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NOTES

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INTRODUCTION

The Employee Retirement Income Security Act of 1974 ("ERISA")[1] is a " 'comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.' "[2] ERISA imposes participation, funding, and benefits-eligibility requirements on pension plans.[3] In addition, the statute establishes " 'various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans.' "[4]

ERISA may be regarded as a remedial statute.[5] Congress intended through the enactment of ERISA to curb widespread abuse and mismanagement by employee benefit plan administrators that placed participants' benefits at risk.[6] In the place of patchwork federal labor laws[7] and

1. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988 & Supp. II 1990)) [hereinafter ERISA].

2. Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990) (quoting Shaw v. Delta Air Lines, 463 U.S. 85, 90 (1983)).

3. *See id.* (citing *Shaw*, 463 U.S. at 91).

4. *Id.* (quoting *Shaw*, 463 U.S. at 91). ERISA recognizes two broad categories of plans: "pension benefit plans" and "welfare benefit plans." Pension benefit plans provide retirement income. *See* ERISA § 3(2), 29 U.S.C. § 1002(2) (1988). Welfare benefit plans provide health, legal, vacation, or training benefits. *See* ERISA § 3(1), 29 U.S.C. § 1002(1) (1988).

5. *See generally* ERISA § 2(a), 29 U.S.C. § 1001(a) (1988) (declaration of policy addressing the need to remedy the lack of employee information and adequate safeguards in the operation of employee benefit plans).

6. The closing of the Studebaker automobile plant in South Bend, Indiana in December 1963, and the resulting loss of pension benefits by employees who had been with the company for as many as forty years is often cited as the impetus for the ERISA legislation. *See* John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 53-58 (1990); *see also* ERISA § 2(a), 29 U.S.C. 1001(a) (1988) ("Owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits.").

7. *See generally* William J. Kilberg & Paul D. Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1313 n.3 (1984) (discussing federal labor laws that imposed operational and reporting requirements on employee benefit plans). Included among these laws are the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-188 (1988 & Supp. II 1990)) (operational and structural requirements for union pension and welfare funds), the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1988)) (fiduciary obligations on union officers and others with access to plan funds), and the Welfare and Pension Plan Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), *repealed by* 29 U.S.C. § 1031(a)(1) (1988) (placing certain reporting and disclosure requirements on pension plans). In addition, since 1926 federal tax laws have extended favorable tax treatment to pension plan contributions. *See generally* Kilberg &

state regulation,[8] ERISA sought to federalize the regulation of employee benefit plans[9] and thereby attain national uniformity in the regulation of such plans.[10]

In an effort to achieve this goal, Congress included an express preemption provision in the statute.[11] ERISA section 514(a) provides that the provisions of titles I and IV of ERISA[12] "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[13] The rest of section 514[14] provides several exceptions to the general rule of preemption[15] and further clarifies ERISA's preemptive scope.[16]

The inherent vagueness of the term "relate to" has produced much litigation regarding what is required for a "state law"[17] to "relate to" an

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Inman, *supra*, at 1313 (providing background and references as to the genesis of federal tax regulation of employee benefit plans).

8. *See generally* James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 25-30 (1978) (providing a comprehensive description of state regulation of employee benefit plans before ERISA); Kilberg & Inman, *supra* note 7, at 1314 n.4 (chronicling the emergence of state regulation of employee benefit plans).

9. Before the enactment of ERISA, "the qualified plan requirements of the [Internal Revenue Code] had set federal standards for certain aspects of pension and profit sharing plans. Otherwise, state law governed the basics of creating, construing, and administering pension and benefit plans." Langbein & Wolk, *supra* note 6, at 363.

10. *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 409 (1990) (commenting on the uniform administrative scheme established by ERISA); Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 484 (1990) (discussing "the goal of uniformity that Congress sought to implement" by the ERISA legislation).

11. *See* ERISA § 514, 29 U.S.C. § 1144 (1988 & Supp. II 1990). Preemption means that the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2, "invalidates state legislation because the state legislation is incompatible with federal regulation." Robin E. Dieckmann, Note, *Federal Jurisdiction Over Declaratory Judgment Suits — Federal Preemption of State Law*, 1986 U. Ill. L. Rev. 127, 127 n.2 (1986). The use of an express preemption provision, such as that contained in ERISA § 514, 29 U.S.C. § 1144 (1988 & Supp. II 1990), is to be contrasted with the implied preemption that results under the Supremacy Clause. [*See supra* discussion this note.]

12. *See* 29 U.S.C. § 1144(a) (1988). ERISA is organized into four titles: Title I—Protection of Employee Benefit Rights, Title II—Amendments to the Internal Revenue Code Relating to Retirement Plans, Title III—Jurisdiction, Administration, Enforcement, Joint Pension Task Force, Etc., and Title IV—Plan Termination Insurance. *See* ERISA: The Law and the Code xi-xvii (Dana J. Domone ed., 1991). ERISA § 514, which is contained in title I, subtitle B ("Regulatory Provisions"), part 5 ("Administration and Enforcement"), applies only to titles I and IV. *See* ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

13. ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

14. 29 U.S.C. § 1144 (1988 & Supp. II 1990).

15. *See* Langbein & Wolk, *supra* note 6, at 364.

16. Of note, ERISA § 514(b)(5)(B)(i), 29 U.S.C. 1144(b)(5)(B)(i) (1988), provides that no "[s]tate tax law relating to employee benefit plans" shall be construed to be exempt from the preemption provisions of § 514(a). *See infra* notes 73-84 and accompanying text.

17. ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1) (1988), defines the term "[s]tate law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law."

employee benefit plan.[18] Although many of the questions concerning ERISA's preemptive scope have been answered in recent Supreme Court decisions,[19] the extent to which ERISA preempts state *tax* laws remains in dispute.[20] Furthermore, the manner in which the Supreme Court's general ERISA preemption doctrine should be applied to state tax laws remains unclear.[21]

This Note considers the reasoning employed by courts in determining whether ERISA preempts a state tax law.[22] Part I reviews the text and legislative history of the statutory provisions at issue in the ERISA preemption analysis. Part II surveys the general ERISA preemption doctrine that provides the backdrop for the state tax-law controversy and then explores this debate by analyzing the text and legislative history of the ERISA provisions that address state tax laws. In addition, this part discusses the alternative lines of analysis that courts use to determine whether ERISA preempts a state tax law. Part III unifies these approaches and proposes a single ERISA state tax-law preemption standard composed of a two-tiered analysis. The first tier of analysis considers whether the tax law is subject to preemption on its face or in its purpose; the second tier considers the extent to which the tax will result in an inconsistency in the state-by-state administration of the plan. Finally, this Note concludes that the ERISA state tax-law preemption standards articulated by the courts, though seemingly discordant, are in fact founded upon the same concern—the desire to preserve uniformity in plan administration. Moreover, this Note concludes that the results produced by the cases may be explained through a two-tiered analysis that

18. *See infra* notes 85-119 and accompanying text.

19. *See* FMC Corp. v. Holliday, 111 S. Ct. 403 (1990); Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990).

20. The lower courts have used four distinct methods of analysis which have produced seemingly inconsistent results. *See infra* notes 85-119 and accompanying text.

21. The threshold question to this inquiry considers whether the Supreme Court's analysis in non-tax cases should be applied to state tax contexts at all. On this matter, the courts are undivided in their willingness to follow the pronouncements of the Supreme Court. *See infra* notes 85-119 and accompanying text. The real dispute is the matter of application. The critical question is how the courts should apply the Supreme Court's standards to the unique analytical problems posed by the many types of state tax laws.

22. The focus of this analysis will be upon state tax impositions, which are to be distinguished from the state tax collection procedures of tax levy and tax withholding. Courts have analogized state tax levies to the judicial process of garnishment and have consequently accorded the same preemption analysis to both. *See, e.g.*, Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 834 (1988) (finding no distinction in the ERISA preemption analysis accorded a garnishment procedure and a tax levy); Franchise Tax Bd. v. United States Postal Serv., 467 U.S. 512, 523 (1984) (quoting Bull v. United States, 295 U.S. 247, 259-60 (1935) (tax assessment "is given the force of a judgment")); Retirement Fund Trust of the Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1275 (9th Cir. 1990) (commenting that "[t]he Supreme Court has . . . held . . . that the judicial process of garnishment is functionally indistinguishable from the nonjudicial process of tax collection" (citations omitted)). Withholding procedures, like tax levies, are also a method of tax collection. The chief difference between tax withholding and tax levies is that withholdings, unlike levies, may be voluntary and elected by the taxpayer if so prescribed by the applicable state statute. *See id.* at 1284.

considers a state tax law's purpose, language, and effect upon the employee benefit plan and the related ERISA entities.

I. ERISA PREEMPTION: TEXT AND LEGISLATIVE HISTORY

A. *ERISA's Preemption Provision*

ERISA's preemption provision is contained in section 514[23] of the statute.[24] Section 514(a)[25] sets forth a general rule of preemption,[26] stating that, subject to the exceptions set forth in section 514(b),[27] "the provisions of [title I] and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)."[28] Section 514(b)[29] exempts from preemption state laws that "regulate[] insurance, banking or securities,"[30] "generally applicable criminal law[s] of a

23. 29 U.S.C. § 1144 (1988 & Supp. II 1990).

24. *See supra* note 12 and accompanying text for an explanation of ERISA's organizational structure.

25. 29 U.S.C. § 1144(a) (1988).

26. Even if ERISA had not contained an express preemption provision, ERISA would have nevertheless "preempted inconsistent state law by implication, through the operation of the Supremacy Clause. [U.S. Const. art. VI, § 2.] Thus, for example, under the Wagner Act, which contains no preemption clause, case law determines the scope of preemption of state labor law." Langbein & Wolk, *supra* note 6, at 363 (citation omitted); *see also* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 484-85 (1990) (even if ERISA contained no express preemption provision, the state "cause of action [at issue] would be pre-empted because it conflicts directly with an ERISA cause of action").

27. 29 U.S.C. § 1144(b) (1988 & Supp. II 1990).

28. ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). ERISA § 4(a)-(b) define the scope of ERISA's coverage. Section 4(a) and (b) read as follows:

> (a) Except as provided in subsection (b) and in sections 201, 301, and 401, this title shall apply to any employee benefit plan if it is established or maintained-
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
> (3) by both.
> (b) The provisions of this title shall not apply to any employee benefit plan if-
> (1) such plan is a governmental plan (as defined in section 3(32));
> (2) such plan is a church plan (as defined in section 3(33)) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1954;
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;
> (4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or
> (5) such plan is an excess benefit plan as defined in section 3(36) and is unfunded.

ERISA § 4, 29 U.S.C. § 1003 (1988 & Supp. II 1990).

29. 29 U.S.C. § 1144(b) (1988 & Supp. II 1990).

30. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144 (b)(2)(A) (1988). This subparagraph is commonly known as the "insurance savings clause" because it preserves the states' power to regulate the business of insurance from preemption. *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 407, 409 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987); Metro-

State,"[31] "qualified domestic relations orders,"[32] and certain other laws that comply with statutory requirements.[33] Section 514(c)[34] provides definitions for purposes of this section.[35] Section

politan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1985). "The insurance savings clause is meant to reconcile ERISA with the policy of the McCarran-Ferguson Act [ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. § 1011-1015 (1988 & Supp. II 1990))] which remits insurance regulation to the states." Langbein & Wolk, *supra* note 6, at 389.

The insurance savings clause is subject to its own exception, the so-called "deemer clause" of ERISA Section 514(b)(2)(B) which provides that no "employee benefit plan . . . shall be deemed to be an insurance company . . . for purposes of any law of any State purporting to regulate insurance. . . ." ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1988); *see generally* FMC Corp. v. Holliday, 111 S. Ct. 403, 405, 407, 409 (1990) (finding the deemer clause applicable and thus exempting from the savings clause [and thereby rendering preempted] a Pennsylvanian anti-subrogation law); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1985) (regarding the use of the term "deemer clause").

In determining whether a state law falls under the savings clause, the Supreme Court looks to two considerations. First, the Court examines the "guidance . . . available from a 'common-sense view' of the language of the savings clause itself." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987) (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985)). Second, the Court draws upon case law to interpret the meaning of the phrase "business of insurance" under the McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1988 & Supp. II 1990)). *See Pilot Life*, 481 U.S. at 48. The case law uses three criteria to decide if a practice is the 'business of insurance' for purposes of the McCarran-Ferguson Act: "[f]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* at 48-49 (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)).

At least one commentator has "call[ed] the result of [ERISA § 514] 'semi-preemption' because the statute has been read to mean that the states can regulate employer-provided health insurance if the employer buys it from an insurance company but not if the employer self-insures." Daniel M. Fox & Daniel C. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 Am. J. Tax Pol'y 47, 48 (1988).

31. ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4) (1988).

32. ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7) (1988).

33. *See* ERISA § 514(b)(5), 29 U.S.C. § 1144(b)(5) (1988 & Supp. II 1990); ERISA § 514(b)(6), 29 U.S.C. § 1144(b)(6) (1988); ERISA § 514(b)(8), 29 U.S.C. § 1144(b)(8) (1988). Of particular interest is ERISA § 514(b)(5)(A), 29 U.S.C. § 1144(b)(5)(A) (1988), which exempts from preemption the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 to -51 (1985 & Supp. 1991)). In qualifying the scope of this exemption, ERISA § 514(b)(5)(B)(i) provides that "[n]othing in subparagraph [514(b)(5)](A) shall be construed to exempt from [the general preemption rule of] subsection [514(a)] any State tax law relating to employee benefit plans. . . ." ERISA § 514(b)(5)(B)(i), 29 U.S.C. § 1144(b)(5)(B)(i) (1988). *See infra* text accompanying notes 73-84.

34. 29 U.S.C. § 1144(c) (1988).

35. ERISA § 514(c), 29 U.S.C. § 1144(c) (1988), provides as follows:

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indi-

514(d)[36] addresses the effect of title I's provisions upon other federal laws.[37]

The statute lends itself to a four-step inquiry in determining whether a state law is preempted. First, a court must decide if a "state law"[38] has been promulgated.[39] Next, the court must determine whether the state law "relate[s] to" an ERISA-covered plan within the meaning of section 514(a).[40] Once a court finds that a state law relates to the plan, the next question is "whether the law is saved [from preemption] by one of ERISA's express exemption provisions"[41] set forth in section 514(b).[42] Finally, if the state law falls within the insurance exemption (that is, as a state law that "regulates insurance"),[43] the court must ascertain whether the "deemer clause" of section 514(b)(2)(B)[44] nonetheless renders such law preempted because the law is being applied to a self-funded plan.[45]

B. *Legislative History of ERISA Section 514*

Congress intended ERISA's preemption provision to serve two main purposes,[46] each of which is rooted in the desire to provide uniformity in plan administration.[47] First, Congress wanted to prevent states from un-

rectly, the terms and conditions of employee benefit plans covered by this subchapter.

36. 29 U.S.C. § 1144(d) (1988).

37. ERISA § 514(d), 29 U.S.C. § 1144(d) (1988), provides that "[n]othing in . . . [title I] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." For an example of a case that considers the scope of this section, see Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990).

38. Defined at ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1) (1988). *See supra* note 35. The Supreme Court has held that the term "state law" encompasses common-law causes of action for which the existence of an ERISA-covered plan forms an integral part of the basis for liability. *See* Ingersoll-Rand v. McClendon, 111 S. Ct. 478, 482-83 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987).

39. The term "state" is defined within § 514 at ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2) (1988). *See supra* note 35 and accompanying text.

40. 29 U.S.C. § 1144(a) (1988).

41. Kilberg & Inman, *supra* note 7, at 1317-18.

42. 29 U.S.C. § 1144(b) (1988 & Supp. II 1990).

43. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988); *see supra* note 30 and accompanying text.

44. 29 U.S.C. § 1144(b)(2)(B) (1988). *See supra* note 30 and accompanying text.

45. *See* ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1988); *see supra* note 30 and accompanying text.

46. For a discussion of the influence of interest group politics upon the scope of ERISA's preemption clause, see generally Fox & Schaffer, *supra* note 30, at 48-52 (discussing the role of lobbyists in the legislative process and the "regulatory vacuum" that resulted with respect to welfare benefit plans, whose content, unlike pension plans, ERISA does not regulate).

47. *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 408-09 (1990); Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 484 (1990); *see also* 120 Cong. Rec. 29,942 (1974), *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974, at 4771 (1976) [hereinafter Legislative History] (statement of Sen. Javits) ("The interests of uniformity . . . require[] . . . the displacement of State action in the field of private employee benefit programs.").

dermining the goals of ERISA[48] through the enactment of legislation affecting employee benefit plans.[49] Second, Congress wanted to simplify the administration of employee benefit plans for multistate employers by establishing a single set of regulations.[50]

Section 514[51] represents the most expansive preemption provision that Congress considered while drafting ERISA. Earlier versions limited the scope of preemption to subject matters specifically regulated by the Act.[52] The broader language of the current preemption provision[53] originated in the conference committee.[54] This broad language, and the

48. *See supra* text accompanying notes 5-10.

49. *See* Laurie F. Hasencamp, Note, *ERISA and Preemption of State Fair Employment Laws*, 59 S. Cal. L. Rev. 583, 585 (1986); *see also* 120 Cong. Rec. 29,933 (1974), *reprinted in* 3 Legislative History, *supra* note 47, at 4746 (statement of Sen. Williams) ("State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized. . . .").

50. *See* Hasencamp, *supra* note 49, at 585; *supra* note 10 and accompanying text.

51. 29 U.S.C. § 1144 (1988 & Supp. II 1990).

52. *See* Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. Mich. J.L. Ref. 109, 112 (1985). The House version limited preemption to enumerated areas expressly covered by the bill. *See* H.R. 2, 93d Cong., 2d Sess. § 514(a) (1974), *reprinted in* 3 Legislative History, *supra* note 47, at 4057-58, debates in House at 120 Cong. Rec. 4782 (1974), *reprinted in* 3 Legislative History, *supra* note 47, at 3898. The Senate version preempted state laws that "relate[d] to . . . subject matters regulated by [ERISA] . . . or the Welfare and Pension Plans Disclosure Act." H.R. 2, 93d Cong., 2d Sess. § 699(a) (1974), *reprinted in* 3 Legislative History, *supra* note 47, at 3820, debates in Senate at 120 Cong. Rec. 5011 (1974), *reprinted in* 3 Legislative History, *supra* note 47, at 3598.

53. *See* ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

54. *See* National Carriers' Conf. Comm. v. Heffernan, 454 F. Supp. 914, 916 (D. Conn. 1978). The conference committee report provides that "the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 383 (1974), *reprinted in* 3 Legislative History, *supra* note 47, at 4650, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5162.

An explanation of this change "from a limited preemption provision to a more comprehensive one," *National Carriers'*, 454 F. Supp. at 916, was provided by Senator Javits, ranking minority member of the Senate Committee on Labor and Public Welfare:

> Both House and Senate bills provided for preemption of State law, but . . . defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

120 Cong. Rec. 29,942 (1974), *reprinted in* 3 Legislative History, *supra* note 47, at 4770-71.

> Similar remarks, indicating that the preemption provision was to be given its widest possible effect, were made by Senator Williams, Chairman of the Senate Labor Committee, 120 Cong. Rec. 2993 (1974) [*reprinted in* 3 Legislative History, *supra* note 47, at 4745-46] and by Representative Dent, Chairman of the House Labor Committee and senior House conferee. 120 Cong. Rec. 29,197 (1974) [*reprinted in* 3 Legislative History, *supra* note 47, at 4670-71.]

National Carriers', 454 F. Supp. at 916.

legislative history that preceded it, provide the backdrop for the state tax-law controversy.[55]

II. THE STATE TAX-LAW CONTROVERSY

A. *The Federal Common Law of ERISA Preemption*

Through an examination of the Supreme Court's jurisprudence, one may identify four different ways in which a "state law" may "relate to" an employee benefit plan within the meaning of ERISA section 514(a) and therefore be subject to preemption:[56] (1) a conflict may exist between the substantive provisions of the state law and the substantive provisions of ERISA;[57] (2) the state law may contain an explicit reference to an employee benefit plan;[58] (3) the state law, although not in conflict with the substantive provisions of ERISA, and despite not making any specific reference to an ERISA-covered plan, may, in fact, be intended by the state legislature to affect an ERISA plan;[59] and (4) the state law may

55. *See infra* text accompanying notes 85-119.

56. *See* 29 U.S.C. § 1144(a) (1988). The development of a federal common law of ERISA preemption has been shaped by the sequence in which the cases have been adjudicated by the Supreme Court. Consequently, attempts to view the current state of the statutory interpretation of ERISA § 514, 29 U.S.C. § 1144 (1988 & Supp. II 1990), as doctrine should be tempered by the understanding that such pronouncements were not articulated all at once, but rather have evolved over the course of nearly two decades of litigation. *See generally* Langbein & Wolk, *supra* note 6, at 363-411 (providing a chronological narrative of the courts' grappling with ERISA's preemption provisions).

57. *See* Alessi v. Raybestos-Manhattan, Inc. 451 U.S. 504, 524-25 (1981). *Alessi* was the Supreme Court's first encounter with ERISA preemption and is regarded as "the prototype of 'substantive' or 'content conflict' preemption." Langbein & Wolk, *supra* note 6, at 373. In *Alessi*, the Court invalidated a New Jersey statute that had prohibited a method of computing a plan participant's pension benefits (offset of a retiree's pension benefits by the amount of workers' compensation awards received subsequent to retirement) that was specifically authorized by ERISA. *See Alessi*, 451 U.S. at 524.

58. *See, e.g.*, FMC Corp. v. Holliday, 111 S. Ct. 403, 408 (1990) ("Pennsylvania[] antisubrogation law [contained] a reference to benefit plans governed by ERISA."); Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 483 (1990) ("Texas cause of action [is preempted because it] makes specific reference to, and indeed is premised on, the existence of a pension plan."); Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 829 (1988) ("The Georgia statute at issue here expressly refers to—indeed, solely applies to—ERISA employee benefit plans.") In each of these cases, the Court based its determination that an explicit reference to an ERISA plan falls within the scope of the "relates to" language of § 514(a) upon its earlier pronouncement in Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or *reference to* such a plan." (emphasis added)). *See FMC Corp.*, 111 S. Ct. at 407-08; *Ingersoll-Rand*, 111 S. Ct. at 483; *Mackey*, 486 U.S. at 829.

59. *See FMC Corp.*, 111 S. Ct. at 409. The Court's statement in *FMC Corp.* that "[s]tate laws directed toward [employee benefit] plans are pre-empted because they relate to an employee benefit plan," *id.* at 409, is conceptually broader than the aggregate scope of the first two types of state laws, i.e., (1) state laws that conflict with the substantive provisions of ERISA, and (2) state laws that contain an explicit reference to an employee benefit plan. This third category captures the difference between the breadth of the Supreme Court's statement, above, and the aggregate scope of categories (1) and (2). An example of this third type of state law would be a statute enacted for the specific purpose

produce an indirect effect upon an employee benefit plan that is substantial enough to warrant preemption.[60]

While the courts' inquiries concerning the first three types of state laws have produced substantially uniform results, the fourth type of state law has generated seemingly inconsistent conclusions among the courts.[61]

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of affecting the cost structure of employee benefit plans. *Cf.* Rebaldo v. Cuomo, 749 F.2d 133, 134, 139-40 (2d Cir. 1984) (New York statute that precluded self-insured employee benefit plans from negotiating discount rates with hospitals *not* preempted by ERISA because no evidence was introduced in *Rebaldo* that the state legislature intended to impair employee benefit plans), *cert. denied*, 472 U.S. 1008 (1985).

60. Preemption may occur even though the state law does not conflict with the substantive provisions of ERISA, and neither makes any reference to an ERISA plan, nor attempts to affect an ERISA plan. *See FMC Corp.*, 111 S. Ct. at 408. In *FMC Corp.*, using the "connection with or reference to" language of Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983), *see supra* note 58 and accompanying text, the Court preempted a Pennsylvanian anti-subrogation law, finding that the law both made a "reference to" and had a "connection with" an ERISA-covered plan. *See FMC Corp.*, 111 S. Ct. at 408. In determining that the state law had a connection with an employee benefit plan, the Court, citing *Shaw*, noted that "[i]n the past, [it had] not hesitated to apply ERISA's pre-emption clause to state laws that risk subjecting plan administrators to conflicting state regulations." *Id.* The Court further noted that "[t]o require plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits." *Id.* (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987)). Turning to the state law in question, the Court concluded that the "[a]pplication of differing state subrogation laws to plans would . . . frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *Id.* at 409. This result would run counter to the policy of plan uniformity underlying ERISA that recognizes that "the most efficient way to meet these administrative responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Id.* (quoting *Fort Halifax*, 482 U.S. at 9).

This passage illustrates that it would not be inconsistent with the Supreme Court's pronouncements in *FMC Corp.* for a state law to "relate to" an employee benefit plan solely on the basis of the administrative burden that it imposes upon an ERISA plan.

61. *Compare* Retirement Fund Trust of the Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1286 (9th Cir. 1990) (application of state tax levy and state tax withholding procedure to welfare benefit plan is not preempted by ERISA) *and* Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 147 (2d Cir.) ("[T]he impact of Connecticut's escheat law on ERISA benefit plans is too tenuous, remote, and peripheral to require preemption under Section 514(a) [because] [t]he Connecticut law does not focus specifically on ERISA plans or benefits; it applies to lost or abandoned property generally."), *cert. denied*, 493 U.S. 811 (1989) *and* Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., 793 F.2d 1456, 1465 (5th Cir. 1986) (state law fiduciary duty claim affecting relationship between director and shareholder not preempted by ERISA), *cert. denied*, 479 U.S. 1034 (1987) *and* Lane v. Goren, 743 F.2d 1337, 1340 (9th Cir. 1984) (application of California's anti-discrimination laws to the employment practices of an ERISA plan's trustees is not preempted by ERISA on the basis that the California law affected the plaintiff "only . . . in its capacity as an employer, and in a way that all other employers are affected") *and* Rebaldo v. Cuomo, 749 F.2d 133, 139 (2d Cir. 1984) (state regulation of hospital rates which increased the plan's "cost of doing business" not preempted by ERISA because "the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated"), *cert. denied*, 472 U.S. 1008 (1985) *with* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 679 F.2d 1307, 1309 (9th Cir. 1982) (ERISA preempts California's attempt to levy on vacation trust for unpaid taxes owed by union members), *vacated on jurisdictional grounds*, 463 U.S. 1 (1983) *and* Northwest Airlines v. Roemer, 603 F. Supp. 7, 11-12 (D. Minn. 1984) (ERISA preempts

Moreover, additional analytical problems have been presented when the state law imposes a tax.[62]

B. *The State Tax-Law Controversy*

1. Congressional Consideration of State Tax Laws

The central question in the state tax-law controversy is whether, and to what extent, the Supreme Court's ERISA preemption doctrine applies to state tax laws. Because the Supreme Court has not yet decided a state tax preemption case on the merits,[63] it is critical to consider Congress's intent in drafting section 514.[64]

An examination of the language and legislative history of section 514[65] reveals that "Congress intended that the same preemption analysis should apply to state tax laws as to other state laws."[66] This conclusion applies to both the preemption provision appearing in the original text of ERISA and the 1982 amendment to section 514.[67]

ERISA did not refer to state tax laws in its original enactment.[68] The legislative history shows that when Congress first enacted ERISA in 1974 it was "alerted to the taxation issue [and] chose not to exempt the taxing power from ERISA's broad preemption of state law."[69] The conference committee, in its deliberations over the House and Senate versions of the bill that would become ERISA, "received a recommendation from the administration regarding the scope of the preemption provision."[70] The Secretaries of Labor and Treasury jointly proposed the following language:

> Notwithstanding the provisions of this section, a State shall have the authority to prescribe the rules and regulations governing the tax qualification and taxation of contributions, distributions or income, of an employee pension plan (including a trust forming a part of such plan) as defined in the Welfare Pension Plan Disclosure Act.[71]

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application of state tax levy to pension plan) *and* Morgan Guar. Trust Co. v. Tax Appeals Tribunal, No. 61, 1992 N.Y. LEXIS 1595, at *9 (N.Y. June 9, 1992) (ERISA preempts the New York State real property transfer gains tax as it applies to transactions completed by an ERISA-covered plan).

62. *See infra* notes 85-119 and accompanying text.

63. In Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 1, 7 (1983), the Supreme Court vacated on jurisdictional grounds a decision of the Ninth Circuit that had held that ERISA preempted a state's power to levy on funds held in trust by an ERISA-covered vacation benefit plan.

64. 29 U.S.C. § 1144 (1988 & Supp. II 1990).

65. *Id.*

66. Retirement Fund Trust of the Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1276 (9th Cir. 1990).

67. 29 U.S.C. § 1144 (1988 & Supp. II 1990).

68. *See generally* 3 Legislative History, *supra* note 47, at 4836-5043 (providing text of statute as originally enacted).

69. National Carriers' Conf. Comm. v. Heffernan, 454 F. Supp. 914, 917 (D. Conn. 1978).

70. *Id.*

71. Administration Recommendations to the House and Senate Conferees on H.R. 2

The conference committee rejected this proposal.[72]

In 1982, Congress passed an amendment to ERISA that was embodied as section 514(b)(5).[73] Despite the amendment's specific reference to state tax laws,[74] an analysis of both the statutory language and legislative history of this amendment reveals that Congress did not intend to afford special treatment to state tax laws. First, the language[75] of section 514(b)(5)(B)(i)[76] indicates that state tax laws should not receive any special treatment.[77] This provision clarifies the scope of the amendment to prevent the states from construing it to create a state tax-law exception to the general preemption analysis.[78] Second, the legislative history of section 514(b)(5)[79] suggests that Congress intended to maintain a uniform preemption analysis for both state tax laws and other laws.[80] Congress adopted the 1982 amendment to create a narrow exception from ERISA preemption for Hawaii's prepaid health care law.[81] Because the Hawaiian law required private plans to provide specific health care benefits, it

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to Provide for Pension Reform (April, 1974), *reprinted in* 3 Legislative History, *supra* note 47, at 5050, 5147.

72. *See* Retirement Fund Trust of the Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1277 (9th Cir. 1990); *National Carriers'*, 454 F. Supp. at 917.

73. 29 U.S.C. § 1144(b)(5) (1988 & Supp. II 1990). *See generally Retirement Fund Trust*, 909 F.2d at 1277 n.39 (indicating that amendment passed in 1982, but was not signed into law until 1983). ERISA § 514(b)(5), 29 U.S.C. § 1144(b)(5) (1988 & Supp. II 1990) reads as follows:

> (5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 to 393-51).
>
> (B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section-
>
> (i) any State tax law relating to employee benefit plans, or
>
> (ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.
>
> (C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

74. ERISA § 514(b)(5)(B)(i), 29 U.S.C. § 1144(b)(5)(B)(i) (1988) provides that "[n]othing in subparagraph [514(b)(5)(A)] shall be construed to exempt from subsection [514](a) . . . any State tax law relating to employee benefit plans."

75. *See supra* notes 73-74.

76. 29 U.S.C. § 1144(b)(5)(B)(i) (1988).

77. *See* Retirement Fund Trust of the Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1276 (9th Cir. 1990).

78. *See id.*

79. 29 U.S.C. § 1144(b)(5) (1988 & Supp. II 1990).

80. *See Retirement Fund Trust*, 909 F.2d at 1276.

81. *See id.* at 1277.

was unable to withstand ERISA preemption analysis.[82] Both the statements in the *Congressional Record*[83] and the committee reports on the 1982 bill support this conclusion of uniform treatment.[84]

2. Approaches Used by the Courts

Despite Congress's instructions that state tax laws should be afforded the same ERISA preemption analysis as any other law,[85] the courts have treated state tax laws uniquely. The problem does not arise from judicial disobedience; rather, the problem stems from difficulties in application. In applying the "relate[s] to" language of ERISA section 514(a)[86] to state tax laws, the courts have formulated four different approaches that have yielded seemingly inconsistent results.

a. *Regulatory Approach*

In the initial cases that considered ERISA's preemption of state tax laws, the laws were struck down because of their impermissible "regulatory effect" upon employee benefit plans.[87] At the forefront of the courts' concern was the fear that if ERISA did not preempt the state tax law, the law would influence an employer's decision to establish an ERISA-covered plan.[88] *National Carriers' Conference Committee v. Heffernan*[89] best illustrates this concern. There, the court found that ERISA preempted an annual tax imposed on amounts paid as benefits to, or on behalf of, the residents of Connecticut by employee welfare plans.[90] The court noted that ERISA's legislative history revealed that Congress

82. *See id.* The Hawaiian law was struck down in Standard Oil Co. v. Agsalud, 633 F.2d 760, 762 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981).

83. Senator Dole explained the tax language appearing in the bill when he reported it on behalf of the Senate Finance Committee, stating that it "amends ERISA to provide that the Hawaii law relating to employer maintained health insurance plans would not be preempted by ERISA to the extent that the Hawaiian law does not . . . impose tax liability on insurance premiums or benefits." 128 Cong. Rec. 26,902 (1982) (statement of Sen. Dole).

84. The Committee reports on the 1982 bill also state that the amendment was designed for the limited purpose of carving out a singular exception to ERISA preemption, thereby leaving the general preemption analysis undisturbed. The Senate report provides that "the provision does not affect the status, under the preemption provisions of ERISA, of any State tax law relating to employee benefit plans." S. Rep. No. 97-646, 97th Cong., 2d Sess. 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4580, 4595-96. Furthermore, the conference committee report declares that "preemption is continued with respect to . . . any State tax law relating to employee benefit plans." H.R. Conf. Rep. No. 97-984, 97th Cong., 2d Sess. 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4598, 4603.

85. *See supra* notes 73-84 and accompanying text.

86. 29 U.S.C. § 1144(a) (1988).

87. *See* General Split Corp. v. Mitchell, 523 F. Supp. 427, 431 (E.D. Wis. 1981); National Carriers' Conf. Comm. v. Heffernan, 454 F. Supp. 914, 917-18 (D. Conn. 1978).

88. *See, e.g.*, *National Carriers'*, 454 F. Supp. at 918 ("[T]ax structure may operate as an incentive to use traditional insurance, rather than ERISA-covered plans.").

89. 454 F. Supp. 914 (D. Conn. 1978).

90. *See id.* at 915.

had considered and rejected a savings clause directed at state tax laws.[91] The court further considered the effects of state regulation and the economic incentives produced by a discrepancy in the tax rates assessed against insurance companies and employee benefit plans.[92] The court concluded that if section 514(a)[93] did not preempt the law at issue, a state could use tax laws to regulate employee benefit plans in contravention of Congressional objectives.[94]

b. *Reference Approach*

A second approach used in the state tax preemption analysis considers whether the language of the state statute contains a specific reference to an employee benefit plan.[95] This approach is rooted in courts' desire to adhere to the Supreme Court's pronouncements regarding the broad scope of the preemption clause.[96] Courts have attached considerable weight to the Supreme Court's statement in *Shaw v. Delta Air Lines*[97] "that the phrase 'relate[s] to' is to be given 'its broad common-sense meaning, such that a state law relate[s] to a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan.' "[98] *General Motors Corp. v. California State Board of Equalization*[99] illustrates this concern. In that case, the Supreme Court's pronouncement of the "reference" standard in *Shaw* served as the justification for the court's conclusion that a tax "computed on the basis of benefits paid" by an employee benefit plan "relate[s] to" an employee benefit plan.[100]

c. *Incidental-Impact Approach*

A third approach to the state tax-law preemption question considers the nature of the tax-law's effect upon an employee benefit plan.[101]

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91. *See id.* at 917.
92. *See id.* at 917-18.
93. 29 U.S.C. § 1144(a) (1988).
94. *See National Carriers'*, 454 F. Supp. at 918; *accord* General Split Corp. v. Mitchell, 523 F. Supp. 427, 431 (E.D. Wis. 1981) (addressing the "use of taxation as a means of regulation," the court struck down a state-wide health risk-sharing program in which employee welfare benefit plans "themselves [were] taxed and [were] required to contribute to the risk[-]sharing plan").
95. *See* General Motors Corp. v. California State Bd. of Equalization, 815 F.2d 1305, 1309 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988).
96. *See, e.g.*, *General Motors*, 815 F.2d at 1309 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Air Lines, 463 U.S. 85 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)).
97. 463 U.S. 85 (1983).
98. *General Motors*, 815 F.2d at 1309 (quoting *Metropolitan Life*, 471 U.S. at 739 (quoting *Shaw*, 463 U.S. at 97)).
99. 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988).
100. *General Motors Corp.*, 815 F.2d at 1309. In *General Motors*, the court ultimately found the state tax law to be saved from preemption under ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988), as a law that regulates insurance. *See id.* at 1310-11.
101. *See, e.g.*, Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 555 (6th Cir.

Under this approach, preemption will be denied if the challenged statute has only an "incidental-impact" upon an employee benefit plan.[102] The incidental-impact approach, like the reference approach,[103] is also derived from the Supreme Court's decision in *Shaw*.[104] In a footnote, the *Shaw* Court indicated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[105] This footnote has served as the basis for the denial of preemption in a number of different contexts,[106] of which state tax laws is but one.

The incidental-impact approach was used, for example, to sustain a municipal income tax of general application[107] against a preemption challenge in *Firestone Tire & Rubber Co. v. Neusser*.[108] In *Firestone*, the Sixth Circuit held that the state law at issue simply had too "remote and

1987) (holding that state tax law had too "remote and peripheral" an effect upon the employee benefit plan to come within the meaning of the ERISA § 514(a), 29 U.S.C. § 1144(a) (1988)).

102. *See Firestone*, 810 F.2d at 556 (citing Rebaldo v. Cuomo, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985)).

103. *See supra* notes 95-100 and accompanying text.

104. *See* Shaw v. Delta Air Lines, 463 U.S. 85 (1983). In *Shaw*, the Supreme Court spared a New York fair employment law from preemption under ERISA § 514(d), 29 U.S.C. § 1144(d) (1988), to the extent that the state law provided a means of enforcing Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1988 & Supp. II 1990)). *See Shaw*, 463 U.S. at 100-02. To the extent that the state law prohibited employment practices that were lawful under Title VII, however, the state law was preempted by ERISA. *See id.* at 103-06.

105. *Shaw*, 463 U.S. at 100 n.21.

106. *See, e.g.*, Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146-47 (2d Cir.) (holding that "the impact of Connecticut's escheat law on ERISA benefit plans is too tenuous, remote, and peripheral to require preemption under section 514(a) [because] [t]he Connecticut law does not focus specifically on ERISA plans or benefits; it applies to lost or abandoned property generally"), *cert. denied*, 493 U.S. 811 (1989); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., 793 F.2d 1456, 1465-70 (5th Cir. 1986) (state law fiduciary duty claim affecting relationship between director and shareholder not preempted by ERISA), *cert. denied*, 479 U.S. 1034 (1987); Lane v. Goren, 743 F.2d 1337, 1340 (9th Cir. 1984) (holding that the application of California's anti-discrimination laws to the employment practices of an ERISA plan's trustees is not preempted by ERISA on the basis that the California law affected the plaintiff "only . . . in its capacity as an employer, and in a way that all other employers are affected"); Rebaldo v. Cuomo, 749 F.2d 133, 139 (2d Cir. 1984) (state regulation of hospital rates which increased the plan's cost of doing business not preempted by ERISA because "the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated"), *cert. denied*, 472 U.S. 1008 (1985).

107. The Akron, Ohio city ordinance at issue in *Firestone* imposed a two percent tax on all income earned by residents of the city. Income earned by nonresidents for services performed within the city was also subject to the tax. *See* Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 551 (6th Cir. 1987).

108. 810 F.2d 550, 556 (6th Cir. 1987). In *Firestone*, the plaintiff, an employer in the city of Akron, Ohio, maintained two separate ERISA-covered plans funded by employee contributions that were deducted from the employees' gross earnings. The employer alleged that the earnings were not subject to the Akron earnings tax because the tax related to an ERISA-covered plan, and was thereby preempted by ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). *See Firestone*, 810 F.2d at 551-52.

peripheral" an effect upon employee benefit plans to come within the preemptive scope of ERISA section 514(a).[109] The court considered the following factors in reaching its decision: (1) "whether the state law represents a traditional exercise of state authority;"[110] (2) whether the state law "affects relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries;"[111] and (3) "the incidental nature of any possible effect of the state law on an ERISA plan."[112] The court concluded that these factors, considered together, weighed against a finding of preemption.[113]

d. *Economic-Impact Approach*

In the more recent cases concerning ERISA's preemption of state tax laws, the courts have adopted yet another method of analysis. This method considers the economic impact of the tax upon the ERISA plan,[114] and in particular, the manner in which the tax affects "[t]he cost of [administering] the plan."[115] Courts utilizing this approach have focused upon the unique attributes of state tax laws[116] and the risks they pose to employees and their beneficiaries by "deplet[ing] the funds otherwise available for providing benefits."[117] Courts' justifications for pre-

109. *See id.* at 555-56.

110. *Id.* at 555 (citing Authier v. Ginsberg, 757 F.2d 796, 800 n.6 (6th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985)). The court indicated that this factor was "not particularly useful in the present case" in light of the language of ERISA § 514(b)(5)(B)(i), 29 U.S.C. § 1144(b)(5)(B)(i) (1988), which "expressly indicate[s] that state tax laws which 'relate to' ERISA plans will be preempted." *Firestone*, 810 F.2d at 555-56.

111. *Id.* at 556 (quoting Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987)). The court noted that the "[a]pplication of this factor mitigate[d] against a finding . . . [of preemption because] . . . [t]he income tax affect[ed] [the] employees in their capacity as employees, without regard to their status as participants in an ERISA plan." *Id.*

112. *Id.* (citing Rebaldo v. Cuomo, 749 F.2d 133, 138-39 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985)). The court noted that the tenuous relationship between the tax ordinance and the benefit plans was insufficient to fall within the preemptive scope of ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). *See id.* (citing opinion of district court, Firestone Tire and Rubber Co. v. Bodle, 645 F. Supp. 305, 312 (N.D. Ohio 1986)).

113. *See id.*

114. *See* E-Systems, Inc. v. Pogue, 929 F.2d 1100 (5th Cir.), *cert. denied*, 112 S. Ct. 585 (1991); Birdsong v. Olson, 708 F. Supp. 792 (W.D. Tex. 1989), *appeal dismissed sub nom.* Birdsong v. Wrotenbery, 901 F.2d 1270 (5th Cir. 1990); Morgan Guar. Trust Co. v. Tax Appeals Tribunal, No. 61, 1992 N.Y. LEXIS 1595 (N.Y. June 9, 1992); *infra* notes 115-19 and accompanying text.

115. *E-Systems*, 929 F.2d at 1103.

116. *See, e.g.*, *Birdsong*, 708 F. Supp. at 801 ("Unlike other forms of state regulation that may affect the costs of these plans in an incidental fashion, state taxation directly depletes the funds otherwise available for providing benefits."). In *Birdsong*, the court found that ERISA preempts the Texas Administrative Services Tax Act, Tex. Ins. Code Ann. art. 4.11A (West Supp. 1992) [hereinafter ASTA]. *See Birdsong*, 708 F. Supp. at 801. The ASTA imposed an annual tax on the gross amount of administrative fees received by certain persons for services rendered to employee benefit plans and held the plans secondarily liable for the payment of the tax. *See id.* at 796.

117. *See id.* at 801.

empting state tax laws under this approach have rested largely upon their construction of Congress's intent in enacting ERISA.[118] In addition, the courts that have adopted this approach have rejected the taxing authorities' arguments that generally applicable statutes, that function irrespective of the existence of a covered plan, cannot be preempted.[119]

III. An Analytical Framework for ERISA State Tax Preemption

As this Note asserted earlier,[120] an analysis of the Supreme Court's decisions reveals four different ways that a "state law" may "relate to" an employee benefit plan within the meaning of ERISA section 514(a).[121] Because Congress has instructed that state tax laws should be accorded the same preemption analysis as any other law,[122] the Supreme Court's jurisprudence may be used to form an analytical framework for determining when ERISA preempts a state tax law.[123]

In developing a model that readily lends itself to the state tax inquiry, the ERISA state tax-law preemption analysis may be organized into two separate tiers. The first tier considers whether the state law is subject to preemption under ERISA section 514(a)[124] because it either conflicts

118. *See, e.g.*, *E-Systems*, 909 F.2d at 1103 ("[As a result of the tax], [t]he cost of the plan must . . . increase for the employer and/or employees or the benefits must be adjusted downwards to offset the tax bite. This is the type of impact Congress intended to avoid when it enacted the ERISA legislation."). In *E-Systems*, as in *Birdsong*, the Texas ASTA was at question. *See id.* at 1101.

119. *See Birdsong*, 708 F. Supp. at 799 (court rejected government's argument that administrative service fees upon which tax was imposed were equivalent to loading); Morgan Guar. Trust Co. v. Tax Appeals Tribunal, No. 61, 1992 N.Y. LEXIS 1595, at *10 (N.Y. June 9, 1992). In *Morgan*, the New York State Court of Appeals held that the New York State real property transfer gains tax does not apply to a transaction completed by an ERISA-covered plan. *See id.* at *11. Economic impact upon the plan was but one of many factors cited by the *Morgan* court in finding that ERISA preempted the state tax law in question. Among the other factors that the court considered were the administrative burden upon the plan, the effect of the tax upon the plan's investment strategy, the undesirability of requiring plans to tailor their conduct to the peculiarities of each particular jurisdiction, and the incompatibility of the imposition of the state tax upon the plan vis-à-vis ERISA's prohibited transaction rules and the Internal Revenue Code's favorable tax provisions. *See id.* at *11-*13.

120. *See supra* notes 85-119 and accompanying text.

121. 29 U.S.C. § 1144(a) (1988). *See supra* text accompanying notes 85-119.

122. *See supra* text accompanying notes 73-84.

123. As previously discussed, *see supra* notes 41-45 and accompanying text, the preemption inquiry does not end with a finding that the state law "relates to" an employee benefit plan within the meaning of ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). Once the preemption provision of § 514(a) is triggered, the court must next consider whether the state law is saved from preemption under the exceptions set forth in ERISA § 514(b), 29 U.S.C. § 1144(b) (1988 & Supp. II 1990). In addition, if the state law is saved from preemption as a law that regulates insurance under ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988), the court must then decide if the state law falls within the scope of the "deemer clause" of ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1988). *See supra* notes 30, 41-45 and accompanying text.

124. 29 U.S.C. § 1144(a) (1988).

with the substantive provisions of ERISA,[125] contains an explicit reference to an employee benefit plan,[126] or is intended by the state legislature to affect an ERISA plan.[127] The second tier, which is only applicable to state tax laws that survive the first tier, considers whether the state tax law produces an indirect effect upon an employee benefit plan that is substantial enough to require preemption.[128] In contrast to the first-tier analysis, which sets forth bright-line rules, the second-tier analysis operates as a matter of degree, and considers both the extent of the burden[129] upon the employee benefit plan[130] and the ease with which the state law is compatible with ERISA's regulatory scheme.[131]

The "regulatory approach,"[132] "reference approach,"[133] "incidental-impact approach,"[134] and "economic-impact approach"[135] cases may each be reconciled to this two-tiered analysis. For example, the state tax laws at issue in the "regulatory approach" case of *National Carriers' Conference Committee v. Heffernan*[136] and the "reference approach" case of *General Motors Corp. v. California State Board of Equalization*[137] each warrant findings of preemption under the first-tier analysis because of the explicit statutory references to ERISA plans.[138] Moreover, the

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125. *See supra* note 57 and accompanying text.

126. *See supra* note 58 and accompanying text.

127. *See supra* note 59 and accompanying text.

128. *See supra* note 60 and accompanying text.

129. This Note uses the term "burden" to mean not only the administrative reporting or collection responsibilities that may be imposed upon a plan, but also the economic consequences that may affect the financial operations of a plan. The economic consequences may include liability for payment of tax.

130. In Mackey v. Lanier Collection Agency & Service, 486 U.S. 825 (1988), the Supreme Court sustained against preemption a state garnishment statute of general application as it applied to an employee welfare benefit plan. (Employee welfare benefit plans, unlike pension plans, are not subject to the anti-alienation provisions of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988).) Commenting on *Mackey*, the Supreme Court remarked that it has "recognized limits to ERISA's pre-emption clause" and that in *Mackey* "[t]he fact that collection might burden the administration of a plan did not, by itself, compel pre-emption." Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 483 (1990). This statement indicates that the Supreme Court supports a materiality consideration in the ERISA preemption analysis. Thus, it is possible that a state law may affect an employee benefit plan yet still not "relate to" the employee benefit plan within the meaning of ERISA § 514(a).

131. The importance of the state law's compatibility with the substantive provisions of ERISA was also stressed in *Mackey*. In *Mackey*, ERISA § 502's provision that "a plan may 'sue or be sued' as an entity in § 502 actions, 29 U.S.C. § 1132(d)(1) [(1988)]," was critical in persuading the Court that Congress did not intend to preempt the enforcement of money judgments against welfare benefit plans by the use of state apparatus. *Mackey*, 486 U.S. at 832.

132. *See supra* notes 87-94 and accompanying text.

133. *See supra* notes 95-100 and accompanying text.

134. *See supra* notes 101-13 and accompanying text.

135. *See supra* notes 114-19 and accompanying text.

136. 454 F. Supp. 914 (D. Conn. 1978). *See supra* notes 87-94 and accompanying text.

137. 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988). *See supra* notes 95-100 and accompanying text.

138. *See National Carriers'*, 454 F. Supp. at 915; *General Motors*, 815 F.2d at 1307.

earnings tax imposed in the "incidental-impact" case of *Firestone Rubber & Tire Co. v. Neusser*[139] warrants a denial of preemption under the second-tier analysis because a state tax imposed upon employees' earnings *prior* to their contribution to an ERISA plan[140] produces a relatively minor effect upon the internal operations of the plan. Rather, the tax at issue in *Firestone* functions as an external environmental factor that does not implicate ERISA's concern for uniformity in plan administration[141] to the same extent as state laws that tax the actual assets held in trust by an ERISA plan. Furthermore, the real estate transfer tax imposed in the "economic-impact" case of *Morgan Guaranty Trust Co. v. Tax Appeals Tribunal*[142] merits a finding of preemption under the second-tier analysis because of the magnitude of the economic consequences triggered by the application of the state tax law to the ERISA plan.[143]

The second-tier of analysis may also be used to guide inquiries into the preemption provision's outermost reach. In such inquiries, Supreme Court precedent would serve as a benchmark for determining if the state tax law's effect upon an employee benefit plan is substantial enough to warrant preemption.[144] For example, an interesting question could arise under the second-tier analysis[145] in regard to the extent that an ERISA plan is subject to a state sales tax on the purchase of materials and equipment for use in the administration of the plan. If an employee benefit plan purchased five hundred new computers, and the purchase were subject to state sales tax, the employee benefit plan would have a colorable second-tier claim that ERISA preempts the state sales tax as it applies to the plan because of the magnitude of the tax imposed. If, on the other hand, the state sales tax only applied to the purchase of pencils, the burden on the plan, in all likelihood, would not be substantial enough to merit a finding of ERISA preemption. Ultimately, the second-tier preemption analysis operates upon analogy, with the Supreme Court's holding in *Mackey v. Lanier Collection Agency & Service*[146] guiding the inquiry by directing an examination of both the materiality of the burden imposed upon the employee benefit plan and the ease with which the state tax law is compatible with ERISA's regulatory scheme.[147]

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139. 810 F.2d 550 (6th Cir. 1987). *See supra* notes 101-13 and accompanying text.

140. *See Firestone*, 810 F.2d at 551-52.

141. *See supra* note 10 and accompanying text.

142. 1992 N.Y. LEXIS 1595 (N.Y. June 9, 1992). *See supra* note 119 and accompanying text.

143. In *Morgan*, the application of the New York State real property transfer gains tax to the property transfer completed by the ERISA plan produced a tax liability of $205,262. *See Morgan*, 1992 N.Y. LEXIS at *3.

144. *See supra* notes 130-31 and accompanying text.

145. *See supra* notes 128-31 and accompanying text.

146. 486 U.S. 825, 831-32 (1988). In *Mackey*, the Supreme Court held that ERISA does not preempt state garnishment procedures of general application as they apply to employee benefit plans. *See supra* notes 130-31 and accompanying text.

147. *See supra* notes 130-31 and accompanying text.

CONCLUSION

Although the doctrine of ERISA preemption continues to take on greater definition, many questions remain regarding the preemption of state tax laws. The courts have encountered difficulties in adapting the Supreme Court's preemption doctrine to the unique setting presented by a state tax law. In their efforts to apply the pronouncements of the Supreme Court, the lower courts have adopted four distinct approaches for determining when ERISA preemption is triggered. The application of these approaches has yielded seemingly inconsistent results.

Despite this apparent lack of consensus, a common policy prevails among the courts—the desire to effectuate the intent of Congress in safeguarding the interests of employees and their beneficiaries in employee benefit plans. To this end, this Note has presented an analytical model for state tax preemption that is consistent with the Supreme Court's jurisprudence in non-tax contexts. This model consists of a two-tiered analysis. Although the precise extent of ERISA's preemptive scope remains undefined, this model may be used to reconcile the courts' divergent approaches, and to provide a unified framework for the analysis of ERISA's preemption of state tax laws.