

# The Scope of Federal Preemption: How Far May States Go in Regulating Multiple Employer Welfare Arrangements Established Under ERISA?

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## INTRODUCTION

The Employee Retirement Income Security Act of 1974<sup>1</sup> (ERISA) is a comprehensive federal statute dealing with all significant aspects of employee benefit and pension plans and the protection of employee benefit rights.<sup>2</sup> Congress, in choosing to implement an all-encompassing federal statutory scheme with regard to employee benefit plans, has asserted federal jurisdiction<sup>3</sup> over an area which concerns virtually every employee in the United States and has exercised its constitutional supremacy over state laws operating in the realm of employee benefits.<sup>4</sup> It is this area, namely ERISA's preemptive scope over state laws purporting to regulate employee benefits and employee benefit plans, that has been the subject of extensive debate and litigation since the legislation was enacted in 1974.

This Note will first provide a general overview of ERISA, including its historical origin, the purposes and intent of its enactment, and its general preemptive scope over state laws purporting to regulate employee benefit plans. It will then address ERISA preemption with regard to a specific type of ERISA benefit plan known as a multiple employer welfare arrangement.

## I. GENERAL OVERVIEW OF ERISA

In order to gain a basic understanding of the preemptive scope of ERISA, it is necessary to understand how the legislation developed, what

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1. 29 U.S.C. §§ 1001-1461 (1988 & Supp. II 1990).

2. *Id.* § 1001.

3. *Id.* § 1144(a).

4. Federal supremacy over state law is established in the Constitution's Supremacy Clause, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

problems it was intended to address, and what position Congress intended it to hold with respect to state laws. Gaining this understanding requires a comprehensive study of the legislative history of the Act and the text of its provisions relating to preemption, as well as subsequent case precedent addressing the scope of the statute's authority. It is only after such an analysis is complete that the scope of ERISA's preemption of state law in the specific case of multiple employer welfare arrangements may be fully addressed and understood.

### A. *Historical Origins of ERISA*

ERISA was enacted in 1974 after several years of consideration by Congress of related legislation.<sup>5</sup> Prior to 1974, no comprehensive federal statutory scheme existed in the area of employee benefits. The principal purposes of the legislation can be found in the Act's subtitle, Protection of Employee Benefit Rights, and in its initial provisions which codify congressional intent and policy.<sup>6</sup> The three primary purposes found in

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5. Several bills were introduced in Congress in the early 1970s with regard to regulation of employee benefits before ERISA was enacted in its present form. Some of these Senate and House bills included the following: H.R. REP. No. 12906, 93rd Cong., 2nd Sess. (1974); H.R. REP. No. 12855, 93rd Cong., 2nd Sess. (1974); H.R. REP. No. 9824, 93rd Cong., 1st Sess. (1973); H.R. REP. No. 4200, 93rd Cong., 1st Sess. (1973); H.R. REP. No. 462, 93rd Cong., 1st Sess. (1973); H.R. REP. No. 2, 93rd Cong., 1st Sess. (1973); S. REP. No. 1631, 93rd Cong., 1st Sess. (1973); S. REP. No. 1557, 93rd Cong., 1st Sess. (1973); S. REP. No. 1179, 93rd Cong., 1st Sess. (1973); S. REP. No. 4, 93rd Cong., 1st Sess. (1973).

6. 29 U.S.C. §§ 1001-03 (1988 & Supp. II 1990). The basic congressional findings and policy are outlined at § 1001, which states:

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of the employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax

the text of this first section include "assuring the equitable character of such plans and their financial soundness,"<sup>7</sup> "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, . . . providing appropriate remedies, sanctions, and ready access to the Federal courts,"<sup>8</sup> and finally "requiring . . . [benefit plans] to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and . . . [provide] plan termination insurance."<sup>9</sup> The ends sought to be achieved by each of these purposes are threefold: to protect the interests of employees and their beneficiaries, to protect interstate commerce, and to protect the federal taxing power, all thought to be of growing concern due to the substantial growth of employee benefit plans nationwide.<sup>10</sup>

The Supreme Court has interpreted the purpose and function of ERISA as "impos[ing] upon pension plans a variety of substantive requirements relating to participation, funding, and vesting. . . . It also establishes various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. . . . It does not regulate the substantive content of welfare benefit plans."<sup>11</sup> The Court has interpreted congressional intent in creating this legislation as providing the necessary continuity in administration of employee benefit plans in the best interest of the beneficiaries.<sup>12</sup>

The historical development of the legislation is apparent from the legislative history from both the Senate and the House of Representatives during the debate regarding its enactment, at which time Congress advocated a nationally regulated plan for employee benefits. This strong

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treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

*Id.* § 1001.

7. *Id.* § 1001(a).

8. *Id.* § 1001(b).

9. *Id.* § 1001(c).

10. *Id.* § 1001(a).

11. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (citations omitted). For related ERISA provisions, see 29 U.S.C. §§ 1051-86, 1021-31, 1101-14 (1988 & Supp. II 1990).

12. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 92 (1983).

advocacy led to the codification of the legislative goals as expressed in congressional findings and declarations of policy.<sup>13</sup>

### B. Preemption Provisions of ERISA

The text of ERISA specifically addressed Congress' position with regard to preemption of state laws relating to employee benefit plans. The portion of ERISA specifically dealing with preemption states:

Except as provided in subsection (b) [the saving clause] of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws<sup>14</sup> 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.<sup>15</sup>

Subsection (b)(2)(A) of 29 U.S.C. § 1144 goes on to save from this preemption "any law of any State which regulates insurance, banking, or securities."<sup>16</sup> However, 29 U.S.C. § 1144(b)(2)(B) limits the saving power of 29 U.S.C. § 1144(b)(2)(A) by not allowing an employee benefit plan to be "deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies."<sup>17</sup> Finally, 29 U.S.C. § 1144(d) provides that "[n]othing in this subchapter 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."<sup>18</sup>

As is apparent from these provisions, the wording clearly establishes federal supremacy in general, as well as the validity of any federal law. From the plain meaning of the preemption, saving, and deemer clauses,

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13. 29 U.S.C. § 1001 (1988). For the relevant portions of the legislative history of ERISA, see 120 CONG. REC. 29,197-29,933 (1974); H.R. CONF. REP. No. 1280, 93rd Cong., 2d Sess. (1974); S. CONF. REP. No. 1090, 93rd Cong., 2d Sess. (1974).

14. This section defines the term "state law" as "includ[ing] 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." 29 U.S.C. § 1144(c)(1) (1988). It goes on to define the term "state" as "includ[ing] a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." *Id.* § 1144(c)(2).

15. 29 U.S.C. § 1144(a) (1988) [hereinafter preemption clause].

16. *Id.* § 1144(b)(2)(A) [hereinafter saving clause].

17. *Id.* § 1144(b)(2)(B) [hereinafter deemer clause].

18. *Id.* § 1144(d).

however, it is more difficult to determine exactly what the legislature intended as the scope of their effect. Hence, the actual scope of preemption has been a significant matter of litigation and has culminated in the Supreme Court adopting an expansive reading of these clauses so as to eliminate to a large extent any state regulation in the area of employee benefit plans.<sup>19</sup>

### C. *The Supreme Court's View of ERISA's Preemptive Scope*

The issue of state law preemption by ERISA was extensively addressed for the first time in the Supreme Court's 1983 decision in *Shaw v. Delta Airlines, Inc.*<sup>20</sup> In this case, the Court held that ERISA's broad preemption provision was intended to preempt any state law that "related to" any employee benefit plan, not merely those state laws that directly conflicted with a substantive provision in the federal statute.<sup>21</sup> The Court determined that in deciding whether federal preemption occurs with respect to a certain state law, it must be shown that the law in question "relates to" an employee benefit plan within the meaning of 29 U.S.C. § 1144(a).<sup>22</sup> "Relates to," in this context, is given its broad common sense meaning, such that a state law relates to employee benefit plans if it has either a connection with or reference to such a plan.<sup>23</sup> Once it is determined that the state law relates to employee benefit plans, it is preempted by ERISA unless it is saved by the exceptions listed in 29 U.S.C. § 1144(b)(2)(A), namely it is a law which regulates insurance, banking, or securities.<sup>24</sup>

The Court believed that such a broad interpretation of ERISA preemption was necessary to make administration of nationwide employee benefit plans possible, because the Court believed that "[t]he administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan [was] apparent."<sup>25</sup> This, according to the Court, fulfilled the intent of Congress to provide a comprehensive federal program to "round out the protection afforded [employee benefit

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19. See *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

20. 463 U.S. 85 (1983).

21. *Id.* at 108-09.

22. *Id.* at 97.

23. *Id.* This view was recently reinforced by the Supreme Court in *Ingersoll Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990) ("Under this 'broad common sense meaning,' a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.").

24. *Shaw*, 463 U.S. at 98.

25. *Id.* at 107-08. See also *Id.* at 105 n.25.

plan] participants by eliminating the threat of conflicting and inconsistent State and local regulation.”<sup>26</sup>

The broad standard for preemption and the interpretation of legislative intent outlined in *Shaw* were again reflected by the Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*.<sup>27</sup> However, *Metropolitan Life* went further in that it applied *Shaw*'s broad interpretation of legislative intent to the saving and deemer clauses of ERISA.<sup>28</sup> *Metropolitan Life* involved the issue of state laws regulating insurance and insurance contracts, thus bringing to bear the saving clause's exception from preemption for state laws regulating insurance.

The insurance issue presented in *Metropolitan Life* made it necessary for the Court to attempt to reconcile the functions of the saving clause in conjunction with the deemer clause, a task that the Court found difficult because of the possible conflicting interpretations in the language of each provision.<sup>29</sup> In making its interpretation, the Court “ [began] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresse[d] the legislative purpose.”<sup>30</sup> The Court also utilized the presumption that “Congress did not intend to preempt areas of traditional state regulation.”<sup>31</sup> In

26. *Id.* at 99 (quoting 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent)). The same purpose was expressed by Senator Williams in addressing the Senate. He stated: It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provision, of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 CONG. REC. 29,933 (1974) (statement of Sen. Williams).

27. 471 U.S. 724 (1985).

28. 29 U.S.C. § 1144(b)(2)(A)-(B) (1988).

29. With regard to the preemption sections of ERISA, the Court stated:

The two preemption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general preemption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.

471 U.S. 724, 739-40 (1985) (footnote omitted). The Court went on to acknowledge attempts by Congress to clarify this problem, such as by introducing a bill in 1979 to amend ERISA to provide that certain types of state mandated benefit statutes are not within the scope of the saving clause. However, this legislation died before it was even debated in the Senate. *Id.* at 740 n.16.

30. *Id.* at 740 (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)).

31. *Id.* (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

other words, there exists in legislative interpretation a presumption against federal preemption, and the Court will not construe federal statutes in such a way that would enlarge their preemptive scope.<sup>32</sup>

In applying the ordinary language of the three preemption clauses of 29 U.S.C. §§ 1144(a) and 1144(b) in light of the aforementioned presumption, the Court declined to impose any limitations on the saving clause beyond those contained in the deemer clause. However, the limitation provided by the deemer clause, namely that plans established under the provisions of ERISA may not be deemed insurance companies for purposes of state regulation, was broadly interpreted. This broad interpretation resulted in the conclusion that self-insured ERISA plans<sup>33</sup> are in effect preempted from state regulation by means of the deemer clause. Insured plans, plans that purchase insurance for their beneficiaries, are directly affected by state laws regulating the insurance industry by means of their outside insurer's subjection to these state laws, and insured plans are thus indirectly subject to state insurance regulation.<sup>34</sup> This is permissible based on the language of ERISA's saving clause.<sup>35</sup>

The Court in *Metropolitan Life* acknowledged the fact that the decision "result[ed] in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing, [the Court] . . . merely [gave] . . . life to a distinction created by Congress in the 'deemer clause,' a distinction [of which] Congress is aware . . . and . . . has chosen not to alter."<sup>36</sup> This decision resulted in a broad interpretation of the deemer clause, which as a general rule removes self-insured employee benefit plans from the realm of state regulation altogether, thus reinforcing the trend established in *Shaw* of interpreting ERISA as having an expansive preemptive scope.

The Court in *Metropolitan Life* faced another issue with regard to ERISA preemption of state insurance laws, that of a possible conflict with different federal legislation, the McCarran-Ferguson Act.<sup>37</sup> In the McCarran-Ferguson Act, Congress provided that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such

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32. *Id.* at 741.

33. Self-insured plans, according to the Court, are plans that do not purchase insurance for their participants from an outside insurer and are therefore not bound by the terms of an insurance contract. *Id.* at 732.

34. *Id.*

35. 29 U.S.C. § 1144(b)(2)(a) (1988). See *supra* note 16 and accompanying text.

36. 471 U.S. at 747 (footnote omitted).

37. 15 U.S.C. §§ 1011-15 (1988). Congress, in drafting ERISA, provided for the validity of coexisting federal law, so that a reading of ERISA's preemptive score that infringed upon another federal law would necessarily fail. See *supra* note 6 and accompanying text.

business.”<sup>38</sup> This appears to conflict with an expansive interpretation of the deemer clause excepting self-insured ERISA plans from state insurance regulation and, thus, does not appear to conform with 29 U.S.C. § 1144(d) of ERISA preserving the validity and enforceability of other federal laws.<sup>39</sup> The Court resolved this conflict by concluding that outside insurers of ERISA plans, subject to state regulation in accordance with McCarran-Ferguson, bring those plans within the scope of state insurance regulations by means of their insurance contracts. This regulation by means of insurance contract is within the scope of the saving clause and is therefore permissible, thus respecting the applicable provision of McCarran-Ferguson.<sup>40</sup> The Court’s conclusion did not, however, clear up the problem of conflicts with the McCarran-Ferguson Act, and this conflict will again be present with regard to the possibility of ERISA preemption of state insurance laws regulating multiple employer welfare arrangements.<sup>41</sup>

The most recent Supreme Court decision regarding ERISA’s preemption of state laws, and specifically state insurance laws, was the 1990 decision in *FMC Corp. v. Holliday*.<sup>42</sup> In this case, which involved a Pennsylvania insurance subrogation law, the Court held that “[i]n view of Congress’ clear intent to exempt from direct state insurance regulation ERISA employee benefit plans, we hold that ERISA preempts the application of [this insurance law] to the FMC Salaried Health Care Plan.”<sup>43</sup> The Court further pointed out that “[t]he preemption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that ‘relate[s] to’ an employee benefit plan governed by ERISA.”<sup>44</sup> In making this determination, the Court rejected respondents’ arguments,<sup>45</sup> which read the

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38. 15 U.S.C. § 1012(a) (1988).

39. 29 U.S.C. § 1144(d) (1988).

40. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743 (1985). This reconciliation with the McCarran-Ferguson Act was explained more clearly in the later decision of *FMC v. Holliday*, 111 S. Ct. 403, 410 (1990) (“By recognizing a distinction between insurers of plans and the contracts of those insurers, which are subject to direct state regulation, and self-insured employee benefit plans governed by ERISA, which are not, we observe Congress’ presumed desire to reserve to the States the regulation of the ‘business of insurance.’”).

41. See *infra* note 106 and accompanying text.

42. 111 S. Ct. 403 (1990).

43. *Id.* at 411.

44. *Id.* at 407.

45. Justice Stevens’ dissent agreed with respondents’ argument that ERISA only preempts state laws that conflict with core ERISA concerns. Justice Stevens goes on to disagree with the distinction between insured and self-insured ERISA plans, and expresses the belief that the majority is reading the preemption and deemer clauses too broadly. *Id.* at 411-13.



deemer clause narrowly, only exempting from the saving clause "state insurance regulations that are pretexts for impinging on core ERISA concerns,"<sup>46</sup> and accepted its own interpretation in prior decisions.<sup>47</sup> The Court expressed the belief that allowing such an expansive preemptive scope of ERISA does not permit the deemer clause to engulf the saving clause, because the saving clause still functions independently to protect insurance contracts purchased by insured employee benefit plans.<sup>48</sup>

The Supreme Court in each decision gave an expansive scope to state law preemption which it determined as the intent of Congress in enacting the legislation.<sup>49</sup> The Court agreed that such an expansive scope is necessary in order to ensure orderly administration of employee pension and benefit plans, as well as consistency and uniformity in regulation of such plans.<sup>50</sup> Such consistency and uniformity was believed to be necessary to "achieve [the] goal of well regulated private pension plans"<sup>51</sup> and ultimately protect the interests of individual employees who are beneficiaries of such plans.

## II. THE PROBLEM OF MULTIPLE EMPLOYER BENEFIT PLANS AND ATTEMPTS AT JUDICIAL SOLUTIONS

Problems with preemption by ERISA of state laws and regulations for certain types of benefit plans became apparent in the late 1970s.<sup>52</sup> During this time, a certain type of benefit plan called a multiple employer trust became prevalent. Such trusts were set up under the title of employee benefit plans and utilized the preemption provisions of ERISA to escape the scrutiny of state insurance regulations. However, ERISA contained no provisions specifically relating to multiple employer trusts,<sup>53</sup> and they

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46. *Id.* at 410.

47. *Id.* at 411. *Accord* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741 (1985); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981).

48. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 411 (1990).

49. *See supra* note 26.

50. *FMC Corp.*, 111 S. Ct. at 410-11.

51. President's Message to Congress Transmitting Reorganization Plan No. 4 of 1978, 14 WEEKLY COMP. PRES. DOC. 1401 (Aug. 10, 1978).

52. David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427 (1987).

53. ERISA requires welfare benefit plans to conform to fiduciary standards as well as reporting and disclosure requirements. 29 U.S.C. §§ 1051(1), 1081(a)(1) (1988). However, ERISA does not require welfare benefit plans to be funded or insured, thus allowing such plans to exist under considerably less scrutiny than pension plans established under ERISA or similar insurance plans governed by state law. Thus a problem with lack of regulation could exist, and allow mismanagement of multiple employer trusts at the

were thus permitted to operate largely outside the scope of any regulation. As a result of this regulatory vacuum, many multiple employer trusts were mismanaged and went bankrupt, leaving the employee beneficiaries without benefits.<sup>54</sup>

Some federal courts attempted to control the problems brought about by this lack of regulation by declaring multiple employer trusts outside the definition of employee benefit plans under ERISA, and instead declaring such trusts insurance providers.<sup>55</sup> These courts advanced the proposition that multiple employer trusts could not provide employees with insurance programs under the guise of employee benefit plans and thus receive the benefit of exemption from state insurance regulations by ERISA without specific federal regulations to ensure their financial stability. In *Bell v. Employee Security Benefit Ass'n.*,<sup>56</sup> the Kansas federal district court stated that "just as a state cannot regulate an 'employee benefit plan' by calling it 'insurance,' neither can . . . [a multiple employer trust] merchandise an insurance program, free of state regulation, by terming it an 'employee benefit plan.'"<sup>57</sup>

In response to the problems created by multiple employer trusts in the years following the enactment of ERISA, as well as the courts' attempts to solve those problems, Congress amended ERISA in 1982. The 1982 amendments added to ERISA several sections dealing with preemption as it specifically relates to multiple employer benefit plans.<sup>58</sup> However, amending ERISA has not completely solved the problem of multiple employer arrangements, as the scope of the additional preemption provision has not yet been determined.

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expense of the employee beneficiaries. This problem prompted the 1982 amendments to ERISA specifically addressing preemption of state law by multiple employer welfare arrangements. For an in-depth discussion of the problems with uninsured benefit plans, see David J. Brummond, *The Legal Status of Uninsured, Noncollectively-Bargained Multiple-Employer Welfare Trusts Under ERISA and State Insurance Laws*, 28 SYRACUSE L. REV. 701 (1977); Linda L. Lanam, *Public Regulation of Self-Insured and Uninsured Employee Benefit Plans—Who is to be Protected? A State Regulator's Perspective*, 19 FORUM 309 (1984).

54. Gregory, *supra* note 52, at 432.

55. Taggart Corp. v. Efros, 475 F. Supp. 124 (S.D. Tex. 1979); Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977); Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977). In *Wayne Chemical*, the Seventh Circuit Court of Appeals held that insurers and group insurance policies such as the one issued by defendant were not preempted by ERISA and, therefore, were subject to state insurance regulations, even though the insurance in question was purchased by an employee benefit plan established under ERISA. 567 F.2d at 700.

56. 437 F. Supp. 382 (D. Kan. 1977).

57. *Id.* at 390.

58. 29 U.S.C. § 1144(b)(6) (1988).

### III. ATTEMPTED STATE INSURANCE REGULATION OF MULTIPLE EMPLOYER WELFARE ARRANGEMENTS: POSSIBLE CONFLICTS WITH ERISA PREEMPTION

The issue of preemption of state law, specifically state insurance regulations, becomes more complicated when examining a certain type of multiple employer benefit plan called a multiple employer welfare arrangement. The 1982 amendments to ERISA added specific provisions dealing with multiple employer welfare arrangements. Under these new provisions, such an arrangement is defined as an employee welfare benefit plan, or any other arrangement other than an employee welfare benefit plan, "which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1)<sup>59</sup> to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries."<sup>60</sup> Once a multiple employer welfare arrangement is established as an ERISA plan, it is subject to the same provisions of ERISA as any other type of employee benefit plan, including the preemption, saving, and deemer clauses. The purposes of ERISA as well as the intent of Congress when enacting the legislation remain fully in effect just as they are with respect to single employer plans.

In addition, ERISA contains another provision dealing specifically with preemption of state laws regulating multiple employer welfare arrangements which provides that "in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement . . . ."<sup>61</sup> The terms

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59. Paragraph 1, as referred to in the above definition, provides:

For purposes of this subchapter:

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

29 U.S.C. § 1002(1) (1988 & Supp. II 1990).

60. *Id.* § 1002(40)(A).

61. *Id.* § 1144 (b)(6)(A)(i). This section goes on to provide that fully insured multiple employer welfare arrangements are subject to state insurance regulations.

[A]ny law of any State which regulates insurance may apply to such arrangement

of this provision apply specifically to fully insured multiple employer welfare arrangements. In addition, with regard to other multiple employer welfare arrangements, ERISA goes on to state that "any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter."<sup>62</sup>

Based upon the separate and distinct category established for multiple employer welfare arrangements by the provisions of the 1983 amendments and reasons of public policy, a movement has been enacted by several states attempting to subject all multiple employer welfare arrangements to extensive insurance regulations.<sup>63</sup> This regulation has been strongly disputed by the administrators of multiple employer welfare arrangements in those jurisdictions, who assert that such state regulation is preempted by ERISA based upon the expansive view of preemption advocated by the Supreme Court.<sup>64</sup> In order to determine the strength of the preemption argument by administrators of multiple employer welfare arrangements, as well as the possible stand the federal courts might take in this regard, it is important to examine the laws of the states that have addressed the issue. This Note will then specifically examine the argument and policies behind including self-insured multiple employer welfare arrangements in ERISA preemption.

#### A. *Enactment of Regulatory State Legislation*

Of the six states that have enacted legislation regulating multiple employer welfare arrangements under each states' respective insurance laws,<sup>65</sup> four have enacted such legislation in 1991.<sup>66</sup> It is for that reason that no definitive answer has been reached by either the state or federal courts in those jurisdictions regarding the validity of this particular

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to the extent that such law provides (I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and (II) provisions to enforce such standards . . . ."

*Id.*

62. *Id.* § 1144(b)(6)(A)(ii).

63. The following states have enacted statutes subjecting multiple employer welfare arrangements to state insurance regulations: Arkansas (ARK. CODE ANN. § 23-86-202 (Michie 1992) (amended 1991)), Florida (FLA. STAT. ANN. § 624.437 (West 1984 & Supp. 1992)), Indiana (IND. CODE § 27-1-34 (Supp. 1992) (amended 1991)), Michigan (MICH. STAT. ANN. § 500.7004 (West Supp. 1992)), New Mexico (N.M. STAT. ANN. § 59A-1-8.1 (Michie 1992)), and South Dakota (S.D. CODIFIED LAWS ANN. § 58-18B-1 (Supp. 1991)).

64. *See supra* note 47.

65. *See supra* note 63.

66. *Id.*

legislation. This is in fact an issue that has not yet been conclusively resolved by any court.

The statutes passed in each jurisdiction hold multiple employer welfare arrangements to essentially the same requirements under each state's respective insurance code.<sup>67</sup> In each state, multiple employer welfare

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67. The Arkansas Code provides the following requirements for regulating multiple employer welfare arrangements:

23-86-202 Definitions [effective Jan. 1, 1992]

- (1) "Small employer" means any person, firm, corporation, partnership, or association actively engaged in business who, on at least fifty percent (50%) of its working days during the preceding year, employed no more than twenty-five (25) eligible employees. In determining the number of eligible employees, companies which are affiliated companies or which are eligible to file a combined tax return for purposes of state taxation shall be considered one (1) employer;
- (2) "Carrier" means any person who provides health insurance in this state. For the purposes of this subchapter, carrier includes a licensed insurance company, a prepaid hospital or medical service plan, a health maintenance organization, a multiple employer welfare arrangement, or any other person providing a plan of health insurance subject to state insurance regulation;
- (3)(A) "Health benefit plan" or "plan" means any hospital or medical expense incurred policy or certificate, hospital or medical service plan contract, or health maintenance organization subscriber contract.
- (B) "Health benefit plan" does not include accident-only, credit, dental, or disability income insurance; coverage issued as a supplement to liability insurance; worker's compensation or similar insurance; or automobile medical-payment insurance;
- (4) "Small employer carrier" means any carrier which offers health benefit plans covering the employees of a small employer;
- (5) "Case characteristics" means demographic or other relevant characteristics of a small employer, as determined by a small employer carrier, which are considered by the carrier in the determination of premium rates for the small employer. Claim experience, health status, and duration of coverage since issue are not case characteristics for the purposes of this subchapter;
- (6) "Commissioner" means the State Insurance Commissioner;
- (7) "Department" means the State Insurance Department;
- (8) "Base premium rate" means, for each class of business as to a rating period, the lowest premium rate charged or which could have been charged under a rating system for that class of business, by the small employer carrier to small employers with similar case characteristics for health benefit plans with the same or similar coverage;
- (9) "New business premium rate" means, for each class of business as to a rating period, the premium rate charged or offered by the small employer carrier to small employers with similar case characteristics for newly issued health benefit plans with the same or similar coverage;
- (10) "Index rate" means, for each class of business for small employers with similar case characteristics, the arithmetic average of the applicable base premium rate and the corresponding highest premium rate;
- (11) "Class of business" means all or a distinct grouping of small employers

arrangements are required to conform to specific provisions of their insurance regulations, generally requiring multiple employer welfare arrangements to file a policy or certificate and an annual financial statement with the state department of insurance, to obtain a certificate of authority from the state department of insurance, to notify the Department if there is a threat of financial hardship, and to obtain actuarial certification.<sup>68</sup>

This significant regulation under each state's insurance laws has been enacted by the legislatures under the belief that such regulation is per-

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as shown on the records of the small employer carrier;

(A) A distinct grouping may only be established by the small employer carrier on the basis that the applicable health benefit plans:

(i) Are marketed and sold through individuals and organizations which are not participating in the marketing or sale of other distinct groupings of small employers for such small employer carrier;

(ii) Have been acquired from another small employer carrier as a distinct grouping of plans;

(iii) Are provided through an association with membership of not less than two (2) or more small employers which has been formed for purposes other than obtaining insurance; or

(iv) Are in a class of business that meets the requirements for exception to the restrictions related to premium rates provided in subparagraph (A)(1)(a) of § 23-86-204 of this subchapter;

(B) A small employer carrier may establish no more than two (2) additional groupings under each of the subparagraphs in subdivision (11)(A) of this subsection on the basis of underwriting criteria which are expected to produce substantial variation in the health care costs;

(C) The commissioner may approve the establishment of additional distinct groupings upon application to the commissioner and a finding by the commissioner that such action would enhance the efficiency and fairness of the small employer insurance marketplace;

(12) "Actuarial certification" means a written statement by a member of the American Academy of Actuaries or other individuals acceptable to the commissioner that a small employer carrier is in compliance with the provisions of § 23-86-204 of this subchapter based upon the person's examination, including a review of the appropriate records and of the actuarial assumptions and methods utilized by the carrier in establishing premium rates for applicable health benefit plans;

(13) "Rating period" means the calendar period for which premium rates established by a small employer carrier are assumed to be in effect, as determined by the small employer carrier.

ARK. CODE ANN. § 23-86-202 (Michie 1992) (amended 1991). The statutes in Florida, Indiana, Michigan, New Mexico, and South Dakota contain essentially the same provisions, bringing multiple employer welfare arrangements squarely within the scope of state insurance regulation. *See supra* note 63. The extent to which these statutes are valid exercises of state regulation under 29 U.S.C. § 1144(b)(6) has not yet been decisively determined by the courts.

68. *See supra* note 67.

mitted by the less expansive scope of 29 U.S.C. § 1144(b)(6) and is necessary to protect the interests of the beneficiaries of such plans. Whether Congress intended states to have such regulatory control over multiple employer welfare arrangements is not clear by the wording of 29 U.S.C. § 1144(b)(6),<sup>69</sup> however, and a strong argument exists that legislatures have in fact stepped beyond their regulatory power under ERISA by implementing these regulations. Florida has recognized the possibility of preemption in a section of its statute which provides, "[T]his section<sup>70</sup> does not apply to a multiple employer welfare arrangement which offers or provides benefits which are fully insured by an authorized insurer or to an arrangement which is exempt from state insurance regulation in accordance with Pub. L. No. 93-406, the Employee Retirement Income Security Act."<sup>71</sup> By recognizing the role that ERISA plays in regulating such benefit plans, the Florida legislature has added strength to the argument that a real conflict between ERISA and the state regulations exists.

*B. The Argument for the Application of Broad ERISA Preemption to Multiple Employer Welfare Arrangements*

The recent implementation of these state regulations requiring multiple employer welfare arrangements to conform to various sections of state insurance codes introduces an issue regarding the extent of ERISA's general preemption provisions, namely the preemption, saving and deemer clauses,<sup>72</sup> as applied to multiple employer welfare arrangements. Section 1144(b)(6)(A) begins with the clause "[n]otwithstanding any other provision of this section . . .", and then goes on in clause (i) to allow certain defined state insurance regulations to apply to fully insured multiple employer welfare arrangements as well as to any arrangement subject to an exemption under subparagraph (B).<sup>73</sup> The exemption provided under subparagraph (B) states that "[t]he Secretary [of Labor]

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69. See *supra* notes 61-62 and accompanying text.

70. FLA. STAT. ANN. § 624.437 (West 1984 & Supp. 1992).

71. *Id.* § 624.437(3). How and to what extent this clause has effected state regulation of multiple employer welfare arrangements is not known, however, because the issue of the scope of this Florida law has not been litigated. The lack of litigation on this issue by multiple employer welfare arrangements could indicate that the regulation has not been intrusive on their functioning, as it is likely that a significantly intrusive use of this statute for regulatory purposes would be challenged as either a violation of subsection (3) of the statute or 29 U.S.C. § 1144(b)(6). Indiana included a similar provision in its statute regulating multiple employer welfare arrangements. See *infra* note 88.

72. 29 U.S.C. §§ 1144(a), 1144(b)(2)(A)-(B) (1988). For the exact wording of these provisions, see *supra* text accompanying notes 15-17.

73. *Id.* § 1144(b)(6)(A).

may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured."<sup>74</sup> The exemption under clause (ii) includes "any other employee welfare benefit plan which is a multiple employer welfare arrangement," and allows application of any state insurance regulation "not inconsistent with the preceding sections of this title".<sup>75</sup> These clauses are complicated because they make it necessary to define and make distinctions between fully insured and self-insured multiple employer welfare arrangements, as well as to define what regulations may be inconsistent with preceding sections.

ERISA provides a definition of a fully insured multiple employer welfare arrangement within 29 U.S.C. § 1144. According to that definition:

For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a state.<sup>76</sup>

The states' ability to regulate these fully insured plans is clear in the text of ERISA, which sets forth specific state insurance regulations that are permitted to apply to fully insured plans.<sup>77</sup> These regulations are limited to maintenance and enforcement of reserve and contribution requirements.<sup>78</sup> Although states appear to be afforded a very limited scope of regulatory power over fully insured plans, they in fact are not so limited, because plans that purchase insurance are directly affected by state laws that regulate their insurer and the insurance industry.<sup>79</sup> Thus, the extent to which states may regulate fully insured plans is relatively clear, and since states may reach these plans through regulation by the plan's insurer, it is unlikely that states will attempt to pass further regulations that might conflict with ERISA's preemptive scope.

The same is not true for self-insured multiple employer welfare arrangements. In order to determine to what extent a self-insured plan may be regulated by the states, regulation which is inconsistent with

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74. *Id.* § 1144(b)(6)(B).

75. *Id.* § 1144(b)(6)(A)(ii). *See also supra* note 62 and accompanying text.

76. *Id.* § 1144(b)(6)(D).

77. *Id.* § 1144(b)(6)(A)(i). The text of this provision is stated previously in this article. *See supra* note 61 and accompanying text.

78. *Id.* § 1144(b)(6)(A)(i)(I).

79. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).



other provisions of ERISA must be defined.<sup>80</sup> What type of regulation would be inconsistent is not clearly defined by 29 U.S.C. § 1144(b)(6)(A)(ii) itself, but it appears that the provision does not allow conflict with the preemption, saving, and deemer clauses<sup>81</sup> or the basic objectives of the ERISA legislation.<sup>82</sup>

In order to remain consistent with the initial preemption provisions of ERISA, states may not enact laws that would for all practical purposes deem multiple employer welfare arrangements insurance companies.<sup>83</sup> A strong argument can be made that insurance regulations as extensive as those in the above-discussed statutes,<sup>84</sup> when applied to self-insured multiple employer welfare arrangements, in practice deem those plans insurance companies and are thus inconsistent with the deemer clause. A good example of this can be found in the applicable portions of the Indiana statute, which provide:

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80. 29 U.S.C. § 1144(b)(6)(A)(ii) (1988).

81. *Id.* §§ 1144(a), 1144(b)(2)(A)-(B).

82. Along with the basic objectives and policies of ERISA set forth in 29 U.S.C. § 1001, *see supra* note 6, ERISA also contains objectives specifically addressing multiemployer plans. Section 1001a(c) states the policy of the Act to be:

(1) to foster and facilitate interstate commerce, (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

*Id.* § 1001a(c). Although these policies specifically address multiemployer pension plans, not welfare benefit plans, an argument could be made that they do not include welfare benefit plans such as multiple employer welfare arrangements. However, these policies are consistently parallel with the general policies of ERISA set forth in 29 U.S.C. § 1001, and a strong argument can be made that under such circumstances, the legislature intended them to extend to any multiple employer plan validly established under ERISA.

83. *Id.* § 1144(b)(2)(B). In support of this position, the Court in *FMC Corp. v. Holliday* stated:

We read the deemer clause to exempt self-funded ERISA plans from state laws 'regulat[ing] insurance' within the meaning of the saving clause. By forbidding States to deem employee benefit plans 'to be an insurance company or other insurer . . . or to be engaged in the business of insurance,' the deemer clause relieves plans from state laws 'purporting to regulate insurance.' As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plans. State laws directed toward the plans are preempted because they relate to an employee benefit plan but are not 'saved' because they do not regulate insurance. State laws that directly regulate insurance are 'saved' but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws.

111 S. Ct. 403, 409 (1990) (alteration in original).

84. *See supra* note 63.

Sec. 2. (a) An arrangement must annually obtain a certificate of registration from the department under rules adopted by the commissioner.

(b) An arrangement that does not obtain a certificate of registration described in (a) or violates the requirements of this chapter is subject to IC 27-4.<sup>85</sup>

Sec. 3. An arrangement may provide benefits under an employee benefit plan in Indiana only through an employee benefit plan that has been filed and approved by the department of insurance.

Sec. 4. An arrangement shall file an annual statement on a form prescribed by the commissioner.

Sec. 5. Except as provided by this chapter and by IC 27-9, Indiana insurance law does not apply to the operation of multiple employer welfare arrangements.

Sec. 6. (a) It shall be the duty of the department to examine every domestic multiple employer welfare arrangement at least every five (5) years or as often as the department in its discretion may deem necessary. The expense of such examination and or investigations of such arrangements shall be paid by the arrangement so examined.

(b) The commissioner shall revoke or suspend: (1) the certificate of registration to do business in Indiana any multiple employer welfare arrangement which refuses to permit such examination described in subsection (a); and any certificate of registration when any condition prescribed by the law or regulation for the issuance of continuance of the certificate no longer exists.

Sec. 7. If any domestic multiple employer welfare arrangement is insolvent or in imminent danger of insolvency, or fails or suspends operation between periods of examination authorized, it is a class A misdemeanor for the highest officer then actively in charge of such multiple employer welfare arrangement to knowingly fail to notify the department immediately, of such condition, failure, or suspension.

Sec. 9. The department of insurance shall adopt rules under IC 4-22-2 necessary to implement this chapter, including but not limited to:

- (1) certificate of registration requirements;
- (2) reinsurance requirements;
- (3) reserve levels;

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85. This section refers to Article 4 of the Indiana Insurance Code, which contains provisions applicable to Unfair Competition, Unauthorized, and Foreign Insurers. IND. CODE §§ 27-4-1-1 to -19 (1988 & Supp. 1992).

- (4) deposits;
- (5) financial reporting;
- (6) fidelity bonds; and
- (7) the operations of multiple employer welfare arrangements.<sup>86</sup>

This statute brings multiple employer welfare arrangements under the umbrella of state insurance regulations and squarely within the control of the state department of insurance.<sup>87</sup> The statute in fact refers to multiple employer welfare arrangements as "insurers." By doing so, it appears that this statute has deemed multiple employer welfare arrangements to be insurance companies or other insurers for purposes of state laws purporting to regulate insurance companies.<sup>88</sup> This is clearly inconsistent with the deemer clause and thus not a permissible function of the exception provided by ERISA for state regulation of self insured multiple employer welfare arrangements.<sup>89</sup>

Such an argument against these recently enacted state statutes is consistent with the broad scope of preemption accepted by the prior decisions of the Supreme Court.<sup>90</sup> And although the specific issue of state regulation of multiple employer welfare arrangements has not been addressed in the state or federal courts, the issue of preemption in general has been decisively determined.<sup>91</sup> In *Reilly v. Blue Cross*

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86. *Id.* § 27-1-34-2 to -9. This statute was signed into law on May 10, 1991, and went into effect on July 1, 1991.

87. The previously discussed statutes of other states, especially those enacted in 1991 by Arkansas, New Mexico and South Dakota, have essentially the same requirements for multiple employer welfare arrangements. *See supra* notes 63, 67. As a result, these statutes have the same possible conflicts with ERISA preemption.

88. Similar to the Florida statute, *see supra* note 71 and accompanying text, the Indiana legislature anticipated a possible conflict with the ERISA preemption provisions. As a result, the legislature enacted the following provision:

Sec. 10. This chapter does not apply to a multiple employer welfare arrangement which offers or provides benefits which are fully insured by an authorized insurer or to an arrangement which is exempt under the federal Employee Retirement Income Security Act (29 U.S.C. 1001 et seq.).

IND. CODE § 27-1-34-10 (Supp. 1992). The mere implementation of this provision, however, does not diminish the problem of regulation of self-insured multiple employer welfare arrangements, which remain strictly regulated under the Indiana Insurance Code. *See supra* note 86 and accompanying text. It is the argument of this Note that the provisions implemented by the Indiana legislature are in themselves violative of the deemer clause.

89. 29 U.S.C. § 1144(b)(6)(A)(ii) (1988).

90. *See Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

91. *See, e.g., Bone v. Association Management Services, Inc.*, 632 F. Supp. 493

& *Blue Shield United of Wisconsin*,<sup>92</sup> the Seventh Circuit Court of Appeals held that a self-insured benefit plan administered by Blue Cross was preempted from state laws by ERISA by means of the deemer clause.<sup>93</sup> In reaching its decision, the appellate court broadly accepted the distinction established in *Metropolitan Life Insurance Co. v. Massachusetts*,<sup>94</sup> between fully insured benefit plans and those that are self-insured, preempting self-insured plans from state regulation based upon the deemer clause.<sup>95</sup> The same arguably could hold true under the deemer clause for self-insured multiple employer welfare arrangements.

A strong argument exists that just as the federal courts have accepted the expansive scope of ERISA preemption as interpreted by the Supreme Court, they will also be likely to accept such an argument as it applies to multiple employer welfare arrangements, as the same policy issues and legislative intent issues apply. Multiple employer welfare arrangements often exist over the area of several states and provide affordable benefits to smaller employers and self employed individuals. To subject them to the requirements of extensive and differing insurance regulations could in fact cripple their operation, thus undermining the policies behind the adoption of the comprehensive ERISA legislation, namely providing well-being and security to employee beneficiaries through a uniform system of regulation.<sup>96</sup> The Supreme Court has concluded that it was the intent of the legislature to avoid such consequences, and stated that "where a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' we have applied the preemption clause to ensure that benefit plans will be governed by only a single set of regulations."<sup>97</sup> Accordingly, the Court rejected the possibility that self-insured plans might be subjected to different state regulatory schemes.

In the case of *Bone v. Association Management Services, Inc.*,<sup>98</sup> the district court did not specifically address the topic of the preemptive

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(S.D. Miss. 1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985); *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977); *Standard Oil Co. of Cal. v. Agsalud*, 442 F. Supp. 695 (N.D. Cal. 1977); *Bell v. Employee Benefit Ass'n*, 437 F. Supp. 382 (D.C. Kan. 1977).

92. 846 F.2d 416 (7th Cir. 1988).

93. *Id.* at 425.

94. 471 U.S. 724, 747 (1985).

95. The Supreme Court's broad view of preemption recently expressed in *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990), was again accepted by the Seventh Circuit Court of Appeals in *Maciosek v. Blue Cross & Blue Shield United of Wis.*, 930 F.2d 536 (7th Cir. 1991).

96. 29 U.S.C. §§ 1001, 1001a (1988 & Supp. II 1990).

97. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 408 (1990). See also *supra* note 26 and accompanying text.

98. 632 F. Supp. 493 (S.D. Miss. 1986).

scope of the ERISA provisions regarding multiple employer welfare arrangements in its holding.<sup>99</sup> However, in a footnote, the court rejected the argument that under 29 U.S.C. § 1144(b)(6)(A)(ii), a multiple employer welfare arrangement could be extensively regulated by the state because the court could find no authority in support of such a proposition, as well as its broad reading of the deemer clause.<sup>100</sup> In addition, the court determined that the exception to preemption for state insurance regulation of multiple employer welfare arrangements "not inconsistent with ERISA"<sup>101</sup> was narrow, and the wording of this ERISA provision called for a case by case examination of the particular state regulation and its effects.<sup>102</sup> Whether other federal courts will adopt such a narrow reading of 29 U.S.C. § 1144(b)(6)(A)(ii) is difficult to determine since the issue is significantly one of first impression in virtually all jurisdictions. However, this narrow interpretation is consistent with the broad reading of ERISA's preemption and deemer clauses previously adopted in most jurisdictions.

Advocates of extensive state regulation of multiple employer welfare arrangements could also attempt to utilize a McCarran-Ferguson Act<sup>103</sup> argument in limiting ERISA preemption.<sup>104</sup> This argument, however, is weak in this instance for the same reasons it was rejected by the Supreme Court in *Metropolitan Life Insurance Co. v. Massachusetts*,<sup>105</sup> namely because ERISA is a statute relating to the business of insurance and thus an allowable exception under 15 U.S.C. § 1012(b) of the McCarran-Ferguson Act.<sup>106</sup> There is no reason why conflicts with McCarran-Ferguson would have a greater impact on the ability of ERISA to preempt state insurance regulation of multiple employer welfare arrangements than it has on preemption for single employer plans. Under its own

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99. The district court in *Bone* held that the benefit plan in question was preempted by ERISA under the general preemption provisions, and that under ERISA, an employee benefit plan does not have to be actuarially sound and set up reserve or capital requirements. *Id.* at 493, 495.

100. *Id.* at 494-95.

101. 29 U.S.C. § 1144(b)(6)(A)(ii) (1988).

102. *Bone*, 632 F. Supp. at 494.

103. 15 U.S.C. §§ 1011-15 (1988 & Supp. II 1991).

104. *See supra* note 40.

105. 471 U.S. 724, 743 (1985).

106. The McCarran-Ferguson Act provides that Congress may not pass legislation that would impair state laws regulating insurance unless the particular federal legislation in question itself relates to the business of insurance. 15 U.S.C. § 1012(b). Based on this provision, federal courts have determined that the McCarran-Ferguson Act is not a barrier to ERISA preemption of state regulations. *See Eversole v. Metropolitan Life Ins. Co.*, 500 F. Supp. 1162 (D. Cal. 1980); *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir. 1978).

terms, McCarran-Ferguson allows ERISA to preempt state insurance laws, regardless of the type of ERISA plan in question.

The above argument advocating broad ERISA preemption of state insurance regulation of multiple employer welfare arrangements must take into account the additional risks to beneficiaries participating in multiple employer plans. These risks, and the inability of courts to resolve them from the language of ERISA, are what prompted Congress to adopt the 1982 amendments specifically addressing multiple employer welfare arrangements.<sup>107</sup> Unfortunately, the provisions that came out of those amendments do not appear to give state legislatures sufficient guidelines to follow in adopting regulations for multiple employer benefit plans, and thus legislatures are passing statutes extensively regulating such plans. Although those statutes in effect eliminate the problems of unregulated plans and protect the strict financial interest of their beneficiaries, they create new, and perhaps even greater, problems in light of congressional intent in enacting ERISA. These problems are great in that by forcing compliance to extensive insurance regulations, as well as conflicting regulations between states, the states may in fact eliminate the ability of small employers to band together and provide reasonably priced health care coverage through multiple employer benefit plans.

#### IV. CONCLUSION

This Note has demonstrated the broad scope of federal preemption provided by ERISA as interpreted by Congress and the United States Supreme Court. It has also demonstrated the continuing problems that conflict between federal and state law generates. Although the scope of ERISA's preemptive power appears to be decisively broad with regard to single employer plans, and this broad scope appears to be firmly rooted in Supreme Court precedent, the position that the Supreme Court, as well as the lower federal courts, will take with regard to multiple employer welfare arrangements is unclear and left largely to speculation at this point. Unless Congress addresses this issue and amends ERISA once again to clarify what it intends the states' role to be in regulation of multiple employer plans, this issue will in all likelihood be a subject of extensive litigation in the next decade.

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