Erisa: The Savings Clause 502 Implied Preemption, Complete Preemption, and State Law Remedies

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When Congress adopted the Employee Retirement Income Security Act of 1974 ("ERISA"), its members hailed the legislation as a colossal achievement in consumer protection designed to reform the private pension industry. Since that hopeful beginning, however, ERISA has become more notorious as a shield against consumer interests in the administra-
tion of non-pension employee benefit plans, rather than notable for the real advances ERISA has implemented in the pension arena, due to the Supreme Court’s early pronouncements on the statute’s preemption of state law. As a result of ERISA preemption, AIDS patients who had their health care benefits canceled, women suffering from breast cancer who

3. ERISA regulates “employee benefit plans.” Employee benefit plans include fringe benefit programs provided or available to workers and their beneficiaries through the worker's employment, either from the worker's employer or union. Employee benefit plans include both “pension” and “welfare” benefit plans. Welfare benefit plans are any non-pension fringe benefit programs, whether self-funded by the provider or funded through the purchase of insurance, including health care benefit plans, accident and death benefit plans, and disability benefit plans.

The terms “employee welfare benefit plan” and “welfare benefit 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. . . .


4. See Andrews-Clarke v. Travelers Insurance Co., noting that, ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. It is therefore deeply troubling that, in the health insurance context, ERISA has evolved into a shield of immunity which thwarts the legitimate claims of the very people it was designed to protect. 984 F. Supp. 49, 56 (D. Mass. 1997) (citations omitted). Similar sentiments have been voiced:

Every single case brought before this Court has involved insurance companies using ERISA as a shield to prevent employees from having the legal redress and remedies they would have had under long-standing state laws existing before the adoption of ERISA. It is indeed an anomaly that an act passed for the security of the employees should be used almost exclusively to defeat their security and leave them without remedies for fraud and overreaching conduct.


By its reading of ERISA's preemption clause, the United States Supreme Court has restricted the very rights of employees . . . that Congress sought to protect. Through peculiar federal judicial interpretation, a statutory addition to workers' rights has been converted into a statutory removal of those rights. The law has been reshaped into a form that achieves the converse of its original purpose.


had been denied potentially life-saving medical treatment, and a myriad of other ERISA plan participants with claims for extra-contractual damages against their plan insurers have had their traditional state law remedies nullified, and the perpetrators of egregious wrongs have not been held accountable.

ERISA contains express preemption language which Congress detailed in § 514 of the statute. Section 514 includes three interrelated passages, known separately as the *preemption clause*, the *savings clause*, and the *deemer clause*.

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8. See Kenneth Starr et al., *The Law of Preemption*, 1991 A.B.A. SEC. ANTITRUST L. REP. APP. JUDGES CONF. 40-55 (urging Congress to include express preemption language in federal enactments to guide the courts on the intended scope of federal preemption of state law). But see Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 43-46 (1996) (suggesting that it is fruitless to include express preemption language in federal statutes because preemption always involves a question of scope and it would be impossible to precisely define the boundaries of federal preemption in every imaginable circumstance.).
(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
(b) Construction and application

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.
(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall 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.
The preemption clause provides that ERISA "shall supersede any and all State laws . . . [that] relate to any employee benefit plan." The savings clause then exempts from preemption any state law "which regulates insurance, banking, or securities." Finally, the deemer clause modifies the effects of the savings clause by nullifying any state attempt to regulate a self-insured employee benefit plan as if it were an insurance company.

ERISA's preemption language has become the bane of practitioners and the courts. The Supreme Court noted,

We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the “deemer clause,” a distinction Congress is aware of and one it has chosen not to alter.


Dissenting Circuit Judge Birch captured the feelings of many judges when he wrote,

I acknowledge the sage observation of the Fifth Circuit . . . that “any court forced to enter the ERISA preemption thicket sets out on a treacherous path.” Perhaps I have entered the thicket and lost the path that my brothers have found and followed. However, if nothing else is clear it is that the “path” is not; obviously the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket.

has issued no fewer than eighteen opinions dealing with ERISA preemption, prompting Justice Scalia to comment in 1997 that the Court's continued involvement with the issue suggests "that our prior decisions have not succeeded in bringing clarity to the law."

In a seminal decision illustrative of the Supreme Court's initial approach to ERISA preemption, the Court ruled in *Pilot Life Insurance Co. v. Dedeaux* that ERISA superseded a plan member's state law cause of action against a plan insurer for extra-contractual damages arising from the alleged

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bad faith denial of a disability benefits claim. Applying ERISA's express preemption language, the Pilot Life Court held that the plaintiff's state law cause of action "related to" an ERISA plan, and was not "saved" from preemption as a law that regulates insurance. Further, the Court suggested, in very expansive language, that ERISA's civil enforcement provisions contained in § 502 of the Act impliedly preempt

17. Claims for violation of an insurer's implied duty of good faith and fair dealing are commonly referred to as "bad faith" claims or claims for "tortious breach of contract." Additionally, many states have enacted statutory bad faith provisions that typically appear in the state insurance codes. Though state statutory provisions vary, I refer to these statutory claims, in general, as "unfair insurance practices" claims throughout this article. See infra text accompanying notes 107-68 and 188-216.

18. See ERISA's civil enforcement provision, 29 U.S.C. § 1132(a), which provides as follows:

(a) Persons empowered to bring a civil action. A civil action may be brought –
(1) by a participant or beneficiary –
(A) for the relief provided in subsection (c) of this section [concerning requests to the administrator for information], or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [§ 1109] [breach of fiduciary duty];
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan;
(4) by the secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105 (c) [§ 1025(c)] [information to be furnished to participants];
(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title;
(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) or under subsection (i) or (l);
(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [§ 1169];
(8) by the Secretary, or by an employer or other person referred to in section 101 (f) (1) [§ 1021], to enjoin any act or practice which violates subsection (f) of section 101 [§ 1021], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;
or
(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any por-
all of a plan participant’s state law remedies in any action asserting improper processing of a claim for benefits. Since ERISA’s express enforcement provisions do not permit recovery of extra-contractual damages, ERISA’s preemption of state law has often left plan participants without a remedy for a recognized wrong.

Adhering to the Court’s initial broad view of ERISA preemption, lower courts have applied ERISA preemption to nullify a spate of state laws adopted to reform the health care benefits industry and to eliminate plan members’ tort remedies in a variety of claims arising from their welfare benefit plans. A number of courts, however, have decried ERISA’s preemption of state law consumer protections as contrary to the statute’s remedial purposes and have called for reform. Though Congress and the President continue to wrangle over various legislative proposals to cure ERISA’s deregulatory effects in the context of the health care benefits industry, plan

29 U.S.C. § 1132(a). Paragraphs 7-9 were added to § 502 by amendment in 1993.

19. Pilot Life, 481 U.S. at 57 (1987). See implied preemption discussion infra Part III. Throughout this paper I refer to ERISA’s express preemption of state law as “§ 514” preemption and to ERISA’s implied preemption of state law as “§ 502” preemption.


22. See Cannon v. Group Health Serv. of Okla., Inc., 77 F.3d 1270 (10th Cir. 1996).


24. On October 7, 1999, the House of Representatives passed the Bipartisan
participants should be encouraged by a shift in the Court’s perspective on ERISA preemption. In 1995, the Court recognized that its broad “plain meaning” interpretation of ERISA’s ambiguous “relates to” preemption language failed to identify any limits to ERISA’s nullification of state law.  

Consensus Managed Care Improvement Act of 1999, H.R. 2723, 106th Cong. (1999), known commonly as the Norwood-Dingell bill, which would have amended ERISA to broadly exempt from ERISA preemption state law causes of action against any person “in connection with the provision of insurance, administrative services, or medical services by such person to or for a group health plan, or ... that arises out of the arrangement by such person for the provision of such insurance, administrative services, or medical services by other persons.” H.R. 2723 § 302(a). The Norwood-Dingle bill passed in the House with overwhelming bipartisan support, but failed to pass the Senate on four separate occasions. In the 109th Congress, Senators John McCain (R-AZ), Ted Kennedy (D-MA), and John Edwards (D-NC) introduced S. 283 as a compromise on the Norwood-Dingell bill. S. 283 provides for a bifurcated system of federal and state causes of action, but does allow state law claims to proceed in many circumstances. President Bush indicated that he would veto S. 283 due to the bill’s exemption from preemption for various state law remedies. S. 283 passed the Senate on June 29, 2001. Rep. Greg Ganske (R-IA) and Rep. John Dingell (D-MI) offered an identical bill in the House, H.R. 526. The bill was revised as the Ganske-Dingell-Norwood-Berry “Bipartisan Patient Protection Act”, H.R. 2563. A competing bill introduced by Rep. Ernie Fletcher (R-KY) and Rep. Collin Peterson (D-MN), H.R. 2315, would have preserved most of ERISA’s preemption of state law remedies in the field of health care benefit claims. Rep. Charles Norwood (R-GA) then offered an amendment to H.R. 2563 which significantly gutted the bill’s provisions that exempted state law causes of action from ERISA preemption. H.R. 2563, as amended passed the house on August 2, 2001. At this writing, a House and Senate conference committee is considering H.R. 2563 and S. 283. However, the events of September 11, 2001, have left scheduling of the Conference Committee meeting in limbo.

The various proposals for a Patient’s Bill of Rights that might amend ERISA to allow health care benefit plan participants to pursue state law remedies would only apply to ERISA health care benefit plans. ERISA accident, death, and disability benefit plans will not be affected by the various proposed amendments to ERISA, even if any of the currently proposed bills are enacted. Consequently, the Supreme Court’s continuing refinement of ERISA preemption analysis remains vital to consumers in many of their claims arising from their various employment-provided fringe benefit programs.


The breadth of § 514 (a)’s preemptive reach is apparent from that section’s language. 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 ... We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.

Id. at 96-97 (citations omitted).

Following that announcement, the Court has enforced a stricter construction of ERISA’s express preemption clause, more in conformance with historic federalist principles.\(^{27}\)

I have recently commented upon the Court’s fresh interpretive approach to ERISA’s preemption clause that emphasizes respect for state law in areas of traditional state regulation.\(^{28}\) This article now examines the Court’s continuing inclination to uphold state law in welfare plan cases under the Court’s newly clarified savings clause formula.\(^{29}\) This article’s review of ERISA’s savings clause will focus on state law remedies that allow consumers to recover extra-contractual damages when they can prove wrongful conduct by over-reaching insurers.\(^{30}\) Because the Court has suggested that the structure of ERISA’s civil enforcement provisions establishes that Congress intended ERISA to preempt state law remedies, this article will also explore the subtleties of ERISA’s implied preemption of state law under ERISA § 502.

Part I of the article provides some history of ERISA’s express preemption language to set the context for the discussion of ERISA’s savings clause. Part II then examines, in depth, the Court’s treatment of the savings clause exception to ERISA preemption, and the emerging trend in the lower courts to uphold state law bad faith and unfair insurance practices claims in the face of express ERISA preemption challenges. In Part III, the article analyzes ERISA’s implied preemption of state law remedies. Finally, in Part IV, the article discusses the issue of federal court removal jurisdiction under the “complete preemption” doctrine, which often com-

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\(^{27}\) One might be excused for wondering, at first blush, whether the words of limitation (“insofar as they . . . relate”) do much limiting. If “relate to” were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for “really, universally, relations stop nowhere,” . . . .

\(^{28}\) Id. at 655 (citation omitted).


\(^{28}\) Donald T. Bogan, Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?, 74 TUL. L. REV. 951 (2000).


\(^{30}\) Extra-contractual damages may include compensatory damages for wrongful death, loss of consortium, and infliction of emotional distress, or punitive damages and triple damages for particularly aggravated misconduct.
plicates bad faith and unfair insurance practices claims arising from ERISA welfare benefit plans. The article concludes that most bad faith and unfair insurance practices claims against plan insurers should survive ERISA preemption for the following reasons: 1) unlike the Mississippi bad faith law at issue in *Pilot Life*, most state bad faith and unfair insurance practices laws are specifically aimed at the insurance industry and therefore do regulate insurance within ERISA's savings clause exception to preemption; and 2) ERISA's express exception to preemption for state laws that regulate insurance, including state remedies laws, trumps implied preemption under ERISA § 502, as a matter of pure statutory construction.

I. A BRIEF HISTORY OF ERISA'S EXPRESS PREEMPTION LANGUAGE

ERISA's final enactment followed more than a decade of investigation into the private pension industry. In the statute, Congress responded to widespread calls to reform the financial practices of pension plan administrators and to provide greater access to retirement benefits for working Americans.

Before ERISA, the Welfare and Pension Plans Disclosure Act ("WPPDA") provided minimal federal regulation of pri-

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32. See THE FIRST DECADE, supra note 1; Bogan, supra note 28, at 964-77. See also the Report of the House Ways and Means Committee, which states, This legislation is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income. In broad outline, the objective is to increase the number of individuals participating in employer-financed plans; to make sure to the greatest extent possible that those who do participate in such plans actually receive benefits and do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the pension plan to accumulate and retain sufficient funds to meet its obligations; and to make the tax laws relating to qualified retirement plans fairer by providing greater equality of treatment under such plans for the different taxpayer groups concerned.


vate retirement and other fringe benefit plans. The WPPDA imposed reporting and disclosure requirements upon fringe benefit programs so that consumers could obtain information concerning the financial practices of plan administrators, but it did not initiate substantive controls over the administration of benefit plans, or create any kind of enforcement mechanism to help remedy plan abuses. Specifically, the WPPDA did not regulate the funding of retirement plans nor the administrative practices of plan fiduciaries, and it did not address concerns that unreasonable vesting requirements were denying workers their anticipated retirement benefits. Consistent with its limited regulatory function, the WPPDA included express language preserving state authority to supplement its minimal regulation of the employee benefits industry.

Following enactment of the WPPDA, retirees continued to suffer the loss of anticipated benefits due to corporate and plan financial mismanagement and to extreme participation requirements. In 1970, Congress appointed the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (the "Subcommittee") to investigate the private pension industry and to identify the causes of pension plan failures and consumer exploitation within the industry.

34. See Turza & Halloway, supra note 2, at 172-74. A few states also directly regulated the private pension industry. See id. at 169-74.

35. See The First Decade, supra note 1, at 6 ("The theory of the law was that full disclosure to participants and beneficiaries of the provisions of their plan and its financial operations would deter abuse ('sunlight being the best disinfectant') and would enable them to police the plans themselves without requiring greater Government regulations or interference.").


39. Senate Resolution 360 of the 91st Congress authorized the initial study by the Subcommittee. See S. Rep. No. 92-634, at 1 (1972). See also 119 Cong. Rec. 30,003 (1973), reprinted in 2 Legislative History, supra note 1, at 1598 (statement of Sen. Williams) ("This 3-year study was conducted by the Sub-
Subcommittee concluded that the WPPDA's failure to cure abuses in the private pension industry resulted from the statute's lack of substantive regulatory controls. Rather than proposing piecemeal amendments to strengthen the WPPDA, the Subcommittee advocated a new "comprehensive and reticulated statute" that would contain extensive, substantive regulation of the private pension industry. Led by Senator Jacob Javits of New York, Congress responded to the recommendations of the Subcommittee with the passage of ERISA in 1974.

ERISA comprehensively regulates the private pension industry, providing detailed vesting and funding requirements for pension plans and a program of pension plan termination insurance. In addition, the statute imposes re-
porting and disclosure requirements on both pension and non-
pension employee benefit plans, and establishes fiduciary
responsibility standards for all plan administrators. As
might be expected with such an ample piece of legislation af-
fecting the rights and obligations of both big business and la-
bor, ERISA also reflects the reality of political compromise.
One significant provision in the statute that Congress in-
cluded—and then altered—in an effort to balance competing
political interests was ERISA's preemption language.

As Congress approached the task of reforming the private
pension industry, it faced a significant dilemma. Private pen-
sion and retirement programs, offered as fringe benefits by
employers to attract and maintain a competitive work force,
were not mandated by any federal or state law. Congress
wanted to encourage employers to continue to offer such vol-
untary retirement programs, and simultaneously contem-
plated placing administrative and financial burdens on such
plans in order to insure that anticipated benefits would be
available for covered workers upon retirement. To lessen

does not comprehensively regulate the field of non-pension employee benefits. See Bogan, supra note 28, at 973-77.

48. See Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 745 n.23 (1985). Michael S. Gordon, who was Senator Javits' appointee as minority counsel to the Senate Labor and Public Welfare Committee from 1970-1975, has written several pieces recalling the events surrounding the Conference Committee's last minute re-write of ERISA's preemption provisions. Mr. Gordon explains in detail, which does not appear in ERISA's legislative history, the political pressures facing the Conference Committee in attempting to produce a substitute bill that would pass in both houses, and the compromise that resulted in the changes to the preemption language. See Michael S. Gordon, The History of ERISA's Preemption Provision and Its Bearing on the Current Debate Over Health Systems Reforms, Remarks at the National Health Policy Forum's Conference on "The Role of Federal Standards in Health Systems Reform: How Much Leash Should ERISA Give the States?" (November 18, 1992) (describing three problem areas that contributed to the alteration of ERISA's preemption language); Michael S. Gordon, Health Reform and ERISA Preemption After the Travelers Decision—Defining the Role of the States, Remarks at the George Washington University Health Policy Forum's Conference on "Health Systems Financing After the Travelers Case" (July 21, 1995) (referring to the Conference Committee action expanding ERISA's preemption language as "a Congressional act of political expediency"). See also Bogan, supra note 28, at 983-85.
ERISA’s regulatory impediments, Congress drafted the statute with the intent that ERISA would provide a single, comprehensive set of rules to govern the private pension industry, thereby relieving large employers from the headache of complying with multiple and divergent state and local regulations in the administration of their retirement plans.51

Consistent with this intent, both House bill H.R. 2 and Senate bill S. 4, the bills that formed the basis for ERISA as finally enacted, included express preemption language reserving exclusive federal authority over the subjects regulated by the statute.52 Consequently, as first approved in both the House and the Senate, ERISA would have superseded state laws related to reporting and disclosure requirements and fiduciary responsibility standards for all ERISA plans, and state laws affecting vesting and funding requirements for pension plans.53 However, neither the House-passed version of ERISA's preemption language, nor the Senate-passed version, as originally drafted, would have had a significant impact on welfare plan participants' state law claims because the subjects comprehensively regulated by ERISA do not significantly impact non-pension employee benefit plan partici-

50, and in 1 LEGISLATIVE HISTORY, supra note 1, at 597-99.

51. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (“Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.”). Congress's overriding intent in enacting ERISA is clear from ERISA's preamble, 29 U.S.C. § 1001(a) (1994), and the statute's legislative history. The purpose of ERISA is to promote the private pension industry and to protect employee rights to their private pension benefits. An ancillary intent was to make the world of pension regulation uniform, in order to encourage employers to continue to provide such benefits. Congress provided uniform regulation of the pension industry for fear that if the industry was over-regulated, it might work to hurt consumers by causing employers to abandon the benefit.

52. See H.R. 2, 93d Cong. § 114 (1973), reprinted in 120 CONG. REC. 8860 (1974), and in 1 LEGISLATIVE HISTORY, supra note 1, at 50-51; S. 4, 93d Cong. § 609 (1973), reprinted in 120 CONG. REC. 8860 (1974), and in 1 LEGISLATIVE HISTORY, supra note 1, at 4272. See also Shaw v. Delta Air Lines, 463 U.S. 85, 98 (1983).

Unfortunately, ERISA's Conference Committee, influenced by various lobbying interests, significantly expanded ERISA's preemption language by enlarging the field of laws superseded by ERISA from state laws governing the specific subjects regulated by the statute to "any and all State laws that . . . relate to" any ERISA plan, regardless of whether ERISA itself regulated the subject area. The Conference Committee action occurred very shortly before President Ford signed ERISA into law, and set the stage for what Justice Stevens has called an "avalanche" of litigation focused on defining the boundaries of ERISA's exclusive field of regulation.

When the Supreme Court first explored the interaction between ERISA's preemption clause and savings clause in Metropolitan Life Insurance Co. v. Massachusetts, the Court found no guidance in ERISA's legislative history concerning the intended scope of the savings clause. The Court commented, "There is no discussion in ERISA's legislative history of the relationship between the general pre-emption clause and the savings clause, and indeed very little discussion of the savings clause at all." Prior to the Conference Committee action, the savings clause appeared as a non-controversial appendage to ERISA's preemption language, apparently included to assure that state insurance, banking, and securities laws would continue to govern pension plan investment transactions. However, as courts applied the expanded pre-

54. See Bogan, supra note 28, at 964-77.
55. See id. at 977-85.
56. De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 808 n.1 (1997). Ironically, one of the reasons Senator Javits listed for expanding ERISA's preemption language was to reduce litigation. See 120 CONG. REC. 29,942 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 1, at 4770-71 ("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.").
58. Id. at 745.
emption clause to create a regulatory vacuum, nullifying state laws even where ERISA did not substitute federal safeguards, the role of the savings clause in preserving state law consumer protections unexpectedly grew in prominence.  

II. THE "SAVINGS CLAUSE" EXCEPTION TO ERISA PREEMPTION

A. The Supreme Court Identifies a "Savings Clause" Test

Early in the history of ERISA preemption litigation, the Supreme Court observed that ERISA's express language creates a difficult tension between the preemption clause and the savings clause. In Metropolitan Life Insurance Co. v. Massachusetts, Justice Blackmun wrote,

The two pre-emption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly pre-empts state law, the savings 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.

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60. See Metro. Life, 471 U.S. at 745 ("[T]here is no indication in the legislative history that Congress was aware of the prominence given the savings clause in light of the rewritten preemption clause, or was aware that the savings clause was in conflict with the general pre-emption provision."). In a footnote reference, the Metropolitan Life Court explained further,

The Conference Committee that was convened to work out differences between the Senate and House versions of ERISA broadened the general pre-emption provision from one that pre-empted state laws only insofar as they regulated the same areas explicitly regulated by ERISA, to one that pre-empted all state laws unless otherwise saved. The change gave the insurance saving clause a much more significant role, as a provision that saved an entire body of law from the sweeping general pre-emption clause. There were no comments on the floor of either Chamber specifically concerning the insurance saving clause, and hardly any concerning the exceptions to the pre-emption clause in general.

Id. at 745 n.23.

61. 471 U.S. 724.

62. Id. at 739.
“Fully aware of this statutory complexity,” the Court proceeded to identify guidelines to mark the boundary between state and federal authority under the savings clause exception to ERISA preemption.63

In Metropolitan Life, the Massachusetts Attorney General sued various insurers in state court to enforce a state statute requiring health care plans covering Massachusetts residents to provide a minimum level of mental health benefits.64 Metropolitan Life Insurance Company, and other group insurance providers who sold health insurance policies to employee benefit plans, absent the mental health coverage, maintained that ERISA superseded the mandated benefits law because the state law “related to” ERISA plans under ERISA § 514(a).65 Massachusetts argued, in turn, that the mental health law was exempt from ERISA preemption because it was a law that “regulates insurance” within the meaning of ERISA's savings clause (§ 514(b)(2)(A)).66

Providing definition to the phrase “regulates insurance,” the Metropolitan Life Court crafted a savings clause test that included both a common-sense component67 and a specific list of factors borrowed from cases interpreting the “business of insurance” language contained in the McCarran-Ferguson Act.68 The three McCarran-Ferguson Act factors identified by

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63. Id. at 740.
64. See id. at 734.
65. See id. at 734-35.
66. The state law did not distinguish between insured and self-funded health care plans; however, the Massachusetts Attorney General never attempted to enforce the mandated benefits law against self-funded plans, conceding that that self-funded plans were not subject to the savings clause exception to ERISA preemption due to the application of ERISA's deemer clause. Id. at 735 n.14.
67. Id. at 740.
68. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945). The McCarran-Ferguson Act provides as follows:

§ 1011. Declaration of policy
The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States
the Court as relevant to the definition of state laws that regulate the business of insurance are 1) whether the practice affects the spreading of policyholder risk, 2) whether the practice is an integral part of the policy relationship between the insurer and the insured, and 3) whether the state law specifically targets the insurance industry.\(^6\)

In *Metropolitan Life*, the Supreme Court held that the Massachusetts mental health mandated benefits law did regulate insurance, both as a common-sense matter and under each of the three McCarran-Ferguson Act factors.\(^7\) However, because the Massachusetts statute met all of the relevant considerations, it was not necessary for the *Metropolitan Life* Court to elaborate on whether the common-sense test carried more or less weight than the McCarran-Ferguson Act criteria, or whether each of the McCarran-Ferguson Act factors must be satisfied to define a state law as one that regulates insurance.\(^8\)

The three factors test cited by the *Metropolitan Life* Court arose in a pair of cases exploring the extent to which insurance companies might be exempt from antitrust liability under the McCarran-Ferguson Act.\(^9\) Given the context of the


\(^7\) Metropolitan Life, 471 U.S. at 743. The Court found that the mandated benefits law was intended to effectuate the Massachusetts legislative judgment that the risk of mental-health care should be shared. Further, the law directly regulated an integral part of the insurer-insured relationship by limiting the type of insurance that an insurer may sell to the policyholder, and by mandating the content of the insurance policy. Finally, by definition, the statute only applied to the insurance industry. *Id.*

\(^8\) Id.

\(^9\) 15 U.S.C. § 1012 (b); see Union Labor, 458 U.S. at 129 (Insurance com-
antitrust cases, the Supreme Court noted that the statutory phrase "regulates the business of insurance" must be construed narrowly when an insurance company is relying on the undefined phrase as a basis to avoid the proscriptions of a consumer protection statute. Though the Court in Metropolitan Life employed the three factor criteria to help define a law that "regulates insurance" under ERISA's savings clause, it expressly rejected an industry argument that ERISA's savings clause should be construed narrowly. In ERISA, where the savings clause presents an exception to preemption, the Metropolitan Life Court held that the phrase "regulates insurance" should be construed broadly both to promote the presumption in favor of the validity of state laws that regulate areas of traditional state interests, and to preserve state consumer protection laws.
B. Pilot Life Limits the Savings Clause and Adds Implied Preemption to the ERISA Mix

The Supreme Court's next application of the savings clause arose when an insured ERISA welfare benefit plan denied a plan participant's claim for disability benefits. The plaintiff in Pilot Life Insurance Company v. Dedeaux filed a diversity jurisdiction action in federal court seeking punitive damages from the plan insurer under Mississippi common law due to the insurer's alleged bad faith in processing Dedeaux's claim. Pilot Life Insurance Company asserted that ERISA superseded Dedeaux's bad faith cause of action because the state law claim "related to" an employee benefit plan under ERISA's express preemption clause. Dedeaux invoked ERISA's savings clause to avoid the insurer's pre-emption argument.

Expanding on the Metropolitan Life savings clause discussion, the Supreme Court in Pilot Life determined that Mississippi's common law remedy for tortious breach of contract was not a law that regulates insurance under a common-sense view. The Court explained that a law which "regulates" a particular industry "must be specifically directed toward that industry." Since the Mississippi bad

der to enlarge their pre-emptive scope."). Compare with the dissent in the Massachusetts Supreme Court opinion suggesting that the savings clause should be construed narrowly to promote uniformity. Attorney Gen. v. Travelers Ins. Co., 463 N.E.2d 548, 552 (Mass. 1984) (Wilkins, J., dissenting).
77. Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311, 1313 (5th Cir. 1985). In addition to his bad faith cause of action, Dedeaux also asserted a state law breach of contract claim. Apparently conceding that the breach of contract claim did relate to an ERISA plan and was not saved from preemption, Dedeaux only pursued his bad faith claim in the Supreme Court. Dedeaux sued only the plan insurer and presented only state law claims in his complaint. See Pilot Life, 481 U.S. at 43-44.
78. See Dedeaux, 770 F.2d at 1313.
79. Id. at 1314.
80. Pilot Life, 481 U.S. at 50. The insurance company prevailed on summary judgment motion at the district court; however, Metropolitan Life had not yet been decided at the time the district court ruled. See Dedeaux, 770 F.2d at 1314-15. The Court of Appeals for the Fifth Circuit reversed, relying on the savings clause test subsequently announced in Metropolitan Life. Id. at 1314.
81. Pilot Life, 481 U.S. at 50 (“A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry.”).
faith remedies law applied to all Mississippi contracts, not just insurance contracts,\textsuperscript{82} it did not regulate insurance as a matter of common-sense.\textsuperscript{83} Applying the McCarran-Ferguson Act factors, the Court then determined that Mississippi's bad faith law did not affect the spreading of policyholder risk,\textsuperscript{84} and as discussed under the common sense test, it was not limited in its application under Mississippi precedents to the insurance industry.\textsuperscript{85} While the Court acknowledged that the remedies law did impact the insurer-insured relationship to some degree,\textsuperscript{86} the Court stated that meeting one prong of the

\begin{itemize}
\item \textbf{82.} Id. ("Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law.").
\item \textbf{84.} Cf. 	extit{Metro. Life}, 471 U.S. at 743-44. The Court explained, Congress was concerned [in the McCarran-Ferguson Act] with the types of state regulation that centers around the contract of insurance . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, its interpretation, and enforcement—these were the core of the "business of insurance." [T]he focus [of the statutory term] was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." 
\item \textbf{85.} Id. (quoting SEC v. Nat'l Securities, Inc., 393 U.S. 453, 460 (1969)).
\item \textbf{86.} The 	extit{Pilot Life} Court acknowledged that the bad faith law affected the insurer-insured relationship, but termed the effect "attenuated at best." 	extit{Pilot Life}, 481 U.S. at 50-51. The Court wrote,
\end{itemize}
McCarran-Ferguson Act test did not save Mississippi’s bad faith law from ERISA preemption.87

As an important aside, the *Pilot Life* Court found support for its expansive view of ERISA preemption in the legislative history and structure of ERISA § 502, the civil enforcement provisions.88 ERISA § 502 details specific remedies that are available to identified persons or entities under the statute.89 Section 502 does not contain any express preemption language, but the Court agreed with the United States Solicitor General’s suggestion, appearing as a friend of the court in *Pilot Life*, that ERISA’s carefully drawn enforcement provisions indicated that Congress intended § 502 to provide “the exclusive vehicle for actions by ERISA-plan participants . . . asserting improper processing of a claim for benefits.”90

The Supreme Court’s holding in *Pilot Life* was fairly narrow. The Court found that Mississippi’s bad faith remedies between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages. The state common law of bad faith is therefore no more “integral” to the insurer-insured relationship than any State’s general contract law is integral to a contract made in that State. Id. at 51.

87. Id. at 51.
88. Id. at 52. The Court stated,
In sum, the detailed provisions of § 502 (a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. at 54.
90. *Pilot Life*, 481 U.S. at 52; see Brief of Amicus Curie the United States at 18-19, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, p. 4, at 18-19 (1987) (No. 85-1043) (“[W]e think that Congress intended ERISA’s provisions relating to enforcement of participants’ rights under benefit plans to be exclusive.”). See also *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (“We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.”). The Court continued, “The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.” Id. (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981)).
law, which was not directed at the insurance industry, was not saved from ERISA preemption as a law that regulates insurance.\textsuperscript{91} The language in the opinion and the rationale for the Court’s holding, however, were much broader. *Pilot Life* modified the preemption analysis announced in *Metropolitan Life Insurance Co. v. Massachusetts* in two interrelated and significant ways. First, the *Pilot Life* Court distinguished *Metropolitan Life* based upon the nature of the state laws at issue in the two cases.\textsuperscript{92} Because the state law involved in *Pilot Life* provided an alternative remedy to those outlined in ERISA, the Court felt that the bad faith law conflicted with ERISA’s civil enforcement provisions and suggested, therefore, that ERISA impliedly preempted the remedies law.\textsuperscript{93} Second, the *Pilot Life* Court construed the savings clause narrowly, despite the *Metropolitan Life* precedent that clearly rejected such a narrow construction, because the Court inferred a broad overall congressional intent to preempt from the structure and legislative history of § 502.\textsuperscript{94}

The *Pilot Life* Court cited comments from ERISA’s spon-

\textsuperscript{91} See UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 376 (1998). “[*Pilot Life*] concerned a Mississippi common law creating a cause of action for bad faith breach of contract, [a] law not specifically directed to the insurance industry and therefore not saved from ERISA preemption.” Id. at 376 n.7.

\textsuperscript{92} See *Pilot Life*, 481 U.S. at 56-57.

\textsuperscript{93} See id. at 57.

\textsuperscript{94} The *Pilot Life* Court stated,

[T]he Court had no occasion to consider in *Metropolitan Life* the question raised in the present case: whether Congress might clearly express, through the structure and legislative history of a particular substantive provision of ERISA, an intention that the federal remedy provided by that provision displace state causes of action. Our resolution of this different question does not conflict with the Court’s earlier general observations in *Metropolitan Life*.

*Id.* Despite the *Pilot Life* Court’s suggestion that it looked to the entire statute in order to discern Congress’s preemptive intentions, the Court deduced a broad intent to preempt solely by looking to ERISA § 502. Inferring a broad intention to preempt from ERISA’s civil enforcement provisions, the Court used that inference to justify a narrow reading of ERISA’s savings clause:

Considering the common-sense understanding of the savings clause, the McCarran-Ferguson Act factors defining the business of insurance, and, most importantly, the clear expression of congressional intent that ERISA’s civil enforcement scheme be exclusive, we conclude that Dedeaux’s state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by § 514 (b) (2) (A), and therefore is pre-empted by § 514 (a).

*Id.* See also Bogan, supra note 28, at 994-95.
sors and specific passages in the Conference Committee Report in support of its narrow reading of ERISA's savings clause. The legislative history indicated that Congress modeled ERISA's civil enforcement provisions on § 301 of the Labor Management Relations Act (LMRA). Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce... may be brought in any district court of the United States having jurisdiction of the parties..." Construing § 301 in a series of cases culminating in Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists, the Supreme Court had previously established that suits "alleging a violation of a labor contract must be brought under § 301 and be resolved by reference to federal law." Consequently, in Avco, the Supreme Court de-

95. For example, “[t]he uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.” Pilot Life, 481 U.S. at 56 (quoting H.R. REP. No. 93-533, at 12 (1973), reprinted in 2 LEGISLATIVE HISTORY, supra note 1, at 2359). “[S]uits involving claims for benefits ‘will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act.” Pilot Life, 481 U.S. at 56 (quoting 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams). “It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.” Pilot Life, 481 U.S. at 56 (quoting 120 CONG. REC. 22,942 (1974) (statement of Sen. Javits).

96. The Court adopted the following:
Under the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility... [w]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947. Pilot Life, 481 U.S. at 55 (quoting H. R. CONG. REP. No. 93-1280, at 327 (1974), reprinted in 1974 U.S.C.C.A.N. 5038 and in 3 LEGISLATIVE HISTORY, supra note 1, at 4277-655).

98. 29 U.S.C. § 185(a).
cided that any "action arising under § 301 is controlled by federal substantive law even though it is brought in state court" and may be removed to federal court under 28 U.S.C § 1441 (b). The Pilot Life Court observed that Congress was well aware of the very broad preemptive effect granted by the LMRA under § 301, and that the references in ERISA's legislative history to that provision demonstrated Congress's intent to emulate that broad preemption of state law remedies when it drafted ERISA § 502. 103

Given the Supreme Court's tone in Pilot Life and the Court's generally expansive view toward ERISA preemption exhibited in the Court's early ERISA cases, it is not surprising that the majority of lower court decisions following Pilot Life concluded that ERISA preempts all manner of state common law and statutory bad faith claims. With the Su-

102. Under the Avco or "complete preemption" doctrine, which is a corollary to the well-pleaded complaint rule, courts recast state law causes of action to state a federal claim for relief. See discussion accompanying infra Part IV.
103. The similarities between ERISA § 502 and § 301 of the LMRA for purposes of preemption analysis are not so pure as Pilot Life suggests. The United States Solicitor General, who initiated the view seized upon by the Pilot Life Court that Congress intended § 502 to provide the exclusive remedy for claims within the scope of § 502, later clarified this view in a case involving a state law that regulated insurance under ERISA's savings clause, emphasizing the fact that unlike § 502, LMRA § 301 is not limited by any express savings clause. See Brief of Amicus Curie the United States at 377, UNUM Life Ins. Co. v. Ward, 526 U.S. 358 (1999) (No. 97-1868). See UNUM Life, 526 U.S. at 377 n.7. The Avco doctrine applies a frustration brand of conflict preemption, not field preemption. If ERISA § 502 likewise was not intended to occupy the field of all remedies under ERISA, but merely to preempt state laws that conflict with the statutes remedial purpose, it is arguable that Congress did not intend to preempt state law consumer protection remedies that complement and supplement ERISA's civil enforcement scheme. See Humana Inc. v. Forsyth, 525 U.S. 299 (1999) (holding that McCarran-Ferguson Act does not preclude enforcement of federal RICO claim because RICO remedies complement, rather than conflict with, state law); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (holding that state law remedies supplement federal remedies under the Atomic Energy Act).
105. Prior to Pilot Life the lower federal courts were split on the extent to which ERISA's saving clause preempted plan participants' bad faith claims against ERISA plan insurers. For example, in Eversole v. Metro. Life Ins. Co., 500 F. Supp. 1162 (C.D. Cal. 1980), a federal district court in California found that a plaintiff's state law bad faith claim was saved from preemption because the applicable state remedies law regulated insurance. In Hoeflicker v. Cent. States, Southeast & Southwest Areas Health & Welfare Fund, 644 F. Supp. 195 (W.D. Mo. 1986), a federal district court held that plaintiff's claim under Mis-
preme Court’s change of emphasis in ERISA preemption since New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., however, it is worthwhile to re-examine some of these bad faith and unfair insurance practices cases to determine whether the rationale supporting preemption can still be defended.

C. Bad Faith and Unfair Insurance Practices Claims Following Pilot Life

As illustrated by the Pilot Life opinion, the historical underpinnings of state law bad faith claims can significantly impact the savings clause analysis and direct whether such a state law remedy will be preempted by ERISA as a law that regulates insurance. Several different types of bad faith and unfair insurance practices claims and remedies exist in the various states.107 The state bad faith law at issue in Pilot Life was unusual in that the common law remedy, which applied to the insurance industry, could also attach to any breach of contract claim under Mississippi law.108 The Pilot Life Court relied upon the multidisciplinary nature of the Mississippi remedy to hold that the law did not regulate insurance under a common-sense view because it was not aimed specifically at the insurance industry.109

In most states, the common law remedy of bad faith breach of contract specifically targets the insurance industry. Additionally, many states have enacted numerous types of unfair insurance practices statutes that apply exclusively to insurance companies. These statutes, typically contained within the insurance law chapters of the various

souri’s unfair insurance practices statute was a law that both related to ERISA, and regulated insurance, but was still preempted because the plan defendant was self-insured and could not be deemed to be an insurance company. Id. at 200.

108. See id. § 1:02, at 1-4 (“For the most part . . . the attempt to extend the bad faith tort beyond the insurance realm has fizzled.”); id. §§ 11:01-11:07.
111. See ASHLEY, supra note 107, § 9:02, at 9-3 to 9-5 & n.22.
state codes,\textsuperscript{112} often provide consumers a private right of action against an insurance company and allow a successful plaintiff to recover extra-contractual damages when an insurer's behavior toward the insured is particularly egregious.\textsuperscript{113} Many of the state unfair insurance practices statutes, however, may only be enforced by the state Commissioner of Insurance or Attorney General.\textsuperscript{114} Finally, some states allow private parties to enforce their unfair insurance practices statute, either expressly or impliedly, through the remedies provided in the state's separate Unfair and Deceptive Trade Practices statute.\textsuperscript{115} Depending upon the peculiarities of each of the various state law bad faith and unfair insurance practices remedies, the \textit{Pilot Life} savings clause analysis may or may not directly govern whether the state law "regulates insurance" within the meaning of ERISA's savings clause.

In \textit{Anschultz v. Connecticut General Life Insurance Co.},\textsuperscript{116} the Eleventh Circuit Court of Appeals considered whether ERISA preempted a state law claim, arising from an insured ERISA disability benefits plan, under Florida's unfair insurance practices statute.\textsuperscript{117} Unlike \textit{Pilot Life}, the statute at issue in \textit{Anschultz} applied only to the insurance industry.\textsuperscript{118}

\textsuperscript{112} See \textit{Anschultz v. Conn. Gen. Life Ins. Co.}, 850 F.2d 1467, 1468-69 (11th Cir. 1988); \textit{Hobbs v. Blue Cross & Blue Shield of Ala.}, 100 F. Supp. 2d 1299, 1307 (M.D. Ala. 2000) (argument that state law regulates insurance merely because it is codified in the state insurance code is "overly simplistic").

\textsuperscript{113} See \textit{ASHLEY, supra note 107, § 9:02, at 9-3 to 9-10 & n.38.}

\textsuperscript{114} See id. at 9-16 & n.39. See, e.g., \textit{Lewis}, 78 F. Supp. 2d at 1205-06 (citing \textit{Gianfillippo v. Northland Cas. Co.}, 861 P.2d 308, 310 (Okla. 1993) (explaining that Oklahoma Unfair Settlement Practices Act, OKLA. STAT. tit. 36, § 1250.1 et seq. (1999), does not provide a private right of action; however, the statute is enforceable by the Commissioner of Insurance, who may issue cease and desist orders to insurers, suspend or revoke an insurer's certificate of authority, and subject an insurer to civil penalties).


\textsuperscript{116} 850 F.2d 1467 (11th Cir. 1988).

\textsuperscript{117} See \textit{FLA. STAT. ANN. ch. 624.155} (2001) (The statute provides a civil remedy, including a punitive damages remedy in certain specified circumstances, for an insurer's bad faith failure to pay legitimate claims, or failure to promptly settle claims after it becomes reasonably clear that the claims are payable, or for other common unfair claims settlement practices).

\textsuperscript{118} \textit{Anschultz}, 850 F.2d at 1468-69.
The court held that even though the Florida statute was directed at the insurance industry, thereby satisfying the common-sense test and one of the McCarran-Ferguson Act factors, the unfair insurance practices law did not regulate insurance under the *Pilot Life* formula because the Florida law failed to meet the other two prongs of McCarran-Ferguson Act test.  

Addressing the three factors test, the Eleventh Circuit observed that the Florida unfair insurance practices law did not spread policyholder risk. Further, the *Anschultz* Court found that the Florida law did not affect an integral part of the insurer-insured policy relationship because it did not mandate specific coverages or define any terms of the plan. Interestingly, *Anschultz* relied upon language in the *Pilot Life* opinion to conclude that a state law, which provided tort remedies for the egregious breach of an insurance contract, did not affect an integral part of the policy relationship between the insurer and the insured. The *Pilot Life* Court declared that Mississippi's bad faith law "may be said to concern" the insurer-insured policy relationship, and assumed for the purposes of the savings clause analysis that Mississippi's common law bad faith claim did affect an integral part of that relationship. However, the *Anschultz* Court was correct in reading the *Pilot Life* opinion as not fully supporting

119. The court stated, [W]e acknowledge... that a "common-sense" understanding of the savings clause indicates that Section 624.155 arguably regulates insurance: the statute is specifically directed toward the insurance industry since the statute is codified in the Chapter of the Florida Statutes entitled Insurance Code & Administration and General Provisions and provides civil remedies against an insurer when a claimant is damaged by various actions of the insurer. . . .

120. *Anschultz*, 850 F.2d at 1469.

121. *Id.* at 1468-69 (noting that statute merely provides a remedy for any breach of the contract terms).

122. *Id.*


124. *Id.* at 51 ("[T]he Mississippi common law of bad faith at most meets one of the three criteria used to identify the 'business of insurance' under the McCarran-Ferguson Act . . . ").
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the integral policy relationship portion of the McCarran-Ferguson Act test. In Pilot Life the Supreme Court also stated that

whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstance allow the policyholder to obtain punitive damages. The state common law of bad faith is therefore no more "integral" to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State. 125

Since the Pilot Life Court assumed that Mississippi's bad faith law did impact an integral part of the insurer-insured policy relationship, it would be wrong to place too much weight on Pilot Life's less enthusiastic dicta. State bad faith laws, and particularly state unfair insurance practices statutes, certainly do more than provide a punitive damages remedy. Bad faith laws establish and define a standard of care owed by the insurer to the insured that attaches to every insurance policy. Typically, unfair insurance practices statutes list detailed procedures incumbent upon insurers to follow in the settlement of claims, 126 including such things as a requirement for timely investigation and settlement of claims. 127 In UNUM Life Insurance Co. v. Ward, 128 the Supreme Court

125. Pilot Life, 481 U.S. at 51.

[Mississippi's] common law of bad faith does not define terms of the relationship between the insurer and the insured; it declares only that, whatever the terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstance allow the policyholder to obtain punitive damages. See Anschultz, 850 F.2d at 1468 (quoting Pilot Life, 481 U.S. at 51). See Smith v. Jefferson Pilot Life Ins. Co., 14 F.3d 562, 570 (11th Cir. 1994) ("[T]he contours of the second [McCarran-Ferguson Act] criteria [substantially affecting an integral part of the insurer-insured relationship] are somewhat vague....").


127. See, e.g., OKLA. STAT. tit 36. § 1250.5 (3) (1999) ("Failing to adopt and implement reasonable standard for prompt investigation of claims arising under insurance policies or insurance contracts."); § 1250.5 (4) ("Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear."). See also ASHLEY, supra note 107, § 9:06, at 9-23 to 9-27 (identifying specific prohibitions contained within the model Uniform Unfair Claims Settlements Practices Act, as amended, originally drafted by the National Association of Insurance Commissioners, and adopted in some form by the vast majority of states).

held that ERISA saved from preemption California’s common law rule requiring an insurance company to establish prejudice before the insurer denied a late-filed claim. The Court in UNUM found that the notice-prejudice rule served as an integral part of the policy relationship between the insurer and the insured because it effectively created a mandatory contract term. Similarly, state unfair insurance practices statutes, incorporated into every insurance contract, effectively create mandatory contract terms that require insurers to timely investigate and settle claims, to notify insured employees of the benefits and coverage contained in insurance policies that are pertinent to a claim, and to refrain from attempts to obtain fraudulent releases of claims from their insured’s.

While the precedential value of the Pilot Life opinion regarding the integral policy relationship leg of the McCarran-Ferguson test is vague, several Supreme Court opinions specifically addressing the extent of federal preemption under the McCarran-Ferguson Act “business of insurance” language indicate that laws regulating insurance company claims practices and the enforcement of insurance contracts do impact an integral part of the policy relationship between the insurer and the insured. In SEC v. National Securities, Inc., quoted in Metropolitan Life, the Court described the type of practices Congress intended to reserve to the states under the McCarran-Ferguson Act. The National Securities Court found that the “business of insurance” covered practices that focused on the “relationship between insurer and insured, the type of policy which could be issued, its reliability, and enforcement.” Likewise, in United States Department of the

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129. Id. at 375.
130. Id. at 374.
131. See Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 967 (7th Cir. 2000), cert. granted, 121 S. Ct. 2589 (June 29, 2001). See 2 LEE. R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 19:1, at 19-2 to 19-4 (3d ed. 1995) (“Existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable.”).
135. Nat'l Sec., 393 U.S. at 457.
136. See id. at 460 (emphasis added). The Court explained,
Congress was concerned [in the McCarran-Ferguson Act] with the type
Treasury v. Fabe, the Supreme Court held that an Ohio law regulating the actual performance of an insurance contract in a bankruptcy setting was central to the policy relationship between the insurer and the insured because the law impacted the payment of policyholder claims. Additionally, in Metropolitan Life Insurance Co. v. Massachusetts, the Supreme Court specifically described laws regulating claims practices as laws that regulate the transacting of the business of insurance.

Anschultz and its genre have extended the preemption rationale of Pilot Life beyond the plain meaning of the savings clause. It defies common sense, and plain meaning, to suggest that laws like Florida’s unfair insurance practices statute do not impact an integral part of the policy relationship between the insurer and the insured. In a savings clause case involving California’s common law rule that an insurer must show actual prejudice before denying a late-filed claim, of state regulation that centers around the contract of insurance. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the “business of insurance.” Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the “business of insurance.”

Id. 137. 508 U.S. 491, 503 (1993) (“There can be no doubt that the actual performance of an insurance contract falls within the ‘business of insurance,’ as we understood that phrase in Pireno and Royal Drug. To hold otherwise would be mere formalism.”).

138. Id. at 503-04 (“The Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholder’s claims despite the insurance company’s intervening bankruptcy.”). See also Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

139. See Metro. Life, 471 U.S. at 728 & n.2 (“Laws regulating aspects of transacting the business of group insurance include, for example, those regulating claims practices or rates.”). See also UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 375 n.5 (1999) (“We reject UNUM’s suggestion that because the notice-prejudice rule regulates only the administration of insurance policies, not their substantive terms, it cannot be an integral part of the policy relationship.”).

140. See DeBruyne v. Equitable Life Assurance Soc’y of the U.S., 920 F.2d 457 (7th Cir. 1990); In re Life Ins. Co. of N.A., 857 F.2d 1190 (8th Cir. 1988); Ramirez v. Inter-Cont’l Hotels, 890 F.2d 760 (5th Cir. 1989).
the Ninth Circuit wondered, “If California’s rule does not regulate insurance, what does it regulate?” Similarly, if the claims settlement process is not integral to the insured-insurer policy relationship, what is? Considering Supreme Court precedents that view laws regulating the enforcement of insurance contracts and the claims settlement process as falling within the term “business of insurance,” and considering the Court’s shift away from unfettered ERISA preemption since Travelers, the continued reliance on inconsistent language in the Pilot Life opinion to suggest that state bad faith and unfair insurance practices laws do not impact an integral part of the insured-insurer policy relationship is not persuasive.

Anschultz is not an unprincipled opinion. The Eleventh Circuit decision followed directly on the heels of Pilot Life and typifies circuit court bad faith cases that appear to have been influenced by a perception garnered from the early Supreme Court preemption opinions that Congress intended ERISA to provide national uniformity in welfare plan regulation. The Fourth Circuit’s treatment of the insurance bad faith issue following Fabe, however, demonstrates how some courts have strained to limit ERISA plan participant claims without any real foundation in the statute or in Supreme Court author-

141. Cisneros v. UNUM Life Ins. Co., 134 F.3d 939, 946 (9th Cir. 1998).

142. See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). Prior to the Travelers decision in 1995, the Supreme Court had endorsed an extremely broad view of ERISA preemption, and any court that limited the scope of ERISA would have been bucking a strong trend, even if persuasive arguments supported a more narrow view of ERISA’s nullification of state law. See generally Bogan, supra note 28, at 986-1011.

143. But see Bridges v. Provident Life & Accident Ins. Co., 121 F. Supp. 2d 1369, 1373 (M.D. Fla. 2000) (observing that UNUM did not diminish the Anschultz precedent because Anschultz held that Florida’s unfair insurance practices statute failed two of the three McCarran-Ferguson Act factors). The Anschultz opinion briefly mentions Pilot Life’s implied preemption under ERISA § 502 as additional support for its conclusion that ERISA preempted Florida’s unfair insurance practices statute, but the Court did not examine § 502 in any depth, or discuss how ERISA preemption impacts removal jurisdiction. In another unfair insurance practices case, the Ninth Circuit Court of Appeals reached the same preemption conclusion as the Eleventh Circuit in Anschultz, but the Court in Kanne v. Connecticut General Life Insurance Co., 867 F.2d 489 (9th Cir. 1988), grounded its holding solely on ERISA’s implied preemption of state court remedies under ERISA § 502. See infra Part III for a discussion of § 502 implied preemption.
ity.144

In *Tri-State Machine, Inc. v. Nationwide Life Insurance Co.*,145 the Fourth Circuit concluded that West Virginia's Unfair Trade Practices Act,146 which regulates insurance companies by prohibiting certain unfair settlement practices, was not saved from ERISA preemption solely because the statute did not affect the spreading of policyholder risk.147 Nationwide Life Insurance Company ("Nationwide") insured and administered several non-pension employee benefit plans provided by Tri-State Machine, Inc. for its employees.148 After a dispute with Nationwide concerning the manner in which the insurer carried out its claims processing responsibilities, Tri-State Machine, Inc. sued the insurer in state court alleging breach of contract, common law bad faith, and statutory unfair insurance practices.149 Nationwide removed the action to federal court and the district court thereafter dismissed every claim as preempted by ERISA.150 The Fourth Circuit affirmed the dismissals,151 badly twisting Supreme Court precedent in the process.

The West Virginia Unfair Trade Practices statute, contained in the insurance chapter of the West Virginia Code, recites that

> [t]he purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson Act], by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.152

Despite the very clear attempt by the West Virginia legisla-

145. 33 F.3d 309 (4th Cir. 1994).
146. W. VA. CODE. ANN. §§ 33-11-1 to 33-11-10 (Michie 2000).
147. *Tri-State Mach.*, 33 F.3d at 314-16.
148. *Id.* at 311.
149. *Id.*
150. Nationwide based removal on both diversity and federal question jurisdiction. *Id.* The Court did not discuss removal jurisdiction or complete preemption. See infra Part IV for a discussion of the complete preemption doctrine and removal jurisdiction.
151. *Tri-State Mach.*, 33 F.3d at 311.
ture to define its Unfair Trade Practices statute as a law that regulates the business of insurance within the ambit of the McCarran-Ferguson Act, the Fourth Circuit majority did not ask whether the statute was directed at the insurance industry, or whether the law regulated practices integral to the policy relationship between the insurer and the insured. Instead, Judge Niemeyer wrote that the Supreme Court in Metropolitan Life Insurance Co. v. Massachusetts "concluded that Congress intended to save from preemption only those state laws that regulate the traditional business of insurance to the extent that it involves contractual arrangements for protection against financial loss through the spreading of risk." The Supreme Court concluded no such thing in Metropolitan Life.

In fact, the Metropolitan Life opinion expressly rejected the argument that ERISA's savings clause exempts only "traditional" insurance laws from preemption. In Metropolitan Life, the group insurers argued that the Massachusetts mandated benefits law was "in reality a health law that merely operates on insurance...and that it is not the kind of traditional insurance law intended to be saved by § 514(b)(2)(A)." In response, Justice Blackmun wrote,

"We find this argument unpersuasive. ... Nothing in § 514(b)(2)(A) [the savings clause] or in the "deemer clause" which modifies it, purports to distinguish between traditional and innovative insurance laws. The presumption is against pre-emption and we are not inclined to read limitations into federal statutes in order to enlarge their pre-

153. See Tri-State Mach., 33 F.3d at 314.
154. Id. at 312 ("In [Metropolitan Life] the Supreme Court construed the Savings Clause to apply only to state laws regulating core insurance issues."). The Act provides a long list of prohibited acts in the marketing, selling, and administering of insurance in West Virginia. It prohibits false or misleading statements or advertising as to the contents of a policy and also prohibits engaging in unfair settlement practices, in an apparent effort to provide truth in insurance advertising and fairness in insurance administration. The Act prohibits many of the practices alleged by Tri-State in its complaint to constitute improper claims processing. But this type of regulation is not unique to the business of insurance, and it does not target, at least in these provisions, the core business of insurance which involves contracts of protection under which risk is spread among policy holders.

Id. at 314.
emptive scope. Further, there is no indication in the legislative history that Congress had such a distinction in mind.\footnote{156} Further, it was in Metropolitan Life that the Court first applied the three-factor McCarran-Ferguson Act test to aid in the construction of ERISA's savings clause language.\footnote{157} The spreading of policyholder risk is only one part of the three factors test, and courts only employ the three factors test to confirm the common-sense view of laws that regulate insurance.\footnote{158}

In Tri-State Machine, Judge Niemeyer chose one of the three factors that the Supreme Court said bear on the definition of the phrase "business of insurance," elevated that factor above all else, including common-sense, and then tried to sanitize his efforts by misrepresenting Supreme Court authority.\footnote{159} The majority opinion in Tri-State ignores the crucial fact that, unlike the common law claim in Pilot Life, West Virginia's unfair insurance practices statute does regulate insurance under a common-sense view because the statute unquestionably applies only to the insurance industry.

In dissent, Judge Luttig established that the majority opinion's failure to discuss the common-sense test was an intentional omission, rather than an innocent oversight, when

\footnotesize{156. Id. at 741-42. The Massachusetts Supreme Court had also expressly rejected this argument. See Attorney Gen. v. Travelers Ins. Co., 433 N.E.2d 1223, 1228-29 (Mass. 1982); UNUM Life Ins. Co. v Ward, 526 U.S. 358, 375 n.5 (1999) ("We reject UNUM's suggestion that because the notice-prejudice rule regulates only the administration of insurance policies, not their substantive terms, it cannot be an integral part of the policy relationship."). See also Brief of Amicus Curie the United States at 10, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (citing Metro. Life, 471 U.S. at 724) ("This court squarely rejected the argument that ERISA's saving clause was intended merely to preserve from preemption traditional state insurance laws such as those regulating the manner in which insurance may be sold.").


158. See UNUM Life, 526 U.S. at 373.

159. Judge Niemeyer also relied upon another Fourth Circuit opinion, which he authored, to support the view that ERISA preempts West Virginia's unfair insurance practices statute. Notably, in Custer v. Pan American Life Insurance Co., 12 F.3d 410 (4th Cir. 1993), just as in Tri-State, Judge Niemeyer wrote that in Pilot Life the Supreme Court "concluded that a state cause of action for improper claim processing filed against an insurer is not saved from preemption" without ever addressing the limits of the Pilot Life holding or the difference between the state law at issue in Pilot Life and the West Virginia statute. Id. at 420.}
he forcefully argued that the majority misconstrued Supreme Court savings clause precedents. Judge Luttig observed that *Pilot Life*’s savings clause holding did not extend to all state law improper claims processing actions. He pointed out that the question before the Court in *Pilot Life* was whether ERISA superseded a common law bad faith claim that was not aimed specifically at the insurance industry. Properly focusing on the sole criteria identified by the Court in *Metropolitan Life* and *Pilot Life* as establishing the common sense understanding of a law that regulates insurance, Judge Luttig exclaimed that “if any law can be said to be ‘specifically directed toward the [insurance] industry,’ it is [West Virginia’s unfair insurance practices] statute.”

The dissent in *Tri-State Machine* is significant because Judge Luttig recognized *Pilot Life*’s very narrow savings clause application. Within a year of *Tri-State Machine*, the Supreme Court changed its broad overall tone concerning the extent of ERISA preemption when the Court decided *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* Though *Travelers* is not a savings clause case, it is important to recognize that the *Travelers* Court renounced a position that was basic to the *Pilot Life* savings clause rationale.

In *Travelers*, the Court emphasized the statutory construction tenet that courts should not interpret federal statutes to preempt state laws in traditional areas of state governance unless the federal enactment unmistakably required such a construction. In *Metropolitan Life*, the Court relied

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160. *Tri-State Mach.*, 33 F.3d at 318 (Luttig, J., dissenting).
161. *Id.*
162. *Id.* at 316-17.
165. The Court wrote, [W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the assumption that the historic police powers of the States were not to
upon this principle to reject the insurance industry's argument that ERISA's savings clause should be construed narrowly.\textsuperscript{166} As previously discussed, however, \textit{Pilot Life} distinguished \textit{Metropolitan Life} and ruled that ERISA's savings clause exception to preemption should be construed narrowly because the structure of ERISA's civil enforcement scheme, and the legislative history of that paragraph, indicated that Congress intended ERISA to occupy the field of employee benefit plan regulation.\textsuperscript{167} The lower federal courts did not immediately recognize that the Court’s shift away from a very broad view of ERISA preemption under the statute’s preemption clause in \textit{Travelers} should inform the savings clause analysis. The Court’s latest savings clause case, however, confirms that the statutory construction rule providing for a presumption against preemption in areas of traditional state governance applies equally to the savings clause.\textsuperscript{168}

D. \textbf{The Supreme Court Clarifies the “Savings Clause” Test}

In 1999, the Court addressed some of the confusion existing in the lower courts concerning the scope of ERISA's savings clause when it decided \textit{UNUM Life Insurance Co. v. Ward}.\textsuperscript{169} \textit{UNUM} involved an ERISA preemption challenge to California’s common law rule that an insurance company must show actual prejudice before it can deny a late-filed claim for benefits under a notice of claim provision in an insurance policy.\textsuperscript{170} \textit{UNUM} Life Insurance Company provided insurance to fund an ERISA disability benefits plan.\textsuperscript{171} A policy provision required plan participants to submit a claim to the insurance company within eighteen months of the loss.\textsuperscript{172} After the onset of Mr. Ward’s illness, he applied for state disability benefits and social security disability benefits, apparently unaware that he was also covered through his

\begin{itemize}
\item be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.
\end{itemize}

\textit{Id.} at 654-55 (internal quotation and citations omitted).

\textsuperscript{167} See \textit{supra} text accompanying notes 88-103.
\textsuperscript{169} 526 U.S. 358.
\textsuperscript{171} \textit{UNUM}, 526 U.S. at 364.
\textsuperscript{172} \textit{Id.}
employment under the UNUM policy.\textsuperscript{173} Within the UNUM policy time limits, Ward informed his employer that he had been approved for both state benefits and social security disability payments.\textsuperscript{174} However, Ward did not submit a claim directly to UNUM until he discovered he might be eligible for benefits from UNUM when he happened upon his employee benefits booklet two years after the inception of his disability.\textsuperscript{175}

The insurance company denied Ward’s claim because he filed it late.\textsuperscript{176} Ward then sued UNUM in federal court to recover his plan benefits under ERISA’s civil enforcement provisions, relying upon California’s notice-prejudice rule to overcome the insurance company’s late-filing defense.\textsuperscript{177} UNUM asserted that ERISA expressly preempted the California notice-prejudice rule because the common law rule “related to” an ERISA plan.\textsuperscript{178} Ward argued that the notice-prejudice rule was saved from ERISA preemption because it was a law that regulated insurance.\textsuperscript{179}

The Supreme Court confirmed that California’s notice-prejudice rule regulated insurance under a common-sense analysis because the law only applied to insurance companies.\textsuperscript{180} Additionally, the Court added further specificity to the savings clause formula by ruling that a state law need not satisfy all three factors of the McCarran-Ferguson Act test in order to be exempt from preemption under the savings clause.\textsuperscript{181} The UNUM Court held that the McCarran-
Ferguson Act factors are merely "guideposts"\textsuperscript{182} to help inform the common-sense determination of whether a state law fits within the savings clause exception to ERISA preemption.\textsuperscript{183}

Prior to \textit{UNUM}, several circuit courts adopted a construction of the savings clause which directed that both the common-sense test and each of the McCarran-Ferguson Act factors must be satisfied for a state law to avoid ERISA preemption.\textsuperscript{184} \textit{UNUM} expressly rejected that view,\textsuperscript{185} but it remains somewhat uncertain what portion, or portions, of the common sense and three factors criteria must be met for a state law to survive ERISA preemption.\textsuperscript{186} An accountant's view of the savings clause following \textit{UNUM} might hold that a state law must be aimed specifically at the insurance industry, plus affect either policyholder risk or some integral part of the insurer-insured relationship to satisfy current doctrine. Rather than merely counting factors, however, \textit{UNUM} sug-

\textsuperscript{182} Id. (quoting Cisneros v. UNUM Life Ins. Co., 134 F.3d 939, 946 (9th Cir. 1998)) (observing that the Metropolitan Life Court first determined that the state law at issue fit a common-sense understanding of insurance regulation, then "checked its conclusion against the criteria from case law interpreting the phrase 'business of insurance' under the McCarran-Ferguson Act.").

\textsuperscript{183} The Court cited both of its previous savings clause cases for support of its statement that the McCarran-Ferguson Act factors are not required elements that must all be proved before a law can be said to "regulate insurance" under ERISA's savings clause. See Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 734, 743 (1985) (McCarran-Ferguson Act factors are relevant); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 49 (1987) (considerations to be weighed). See also Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) ("[N]one of the [McCarran-Ferguson three factor] criteria is necessarily determinative in itself"). Additionally, the \textit{UNUM} Court quoted the District of Columbia Circuit Court with approval when that court stated "[t]hat the [McCarran-Ferguson] factors are merely 'relevant' suggests that they need not all point in the same direction, or else they would be 'required.'" \textit{UNUM}, 526 U.S. at 373 (quoting O'Connor v. UNUM Life Ins. Co. of Am., 146 F.3d 959, 963 (D.C. Cir. 1998). See also Franklin H. Williams Ins. Trust v. Travelers Ins. Co., 50 F.3d 144, 150 (2nd Cir. 1995) ("In our view, ... Metropolitan Life placed its primary emphasis upon a 'common sense' assessment of the state statute at issue in that case, and simply supplemented that assessment with a discussion of the statute's conformance with the McCarran-Ferguson standards.").


\textsuperscript{185} \textit{UNUM}, 526 U.S. at 373.

\textsuperscript{186} See generally Jordan, supra note 144.
gests that courts should adhere to a more fluid approach in weighing whether a state law "regulates insurance" under ERISA's savings clause.187 Coupling the Travelers message with UNUM's holding, it becomes clear that, at a minimum, courts must emphasize the presumption against preemption in any ERISA non-pension employee benefits claim, including a claim involving the savings clause.

E. The Return of Bad Faith Remedies: An Emerging Trend Following UNUM

Following UNUM Life Insurance Co. v. Ward, numerous plan participants urged federal district courts to re-examine their ERISA preemption precedents and to allow state bad faith and unfair insurance practices claims to proceed under UNUM's clarified savings clause authority.188 While the district courts remain divided, several courts have now held, contrary to pre-UNUM circuit court authority, that state law bad faith remedies laws that specifically target the insurance industry do regulate insurance within the ambit of ERISA's savings clause.189

187. See UNUM, 526 U.S. at 373 (describing the Court's savings clause precedents as "supple"). Perhaps the message is that a state law will be saved from preemption if it specifically targets the insurance industry, and affects policyholder risk or an integral part of the insurer-insured policy relationship, where the court's interpretation of those factors will be broadly construed in favor of finding that a law does regulate insurance.


Judge Sven Erik Holmes in the Northern District of Oklahoma decided the first case to uphold a state law bad faith claim following UNUM. In Lewis v. Aetna U.S. Healthcare, Inc., a plan insurer removed a state common law bad faith claim arising from an employment-provided life insurance policy to Judge Holmes' federal district court. Along with removal, Aetna moved to dismiss the state law claims based upon ERISA's express preemption clause. The plaintiff asserted that her bad faith claim was saved from preemption, arguing that UNUM changed the savings clause legal landscape. The Tenth Circuit Court of Appeals had previously ruled that ERISA preempted an Oklahoma state law bad faith claim arising from the alleged violation of Oklahoma's unfair insurance practices statute. Judge Holmes found that UNUM had effectively overruled this authority, and he re-examined plaintiff's claims under UNUM's more generous savings clause formula.

Judge Holmes exhaustively reviewed Oklahoma state court precedent and discovered that Oklahoma only applies its bad faith breach of contract remedy against the insurance industry. The Oklahoma Supreme Court first recognized a common law claim for bad faith breach of an insurance con-
tract in *Christian v. American Home Assurance Co.* Quoting from one of the two seminal California cases that first articulated the policies behind the tort, the *Christian* court stressed that a claim for violation of an insurer's breach of its implied covenant of good faith and fair dealing arises out of the unique relationship between the insured and the insurer:

> [T]he special relationship and duties of the insurer exist in recognition of the fact that the insured does not contract "... to obtain a commercial advantage but to protect [himself] against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing ... insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss ..."

Given the important insurance law policy considerations supporting Oklahoma's bad faith remedy, which clearly distinguished Oklahoma's law from the Mississippi law described in *Pilot Life*, and given UNUM's broader construction of the savings clause, Judge Holmes found that Oklahoma's bad faith claim was saved from ERISA preemption.

Similarly, in *Hill v. Blue Cross & Blue Shield of Alabama*, a federal district court found that a state law bad faith insurance claim arising from an ERISA welfare benefit plan was saved from preemption following *UNUM*, despite circuit court authority to the contrary. The Eleventh Circuit had previously held that ERISA preempted state law bad faith claims under Alabama law. In *Amos v. Blue Cross-Blue Shield of Alabama*, an Eleventh Circuit panel had ex-
pressed its regret that ERISA preemption law was producing the "unintended consequence of removing historical disincentives to insurance company misbehavior," but held that "any change in the law's course will have to be charted by the Congress or the Supreme Court."\(^{203}\)

In *Hill*, District Judge William M. Acker, Jr. determined that *UNUM* had, in fact, charted a new course in the implementation of ERISA's savings clause.\(^{204}\) Judge Acker took his guidance from the Supreme Court's remark in *UNUM*, which unequivocally stated that ERISA preempted the Mississippi bad faith law at issue in *Pilot Life* specifically because the Mississippi law was not limited in its application to claims against the insurance industry.\(^{205}\)

In *Colligan v. UNUM Life Insurance Co.*,\(^{206}\) District Judge John Kane considered an ERISA preemption challenge to a Colorado bad faith claim brought by an ERISA plan participant against a plan insurer.\(^{207}\) As in *Lewis*, Judge Kane examined the policy reasons underlying the state bad faith law and found that, in Colorado, the remedy grew out of considerations peculiar to the relationship between an insurer and an insured.\(^{208}\) In *Decker v. Browning-Ferris Industries of Colorado, Inc.*,\(^{209}\) the Colorado Supreme Court declined to rec-

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203. Id. at 433.
206. Id. at *5.
207. Id. at *8.
208. 931 P.2d 436 (Colo. 1997).
ognize the existence of a tort claim for violation of the duty of good faith and fair dealing in the context of an employment contract. The Decker court analyzed the tort of bad faith breach of contract and found that the policy reasons underlying the tort were unique to the insurance industry. The Colorado Supreme Court held that

[a]n insurer's tort liability for breach of an implied duty of good faith and fair dealing arises from the nature of the insurance contract as well as from the relationship between the insurer and the insured. In contrast to a party who seeks to secure commercial advantage in the context of a general commercial contract, an insured who enters into a contract of insurance seeks to obtain "financial security and protection against calamity." Because an insurer's bad faith refusal to pay valid claims defeats the very purpose of the insurance contract, a special duty is imposed upon an insurer to deal in good faith with an insured.

The federal district courts that have allowed state law bad faith claims to proceed in spite of ERISA preemption challenges have easily distinguished Pilot Life's savings clause approach. Circuit courts, like the Eleventh Circuit in Anschultz, could have reached the same conclusion these district judges are reaching now, but the tenor of Supreme Court ERISA preemption jurisprudence prior to Travelers counseled against any narrowing of ERISA preemption. Neither Travelers nor UNUM expressly overrule Pilot Life, but those

210. Id. at 440.
211. Id. at 446.
212. The Colorado Supreme Court continued, This "quasi-fiduciary" relationship between an insurer and an insured is thus based in part on this special contract. In addition, when an insured suffers a loss, the insured becomes "particularly vulnerable" to the insurer. For example, an insurer may delay payment of a claim to the insured in the hope of settling for an amount less than what might be due under the contract. Thus the implied covenant of good faith and fair dealing in the context of [an] insurance contract[] also arises from the heightened reliance necessarily placed by an insured on the insurer.


214. See generally Bogan, supra note 28.
two cases, with their marked change in tone favoring a more limited application of ERISA preemption, have now freed lower courts to carefully scrutinize arguments urging the nullification of state law in areas of traditional state dominance. As a result, bad faith laws are making a comeback in claims against ERISA plan insurers, but the story is not over yet.

Each of the published federal district court opinions that have allowed state law bad faith or unfair insurance practices cases to proceed following UNUM have focused solely on the savings clause exemption from preemption for state laws that regulate insurance. As previously discussed, however, Pilot Life suggests that, in addition to ERISA's express preemption of state law, Congress intended ERISA's civil enforcement provisions to provide the exclusive vehicle for plan participants to pursue a claim for benefits under an ERISA plan. While the district court opinions that distinguish Pilot Life's savings clause application are sound, courts evaluating ERISA's possible preemption of state bad faith claims should also address Pilot Life's alternate implied preemption rationale.

III. THE SAVINGS CLAUSE AND § 502: A CONFLICT BETWEEN EXPRESS AND IMPLIED PREEMPTION

A. The Kanne Approach

UNUM Life Insurance Co. v. Ward clarified the express preemption analysis, previously addressed in Metropolitan Life Insurance Co. v. Massachusetts and Pilot Life Insurance Co. v Dedeaux, which courts must apply when considering whether a state law is exempt from ERISA preemption under the savings clause. As a result of UNUM, we know that the


216. Pilot Life, 481 U.S. at 52.


McCarran-Ferguson Act factors identified by the Supreme Court as affecting the savings clause inquiry are checkpoints, but not required elements, for courts to weigh in support of the commonsense observation that a challenged state law regulates insurance.\textsuperscript{220} \textit{UNUM}, however, did not directly address the § 502 implied preemption thesis advanced in the \textit{Pilot Life} opinion as a second reason justifying the Court’s nullification of the plaintiff’s state law bad faith cause of action in that case.

Recall that in \textit{Pilot Life} the Court inferred from the legislative history and structure of ERISA’s civil enforcement provisions that Congress intended § 502 to supplant all state law remedies in connection with a claim for benefits under an ERISA plan.\textsuperscript{221} \textit{UNUM} did not examine the interplay of ERISA’s express exemption from preemption under the savings clause and preemption implied under ERISA § 502 because the state law at issue in \textit{UNUM}, the California notice-prejudice rule, was not a remedies law.\textsuperscript{222} Similarly, in \textit{Pilot Life} the Court did not have to balance its implied preemption formula under § 502 against the circumstance of a direct conflict with the limiting language in ERISA’s express savings clause because the Mississippi common law remedy at issue in \textit{Pilot Life} was not a law that regulated insurance.\textsuperscript{223} Alter the \textit{Pilot Life} facts, however, and imagine that an ERISA plan participant sues a plan insurer under state law seeking punitive damages for tortious breach of an insurance contract (common law bad faith or statutory unfair insurance practices) in a state where that remedy only applies to claims against the insurance industry.\textsuperscript{224} Is the state law bad faith or unfair insurance practices remedy impliedly preempted by § 502, even though the remedies law would otherwise be ex-

\textsuperscript{220} \textit{UNUM}, 526 U.S. at 373.
\textsuperscript{221} See \textit{Pilot Life}, 481 U.S. at 51-57.
\textsuperscript{222} See \textit{UNUM}, 526 U.S. 376-77 (“\textit{UNUM} next contends that ERISA’s civil enforcement provision, § 502 (a), 29 U.S.C. § 1132 (a), preempts any action for plan benefits brought under state rules such as notice-prejudice. Whatever the merits of \textit{UNUM}’s view of § 502 (a)’s preemptive force, the issue is not implicated here. Ward sued under § 502 (a) ‘to recover benefits due . . . under the terms of his plan.’”).
\textsuperscript{223} \textit{Pilot Life}, 481 U.S. at 49.
\textsuperscript{224} See, e.g., \textit{Lewis v. Aetna U.S. Healthcare, Inc.}, 78 F. Supp. 2d 1202 (N.D. Okla. 1999) (holding that Oklahoma’s bad faith remedy applied only against insurers, and therefore, was saved from ERISA’s § 514 preemption).
pressly saved from preemption under UNUM's expanded savings clause formula? While this question remains unanswered in the Supreme Court, several circuit courts have decided the issue. Unfortunately, the cases that present the fact scenario which invites an exploration of the interplay between the savings clause express exemption from preemption and § 502 implied preemption do not fully plumb the depth of the issue.

In *Kanne v. Connecticut Life Insurance Co.*, the Ninth Circuit Court of Appeals addressed this fact pattern. *Kanne* involved a plan participant's complaint of mistreatment by an ERISA health care benefits plan insurer. The Kannes filed their state law petition under California law in effect at the time which provided that in egregious circumstances, a consumer could recover extra-contractual damages from an insurer under either a common law bad faith theory or via an implied right of action to enforce California's unfair insurance practices statute. At trial, which occurred prior to the announcement of the Supreme Court's opinion in *Pilot Life*, a jury awarded the Kannes both compensatory and punitive damages on their state law claims.

On appeal, then subsequent to *Pilot Life*, the Ninth Circuit vacated the judgment. In the court of appeals, the Kannes argued that *Pilot Life* should be limited to its facts. They maintained that only state laws that do not regulate insurance, like the Mississippi common law claim in *Pilot Life*, are preempted by ERISA, and that state laws that apply solely to the insurance industry, like the California statutory claim, are saved from preemption as laws that regulate insurance. Despite the Kannes' urgings, the Ninth Circuit did not address the savings clause argument. Rather, the court...

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225. 867 F.2d 489 (9th Cir. 1988).
226. Id. at 491.
227. See CAL. INS. CODE § 790.03(h). The California Supreme Court has since held that the unfair insurance practices statute does not provide a private right of action. See Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58 (Cal. 1988) (overruling Royal Globe Ins. Co. v. Super. Ct., 592 P.2d 329 (Cal. 1979)).
228. *Kanne*, 867 F.2d at 491.
229. Id. at 494.
230. Id.
231. The Ninth Circuit stated, The Kannes' argument asks us to limit *Pilot Life*’s pre-emption holding to only those state laws which do not fall within the savings clause. To
concluded that, even assuming the unfair insurance practices statute did regulate insurance, ERISA preempted both the bad faith and the unfair insurance practices claims under the 
Pilot Life § 502 implied preemption authority.¹¹

The Kanne opinion is notable for its one glaring omission. The Ninth Circuit failed to address the fact that state law bad faith and unfair insurance practices claims that apply exclusively to the insurance industry raise an express preemption issue not present in Pilot Life. When a remedies law fits within the savings clause, § 502 implied preemption conflicts with ERISA’s express exemption for laws that regulate insurance. In Kanne, the Ninth Circuit held that implied preemption arising from ERISA § 502 trumps ERISA’s express savings clause exception to preemption, without ever discussing, or seemingly even recognizing, that a clash existed.³

accept this argument, however, we would have to ignore the second half of Pilot Life in which the Court made abundantly clear that its preemption holding was equally based on its acceptance of the Solicitor General’s view that “Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits.”

Id. at 493 (“We can assume, without deciding, that § 790.03 (h) [the California unfair insurance practices statute] is a law regulating insurance under the savings clause. Nevertheless, under Pilot Life we find the conclusion inescapable that the private right of action for violation of § 790.03 (h) is preempted by ERISA.”). The court continued,

In sum, the detailed provisions of § 502 (a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress had rejected in ERISA.

Id. at 494 (quoting Pilot Life, 481 U.S. at 54).

232. Id. at 493 (“We can assume, without deciding, that § 790.03 (h) [the California unfair insurance practices statute] is a law regulating insurance under the savings clause. Nevertheless, under Pilot Life we find the conclusion inescapable that the private right of action for violation of § 790.03 (h) is preempted by ERISA.”). The court continued,

In sum, the detailed provisions of § 502 (a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress had rejected in ERISA.

233. See Kanne, 867 F.2d at 494 (“We do not find it possible to read [Pilot Life’s § 502 implied preemption] language in a way that permits a state statute like [California’s unfair insurance practices statute] to supplement the ERISA civil enforcement provisions available to remedy improper claims processing.”). Similarly, the Eighth Circuit Court of Appeals relied on Pilot Life to hold that ERISA preempted a plaintiff’s state law unfair insurance practices claim against an ERISA disability plan insurer because ERISA impliedly preempted state law remedies. In In Re Life Insurance Co. of North America, 857 F.2d 1190 (8th Cir. 1988), the court did not decide whether the Missouri statute at issue regulated insurance within the context of the savings clause. Rather, the Eighth Circuit focused solely upon the implied preemption analysis presented in
B. Express Versus Implied Preemption: A Statutory Construction Problem

Notice the different conflict presented in Kanne from the conflict the Supreme Court identified in Pilot Life. The Pilot Life Court found that Mississippi's state law bad faith remedy conflicted with ERISA's civil enforcement provisions. With no savings clause involvement, Pilot Life presented a straightforward Supremacy Clause issue; resolution of that issue was relatively easy—federal law preempts state laws that frustrate the purposes of the federal enactment. The conflict presented in Kanne is different. Though the Ninth Circuit did not discuss it, the clash in Kanne is not really between a state law and a federal law; rather the Kanne facts present a conflict between two competing sections of the same federal statute. Framed in this manner, the issue is not so much a preemption problem as it is a statutory construction dilemma.

Where there are internal inconsistencies within a statute, that is, where the reasonable interpretation of one section of a statute conflicts with the reasonable interpretation of another section of the same statute, which interpretation controls? Classic statutory construction principles giving effect to legislative intent provide guidance. In this ERISA statutory construction problem, we confront an express, un-

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*Pilot Life* arising from ERISA's civil enforcement provisions to declare that ERISA superseded the state insurance remedies law. *Id.* at 1193. Because the Eighth Circuit did not determine whether Missouri's vexatious refusal to pay statute regulates insurance under ERISA's savings clause, the Court did not confront the statutory construction problem, lurking in many of these state law unfair insurance practices and bad faith cases, of whether ERISA's implied preemption of state law remedies overrides ERISA's express exception to preemption for state laws, including insurance remedies laws, that regulate insurance. *See also* Ramirez v. Inter-Cont'l Hotels, 890 F.2d 760 (5th Cir. 1989) (holding that ERISA preempts state statutes that provide a private right of action for the improper handling of insurance claims). *Cf.* Franklin H. Williams Ins. Trust v. Travelers Ins. Co., 50 F.3d 144 (2d Cir. 1995).


qualified statement in the statute that laws regulating insurance shall not be preempted. Confirming this seemingly unambiguous declaration, a review of ERISA's legislative history provides no direct ammunition to suggest that state insurance remedies laws were not intended to be included in the savings clause exception to ERISA preemption.237

In potential conflict with ERISA's express savings clause is the inference drawn from ERISA's civil enforcement provisions that Congress intended § 502 to provide the exclusive remedies for identified ERISA affiliates in connection with any employee benefit plan. The legislative history concerning § 502, however, is somewhat ambiguous. Senator Harrison Williams, one of ERISA's sponsors, remarked that "with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans."238 On the one hand, Senator Williams suggests that ERISA occupies the field of employee benefit plan enforcement, but he justifies this broad intent by referring to problems that can be remedied by less intrusive conflict preemption principles.239 Importantly, Senator Williams qualified his remarks by excluding state laws expressly exempt from ERISA preemption when he began by acknowledging the "narrow exceptions" in the bill.240 The most prominent of the "narrow exceptions," of course, is the savings clause exception to ERISA preemption for state laws that regulate insurance.241

239. See Bogan, supra note 28, at 979-82.
240. See 120 Cong. Rec. 29,933, reprinted in 3 Legislative History, supra note 1, at 4745-46.
241. Additionally, another ERISA sponsor, in fact "the Father of ERISA," Senator Jacob Javits, is widely cited for his remarks that Congress intended the federal courts to develop an ERISA common law to help implement the purposes of the statute. See, e.g., Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 24 (1983) (quoting 120 Cong. Rec. 29,942 (1974), reprinted in 3 Legislative History, supra note 1, at 4770-71 (statement of Sen. Javits) ("It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."). See also Michael S. Gordon, ERISA, ESOP's, and Senator Javits: The Mind of a Reformer, 7 Am. J. Tax Pol'y 3
Where separate sections of the same statute appear to conflict, courts should attempt to apply a construction of the conflicting language that harmonizes the purposes of each section.\textsuperscript{242} Presented with the sometimes conflicting purposes of the savings clause and § 502, a suggested solution is for courts to identify one boundary of the field occupied by ERISA's civil enforcement provisions by the limitation in the savings clause. That is, § 502 provides the exclusive remedies for all claims within the ambit of that section, except state law remedies applicable solely against the insurance industry, which are saved from preemption by ERISA § 514. Of course, if two sections of the same statute conflict irreconcilably, where one expressly states Congress's intent and the other suggests a purpose merely by inference, the express provision should control.\textsuperscript{243}

C. The Solicitor General Qualifies His § 502 Implied Preemption Argument

While it is difficult to find any circuit court authority that thoroughly addresses the savings clause versus § 502 conflict in bad faith cases,\textsuperscript{244} the Supreme Court has clearly identified the issue. In \textit{UNUM}, the Court recognized, but left open the question of whether ERISA's express exemption from preemption under the savings clause trumps implied preemption under ERISA § 502.\textsuperscript{245} At footnote seven, the \textit{UNUM} Court explained,

\begin{quote}
We discussed [the issue of ERISA implied preemption under § 502] in \textit{Pilot Life Ins. Co. v. Dedeaux}. That case concerned Mississippi common law creating a cause of action for bad faith breach of contract, [a] law not specifically directed to the insurance industry and therefore not saved
\end{quote}

(1988). The suggested addition of common law remedies belies the argument that Congress intended ERISA's § 502 remedies to be exclusive.

\textsuperscript{242} See \textit{SINGER, supra} note 236, § 46.05.

\textsuperscript{243} \textit{Id.} ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.").

\textsuperscript{244} See, \textit{e.g.}, Franklin H. Williams Ins. Trust v. Travelers Ins. Co., 50 F.3d 144 (2d Cir. 1995) (explaining that state law that is saved from preemption cannot provide basis for removal jurisdiction); Kanne v. Conn. Gen. Life Ins. Co., 867 F.2d 489 (9th Cir. 1988) (holding, without significant discussion, that state law insurance remedy that would otherwise be saved from preemption is impliedly preempted by ERISA § 502).

\textsuperscript{245} \textit{UNUM}, 526 U.S. at 377 n.7.
from ERISA preemption. In that context, the Solicitor General, for the United States as amicus curie, urged the exclusivity of § 502 (a), ERISA's civil enforcement provision, and observed that § 502 (a) was modeled on the exclusive remedy provided by § 301 of the Labor Management Relations Act. The Court agreed with the Solicitor General's submission.

In the instant case, the Solicitor General, for the United States as amicus curie, has endeavored to qualify the argument advanced in Pilot Life. Noting that "LMRA Section 301 does not contain any statutory exception analogous to ERISA's insurance savings provision," the Solicitor General now maintains that the discussion of § 502 (a) in Pilot Life "does not in itself require that a state law that 'regulates insurance,' and so comes within the terms of the savings clause, is nevertheless preempted if it provides a state-law cause of action or remedy." We need not address the Solicitor General's current argument, for Ward has sued under § 502(a)(1)(B) for benefits due, and seeks only the application of saved state insurance law as a relevant rule of decision in his § 502 (a) action.246

The Solicitor General's arguments in UNUM are persuasive, though the Supreme Court correctly held that the debate concerning the interplay between ERISA's savings clause and § 502 was not presented in UNUM.247 The Solicitor General observed that the implied preemption portion of the Pilot Life opinion "is in significant tension with the text of the insurance savings provision and was unnecessary to Pilot Life's holding" that Mississippi's bad faith law did not regulate insurance.248 The Solicitor General did not question the implied preemption reasoning in Pilot Life, but merely suggested that Pilot Life should not be extended to a context, not applicable in Pilot Life, where the general exclusivity of ERISA's civil enforcement provisions conflicts with ERISA's savings

246. Id. (citations omitted).
247. The Solicitor General disagreed with the insurance company's suggestion that California's notice-prejudice rule effectively provided a state law remedy. Therefore, the Solicitor General himself suggested to the Court that the savings clause versus § 502 conflict should not be reached in UNUM. However, because the insurance company presented the argument, the Solicitor General also addressed the issue. See Solicitor General's Brief at 18-21, UNUM Life Ins. Co. v. Ward, 526 U.S. 358 (1999)(No. 97-1868).
In that circumstance, said the Solicitor General, "Congress has saved state substantive law, and it is not clear why Congress would have wanted to foreclose all access to state-created remedies or sanctions to enforce that substantive law, especially where the causes of action provided under Section 502 itself are not suited to that purpose."

The Solicitor General made several other cogent points in support of the view that § 502 should not be read to preempt state law remedies that would otherwise be exempt from preemption under the savings clause. Section 514(b) itself states, "nothing in this subchapter shall be construed to ex-
empt or relieve any person from any law of any State which regulates insurance.”252 “This subchapter” includes § 502, “[a]ccordingly, the savings clause, by its terms directs that nothing in Section 502 . . . shall be ‘construed’ to relieve or exempt any person from ‘any law’ of a State that regulates insurance.”253 Additionally, to the extent that the Pilot Life Court relied on Congress’ intent that § 502 was to emulate the broad preemptive effect given to § 301 of the LMRA, that analogy must be tempered with the realization that the LMRA does not contain a savings provision.

While Section 301 is no doubt highly instructive in cases in which the scope of ERISA’s broad “relates to” preemption provision is at issue, Congress’s enactment of the insurance savings provision suggests that it did not intend that parallel [to § 301 of the LMRA] to be controlling where the state law, while within the scope of the preemption provision, also falls within the terms of the insurance savings clause.254

Finally, in Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,255 the first Supreme Court opinion to discuss the interplay of § 502 and ERISA’s savings clause, the Court found that ERISA § 502 “does not purport to reach every question relating to plans covered by ERISA.”256 Contrasting § 502 with LMRA § 301, the Franchise Tax Board Court observed that § 301 of the LMRA applies to all suits for violation of collectively bargained contracts, whereas ERISA’s savings clause “makes clear that Congress did not intend to preempt entirely every state cause of action relating to [ERISA employee benefit

253. See Solicitor General’s Brief at 23 (“[T]he insurance savings clause, on its face, saves state law conferring causes of action or affecting remedies that regulate insurance, just as it does state mandated-benefits laws and other prescriptive measures that do so.”).
254. Id. at 25 (“Thus, the general background of Section 502 (a) discussed in Pilot Life does not in itself require that a state law that ‘regulates insurance,’ and so comes within the terms of the savings clause, is nevertheless preempted if it provides a state-law cause of action or remedy.”).
256. Id. at 25. Franchise Tax Board addressed the § 502 conflict with the savings clause in the context of removal jurisdiction and the possible application of the “complete preemption” doctrine to ERISA. See infra text accompanying notes 288-310.
The underlying fact pattern necessary to raise the express preemption versus implied preemption issue occurs whenever plan participants bring state law bad faith or unfair insurance practices claims against their ERISA plan insurers in states where those state law remedies are aimed specifically at the insurance industry. The conflict is presented most clearly in diversity jurisdiction actions filed in federal court, but asserting remedies under state insurance law. In that circumstance, preemption is the only issue because federal court jurisdiction is satisfied by facts (diversity of citizenship) unrelated to ERISA. When plan participants pursue state law insurance remedies, such as bad faith or unfair insurance practices claims, in state court against ERISA plan insurers, a confusing removal jurisdiction question often appears. The inference that ERISA § 502 provides the exclusive remedies available to pursue claims for benefits from an ERISA plan suggests that all ERISA claims within the scope of § 502 present "federal questions" that defendants may prefer to litigate in federal court. The same implied preemption versus express preemption conflict that is presented in the diversity jurisdiction action remains at the heart of the federal question. However, courts have often overlooked this core ERISA statutory construction problem in the analysis of the rather unique "complete preemption" removal jurisdiction context in which the issue is presented.\textsuperscript{258}

IV. THE SAVINGS CLAUSE AND COMPLETE PREEMPTION

A. The Well-Pleaded Complaint Rule

Article III, Section 2 of the United States Constitution establishes that federal judicial authority "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."\textsuperscript{259} Implementing Article III, the United States Code provides that the federal dis-
District courts “shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Further, the United States Code allows a defendant to remove to federal district court any action brought in state court over which the federal court has original jurisdiction, even where there is concurrent jurisdiction in state and federal court. Viewing these federal rules in combination, it is apparent that federal courts may exercise subject matter jurisdiction whenever a case presents a federal question. However, the mere presence of a federal question does not require a plaintiff to litigate in federal court.

The primary governing principle developed by the Supreme Court for determining removal based upon federal question jurisdiction is known as the “well-pleaded complaint” rule. The well-pleaded complaint rule recognizes that plaintiffs should be masters of their own theories of their cases. As described by the Supreme Court in Taylor v. An-
whether a case is one arising under the Constitution or a law or treaty of the United States, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose. 265

If the allegations stated on the face of a well-pleaded complaint present only state law claims, removal is generally improper, even if federal law might provide an affirmative defense to the state court action. 266 Consequently, the Supreme Court has held that a defendant's assertion of removal jurisdiction based upon ERISA's express preemption language, without more, cannot form the basis of federal court removal jurisdiction. 267

B. The Complete Preemption Exception to the Well-Pleaded Complaint Rule

The issue becomes more complex, however, in ERISA cases because the structure and comprehensiveness of ERISA's civil enforcement provisions suggest that Congress intended § 502 to provide the exclusive vehicle for enforcement of ERISA claims for benefits. 268 The Court has estab-

265. 234 U.S. 74, 75-76 (1914). See also Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.").

266. See Franchise Tax Bd., 463 U.S. at 13, where the Court stated,

As an initial proposition, then, the law that creates the cause of action is state law, and original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is "really" one of federal law.

Id. (internal quotations omitted); Gully v. First Nat'l Bank in Meridan, 299 U.S. 109, 116 (1936) ("By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.").

267. Specifically, the Court noted,

[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

Franchise Tax Bd., 463 U.S. at 14.

lished an exception to the well-pleaded complaint rule, known as the "complete preemption" doctrine, which may govern the removal question in ERISA cases when a plan participant sues in state court and seeks a state law remedy that falls within the scope of ERISA § 502.\footnote{269} The complete preemption doctrine applies when the Supreme Court determines that Congress intended a federal statute, which creates a federal claim for relief, to so dominate a particular field of claims that the federal remedy is exclusive. Under the complete preemption doctrine, any state law claim for relief within the scope of the federally dominated field of claims is "re-characterized" and converted into a federal cause of action.\footnote{270}

The concept of complete preemption is fairly elusive.\footnote{271} Judges often complain that the use of the "preemption" label to identify complete preemption is a misnomer.\footnote{272} Ordinary conflict or field preemption, sometimes referred to by courts together as "conflict" preemption,\footnote{273} typically appears as an affirmative defense, challenging the authority of a state law to provide the rule of decision that may control the legal responsibilities between parties. In contrast, complete preemption is a jurisdictional matter, which operates as a corollary to the well-pleaded complaint rule.\footnote{274} One court suggests that "[p]reemption is what wipes out the state law, but the foundation of removal [under complete preemption] is the creation of federal law to replace state law."\footnote{275} The inference of an excl-

sive federal remedy provides the crucial element that distin-
guishes complete preemption from ordinary preemption. If a state law remedy falls within the scope of a federal remedial scheme, removal jurisdiction exists because the state law remedy is vaporized. Essentially, it ceases to exist—it never did exist, and the claim is necessarily recast as federal.

Under the complete preemption doctrine, federal law is said to displace state law, not necessarily replace it. Consequently, the Supreme Court has observed that an equivalent substitute federal remedy is not a prerequisite for complete preemption. But there must be some federal remedy available, even if the remedy is not equivalent, because complete preemption deals in remedies. Where the federal remedy is exclusive, and displaces all state law claims within the parameters of the federal remedy, federal question jurisdiction exists to justify removal of a state court filed action.

In sum, complete preemption is a "super" species of preemption, jurisdictional in nature, reserved for that rare

276. When the Supreme Court perceives that a federal statute totally displaces state law remedies arising from contracts subject to comprehensive federal regulation, preemption becomes a jurisdictional matter, rather than a device to direct what law provides the rule of decision in a case. See Rice v. Panchal, 65 F.3d 637, 639-43 (7th Cir. 1995).


278. In Caterpillar, the Supreme Court briefly discussed whether complete preemption required that a federal remedy replace the displaced state law remedy as a perquisite for finding complete preemption. The Ninth Circuit ruled, "[A] state law cause of action has been 'completely pre-empted' when federal law both displaces and supplements the state law—that is, when federal law provides both a superseding remedy replacing the state cause of action and pre-empts the state law cause of action." Caterpillar Inc. v. Williams, 786 F.2d 928, 932 (1986). The Caterpillar Supreme Court stated, "This analysis is squarely contradicted by our decision in Avco Corp. v. Machinists. We there held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained only in state court." Caterpillar, 482 U.S. at 391 (citations omitted).

situation where the Supreme Court determines that Congress intended the federal enactment to displace all state law causes of action within the scope of the federal statutory claim. To justify removal, the federal court reconstructs the complaint to allege a federal claim for relief. The fiction of "recasting" the plaintiff's complaint alters the court's perspective on the parties' pleadings, so that instead of the answer suggesting federal question jurisdiction, the court pretends that the complaint states a claim for relief within the scope of the federal act. The difficulty in applying the doctrine lies in defining the border between state laws that do, and those that do not, fit within the "scope" of the federal remedial scheme. Specifically for the purposes of this article focusing on ERISA's savings clause, does a state-filed claim under a law that regulates insurance fall within the scope of claims that Congress intended ERISA § 502 to completely preempt?

C. Complete Preemption Under ERISA

Prior to ERISA, the Supreme Court had only applied the complete preemption doctrine to claims arising under § 301 of the LMRA. In the seminal case, Avco Corp. v. Aero Lodge


281. See Bartholet, 953 F.2d at 1075, where the court stated, the difficulty—what makes [complete preemption] a darling of judges but a bane of practice—is that national law never fully occupies a field. Although ERISA may be the most comprehensive of the occupying statutes, it contains exceptions . . . And no matter how thoroughly federal law has suffused a body of rules, there is a border with the rest of the law; cases close to the border create difficult problems.

Id. See also Bogan, supra note 28, at 960-63, 1022-24.

No. 735, International Ass’n of Machinists, the Supreme Court held that Congress intended § 301 of the LMRA to provide the exclusive remedy for all contract claims arising from a collectively bargained labor agreement. The Court has since extended the Avco doctrine to ERISA because ERISA’s legislative history indicates that Congress modeled the civil enforcement provisions in ERISA § 502 upon § 301 of the LMRA. Complete preemption under ERISA, however, is more complicated than complete preemption under LMRA § 301. ERISA includes express preemption language, not present in the LMRA, which bears on the extent of Congress’ intent to displace state law remedies under ERISA § 502.

In Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, the Supreme Court first addressed the interplay of express ERISA preemption under § 514 and implied preemption under § 502 in the context of removal jurisdiction. The Franchise Tax Board is a California agency charged with enforcement of the state’s personal income tax laws. Under California law, the Tax Board may require any person or entity in possession of assets belonging to a delinquent taxpayer to withhold a taxpayer’s property and transmit the amount of tax owed by the taxpayer to the Tax Board. The Construction Laborers Vacation Trust for Southern California (the “Trust”) is an ERISA welfare benefit plan that held funds in trust for several union workers who owed money to the State of California court case to allow removal based on federal preemption was Fay v. America Cystoscope Makers, Inc., 98 F. Supp. 278 (S.D.N.Y. 1951), which held that federal law preempts the field of claims arising from collectively bargained labor agreements under LMRA § 301).

284. See id. Avco contained very little analysis, and did not even refer to the well-pleaded complaint rule. See also Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957).
286. Taylor, 481 U.S. at 66.
288. Id. at 5.
289. CAL. REV. & TAX CODE § 18670 (West 2001). The Trust could have been held liable for the taxpayer obligation upon its refusal to obey the levy. See Franchise Tax Bd., 463 U.S. at 5 (citing CAL. REV. & TAX CODE § 18672 (West 2001).
for back taxes.\textsuperscript{290}

After accepting service of a notice of levy from the Tax Board, the Trust received advice from the Department of Labor detailing the Trust's responsibilities regarding the levy under ERISA.\textsuperscript{291} The Department of Labor declared that "the process of any State judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is pre-empted under ERISA § 514."\textsuperscript{292} The Trust refused to honor the levy, in reliance on the Department of Labor opinion that ERISA preempted California's authority to levy against an ERISA plan.\textsuperscript{293}

The Franchise Tax Board sued the Trust in state court under state law theories, including California's Declaratory Judgment statute, seeking to establish California's right to levy against trust assets in order to collect taxes owed to the state by employee participants in the vacation plan.\textsuperscript{294} The Trust removed the action to federal court, asserting that ERISA preemption provided federal question jurisdiction.\textsuperscript{295} The district court denied the Tax Board's motion to remand, but then ruled that ERISA did not preempt the state's power to levy on funds held in trust by the vacation plan.\textsuperscript{296} The Ninth Circuit reversed, holding that ERISA expressly preempted (under § 514) the California tax law authorizing the State's attempt to levy against the plan.\textsuperscript{297} In a dissenting opinion, Judge Tang questioned the original exercise of fed-

\textsuperscript{290} Franchise Tax Bd., 463 U.S. at 3-5.
\textsuperscript{291} Id. at 5 n.4.
\textsuperscript{292} Id.
\textsuperscript{293} Id.
\textsuperscript{294} Id. at 5-6.
\textsuperscript{295} Id. at 7. The Trust was considered a California citizen for jurisdictional purposes; consequently, diversity of citizenship could not form the basis of federal court jurisdiction. See id. at 8.
\textsuperscript{296} Id. at 7. The district court ruling seems particularly incongruous. The court held that an action filed in state court, where state law controls, could be removed to federal court and be litigated in that forum. See Harris v. Provident Life & Accident Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994) (stating that even when not suggested by any of the parties, federal courts must always be aware of their subject matter jurisdiction, and must dispose of cases where jurisdiction is lacking).
\textsuperscript{297} See Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982).
eral question jurisdiction by the district court. Judge Tang would have remanded the matter to state court under the well-pleaded complaint rule.

The Supreme Court focused on the issue of federal question jurisdiction raised by Judge Tang, but not addressed in the circuit court's majority opinion. Applying the well-pleaded complaint rule, the Court decided that the Tax Board's claim was not within the removal jurisdiction of 28 United States Code § 1441, and therefore reversed the circuit court decision, with instructions to remand the action to state court. In so doing, the Court did not decide whether ERISA superseded California's tax laws under ERISA's express preemption clause; that question, said the Court, had to be addressed by the state court as a matter of the Trust's defense to the state law claims.

Explaining its rationale, the Supreme Court declared that "Avco stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." The Franchise Tax Board Court, however, distinguished application of the Avco rule arising under LMRA § 301 from the suggestion of complete preemption under ERISA § 502, specifically because the scope of § 502 is significantly more limited than the scope of LMRA § 301. Speaking for a unanimous Court, Justice Brennan wrote,

The phrasing of § 502 is instructive. Section 502 (a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies or for any other purpose. It does not purport to reach every question relating to plans covered by ERISA. Furthermore, § 514 (b)(2)(A) of ERISA [the savings clause] makes clear that Congress did not intend to pre-empt entirely every state cause of action relating to

298. See id. at 1310 (Tang, J., dissenting).
299. See id.
301. See Franchise Tax Bd., 463 U.S. at 7.
302. Id. at 23-24.
such plans. With important, but express limitations, it states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." In contrast, § 301 (a) of the LMRA applies to all "[suits] for violation of contracts between an employer and a labor organization representing employees in an industry effecting commerce... or between any such organizations."

*Franchise Tax Board* teaches several lessons. First, the Court emphasized, despite ERISA's legislative history, that the comparison between LMRA § 301 and ERISA § 502 is imperfect, at best, because the LMRA enforcement provision is not expressly modified by a savings clause. Second, ERISA's civil enforcement provisions do not provide the "sole launching ground" for all litigation involving an ERISA plan. Of particular importance in *Franchise Tax Board* was the fact that California's appointed agent to collect taxes could not bring an action as plaintiff under § 502. Section 502 only allows plan participants or beneficiaries, ERISA fiduciaries, or the Secretary of Labor to pursue claims.

303. *Id.* at 25. The trickiest issue confronting the Court in *Franchise Tax Board* involved the nature of the relief sought by the plaintiff. The Supreme Court remarked that whether plaintiff's declaratory judgment count necessarily raised a federal question sufficient to trigger removal jurisdiction posed a difficult problem because the determination of the preemption issue was a necessary element of the declaratory judgment claim. Indeed, the only question in dispute between the parties concerned the rights and responsibilities of the Trust under ERISA. The answer to the question depended upon the unique relief provided by declaratory judgment. *See id.* at 14-22. Previously, the Supreme Court had held that "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." *Id.* at 16 (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) (quoting 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2767 (2d ed. 1983)).

307. *Id.* at 24 n. 26. The Court continued, ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its pre-empted state contract claim... ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief
Third, the Avco rule may apply to ERISA, but only if courts restrict the field of remedies occupied by ERISA to those remedies that fall within the more limited scope of § 502.\textsuperscript{308} Even claims seemingly within the parameters of § 502 will not be removable to federal court if the state law remedy at issue operates as an insurance regulation under ERISA’s savings clause.\textsuperscript{309}

Several years after Franchise Tax Board, the Supreme Court announced in Pilot Life Insurance Co. v. Dedeaux\textsuperscript{310} that state law remedies asserted in an action connected with an ERISA governed-employee benefit plan conflicted with ERISA’s civil enforcement provisions because Congress intended ERISA § 502 to provide the exclusive vehicle for plan participants to pursue benefits allegedly due from an ERISA plan.\textsuperscript{311} Pilot Life did not involve removal jurisdiction issues because the Pilot Life plaintiff originated his action in federal court based upon diversity of citizenship.\textsuperscript{312} On the same day the Court decided Pilot Life, however, the Court also decided a case that did involve federal question removal jurisdiction under the complete preemption doctrine in an ERISA context.

In Metropolitan Life Insurance Co. v. Taylor,\textsuperscript{313} a plan participant sued his ERISA disability benefits plan insurer and his employer in state court under state law theories seeking to recover benefits allegedly due to him under the plan, plus emotional distress damages arising from the breach of contract.\textsuperscript{314} Similar to the Pilot Life action, the state law remedies pursued by Mr. Taylor were not aimed specifically at the insurance industry, and therefore did not impli-
cate ERISA’s savings clause.\textsuperscript{315} The defendants removed the action alleging federal question jurisdiction over the disability benefits claim and pendant jurisdiction over the remaining claims.\textsuperscript{316}

The Supreme Court attempted to address the issue specifically left open in \textit{Franchise Tax Board}, that is, whether the \textit{Avco} complete preemption doctrine should be extended to claims within the scope of ERISA § 502.\textsuperscript{317} The \textit{Taylor} Court held that Congress intended to make causes of action within the scope of ERISA’s civil enforcement provisions removable to federal court in the same manner that LMRA § 301 completely preempts state law actions.\textsuperscript{318} The \textit{Taylor} Court found that the state law claims presented by the plaintiff were, in essence, merely complaints with the manner in which his ERISA disability plan processed his claim for benefits and could have been brought under ERISA § 502.\textsuperscript{319} Because the claim fell within the scope of that section, and since Taylor, as a plan participant, was eligible to sue under § 502, the defendants properly removed the action to federal court under the complete preemption doctrine.\textsuperscript{320}

While the Court said it was addressing the issue left open

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\textsuperscript{315} \textit{Id.} at 62. \\
\textsuperscript{316} \textit{Id.} The district court found removal proper and then entered summary judgment for the defendants. \textit{Id. But see Taylor v. Gen. Motors Corp.,} 763 F.2d 216, 219 (6th Cir. 1986). The Sixth Circuit reversed because the well-pleaded complaint rule precluded removal jurisdiction on the basis of a federal defense. \textsuperscript{317} \textit{See Metro. Life v. Taylor,} 481 U.S. at 64. \\
\textsuperscript{318} \textit{See id.} at 66. \textit{See also Franchise Tax Bd.,} 463 U.S. 1 at 23. Here, the Court stated, \\
\textit{The necessary ground of decision [in Avco] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action “for violation of contracts between an employer and a labor organization.” Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.} \textit{Id.} (footnote omitted) (quoted in Taylor, 481 U.S. at 64). \\
\textsuperscript{319} \textit{Taylor,} 481 U.S. at 64. \\
\textsuperscript{320} ERISA § 502 does not provide a federal remedy equivalent to the emotional distress remedy available to Mr. Taylor in state court since the state remedy would have allowed Taylor to recover extra-contractual damages. Regardless of the dissimilarities in the measure of damages under the state and federal causes, the \textit{Taylor} Court found the state law claim to be within the scope of § 502. Without discussing the issue, the Court held that ERISA displaced Mr. Taylor’s state law remedies, even though the federal statute did not replace the state remedy with an equivalent remedy. \textit{See generally Taylor,} 481 U.S. 58.
\end{flushright}
in Franchise Tax Board, Taylor only addressed part of the issue.\textsuperscript{321} Taylor, like Pilot Life, did not involve ERISA's savings clause because the state law theories Mr. Taylor pursued did not spring from remedies that targeted the insurance industry.\textsuperscript{322} Consequently, all that Taylor tells us is that in the field of all claims which could be brought under ERISA § 502, excepting state law claims that provide remedies specifically targeting the insurance industry, the state law causes will be transmogrified.

One circuit court that has addressed the § 502 versus § 514(b) conflict in the removal context determined that ERISA's express savings clause trumps implied preemption under ERISA § 502. However, like the cases discussed previously where courts found that § 502 implied preemption defeated ERISA's express savings clause,\textsuperscript{323} Franklin H. Williams Insurance Trust v. Travelers Insurance Co.\textsuperscript{324} also fails to fully analyze the conflict issues. In Franklin H. Williams, the Franklin H. Williams Insurance Trust ("the Trust") owned a group life insurance policy made available to employees of Chemical Bank and issued by Travelers Insurance ("Travelers").\textsuperscript{325} Several months after Mr. Williams died, the Trust submitted a claim to Travelers seeking the principal amount of the life insurance coverage, plus interest from the date of Mr. Williams's death pursuant to New York insurance law.\textsuperscript{326} Travelers only offered to pay interest from the date the Trust presented the insurance claim, rather than from the date of death.\textsuperscript{327} Unable to resolve the conflict over the

\begin{itemize}
\item \textsuperscript{321} See id. at 64.
\item \textsuperscript{322} Franchise Tax Board remains the only Supreme Court opinion that discusses complete preemption under ERISA § 502 in relation to ERISA's savings clause.
\item \textsuperscript{323} See supra discussion accompanying notes 225-33.
\item \textsuperscript{324} 50 F.3d 144 (2d Cir. 1995).
\item \textsuperscript{325} Id. at 146.
\item \textsuperscript{326} See N.Y. INS. LAW § 3214(c) (McKinney 2001), which provides as follows:
\begin{quote}
If no action has been commenced, interest upon the principal sum paid to the beneficiary . . . shall be computed daily at the rate of interest currently paid by the insurer on proceeds left under the interest settlement option, from the date of the death of an insured . . . in connection with a death claim on a policy of life insurance . . . to the date of payment and shall be added to and be a part of the total sum paid.
\end{quote}
\item \textsuperscript{327} Franklin H. Williams, 50 F. 3d at 146.
\end{itemize}
amount of interest due, the Trust sued in state court seeking compensatory and punitive damages under New York law.\footnote{328} After Travelers removed the action to federal court on the ground that the action was one to recover benefits under an ERISA plan, the Trust moved to remand.\footnote{329} The District Court for the Southern District of New York denied the motion to remand, even though the interest law was saved from preemption as a law that regulates insurance, because the plaintiff's state law complaint fell within the scope of ERISA § 502.\footnote{330}

On appeal, the Second Circuit held that when a law is saved from ERISA preemption under ERISA § 514, removal is improper. The court found that \textit{Pilot Life} was distinguishable from the Trust's action because \textit{Pilot Life} did not involve any interplay between the savings clause and § 502.\footnote{331} The court explained that following \textit{Taylor}, the Second Circuit adopted a test for complete preemption in \textit{Smith v. Dunham-Bush, Inc.}\footnote{332} as follows: "A claim styled as a state common law cause of action is removable under ERISA if it 'relates to' an employee benefit plan within the meaning of section 514(a), 29 U.S.C. § 1144(a), and falls within the scope of the statute's civil enforcement provisions, found in section 502(a), 29 U.S.C. § 1131(a)."\footnote{333} The \textit{Franklin H. Williams} court added

\footnote{328. \textit{Id.}}\footnote{329. \textit{Id.}}\footnote{330. The district court held that the New York insurance law was saved from preemption, but that ERISA § 502 nevertheless preempted any private right of action that could be brought under New York Insurance law § 3214(c), because § 502 provided the exclusive remedy for all claims for benefits arising from an ERISA benefits plan. \textit{See} \textit{Franklin H. Williams Ins. Trust v. Travelers Ins. Co.}, 847 F. Supp. 23 (S.D.N.Y. 1994). The Trust sued under state law for breach of contract, conversion, and alleged a private right of action under a New York insurance law that required life insurance companies to pay interest on benefits from the date of death. \textit{Id.} at 24. Though the Trust sought both compensatory and punitive damages, it does not appear that an unfair insurance practices claim or common law bad faith claim was presented. Neither the district court nor the Second Circuit viewed any of the state law remedies as laws that regulate insurance. \textit{Id.} at 26-27. The savings clause issue focused on application of the interest on life insurance contracts law as providing the rule of decision in the case. \textit{Id.} at 26. The question of whether the interest on insurance law provided a private right of action that could be viewed as a separate insurance remedies law was not clearly addressed. \textit{See} \textit{id.} at 23.} \footnote{331. \textit{Franklin H. Williams}, 50 F.3d at 149.} \footnote{332. 959 F.2d 6 (2d Cir. 1992).} \footnote{333. \textit{Franklin H. Williams}, 50 F.3d at 149 (quoting \textit{Smith}, 959 F.2d at 8).}
that the reference to "relates to" in the Smith opinion was not meant to exclude the application of the savings clause in evaluating complete preemption; the Smith case left the savings clause reference out merely because that case did not involve a savings clause issue. Franklin H. Williams then modified the test to hold that a state law claim is completely preempted if first, the state law is preempted under § 514, that is, the claim both "relates to" an employee benefit plan and is not saved from preemption by § 514(b)(2)(A), and second, the law falls within the scope of § 502.334

The Second Circuit agreed that the New York interest law regulated insurance and, therefore, was expressly saved from preemption.335 Then, overruling the district court, the Second Circuit declared, "It would be quixotic to rule that a claim under a state statute that is saved from ERISA preemption, with the result that the claim may not be removed to federal court, may nonetheless be enforced only via ERISA provisions and remedies."336

If the Second Circuit in Franklin H. Williams Insurance Trust believed that the New York interest on insurance contracts law provided an implied remedy, the court was not clear. But assuming that was the court's approach, I would agree with the result reached in Franklin H. Williams, but for a reason not explored in the Second Circuit opinion. State insurance law remedies do not fit within the scope of claims completely preempted under ERISA § 502 because the inference of preemption under § 502 is modified by the express language of the savings clause.337

If the New York insurance law does not provide a private right of action, then the district court was correct to hold that removal was proper. The saved insurance law would still provide the rule of decision to control the interest issue, but § 502 would provide the remedy. As subsequently made clear in UNUM Life Insurance Co. v. Ward,338 the insurance law would have effectively added a mandatory contract term to the ERISA plan, comparable to the way the notice-prejudice

334. Franklin H. Williams, 50 F.3d at 149.
335. Id. at 150.
336. Id. at 151.
337. See supra statutory construction discussion accompanying notes 234-43.
rule in *UNUM* added a term to the insurance contract in that case, but the plan participant’s relief would have to come under a § 502 claim for benefits.\(^{339}\)

Furthermore, the *Franklin H. Williams* case confuses the savings clause issues. The circuit court seemingly failed to identify that the fact pattern presented two separate savings clause questions. The first question was whether the New York interest law regulates insurance; that question presents a straight § 514 problem. The second issue was whether the state law remedy to enforce the interest on insurance contracts law was also a law that regulates insurance; that question presents a potential conflict between the savings clause and § 502. If the New York interest law provided a private right of action to enforce the law’s provisions, and the remedy therefore only applied against insurance companies, the remedy would be saved from preemption because ERISA’s express exemption from preemption for laws that regulate insurance defeats the implied preemption of state law remedies under § 502. If general contract law provides the remedy to enforce the New York interest on insurance contracts law, then there would be no savings clause conflict with § 502, and § 502 would preempt the state law remedy.

**D. Defining the Scope of ERISA § 502**

Given that ERISA only preempts state law claims within the scope of § 502, it is incumbent on federal courts to define the scope of § 502 remedies. The Supreme Court has not yet had occasion to identify all of the boundaries of § 502 claims, but the Court has provided some guidance in cases addressing the similar limitations of LMRA § 301. Analysis of Supreme Court cases involving implied preemption or complete

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339. Plaintiff asserted that a private right of action was implied from the insurance law. *See* Franklin H. Williams Ins. Trust v. Travelers Ins. Co., 847 F. Supp. 23, 25-28 (S.D.N.Y. 1994). If the New York insurance law did not provide a private right of action to enforce the law, the Trust could have sued under ERISA § 502 to recover benefits due under the plan. In that action, the New York insurance law would have been saved from preemption as a law that regulates insurance and would have provided the “rule of decision” to determine what benefits were due, similar to how the notice-prejudice rule in *UNUM* provided the “rule of decision” in that case. The Trust would have recovered interest from the date of death as provided in the New York law under ERISA § 502, but the Trust would not have been able to recover punitive damages under ERISA’s civil enforcement scheme. *See* UNUM, 526 U.S. 358 (1999).
preemption under LMRA § 301, therefore, provides a good
starting point to identify state law claims that may fall
within the implied preemptive scope of ERISA § 502, but
ERISA's savings clause implications must then be added to
the mix. 340 Supplementing the rationale of the LMRA § 301
cases with ERISA's distinguishing characteristics, a working
formula to define the scope of ERISA § 502 can then be identi-

340. One of the early cases interpreting LMRA § 301, Textile Workers Union
of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), held that § 301
authorized federal courts to fashion a body of federal law that would control the
enforcement of collectively bargained contracts. Id. at 456-57. See also Local
174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962) ("[The] dimensions of § 301 re-
quire the conclusion that substantive principles of federal labor law must be
paramount in the area covered by the statute [so that] issues raised in suits of a
kind covered by § 301 [are] to be decided according to the precepts of federal la-
bor policy."). Lincoln Mills instructed that courts could resort to state law, if
compatible with the purposes of § 301, to establish the best rule to effectuate
the federal policy, but any state law applied would be absorbed as federal law
and would not form the basis of any independent source of rights or privileges.
Lincoln Mills, 353 U.S. at 456-57. Justice Frankfurter was not impressed. His
dissent complains that "by attributing to [§ 301] an occult content," the majority
opinion "transmuted" a plainly procedural section "into a mandate to the federal
courts to fashion a whole body of substantive law." Id. at 461-62 (Frankfurter,
J., dissenting).

A series of § 301 cases then followed Avco Corp. v. Aero Lodge No. 735,
International Ass'n of Machinists, which provide some definition of those reme-
dies that fall within the scope of § 301 for complete preemption removal jurisdic-
tion purposes. While § 301 does not provide guidance regarding complete
preemption of state laws that regulate insurance, cases interpreting § 301 do
help to define the extent of laws that fall within the scope of the remedial
scheme in comparison to other claims.

341. See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S.
557 (1968) (holding that the complete preemption doctrine allows cases to be
removed to federal court by recasting state law actions to enforce labor con-
tracts into claims under § 301).

injured worker filed a state law claim against his employer and the insurance
company that administered his disability benefits program, alleging bad faith
harassment in the processing of his benefits claim. Id. at 206. The disability
insurance contract was provided as part of a collectively bargained labor agree-
ment. Id. at 204. The Supreme Court held that when the resolution of a state-

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ferred to in a matter peripheral to the controversy, for example, to calculate damages in a non-contract state law claim where the terms of the plan are not disputed, will not provide a basis for complete preemption. Additionally, Franchise Tax Board instructs that § 502 does not mimic LMRA § 301 in

labor contract, the claim falls within the scope of LMRA § 301, and must either be treated as a § 301 claim, or be dismissed as pre-empted by federal labor-contract law. Id. at 221. Specifically, the Lueck court stated, "If the policies that animate § 301 are to be given their proper range,. . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." See id. at 210. Because Lueck’s tort claim was “inextricably intertwined” with the labor contract, and because it was a matter of federal contract interpretation to decide whether there was an obligation under the contract to provide payments in a timely manner, the state law bad faith claim fell within the ambit of § 301 and was, therefore, preempted. Id. at 219.

In Caterpillar Inc. v. Williams, 482 U.S. 386 (1987), the Supreme Court further clarified the scope of § 301 preemption in a case specifically applying the complete preemption doctrine. Id. at 392-93. In Caterpillar, several management level employees alleged that Caterpillar promised them they would be offered employment at other Caterpillar plants if the employer closed the plant where they worked. Id. at 389. Contrary to that promise, Caterpillar demoted the plaintiffs to positions covered by a collective-bargaining agreement, and then fired the complaining employees as part of a plant closing in California. Id. The former employees sued in state court alleging breach of the alleged private employment contracts. Id. at 390. Caterpillar removed the action to federal court asserting that any such private employment contracts had merged into the collective-bargaining agreement, and that all claims for breach of the labor agreement were completely preempted by § 301 of the LMRA. The Supreme Court held that removal was improper. Id. at 391. While § 301 governs claims founded directly upon rights created by collective-bargaining agreements and claims substantially dependent on analysis of such agreements, the Court found that the plaintiff's state law claims under the alleged oral contracts did not require any interpretation of the labor contract in order to determine the validity of the state law claims. Id. at 394.

343. See Livadas v. Bradshaw, 512 U.S. 107, 124 (1994) ("[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.").

In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), the Supreme Court upheld a state law retaliatory discharge claim in the face of a § 301 preemption challenge. Id. at 401. The employee's collective bargaining agreement prevented her employer from discharging her without just cause. Id. After plaintiff was fired, allegedly in retaliation for filing a workers compensation claim, she brought suit under an Illinois statute making such employment practices unlawful. Id. at 402. The Supreme Court found that § 301 did not preempt the state law action, even where the factual inquiry into the state law claim necessarily overlapped the factual inquiry into whether the termination was for just cause under the labor contract. Id. at 410. The Court held that § 301 did not preempt the state law claim because none of the elements of the state law claim required an interpretation of the labor contract. Id. at 405-06.
all respects: unlike the LMRA, ERISA’s express preemption language modifies ERISA’s civil enforcement provisions and § 502 only offers relief to limited specified parties. Considering *Franchise Tax Board* in conjunction with the LMRA § 301 cases, complete preemption in ERISA cases therefore should not apply to state law claims brought by parties ineligible to sue under § 502, and complete preemption should not apply to state insurance law claims, which are expressly saved from ERISA preemption.

**E. Moran v. Rush Prudential HMO, Inc. and Corporate Health Insurance v. Texas Department of Insurance**

Following *Taylor*, complete preemption flourished in claims directed at ERISA-governed Health Maintenance Organizations ("HMOs"), Managed Care Organizations, and ERISA plan Utilization Review providers. Typical of the health care benefit claims that defendants have removed to federal court, and that federal courts then fictionalized into § 502 claims, have been causes based on utilization review determinations that some recommended medical procedure was “experimental” or “not medically necessary.” In many of these cases courts struggle to define the line between utilization review decisions that determine either the “quality” (not preempted) or “quantity” (preempted) of benefits provided.

344. See, e.g., Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992).
While these cases are vitally important to patients and figure prominently in the current debate over competing "Patient Protection" bills under consideration in Congress, the "quality versus quantity" cases do not all present causes of action aimed specifically at the insurance industry.

In this article focusing on ERISA's savings clause and the potential conflict between the savings clause and ERISA's civil enforcement provisions, the most pertinent health care benefit plan disputes are presented in two circuit court opinions, Moran v. Rush Prudential HMO, Inc. and Corporate Health Insurance, Inc. v. Texas Department of Insurance, that consider ERISA's preemptive effect on separate state "HMO reform" laws. The two circuit courts disagree on whether an "independent review provision" within the HMO reform laws provides an alternative remedy to ERISA's civil enforcement provisions. The Supreme Court has granted certiorari in Moran, the Seventh Circuit case that rejected the alternative remedy rationale, and is considering a petition for certiorari in Corporate Health, which found that ERISA preempted the state law under § 502, even though the HMO law regulated insurance. If the Supreme Court finds that independent review provisions in the HMO reform laws do provide an alternative remedy that regulates insurance, the Court will likely address the statutory construction conflict involving ERISA's savings clause and ERISA § 502.

The Texas statute at issue in Corporate Health requires health care plans to offer an independent review of any adverse determination by an insurer, HMO, or utilization re-

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346. See supra note 24.
347. 230 F.3d 959 (7th Cir. 2000), cert. granted, 121 S. Ct. 2589 (June 29, 2001).
348. 215 F.3d 526 (5th Cir. 2000), reh'g denied, 220 F.3d 641 (5th Cir. 2000), petition for cert. filed.
349. See Moran, 230 F.3d 959.
view agent that some recommended treatment is not medically necessary.\textsuperscript{351} Additionally, the statute requires that a utilization review agent must comply with the independent review organizations determination.\textsuperscript{352} Similarly, the Illinois' Health Maintenance Organization Act\textsuperscript{353} at issue in Moran requires HMOs to submit to an independent physician review when a patient's primary care doctor disagrees with the HMO's conclusion that a recommended treatment is not medically necessary. Like the Texas law, the Illinois statute also directs the HMO to cover the treatment if the independent reviewer determines that the treatment is necessary.\textsuperscript{354}

In \textit{Corporate Health}, various insurers and HMO's filed suit in federal district court seeking injunctive relief and a declaration that ERISA preempted Texas Senate Bill 386.\textsuperscript{355} Circuit Judge Patrick E. Higginbotham wrote that the independent review portion of the Texas statute "related to" ERISA, but also fell within the savings clause exception to preemption for laws that regulate insurance.\textsuperscript{356} Judge Higginbotham continued, however, to analyze the independent review portion of the Texas statute in relation to ERISA's civil enforcement provisions.\textsuperscript{357} The Fifth Circuit determined that the independent review provisions created an alternative state law remedy that allowed plan participants to obtain plan benefits in a manner that conflicted with ERISA § 502.\textsuperscript{358} Judge Higginbotham declared,

\begin{itemize}
\item \textsuperscript{351} \textit{Tex. Ins. Code Ann.} art. 20A.12A(a)(1) (Vernon 2000) (codified in 1997 at art. 20A.12(c)(1)).
\item \textsuperscript{353} 215 ILL. COMP. STAT. ANN. 125/1-1, 4-10 (West 2001).
\item \textsuperscript{354} \textit{Id.} at § 4-10.
\item \textsuperscript{355} \textit{See Corporate Health Ins.}, 215 F.3d at 531. Senate Bill 386 is the popular name for the Texas HMO reform law, and is codified as amendments to various sections of the Texas Insurance Code. \textit{See id.}
\item \textsuperscript{356} \textit{Id.} at 537-38.
\item \textsuperscript{357} \textit{Id.} at 538-39.
\item \textsuperscript{358} The court explained, This [independent review scheme] creates an alternative mechanism through which plan members may seek benefits due them under the terms of the plan – the identical relief offered under [§ 502] of ERISA. As such, the independent review provisions conflict with ERISA's exclusive remedy and cannot be saved by the savings clause. \textit{Id.} at 539.
\end{itemize}
Even if the [independent review] provisions would otherwise be saved, they may nonetheless be preempted if they conflict with a substantive provision of ERISA. In *Pilot Life v. Dedeaux*, the Supreme Court held that “our understanding of the savings clause must be informed by the legislative intent concerning [ERISA’s] civil enforcement provisions.” The Court interpreted Congress’s intent regarding the exclusivity of ERISA’s enforcement scheme very broadly, concluding that the scheme preempts not only directly conflicting remedial schemes, but also supplemental state law remedies. Thus, the savings clause does not operate if the state law at issue creates an alternative remedy for obtaining benefits under an ERISA plan.  

Contrary to Judge Higginbotham’s suggestion, *Pilot Life* does not stand for the proposition that state remedies laws that regulate insurance are nevertheless impliedly preempted by ERISA § 502. Recall that in *Pilot Life* the Mississippi remedies law at issue was not aimed at the insurance industry, and therefore was not saved from preemption. The purpose of the sentence Judge Higginbotham quoted from *Pilot Life* was not to declare the winner in a contest between § 502 and the savings clause; that conflict was not presented in *Pilot Life*. In *Pilot Life*, the Supreme Court referred to the broad structure of ERISA’s civil enforcement provisions merely as evidence to support the Court’s determination that ERISA’s savings clause should be construed narrowly. *Pilot Life* nowhere intimates that the inference of preemption under § 502 more accurately reflects Congress’s preemptive intentions than the statute’s express preemption language. Importantly, the Fifth Circuit opinion fails to cite *Franchise Tax Board*, and therefore, apparently did not consider the guidance that case offers on how the Supreme Court might approach the internal conflict between implied preemption

359. Id. at 538-39.
360. See *Pilot Life*, 481 U.S. at 57.
361. See supra text accompanying notes 76-91.
362. See supra text accompanying notes 92-94.
363. See supra Part III. As described in Part III of this paper, the *Pilot Life* Court found that a state law remedy, which the Court expressly found to be outside the scope of the savings clause, conflicted with Congress’s intent that ERISA § 502 should provide the exclusive vehicle for plan participants to pursue claims within the ambit of that provision. See id.
under § 502 and ERISA's express exception to preemption for laws that regulate insurance.\footnote{364}{See Franchise Tax Bd., 463 U.S. at 25.}

In \textit{Moran v. Rush Prudential HMO, Inc.},\footnote{365}{230 F.3d 959 (7th Cir. 2000), cert. granted, 121 S. Ct. 2589 (June 29, 2001).} the Seventh Circuit addressed Illinois' independent review statute in a context that involved complete preemption removal jurisdiction.\footnote{366}{See id. at 965.} Debra Moran sued her ERISA-governed HMO in state court under state law to enforce compliance with an independent reviewers determination that a medical procedure recommended by her primary care physician was medically necessary.\footnote{367}{Id. at 964.} The Seventh Circuit held that the state law claim fell within the scope of ERISA § 502 because Ms. Moran was seeking reimbursement for the costs of the medical procedure she underwent—that is, she was seeking benefits due under the plan.\footnote{368}{Id. at 965.} The court recast her complaint to state a claim under ERISA § 502, and therefore, found removal proper under the complete preemption doctrine.\footnote{369}{Id. at 966.} The \textit{Moran} court then went on to consider whether ERISA expressly preempted the independent review provisions under ERISA § 514.\footnote{370}{See supra note 131.} The Seventh Circuit agreed with the Fifth Circuit that the independent review law regulates insurance, but then disagreed with the Fifth Circuit's depiction of the law as providing an alternative remedy.\footnote{371}{See Moran, 230 F.3d at 971.}

The \textit{Moran} court reasoned that the independent review statute was an insurance regulation.\footnote{372}{See id. at 969.} Under Illinois law, as in most states, the provisions of the state's insurance code are deemed to be incorporated into every insurance policy.\footnote{373}{See Corporate Health Ins., Inc. v. Tex. Dep't of Ins., 215 F.3d 526, 536 (5th Cir. 2000); Moran, 230 F.3d at 969.} As such, the independent review statute merely added a mandatory contract term to the insurance policy.\footnote{374}{See supra note 131.} \textit{Moran} then
compared the Illinois independent review statute to the notice-prejudice rule at issue in *UNUM Life Insurance Co. v. Ward*. The Seventh Circuit found that the Illinois independent review law, like the notice-prejudice rule in *UNUM*, provided the rule of decision that governed interpretation of the plan contract, but the remedy for breach remained a claim pursuant to ERISA § 502.

In *Moran*, the Seventh Circuit did not address any conflict between § 502 and the savings clause because the court held that the state law subject to the savings clause was not a remedies law. The two ERISA sections only come into conflict when a state insurance law provides remedies that are not available under § 502. If the Supreme Court agrees with the Fifth Circuit decision in *Corporate Health* and finds that the independent review law does provide an alternative remedy, and if the Court also finds that the independent review law is a law that regulates insurance, then the Supreme Court will have to decide the savings clause versus § 502 conflict when it considers *Moran*.

**V. CONCLUSION**

ERISA preemption issues continue to befuddle attorneys and judges, and continue to clog federal court dockets. The Supreme Court, however, is slowly providing improved direction to litigants by maintaining a focus on the rule that courts should be loath to preempt state laws regulating areas of traditional state governance. A number of lower courts have taken direction from the Supreme Court's trend to closely scrutinize any request to preempt state laws that regulate non-pension employee benefit plans. Relying upon the Supreme Court's new, kinder ERISA preemption analysis, these federal district court judges have re-visited the question of ERISA's preemption of state law bad faith or unfair insurance practices remedies and held that the state laws in question do

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376. *See Moran*, 230 F.3d at 967. The Court had already recast Ms. Moran's cause as a claim for benefits under § 502. *See id.*
377. *Id.* at 970.
regulate insurance and, therefore, are saved from ERISA preemption.

Further direction is needed from the Supreme Court, however, to instruct litigants concerning the interplay between ERISA's express savings clause and implied preemption under ERISA's civil enforcement provisions. When the reasonable interpretation of those two ERISA sections conflict because a state insurance law provides an alternative remedy not available under ERISA § 502, I suggest that the savings clause, which expressly details that ERISA does not preempt state insurance laws, must prevail over implied preemption under ERISA § 502.