For the Sake of Your Health: ERISA’s Preemption Provisions, HMO Accountability, and Consumer Access to State Law Remedies

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“A hyperbolic wag is reputed to have said that E.R.I.S.A. stands for ‘Everything Ridiculous Imagined Since Adam.’ This court does not take so dim a view of the Employee Retirement Income Security Act of 1974. Instead, this court is willing to believe that ERISA has lurking somewhere within it a redeeming feature.”

When Florence Corcoran learned she was pregnant in 1989, she and her husband were excited but apprehensive. Their last child had almost not survived—weeks before the baby was due, he went into fetal distress and required delivery by an emergency caesarian section.

This time though, precautions were taken. Mrs. Corcoran’s pregnancy was characterized appropriately as high risk. Accordingly, towards the end of her pregnancy, her doctor ordered her hospitalized until the baby’s birth in order to monitor the fetus. Nevertheless, after a few days of hospitalization she was discharged because her Health Maintenance Organization (“HMO”), United HealthCare, de-

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3. See id. at 1322.
4. See id. at 1322–23.
5. In the health care industry, the term “Health Maintenance Organization” has been defined as “[a] prepaid organized delivery system where the organization and the primary care physicians assume some financial risk for the care provided to its enrolled

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terminated that her hospitalization was not medically necessary. As an alternative to hospitalization, United HealthCare authorized up to ten hours per day of home nursing care for Mrs. Corcoran. However, tragically, while no nurse was present, the baby went into fetal distress and died.

The Corcoran couple filed a wrongful death action in Louisiana state court. Because the health care benefits in dispute were provided under a federally-governed plan, United HealthCare was able to defend successfully on the basis that the state law claim was preempted by federal law. That federal law is the Employee Retirement Income Security Act ("ERISA"). Because ERISA has no provisions for a wrongful death action, the case was dismissed, and its ruling was subsequently upheld by the Fifth Circuit on appeal.

ERISA was enacted in 1974 as a response to fraud and abuse that occurred in employee pension funds. At the time, it was hailed as a much-needed reform of the entire employee pension fund system. Although most of ERISA's provisions govern the administration of employer-offered pension funds, it also regulates non-pension employee benefits such as disability and health insurance plans. As a result, those seventy-three million Americans, like the Corcorans, who obtain health care through an employer-offered benefit plan contracted through an outside provider are subject to these provisions. In the area of health care, ERISA's promise of protection has not been realized. Instead, ERISA has misguidedly harmed these interests.

Under ERISA, a civil action may be brought by a plan participant or beneficiary only "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." Extra-con-

6. Corcoran, 965 F.2d at 1324.
7. Id.
8. Id.
9. See id. at 1325.
10. See id. at 1339.
tractual damages such as compensatory or punitive damages are not allowed. In the Corcoran case, the remedy under ERISA would therefore be limited to the cost of the few days of hospitalization that Mrs. Corcoran was denied. When the inadequacy of this remedy is contrasted with the magnitude of the loss of a child, the inequity is startling. Though it did not alter the harsh result of their ruling, the Corcoran court aptly commented on this inadequacy, acknowledging the painful reality:

The result ERISA compels us to reach means that the Corcorans have no remedy, state or federal, for what may have been a serious mistake. This is troubling for several reasons. First, it eliminates an important check on the thousands of medical decisions routinely made in the burgeoning utilization review system. With liability rules generally inapplicable, there is theoretically less deterrence of substandard medical decisionmaking.

... Finally, cost containment features... did not exist when Congress passed ERISA. While we are confident that the result we have reached is faithful to Congress's intent neither to allow state-law causes of action that relate to employee benefit plans nor to provide beneficiaries in the Corcorans' position with a remedy under ERISA, ... [f]undamental changes such as the widespread institution of utilization review would seem to warrant a reevaluation of ERISA so that it can continue to serve its noble purpose of safeguarding the interests of employees.17

An ERISA provision known as the "savings clause" exempts state laws that "regulate insurance" from ERISA preemption. In the recently-decided Rush Prudential HMO, Inc. v. Moran,19 the Court held for the first time that an HMO is an insurer and that some state laws regulating HMOs are therefore protected from preemption under the savings clause.20 On one hand this decision heralded advancement for health care consumers' rights. Unfortunately, however, the Court created an untenable position for HMO state law when it inferred that it would not exempt state insurance/HMO laws from preemption when the laws offered remedies in excess of those provided under ERISA.21

20. See id. at 367.
Given this latter aspect of the decision, if the Corcoran case were heard today, it would likely not turn out differently. This comment suggests that when a court determines that a claim under a state HMO law is spared from ERISA preemption because it "regulates insurance," it should recognize that the existence of remedies that exceed those of ERISA should not counteract this determination.

By determining that state HMO laws "regulate insurance" and thus are saved from ERISA preemption, yet precluding those same state HMO laws from preemption if their remedial provisions exceed those of ERISA's, the Rush Court has created an inconsistency and severely narrowed the application of the savings clause. At the time of ERISA's creation, health care was the province of state law and health coverage was obtained primarily through insurance. By excluding from preemption those state laws that regulated insurance, Congress attempted to exclude health care benefits such as these from ERISA oversight. However, this purpose cannot be fulfilled if the Court limits the state's purview to only those laws without significant remedies. This comment proposes that the inconsistency found in Rush can nonetheless result in a positive outcome. The Court's current untenable analysis of savings clause issues, exposed to further scrutiny, can lead to a truer interpretation of ERISA, one in harmony with its dual purposes of protecting worker's rights and reserving to the states those matters traditionally considered as under state authority.

This comment discusses how to 1) remove the barriers to recovery under state law for ERISA-governed health care plan participants with claims related to wrongfully-denied medical care and 2) ensure that managed care organizations such as HMOs are held accountable for decisions made as to medical necessity. Part I presents a background on ERISA. Part II examines the Rush decision with regard to ERISA preemption. Part III argues that once a state law claim is determined to be exempt from ERISA preemption under the savings clause, any additional impliedly preemptive force of ERISA's civil enforcement provisions ("section 502") is inapplicable.

22. See Sullivan, supra note 11, at 251.
23. See id.
The following four reasons are offered in support of this contention. First, neither ERISA's text, nor its legislative history, supports a limitation regarding remedies on a law saved from preemption. Second, the United States Supreme Court's interpretation of the preemptive effect of section 502 on state law otherwise exempted by the savings clause is dicta. Third, applying established principles of statutory interpretation, any impliedly preemptive effect of section 502 is inapplicable to the savings clause. Fourth, applying conflict preemption doctrine, section 502 is inapplicable to the savings clause.

Part IV offers suggestions for needed legislative reform of ERISA and further proposes that in the absence of such changes, the judiciary should apply ERISA law in the context of current health care realities unanticipated when ERISA was enacted. Part V concludes with the assertion that because ERISA was not enacted with the intent to govern litigation involving claims against HMOs for wrongfully denied medical treatment, state HMO laws—remedial or otherwise—determined to be saved from preemption because they regulate insurance are the appropriate vehicle by which to adjudicate these matters.

I. ERISA Background

ERISA, notorious for its complexity and ambiguity, is a 700-page federal statute with 3,600 pages of published regulations. It came about at a time when the country was rocked with highly publicized reportings of fraud and mismanagement of employee pension funds, resulting in workers losing retirement benefits they had worked a lifetime to accumulate. Accordingly, legislative efforts devoted to the reform of employee pension fund administration produced ERISA. ERISA's scope comprised the regulation of all employee welfare benefit plans and the rights of beneficiaries under these plans. Upon its signing by President Ford on Labor Day in 1974, ERISA was touted as the pension "bill of rights." Despite its title, and primary focus on

27. Id.
the regulation of employee pension fund benefits. ERISA applies to any employee benefit plan maintained by an employer.

In the area of non-pension employee welfare plan benefits, ERISA's promise of protection has not been realized. In fact, ERISA has misguidedly harmed these interests. Because of ERISA, managed care organizations such as HMOs and Preferred Provider Organizations ("PPOs") are shielded from liability for extra-contractual damages that would otherwise be in effect under state law. In commenting on the Supreme Court's statutory interpretation of ERISA, the court in Cathey v. Metropolitan Life Insurance Co. noted that "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 shaped into a form that achieves the converse of its original purpose." Moreover, the sweeping dominance of federal preemption under ERISA can be said to threaten longstanding principles of federalism.

The interrelationship of three ERISA provisions is central to understanding ERISA's effect on HMO claims: 1) the express preemption clause, 2) the savings clause, and 3) the civil enforcement provisions. First, ERISA's preemption clause states that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA recognizes as an employee benefit plan either an "employee welfare benefit plan" or an "employee pension benefit plan." An "employee welfare benefit plan" is defined as: "any plan, fund or program which . . . [is] maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or

31. See id. § 1101.
32. A Preferred Provider Organization is a form of managed health care that operates more loosely than an HMO in that plan members have a choice of obtaining services from either plan-sponsored providers or, at a higher price, from independent providers not affiliated with the plan. See RAND E. ROSENBLATT ET AL., LAW AND THE AMERICAN HEALTH CARE SYSTEM 552 (1997).
33. 805 S.W.2d 387 (Tex. 1991).
34. Id. at 392 (Doggett, J., concurring).
35. See Bogan, supra note 16, at 955.
37. Id. § 1144(b)(2)(A).
38. Id. § 1132(a).
39. Id. § 1144(a).
40. Id. § 1002(3).
otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, [etc.].”

Although the issue of whether an HMO law “relates to” an employee benefit plan has been the subject of at least twenty Supreme Court opinions, this issue is not in controversy here. Justice Scalia noted in 1997 that with regard to ERISA, “our prior decisions have not succeeded in bringing clarity to the law.”

The second provision is ERISA’s savings clause. It states: “[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . .” Thus for health care benefits claims, the issue of whether a state law affecting an HMO is one that “regulates insurance” becomes crucial. As will be explored further in Rush, infra, the Court, in a decision applauded by health care consumers, held for the first time that be-

41. Id. § 1002(1).


cause an HMO is both a medical services provider and an insurer, the state HMO law at issue was saved from preemption.\(^46\)

The relationship between ERISA’s express preemption provision and its savings clause was explored in *Metropolitan Life Insurance Co. v. Massachusetts.*\(^47\) However, the Court found little guidance in ERISA’s legislative history. The Court noted that there was no discussion in ERISA’s legislative history of the relationship between the two provisions.\(^48\) In fact, there was little discussion of the savings clause at all.\(^49\)

The third relevant provision is ERISA’s civil enforcement scheme (section 502), which provides exceedingly limited remedies.\(^50\) It states that a civil action may be brought by a plan participant or beneficiary “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.”\(^51\) Under ERISA, no extra-contractual damages are allowed.\(^52\) Furthermore, because the statute restricts those with standing to bring suit under ERISA to participants or beneficiaries,\(^53\) these rights do not survive death, leaving survivors without recourse under ERISA.

The significance of section 502’s limitations can be shown by the following hypothetical. An ERISA-governed patient with a difficult-to-diagnose condition seeks treatment from his HMO. In the interests of cost-containment, the HMO determines that the non-standard diagnostic test requested by the patient’s physician is medically unnecessary and denies coverage for it. As a result, ten days elapse before the correct diagnosis is made and proper treatment can begin. Although, fortunately, the patient survives, the delay in diagnosis causes the patient irreversible damage. The patient is left unable to work, facing the reality of lifelong medical care and a shortened life expectancy. Under ERISA, the patient’s only option is to bring an action to recover for the cost of the denied benefit, in this case the cost of the diagnostic test. Even if he prevails, he is not assured of recovering attorney fees, and furthermore, he is left entirely without compensa-

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\(^46\) See id. at 367.


\(^48\) Id. at 745.

\(^49\) Id.


\(^51\) Id.

\(^52\) See Corcoran v. United HealthCare, Inc., 965 F.2d 1321 (5th Cir. 1992); see also Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (stating that ERISA section 409(a) does not provide a cause of action for extra-contractual damages to a beneficiary caused by the improper or untimely processing of a benefit claim).

tion for his injuries. More troublesome still, the HMO is shielded from liability by the inadvertent effects of ERISA law. As a result, the incentive customarily provided to an HMO by state regulatory and tort law to apply greater care to medical and cost-containment decisions is removed. It would come as no surprise if such a patient were to conclude that the legal system failed not just him, but the interests of justice.

II. *Rush v. Moran*\(^{54}\)

Debra Moran was a beneficiary of Rush Prudential HMO, Inc. ("Rush") through her husband’s employer-provided, ERISA-governed health care benefits.\(^{55}\) After a course of non-surgical treatment for Moran’s painful shoulder condition proved ineffective, her primary care physician recommended she obtain an unconventional surgery that could only be done by a specialist unaffiliated with Rush.\(^{56}\) Rush denied the costly procedure on the grounds that it was medically unnecessary.\(^{57}\) After pursuing an internal medical review, which affirmed the denial, Moran next requested an independent medical review as guaranteed under the Illinois HMO Act.\(^{58}\) However, Rush refused, until Moran obtained a court order that compelled Rush to perform the review.\(^{59}\)

While the suit to compel the review was pending, a suffering Moran undertook the surgery at her own cost.\(^{60}\) As a result she expanded her complaint against Rush to request reimbursement costs.\(^{61}\) The court-ordered independent medical review concluded that Moran’s surgery had been medically necessary,\(^{62}\) requiring under state law that Rush pay the costs.\(^{63}\) Rush refused to pay the costs, having successfully removed the case to federal court on the basis that Moran’s claim was for ERISA benefits, and thus preempted under ERISA’s civil enforcement scheme.\(^{64}\)


\(^{55}\) Id. at 359.

\(^{56}\) Id. at 360.

\(^{57}\) Id.


\(^{59}\) Rush, 536 U.S. at 361-62.

\(^{60}\) Id.

\(^{61}\) Id. at 363.

\(^{62}\) Id. at 362-63.

\(^{63}\) Id. at 361.

\(^{64}\) Id. at 362-63.
The district court agreed with Rush regarding the ERISA preemption and dismissed the case.\textsuperscript{65} On appeal by Moran, the Seventh Circuit reversed, holding that the Illinois HMO Act is a law that "regulat[es] insurance," and was thus saved from preemption.\textsuperscript{66}

Upon appeal by Rush, in a decision long-awaited by health care consumers, the Supreme Court determined definitively that an HMO is an insurer,\textsuperscript{67} and held that the state law was saved from preemption.\textsuperscript{68} The Court relied on two methods in determining that the HMO was an insurer. First, the Court applied a "common-sense view of the matter," under which "a law must have not just an impact on the insurance industry, but must be specifically directed toward that industry."\textsuperscript{69} Next, the Court tested the results using three factors that, under the McCarran-Ferguson Act,\textsuperscript{70} spare insurance laws from federal preemption.\textsuperscript{71} Its conclusion was that "the Illinois HMO Act is a law 'directed toward' the insurance industry, and [is] an 'insurance regulation' under a 'commonsense' view."\textsuperscript{72}

The Court's determination that the HMO was an insurer, however, did not complete its analysis. Next, the Court turned to ERISA's civil enforcement provisions to determine if the relief provided by state law—HMO compliance with the external medical review decision—was in keeping with those remedies available under ERISA.\textsuperscript{73} While ERISA's civil enforcement procedures are not explicitly preemptive, the Supreme Court has determined that these provisions are the "exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits."\textsuperscript{74}

Applying this analysis, the Court recognized that the state law at issue in \textit{Rush} was not a remedies law and provided only for compliance with the external medical review, and contained no provisions for extra-contractual damages.\textsuperscript{75} The Court thus viewed the Illinois HMO Act as not providing any new cause of action or any new form of relief.\textsuperscript{76} Because ERISA's own mechanisms provide the same relief—

\textsuperscript{65} Id.
\textsuperscript{66} Id. at 363–64.
\textsuperscript{67} Id. at 367.
\textsuperscript{68} Id. at 375.
\textsuperscript{69} Id. at 365–66 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987)).
\textsuperscript{71} \textit{Rush}, 536 U.S. at 365–66.
\textsuperscript{72} Id. at 373.
\textsuperscript{73} See id. at 377–80.
\textsuperscript{74} \textit{Pilot Life}, 481 U.S. at 52.
\textsuperscript{75} \textit{Rush}, 536 U.S. at 379–80.
\textsuperscript{76} Id.
reimbursement—for an improperly denied benefit; the Court was satisfied that the state law’s provisions did not provide a remedy that “supplements or supplants” ERISA. In a five-to-four vote, the Court upheld Ms. Moran’s right to reimbursement for the cost of an improperly denied benefit as per the independent review’s determination that the procedure was medically necessary.

Because both ERISA and the Illinois HMO Act allow reimbursement for the cost of a wrongly-denied benefit, it is not clear why Ms. Moran did not take her claim to federal court, where it might have proceeded more smoothly. A number of factors may explain this. Perhaps state court was a timelier forum for her claim, or perhaps her decision was affected by the unanimous jury requirement for federal civil verdicts. Nevertheless, her choice of state court did not appear to affect the Court’s ruling. Importantly, her decision to proceed in state court provided a needed opportunity for the Court to clarify that an HMO was an insurer for ERISA purposes, and extend what one ERISA commentator noted as an encouraging trend consistent with federalist principles by the current Court towards respecting state law in traditional areas of state regulation.

Although the Rush Court did not reach the issue of whether a state insurance law saved from ERISA must undergo further scrutiny to determine if its remedies exceed those offered by ERISA, the Court noted that in the event of such a conflict, the state insurance regulation would lose out if it provided plan participants the types of remedies that Congress rejected in ERISA. If such a conflict existed, pointing to its prior holding in Pilot Life Insurance Co. v. Dedeaux, the Court emphasized that the savings clause must stop short of subverting the congressional intent for the federal remedy to displace state causes of action. Interestingly, the Court recognized that it had not yet been asked to decide a case where this was at issue. The Court nonetheless opined:

Although we have yet to encounter a forced choice between the congressional policies of exclusive federal remedies and the “reservation of the business of insurance to the States,” we have antici-

77. See id. at 378–79.
78. Id. at 387.
80. See Bogan, supra note 16, at 955–60.
81. See Rush, 536 U.S. at 377.
82. 481 U.S. 41, 57 (1987).
83. See Rush, 536 U.S. at 377.
84. See id.
pated such a conflict, with the state insurance regulation losing out if it allows plan participants "to obtain remedies . . . that Congress rejected in ERISA." 85

As a result of Rush, an ERISA-governed HMO patient may sue under state HMO law. This is encouraging. However, such a patient does not yet have a remedy available beyond reimbursement for the cost of a denied benefit. Accordingly, the Corcoran wrongful death action would still be barred, and the HMO would remain immunized against accountability for the harmful effects of its cost-saving decisions. Justice will not be served as long as the courts interpret ERISA's savings clause so narrowly as to cancel its effect if the law at issue offers remedies in excess of those of ERISA.

III. Analysis of ERISA Preemption After Rush

A. Text and Legislative History

Once a claim is saved from ERISA preemption because it falls under state insurance law, it should not be subject to any implied preemptive force of ERISA's civil enforcement provisions. This section will demonstrate that neither the text nor legislative history of ERISA's savings clause require that state laws otherwise saved from preemption be precluded from exemption because they include remedial provisions that exceed those of ERISA. First, the relationship between the preemption provision and the savings clause is examined. Second, the interrelationship between the savings clause and the civil enforcement provisions is discussed.

1. Relationship Between ERISA's Preemption Provision and Savings Clause

The text of the saving clause states: "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 86 The plain meaning of this text makes clear that any state law regulating insurance should require no further qualification in order to be saved from ERISA preemption.

The results of an examination of the legislative history of ERISA's preemption and ERISA's savings clause are not as clear. At the time of its enactment, ERISA represented a much-needed comprehensive reform of the private pension industry. 87 Accordingly, ERISA's provi-

85. Id. (citations omitted).
sions address the fiduciary responsibilities of plan administrators, such as reporting and disclosure requirements. Because the legislation's effect was so broad, encompassing big business and labor interests, political compromise necessarily came into play.

Congress was balancing two competing interests. On one hand, Congress wanted to encourage employers to offer retirement plans. Because these plans were voluntary, it was important for Congress to not make the process of doing so onerous. On the other hand, existing fraud and other forms of pension fund abuse required placement of burdens on employers in order to ensure that covered workers received fair benefits. The statute was created envisioning a single set of rules to govern the private pension industry. The purpose of the resultant uniformity was to enable "administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."

The initial versions of ERISA passed by both the House and Senate provided exactly that—preemption over state laws that involved matters that ERISA regulated. If that had been the final outcome, federal preemption would not have applied to non-pension employee benefit plan participants because ERISA does not regulate insurance or medical care. ERISA's conference committee, however, influenced by lobbying interests, expanded ERISA's preemption language by enlarging the field of laws subject to ERISA preemption to "any and all state laws that relate to" an ERISA plan.

ERISA's broadened preemption clause was added at the last minute, and the bill was rushed through Congress to meet its signing date on Labor Day in 1974. After extensively reviewing ERISA's legislative history, one commentator reports that in the process, the preemption change escaped congressional analysis altogether.

90. Id.
91. Id. at 118.
92. Id.
93. Id. at 128.
94. See id. at 118.
95. See id. at 119; Bogan, supra note 16, at 983.
96. See Bogan, supra note 16, at 978.
97. Levinson, supra note 12, at 23.
The Supreme Court has noted the inherent ambiguity in the interaction between ERISA's express preemption clause and the savings clause:

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 saving[s] clause appears broadly to preserve the States' lawmakers' 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.98

[T]here is no indication in the legislative history that Congress was aware of the new prominence given the saving[s] clause in light of the rewritten pre-emption clause, or was aware that the saving[s] clause was in conflict with the general pre-emption provision.99

Congress's purpose in enacting the savings clause was apparently to ensure that state insurance, banking, and securities law would continue to govern pension plan investment transactions.100 However, ERISA's expanded preemption provision ended up nullifying state laws even where ERISA did not provide alternatives. Therefore, the role of the savings clause in preserving state law causes of action for employee beneficiaries of plans with claims of wrongdoing by insurance companies and HMOs unexpectedly increased in significance.

2. Relationship Between ERISA's Savings Clause and Civil Enforcement Provisions

ERISA's section 502 civil enforcement provisions do not contain any express preemption language and do not require that their remedies be exclusive.101 Nonetheless, the Supreme Court has concluded that state laws that create additional remedies are preempted.102 Justice Thomas, in his dissent in Rush, explained: "Such exclusivity of remedies is necessary to further Congress' interest in establishing a uniform federal law of employee benefits so that employers are encouraged to provide benefits to their employees."103

Congressional records on ERISA describe the legislation's intention that a body of federal substantive common law would be "developed by the courts to deal with issues involving rights and obligations

99. Id. at 745.
100. Bogan, supra note 89, at 119.
under private welfare... plans."\textsuperscript{104} After all, the Court reasoned, the expectation of the development of federal common law under ERISA did not have any purpose unless Congress intended to exclude state law from supplementing or supplanting ERISA remedies.\textsuperscript{105} However, in the areas of health care and insurance, no such body of law has evolved in twenty-eight years.

Assuming, arguendo, that the interpretation is correct and that generally section 502 has an implied preemptive effect, the narrower issue is whether it is applicable to those laws that avoid preemption through the savings clause. ERISA's text is silent on the intended results when a state law is expressly saved because it "relates to insurance" but could be impliedly preempted because its remedies exceed those provided by section 502.\textsuperscript{106} Importantly, when read for its plain meaning, satisfaction of the savings clause requirement involves only one criterion: the law must "regulate insurance."\textsuperscript{107} If Congress intended an additional requirement—that the law's remedies must not exceed ERISA's—then how can this omission be explained?

One argument relied on by some courts to support the exclusivity of section 502 is that ERISA was closely modeled after the Labor Management Relations Act ("LMRA").\textsuperscript{108} Because the LMRA's remedies are explicitly exclusive, courts have inferred that ERISA section 502 remedial provisions must also be intended to be exclusive.\textsuperscript{109} This reasoning, however, is unsound. The LMRA has no savings provisions comparable to ERISA's.\textsuperscript{110} Therefore, the LMRA fails to offer any guidance on the narrower issue at hand—the interaction of the savings clause with ERISA's section 502 provisions.\textsuperscript{111}

Neither ERISA's text nor intent suggests any required restriction that the only insurance laws saved from preemption must be non-remedial. ERISA's overarching intent is clear. Workers needed better protection and employers needed incentives to offer fair benefits to employees. Employees needed greater disclosure of information from employers about the status of their pension funds. Pension plan administrators needed uniformity to make the administration of pension plan benefits manageable. A law intended to protect workers' rights

\textsuperscript{104} Bogan, \textit{supra} note 16, at 981 (quoting 120 \textit{Cong. Rec.} 29,942 (1974)).
\textsuperscript{105} \textit{Pilot Life}, 481 U.S. at 56.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Pilot Life}, 481 U.S. at 52.
\textsuperscript{109} See \textit{id.} at 55–56.
\textsuperscript{110} Bogan, \textit{supra} note 89, at 158.
\textsuperscript{111} See Levinson, \textit{supra} note 12, at 20–21.
regarding pension fund abuse that, as an unanticipated offshoot, significantly diminishes employee rights regarding health care benefits and unwittingly protects the managed care industry from accountability, cannot credibly be said to be applied correctly. If common sense has any place in the law, the judiciary must recognize this reality.

3. Dicta as Basis for the Implied Preemptive Power of ERISA's Civil Enforcement Provisions

The Court's conclusion that ERISA's civil enforcement provisions have preemptive power as applied to state law otherwise saved from preemption is based on dicta. The term dicta typically refers to statements in a judicial opinion that are unnecessary to support the court's decision.112 Dicta is not considered to be binding authority.113 Because there is widespread lack of consensus as to how to distinguish dicta from holding, dicta can be and is confused with precedent.114 If, however, the Court relied on dicta rather than holding in *Rush*, then it was not truly precedent and the Court can therefore revise its holding in future opinions without risking the disruption that can be associated with overturning precedent.

An analysis of ERISA's preemption issues from the perspective of the dicta/holding distinction suggests that the Court has improperly applied the force of law to its own dicta to the detriment of ERISA's true intent and proper application.

The Court's opinion in *Pilot Life*, that ERISA remedies are the exclusive vehicle for a claim covered by ERISA,115 has been relied upon frequently in subsequent opinions regarding ERISA preemption.116 In *Pilot Life*, Mr. Dedeaux was injured at work and sought permanent disability benefits under an employer-based, ERISA-governed policy from the Pilot Life Insurance Company.117 When Pilot Life terminated his benefits, Dedeaux sued on various Mississippi laws related to bad faith, seeking general and punitive damages.118 Justice O'Connor, writing for a unanimous Court, held that the state claim was preempted because 1) the state law did not fall under the exemp-

117. *See Pilot Life*, 481 U.S. at 43.
118. *Id.*
tion for law that "regulates insurance," and 2) "most importantly, the clear expression of congressional intent [is] that ERISA's civil enforcement scheme be exclusive." The Court first reasoned that to "regulate insurance," the law "must not just have an impact on the insurance industry, but must be specifically directed toward that industry." Accordingly, the Court found that because the bad faith law applied more broadly—to any bad faith breach of contract—the law was not saved from preemption.

Although this conclusion should have ended the Court's analysis of the issue, the Court inexplicably went past the point of necessity to analyze the law based on its remedial provisions. In dicta, the Court decided that the interpretation of the savings clause should be informed by the legislative intent concerning ERISA's remedies provisions. In essence, the Court added a new requirement for a law to qualify under the savings clause exemption, in addition to regulating insurance—whether its remedies exceed those offered by ERISA. The Court found that the language, structure, and legislative history of ERISA required the conclusion that its civil enforcement provisions were meant to be an exclusive remedy, further justifying its conclusion that the Mississippi law was not preempted. This assumption, that Congress applied its prohibition of any remedies not set forth in ERISA to those laws appropriately saved from preemption via the savings clause, has improperly rendered the savings clause meaningless for any state law with state extra-contractual remedies.

An intriguing explanation has been offered for the Court's diversion in Pilot Life from a focused savings clause analysis to an analysis concerning section 502. One ERISA commentator reported that the Court was inadequately briefed on the issue. The commentator critiqued the briefs filed in support of the respondent insured as woefully insufficient. He noted that the brief was a total of only seventeen pages, and contained no discussion of the issue of the exclusivity of the remedies provision other than to cite the savings clause itself. Furthermore, the Solicitor General's amicus brief urging the

119. Id. at 57.
120. Id.
121. Id. at 50.
122. Id.
123. Id. at 52.
124. Id. 52-53.
125. See Levinson, supra note 12, at 24.
126. Id.
127. Id.
Court to accept certiorari contained just three paragraphs in support of the exclusivity of remedies as relevant to a savings clause analysis. 128 Subsequently, however, in *UNUM Life Insurance Co. of America v. Ward*,129 the United States Solicitor General reversed his prior stance on this issue, stating: "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 [s]ection 502 itself are not suited to that purpose." 130

Nonetheless, the section 502 analysis from *Pilot Life* has been regarded as holding, or law.131 However, an analysis of section 502 for determining whether a state law “regulates insurance” is superfluous, because anything not essential to the Court’s opinion is non-binding dicta. The Court did not need to reach the issue of comparing the Mississippi bad faith law remedies with ERISA’s remedies to decide the issue of whether the law regulated insurance;132 in fact, it should not have even commented on the issue. In applying the savings clause, the Court is asked only to determine if the law at issue “regulates insurance.” Surely, the nature of its remedies does not shed light on the issue of whether the law regulates insurance.

Because *Pilot Life* was decided over fifteen years ago, the Court has had opportunity to apply the dicta to subsequent cases, reaching the same outcome.133 As a result, what was once non-binding dicta has in fact become holding. Accordingly, any future shift in the Court’s view would compromise stare decisis. Stare decisis suggests that when

128. *Id.*
133. *See, e.g.*, Ingersoll-Rand, 498 U.S. at 142 (holding that a state law wrongful discharge claim was expressly preempted by ERISA where the plaintiff alleged that Ingersoll-Rand Company fired him in order to avoid contributing to his pension fund); Kanne v. Conn. Life Ins. Co., 867 F.2d 489, 494 (9th Cir. 1988) (holding that ERISA’s civil enforcement provisions impliedly preempted a state law insurance remedy that would otherwise have been saved from preemption); In re Life Ins. Co. of N. Am., 857 F.2d 1190, 1194–95 (8th Cir. 1988) (holding that a state law refusal to pay insurance benefits claim was preempted because ERISA’s civil enforcement provisions are intended to be exclusive); Ramirez v. Inter-Cont’l Hotels, 890 F.2d 760, 763–64 (5th Cir. 1989) (holding that state law contract, tort, and statutory claims attempting to recover medical benefits due under an employer health benefit plan were preempted because allowing recovery under state law would be inconsistent with the congressional intent explicated in *Pilot Life*).
an earlier decision has not proven unworkable, and where overturning it would damage reliance interests, the earlier decision should not be overturned. However, earlier decisions have proven unworkable. The cases decided since Pilot Life, culminating in Rush, have increasingly rendered the savings clause ineffectual. Furthermore, in considering any reliance interests on the part of an HMO that could be harmed should precedent be overturned, the point can be made that this reliance is both an inadvertent and illegitimate byproduct of ERISA law. Besides, shielding an HMO from liability should be void as against the public policy favoring protection of the rights of health care consumers.

4. Statutory Interpretation, the Savings Clause, and Civil Enforcement Provisions

By applying two established principles of statutory interpretation, ERISA can be properly interpreted to allow state remedial law claims against HMOs. First, the presumption against preemption in matters involving traditional areas of state governance should control. Second, when resolving internal inconsistencies within a statute, express provisions should supersede implicit ones, and when an interpretation of one provision renders another meaningless, that interpretation should be rejected.

The first and most relevant statutory construction principle is that the courts should not interpret federal statutes to preempt state law in traditional areas of state governance unless the federal government unambiguously requires such a construction. Yet, ERISA's preemption provisions are known for their ambiguity. Accordingly, the Court in Pilot Life was unable to support its conclusion that ERISA's enforcement provisions act as a bar to a plan participant's access to state insurance law remedies by anything more than inference, because neither the explicit text nor the legislative intent of ERISA guided the Court to clarity. Therefore, in the absence of clear intent, the law should not be preempted.

137. See Pilot Life, 481 U.S. at 52–54.
Support of preemption through an inference alone does not satisfy this rule of statutory interpretation. In the matter of non-pension plan benefits, ERISA's savings clause has produced considerable confusion. When no clarification can be found textually or from congressional intent, the rule of statutory interpretation requires that the law at issue not be preempted.138

A second principle of statutory interpretation comes into play when different portions of a statute appear to contradict one another. As has been described, ERISA's civil enforcement provisions can reverse the protection against preemption provided by the savings clause. Given this, the issue becomes how to resolve the dilemma of internal inconsistency in ERISA.

As an illustration, consider the California Managed Care Health Care Insurance Accountability Act of 1999.139 As a result of Rush's holding that an HMO is an insurer,140 in an ERISA-related matter the law would almost certainly be considered to be one that "regulates insurance" and therefore saved from ERISA preemption. Yet, because the statute permits the recovery of all available tort damages,141 it could, and almost certainly would, be preempted if the Court applied the impliedly preemptive force of section 502. In Rush, the Court's analysis reflected a willingness to permit what is at most an impliedly preemptive force of the civil enforcement clause to supersede the express non-preemption provisions of the savings clause. As importantly, the Court seemed not to recognize the statutory inconsistency inherent in this approach. Express preemption provisions should control over implied preemption provisions.

Assuming, nonetheless, that the interpretations of ERISA's savings clause and its civil enforcement provisions are each reasonable, how should a court decide which provision controls? Typically courts rely on text and legislative intent. The intent of the savings clause is ambiguous. However, the language of the clause is not ambiguous. Regardless, neither textual analysis nor legislative intent has thus far resolved this issue.

One method employed by the courts in resolving an internal inconsistency of a statute is to apply a construction of the conflicting

language that harmonizes with the purposes of each section. Rather than being guided by a single sentence of a statute, the Court looks to the law in its entirety, including its object and policy basis. In keeping with this principle, one ERISA-preemption commentator suggested a straightforward judicial solution to the conflict at issue. The Court could simply identify a bright-line boundary that regards ERISA's civil enforcement provisions to be exclusive regarding all matters except any state law that regulates insurance. This would mean that state law, saved from preemption under ERISA's savings clause, could include remedial provisions and enable claimants to recover extra-contractual damages when warranted.

"Statutory interpretations that 'render superfluous other provisions in the same enactment' are strongly disfavored." The presumption is that congressional purpose for each provision is intended to be harmonious with the law's overall purpose. The application of this principle is as follows. If an interpretation of ERISA's civil enforcement provisions negates the savings clause exemption for a law that regulates insurance, the savings clause would be superfluous. This rendering of the savings clause as meaningless suggests that any such interpretation of the civil enforcement provisions should be rejected.

B. Conflict Preemption Analysis of the Savings Clause and Civil Enforcement Provisions

ERISA's preemption provision has been analyzed mistakenly as field preemption. The Court should instead apply conflict preemption analysis, sparing state remedial law from preemption, because this poses no inherent conflict with ERISA's core purpose.

Preemption analysis begins with the United States Constitution. The Supremacy Clause of Article VI states: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof

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142. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 103 (5th ed. 1992); see also Bogan, supra note 16, at 953; Bogan, supra note 89, at 155.
144. See Bogan, supra note 89, at 155.
145. See id.
147. SINGER, supra note 142, at 105.
148. 29 U.S.C. § 1144 (a) (1999) (providing that ERISA provisions shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").
149. See Bogan, supra note 16, at 980–81 (describing congressional confusion between conflict versus field preemption in relation to ERISA).
shall be the supreme Law of the Land ...."\textsuperscript{150} The scope of preemption is determined using two categories.\textsuperscript{151} The first, field preemption, also known as complete preemption, is found when Congress demonstrates the intent to entirely occupy a field of law.\textsuperscript{152} It arises when the scheme of federal regulation is so comprehensive as to reasonably infer that Congress left no room for supplementary state regulation.\textsuperscript{153} In cases involving field preemption, the court must define the limits of the field Congress intended the law to preempt.\textsuperscript{154} The second type, conflict preemption, occurs when Congress has not completely preempted a field, but a conflict exists between state and federal law.\textsuperscript{155} This arises when the conflict is significant enough that it is impossible to comply with both state and federal law,\textsuperscript{156} or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{157}

In interpreting the preemptive effect of a federal statute, courts should look to the structure and purpose of the law to divine congressional intent regarding the relationship between federal and state law.\textsuperscript{158} This includes scrutiny of any express preemption instructions. However, express preemption provisions should be examined with the assumption that Congress intended them to advance the overall goals of the legislation.\textsuperscript{159}

Through the broad and expansive language of ERISA's preemption provision, Congress suggested its intention to make the entire field of employee benefits an exclusively federal matter.\textsuperscript{160} Additionally, the savings clause was interpreted very narrowly.\textsuperscript{161} However, the application of complete preemption in the non-pension employee plan areas of health care and insurance has had harsh results.\textsuperscript{162} After all, ERISA provides no substantive law in those areas.\textsuperscript{163} Therefore, if the state law is preempted, a regulatory vacuum occurs. Furthermore,

\begin{itemize}
\item \textsuperscript{150} U.S. Const. art. VI, cl. 2.
\item \textsuperscript{152} Bogan, supra note 16, at 961.
\item \textsuperscript{153} See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
\item \textsuperscript{154} Bogan, supra note 16, at 985.
\item \textsuperscript{155} See id. at 961–62.
\item \textsuperscript{157} Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
\item \textsuperscript{158} See Bogan, supra note 16, at 963.
\item \textsuperscript{159} See id.
\item \textsuperscript{161} See Bogan, supra note 89, at 127–28 (describing the Court's narrow interpretation of the savings clause in Pilot Life).
\item \textsuperscript{162} See Bogan, supra note 16, at 996–97.
\item \textsuperscript{163} See id. at 973–76.
\end{itemize}
if complete preemption occurs, plan beneficiaries are left with severely limited avenues for redress.

Regardless, the Court in *Pilot Life* determined that ERISA completely preempts state law in the field of employee welfare plans.\(^{164}\) Emphasizing that the question of whether a certain state action is preempted by federal law is one of congressional intent, and that "[t]he purpose of Congress is the ultimate touchstone," the Court relied on its earlier opinions that the express preemption provisions are deliberately expansive and designed to establish pension plan regulation exclusively as a federal concern.\(^{165}\)

In applying a field preemption analysis, the Court in *Pilot Life* missed the mark in two different ways. First, it assumed that the complete preemption referred to in the regulation of pension plan funds applied equally to ERISA oversight of non-pension funds. Second, the Court ignored the savings clause. The savings clause provision reserves to the states the traditional state matter of insurance regulation;\(^{166}\) law with provisions for a preemption exception by definition rules out a complete preemption approach. The only alternative is a conflict preemption model.

In its more recent cases, the Court has moved away from a complete preemption model and has applied more properly a conflict preemption analysis to ERISA claims that invoke the savings clause in order to proceed under state law.\(^{167}\) In the recently-decided *Rush* case, in addition to determining that the state law was saved from preemption because it emanated from a law that regulated insurance,\(^{168}\) the Court also discussed Ms. Moran's claim to see if the relief sought was consistent with ERISA's civil enforcement provisions as understood in light of ERISA's overall purpose.\(^{169}\)

The Court found that the Illinois HMO Act,\(^{170}\) under which Ms. Moran asserted a claim for enforcement of the independent medical review board's decision,\(^{171}\) did not conflict with ERISA because it did not create a new cause of action nor provide a new form of ultimate


\(^{168}\) Id. at 387.

\(^{169}\) Id. at 379–80.

\(^{170}\) HMO Act, 215 ILL. COMP. STAT. 125/4-10 (2000).

\(^{171}\) *Rush*, 536 U.S. at 363.
relief. Instead, the Court likened Moran's claim to the common practice of obtaining a second opinion to ensure sound medical judgment rather than any additional remedy beyond ERISA's existing enforcement scheme. While the decision to allow Ms. Moran's claim to proceed is not insignificant, what is most encouraging is the Court's use of a conflict, rather than a field, preemption analysis to reach this result.

However, the particular conflict identified by the Supreme Court for analysis was incorrect. The Court in Rush examined Moran's claim in light of its faithfulness to Congress's desire for uniformity of its enforcement mechanisms. Uniformity of enforcement provisions under ERISA was not core to ERISA's purpose, but rather a mechanism for structuring the legislation to encourage more employers to offer welfare plans. The core purpose of ERISA was to protect workers' pension plan funds. Congress also extended that protection to non-pension benefit plans, to protect "the interests of participants in employee benefit plans and their beneficiaries." Therefore, the focus of the Court should have been on whether Moran's claim was faithful to ERISA's employee-protective core. When examined in this light, there is no conflict between sparing state remedial insurance laws from preemption and protecting workers' rights. Ironically, a conflict only emerges when the Court interprets the preemption provision so as not to exempt these kinds of laws from preemption. When this is the case, ERISA's goal of protection for employees is not met.

Silkwood v. Kerr-McGee Corp. provides a useful example of the Court's ability to achieve a harmonious coexistence of state and federal law in a matter affecting both. While concerned with a different body of law from ERISA—the Atomic Energy Act—its illustration of the allowance of recovery under state law within an area highly regulated by federal law is instructive. The Silkwood Court upheld a state award of punitive damages for radiation injuries against preemption by federal law. The defendants contended that state law was in conflict with federal law in two ways: 1) with the purpose of the federal

172. Id. at 379–80.
173. Id. at 383–84.
175. See id.
176. See Bogan, supra note 89, at 117.
177. See Grosso, supra note 28, at 441.
180. See id. at 258.
Atomic Energy Act to encourage widespread participation in the utilization and development of atomic energy for peaceful purposes and 2) with congressional intent to preclude dual regulation of radiation hazards. However, the Court was satisfied that the federal Atomic Energy Act evidenced no intention to bar the states from providing remedies for those suffering injuries from radiation in a nuclear plant. Referring to damages for radiation, the Court said:

[P]re-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

The Court ruled that even though civil fines under federal law may be imposed, it was not inconsistent to additionally impose state-based punitive damages. In rejecting the claim that it was inconsistent with congressional intent to preclude dual regulation of radiation hazards, the Court did not find it inconsistent to vest the Nuclear Regulatory Commission with exclusive regulatory authority over the safety aspects of nuclear development while allowing plaintiffs to recover on state-based claims for tortious harm.

As an analogy, Silkwood offers a flexible model for conflict pre-emption analysis. It demonstrates that states can appropriately regulate and enforce law even when federal law is involved, preserving the concept of federalism.

IV. Proposals for Change

Solutions to the ERISA preemption quagmire can constructively originate in either the legislature or the courts. The legislature has made some efforts towards this end. Both the House of Representatives and the Senate formed their own versions of law addressing patients' rights. The Norwood-Dingell Bill of Rights, a bill that first originated in the House of Representatives in 1997, included provisions amending ERISA so as to permit injured HMO patients to sue in

181. Id. at 257.
182. See id.
183. Id. at 256.
184. See id. at 256-57.
185. See id.
state courts. Both the House and Senate versions of the patients’ rights legislation remained deadlocked over the politically charged issue of how much liability HMOs should have in consumer lawsuits, until the bill eventually died in the Senate in August, 2002. Representative Charlie Norwood introduced another version of the Bill in February of 2003. This version was so compromised from the original Norwood-Dingell Bill that Representative John Dingell would not support it, likening its power, or lack thereof, to a “car without an engine.”

Greater HMO liability is not without its costs to consumers. Affordability of health care could be compromised if HMOs were forced to absorb the increased costs of either preventing or responding to litigation. With many people in the country already unable to afford health care coverage at all, this concern is admittedly valid. Though no easy solution presents itself, Congress should not be excused from developing legislation that better balances the current inequity of HMO protection from liability at great consumer cost.

Change is also possible through the judiciary. After all, in fashioning ERISA, Congress gave latitude to the courts in its interpretation and application, recognizing that proper balancing is inherently subject to changing conditions. At the time of ERISA’s formation, the primary concern was the proper balance between protecting the retirement interests of employees and fostering further pension plan formation. Determining exactly what ERISA was aimed at correcting or balancing, if anything, in terms of health care and insurance benefits at its time of formation may never be possible. Regardless, the courts’ primary responsibility regarding ERISA pre-emption in health care issues at this time is to balance the interests of consumers against the interest of the health care delivery system. Admittedly, achieving such a balance is challenging. Nonetheless, the interests of justice would be well-served by a clear correction favoring the interests of the consumer.

187. Sullivan, supra note 11, at 274.
189. Id.
190. See Eversley, supra note 186.
191. Id.
193. Id.
Congress apparently failed to consider the effect of the preemption provision on health care plans. Even if it had, it could not have anticipated the fundamental change in health care delivery that has come about through the dominance of a managed care, cost-containment model. Congress's decision to leave state insurance laws intact through ERISA's savings clause may not have been clearly intended to leave an avenue open for plan beneficiaries to pursue state law redress for claims related to health care or insurance benefits. What is clear is that Congress could not have intended ERISA to offer HMOs a safe harbor against negligent or intentional tortious conduct. Accordingly, arming plan participants with adequate remedies has never been more important.

In the 1960s, the cost of medical care increased substantially. In response, HMOs, designed to control costs by managing the delivery of health care, began their rise to prominence. At this same time, ERISA was enacted. ERISA's effect on managed care has been to shield managed care organizations from liability for harm caused.

A dilemma inevitably arises for the courts in their efforts to apply law that is, at best, ambiguous, and at worst, out of step with current realities. Short of much-needed legislative reform of ERISA, the judiciary must apply ERISA in light of the reality that health care and insurance are matters traditionally regulated by the state, and as such, there is no substantive law within ERISA with which to regulate and govern health care delivery. Moreover, principles of federalism require the presumption against preemption when legislative history regarding preemption is ambiguous. Furthermore, courts should recognize that to distinguish non-remedial state insurance laws from remedial state insurance laws in an analysis of whether a law is saved from ERISA preemption has no support in the text of the savings clause or in ERISA's fundamental purpose of safeguarding employee rights.

Conclusion

It is too soon to evaluate fully Rush's impact. The Pilot Life question discussed in Rush—whether the civil enforcement provisions are

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195. Id.
197. Grosso, supra note 28, at 435.
impliedly preemptive—while of major significance for ERISA litigation, remains unresolved. Significantly, however, since the ruling in *Rush* that the state HMO law at issue qualified under the savings clause and was outside the reach of ERISA preemption, the Court in a subsequent unanimous decision affirmed a Sixth Circuit ruling upholding two state laws requiring health insurers to open their provider lists to any qualified providers willing to agree to its terms. The laws were not preempted by ERISA because, like the state law in *Rush*, they, too, were laws that regulated insurance. Because the Kentucky laws contained no remedial provisions, no section 502 analysis was needed. Thus it remains that since *Rush*, the Court has not addressed preemption of a state law that regulates insurance but provides remedies that supplant or supplement ERISA’s section 502 provisions.

In fact, neither has the Court pre-*Rush* directly reached this issue. The Court’s prior opinions involved either non-remedial insurance laws that were held as saved from preemption, or laws—remedial or otherwise—that did not meet the “regulate insurance” savings clause requirement and were thus preempted. For those states, including California, whose HMO laws provide extra-contractual remedies, further litigation will be necessary to clarify the viability of remedial provisions beyond those of ERISA.

In conclusion, it must be underscored that congressional intent with regard to ERISA’s authority over non-pension employee welfare plans in general remains mysterious and, to many ERISA experts, illogical. Even more confusing is congressional intent with regard to those laws that regulate insurance, and that would accordingly be saved from preemption but whose remedial provisions exceed those of ERISA. The Court’s strong suggestion that ERISA’s civil enforcement provisions nullify the savings clause when state remedial law is involved remains unsatisfying in the light of federalism and the historic allocation of control over matters of health and insurance to the states.

This comment proposes statutory analysis and interpretation that, when applied, will enable the Court to abandon its current savings clause analysis practice of differentiating state insurance law on the

200. See id.
basis of whether it is remedial. In so doing, the Court will be following the constitutionally-bound imperative to reserve to the states the appropriate right to govern in the matter of the health and safety of its citizens.

The Court’s position in *Rush*, though dicta, that a state HMO law considered saved from ERISA preemption would be “unsaved” if its remedies exceed or supplant those of ERISA, is untenable. It is this commentator’s best hope that the unavoidable recognition of this will lead to a shift in the interpretation of ERISA preemption law to be more consistent with ERISA’s fundamental purpose of safeguarding and enhancing workers’ rights and benefits. After all, bereaved parents like the Corcorans deserve no less.