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ERISA Regulation of Employee “Payroll Practices”: California Hospital Association v. Henning

Mark A. Casciari*

I. INTRODUCTION

In California Hospital Association v. Henning,1 the Court of Appeals for the Ninth Circuit reached the startling conclusion that the coverage language of section 3(1) of the Employee Retirement Income Security Act of 1974 (“ERISA”)2 does not mean what it says. The court held that section 3(1) of ERISA does not cover employee welfare benefit plans that provide vacation benefits from the sponsoring employer’s general assets, even though that section covers any “plan, fund, or program,” established or maintained for the purpose of providing vacation benefits through the purchase of insurance “or otherwise.”3 In the Ninth Circuit’s view, general asset or unfunded vacation welfare benefit plans escape ERISA coverage because they are “payroll practices.”4

This article will explore the reasons for, ramifications of and a better alternative to the Henning rationale. First, the article will


The author is one of the attorneys representing the plaintiff and counter-defendant in National Metalcrafters v. McNeil, 602 F. Supp. 232 (N.D. Ill. 1985), rev’d, 784 F.2d 817 (7th Cir. 1986). The views expressed in this article are those of the author alone. This article is in part a response to Note, Erisa Preemption of State Vacation Pay Laws: California Hospital Association v. Henning, 16 Loy. U. Chi. L.J. 387 (1985), which presented a different view of the issues addressed herein.

1. 770 F.2d 856 (9th Cir. 1985), cert. denied, 106 S. Ct. 3273 (1986).
3. 770 F.2d at 858-59.
explain the extraordinary breadth of ERISA coverage. Second, it will discuss the Henning reasoning. Third, it will address the serious ramifications of the Henning decision and conclude that the decision may, paradoxically, encourage more federal regulation and litigation in an already heavily regulated field. Finally, the article will offer good reasons why ERISA's plain language does regulate most unfunded employee welfare benefit plans, including vacation benefit plans that provide benefits from the plan sponsor's general assets.

II. ERISA'S STATUTORY FRAMEWORK

In the years after World War II, employee benefits became an increasingly important source of income for American workers. Employees, however, often failed to recognize the significance of employee benefits, and some private employers took advantage of their employees' lack of information. To protect American pri-

5. Programs providing fringe benefits developed as a means of compensating workers in lieu of increased wages; such programs multiplied when wage freezes were imposed during World War II and the Korean War. Henning, 770 F.2d at 859; S. REP. NO. 127, 93d Cong., 1st Sess. 3 (1973), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4639, 4839, and in 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT of 1974, at 587, 589 (Comm. Print 1976). By 1974, when ERISA was enacted, Congress had made the following findings:

- The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . . that they have become an important factor affecting the stability of employment and the successful development of industrial relations . . .

ERISA § 2(a), 29 U.S.C. § 1001(a) (1982). Congress characterized the growth in employee benefit plans as "enormous." Id.

Employee benefits have increased in importance for reasons other than wage freezes. These include: (1) the relative aging of the population, see, e.g., Chi. Tribune, Dec. 16, 1985, § 1, at 1, col. 2, at 16, cols. 1-6; (2) the increase in two-wage-earner families and a concomitant increase in the importance of non-wage income such as maternity and child care benefits; (3) technological advances and the decline of traditional industries, which increased the importance of relocation benefits such as training and severance benefits; and (4) continued favorable federal income tax treatment of benefits as compared to wages, see, e.g., 26 U.S.C. §§ 104-106 (1982) (employer-paid medical benefits generally are tax-free); 26 C.F.R. § 1.501(c)(9)-1 (1985) (voluntary employee benefit association may provide fringe benefits tax-free).

6. Congress found that there was a "lack of employee information" concerning the operation of employee benefit plans. ERISA § 2(a), 29 U.S.C. § 1001(a) (1982). Congress also found that many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; . . . owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; . . . owing to the termination of plans before requisite funds have been
vate sector employees from these abuses, Congress enacted ERISA. The statute is quite detailed and has been characterized as "comprehensive and reticulated." The term "employee benefit plan" as used in ERISA is all-encompassing: it includes both pension benefit plans and welfare benefit plans.

ERISA consists of four titles. Title I sets forth congressional findings and a declaration of policy, and defines the coverage of the statute. Title I also legislates reporting and disclosure, participation and vesting, funding, fiduciary responsibility, and administration and enforcement standards. These standards apply to both employee pension and welfare benefit plans, except that welfare benefit plans are exempted from the participation, vesting and funding requirements. Application of the Title I provisions is not contingent upon receipt of the favorable federal tax treatment provided for in Title II and the Internal Revenue Code, so plan sponsors are not given the option of not complying with Title I requirements and accepting unfavorable tax consequences in return. Title II of ERISA consists of amendments to the Internal

accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . . .

Id.

7. Congress declared that "[i]t is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such [employee benefit] plans and their financial soundness." Id.


20. ERISA §§ 1001-2008 (codified in various sections of 5, 26, 31 and 42 U.S.C. (1982)).
Revenue Code. These amendments altered the standards which employee benefit plans were required to satisfy, prior to ERISA, in order to qualify for favorable federal income tax treatment.

Title III contains procedures relating to the tax qualification of employee pension benefit plans, and procedures regarding prohibited transactions. Title III also coordinates the efforts of the Department of the Treasury and the Department of Labor, and provides for studies of certain employee benefit issues and the enrollment of actuaries. Title IV of ERISA establishes the Pension Benefit Guaranty Corporation, which insures certain employee pension benefit plans. Title IV also contains the Multi-Employer Pension Plan Amendments Act of 1980, which establishes and regulates the liability of employers who withdraw from multiemployer pension plans.

Congress intended to protect this complicated scheme of plan regulation from state interference. To accomplish this end, Congress enacted section 514 of ERISA which, because of its breadth, is "a virtually unique preemption provision." Section 514 provides that, with the exception of specifically enumerated types of state regulation, ERISA Titles I and IV "shall supersede any and all state laws insofar as they may now or hereinafter relate to any employee benefit plan described in Section 4(a) and not excepted under Section 4(b)." The breadth of this preemption lan-

31. 29 U.S.C. § 1144(a) (1982). The term "state law" is defined in section 514(c)(1) to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1) (1982). The term "state" is defined in section 514(c)(2) to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c)(2) (1982); see also 29 U.S.C. § 1002(10) (1982) (the term "state" includes the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island and the Canal Zone). Section 4(b) of ERISA, 29 U.S.C. § 1003(b) (1982), provides that ERISA Title I, which includes the preemption provision, does not apply to:

1. governmental plans, as defined in 29 U.S.C. § 1002(32) (1982);
2. church plans, as defined in 29 U.S.C. § 1002(33) (1982), with respect to which no election has been made under 26 U.S.C. § 410(d) (1982);
language is underscored by ERISA’s legislative history. Both the House of Representatives and the Senate passed preemption provisions which effectively required preemption of state law only if the state law conflicted with Titles I and IV.\(^3\) When the House and Senate bills went to conference, the Conference Committee rejected both versions and substituted what is now section 514’s preemption of all state laws that even “relate to” employee benefit plans.\(^3\)

This conference bill eventually became law. The sweeping “relate to” language embodies, with a few specifically enumerated exceptions,\(^3\) federal regulation of the entire employee benefits field.\(^3\)

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(3) plans maintained solely for the purpose of complying with applicable worker’s compensation laws or unemployment compensation or disability insurance laws;

(4) plans maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; and

(5) excess benefit plans, as defined in 29 U.S.C. § 1002(36) (1982) that are unfunded.

32. 120 CONG. REC. 4742, 5002 (1974).

33. H.R. REP. No. 1280, 93d Cong., 2d Sess. 383, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4639, 5162. The Conference Committee report was reaffirmed when the bill that emerged from conference was considered on the floors of the House and Senate. For example, Representative Dent, one of the bill’s sponsors and Chairman of the Subcommittee on Labor of the House Labor and Education Committee, explained: Finally, I wish to make note of what is to many the crowning achievement of this Legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . . .

The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of Section 514 would reach any rule, regulation, practice or decision of any State . . . which would affect any employee benefit plan . . . .

120 CONG. REC. 29,197 (1974). Senator Williams, another sponsor of the bill and Chairman of the Senate Committee on Labor and Public Welfare, said that section 514 “is intended to apply in its broadest sense to all actions of State or local governments. . . .” Id. at 29,933.

34. See supra note 31. Section 514’s exceptions to the preemption provision apply

(1) with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975, 29 U.S.C. § 1144(b)(1) (1982);


(3) to the Hawaii Prepaid Health Care Act, HAWAII REV. STAT. §§ 393-1 to 393-51 (1976), although this exemption is limited by 29 U.S.C. §§ 1144(b)(5)(B), 1144(b)(5)(C) (1982);
Preemption under ERISA does not depend on whether a state law concerns, or is inconsistent with, subjects that ERISA itself regulates; rather, it depends only upon whether the law "relates to" an employee benefit plan.\textsuperscript{36} In \textit{Metropolitan Life Insurance Co. v. Massachusetts},\textsuperscript{37} the Supreme Court's most recent ERISA preemption decision, the Court stated that section 514 "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive

\begin{itemize}
    \item[(4)] to certain multiple-employer welfare benefit plans, 29 U.S.C. § 1144(b)(6) (1982);
\end{itemize}


36. \textit{Shaw v. Delta Air Lines, Inc.}, 463 U.S. 85, 98 (1983). Since "state law" is defined as a law that "purports to regulate, directly or indirectly" the terms of a covered employee benefit plan, see \textit{supra} note 31, and because such a law must of necessity "relate to" the plan, the "relate to" language appears superfluous.

requirements." 38

The Supreme Court on two occasions found that ERISA's pre-emption clause invalidated state law. In Alessi v. Raybestos-Manhattan, Inc., 39 the Court held that a state statute which prohibited the integration of pension benefits with state workers' compensation benefits—an integration scheme not prohibited by ERISA—was preempted by section 514. 40 In Shaw v. Delta Air Lines, Inc., 41 the Court held that a New York law which required payment of disability benefits to pregnant employees "related to" an employee welfare benefit plan and thus was preempted. 42 The Court explained that the "relate to" standard is "extraordinarily broad"; a law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." 43

38. Id.
40. Id. at 526.
42. Id. at 98.
43. Id. at 96-98 (footnote omitted). There are two circumstances under which a state law arguably affecting an employee benefit plan may not "relate to" the plan and may thereby be saved from preemption without a statutory exemption. First, the law may not be a "state law" because it does not "[purport] to regulate, directly or indirectly, the terms and conditions of [covered] employee benefit plans." 44 ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2) (1982). The "terms and conditions" of employee benefit plans might be limited to those matters that define benefit amounts. Cf. 29 U.S.C. § 158(d) (1982) (mandatory subjects of collective bargaining and "wages, hours and other terms and conditions of employment"). But cf. Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1911-12 (1985) (preemptive scope of 29 U.S.C. § 185 (1982), providing claim for breach of collective bargaining agreement, defined broadly to include any state law claim not "independent of" any contract right). Under this approach, the states might be permitted to regulate certain provisions in benefit plans, such as a mandatory retirement provision which has little to do with benefit amounts and which might be included simply to shelter personnel practice otherwise prohibited by the state. But see Waukesha Engine Div. v. Department of Indus., Lab. & Human Relations, 619 F. Supp. 1310, 1312 (W.D. Wis. 1985) (Wisconsin statute prohibiting mandatory retirement at any age preempted where pension plan required mandatory retirement at age 70).

Second, a state law may affect employee benefit plans in a manner too tenuous, remote or peripheral to warrant a finding that the law "relates to" the plan. Shaw, 463 U.S. at 100. The courts have not hesitated to find examples of too tenuous a relationship. See, e.g., Rebaldo v. Cuomo, 749 F.2d 133, 139 (2d Cir. 1984) (New York law prohibiting hospitals from establishing in-patient charges for self-insured employee benefit plans other than as authorized by statute not preempted), cert. denied, 105 S. Ct. 2702 (1985); Lane v. Goren, 743 F.2d 1337, 1338 (9th Cir. 1984) (California statute prohibiting discrimination in hiring, promotion and salary not preempted); Savings & Profit Sharing Fund v. Gago, 717 F.2d 1038, 1039 (7th Cir. 1983) (Wisconsin law governing property settlement pursuant to divorce not preempted); Bowen v. Bowen, 715 F.2d 559, 560 (11th Cir. 1983) (same); American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders not preempted); see also St. Paul Fire & Marine Ins. Co. v. Fox, 752 F.2d 550, 552 (11th Cir. 1985) (ERISA non-alienability provision, ERISA § 203(a), 29 U.S.C. § 1053(a)
The breadth of ERISA's preemption provision promotes the Congressional goal of creating a single, uniform employee benefit plan law\(^44\) and thereby avoiding the need to comply with varying state regulations. By promoting uniform regulation of employee benefit plans, and by avoiding the costs of multistate regulation, ERISA encourages multistate employers to pass administrative savings on to employees in the form of increased benefits.\(^45\) In ad-

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\(\text{(1982), did not preempt garnishment of employee benefits); Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349, 1356-58 (9th Cir. 1986) (state agency } \text{"make whole" relief that includes fringe benefits does not relate to or regulate benefit plans); 86 Op. U.S. Dep't Lab. 5A (Jan. 21, 1986) (state tax treatment of employee benefits does not relate to employee benefit plan). These cases may have turned on the fact that the state laws did not interpret or dictate terms of an employee benefit plan. See Shaw, 463 U.S. at 95-100 (law prohibiting dissimilar treatment between pregnancy and other disabilities relates to employee benefit plan); Ellis Fleisher Produce Co. v. Tanker & Assoc., No. 85-3495 (E.D. Pa. Apr. 18, 1986) (claims } \text{"relate to" a plan if ERISA provides a remedy for the alleged wrong). Further litigation is needed to define precisely the } \text{"relate to" preemption line. Because there is a presumption against preemption, Metropolitan, 105 S. Ct. at 2389-90, litigants can be expected to assert strongly that a law either is not a } \text{"State law" within the meaning of 29 U.S.C. } \text{§ 1144(c)(2) (1982) or that it does not } \text{"relate to" employee benefit plans. The Henning decision, upon which this article focuses, undeniably involves a state law that relates to an employee benefit plan. In Henning, California law barred forfeiture of vacation benefits and required payment of pro rata benefits upon termination. California Hosp. Ass'n v. Henning, 770 F.2d 856, 858 (9th Cir. 1985), cert. denied, 106 S. Ct. 3273 (1986). The California law, therefore, regulated participation, vesting and benefit calculation, and central aspects of benefit plan administration. See ERISA §§ 203, 204, 29 U.S.C. §§ 1053, 1054 (1982) (minimum participation and vesting standards); California Hosp. Ass'n v. Henning, 569 F. Supp. 1544, 1544-47 (C.D. Cal. 1983), rev'd, 770 F.2d 856 (9th Cir. 1985), cert. denied, 106 S. Ct. 3273 (1986). 44. Senator Javits, a member of the Senate Committee on Labor and Public Welfare and one of ERISA's principal advocates, noted that broad preemption was necessary to serve } \text{"the interests of uniformity with respect to interstate plans." 120 Cong. Rec. 29,942 (1974). 45. The Supreme Court has explained how uniformity of law encourages increased benefits: An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varying and perhaps conflicting requirements of particular state } \text{... laws } \text{... would make administration of a uniform nationwide plan more difficult. The employer might choose to offer a number of plans, each tailored to the laws of particular States; the inefficiency of such a system presumably would be paid for by lowering benefit levels. Alternatively, assuming that the state laws were not in conflict, the employer could comply with the laws of all States in a uniform plan. To offset the additional expenses, the employer presumably would reduce wages or eliminate those benefits not required by any State. Another means by which the employer could retain its uniform nationwide plan would be by eliminating classes of benefits that are subject to state requirements with which the employer is unwilling to comply. ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans. Shaw, 463 U.S. at 105 n.26.}
dition to promoting uniformity and maximum benefit levels, broad ERISA preemption also promotes the goal of avoiding piecemeal litigation, and recognizes both the emergence of a pervasive federal interest in employee benefit plans and the existence of a comprehensive federal program for the future study of employee benefits.  

Section 4(a) of the statute is ERISA's coverage section; it provides that Title I of ERISA, except as otherwise provided, covers all "employee benefit plans" established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce, by any employee organization representing employees engaged in commerce or in any industry or activity affecting commerce, or by both.  

The term "employee benefit plan" is defined in section 3(3) to include a "welfare benefit plan," which in turn is defined in section 3(1) of the statute as "any plan, fund, or program" established or maintained by an employer, an employee organization, or 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, any of sixteen different types of welfare benefits, including "vacation benefits."  

Section 3(3) of ERISA also defines "employee benefit plan" to include "pension benefit plans."  

Section 2(A) defines a pension benefit plan as any "plan, fund, or program" established or maintained by an employer, an employee organization, or both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program provides retirement income to employees or results in a deferral of income by employees for periods of employment extending to the

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49. 29 U.S.C. § 1002(1) (1982). The sixteen "welfare benefits" regulated by ERISA are: (1) medical benefits, (2) surgical benefits, (3) hospital care or benefits, (4) benefits in the event of sickness, (5) accident benefits, (6) disability benefits, (7) death benefits, (8) unemployment benefits, (9) vacation benefits, (10) apprenticeship benefits, (11) other training program benefits, (12) day care center benefits, (13) scholarship fund benefits, (14) prepared legal service benefits, (15) holiday benefits, and (16) severance benefits. The last two benefits are included in ERISA § 3(1) by virtue of the statute's reference to "any benefit described in Section 302(c) of the Labor-Management Relations Act, 1947 [29 U.S.C. § 186(c) (1982)] (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. § 1002(1)(B) (1982).  

Section 302(c) of the Labor-Management Relations Act refers to many of the benefits specifically mentioned in ERISA § 3(1)(A). The only benefits not listed in § 3(1)(A) but included in the Labor-Management Relations Act are holiday and severance benefits. See 29 C.F.R. § 2510.3-1(a)(3) (1985).
termination of covered employment or beyond.\textsuperscript{51}

III. \textit{CALIFORNIA HOSPITAL ASSOCIATION v. HENNING}

In \textit{California Hospital Association v. Henning},\textsuperscript{52} a group of trade associations commenced an action against the Labor Commissioner of the Department of Industrial Relations of the State of California. The plaintiffs sought a declaration that a California enforcement policy, which barred forfeiture of vacation benefits and required payment of a pro rata share of vacation benefits upon termination of employment, was preempted by ERISA.\textsuperscript{53} The plaintiff employer-associations maintained plans that both forbade payment of prorated vacation benefits and forfeited the vacation benefits of employees not actively employed on specific eligibility dates (for example, the anniversary of the date on which employment commenced).\textsuperscript{54}

The United States District Court for the Central District of California entered judgment for the plaintiff trade associations.\textsuperscript{55} The district court ruled that the plain language of section 3(1) of ERISA revealed a congressional intent that ERISA embrace every plan or program established, by an employer engaged in activities affecting interstate commerce, for the purpose of providing vacation benefits.\textsuperscript{56} The court interpreted section 3(1)'s "plan, fund, or program" language to encompass any benefit arrangement that has (i) intended benefits, (ii) intended beneficiaries, (iii) a source of financing, and (iv) a procedure for the application and collection of benefits.\textsuperscript{57} The court specifically rejected California's contention that ERISA regulates only "formal plans funded by a trust."\textsuperscript{58} The court reasoned that ERISA does not require the funding of welfare benefit plans and that if an informal vacation benefit plan violates ERISA's reporting and disclosure requirements, the issue thus presented is whether the plan complies with ERISA, not whether it is covered.\textsuperscript{59} The court also rejected the state's interpre-

\begin{footnotesize}
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\item \footnotesize 770 F.2d 856 (9th Cir. 1985), \textit{cert. denied}, 106 S. Ct. 3273 (1986).
\item \footnotesize \textit{Id.} at 858.
\item \footnotesize \textit{Id.}
\item \footnotesize \textit{Id.}
\item \footnotesize \textit{Id.} at 1544.
\item \footnotesize \textit{Id.} at 1546.
\item \footnotesize \textit{Id.} at 1545-46.
\item \footnotesize \textit{Id.}; \textit{see infra} note 125.
\end{enumerate}
\end{footnotesize}
tation of a United States Department of Labor regulation, which excluded from ERISA coverage certain "payroll practices" including payment of compensation out of the employer's general assets while an employee is on vacation. The district court noted that it is "sensible" to read this regulation as applying only to discretionary vacation "practices," rather than to "plans, funds, or programs" within the meaning of section 3(1) of ERISA. The court concluded that to the extent the regulation excludes all general asset vacation welfare benefit plans, it is clearly at odds with the lan-

60. 29 C.F.R. § 2510.3-1(b) (1985). This Department of Labor regulation provides in pertinent part:

(b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as—

(i) Overtime pay,

(ii) Shift premiums,

(iii) Holiday premiums,

(iv) Weekend premiums;

(2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons,

(ii) Payment of compensation to an employee who is absent while on active military duty,

(iii) Payment of compensation while an employee is absent for the purpose of serving as a juror or testifying in official proceedings,

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

Id. (emphasis added).


62. Id.
language of ERISA and therefore invalid.63

After deciding that the vacation benefit plans of the employer associations were "plans, funds, or programs" within the meaning of ERISA section 3(1), the district court next concluded that the California enforcement policy, which established payment of pro rata vacation benefits upon termination of employment and prohibited the forfeiture of such benefits, was a "state law" that "related to" the plans because it directly regulated benefit plan participation and vesting and benefit calculation. The court thus found that California's enforcement policy was preempted by ERISA section 514(a).64

The Court of Appeals for the Ninth Circuit reversed. In the appellate court's view, the "sole" ERISA coverage issue was the validity of the United States Department of Labor regulation, which the court interpreted as exempting from ERISA coverage "payroll practices," including payment of compensation out of the employer's general assets while an employee is on vacation.65 The court of appeals initially noted that the ERISA terms "employee benefit plan" and "plan . . . providing . . . vacation benefits" are undefined or ambiguous, and that the terms have no precise meaning which precludes the court's reading of the Department of Labor "payroll practices" regulation.66 The appellate court next addressed the issue of whether the Department of Labor had exceeded its authority by issuing a regulation which was not a "reasonable and permissible" interpretation of ERISA section 3(1).67

According to the Ninth Circuit, Congress was primarily concerned with regulating private pension plans when it enacted ERISA, and the legislation was intended to remedy two principal abuses in the private benefit system: mismanagement of funds that financed employee benefits and failure to pay employees the bene-

63. Id.
64. Id. at 1547. The California enforcement policy was based on CAL. LABOR CODE § 227.3 (West Supp. 1986), as interpreted in Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 784, 647 P.2d 122, 128, 183 Cal. Rptr. 846, 852 (1982).
66. Henning, 770 F.2d at 858.
67. Id. at 859.
fits promised. 68 "[T]raditional vacations during which the em-
ployer continue[s] to pay the employees' regular wages," in the
Ninth Circuit's view, present neither of the evils Congress intended
to address in ERISA, because they do not involve an administered
fund or a special risk of loss or nonpayment. 69 Moreover, there is
no specific legislative history indicating that Congress intended to
regulate such vacation payments. 70

Given the primary focus of ERISA and the absence of any indi-
cation that Congress sought to regulate unfunded vacation benefit
plans, the Ninth Circuit found that the Department of Labor's
payroll practices regulation, as interpreted by the court, was rea-
sonable. Under this interpretation, only funded vacation benefit
plans would be covered by ERISA. 71 Presenting further evidence
of the reasonableness of its reading of the statute, the court stated
that ERISA coverage of general asset vacation benefit plans would
"impose a substantial and needless burden upon employers and the
federal courts."72 It is unlikely, the court said, that Congress in-
tended to create burdens of such magnitude without evidence of
need, and without comment. 73

Recognizing that its holding could conflict with a prior decision
in Scott v. Gulf Oil Corp., 74 wherein the Ninth Circuit held that
ERISA does regulate an employer welfare benefit plan that pro-
vides severance welfare benefits from general assets, 75 the court distin-
guished severance from vacation benefits. The court reasoned
that severance benefits are generally greater than vacation benefits,
and that there is a correspondingly greater chance of default on

68. Id.
69. Id.
70. Id.
71. Id. at 860.
72. Id.
73. Id. at 860-61.
74. 754 F.2d 1499 (9th Cir. 1985).
75. The Scott holding that ERISA regulates general asset severance welfare benefit
"plans, funds or programs" has been endorsed by every other court that has addressed
the issue, and has been affirmed summarily by the Supreme Court. See, e.g., Holland v.
Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985), aff'd sub nom. Brooks v. Burling-
ton Indus., Inc., 106 S. Ct. 3267 (1986); Gilbert v. Burlington Indus., Inc., 765 F.2d 320
(2d Cir.), aff'd sub nom. Roberts v. Burlington Indus., Inc., 106 S. Ct. 3267 (1986); An-
derson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir. 1985); Jung v. FMC Corp., 755
F.2d 708 (9th Cir. 1985); Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983); Pinto
v. Zenith Radio Corp., 480 F. Supp. 361 (N.D. Ill. 1979), aff'd, 618 F.2d 110 (7th Cir.
1980); Mylstar Elec., Inc. v. McNeil, No. 86-387 (N.D. Ill. June 2, 1986); accord Blau v.
Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, 106 S. Ct. 183 (1985);
Director of Bureau of Lab. Standards v. Halifax Parking Co., No. 85-216 (Me. June 2,
1986).
severance obligations than on vacation obligations. Since ERISA was intended in part to ensure that employers fulfill promises made to employees, the Ninth Circuit found it reasonable to conclude that unfunded severance, with its danger of default, falls within ERISA coverage while unfunded vacation benefits, which present less chance of default, do not.

IV. ANALYSIS OF THE HENNING DECISION

The Ninth Circuit’s decision in Henning represents one interpretation of ERISA’s “plan, fund, or program” language. The court correctly recognized that these words are not specifically defined in the statute. Because these words are critical in determinations of ERISA coverage and concomitant state law preemption, the court’s attempt to establish the contours of preeminent federal regulation of the employee benefits field warrants serious attention.

76. Henning, 770 F.2d at 860. In Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir.), aff’d sub nom. Roberts v. Burlington Indus., Inc., 106 S. Ct. 3267 (1986), the Second Circuit recognized but specifically declined to rely on the Scott court’s distinction between severance and vacation benefits for ERISA coverage purposes. The validity of this distinction is questionable, particularly as applied to the facts of the Henning case. In Henning, vacation benefits upon termination were at issue. These benefits, therefore, were quite similar to severance benefits. Henning, 770 F.2d at 858.

77. Henning, 770 F.2d at 860-61.

78. See supra notes 44-48 and accompanying text.

79. Preemption issues historically have been extremely difficult for the courts to resolve. Our federal system seeks to reserve to the states as much authority to regulate matters affecting their citizens as is possible. See New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (state sovereignty encourages valuable policy experimentation). Federal preemption is a limited exception to the rule of state preeminence. See Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2389-90 (1985) (“We also must presume that Congress did not intend to pre-empt areas of traditional state regulation . . . . The presumption is against pre-emption . . . .”). On the other hand, Article VI of the United States Constitution dictates that federal law is the supreme law of the land. It is helpful to review the experience of the courts in defining the boundaries of preemption of state laws by the federal National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-187 (1982), although the NLRA is distinguishable from ERISA because, unlike ERISA, the NLRA contains no express preemption provision. See Metropolitan, 105 S. Ct. at 2393. In the more than fifty years since enactment of the NLRA, the courts have constantly struggled to define the federal/state lines of authority. See, e.g., Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm’n, 427 U.S. 132, 151-55 (1976) (state regulation of union refusal to work overtime preempted even though the refusal was arguably neither protected nor prohibited by the NLRA). No end to the preemption litigation is in sight. Compare Gould, Inc. v. Department of Indus., Lab. & Human Relations, 106 S. Ct. 1057 (1986) (state recidivism law based on NLRA violations preempted with International Longshoremen’s Ass’n v. Davis, 106 S. Ct. 1904 (1986) (superintendent’s fraud and misrepresentation in acting against union not preempted by the NLRA). It must be recognized that, given our dual sovereignty system, federal/state lines of authority will never be frozen, and there will always be considerable litigation over where the line should be drawn. See generally Cox, Labor Law Preemption
The *Henning* analysis may be applied to establish ERISA coverage in many contexts other than general asset vacation benefit plans. There are sixteen types of welfare benefit "plans, funds, or programs" specifically regulated by ERISA, of which vacation benefits are one, and ERISA also regulates each pension benefit "plan, fund, or program." Thus, *Henning* may have a critical impact on determinations of the scope of ERISA in many different welfare and pension benefit plan contexts.

The *Henning* court, however, did not proffer a clear method for defining a "plan, fund, or program." Instead, it proposed three inconsistent coverage rationales. First, the court's decision may be read to exclude from ERISA coverage only benefit plans that provide benefits from an employer's general assets. Second, *Henning* may be interpreted to exempt from coverage only those plans that provide "traditional" benefit payments in the form of "ordinary" or "regular" wages. Third, the decision may be read to exclude plans that present no danger that the employer will default on his promises to pay considerable, as opposed to limited, plan benefits. Each of these coverage tests contravenes ERISA when viewed separately, and each undermines Congress' clear intent in enacting the statute. Furthermore, the three tests are invalid when viewed together. Following are discussions of each of the *Henning* coverage tests.

### A. The Funding Precondition to ERISA Coverage

Sections 3(1) and 3(2) of ERISA provide that the statute covers any "plan, fund, or program." Had Congress intended to limit ERISA coverage to funded plans, there would have been no reason to include the words "plan" and "program" as alternatives to "fund." Section 3(1), which covers an employee welfare benefit "plan, fund, or program," provides that coverage exists if benefits

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Revisited, 85 Harv. L. Rev. 1337 (1972); Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio L.J. 277 (1980). The specific preemption language in ERISA is an attempt by Congress to minimize the inevitable litigation.

80. See supra note 49 for a list of the sixteen welfare benefits; see also *Henning*, 770 F.2d at 860 (ERISA-regulated severance plans are distinguishable from non-ERISA-regulated general asset vacation benefits and "medical leaves").


82. *Henning*, 770 F.2d at 859.

83. Id.

84. Id. at 860; see also Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3090 n.8 (1985) (extensive legislative history shows congressional intent to prevent mismanagement of benefit funds).

are provided through the purchase of insurance "or otherwise." 86 Here again, if coverage depended on the existence of a fund, there would have been no reason to define coverage in terms of benefits provided through the purchase of insurance "or" otherwise, since such language is inconsistent with the notion that coverage depends on the existence of a "fund." Similarly, section 3(2) does not define ERISA coverage of pension benefit plans in terms of benefits provided from a fund; rather, it states that coverage exists regardless of "the method of distributing benefits from the plan." 87

When Congress intended to exclude an unfunded employee benefit plan from ERISA coverage, it clearly said as much. For example, ERISA section 4(b)(5) exempts unfunded excess benefit plans from coverage. 88 This exclusion would be entirely unnecessary if, to begin with, all unfunded benefit plans were excluded from the purview of ERISA.

Section 3(1)(A) of ERISA provides that welfare benefits include medical, surgical, hospital, sickness, accident, disability, death, unemployment and vacation benefits; benefits relating to apprenticeship or other training programs; day care center benefits; scholarship fund and legal services benefits. 89 Section 3(1)(B) 90 states that welfare benefits also include any benefit described in section 302(c) of the Labor Management Relations Act, 91 which includes the same benefits listed in section 3(1)(A) of ERISA (as well as severance and holiday benefits), but only insofar as the benefits are paid from a trust fund. 92 The logical way to condition coverage on funding of welfare benefit plans would have been to limit the definition of "employee welfare benefit plan" to those funded plans described in ERISA section 3(1)(B) instead of also covering those plans listed in 3(1)(A). But Congress did not choose to so limit ERISA's coverage.

A funding precondition to ERISA coverage conflicts with the plain language of the statute. Furthermore, a definition of "plan, fund, or program" which includes such a precondition would

88. 29 U.S.C. § 1003(b)(5) (1982). Congress was ambiguous, however, in at least one other context. It defined welfare benefit plans to include a "plan, fund, or program" established or maintained to provide a "scholarship fund." ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A) (1982); see also 40 Fed. Reg. 34,527 (1975); 29 C.F.R. § 2510.3-1(k) (1985) (general asset scholarship "fund" not covered by ERISA).
wholly frustrate ERISA's goal of attaining uniformity in benefit regulation. A funding coverage standard would, in effect, allow employers and employee organizations to choose between being regulated by ERISA or by state law. If state law did not regulate employee benefit plans or if state regulations were more favorable to the plan sponsor than ERISA regulation, the plan sponsor could avoid ERISA requirements simply by providing benefits from his general assets. Conversely, if ERISA coverage were preferable to state regulation, the plan sponsor would only need to establish a

93. Section 39m-5 of the Illinois Wage Payment and Collection Act, for example, is entitled "Final compensation—Vacation pay—Time for payment," and provides:

Every employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for such employee. Where such employee requests in writing that his final compensation be paid by check and mailed to him, the employer shall comply with this request.

Unless otherwise provided in a collective bargaining agreement, whenever a contract of employment or employment policy provides for paid vacations, and an employee resigns or is terminated without having taken all vacation time earned in accordance with such contract of employment or employment policy, the monetary equivalent of all earned vacation shall be paid to him or her as part of his or her final compensation. An Illinois appellate court panel has endorsed such an interpretation. Golden Bear Family Restaurants, Inc. v. Murray, 144 Ill. App. 3d 616, 494 N.E. 2d 581 (1st Dist. 1986), petition for leave to appeal filed, No. 63919 (Ill. Sup. Ct. Aug. 7, 1986). California has adopted the same minimum vesting rule. Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982). ERISA permits an employer to reject a state minimum vesting standard and to establish a no-vesting rule or the vesting standard of his choice.
funded plan in order to fall within ERISA’s purview. Moreover, since welfare benefit plans are exempt from ERISA’s minimum funding requirements, an option to choose to be regulated by ERISA merely by creating a fund could frustrate the congressional intent of preventing the mismanagement of benefit funds. If a funding precondition existed, an employer or employee organization might establish a grossly underfunded welfare benefit plan and still meet ERISA standards.

Thus, defining “plan, fund, or program” in terms of whether the plan sponsor chooses to establish a fund through which to pay benefits not only conflicts with the plain language of ERISA, but also gives plan sponsors the illogical option of avoiding ERISA requirements.

21, 1986) (vesting of retiree welfare benefits determined solely by plan documents, not ERISA common-law minimum vesting rule); Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276, 280 (3d Cir. 1984) (“[u]nless the collective bargaining agreement establishes a duty to maintain the [welfare benefits] program, ERISA does not come into play”); Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans, 607 F. Supp. 196, 198 (W.D.N.Y. 1984) (the “sole question” is “whether under the terms of the Plan documents Bethlehem had reserved the right to reduce the terms of pensioner health coverage”); Pinto v. Zenith Radio Corp., 480 F. Supp. 361, 363-64 (N.D. Ill. 1979) (severance benefits defined by the terms of the plan), aff’d, 618 F.2d 110 (7th Cir. 1980). See generally H.R. REP. NO. 807, 93d Cong., 2d Sess. 60 (1974) (to require vesting of welfare benefits would seriously complicate administration and increase the cost of plans); Hearing on H.R. 5475 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 98th Cong., 2d Sess. 17 (Comm. Print 1984) [hereinafter cited as ERISA Hearing] (prepared statement of R. Marks, Administrator, Office of Pension and Welfare Benefit Programs, U.S. Dep’t of Labor) (Congress intentionally has decided not to establish minimum vesting standards for welfare benefit plans); Pub. L. No. 98-369, 98 Stat. 901, § 560(a) (1984) (Congress has directed the Secretary of the Treasury to study the need for participation, vesting and funding requirements for welfare benefit plans).

State law also may impose more severe remedies than does ERISA. Compare Ill. REV. STAT. ch. 48, ¶ 39m-14, ch. 38, ¶¶ 1005-8-3-(a)(3), 1005-9-1-(a)(3) (1985) (employers who are able but refuse to pay required vacation pay may be subject to a fine of $500 and imprisonment for 30 days, for each day of violation, and a one percent per day penalty up to twice the amount due) with Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3092-93 (1985) (ERISA § 409(a), 29 U.S.C. § 1109(a) (1982) does not provide a claim for extra-contractual damages).

95. See supra note 84.
96. An employer seeking ERISA coverage to shield himself against more burdensome state laws could fund a vacation welfare benefit plan with one dollar, and make payments from general assets to the “fund” to pay benefits. The Internal Revenue Service has even ruled that an employer can continue to pay vacation benefits from its general assets on behalf of such a trust and later simply seek reimbursement from the trust. IRS, Priv. Letter Rul. 8,335,087 (June 1, 1983). Because welfare plans are exempted from ERISA’s insurance provisions, ERISA §§ 4001-4303, 29 U.S.C. §§ 1301-1453 (1982), participants in underfunded welfare plans lack the insurance protection afforded by pension plans.
B. Defining ERISA Coverage in Terms of Whether the Benefits Are "Traditionally" Made in the Form of "Ordinary" Wages

The court of appeals in Henning obviously was alarmed by the prospect of ERISA regulating the long-standing employer tradition of paying employees their "regular" paycheck from general assets while they are on vacation. In the court's view, these transactions were mere wage payments, and Congress never intended for ERISA to cover the payment of ordinary wages. Before ordinary wage payments are unwisely brought under federal regulation, the court reasoned, there should be specific legislative history supporting the inclusion. The court found no such history.

The Henning court's conclusion that ERISA does not cover "traditional" payments of benefits in the form of ordinary wages is misplaced. It is prohibitively difficult, as the Supreme Court recently has acknowledged, to define federal regulation in terms of "tradition." Moreover, because traditions constantly change, a tradition must be fixed in time and substance to be of any assistance in interpreting a federal regulation. The logical freezing point for purposes of ERISA coverage is the enactment of ERISA in 1974. The statute and its legislative history, however, do not define ERISA's scope in terms of reserving for the states what was "traditionally" theirs in 1974. In fact, an important impetus for ERISA was the widespread perception that the "traditional" state regulation of pension benefits was inadequate. Furthermore, the statute and its legislative history reveal that Congress chose to regulate the entire field of employee benefit plans, funds and programs, and to preempt all state regulation, whether or not it was consistent with ERISA. When Congress chose to include training benefits, day care center benefits and prepaid legal services in ERISA's coverage definition of welfare benefit plans, it was clearly thinking of the future, not the traditional past. It is, therefore, both imprac-

97. See supra note 69 and accompanying text.
98. See supra notes 69-70 and accompanying text.
99. Henning, 770 F.2d at 859.
102. See supra notes 29-37 and accompanying text.
103. ERISA § 3(1), 29 U.S.C. § 1002(1) (1982); see also supra note 46. Child care, for example, will become an increasingly important employee welfare benefit. 121 Analyses 61 (BNA) (Apr. 21, 1986).
tical and contrary to the comprehensive ERISA scheme to define the statute's scope in terms of judicial notions of traditional state regulation.

A definition of "plan, fund, or program" which excludes "ordinary wages" also is flawed.\(^{104}\) While ERISA does not define "wages" and "benefits," pre-ERISA federal tax law defined "benefits" as employee compensation intended to safeguard or improve the health of employees or to protect against a contingency which interrupts earning power.\(^{105}\) Current Treasury regulations specifically include vacation pay as a "benefit," not a "wage," because such pay safeguards the health of employees by providing a period of rest and relaxation and by protecting against physical or mental fatigue, accidents or illness which can interrupt earning power.\(^{106}\) Because ERISA amended the Internal Revenue Code in part, and because the Internal Revenue Code regulates the same subject matter, the Code serves as useful authority by which to distinguish between "wages" and "benefits."

The rationale that benefits in the form of "ordinary wages" are excluded from ERISA coverage also leads to anomalous results. The logical extension of this theory is that any benefit payment substantially equivalent in amount to a wage payment is not covered by ERISA because it is in reality part of an employee's wages, not a benefit. The anomalous nature of this result becomes evident when it is contrasted with the treatment of pension benefit payments under ERISA and the Internal Revenue Code;\(^{107}\) while pension benefit payments may well equal pre-retirement wage checks, no one seriously could argue that such pension benefits are excluded from ERISA coverage. Focusing on the amount of the benefit in defining statutory coverage denies employees the protection of ERISA, which establishes standards for how the amount of the benefit is to be calculated. Further difficulties arise in defining the

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\(^{104}\) The Henning court relied upon the Department of Labor regulation. See supra note 60. There is some evidence that the regulation was initially intended to exclude from ERISA coverage only certain arrangements under which employers simply cut regular wage checks and called them "benefits." 39 Fed. Reg. 42,236 (1974); see also 29 C.F.R. § 2510.3-1(a)(2) (1985) ("payroll" savings plan does not meet requirement of pension plan); 29 C.F.R. § 2510.3-1(b) (1985) ("payroll" practices do not constitute welfare benefit plans). Over time, however, the Department of Labor has expanded its interpretation of the regulation to exempt certain specifically identified benefits, whether "regular" wage payments or not, if the payments are made from the plan sponsor's general assets.

\(^{105}\) 26 C.F.R. § 1.501(c)(9)-3(d) (1985).

\(^{106}\) Id. at § 1.501(c)(9)-3(e); see also 26 C.F.R. § 1.162-10(a) (1985).

\(^{107}\) I.R.C. § 415(b)(1) (1982) (maximum limitation for defined benefits is $90,000 per year or 100% of the participant's average compensation for his high three years).
point of similarity at which benefits are considered wages. Any "ordinary" wage exemption from ERISA would provide plan sponsors with an expedient method of escaping the statute. A plan sponsor who could devise a benefit plan to provide benefits in the form of ordinary wages could attain voluntary deregulation. The Ninth Circuit’s wage/benefit test for ERISA coverage is, therefore, ill-advised.

C. The Amount in Controversy Precondition to ERISA Coverage

The Henning court, in order to reach its conclusion, had to overcome both the unmistakable fact that section 3(1) of ERISA makes no substantive distinction between vacation benefits and fifteen other welfare benefits, and the fact that a previous Ninth Circuit decision had held that severance benefit plans providing benefits from an employer’s general assets fall within ERISA’s purview. According to the Henning court, a severance welfare benefit plan is a “plan, fund, or program” because severance payments generally are substantial in amount, and because there is a considerable danger that the plan sponsor will default on the severance obligations—a danger Congress sought to minimize in enacting ERISA. Vacation benefits, in the court’s view, involve considerably less money and therefore do not present the same danger and the same need for federal protection. This theory of ERISA coverage thus conditions the application of the statute on the amount in controversy in an employee benefit dispute.

There is no basis for the Henning court’s finding, by judicial notice, that severance benefits generally involve more money than vacation benefits. This method of determining ERISA coverage would also require judicial labelling of fourteen other benefits in terms of “generally” involving large or small sums of money. Child care benefits, for example, might be viewed as involving little

108. 29 U.S.C. § 1002(1) (1982); see supra notes 89-92 and accompanying text.
109. See supra note 74.
110. See supra note 76.
111. Id.
112. A judicially noticed fact must not be subject to reasonable dispute; it must be either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). One can reasonably dispute whether the amounts involved in severance benefit controversies generally exceed those involved in vacation benefit disputes, especially if the vacation benefit dispute is a class action. See National Metalcrafters v. McNeil, 784 F.2d 817, 818 (7th Cir. 1986) (class action to recover $115,000 in vacation benefits); Chi. Tribune, Feb. 5, 1986, § 2, at 1, col. 1 (Chicago Transit Authority grants employees as much as seven weeks vacation per year).
money and therefore not worthy of ERISA safeguards, while hospital care benefits might be viewed as involving large sums of money. Obviously, however, the amount in controversy is not necessarily dependent on the type of benefit in issue. This controversy test invites presumptions which are subject to reasonable dispute and are thus not properly the objects of judicial notice.

Moreover, the amount in controversy coverage standard, if valid, would also exempt minor pension controversies from the coverage of the statute. The courts have consistently rejected this approach,\(^{113}\) since it leads to the inequitable result that individuals with considerable benefits are entitled to federal protections while those with lesser benefits are not.

The controversy test also violates the language and purpose of the Act. ERISA was drafted to protect individuals, not claims,\(^{114}\) and the statute establishes no minimum amount in controversy as a precondition to jurisdiction.\(^{115}\) Congress enacted ERISA to apply to the entire employee benefits field, not just the lucrative portion of the field.\(^{116}\) Thus, the amount in controversy coverage rationale of the Ninth Circuit's *Henning* decision is also flawed.

**D. The Probability of Further Regulation and Litigation as a Result of Henning**

Each of the three ERISA coverage tests articulated in *Henning* could lead to negative consequences. Welfare benefits are becoming increasingly important to the nation's employees.\(^{117}\) Pension

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\(^{113}\) See, e.g., *Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir. 1984) (fact that profit-sharing trust lost no money in challenged investment transaction, and in fact received extraordinary return, did not preclude ERISA breach of fiduciary duty action).

\(^{114}\) See ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (1982) (a civil action may be brought by "a" participant or beneficiary).

\(^{115}\) ERISA § 502(f), 29 U.S.C. § 1132(f) (1982) (the district courts have jurisdiction over ERISA actions without regard to the amount in controversy).

\(^{116}\) See *supra* notes 29-37 and accompanying text.

\(^{117}\) The testimony of Robert A.G. Marks, Administrator, Office of Pension and Welfare Benefit Plans, U.S. Department of Labor, on Sept. 26, 1984, before the Subcommittee on Labor-Management Relations, is a good summary of the new prominence of welfare benefits:

At the time that ERISA was enacted, welfare plans did not appear to have the same kind of significance that they have today. For most workers and employers benefits were provided largely through insurance policies. In addition, national health insurance was a part of the national dialogue at that time, and, depending on the results in the ballot box, it was thought there might be a national health insurance program for America.

So the issues weren't as clear at that time as they are now. There had been substantial changes in the welfare benefit universe and substantial growth since ERISA was passed. There are now many new types of plans—van pooling,
In the retiree medical welfare benefit area, for example, some courts are even fashioning their own ERISA federal common-law vesting rules to fill a perceived ERISA gap which exempts welfare benefits from minimum ERISA vesting standards. The Ninth Circuit's Henning coverage rationales may promote confusion regarding the definition of "plan, fund, or program." The volume of preemption litigation will increase as the federal/state line of authority becomes unclear, and Henning blurs that line. Faced with increased litigation and the increasing importance of welfare benefits, Congress may choose to amend ERISA's welfare benefit coverage provisions. While the outcome of any legislative effort is uncertain, further definition of "plan, fund, or program" is entirely unnecessary. The current definition is fully adequate to satisfy congressional aims and it limits litigation.

V. THE PLAIN LANGUAGE ALTERNATIVE TO THE PAYROLL PRACTICES EXCEPTION

The Supreme Court with increasing frequency has endorsed giving effect to the plain language of statutes, unless legislative history

prepaid legal services, child care. There are cafeteria plans and flexible benefit arrangements that have become very popular.

ERISA Hearing, supra note 93, at 23; see also supra note 103; 27 DAILY LAB. REP. (BNA) at C-1 (Feb. 10, 1986) (legal service plans for employees are on the rise).

118. There has been a very rapid growth in employer-sponsored welfare benefits, primarily health benefits . . . . [T]he dollar level of payments paid for health is today slightly larger than the annual level of dollar payments made to private pension plans. In fact, on an annual basis, more dollars are going to health costs.

ERISA Hearing, supra note 93, at 24.


120. Congress may, for example, decide to expand the types of welfare benefits covered by ERISA. See, e.g., Analysis, Caregiving to Elderly as Emerging Employment Issue, 121 ANALYSIS 17 (BNA) (Feb. 3, 1986) (caregiving to the elderly—not child care—may be the employee benefit issue of the 1990's); accord 36 DAILY LAB. REP. (BNA) at C-1 (Feb. 24, 1986). Congress has responded recently to judicial efforts to create a domestic relations order exception to ERISA preemption. See 29 U.S.C. § 1144(b)(7) (Supp. II 1984) (qualified domestic relations orders are not subject to the broad preemption provided for by § 1144(a)).
compels otherwise.\textsuperscript{121} The dictionary defines "plan" or "program" as any organized arrangement, scheme or schedule.\textsuperscript{122} The words "established or maintained," modify "plan, fund, or program" in section 3(1).\textsuperscript{123} These words are also expansive: they reveal that one need not specifically intend to provide benefits, as long as a plan, fund or program is established or is maintained to provide the benefits.

One important decision has endorsed the plain meaning of ERISA's coverage language. In Donovan v. Dillingham,\textsuperscript{124} the Court of Appeals for the Eleventh Circuit initially dismissed the proposition that ERISA coverage is conditioned upon compliance with ERISA requirements:

There is no requirement of a formal, written plan in either ERISA's coverage section or its definitions sections. Once it is determined that ERISA covers a plan, the Act's fiduciary and reporting provisions do require the plan to be established pursuant to a written instrument; but clearly these are only the responsibilities of administrators and fiduciaries of plans covered by ERISA and are not prerequisites to coverage under the Act.\textsuperscript{125}


\textsuperscript{122} Webster's Third New International Dictionary 1729 (14th ed. 1964).

\textsuperscript{123} 29 U.S.C. §§ 1002(1), 1002(2) (1982).

\textsuperscript{124} 688 F.2d 1367 (11th Cir. 1982) (en banc).


In addition to possible judicial remedies for violations of ERISA's reporting and disclosure rules, there are civil and criminal statutory penalties for noncompliance with ERISA requirements. ERISA §§ 501, 502, 504, 510, 511, 29 U.S.C. §§ 1131, 1132, 1134, 1140, 1141 (1982). The Blau v. Del Monte decision reflects judicial recognition that these ER-
The Eleventh Circuit then defined "plan, fund, or program." 
"[A] plan, fund or program under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits."

This definition would exclude purely discretionary practices that lack a class of beneficiaries and procedures for receiving benefits. Purely discretionary vacation or severance bonuses, for example, are not covered by ERISA. This conclusion is supported by ERISA's reporting and disclosure requirements, which contemplate a benefit scheme or formula to be disclosed to participants and beneficiaries. It is virtually impossible, when dealing with purely discretionary practices, to satisfy ERISA's disclosure requirements.

The interpretation of ERISA's coverage language in plain terms would not, as the Ninth Circuit suggested, lead to negative results. The Henning decision was concerned with two adverse consequences of ERISA regulation of employee welfare benefit plans that are "payroll practices": (1) overburdening employers with federal regulation and (2) overburdening the courts with ERISA litigation. The ERISA scheme, however, was carefully designed to avoid these negative consequences.

ERISA already exempts welfare benefit plans from its participation, vesting, funding and plan termination requirements. Moreover, compliance with the remaining requirements, which concern reporting, disclosure, fiduciary and claims procedures, is not difficult. The Department of Labor exempts welfare benefit plans with fewer than 100 plan participants from the reporting and disclosure

ISA remedies may be ineffective because they are too lenient or employed too rarely to ensure compliance.

126. Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc); cf. 26 C.F.R. § 1.401(a)-1(b) (1985) (in order for a pension plan to be a qualified plan under Internal Revenue Code § 401(a), the plan must be "established or maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement").

127. Following is an example of a purely discretionary severance practice not covered by ERISA:

The Company may give a severance payment to an employee who is terminated.

A decision whether to make a severance payment, and the amount and terms of the payment, will be made in all cases at the sole discretion of the personnel department.


129. For example, current regulations require that a summary plan description state eligibility and years and service requirements. Id. at § 2520.102-3(j). Purely discretionary practices simply do not have such standards.

requirements if benefits are paid from the employer's general assets. Since employees who have not satisfied a plan's eligibility conditions are not plan "participants," this additional exemption is available to many employers with more than 100 employees.

Many employers already comply with ERISA's reporting, disclosure, fiduciary and claims procedure rules with respect to pension, health, death, life, accident, dental and medical plans, which most employers and employee organizations concede are regulated by ERISA. For these employers, the added step of complying with

131. The reporting and disclosure requirements for welfare benefit plans may be summarized as follows:

1. Preparing a summary plan description (SPD) containing procedures by which eligible employees may file claims for benefits and appeal from denial of claims, see infra note 134 and accompanying text; furnishing the SPD to each plan participant and beneficiary; and filing the SPD with the United States Department of Labor (DOL).

2. Updating the SPD, furnishing the updated SPD to each participant and beneficiary, and filing the updated SPD with the DOL. (Ordinarily, the updated SPD must be prepared every fifth year after the filing of the initial SPD; however, if there have been no plan amendments during a five-year period, the interval between the SPD and the updated SPD, or between updated SPD's, can be as long as ten years.

3. If the plan is changed, preparing a summary material modification (SMM), providing participants and beneficiaries with the SMM (except that SMM's need not be provided to retired participants or beneficiaries if the changes do not affect them), and filing the SMM with the DOL.

4. Filing annual reports with the Secretary of Labor.

5. Preparing a summary annual report and providing it to the participants.

6. Responding to requests for plan information from participants and beneficiaries.

ERISA §§ 101-111, 29 U.S.C. §§ 1021-31 (1982). The only other ERISA requirements applicable to welfare benefit plans are ERISA's fiduciary standards. These requirements provide that employee benefit plans must be established and maintained pursuant to a written instrument. The written plan must provide for one or more named fiduciaries who have authority to administer the plan. The plan must also specify the basis on which payments are made from the plan. ERISA § 402, 29 U.S.C. § 1102 (1982). ERISA fiduciaries generally must discharge their duties with respect to a plan:

1. Solely in the interest of the participants and beneficiaries;

2. For the exclusive purposes of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan;

3. With the care, skill, prudence and diligence, under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and under the circumstances then prevailing; and

4. In accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA Title I.


ERISA requirements with respect to payroll practice welfare benefit plans—such as vacation plans—should not be difficult.

ERISA coverage of payroll practices will not result in federal courts overburdened with benefits litigation. ERISA requires that private claim procedures be exhausted before federal court jurisdiction can be invoked. The Department of Labor rules defining permissible private claim procedures are flexible and easy to follow. The plan sponsor may establish strict time limits within which claims and appeals must be asserted, and the sponsor may retain complete decisionmaking authority over the claims process or may incorporate existing collective bargaining dispute resolution procedures. Plan sponsors must disclose the establishment of these procedures to plan participants, and claimants must ordinarily exhaust these remedies prior to suit. Most claims

136. For a variety of common-sense reasons, most courts require exhaustion as a precondition to a suit by a participant or beneficiary to recover benefits under the terms of the plan. Haeberle v. Board of Trustees, 624 F.2d 1132, 1134-35 n.3 (2d Cir. 1980) (statutory scheme, trustee expertise, and expense of lawsuits require exhaustion of private remedies); Challenger v. Local 1, Int'l Bridge, Structural & Ornamental Ironworkers, 619 F.2d 645, 649 (7th Cir. 1980) (same); Amato v. Bernard, 618 F.2d 559, 566-68 (9th Cir. 1980) (exhaustion reduces frivolous lawsuits and enhances the trustee's role, thereby assisting courts); Weeks v. Coca-Cola Bottling Co., 491 F. Supp. 1312, 1313-14 (E.D. Ark. 1980) (same); Scheider v. U.S. Steel Corp., 486 F. Supp. 211, 213 (W.D. Pa. 1980) (exhaustion scheme requires exhaustion of private remedies); Sample v. Monsanto Co., 485 F. Supp. 1018, 1019 (E.D. Mo. 1980) (trustee discretion and arbitrary and capricious review standard require exhaustion); Lucas v. Warner & Swasey Co., 475 F. Supp. 1071, 1074-75 (E.D. Pa. 1979) (ERISA principles require exhaustion); Taylor v. Bakery & Confectionary Union, 455 F. Supp. 816 (E.D.N.C. 1978) (cost savings, trustee expertise, statutory scheme and policy of reducing frivolous lawsuits require exhaustion).

The courts are split, however, as to whether exhaustion is a precondition to a suit by a participant or beneficiary seeking relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1982), for statutory violations. Compare Burke v. Latrobe Steel Co., 775 F.2d 88 (3d Cir. 1985) (no exhaustion of previous remedies required) and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984) (same) with Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985) (exhaustion required) cert. denied, 106 S. Ct. 863 (1986) and Kross v. Western Elec. Co., 701 F.2d 1238 (7th Cir. 1983) (same). Justices Brennan and White dissented from the denial of certiorari in Mason because increasing ERISA litigation evidences "the need for clear procedural rules governing access to the federal courts." Mason, 106 S. Ct. at 863 (White, J., dissenting). Conditioning the exhaustion requirement on whether the suit is brought to recover benefits under a plan or to remedy a statutory violation may permit a plaintiff to avoid exhaustion by recharacterizing his suit to recover benefits as one filed to remedy a statutory violation. Compare ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1982) (a participant may sue to remedy a violation of any provision of Title I) with ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (1982) (failure to adhere to plan terms is a breach of statutory fiduciary duties). Retirees may not be required to exhaust internal plan remedies prior to suing for welfare benefits. Anderson v. Alpha Portland Indus., Inc., 752 F.2d 1293 (8th Cir.), cert. denied, 105 S. Ct.
should be resolved without litigation.\textsuperscript{137} State courts, moreover, have concurrent jurisdiction with federal courts to resolve actions brought to recover benefits due under the terms of an employee benefit plan, to enforce rights under the terms of the plan, and to clarify rights to future benefits under the terms of the plan; this eases the federal court burden.\textsuperscript{138} ERISA also provides for an award of attorneys' fees to the prevailing party, thereby discouraging frivolous litigation.\textsuperscript{139} Finally, by giving plain meaning to ERISA's coverage language, courts can discourage both the extensive litigation that otherwise would ensue regarding the definition of a vague, shifting preemption provision,\textsuperscript{140} and the development of a body of varying state benefit laws.\textsuperscript{141}

ERISA severely limits the scope of any judicial review of employee pension and welfare benefit plans that does take place. Under the statute, the decision of a plan administrator may be

\footnotesize{\textsuperscript{137} 2329 (1985). Failure to exhaust remedies within the time specified by a plan's limitation rules may bar a subsequent lawsuit altogether. See 29 C.F.R. § 2560.503-1 (1985) (nothing in the claims procedure regulations prohibits mandatory claim and appeal filing time limits).

There are remedies for a plan administrator's failure to establish internal claims processing remedies. A participant or beneficiary may sue to force the administrator to maintain and adhere to internal claims procedures. 29 U.S.C. § 1132(a)(3) (1982). The employer's failure to follow claims procedures may excuse the duty to exhaust. Adams v. Joy Mfg. Co., 6 Empl. Ben. Cas. (BNA) 2594 (D.N.H. 1985). It is even possible that extra-contractual damages for breach of the claim requirements will be awarded. See Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3094-99 (1985) (Brennan, J., concurring). But see id. at 3091; 29 C.F.R. § 2560.503-1(h)(4) (1985) (remedy for administrator's failure to issue timely decision on a claim is that the claim is deemed denied so as to permit court review); Powell v. Chesapeake & Potomac Tel. Co., 780 F.2d 419, 424 (9th Cir. 1985) (ERISA does not authorize an award of extra-contractual or punitive damages for breach of fiduciary duties in the administration of an employee benefit plan), petition for cert. filed, \textsuperscript{138} 54 U.S.L.W. 3748 (U.S. Apr. 17, 1986) (No. 85-1701).

\textsuperscript{138} 137. But see National Metalcrafters v. McNeil, 784 F.2d 817 (7th Cir. 1986) (finding ERISA coverage of vacation welfare benefit plans is a "difficult" issue with "far-reaching consequences"; "we shall not reach it or drop the slightest hint about its correct resolution"). ERISA claims procedures, unlike collective bargaining procedures, ordinarily present a situation where the judge (the plan administrator) has an affiliation with the employer-party (the plan sponsor) to the controversy. As ERISA becomes more well-known among the plaintiffs' bar, claims of collusion may be raised in court.


\textsuperscript{140} 139. ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1982).

\textsuperscript{140} 140. See \textit{supra} note 46 and accompanying text. It is particularly inappropriate to deviate from the plain meaning of a statute as carefully crafted and as specific as ERISA. \textit{Cf.} Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085, 3093 (1985) (courts should not "fine tune" ERISA to create remedies not specifically provided by Congress).

\textsuperscript{141} 141. One federal judge has reacted with dismay to the development of numerous state-law exceptions to the employment-at-will rule. Cox v. Resilient Flooring Div. of Congoleum Corp., No. 84-6951 (C.D. Cal. June 17, 1986) (available Aug. 4, 1986, on LEXIS, Genfed library, Dist. file). ERISA preemption is intended to preclude such an occurrence in the benefits area.
overturned only if it is arbitrary or capricious. Under this standard, the court cannot interpret employee benefit plan language de novo and make its own interpretations controlling. Rather, the court is limited to deciding if the interpretation by the plan administrator is reasonable. If the interpretation is reasonable, the court must dismiss the complaint. Moreover, if there is an ambiguity in plan language, the arbitrary and capricious standard rejects the proposition that the ambiguity must be resolved in favor of the claimant. Reasonable resolutions of ambiguities must be sustained by the courts, and, where plan language is susceptible of more than one reasonable interpretation, the courts may not substitute their judgment for that of the plan administrator. The arbitrary and capricious standard also limits court review of an administrator's decision to the evidence presented to the administrator prior to his decision. If new matters are introduced before the court, the court must require the claimant to present the new evidence to the administrator before proceeding further in court. The arbitrary and capricious standard therefore further limits judicial involvement—and preserves judicial resources—in the resolution of employee benefit plan disputes.

Deference to the plain coverage language of ERISA also serves to maximize employee benefits. Relying on the broad ERISA coverage standards, plan sponsors may pass on in the form of in-


144. Smith v. CMTA-IAM Pension Trust, 654 F.2d 650, 655 (9th Cir. 1981).

145. Id.


creased benefits the administrative savings resulting from compliance with one law, as opposed to fifty or more state or local benefit laws.ERISA's preemption provision also relieves employers of the need to comply with state laws that are not benefit plan laws but nonetheless "relate to" ERISA-covered employee benefit plans. This freedom from state regulation should maximize employee benefits.

The Court of Appeals for the Ninth Circuit implicitly may have made a judgment in Henning that regulation of certain welfare benefit plans should not be a federal matter. In the court's view, the states may be fully competent to regulate the field. Such a deregulation judgment is, however, a legislative, not a judicial, matter. Where a statute, enacted in a period of federal intervention, employs general language, courts interpret the statute's language with contemporary notions of federalism in mind. ERISA's coverage language, however, is designed to permit very little judicial flexibility. Congress cut a very broad path in enacting ERISA and only Congress can cut back on the scope of the statute.

VI. CONCLUSION

The Court of Appeals for the Ninth Circuit has articulated a payroll practices exception to ERISA coverage. In California Hospital Association v. Henning, the court held that a vacation welfare benefit plan that provides benefits from an employer's general assets is not a "plan, fund, or program" regulated by ERISA. The court reasoned that such plans are mere wages or payroll practices and deferred to its reading of a Department of Labor payroll practices exception to ERISA coverage.

The Henning decision perhaps reflects current notions of federal deregulation and federalism, but it does violence to the plain meaning of the statute. Henning also will lead to increased litigation over the contours of ERISA coverage.

A better alternative to Henning interprets "plan, fund, or program" according to its plain meaning. Application of this approach, in essence, will restrict ERISA coverage to nonexempted employee benefit plans that contain a benefit formula. The plain meaning alternative will limit litigation and judicial interference in the administration of employee benefit plans. It will also maximize benefits by freeing plan sponsors of the need to comply with con-

148. See supra note 45 and accompanying text.
150. See supra notes 97-99 and accompanying text.
flicting state benefit laws. If the coverage language "plan, fund, or program" cuts too broad a path of federal regulation, Congress, not the courts, should amend ERISA to restrict its scope.