judgment-notwithstanding-the-verdict. *Id.* The trial court entered judgment on the verdict and the Alabama Supreme Court affirmed, holding that the union had waived NLRA preemption because Alabama law required defendants affirmatively to plead federal preemption. *Id.* at 386-87. The United States Supreme Court ruled that the Alabama court had erred in deciding the case on this basis, but affirmed on other grounds. *Id.* at 399-400.

184. *See* Local No. 438, Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542, 548 (1963), *cited in Davis*, 476 U.S. at 390.

185. *Davis*, 476 U.S. at 392.

186. 29 U.S.C. § 185(a) (1988); *see infra* note 310 and accompanying text.

187. *Davis*, 476 U.S. at 391; *see Curry*, 371 U.S. at 548; Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (an employer sought damages under state law as a result of a union striking in violation of a collective bargaining agreement).

188. *Davis*, 476 U.S. at 392 n.9.

189. *Id.*

190. *Id.*

Courts subsequently applying *Davis* to other statutes have not followed this clear direction[191] or examined the congressional intent for the statute.[192] Instead, courts have developed elaborate tests for the choice-of-forum/choice-of-law distinction. One court outlined three types of preemption: one for choice of law in a case properly before a state or federal court; one for claims such as the LMRA Section 301 lawsuit, which does not involve jurisdiction; and one for the choice of forum.[193]

Other than for implicit NLRA preemption, courts have used *Davis* primarily as the basis for implicit preemption under LMRA and explicit preemption under ERISA.[194] Several courts that considered LMRA preemption did not reach the waiver issue because preemption was raised at the trial level,[195] and one court found no

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191. *See supra* note 158 and accompanying text.

192. New York's highest court examined legislative intent prior to *Davis*, 476 U.S. at 391. *See* Sasso v. Vachris, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856 (1985); *see also* Note, *Preemption or Preservation of State Remedies under ERISA? The New York Court of Appeals Preserves a State Remedy in* Sasso v. Vachris, 60 ST. JOHNS L. REV. 567, 578-79 (1986).

193. *See* Miller v. Norfolk & W. Ry., 834 F.2d 556, 560 (6th Cir. 1987).

194. *See supra* notes 17 & 37 and accompanying text.

Courts have also considered the impact of *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), on preemption under four other statutes without the waiver issue before them. Under the Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-86 (1988)), federal preemption arose in two district courts *after* removal from state court. Therefore, the litigants did not need to raise the waiver issue. *See* Railway Labor Executives Ass'n v. Pittsburg & L.E.R.R., 858 F.2d 936, 943 (3d Cir. 1988) (because state action not found to encompass a federal cause of action, federal court lacked jurisdiction under removal statute); Miller v. Norfolk & W. Ry., 834 F.2d 556, 560 (6th Cir. 1987) (trial court did not resolve preemption question; case remanded for determination).

Under the Federal Food Drug and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-92 (1988)), in a case without removal jurisdiction, the court suggested that the petitioner should have argued preemption. *See* Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 816 (1986). In a case under the Federal Boat Safety Act, Pub. L. No. 92-75, 85 Stat. 213 (1971) (codified as amended at 29 U.S.C. §§ 1451-89 (1988)) (with an express preemption provision), the Wisconsin state court dealt with preemption which was raised for the first time in a postverdict motion and treated it as if it related to subject matter jurisdiction, but found no preemption and avoided the waiver issue. Mulhern v. Outboard Marine Corp., 146 Wis. 2d 604, 626, 432 N.W.2d 130, 139 (Wis. Ct. App. 1988).

195. Central States, S.E. & S.W. Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1108 (6th Cir. 1986) (trustees suing for employer contributions to pension plan), *cert. denied*, 479 U.S. 1086 (1987); Teamsters Local No. 429 Health & Welfare Fund v. Chain Bike Corp., 643 F. Supp. 1337, 1341-43 (E.D. Pa. 1986) (trustees sued for employer contribution to welfare plan both under LMRA and ERISA; court used the express language of ERISA, 29 U.S.C. § 1132(g)(2) (1985)); Sargent v. Browning-Ferris Indus., 167 Mich. App. 29, 33, 421 N.W.2d 563, 565 (1988) (wrongful discharge).

preemption and, therefore, did not consider the waiver issue.[196] When LMRA preemption was raised initially after trial or on appeal, the courts discussed neither the meaning of LMRA preemption nor its legislative intent. In an ERISA preemption case,[197] the Ninth Circuit found that the defendant had waived LMRA preemption[198] without citing any difference between ERISA's express preemption provision and LMRA's implied preemption. On the basis of NLRA cases, the Alabama Supreme Court found that the fiduciary had not waived LMRA preemption.[199] That case also failed to note the jurisdictional differences between the two statutes. Because the Alabama court refused to recast the lawsuit as an LMRA action, the plaintiff's claim consisted only of state causes of action preempted by LMRA, and, therefore, the plaintiff could not invoke the state court's subject matter jurisdiction. An Illinois appellate court reached the same result based on a pre-*Davis* Seventh Circuit opinion.[200]

Like the LMRA cases relying on *Davis*, ERISA preemption cases have not reached the waiver issue because the defendant had raised the matter at trial.[201] Several other courts, however, have dealt with ERISA preemption raised initially on appeal. Instead of exploring the legislative intent behind ERISA, these courts have created a rule converse to the Supreme Court's NLRA rule, holding that if the preemption merely involves a choice of law, the litigant may waive it.[202]

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196. National Can Corp. v. Jovanovich, 503 N.E.2d 1224, 1229 (Ind. Ct. App. 1987) (employee sued for intentional tort of not assigning light duty for injured back).

197. Johnson v. Armored Transport of Cal. Inc., 813 F.2d 1041 (9th Cir. 1987) (employee sued for wrongful discharge).

198. *Id.* at 1043-44.

The *Johnson* court determined that LMRA preemption was similar to the ERISA preemption considered in *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986). Both cases held that the fiduciary had waived preemption that was initially raised in post-trial motions.

199. Reynolds Metals Co. v. Mays, 516 So. 2d 517, 518 (Ala. 1987) (retaliatory discharge and defamation; state court was without jurisdiction), *vacated*, 486 U.S. 1050 (1988).

200. Sagen v. Jewel Cos., 148 Ill. App. 3d 447, 450, 499 N.E.2d 662, 664 (1986) (citing National Metalcrafters v. McNeil, 784 F.2d 817 (7th Cir. 1986) (tortious interference with employment contract, a collective bargaining agreement; raised for first time on appeal in supplemental brief)).

201. Cathey v. Metropolitan Life Ins. Co., 764 S.W.2d 286, 292 (Tex. Ct. App. 1988) (writ granted) (preemption raised in answers); Gorman v. Life Ins. Co., 752 S.W.2d 710, 713 (Tex. Ct. App. 1988) (writ granted) (preemption raised in pretrial discussions).

202. Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1497 (9th Cir. 1986); Hughes v. Blue Cross, 199 Cal. App. 3d 958, 245 Cal. Rptr. 273 (1988), *reconsidered*, 215 Cal. App. 3d 832, 263 Cal. Rptr. 850 (1989), *cert. dismissed*, 110 S. Ct. 2200 (1990); Associates Inv. Co. v. Claeys, 533 N.E.2d 1248, 1251 (Ind. Ct. App. 1989); Great N. Am. Stationers v. Ball, 770 S.W.2d 631, 632 (Tex. Ct. App. 1989).

The failure to examine the congressional intent of the express ERISA preemption provision compounds the error of these appellate courts when they apply *Davis*. The *Davis* case dealt with an implicit preemption for which the courts will accommodate state law.[203] Because ERISA preemption is an express preemption, the courts can prevent encroachment by state law.[204] Therefore, a holding on an implicit preemption is not necessarily relevant to an express preemption.

IV. LEGISLATIVE INTENT

To determine whether ERISA preemption is jurisdictional, the courts must first examine ERISA's express preemption provision in light of preventing encroachment by state laws and promoting uniformity.[205] Courts will normally inquire into legislative intent to determine statutory meaning.[206] To achieve a just result, a court uses different principles depending on the circumstances of the case.[207] In statutory construction, courts employ two techniques: the analytical or plain-meaning method, acting on the literal meaning of the words in the statute, and the teleological method, acting on the intended legislative remedy.[208]

In applying the analytical method, courts use only the statute itself and intrinsic aids such as section headings, preambles, titles, punctuation, context, grammar, and word choice.[209] This method

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203. *See supra* note 42 and accompanying text.

204. *See supra* note 44 and accompanying text.

205. *See infra* notes 344-64 and accompanying text.

206. *See, e.g.*, United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 55 (1942) (the all-important controlling factor in determining the meaning of a statute is legislative intent); United States v. Stone & Downer Co., 274 U.S. 225, 239 (1927) (same); Ebert v. Poston, 266 U.S. 548, 554 (1925) (same); Wisconsin Cent. R.R. v. Forsyth, 159 U.S. 46, 55 (1895) (same); Jones v. New York Guar. & Indem. Co., 101 U.S. 622, 626 (1879) (legislative intent is the law); Indianapolis & St. L. R.R. v. Horst, 93 U.S. 291, 300 (1876) (same); Raymond v. Thomas, 91 U.S. 712, 715 (1875) (same); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 396 (1867) (same); *see also* United States v. Cooper Corp., 312 U.S. 600, 605 (1941) (role of the court is to declare the legislative intent); United States v. Palmer, 16 U.S. (3 Wheat) 610, 630 (1818) (same).

207. *See* K. LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960). *See generally* R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 60-85 (1983) (discussing principles and counterprinciples in contract law, such as the freedom to contract and fairness).

208. S. SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 86 (1973). The key difference between the two methods is the use of legislative history to interpret statutes.

209. *See generally* C. NUTTING, S. ELLIOT, & R. DICKERSON, LEGISLATION CASES AND MATERIALS 471-508 (4th ed. 1969) [hereinafter C. NUTTING]. English courts have a definite preference for the analytical method and eschew the use of extrinsic aids such as historical legislative material. *See* Vacher & Sons, Ltd. v. London Soc'y of Compositors, [1913] App.

determines not what the legislators meant to say, but the meaning of what they did say.[210] Under the analytical method, the court determines a statute's meaning through its exact language, using intrinsic aids only if necessary.[211] A court must enforce the statute as written, even if the literal construction leads to unjust results.[212] Courts frequently weaken this method by combining it with the teleological method. They create an ambiguous language exception to the plain-meaning rule under which the court considers extrinsic aids in addition to intrinsic aids.[213]

Under the teleological method, courts use external aids, such as other statutes, prior judicial and administrative decisions, historical context, and legislative history.[214] In contrast to the analytical method, a court examines the problem that the legislature set out

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Cas. 107, 121-22. Two facets of the relationship between the legislature and the judiciary explain the English courts' preference for the analytical method. *See* G. MARSHALL, CONSTITUTIONAL THEORY 74 (1971). First, the supremacy of Parliament over the other branches of government encourages a belief in the sanctity of the exact words of the statute. *See* Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 406-07 (1942). Second, four aspects of the legislative process discourage a search for the legislative intent: (1) a joint statutory effort of two legislative houses and the Crown obscures ascertaining any single intent from the historical document, *see* G. MARSHALL, *supra*, at 74-75; (2) the number of participants involved in the statute's passage renders valueless any single member's opinion concerning the meaning, *see* Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899); (3) statements of the civil servant drafters contain bias, *see* G. MARSHALL, *supra*, at 76; and (4) because a statute frequently results from compromise, the legislators often confuse their intention with the language actually employed. *See* Hilder v. Dexter, [1902] App. Cas. 474, 477 (Earl of Halsbury).

210. Dockers' Labour Club & Inst. Ltd. v. Race Relations Bd., [1974] 3 All E.R. 592, 600 (Lord Simon of Glaisdale).

211. *See, e.g.*, F. HORAK, CASES AND MATERIALS ON LEGISLATION 271-76 (1940); C. NUTTING, *supra* note 209, at 408.

212. *See, e.g.*, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 521 (1981) (concerning ERISA preemption "[o]ur judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales."); F. HORAK, *supra* note 211, at 271-76 and 1059; C. NUTTING, *supra* note 209, at 408; *see also* Hill v. East & W. India Dock Co., 9 App. Cas. 448, 465 (1884) (Lord Bramwell). English courts follow this attitude even when facing ambiguous words. Commonwealth of Australia v. Bank of New S. Wales, [1950] App. Cas. 235, 307.

213. *See, e.g.*, F. HORAK, *supra* note 211, at 271-76; C. NUTTING, *supra* note 209, at 408.

214. F. HORAK, *supra* note 211, at 508-56. France, the United States, and the international community follow this latter approach. *See, e.g.*, Vienna Convention on the Law of Treaties, 1969, art. 31, U.N. Doc. A/Conf. 39/27; M. PLANIOL, 1 TRAITE ELEMENTAIRE DE DROIT CIVIL 86 (1925); Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 537-38 (1948).

In stark contrast, English common law forbids the courts to use the bill introducing the act, Herron v. Rathmines & Rathgar Improvement Comm'rs, [1892] App. Cas. 498, 502; speeches and debates on the bill or the fate of committee amendments, Warner v.

to solve and the remedy it developed and then construes the statute in light of achieving those ends.[215] This principle permits judges to interpret statutes in a variety of ways.[216] Some courts treat this method as an additional exception to the analytical method to prevent unjust or absurd results.[217] The United States Supreme Court has used both methods.[218]

In the case of ERISA's preemption and jurisdictional provisions, both methods lead to the same conclusion.

A. Intrinsic Aids

Regardless of the method used, the court's analysis ordinarily starts with the statute itself following well-established canons of statutory construction.[219] The analytical method is limited to these canons. Unfortunately, use of only the canons is frequently not

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Metropolitan Police Comm'r, [1969] 2 App. Cas. 256, 279, [1968] 2 All E.R. 356, 367; reports of Royal commissions or government committees, Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., [1975] App. Cas. 591, 615 [1975] 1 All E.R. 810, 815; the views of an administrative body concerned with administering the act, London City Council v. Central Land Bd., [1959] Ch. 386, 392, [1958] 3 All E.R. 676, 678 or views of the draftsman, Hilder v. Dexter, [1902] App. Cas. 475, 477.

215. *See, e.g.*, F. HORAK, *supra* note 211, at 268-71, 1059; C. NUTTING, *supra* note 209, at 408-09. The teleological method derives from Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (1584) (Sir Edward Coke).

216. *See* C. BOWEN, THE LION AND THE THRONE 261-62 (1956) (King James I's statements about Sir Edward Coke's idea concerning statutory interpretation by judges); *see also* Magor & St. Mellons Rural Dist. Council v. Newport Corp., [1952] App. Cas. 189, 191 (Lord Denning's approach of filling in the gaps and making sense of the statute by supplementing the written word by considering the legislative and ministerial intent criticized as "a naked usurpation of the legislative function under the thin guise of interpretation").

217. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

218. *Compare* Chung Fook v. White, 264 U.S. 443, 446 (1924) (if the language is plain and an injustice arises, the remedy lies with Congress and not the courts) *and* Caminetti v. United States, 242 U.S. 470, 485 (1917) (if the language is plain and unambiguous, the duty of interpretation does not arise and the court need not discuss the aids for resolving ambiguity) *with Church of the Holy Trinity*, 143 U.S. at 459 (statutes should be sensibly construed so that the reason of the law prevails over its letter if an injustice or absurdity would result) *and* Pierson v. Ray, 386 U.S. 547, 560 (1967) (teleological method; suggesting Sir Edward Coke's rule in Heydon's Case).

219. *See, e.g.*, Hassett v. Welch, 303 U.S. 303, 307 (1938). Even the canons have principles and counter principles. *See* K. LLEWELLYN, *supra* note 207, at 521-35. As a result, a declaration of the legislative intent can overcome a canon of construction. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 336 (1981) (the starting point for interpreting a statute is the language of the statute itself; "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive"); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 661 (1829) (technical rule must yield to the expression of the will of the legislature); Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797) (same).

determinative because different canons occasionally provide conflicting results,[220] and due to the lack of a hierarchy among the canons,[221] judges frequently speculate on legislative intent when selecting the proper canon.[222]

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220. *See* Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 443 (1989).

The English Race Relations Act of 1968 (RRA), ch. 71, repealed by the Race Relations Act of 1976, ch. 74, § 79, provides an example of this conflict. (An English statute is preferable for this purpose because the English court uses the analytical method more strenuously than American courts.) The first RRA case to reach the House of Lords dealt with whether the act prohibiting discrimination on the basis of "national origin" included discrimination on the basis of changeable national citizenship. London Borough of Ealing v. Race Relation Bd., [1972] App. Cas. 342, [1972] 1 All E.R. 105 (1971), *rev'g* [1971] Q.B. 309, [1970] 1 All E.R. 424.

One canon presumes that a specific proviso excludes unmentioned situations from the act that otherwise would come within its scope. *See* Mullins v. Treasurer of Surrey, 5 Q.B.D. 170, 173 (1880). Because the RRA has two sections exempting some discrimination on nationality grounds, RRA, §§ 8(11), 27(9), the term "national origin" would include "nationality." *See Ealing*, [1971] 1 All E.R. at 435.

Another canon requires interpreting statutes that limit common-law freedoms narrowly in favor of the freedom. *In re* Cuno, 43 Ch. D. 12, 17 (1889). Because race discrimination was lawful prior to the RRA, the term "national origin" would be limited to citizenship by birth. *Ealing*, [1971] 1 All E.R. at 435 (Swanwick, J., noting the conflict and the absence of direction on which governs).

221. *See* Posner, *supra* note 220, at 443.

The RRA again provides an example. In the *ex abundanti cautela* canon the court presumes that the legislature included an exception clause to prevent an incident related to the enacting clause from escaping the judges' notice. *See* Wakefield Local Bd. of Health v. West Riding & Grimsby Ry., L.R. 1 Q.B. 84, 85 (1865). The excepting proviso of the RRA also provides an exception for residence, which lies without the ambit of the RRA. RRA, §§ 1(1), 27(9)(a). The RRA's excepting proviso expressed the draftsman's cautiousness by including more in the saving clause than is absolutely necessary. *Ealing*, [1972] 1 All E.R. at 109 (Lord Donovan), 112 (Viscount Dilhorne), 115 (Lord Simon), 118 (Lord Cross).

222. *See* Posner, *supra* note 220, at 443 (no one has suggested a satisfactory ordering of the canons).

With respect to the RRA, Viscount Dilhorne confirmed his interpretation by speculating that if Parliament had intended to include nationality within the discrimination definition it could have easily added the words "or nationality" after "national origins." *Ealing*, [1972] 1 All E.R. at 113. This approach overlooks the possibility that members of Parliament thought "national origins" included "nationality," making the addition superfluous. Lord Cross also confirmed his interpretation by speculating that Parliament used "national origins" and not "nationality" because nationality based on citizenship did not include British subjects against whom violators practiced discrimination, whereas national origins based on birth did. *Id.* at 117. This interpretation overlooks the possibility that "colour, race or ethnic . . . origins" includes the type of discrimination Lord Cross had in mind.

At best, these canons provide a checklist for the judge to consult before determining the meaning of a statute. Posner, *supra* note 220, at 443. One such checklist was prepared by Professor Llewellyn. *See* K. LLEWELLYN, *supra* note 207, at 522-25.

1. Statutory Language

The only statutory language the courts should need to construe lies in the ERISA preemption provision, Section 514:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.[223]

Some courts, however, have also felt a need to examine the ERISA jurisdictional provision, Section 502(e),[224] which provides that non-benefits-due actions must be brought in federal court and benefits-due actions may be brought in either federal or state court.[225] Only those courts that fail to distinguish between implicit and express preemption have given significance to the jurisdictional provision. These courts have used the jurisdictional provision to create a choice-of-law preemption, which only relates to implicit preemption.

2. Plain Meaning

The Supreme Court primarily applies the plain-meaning rule: in the absence of ambiguity in a statute's wording, the statute's explicit terms express the legislative intent.[226] Ambiguity is an

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223. 29 U.S.C. § 1144(a) (1985 & Supp. 1987).

The saving clause exceptions in § 1144(b) generally apply to: pre-ERISA matters; state regulation of insurance, banking, and securities; the use of state facilities by the Department of Labor; criminal laws of general applicability; the Hawaiian Prepaid Health Care Act; fully-insured, multiple welfare arrangements; qualified domestic relation orders; and non-exclusion of welfare plan coverage due to social security coverage.

The exemptions in § 1003(b) generally relate to: governmental plans; most church plans; plans maintained only to comply with applicable worker's compensation laws; plans maintained outside the United States primarily to benefit nonresident aliens; and unfunded, excess-benefit plans.

224. 29 U.S.C. § 1132(e) (1988).

225. Section 502(e) states:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Id.

226. *See*, Caminetti v. United States, 242 U.S. 470, 485 (1917) (stating the analytical construction principle); *see also* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482-83 (1990) (applying the plain-meaning rule to the ERISA preemption provision); FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990) (same); Pilot Life Ins. Co. v. Dedeaux, 481 U.S.

imprecise word that can permit a court to use the extrinsic aids when it chooses.[227] The discussion in this subsection assumes the absence of any ambiguity or use of extrinsic aids.

A court should begin by examining the plain meaning of the wording of ERISA's express preemption. Under the plain-meaning canon, the words are given their commonly attributed meaning.[228] The plain meaning is usually obtained from the contemporary edition of a respected dictionary, for example, *Black's Law Dictionary* or *Webster's New International Dictionary*.[229]

41, 50 (1987) (same); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741 (1985) (applying the plain-meaning rule to the savings clause of the ERISA preemption provision); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) (same); United States v. Turkette, 452 U.S. 576, 581 (1981) (if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive); Howe v. Smith, 452 U.S. 473, 484 (1981) (same); Maine v. Thiboutot, 448 U.S. 1, 7 (1980) (ordinarily it is not necessary to look beyond the words of a statute, into the legislative history, in order to ascertain the meaning of a statute); United States v. Apfelbaum, 445 U.S. 115, 122 (1980) (absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language). *But see* Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 9-10 (1976) (courts should consider legislative history even if the language of the statute is clear). *See generally* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975) (analyzing cases in which the Supreme Court only appeared to give weight to the rule and other cases where federal courts followed *Caminetti*, 242 U.S. 470, in its full rigor).

For criticism of the plain-meaning rule see Posner, *supra* note 220, at 442 (the rule is unnecessary; competent judges do not need grammar handbooks, incompetent judges are unable to apply them). *See generally* Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 DAY. L. REV. 31 (1979).

227. *See* White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7, 21 (reconciling Karl Llewellyn's Uniform Commercial Code with Legal Realism by intentionally using the imprecise words "unconscionable" and "good faith" to allow judges to derive an equitable result without torturing an accepted rule of law).

228. *See, e.g.*, Russello v. United States, 464 U.S. 16, 22 (1983) (when a statute does not define a term, the court must start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used); Diamond v. Diehr, 450 U.S. 175, 182 (1981) (in cases of statutory construction, begin with the language of the statute, and, unless otherwise defined, words will be interpreted according to their ordinary, contemporary, common meaning); *see also* Jones v. Liberty Glass Co., 332 U.S. 524 (1947); Rosenman v. United States, 323 U.S. 658 (1944); Western Union Tel. Co. v. Lenroot, 323 U.S. 490 (1944); Levy v. M'Cartee, 31 U.S. (6. Pet.) 102 (1932); *cf.* UNIF. STATUTORY CONSTRUCTION ACT § 2, 14 U.L.A. 513 (1980).

229. *See, e.g.*, Russello v. United States, 464 U.S. 16, 21 (1983) (using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1981) [hereinafter WEBSTER'S 3d], RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1979), and BLACK'S LAW DICTIONARY (5th ed. 1979)); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 n.16 (1983) (using BLACK'S LAW DICTIONARY (5th ed. 1979) for the ERISA preemptive provision).

The Supreme Court has indicated that a court should not apply a dictionary mechanically in unintended contexts, but only when using the teleological method. *See* Farmers Reservoir

The key terms in the ERISA preemption provision are: the introductory proviso,[230] "shall," "supersede," "State laws," "insofar," "relate to," and "employee benefit plans." Because the introductory proviso and the phrases "State laws," "relate to," and "employee benefit plan" concern substantive law, they are less important for dealing with the procedural aspects of state law survivability. Moreover, the statute defines two of these terms,[231] and the Supreme Court has initiated the investigation of the other two.[232]

"Shall" indicates a mandatory requirement.[233] "Supersede" commonly means: "(2) to make void or useless . . . by superior power . . . ; to cause to be set aside; to force out of use . . . ; to render obsolete; to cause to be abandoned. (3) to take the place . . . of; to replace. (4) to displace . . . or make way for another."[234]

& Irrigation Co. v. McComb, 337 U.S. 755, 764 (1948) (citing Hand, J., using the teleological method, in Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945)).

The Third Circuit has advocated that Congress intended the dictionary meaning when drafting the ERISA preemption provision. Buczynski v. General Motors Corp., 616 F.2d 1238, 1250 (3d Cir. 1980); *see also* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985) (giving the ERISA preemption provision its "broad common-sense meaning"); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97-98 (1983) (relying on legislative history and the "normal sense of the phrase" to interpret the ERISA preemption provision).

230. 29 U.S.C. § 1144(a) (1988) ("Except as provided in subsection(b) . . .)".

231. *Id.* §§ 1002(3), 1144(c)(1) (employee benefit plan, state laws). One statutory construction canon binds courts to use definitions and rules of interpretation contained in the statute. K. LLEWELLYN, *supra* note 207, at 523 (Canon no. 9).

232. The Supreme Court has determined that "relates to" means "has a connection to or reference to." *See Shaw*, 463 U.S. at 96-97 (using BLACK'S LAW DICTIONARY, *supra* note 229; *see also* Mackey v. Lanier Collections Agency & Serv. Inc., 486 U.S. 825 (1988) (Georgia garnishment law does not relate to a welfare plan); Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987) (Maine severance pay statute does not relate); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (Mississippi bad-faith claims-processing does relate); *Metropolitan Life Ins.*, 471 U.S. 724 (1985) (Massachusetts statute requiring minimum health care relates); *cf.* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (New Jersey worker's compensation statute prohibiting benefit offset relates).

The Supreme Court has also determined that certain laws regulate insurance within the introductory proviso. *See Pilot Life Ins.*, 481 U.S. 41 (1987) (Mississippi bad-faith claims-processing not saved from preemption); *Metropolitan Life Ins.*, 471 U.S. 724 (1985) (Massachusetts statute requiring minimum health care saved).

233. *See, e.g.*, Escoe v. Zerbst, 295 U.S. 490, 492 (1934); United States *ex rel.* Siegel v. Thoman, 156 U.S. 353, 359-60 (1895). *Contra* West Wis. Ry. v. Foley, 94 U.S. 100 (1876) (only in relation to other parts of the statute).

Another statutory construction canon requires courts to use definitions determined prior to the statute's passage. K. LLEWELLYN, *supra* note 207, at 524 (Canon no. 13).

234. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2533 (2d ed. 1951) [hereinafter WEBSTER'S 2d]; *see also* WEBSTER'S 3d, *supra* note 229, at 2295.

"Insofar" commonly means "to such an extent or degree."[235] This straight-forward reasoning indicates that ERISA has eliminated state law to the extent that "it relate[s] to any employee benefit plan."[236] Therefore, because this area of substantive state law no longer exists, it cannot give a court jurisdiction.

The Ninth Circuit's construction of this section in *Gilchrist*[237] conflicts with the ERISA preemption provision's plain meaning. Although the plain meaning eliminates all state law, the court would permit substantive state law to apply in some benefits-due lawsuits. The conflict arises from the Ninth Circuit's treatment of ERISA's express preemption as an implicit preemption. In *Davis*, the Supreme Court created NLRA preemption on the basis of an implied legislative intent, not on a judicially-perceived conflict between state and federal labor law. If the Court had created ERISA preemption in this manner, the courts might be free to determine ERISA preemption's limits.[238] Instead, Congress created ERISA preemption by express statutory language. Therefore, courts should act to prevent state law encroachment on ERISA's uniform federal common law rather than accommodate the least possible displacement of state law.

The legislative intent expressed in the language of this statute should not lead to a split between lawsuits brought in federal and state courts or between non-benefits-due and benefits-due lawsuits.[239] Under the plain-meaning rule, ERISA preempts all state laws at all times. Nowhere does the statute suggest a distinction based on the type of lawsuit or the forum.

Another statutory construction canon suggests that a court cannot construe ERISA to preempt state law only when the litigants do not waive preemption in a particular type of lawsuit or forum. The canon, contrary to the plain-meaning rule, provides an exception to plain meaning when the literal interpretation leads to absurdities, "mischievous consequences," or thwarts the statute's purpose.[240] For ERISA preemption, however, it is not the plain-meaning result that leads to absurd results but the waiver concept.

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235. WEBSTER'S 3d, *supra* note 229, at 1170; WEBSTER'S 2d, *supra* note 234, at 1286.

236. This is clearly the Ninth Circuit's understanding of the meaning of "supersede." *See* City of Los Angeles v. Gurdane, 59 F.2d 161, 163 (9th Cir. 1932) ("supersede" in a statute means " '[s]et aside;' 'annul;' 'displace;' 'make void, inefficacious, or useless;' 'repeal' " or that "there is not much left of the existing").

237. Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986).

238. *Cf.* J.I. Case v. Borak, 377 U.S. 426, 433 (1964) (court to determine extent and nature of implied action for proxy violation from federal policy underlying statute).

239. *See supra* notes 36, 54 & 101 and accompanying text.

240. K. LLEWELLYN, *supra* note 207, at 524 (Canon no. 12).

It is far easier for courts to apply a uniform rule that is applicable to all ERISA actions than to first analyze the type of lawsuit or available forum. The latter approach creates multiple bodies of employee benefit law, one for nonwaiver and several for waiver of ERISA preemption. This bifurcation undermines the preemption provision's purpose of encouraging the growth of private-employer, employee-benefit plans through uniformity of law.[241]

Permitting waiver of preemption also violates several other statutory construction canons. The waiver situation effectively creates a new implied proviso for Section 514 of ERISA. One canon requires a court to construe a proviso narrowly to exclude any situation that is not contained in the specific wording.[242] Another canon forbids a court to read an exception like waiver into the statute.[243] Under yet another canon, the express statement of a proviso excludes the creation of a new proviso.[244] Still another canon requires the court to give meaning to every word in the statute.[245] This does not, however, authorize a court to create a waiver exception through the jurisdiction provision because as that provision merely designates jurisdiction for lawsuits arising under ERISA.

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241. *See* 29 U.S.C. § 1001a(c)(2) (1988) (purpose of the multiemployer plan amendments to ERISA is to prevent discouraging their growth); *see also id.* § 1001(a) (congressional findings that employee-benefit plans are important to the security of millions of Americans, to the stability of labor, and to the continuity of interstate commerce suggest a purpose to foster the growth of those plans); *cf. infra* notes 345-47 and accompanying text (growth purpose also evidenced extrinsically).

242. K. LLEWELLYN, *supra* note 207, at 528 (Canon no. 28); *cf. infra* note 332 (ERISA extrinsic evidence indicates a court should construe the exceptions narrowly). The counter canon provides an equitable exception, but waiver does not treat the "waiving" party equitably. The nonwaiver situation is far less inequitable because the losing litigant may retry the case under ERISA. *See, e.g., supra* notes 119, 122, 135, 137 & 145. The only potential inequity is additional litigation costs. The plaintiff, however, created those costs attempting to avoid ERISA, and the defendant is generally the beneficiary of nonwaiver.

243. K. LLEWELLYN, *supra* note 207, at 526 (Canon no. 19).

Under ERISA, courts generally have not followed this canon. For example, when considering preemption of marital property law, courts have found an implied exception or irrebuttable presumption against preemption. *See, e.g.*, American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (garnishment for alimony and support); Stone v. Stone, 450 F. Supp. 919, 932 (N.D. Cal. 1928), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981) (community property laws); *see also* Kilberg & Inman, *supra* note 39, at 1320-21.

Congress finally resolved this problem in the Retirement Equity Act of 1984, Pub. L. No. 93-397, 98 Stat. 1426, 1433-36 (1984), creating an express provision for qualified domestic relations orders and clarifying the preemption in other family law areas. 29 U.S.C. § 1056 (1988).

244. K. LLEWELLYN, *supra* note 207, at 526 (Canon no. 20).

245. *Id.* at 525 (Canon no. 16).

Therefore, any state or federal court that relies solely on state law for jurisdiction when reviewing a claim that "relate[s] to any employee benefit plan," will lack subject matter jurisdiction because ERISA supersedes that state law. The only way a state court could obtain subject matter jurisdiction would be if the plaintiff amended the petition to include the appropriate ERISA action, which would invoke ERISA's jurisdictional provision. The effect of holding that ERISA preemption can be waived is either: (1) to recognize ERISA for purposes of asserting jurisdiction, then deny its existence for purposes of conducting the lawsuit;[246] or (2) to interpret the jurisdictional provision as an exception to the preemption provision although the language of the preemption provision explicitly excludes exceptions.[247] Neither method is condoned by the Supreme Court.

B. Extrinsic Aids

Under the plain-meaning method, a court must find an ambiguity in the words of the statute before it can examine extrinsic aids to interpretation.[248] Under the teleological method, the explicit words are not a barrier to the examination of extrinsic aids.[249]

Commentators have suggested several ambiguities in ERISA. For example, the key word in the preemption provision, "supersede," is ambiguous because a court could interpret it narrowly or broadly.[250] The narrow interpretation would limit the effect to only those statutes that actually conflict with ERISA.[251] Conversely, the

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246. This idea runs counter to the procedure for cases tried on the wrong theory. *See, e.g., supra* notes 119, 122, 135, 137 & 145.

247. *See supra* note 243.

248. *See supra* note 213 and accompanying text. The Supreme Court has adopted this rule with respect to legislative history, the primary extrinsic aid discussed in this Article. *See, e.g.*, Kuehner v. Irving Trust Co., 299 U.S. 445 (1937) (legislative history cannot compel a construction at variance with the plain words of the statute); Fairport, P. & E.R.R. v. Meredith, 292 U.S. 589 (1934) (if the statute is unambiguous, consideration of legislative history is not permissible); Wilbur v. United States, 284 U.S. 231 (1931) (same).

249. *See supra* note 215 and accompanying text.

250. *See* Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 IOWA L. REV. 57, 67 (1976) (suggesting "supersede" is narrower than "preempt"); Manno, *supra* note 10, at 60 (describing the two meanings the same as for court-implied preemption; *see supra* notes 39 & 40).

251. *See* Brummond, *supra* note 250. One court rejected the narrow interpretation, deciding that "supersede" in § 514 of ERISA, 29 U.S.C. § 1144(a) (1988), means "preempt". Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287, 1302 (2d Cir. 1981), *modified sub nom.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

The Supreme Court chose this narrow approach when it first defined "relate to," but it later moved to a broad interpretation. *Compare* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) *with* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983).

broad interpretation would eliminate a whole statute that only tangentially touched on ERISA.[252] Another ambiguity exists because "insofar as" implies that preemption applies only to the application of the state law, but "relate to" implies preemption of the state law itself.[253] In addition, a court could interpret "relate to" broadly to eliminate state laws that regulate areas traditionally left to state governance if such laws impose substantive requirements on an ERISA plan; or it could interpret "relate to" narrowly which could permit states to impose requirements on plans under the guise of regulating other matters.[254]

For purposes of this subsection, this Article will assume that either an ambiguity exists or the teleological method otherwise applies. This assumption leads to the consideration of extrinsic aids, in particular the legislative history, which is the preferred extrinsic aid of the Supreme Court.[255]

Use of extrinsic aids is often not decisive because different extrinsic aids frequently lead to different results.[256] In addition,

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252. Brummond, *supra* note 250, at 67; *see also* Hirsch, *supra* note 40, at 516.

253. *See* Kilberg & Heron, *The Preemption of State Law under ERISA*, 1979 DUKE L.J. 383, 389.

254. *See* Hutchinson & Ifshin, *Federal Preemption of State Law under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23, 53 (1978).

255. *See, e.g.*, Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 9-10 (1976) (courts can and should consider legislative history even where the language of the statute is clear); *see also* United States v. Public Util. Comm'n, 345 U.S. 295, 315 (1953) (when the statute is ambiguous, may use legislative history); United States v. Missouri P.R.R., 278 U.S. 269, 278 (1928) (same).

256. Again, the RRA provides an example. The problem in *London Borough of Ealing v. Race Relation Bd.*, [1972] App. Cas. 342, [1972] I All E.R. 105 (1971), was to determine whether discrimination on the basis of "national origins" in the RRA included changeable national citizenship. *See supra* note 220.

One extrinsic aid is the examination of statutes that are *in pari materia* with the statute in question. Because legislative draftsmen do not change the wording of a statute unless they intend a different meaning, the court may glean a statute's meaning by comparing its language with earlier, related statutes. Hadley v. Perks, L.R. 1 Q.B. 444, 457 (1866). The earlier act, the Race Relations Act of 1965, ch. 73, used the term "national origin," *id.* §§ 1(1), 5(1), 6(1), but not "nationality" as did the RRA. *See* RRA, §§ 8(11), 27(9). Moreover, the earlier statute had a long title indicating that it prohibited "racial discrimination." *Ealing*, [1972] 1 All E.R. at 111. Using the statutory interpretive canon which allows a court to consult statute titles to resolve ambiguities, *see* K. LLEWELLYN, *supra* note 207, at 524 (Counter-Canon no. 11), Viscount Dilhorne concluded that "national origin" meant "racial origin." *Ealing*, [1972] 1 All E.R. at 111. Using statutes *in pari materia*, he further concluded "nationality" did not possess the same meaning as "national origin," and, therefore, the law permitted discrimination on the basis of citizenship. *Ealing*, [1972] 1 All E.R. at 111-12.

There is a counter-principle to *in pari materia*, however, holding that the legislature changed the words without intending to change the meaning in an attempt to improve the

one extrinsic aid, consideration of the result, permits voiding the result obtained through the use of the statutory interpretation canons.[257]

1. Legislative History

In the years before the passage of ERISA, congressional committees heard much testimony about the proposed scope of ERISA preemption.[258] Some witnesses advocated broad preemption to avoid chaotic, dual regulation.[259] Other witnesses urged cooperative federal and state regulation.[260] While both favored some type of ERISA preemption, the House and Senate developed different proposals.[261] Earlier versions of the preemption provision contained

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style and avoid using the same words over and over. Hadley v. Perks, L.R. 1 Q.B. 444, 457 (1866).

Viscount Dilhorne also consulted a treatise: A. OPPENHEIM, 1 INTERNATIONAL LAW 645 (8th ed. 1955). When statutes contain terms of art, the court may refer to treatises that would show the sense of the words when the legislature passed the statute. *In re* Castiori, [1981] 1 Q.B. 149. Contrary to his earlier conclusion, Viscount Dilhorne discovered that "nationality" included both race and citizenship. *Ealing*, [1972] 1 All E.R. at 111-12. If he had consulted a different source, the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/C 3/SR. 1304 (1969), he would have discovered that "national origins" has no international meaning, according to the Convention. *Id.*

257. When a phrase is capable of two or more interpretations, one of which leads to an enormous inconvenience or injustice, the court may give the statute whichever construction causes the least inconvenience. Reid v. Reid, 31 Ch. D. 402, 407 (1886).

In his *Ealing* dissent, Lord Kilbrandon thought that this test had been met. *Ealing*, [1972] 1 All. E.R. 119-20. A sign saying "No Poles admitted" would not put anyone on notice of whether the violator discriminated against Polish nationals or against persons of Polish origin.

258. *See generally* Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1298 (N.D. Cal. 1977), *cert. denied*, 439 U.S. 831 (1978).

259. *E.g.*, Statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO, Hearings on H.R. 5741 (Proposed Welfare and Pension Plan Protection Act) before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 2d Sess., at 186 (1968); Statement by Preston C. Basset on behalf of Towers, Perrin, Forster, & Crosby, Inc., Hearings on H.R. 2 and H.R. 462 (Proposed Revisions of the Welfare and Pension Plans Disclosure Act) before the General Subcomm. on Labor of the House Comm. on Education & Labor, 93d Cong., 1st Sess., pt. 1, at 315 (1973); Statement of Lauren Upson, Member, California Banker's Association Committee on Employee Benefit Trusts, Hearings on H.R. 2 and H.R. 462, *supra*, pt. 2, at 651.

260. *E.g.*, Statement of Robert D. Haase, Commissioner of Insurance, State of Wisconsin, Hearings on H.R. 5741, *supra* note 259, at 338; Statement of John P. Thompson for The Southland Corporation, Hearings on H.R. 2 and H.R. 462, *supra* note 259, pt. 1, at 554-55; Statement of Stanley C. DuRose, Jr., Commissioner of Insurance of the State of Wisconsin, Hearings on H.R. 2 and H.R. 462, *supra* note 259, pt. 2, at 188-95.

261. *See generally Hewlett-Packard*, 425 F. Supp. at 1298.

narrower forms of preemption,[262] which would have limited preemption to the substantive areas actually covered by the Act and to particular types of plans.[263] The Ford administration proposed a similar preemption provision and requested that the provision state clearly that the states could not set minimum standards for the aspects of retirement plans listed in the statute, but could set standards in other areas such as tax aspects.[264]

The conference committee, however, discarded both the Senate and House limited versions and the administration's version of the ERISA preemption provision. In their place, the conference committee substituted an expanded preemption provision reaching all state laws relating to employee benefit plans, not just state laws governing the regulated substantive areas.[265] Statements made in the House and Senate debates that preceded enactment of the conference committee's version of ERISA preemption indicate that both houses believed that the conference committee's change was intended to be the broadest possible preemption following the procedures of LMRA preemption.[266] This broad preemption would create a uniform federal common law regulating employee benefit plans.[267]

Courts that have ruled on the waivability of ERISA preemption have not examined the legislative history, perhaps because it does not speak specifically to waiver or procedural laws. These courts have relied on two preemption presumptions. First, a court should

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262. *See generally* Kilberg & Heron, *supra* note 253, at 390.

263. *See, e.g.*, S.4, 93d Cong., 1st Sess. § 609(a) (as introduced Jan. 4, 1973); H.R. 2, 93d Cong., 1st Sess. § 699 (as passed by the Senate on Mar. 4, 1974); *id.* § 514 (as passed by the House on Feb. 28, 1974) ("shall supersede any and all laws of the States and political subdivision thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities and fiduciary responsibilities, of persons acting on behalf of any employee benefit plans . . . ."); 120 CONG. REC. 4742 (1974); S. 4200, 93d Cong., 1st Sess. § 699 (as passed by the Senate on Sept. 19, 1973) ("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"); 120 CONG. REC. 5005 (1974); H.R. 2, 93d Cong., 1st Sess. § 14 (as introduced Jan. 3, 1973); *see also, Hewlett-Packard*, 425 F. Supp. at 1298 n.13, 14 (wording of H.R. 2 as enacted by the House on Feb. 28, 1974; different wording of H.R. 2 as enacted by the Senate on Mar. 4, 1974); Turza & Halloway, *Preemption of State Laws Under the Employee Retirement Income Security Act of 1974*, 28 CATH. L. REV. 163, 167 n.22 (1979).

264. *See* Administration Recommendations to the House and Senate Conferees of H.R. 2 to Provide for Pension Reform, *reprinted in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 5145.

265. Kilberg & Heron, *supra* note 253, at 390.

266. *See infra* notes 271-320 & 323-43 and accompanying text.

267. *See infra* notes 344-64 and accompanying text.

presume that there is no express preemption if the subject matter is traditionally subject to state regulation.[268] Traditionally, procedure is an area subject to state formulation.[269] Second, a court should presume that there is no express preemption of a state law unless Congress explicitly considered that type of state law.[270] While legislative history does not specifically mention waiver of preemption, the following items of legislative history can overcome these two presumptions.

2. The LMRA Practice

Courts generally use committee reports to confirm statutory construction[271] or to determine the meaning of ambiguous language.[272] The conference committee report on ERISA[273] detailed the procedural rules for the nongovernmental, civil enforcement provision in both breach of fiduciary duty and benefits-due suits. That conference committee report states that all actions related to ERISA plans "in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of" LMRA.[274] This confirms the plain-meaning construction of the statute and indicates that the benefits-due lawsuit, the only one that is triable in state court, is in state court only under federal law. Therefore, a state court could not hold that a party has waived ERISA preemption and

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268. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741 (1985) (dealing with the savings clause of the ERISA preemption provision); Kilberg & Inman, *supra* note 39, 1326; Note, *ERISA Preemption of State Law: the Meaning of "Relate to" in Section 514*, 58 WASH. U.L.Q. 143, 164-65 (1980).

269. Federal courts sitting in diversity actions follow some state procedural rules to avoid forum shopping. *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (statute of limitations); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (conflict of law); West v. American Tel. & Tel. Co., 311 U.S. 223, 238 (1940) (accrual of the cause of action); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 210 (1939) (burden of proof). *But see* Hanna v. Plumer, 380 U.S. 460, 469-74 (1965) (federal court will not follow state rules nullifying the Federal Rules of Civil Procedure); Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 538 (1958) (federal court will not look to state law for jury rules), *overruled on other grounds*, *Hanna*, 380 U.S. 460.

270. *See* Hirsch, *supra* note 40, at 538-49.

271. Commissioner v. Bilder, 369 U.S. 499, 502 (1962); McLean v. United States, 226 U.S. 374, 380 (1912); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 610 (1869), *overruled on other grounds*, Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553 (1870).

272. Wright v. Vinton Mountain Trust Bank, 300 U.S. 440, 459 (1937); United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929); Railroad Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563, 589 (1922); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921).

273. H.R. CONF. REP. No. 1280, *supra* note 30.

274. *Id.* at 5107; *see supra* note 18 and accompanying text for LMRA litigation practice.

then proceed to hear the lawsuit under state law. Furthermore, the committee report reveals that Congress did consider the preemption of state procedural rules concerning ERISA plans.

Senator Harrison Williams, Jr., then Chairman of the Senate Committee on Labor and Public Welfare,[275] a cosponsor of the original draft legislation containing a subject-matter preemption provision,[276] and the floor manager of the bill,[277] confirmed the scope of ERISA preemption by suggesting that the courts treat such actions in the same fashion as LMRA cases.[278] Courts often treat the explanations of committee reports made by a committee member or the committee chairman as supplemental committee reports.[279] The Supreme Court used this legislative history in applying the preemption removal rules of LMRA practice to ERISA cases.[280] Under LMRA, the courts also create a uniform federal common law, in which state law is a source of potentially compatible rules, not an independent source of litigable private rights.[281] LMRA may differ from ERISA as to what law is preempted because LMRA lacks an express preemption provision and, therefore, has no savings clause.[282] To determine what procedural rules apply to ERISA preemption, courts should examine LMRA preemption procedure.

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275. Note, *Recent Decisions*, 27 DUQ. L. REV. 783, 795 (1989).

276. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985); Manno, *supra* note 10, at 61.

277. Irish & Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 113 (1985).

278. *See* 120 CONG. REC. S29,933 (daily ed. Aug. 22, 1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5188-89. "It is intended that such [ERISA] actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act . . . ." *Id.*

279. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475-77 (1921); *see also* Wright v. Vinton Mountain Trust Bank, 300 U.S. 440, 459 (1937) (explanations given in Congress make meaning plain); Helvering v. Twin Bell Oil Syndicate, 293 U.S. 312, 322 (1934) (chairman of committee so stated); United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929) (statements by those in charge); Railroad Comm'n. v. Chicago, B. & Q.R.R., 257 U.S. 563, 589 (1922) (explanatory statements of members in charge); United States v. St. P., M. & M. Ry., 247 U.S. 310, 318 (1918) (remarks in nature of supplementary report); United States v. Coca Cola Co., 241 U.S. 265, 281 (1916) (chairman explaining the provision).

280. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-67 (1987) (benefits-due lawsuit); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 n.2 (1968) (Courts will consider LMRA preemption alleged in the answer part of the complaint for purposes of the well-pleaded complaint doctrine for determining removal for a federal cause of action).

281. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

282. *See* Sherrich, *ERISA Preemption: An Introduction*, 64 MICH. B.J. 1074, 1078-79 (1985).

The Supreme Court's characterization of Section 301 of LMRA as an example of a preemption that involves a choice of law[283] could mean that courts considering LMRA preemption should find it waivable for this reason. Most courts, however, have followed the Supreme Court's directive to eschew the choice-of-law/choice-of-forum distinction under LMRA,[284] and they agree on the nonwaivability of LMRA preemption. Six courts have decided nongovernmental, civil actions involving LMRA preemption raised initially after trial or on appeal. Five courts held that the litigant had not waived LMRA preemption, and the sixth determined that the litigant had waived preemption.

a. Nonwaivable

The Sixth and Seventh Circuits and state courts in Illinois and Alabama have decided that when a litigant initially raises LMRA preemption on appeal, the litigant has not waived preemption. Both state and federal courts can assert jurisdiction over both benefits-due and non-benefits-due lawsuits under LMRA.[285] Unlike the ERISA cases, the LMRA nonwaivability cases do not consider whether the court would have had jurisdiction under LMRA if the plaintiff had pled it. These courts may believe that the Supreme Court's opinion in *Allis-Chalmers Corp. v. Lueck*[286] mandates this result. Under *Lueck*, when a state claim depends substantially on analyzing a collective bargaining agreement, the court must treat the claim as a Section 301 claim or dismiss it.[287] Unless it recasts the state lawsuit as an LMRA lawsuit, the court lacks jurisdiction over the state claim due to LMRA preemption.

Another reason the courts give for finding nonwaivability of LMRA preemption is the federal policy seeking uniformity in the interpretation of collective bargaining agreements. The Supreme Court cited this reason for recognition of LMRA preemption[288] when, as with NLRA, the statute lacked an express preemption provision. Although ERISA has an express provision, it embodies the same policy of uniformity in the law.[289]

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283. *See* International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 391 (1986).

284. *Id.* at 391 n.9.

285. *See supra* notes 18-24 and accompanying text.

286. 471 U.S. 202, 220 (1985).

287. *Id.*

288. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 404 (1988) ("[Section] 301 mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes.")

289. *See infra* notes 344-64 and accompanying text.

In *National Metalcrafters v. McNeil*,[290] the Seventh Circuit noted that preemption is usually an affirmative defense which litigants waive unless they plead.[291] There are exceptions to this rule, however, other than subject matter jurisdiction, such as federal policy grounds.[292] The strong public policy underlying Section 301 requires applying uniform federal principles to the interpretation of collective bargaining contracts.[293] *McNeil*, however, involved a multipoint opinion in which the court also found NLRA preemption.[294] The court refused to address ERISA preemption to avoid further weakening the LMRA holding.[295]

In *Apponi v. Sunshine Biscuits, Inc.*,[296] the Sixth Circuit followed *McNeil* and observed that a compelling federal policy favored a uniform application of federal law to enforce labor contracts.[297] The court noted that the rule in *Lueck* mandated its refusal to recognize a waiver of the preemption.[298]

In *Sagen v. Jewel Cos., Inc.*,[299] an Illinois appellate court also followed *McNeil*.[300] The court determined that LMRA preemption

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290. 784 F.2d 817 (7th Cir. 1986) (Posner, J.).

291. *Id.* at 825-26.

In *McNeil*, an employer sought a declaratory judgment that a state statute concerning payments to a vacation plan under a collective bargaining agreement was preempted by LMRA, NLRA, and ERISA. *Id.* at 820. Judge Posner addressed only LMRA and NLRA. The defendant had not raised LMRA preemption in the trial court other than under the rubric of federal labor law, mentioning specifically only NLRA. *Id.* at 825. The appellate court reversed and directed the trial court to enter the declaration desired by the employer. *Id.* at 829.

292. *Id.* at 825-36; *see, e.g.*, Singleton v. Wulff, 428 U.S. 119, 121 (1976) ("We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result' . . . ."); Capitol Indem. Corp. v. Keller, 717 F.2d 324, 328-29 (7th Cir. 1983) (Posner, J.) (for serious and sensitive issues of federalism or plain error).

293. *McNeil*, 784 F.2d at 825-26.

294. *Id.* at 826-29. See *supra* note 107 for weakened authority of multipoint opinions.

295. *McNeil*, 784 F.2d at 822-23.

296. 809 F.2d 1210 (6th Cir.), *cert. denied*, 484 U.S. 820 (1987).

In *Apponi*, employees sued for benefits due under a pension plan subject to a collective bargaining agreement for pre-ERISA service. *Id.* at 1213. The employer failed to raise LMRA preemption until the second appeal. *Id.* at 1215. The court remanded for jury trial on those elements of LMRA law not previously considered. *Id.* at 1217, 1220.

297. *Id.* at 1215.

298. *Id.*

299. 148 Ill. App. 3d. 447, 499 N.E.2d 662 (1986).

In *Sagen*, an employee sued for tortious interference with her union-negotiated employment contract. *Id.* at 449, 499 N.E.2d at 663. The employer first raised preemption by supplemental brief before the appellate court. *Id.*

300. *Id.* at 450, 499 N.E.2d at 664.

was jurisdictional and, therefore, was not waivable.[301] Subsequently, in *Netzel v. United Parcel Service, Inc.*,[302] another intermediate Illinois appellate court determined, on the basis of *Lueck*, that LMRA preemption was jurisdictional, and, therefore, the court could raise the matter *sua sponte*.[303] After a reconsideration mandated by the Illinois Supreme Court, the appellate court found no preemption.[304]

The Alabama Supreme Court, in *Reynolds Metals Co. v. Mays*,[305] also determined that the litigant had not waived preemption.[306] Upon reconsideration mandated by the United States Supreme Court, the Alabama Supreme Court found no preemption.[307]

The foregoing court opinions do not encompass the entire LMRA litigation concerning waivability. Cases prior to both ERISA's enactment and the recent confusion concerning the waivability of ERISA preemption, although not directly addressing the issue, indicate that a litigant cannot waive LMRA preemption. *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*,[308] the case in which the United States Supreme Court first considered LMRA preemption, involved a union that was sued for strike damages, and the union raised federal law preemption only in its motion for a new trial in state court, specifically naming only NLRA.[309] The union did not raise LMRA jurisdictional preemption under Section 301 until it filed a writ of certiorari after it had lost in the state supreme court.[310] The Washington Supreme Court had

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301. *Id.*

302. 165 Ill. App. 3d 685, 520 N.E.2d 665 (1988), *modified*, 181 Ill. App. 3d 808, 537 N.E.2d 1348 (1989) (ordered by the Illinois Supreme Court on the basis of Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (retaliatory discharge doesn't relate to collective bargaining agreement)).

The *Netzel* court faced a retaliatory discharge action in which the employer first raised LMRA preemption on appeal. *Netzel*, 165 Ill. App. 3d at 686, 520 N.E.2d at 666.

303. *Id.* at 695, 520 N.E.2d at 671-72.

304. *Netzel*, 181 Ill. App. 3d at 811, 537 N.E.2d at 1349.

305. 516 So. 2d 517 (Ala. 1987), *vacated*, 486 U.S. 1050 (1988) (for reconsideration under Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (retaliatory discharge does not relate to collective bargaining agreement)), *on remand*, 547 So. 2d 518 (Ala. 1989) (no preemption).

The *Mays* court faced a retaliatory discharge and associated defamation action in which the employer raised LMRA preemption initially on appeal. *Mays*, 516 So. 2d at 518.

306. *Id.* at 519.

307. *Id.* at 522-23.

308. 369 U.S. 95 (1962).

309. Petitioner's Brief at 8, *Lucas Flour Co.*, 369 U.S. 95 (1962) [hereinafter Petitioner's Brief] (memorandum of authorities and motion for dismissal mentioned only NLRA preemption under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

310. Petitioner's Brief at 8 (first mention of Section 301 of LMRA was in respondent's brief to the Washington Supreme Court).

used LMRA as support for its jurisdiction to affirm the lower court's judgment, but it had applied state law substantively.[311] The United States Supreme Court held that the Washington court had jurisdiction under LMRA, but it must apply federal law. After applying federal law, the Court affirmed the judgment.[312] The Supreme Court has subsequently referred to *Lucas Flour Co.* as defining the scope of LMRA preemption when the defendant has raised the application of the uniform federal laws for the first time on appeal.[313]

The Ninth Circuit considered an LMRA benefits-due lawsuit removed to federal court on diversity.[314] The plan trustees raised LMRA Section 301 on appeal to demand application of the arbitrary and capricious standard in an attempt to overturn the state review standard used by the district court.[315] The Ninth Circuit reversed and remanded with instructions to apply the uniform federal law.[316]

The result is that whenever a party raises the applicability of LMRA, the court must apply the uniform federal law, reversing and remanding the case if necessary, or dismissing the case for lack of jurisdiction.[317] Because the Supreme Court has indicated that Congress modeled ERISA preemption after LMRA preemption,[318] lower courts should determine that ERISA preemption is likewise not waivable. The Supreme Court suggested that the reference to LMRA in ERISA's legislative history is meaningless if an ERISA action could be supplemented by a state action.[319] The directive to follow the LMRA litigation indicates that the bifurcations created by some appellate courts applying different waivability rules to different types of lawsuit or forum under ERISA, are in error because LMRA holdings make no such distinction.

b. Waivable

The Ninth Circuit, in *Johnson v. Armored Transport of California, Inc.*,[320] enunciated a lone opinion holding that a defendant

311. Lucas Flour Co. v. Local 174, Int'l Bhd. of Teamsters, 356 P.2d 1, 5 (Wash. 1960), *aff'd*, 369 U.S. 95 (1962).

312. *Lucas Flour Co.*, 369 U.S. at 103-04.

313. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 404 n.3 (1988).

314. Rehmar v. Smith, 555 F.2d 1362, 1366 (9th Cir. 1976).

315. *Id.* at 1368-70; *see also* HECI Exploration Co. v. Holloway, 862 F.2d 513, 520 n.11 (5th Cir. 1988) (claiming the *Rehmar* court *sua sponte* raised Section 301 of LMRA).

316. *Rehmar*, 555 F.2d at 1372.

317. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220-21 (1985).

318. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

319. *Id.* at 56.

320. 813 F.2d 1041 (9th Cir. 1987); *see also supra* note 176.

has waived LMRA preemption when not raised at trial. The court based its opinion, however, on a prior ERISA case.[321] As a result, the opinion on its own does not accurately reflect LMRA practice.

3. Broad Preemption

The legislative history surrounding the passage of the ERISA preemption provision provides evidence of the broad scope of that preemption. The record consists of prior versions of the provision, the conference report, statements made by various committee members, and the postpassage congressional report on the desirability of the provision.

During passage of ERISA preemption, the state laws preempted evolved from those narrowly affecting regulated subject matter to those more broadly affecting employee benefit plans.[322] Courts consider statutory construction arguments based on changes made during the passage or rejection of statutes unreliable.[323] Although courts may use these changes to help interpret doubtful or ambiguous provisions,[324] the arguments are generally unreliable because the court usually is unable to determine why the legislature rejected the prior language.[325] In this case, however, a prominent member of the conference committee, Senator Jacob Javits, the other cosponsor of the original draft legislation containing a subject-matter preemption provision[326] and the senior ranking Republican on the Senate Committee on Labor and Public Welfare,[327] explained that the Committee rejected the language to avoid "endless litigation over the validity of State action that might impinge on Federal regulation."[328] Allowing waiver of ERISA preemption would permit some state regulation to displace the uniform federal law of employee benefit plans.

The conference committee's report also indicates that Congress intended courts to give broad preemptive effect to the preemption

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321. *Id.* at 1043-44.

322. *See supra* notes 258-65 and accompanying text.

323. *See, e.g.*, Andrews v. Hovey, 124 U.S. 694, 716 (1888).

324. *See* Russello v. United States, 464 U.S. 16, 23-24 (1983) (deletion by Congress of limiting language contained in an earlier version implies the limitation was not intended to apply); United States v. St. P., M. & M. Ry., 247 U.S. 310, 318 (1918).

325. *See, e.g.*, Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935) (not conclusive of meaning); Pennsylvania R.R. v. International Coal Mining Co., 230 U.S. 184, 198-99 (1913) (a Senate Conference Committee member contended an omission by amendment did not exclude, contrary to the Conference Committee report).

326. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (Brennan, J., concurring); Manno, *supra* note 10, at 61.

327. Note, *supra* note 275, at 795.

328. 120 CONG. REC. S29,942 (daily ed. Aug. 22, 1974).

provision.[329] Examining this language in light of the preceding bills, the Supreme Court, in *Shaw v. Delta Airlines, Inc.*,[330] stated that "the Conference Committee . . . indicated that the section's pre-emptive scope was as broad as its language."[331] Under the plain-meaning rule, this language preempts all state laws relating to employee benefit plans, and makes no distinction between substantive and procedural laws.

Two conference committee members made statements concerning the breadth of the preemption. Senator Williams stated that courts were to construe the preemption provision "in its broadest sense to all actions of State or local governments" to eliminate inconsistent state regulation.[332] This statement, by the leader of the committee considering the bill on behalf of the whole Senate, establishes congressional intent that the provision be given the widest possible preemptive effect to override state law.

The House heard similar statements, and another prominent legislator interpreted ERISA's preemption provision to have the broadest possible effect. Representative John Dent, the Chairman of the Subcommittee on Labor of the House Labor and Education Committee[333] and House sponsor of the original legislation,[334] explained that the preemption provision's effect was "the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans" and that courts were to apply "this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans."[335]

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329. H.R. CONF. REP. No. 1280, *supra* note 30, at 5162.

> Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce . . . .
>
> The preemption provisions of title I are not to exempt any person from any State law that regulates insurance, banking or securities.

Id.

330. 463 U.S. 85 (1983).

331. *Id.* at 98; *see* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990) (ERISA preemption provision interpreted in the broad sense); FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990) (ERISA "preemption clause is conspicuous for its breadth").

332. 120 CONG. REC. S29,933 (daily ed. Aug. 22, 1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 5188-89. "It should be stressed that with the *narrow exceptions specified* in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation, thus *eliminating* the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Id.* (emphasis added).

333. Note, *supra* note 275, at 795.

334. Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After Pilot Life Insurance Co. v. Dedeaux*, 21 LOY. L.A.L. REV. 1343, 1355 (1988).

335. 120 CONG. REC. H29,197 (daily ed. Aug. 22, 1974). "Thus, the provisions of

Additional congressional explanation appeared in a 1977 report of the House Committee on Education and Labor after it received the Joint Pension Task Force study.[336] This report indicated that ERISA preemption was "expressly extended to occupy the field to the exclusion of state authority" and was to be "sufficiently broad to leave no room for effective state regulation."[337] Although a report is not contemporaneous legislative history, it is virtually conclusive as to legislative intent and is persuasive authority for demonstrating congressional intent.[338] This report supports the broadest possible interpretation of ERISA preemption.

Considering this legislative history, courts should conclude, as did the *Barry* court,[339] that Congress intended them to construe the ERISA preemption provision as broadly as possible to end state law in this arena and replace it with federal law. Any narrower application of preemption would not eliminate the encroachment of inconsistent state laws.

After the creation of this legislative history, the Supreme Court has recognized at least one nonwaivable preemption in implicit NLRA preemption.[340] Explicit ERISA preemption should at least equal the breadth of implicit NLRA preemption, which does not recognize waivability. Therefore, a state court could only assert subject matter jurisdiction over a pension fund case through ERISA, because the alternative state law no longer exists due to the broad preemption.

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section 514 would *reach any* rule, regulation, *practice* or decision of any State, subdivision thereof or any agency or instrumentality thereof . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b)." *Id.* (emphasis added).

336. ERISA Sections 3021 and 3022 created the Joint Pension, Profit-Sharing, and Employee Stock Ownership Plan Task Force to study within two years of ERISA's effective date, among other items, the effects and desirability of ERISA preemption. 29 U.S.C. §§ 1221-22 (1988).

337. H.R. REP. No. 1785 (Activity Report of the House Comm. on Education & Labor), 94th Cong., 2d Sess., at 46-47 (1977) [hereinafter H.R. REP. No. 1785].

> Based on our examination of the effects of section 514, it is our judgment that the legislative scheme of ERISA is *sufficiently broad to leave no room for effective state regulation* within the field preempted. Similarly it is our finding that the Federal interest and *the need for national uniformity are so great* that the enforcement of a state regulation should be precluded . . . . Accordingly, any activity by a state or political subdivision thereof, which relates to employee benefit plans . . . is preempted by section 514(a).

Id. (emphasis added).

338. *See* Sioux Tribe v. United States, 316 U.S. 317, 329-30 (1942).

339. Barry v. Dymo Graphic Sys., Inc., 394 Mass. 830, 478 N.E.2d 707 (1985); *see supra* notes 126-35 and accompanying text.

340. *See* International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986).

ERISA preemption is jurisdictional and nonwaivable. To conclude otherwise could result in inconsistent state law which would be contrary to the intended result expressed in the explanations for the legislative change, the Supreme Court's interpretation of the conference committee's report, Senator Williams's and Representative Dent's statements, and the review committee's stated understanding. Senator Javits suggested that if experience reveals the ERISA preemption provision to be overly broad on policy grounds, Congress, not the judiciary, should modify the provision by creating exceptions in pursuit of a better policy.[341] The limited success of congressional attempts to narrow ERISA preemption[342] and the Supreme Court's adherence to literalism[343] mandate that courts apply ERISA preemption broadly and literally, thereby excluding waivability of ERISA preemption. If future policy determinations demand an exception to ERISA preemption, Congress, not the courts, should fashion it.

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341. 120 CONG. REC. S29,942 (daily ed. Aug. 24, 1974).

> The conferees—recognizing the dimensions of such a [preemption] policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

Id.; *see also* Irish & Cohen, *supra* note 277, at 113.

342. *See* Irish & Cohen, *supra* note 277, at 114-15.

In 1979, Senators Williams and Javits drafted a bill, S. 209, 96th Cong., 1st Sess., 125 CONG. REC. 933 (1979), to create additional exceptions for ground-breaking state legislations, 125 CONG. REC. 947 (1979) (Hawaii Prepaid Health Care Act, struck down in Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981)); to uphold one court created implied exception, 125 CONG. REC. 947 (1979) (divorce decrees under Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981)); to overrule another court created implied exception, 125 CONG. REC. 947 (1979) (laws requiring mental health benefits in group insurance policies under Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978)); and to affirm two denials of court implied exceptions, 125 CONG. REC. 947 (1979) (insurance inquiry into benefit status of participants under Azzaro v. Harnett, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977), *cert. denied*, 434 U.S. 824 (1977), and state taxes measured in terms of benefit paid under National Carriers' Conference Comm. v. Heffernan, 454 F. Supp. 914 (D. Conn. 1978)).

Congress only partially adopted two of these modifications: (1) to permit partial enforcement of the Hawaii Prepaid Health Care Act, Pub. L. No. 97-473, § 301(b), 96 Stat. 2605, 2612 (1983); and (2) to permit qualifying domestic relations orders thereby excluding other domestic relations orders. Pub. L. No. 98-97, § 104, 98 Stat. 1426, 1433-36 (1984).

343. *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985); *see also* Note, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519, 532 (1988) (it is clear the Supreme Court will apply ERISA preemption with expansive force).

4. Uniformity

Another strand of legislative history relates to the desire of Congress to establish uniform federal rules for employee benefit plans. This appears both in the committee reports and in statements of committee members.

The purpose of a uniform federal law regulating private employee benefit plans was to encourage the growth of such plans. A House committee report on one of the predecessor bills to ERISA noted that "the objective is to increase the number of individuals participating in employer-financed plans . . . [and to] continue[] the approach in present law of encouraging the establishment of retirement plans which contain socially desirable provisions . . . ."[344] The Senate report urging the passage of ERISA noted that ERISA "will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers."[345] Senator Williams noted that ERISA was "designed to improve and encourage the expansion of private pension plans."[346] The ranking majority member of the House Ways and Means Committee, Representative Al Ullman, made similar remarks on the introduction of the conference committee report that led to ERISA's passage. He stated that ERISA's requirements were "carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans."[347]

The key to this uniformity and encouragement is the ERISA preemption provision insuring that state law will not upset the delicate balance between employees and employers. The Supreme Court has recognized this delicate "balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."[348]

The report of the Senate Committee on Labor and Public Welfare indicated that Congress intended ERISA preemption to

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344. H.R. REP. NO. 779, 93d Cong., 2d Sess. 8 (1974).

345. S. REP. NO. 127, 93d Cong., lst Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4849 [hereinafter S. REP. NO. 127].

346. 120 CONG. REC. S29,928 (daily ed. Aug. 22, 1974).

347. 120 CONG. REC. H29,198 (daily ed. Aug. 20) *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5166-67. "This legislation provides urgently needed reform in the pension area. But, at the same time, it continues the basic governmental policy of encouraging the growth and development of voluntary private pension plans." *Id.*

348. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

create uniformity in employee benefit law in order to give interstate plan fiduciaries certainty about the legality of their actions without reference to varying state laws.[349] One of these fiduciary standards is ERISA's arbitrary and capricious review standard for discretionary fiduciary decisions.[350]

The report of the Senate Committee on Education and Labor stated that ERISA alone was "a uniform source of law" for fiduciary standards.[351] The reason was "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law."[352] This is evidence that Congress considered state procedural rules when creating the preemption provision. As a result, ERISA preemption is jurisdictional and not waivable.

Senator Javits revealed the bipartisan nature of the ERISA preemption provision in similar statements concerning the efficacy of the provision. He indicated that "the interests of uniformity . . . required" that the ERISA preemption provision provide for

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349. S. REP. No. 127, *supra* note 345, at 4865, 4871.

> Furthermore, a fiduciary standard embodied in Federal legislation is considered desirable because it will *bring a measure of uniformity* in an area where decisions under the same set of facts may differ from state to state . . . .
>
> Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The *uniformity of decision* which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws . . . .
>
> . . . [S]tate law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a *uniform source of law* in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.

Id. (emphasis added).

350. *See supra* notes 55-57 and accompanying text.

351. S. REP. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CONG. CODE & ADMIN. NEWS 4639, 4655.

> The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and *to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law* for recovery of benefits due to participants . . . .
>
> Except where plans are not subject to this Act and in certain other enumerated circumstances, *state law is preempted.* Because of the interstate character of employee benefit plans, the committee believes it essential to provide for a *uniform source of law* in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports . . . .

Id. (emphasis added).

352. *Id.*

"the displacement of State action in the field of private employee benefit programs."[353] This pronouncement indicates that the ERISA preemption provision supersedes state law. Therefore, state law cannot constitute the basis of state court jurisdiction, confirming the construction of the ERISA preemption provision under the plain-meaning rule.

The report of the House Committee on Education and Labor resulting from the Joint Pension Task Force study indicated that Congress intends the ERISA preemption to bring about the uniformity of decision necessary for plan fiduciaries to determine their actions without reference to state laws.[354]

The Supreme Court has also declared that the legislative history of the comprehensive remedies provided by ERISA's jurisdictional provision indicates a congressional intent to displace state law to prevent state actions from supplementing the federal remedies.[355] When the state law falls within the preemption savings clause but affects the federal remedies, ERISA preempts that state law.[356]

This legislative history indicates a clear intent to make the rules governing employee benefit plans nationally uniform. In another context, without examining the legislative history, the Supreme Court ruled on waiver of preemption under a statute through which Congress had intended to create uniform rules. When the Supreme Court first recognized preemption of state law by NLRA for unfair labor practices, it did so for reasons of uniformity.[357]

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353. 120 CONG. REC. S29,942 (daily ed. Aug. 22, 1974); *see also id.* at S29,933 (statement of Sen. Williams that ERISA preemption is to eliminate "the threat of conflicting or inconsistent state and local regulation of employee benefit plans"); *id.* at H29,197 (statement of Rep. Dent that ERISA preemption is to reserve "to Federal authority the sole power to regulate the field of employee benefit plans").

354. *See* S. REP. No. 127, *supra* note 345, at 4865-71.

355. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

356. *Id.*; *see also* Roberson v. Equitable Assurance Soc'y, 661 F. Supp. 416, 424 (C.D. Cal. 1987), *aff'd mem.*, 869 F.2d 1498 (9th Cir. 1989); Note, *supra* note 334, at 1382.

357. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). The *Garmon* court noted:

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law . . . ."
>
> . . . To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.

Although NLRA has no express preemption provision, the Court recognized preemption because of a perceived conflict between state and federal regulation of the same subject.[358] The Court recognized that a conflict could frustrate the national purpose of fostering unionization, NLRA's function, by permitting bodies of state law to arise.[359] For this reason, the Court found that NLRA preemption was jurisdictional and nonwaivable.[360]

Courts should find that ERISA preemption is also jurisdictional and nonwaivable. Because ERISA preemption is express and not implicit, the uniformity sought concerns only encroachment by, and not accommodation with, state law. The function of ERISA is to foster private pension plans.[361] To advance that purpose, Congress has created a system of uniform regulation under federal law by eradicating state law. The only real difference between NLRA and ERISA is that ERISA contains express provisions and express legislative history. Therefore, under ERISA, the court does not need to infer an intent from the procedures outlined in the statute.

There is one more policy reason for adhering to an exclusive federal remedy and denying supplemental state actions through waiver. Most benefits-due claims are small in comparison to state punitive damages. This results in a reluctance by employee-beneficiary attorneys to negotiate settlements when state punitive damages are involved.[362] Elimination of the possibility of state punitive damages removes the greatest obstacle to settlement, reduces the stakes, and fosters settlement negotiations.[363] This comports with Senator Javits's statement that Congress intended ERISA preemption to eliminate endless litigation over the validity of state action

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> Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

Id. at 242-44 (quoting Garner v. Teamsters, 346 U.S. 455, 490-91 (1953)).

358. *See, e.g.*, R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 767 (1976) (conflict between substantive provisions of laws and potential conflict between enforcement bodies).

359. *Id.* at 4-5 (describing Section 7 of NLRA as protecting the right to unionize, and Section 8 of NLRA as prohibiting prohibit employer deterrence practices).

360. International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 398-99 (1986).

361. *See supra* notes 345-48; *see also* Manno, *supra* note 10, at 51 (suggesting that plan administrators, faced with inconsistent federal and state judicial pronouncements, will terminate employee benefit plans).

362. *See* Chittenden, *ERISA Preemption: The Demise of Bad Faith Actions in Group Insurance Cases*, 12 S. ILL. U.L.J. 517, 531 (1988).

363. *See id.*

that might impinge on federal regulation.[364] Admitting waivability only fosters that prohibited litigation.

V. CONCLUSION

Based on both the ERISA preemption provision's literal words and its legislative history, any court following the Supreme Court's directive in determining the procedural effect of ERISA preemption must conclude that a litigant can raise ERISA preemption for the first time after trial or on appeal.[365] Congressional intent, expressed

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364. *See supra* note 328.

365. Recently, the United States Supreme Court considered a case in which ERISA preemption was first raised on appeal, but the case did not involve waiver. In *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), *rev'g*, 779 S.W.2d 69 (Tex. 1989), an employee sued his employer for wrongful discharge under Texas law. *Id.* at 481. The termination occurred four months before contributions to a pension plan would have been required. *McClendon*, 779 S.W.2d at 73 (dissenting opinion). Texas follows the employment-at-will doctrine, and the employer obtained summary judgment. *McClendon*, 111 S. Ct. at 481. The judgment, affirmed by a Texas appellate court, was reversed by the Texas Supreme Court on public policy grounds. *Id.* The Texas Supreme Court created a new exception to the employment-at-will doctrine when an employee is terminated to avoid a pension plan contribution under ERISA and remanded to determine the employer's intent for the termination. *McClendon*, 779 S.W.2d at 71, 73.

Because this was the first mention of ERISA in the case, the employer explicitly raised the issue of ERISA preemption for the first time in its motion for rehearing. Respondent's Motion for Rehearing at 3, 16, McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69 (Tex. 1989) (No. C-7973). The United States Supreme Court considered the ERISA preemption issue without addressing possible waiver. *McClendon*, 111 S. Ct. at 482.

McClendon did not involve waiver of ERISA preemption. Waiver can only occur if a matter is not timely raised initially. *See generally* Hatchell & Calvert, *Some Problems of Supreme Court Review*, 6 ST. MARY'S L.J. 303, 306 (1974) (an error is preserved in trial court through objection in trial court, *if* the error occurs there). Usually, the matter would be raised at trial, but frequently the matter is raised or the error occurs at an appellate level. In the latter situation, it is proper to raise the objection for the first time at the appellate level. *See* Maryland v. United States, 381 U.S. 41, 53 n.38 (1965) (point of collateral estoppel was preserved by raising it initially in the motion for rehearing in the circuit court, when estoppel was based on a circuit court opinion arising between the argument and the opinion); Moore v. Dilworth, 142 Tex. 538, 543-44, 179 S.W.2d 940, 942 (1944) (error of appellate court not preserved by omitting it from motion for rehearing when error was failure to remand rather than render decision). Because ERISA's application to *McClendon* first arose in the Texas Supreme Court, the first opportunity to raise the matter of ERISA preemption was in the motion for rehearing. Therefore, the matter could not have been waived.

In *McClendon*, the Texas Supreme Court interjected ERISA due to a quirk in Texas summary judgment law. Texas summary judgment law provides that defendant movants have the burden to show conclusively that plaintiff nonmovants cannot prove their case by showing one missing element. *See* Combs v. Fantastic Homes, Inc., 584 S.W.2d 340, 343 (Tex. Ct. App. 1979) (the losing nonmovant may raise on appeal the insufficiency of the movant's evidence to show that there is no fact issue), *approved*, 596 S.W.2d 502 (Tex.

in both ERISA's language and legislative history, mandates this result. ERISA actions are to follow the LMRA practice of non-waivability of preemption. ERISA preemption should be as broad as possible and should be at least as extensive as NLRA preemption, which does not recognize waivability of preemption. The function of ERISA is to encourage the development of the private employee benefit system through the development of a uniform federal law governing employee benefit plans. To permit waiver of ERISA preemption, as some courts have done, thwarts this congressional intent.

1979). Therefore, in *McClendon*, the mere mention, in response to the motion in the trial court, that the termination occurred four months before the employer would have been required to make a contribution to the pension plan raised the fact question of whether the termination was to avoid the contribution.

Unlike Texas summary judgment law, federal summary judgment law places the burden of proof on the other party. Once the defendant files and supports its motion with some evidence, then the plaintiff has the burden to prove its case. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("Rule 56(c) mandates summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 779 (1988). Because most states follow the federal procedural rule, *see* C. WRIGHT, *supra* note 83, § 62, at 406, the Texas result is not likely to be available in other procedural systems.