

ERISA'S DEEMER CLAUSE AND THE QUESTION OF SELF-INSURED:  
WHAT'S A STATE TO DO?

*Reilly v. Blue Cross and Blue Shield United of Wisconsin*,  
846 F.2d 416 (7th Cir. 1988)

In *Reilly v. Blue Cross and Blue Shield United of Wisconsin*,<sup>1</sup> the Seventh Circuit joined other federal circuit courts,<sup>2</sup> in pronouncing that the "deemer" clause<sup>3</sup> of the Employee Retirement Income Security Act of 1974 (ERISA)<sup>4</sup> preempts state law claims against self-insured<sup>5</sup> employee benefit plans.<sup>6</sup>

Plaintiffs, a husband and wife, belonged to a self-insured group health plan administered by Blue Cross and Blue Shield of Wisconsin.<sup>7</sup> Blue Cross denied Mrs. Reilly coverage for an in vitro fertilization procedure.<sup>8</sup>

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1. 846 F.2d 416 (7th Cir. 1988).

2. For a list of other cases, see *infra* note 49 and accompanying text.

3. The "deemer" clause is so named because in it Congress forbids any employee benefit plan from being "deemed" an insurance company, bank, or other investment company for purposes of any law of any state purporting to regulate such companies. ERISA § 514 (b)(2)(B), 29 U.S.C. § 1144 (b)(2)(B). See *infra* text accompanying notes 19-22.

4. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001-1371 (1976 ed. and Supp. V) (original version at 88 Stat. 829), subjects to federal regulation plans providing employee fringe benefit plans. ERISA is a comprehensive statute designed to promote employees' interests in their benefit plans. *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 90 (1983). For a general treatment of ERISA, see G. BOREN, *QUALIFIED DEFERRED COMPENSATION PLANS* § 1:04 (1983); T. MCCORD & R. DOREIAN, *ERISA PLAN ADMINISTRATORS' DESK BOOK* (1983).

5. This Comment will concentrate on self-funded or "self-insured" employee benefit plans. For an explanation of the different ways a plan can insure itself, see *infra* note 15.

6. An employee benefit plan can involve either pension benefits, see ERISA § 3(2), 29 U.S.C. 1002(2) (1982); welfare benefits, see ERISA § 3(1), 29 U.S.C. 1002(1) (1982); or both. This Comment concerns the state regulation of plans offering insurance-like benefits, falling under ERISA's welfare benefit category.

7. Although the benefit plan was self-insured, see *infra* note 15, Blue Cross acted as third party plan administrator, making benefit payment decisions. *Reilly*, 846 F.2d at 417.

The plan itself was part of a collective bargaining agreement between the Milwaukee Teachers Education Association and the Milwaukee Public Schools. This category of self-insured plans involves single entity employers. *Reilly* does not address the status of group insurance coverage through a Multiple Employer Trust (MET) or Multiple Employer Benefit Plan. For a general description of the implications of self-insured METs, see Buchman, *Insured and Uninsured METs—Current Problems*, 16 CONN. L. REV. 453 (1983-84). For a general treatment of Multiple Employer Benefit Plans see CANAN, *QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS* 206-22 (1988).

8. The court held that in vitro fertilization was experimental. The terms of the contract excluded coverage for experimental and investigative procedures. *Reilly*, 846 F.2d at 419. Although a new contract existed, at the time of the in vitro fertilization, the school system had not distributed

Plaintiffs brought suit,<sup>9</sup> charging, *inter alia*,<sup>10</sup> that Blue Cross acted in bad faith in the administration of the insurance plan.<sup>11</sup> Plaintiffs requested punitive damages.<sup>12</sup> In addition, they sought to amend their complaint to include charges of conspiracy, fraud, and breach of fiduciary duty.<sup>13</sup> The district court found<sup>14</sup> that ERISA preempted these state claims against a self-insured benefit plan.<sup>15</sup> The Seventh Circuit affirmed

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the contract to the Teachers Association, and the court therefore did not apply it. This Comment does not address whether *in vitro* fertilization is experimental.

9. The Reillys brought the original suit in state court, but Blue Cross removed the matter to the federal District Court for the Eastern District of Wisconsin due to the federal issues involved. *Id.*

10. The original complaint included state law claims of intentional infliction of emotional distress and loss of consortium, both dropped on appeal. *Reilly*, 846 F.2d at 425. Interestingly, in affirming the lower court's summary judgment, the appeals court cited Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, (1987). *Taylor* is the companion case to Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); see *infra* notes 41-48 and accompanying text. For a discussion questioning why the court did not dismiss the plaintiffs' claim of bad faith under like authority, see *infra* notes 80-86 and accompanying text.

Besides the state law claims, plaintiffs filed an ERISA claim of improper benefit denial. *Reilly*, 846 F.2d at 417. The court addressed this claim on appeal, but it is beyond the scope of this Comment.

11. Wisconsin, the state in which plaintiffs brought their action, recently developed this claim of bad faith in failure to perform an insurance contract. In *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (Wis. 1978), the Wisconsin Supreme Court recognized an insurance carrier's duty, such that breach of the insurance contract might lead to a tort action.

The court later generalized this contract breach leading to a tort to cover potentially any contract setting. In *Autumn Grove Joint Venture v. Rachlin*, 138 Wis.2d 273, 405 N.W.2d. 759 (Wis. App), *reh'g denied*, 416 N.W.2d 65 (1987), the Wisconsin court recognized the potential for a tort whenever a contract duty existed. The *Rachlin* court treats the *Anderson* decision as involving a fiduciary duty.

12. Courts have consistently denied punitive damage claims under ERISA. Note, *Punitive Damages and ERISA: An Anomalous Effect of ERISA's Preemption of Common Law Actions*, 65 WASH. U.L.Q. 589, 598 n.64 (1987). The Reillys did not raise this issue. For the Supreme Court's most recent pronouncement on punitive damages under ERISA, see *Massachusetts Mutual Life Insurance v. Russell*, 473 U.S. 134 (1985). Brennan's concurrence interprets the decision as only denying punitive damages under ERISA § 409(a) without addressing their availability under § 502(a)(3). *Id.* at 150-51. See also *Sanchez, Punitive Damages Under ERISA*, 13 W. ST. L. REV. 413 (1986).

13. *Reilly*, 846 F.2d at 417.

14. The district court opinion was unreported.

15. 846 F.2d at 418. An ERISA plan can employ an insurance company in one of three ways. The labels "fully-insured," "partially-insured," and "self-insured" provide a suitable way of distinguishing between the three.

A fully insured plan purchases from the insurance company first dollar group insurance coverage for plan members.

A partially insured plan, applied in one of two ways, only purchases coverage above a certain level. "Excess-risk" coverage provides plan participants with additional payments directly from the insurer after the plan's own claim limit is met. "Stop-loss" coverage reimburses the plan for payments it makes exceeding the plan limit.

A self-insured plan funds its own benefit coverage. These plans might employ an insurance com-

the lower court and *held*: a self-insured plan<sup>16</sup> is not subject to state insurance regulations<sup>17</sup> because of ERISA's deemer clause.<sup>18</sup> The deemer clause is part of the overall ERISA preemption scheme.<sup>19</sup> The first preemption provision section 514(a), the "preemption clause," provides that ERISA supercedes any and all state laws "relating to" ERISA-covered employee benefit plans.<sup>20</sup> The "savings clause," section 514(b)(2)(A), limits section 514(a) by providing that no ERISA section exempts any person from state law regulating insurance, banking or securities.<sup>21</sup> The "deemer clause," section 514(b)(2)(B), then modifies the savings clause:

Neither an employee benefit plan, . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, . . . or to be engaged in the business of insurance . . . for the purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.<sup>22</sup>

Congress intended ERISA to supplant conflicting or inconsistent local

pany to administer the plan, but the plan's funds are separate. The insurance company only makes the claims payment decisions. This situation is present in *Reilly*.

The name "self-insured" is only one way to describe a self-funded benefit plan. The Supreme Court has titled such a program "uninsured." See *infra* note 40.

For a general description of these three categories and the preemption effect on each, see Engel, *ERISA: To Preempt or Not To Preempt, That is a Question*, 22 TORT & INS. L.J. 431 (1986-87).

16. The line between a self-insured plan and a plan which purchases insurance may not be well defined. For example, in *Insurance Board Under the Social Insurance Plan v. Muir*, 628 F. Supp 1537(M.D. Pa. 1986), *rev'd*, 819 F.2d 408 (3d Cir. 1987), the court distinguished a plan *claiming* to use an insurance company in a purely administrative capacity from one which actually did. *Id.* at 1541. The distinction is critical, however. Crossing that line invokes questions not addressed by *Reilly* or this Comment.

17. The holding in *Reilly* appears to cover all insurance regulations as they apply to benefit plans; nothing in the text indicates the court singled out a certain class of insurance regulations. *Reilly*, 846 F.2d at 425.

18. *Id.* at 425-26. For a discussion of the court's reasoning and other supporting evidence, see *infra* notes 57-64 and accompanying text.

19. See ERISA § 514, 29 U.S.C. § 1144.

Although the preemption provisions contain other clauses, only the preemption clause, savings clause, and deemer clause are relevant to this Comment.

20. The exact wording of section (a) is as follows: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws in so far as they may now or hereafter relate to any employee benefit plan. . . ." ERISA § 514(a), 29 U.S.C. § 1194 (1982).

21. The exact wording is as follows: "Except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1982).

22. ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1982).

or state employee benefits regulations.<sup>23</sup> The preemption provisions, which play a large role in achieving uniform benefit regulation, received considerable attention in early benefit reform hearings.<sup>24</sup> However, after Congress molded them into their final form,<sup>25</sup> these provisions received little comment in reports or on the floor of either House.<sup>26</sup> In light of

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23. With the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute [for the preemption provisions] are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 CONG. REC. 29,933 (1974) (Statement of Senator Williams), *quoted in* *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549 at 1552 (1987).

24. For commentary on the preemption question in congressional hearings on earlier pension reform attempts, compare *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess., at 481 (1969) (statement of George P. Shultz, Secretary of Labor) (supporting one uniform pension law); *Welfare and Pension Plan legislation: Hearings on H.R. 2 and H.R. 462 before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess., pt. 2, at 651 (1973) (statement of Lauren Upson, Member, California Banker's Association Committee on Employee Benefit Trusts) (calling for preemption of state laws regulating the subject matter covered by the act); *Hearings on H.R. 1045, H.R. 1046 and H.R. 16462*, pt. 1, at 110 (statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO) (recommending preemption even with regard to state trust laws with respect to health, welfare, pension, and profit-sharing plans) with *Proposed Welfare & Pension Plan & Protective Act: Hearings on H.R. 5741 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 2d Sess., (1968) at 338 (statement of Robert D. Haase, Commissioner of Insurance, State of Wisconsin) (asking that states also be allowed to control pension plans) and pt., at 188-195 (statement of Stanley Du Rose, Jr., Commission of Insurance of the State of Wisconsin, *Hearings on H.R.2 and H.R. 462*) (stating it would be counter-productive to eliminate the large body of state law on the subject).

25. H.R. 12906, introduced in the House on February 20, 1974, essentially contains the final form of the preemption provisions. *See infra* note 26.

26. The general dearth of congressional commentary on the preemption provisions is due to the late substitution of H.R. 12906 for the original H.R. 2. H.R. 12906, a substitute for Title I of the Pension Reform Act, contained a new set of provisions for the federal law's effect on state laws. Prior to this proposed substitute, H.R. 2 preempted only those state laws which would affect benefit plans in the areas of federal regulation. H.R. 2, REP. NO. 93-533, *cited in* LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 2181 (1976) [hereinafter ERISA LEGISLATIVE HISTORY]. H.R. 12906 added the deemer clause. *Id.* at 2761, 2921.

Illustrating the lack of consideration given the preemption provisions prior to conference committee, one finds in the entire explanation given by the committee reporting H.R. 12906 contains only one relevant sentence: "All States' laws would be preempted except for those covering plans not subject to titles II and III." *Id.* at 3293. The floor debate in the House on substituting 12906 for the original H.R. 2 covers over two hundred pages, *id.* at 3351-593, but Congress heard only two questions on the preemption effect, and even these concerned only the new law's effect on pending litigation, *id.* at 3404, and the effective date of preemption, *id.* at 3404. The Joint Committee's report included less than a page on the subject of preemption, most of which was a reiteration of the

this dearth of legislative history, the few remarks made on the floor of the Senate<sup>27</sup> and post-enactment treatment of the deemer clause<sup>28</sup> have significant weight.

The Supreme Court defined the scope of the preemption clause in *Shaw v. Delta Air Lines, Inc.*<sup>29</sup> *Shaw* involved state-mandated insurance benefits.<sup>30</sup> In interpreting the language "relat[ing] to any employee bene-

clause's language. *Id.* at 4650. The most lengthy remarks came in speeches before both Houses in the debates following the Joint Committee's report. *See infra* note 27.

27. Several remarks made in both the House and Senate during the debate on the Joint Committee's bill shed light on Congress' intent concerning preemption.

In the House, Representative Dent called the preemption provisions "the crowning achievement of this legislation, the reservation to Federal authority 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." 120 CONG. REC. 29,197 (1974), *reprinted in* ERISA LEGISLATIVE HISTORY, *supra* note 26, at 4670.

28. Although generally post-enactment treatment of a law in Congress might not be apposite, in two instances Congress acted, or failed to act, on ERISA in a way that bears mentioning.

The Joint Committee report on ERISA specified a post-enactment study of the preemption provisions: "The substitute provides that the congressional Pension Task Force is to study this provision and report back to the labor committees of the Congress on the results of its study." ERISA LEGISLATIVE HISTORY, *supra* note 26, at 4650. Hence, Congress enacted ERISA with the plan to study its progress and correct if necessary. The Pension Task Force did review the first several years under ERISA, and their report summarized their view on the deemer clause as follows:

[T]he deemed language was utilized to create an *irrebuttable* presumption that these [employee benefit] plans are not insurance, trust companies, etc., for the purposes of state regulation . . . [S]hould [this] understanding of the language in section 514, when read in conjunction with the legislative history, not prove correct or desirable, then of course further congressional action would be necessary to protect the policy in section 514(a).

ERISA Oversight Task Force on Welfare and Pension Plans, 46-48 of the Activity Report of the Committee on Education and Labor of the House of Representatives, Report No. 94-1785.

The Pension Task Force findings deserve attention beyond that normally accorded a post-enactment pronouncement. First, they specifically call on Congress to change the law if their understanding is not correct. Second, and perhaps more important, the very terms under which Congress enacted the preemption provisions invoked this Task Force's authority to make findings concerning the proper preemptive role of ERISA. The Task Force stated its understanding of the law, and Congress allowed the deemer clause to remain intact.

The next congressional action worthy of note was an attempt in 1979 by a number of legislators to revise ERISA's preemption provisions. These revisions were part of an ERISA improvement plan numbered S. 209, 125 CONG.REC. 933 (1974). Although S. 209 changed the preemption provisions, it did not affect the deemer clause at all. *Id.* at 937. The absence of any attempt to change the deemer clause is meaningful in light of both the Pension Task Force's report and the prior Ninth Circuit decision in *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir. 1978) (affirming a decision that ERISA preempts state insurance laws as they apply to self-insured plans, due to the deemer clause). The congressmen involved were aware of judicial activity on the preemption question. *See* 125 CONG. REC. 947 (1979) (statement of Sen. Williams). Thus, failure to consider amending or deleting the deemer clause stands as evidence of satisfaction with the current judicial interpretation.

29. 463 U.S. 85 (1983).

30. The question presented by *Shaw* was "whether the [state] Human Rights Law and Disabil-

fit plan" in section 514(a), the Court applied the phrase's "normal sense."<sup>31</sup> By doing so, the Court found the language preempts<sup>32</sup> any law that "has a connection with or reference to . . . a plan."<sup>33</sup>

Having set out such a broad preemption standard, the Supreme Court next addressed the exception created by the savings clause.<sup>34</sup> In *Metropolitan Life Insurance Co. v. Massachusetts*,<sup>35</sup> the Court found that a Massachusetts statute mandating minimum insurance benefits for residents insured under a general insurance policy related to ERISA benefit plans.<sup>36</sup> The statute was not preempted, though because it fell within the savings clause as "regulat[ing] insurance" by controlling the substance of insurance plans. Thus, notwithstanding ERISA's preemption clause, the savings clause barred the statute's preemption.<sup>37</sup> Substantive regulations aimed directly at the insurance industry may indirectly affect benefit plans.<sup>38</sup> In dicta,<sup>39</sup> the Court noted its ruling distinguished insured plans from self-insured plans, as the latter would not be open to state regulation.<sup>40</sup>

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ity Benefits Law 'relate to' employee benefit plans within the meaning of § 514(a) [of ERISA], . . . and if so, whether any exception in ERISA saves them from preemption." *Id.* at 96. The laws in question mandated certain non-discriminatory coverage in insurance policies. *Id.* at 88.

31. *Id.* at 96-97.

32. At one point the debate was whether "supersede" in the preemption clause meant ERISA preempted all state benefit plan law or merely preempted those state laws whose area of regulation ERISA addressed, see Brummond, *Federal Preemption of State Insurance Regulations Under ERISA*, 62 IOWA L. REV. 57 (1976). The Court in *Shaw* defined the scope of preemption: "Section 514(a) of ERISA, 29 U.S.C. § 1144(a), pre-empts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by ERISA.'" 463 U.S. at 91.

33. *Id.* The Court based this reading on a common sense view of the preemption provisions as a whole. "To interpret § 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans." *Id.* at 98.

34. The savings clause provides an exception to the general preemption clause. 29 U.S.C. 1144b(2)(A), see *supra* text accompanying note 21.

35. 471 U.S. 724 (1985).

36. *Id.* at 739. The plans in question in *Metropolitan Life* were "insured" plans. For a comparison to "self-insured" plans, such as the one at issue in *Reilly*, see *supra* note 15.

37. *Id.* at 739-46. The Court found no congressional intent to limit the savings clause preemption to statutes affecting insurance administration. *Id.*

38. *Id.* at 741.

39. For an explanation of why the Court's pronouncement on the deemer clause is dicta, see *infra* notes 68-71 and accompanying text.

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

In *Pilot Life Insurance Company v. Dedeaux*,<sup>41</sup> the Supreme Court limited this reading of the savings clause. The Court announced only to the extent that laws regulate insurance would such laws escape preemption.<sup>42</sup> The new interpretation prevented the plaintiff from bringing a state law tort claim in order to receive punitive damages from a plan insurer who failed to pay a claim.<sup>43</sup>

Other than dicta,<sup>44</sup> the Supreme Court has not spoken on the deemer clause, but the Ninth Circuit took up the question as early as 1978. In *Hewlett-Packard Co. v. Barnes*,<sup>45</sup> that court, following the reasoning of the district court below,<sup>46</sup> found the clause specifically exempted self-insured plans from all state insurance regulations.<sup>47</sup> The district court reasoned that Congress clearly meant to preclude a state from calling a benefit plan an "insurer" and invoking the savings clause in order to avoid ERISA's preemption.<sup>48</sup> Other circuits have since interpreted the deemer clause in like fashion.<sup>49</sup>

Despite such authority, in 1987 the Sixth Circuit, in *Northern Group*

*Metropolitan Life*, 471 U.S. at 747.

*Reilly* uses this dicta for support of its decision. See *infra* notes 62-63 and accompanying text.

41. 107 S. Ct. 1549 (1987).

42. *Id.* at 1553. *Pilot Life*, like *Metropolitan Life*, involved an "insured plan." See *supra* note 15.

43. *Id.* at 1554. Plaintiffs sought punitive damages as a result of the insurance carrier's alleged "bad faith." For an explanation of the Court's holding that the state bad faith claim did not regulate insurance, see *infra* note 83. In a companion case decided on the same day, the Court also rejected claims for breach of contract, retaliatory discharge and wrongful termination of disability benefits. *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987).

These decisions have profound implications for plaintiffs in any action against plan administrators. The diminished possibility of recovering punitive damages may deter many plaintiffs and their attorneys from filing claims against administrators.

44. See *infra* notes 68-71 and accompanying text.

45. 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1979).

46. *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977). The Court of Appeals adopted the district court's reasoning in toto on the question involved. 571 F.2d at 504.

47. 571 F.2d at 504. The district court reached its decision by looking both at the plain meaning of the deemer clause, 425 F.Supp. at 1297, and its legislative history, *id.* at 1298-300.

48. *Id.* at 1300.

49. See, e.g., *General Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305 (9th Cir. 1987); *Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Pub. Instruction*, 804 F.2d 1059 (8th Cir. 1986); *Light v. Blue Cross and Blue Shield of Ala., Inc.*, 790 F.2d 1247 (5th Cir. 1986); *Powell v. Chesapeake and Potomac Tel. Co. of Virginia*, 780 F.2d 419 (4th Cir. 1985), *cert denied*, 476 U.S. 1170 (1986). *Contra Insurance Bd. Under the Social Ins. Plan v. Muir*, 628 F. Supp. 1537 (M.D. Pa. 1986), *rev'd*, 819 F.2d 408 (3d Cir. 1987).

*Services, Inc. v. Auto Insurance Co.*,<sup>50</sup> allowed a state insurance regulation<sup>51</sup> to affect a self-insured employee benefit plan.<sup>52</sup> The court held a state insurance regulation will apply to self-insured plans where no independent federal interest in national uniformity exists.<sup>53</sup> After finding that the Michigan insurance regulation fell within the savings clause,<sup>54</sup> the court determined the state could also regulate plans acting as insurers.<sup>55</sup> The Court reached this conclusion by balancing what it found to be conflicting intents in the savings and deemer clauses.<sup>56</sup>

The Seventh Circuit, in *Reilly v. Blue Cross and Blue Shield United of Wisconsin*,<sup>57</sup> was the first appellate court decision since *Northern Group*

50. 833 F.2d 85 (6th Cir. 1987), *reh'g denied, sub nom.*, *Northern Group Services, Inc. v. State Farm Mut. Auto Ins.*, 9 EBC 1376 (1987), *cert. denied*, 108 S. Ct. 1754 (1988).

51. The regulation in question in *Northern Group* was a coordination of benefits law. This law, under the interpretation of Michigan state courts, made no-fault insurance coverage secondary to other health and accident coverage. The plaintiff plans nevertheless made no-fault liability primary and their own liability secondary. Thus, the statute actually changed the terms of the plan. *See* MICH. COMP. LAWS ANN. § 500.3109a (West 1983).

52. The court in *Northern Group* did not state that insurance regulations can always apply to benefit plans. Its balancing of rational interest in uniformity with state need to regulate insurance merely happened to deny preemption in this case.

53. "[F]or the deemer clause to override the savings clause in a given case, there must be some ERISA interest in uniformity to outweigh the McCarran-Ferguson interest in state regulation of insurance." *Northern Group*, 833 F.2d at 95. The court thus chose to see the two clauses in conflict. For a logical and consistent way to read the two clauses, see *infra* note 79.

54. *Id.* at 89-90.

55. *Id.* at 90-91. The *Northern Group* court deceptively relied on *Employer's Ass'n v. New Jersey*, 601 F. Supp. 232 (D.N.J.) (1985) as saying "state coordination of benefits [is] not barred by the deemer clause." *Northern Group*, 833 F.2d at 95. *Employer's Ass'n* does support the conclusion that a coordination of benefits law is a state insurance regulation under the savings clause. *Employer's Ass'n* does not, however, involve self-insured plans, but insured plans. *Employer's Ass'n*, 601 F. Supp. at 236. Thus, *Northern Group's* assessment of *Employer's Association's* holding is at best overstated.

56. The *Northern Group* opinion contains a tripartite analysis:

First, the court found no clear intent by Congress to preempt state law. *Northern Group*, 833 F.2d at 91. Without this clear intent, state law presumptively stands.

Second, Congress expressed a desire in ERISA § 514 (d) ("Nothing in this subchapter shall be construed to alter . . . any law of the United State") to leave federal law intact. The McCarran-Ferguson Act, 15 U.S.C. § 1011-1015 (1982), specifically leaves insurance regulation to the states. Therefore, a plan which mimics the business of insurance will still be regulable by the states. To strengthen this interpretation, the court pointed out that Congress specifically used the term "business of insurance" in the deemer clause to echo the McCarran-Ferguson Act. 833 F.2d at 91-92.

Third, the legislative history offers little to contradict this interpretation. *Id.* at 92.

The court then concluded that this tension between the state's right to regulate insurance and the federal government's right to regulate plans results in a balance. *See supra* note 53 and accompanying text. Because Michigan's law does not hurt the plan in a way feared by Congress (i.e. regulating the plan's *content*), it can affect the plan itself. 833 F.2d at 93.

57. 846 F.2d 416 (7th Cir. 1988).

to consider the deemer clause specifically. On appeal, the court dealt only with the state law tort claim of bad faith and the plaintiffs' demand for punitive damages.<sup>58</sup> The court disregarded completely whether these claims regulated insurance under the savings clause.<sup>59</sup> Instead, the Seventh Circuit adopted the view that ERISA preempts any state law applied to a self-insured plan.<sup>60</sup>

In rejecting plaintiffs' arguments, the court offered little more than a cursory treatment of the deemer clause question.<sup>61</sup> After reciting the preemption, savings and deemer clauses, the court pointed only to dicta in *Metropolitan Life v. Massachusetts* for support of its result.<sup>62</sup> In *Metropolitan Life*, Justice Blackmun, writing for the Court, strongly indicated the Court's leaning on the interpretation of the deemer clause.<sup>63</sup> The *Reilly* court's interpretation would apparently preclude state insurance regulations from applying to plans themselves. The *Reilly* court further relied on *Metropolitan Life* in that the Court recognized that the state of Massachusetts, by never applying the law in question to benefit plans directly, acknowledged the law's invalidity as it applied to self-insured plans.<sup>64</sup>

The court's analysis in *Reilly* is deficient in two respects. First, in relying solely on the dicta in *Metropolitan Life*,<sup>65</sup> the court ignored other, more satisfactory rationales for its decision.<sup>66</sup> Second, in examining the

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58. *Id.* at 425.

59. *Id.*

60. *Id.* at 423-26.

61. Supporting *Reilly's* decision, a number of circuits have found the same result in addressing state regulation of self-insured plans. See *supra* note 49. An appreciable amount of legislative history is also available on the interpretation of the deemer clause. See *infra* notes 72-76 and accompanying text. For a full treatment of the ways the court could have substantiated its opinion, see *infra* notes 72-79 and accompanying text.

62. 846 F.2d at 425-26.

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

*Metropolitan Life*, 471 U.S. at 747, cited in *Reilly*, 846 F.2d at 425-26.

64. *Metropolitan Life*, 471 U.S. at 735 n.14.

65. In looking to the Supreme Court for guidance, the Seventh Circuit could have quoted further dicta in *Pilot Life* to the effect that the deemer clause would preclude a *Reilly* claim from being saved. Describing the three preemption clauses, the Court said, "[t]he deemer clause makes clear that a state law that 'purport[s] to regulate insurance' cannot deem an employee benefit plan to be an insurance company." 107 S. Ct. 1552. Although this passage is at first blush a mere restatement of the law, it apparently contradicts the conclusion reached by the Sixth Circuit in *Northern Group*, see *supra* notes 50-56 and accompanying text, and thus supports *Reilly's* outcome.

66. See *infra* notes 72-79 and accompanying text.

deemer clause, the court reached an issue it need not have addressed.<sup>67</sup>

In *Metropolitan Life*, the deemer clause was not before the Supreme Court for interpretation.<sup>68</sup> Thus Justice Blackmun's statements are purely dicta.<sup>69</sup> Likewise, Massachusetts' failure to enforce its law against self-insured plans was not evidence requiring the Court's interpretation for resolution on the merits.<sup>70</sup> Nevertheless the Seventh Circuit inappropriately cited *Metropolitan Life* as if its holding involved self-insured plans.<sup>71</sup>

The *Reilly* court ignored other justifications for its decision. ERISA's legislative history does not often address the preemption provisions.<sup>72</sup> The conference committee's report on the bill, however, makes clear the compromise reached by the committee was subject to a study by the Pension Task Force.<sup>73</sup> The fact that Congress passed this clause with such assurances adds weight to the Task Force's study which favors the *Reilly* decision.<sup>74</sup> Also, an attempt to amend the preemption clauses in 1979 did not address the deemer clause at all.<sup>75</sup> This decision to leave the deemer clause unamended is significant because it follows both the Pension Task Force's report<sup>76</sup> and a prior circuit court of appeals decision.<sup>77</sup> Additionally, commentators have noted it is likely Congress intended the

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67. See *infra* notes 80-86 and accompanying text.

68. The question in *Metropolitan Life* was whether a state-mandated benefit law would apply to insurance packages sold to a benefit plan. *Metropolitan Life*, 471 U.S. at 732. The Court clearly recognized the difference between plans purchasing insurance and "self-insured" plans. *Id.*

69. Emphasizing the inconclusiveness of the Court's dicta concerning the deemer clause, both *Northern Group* and *Reilly* quote the same *Metropolitan Life* language and yet reach the opposite conclusion. *Northern Group*, 833 F.2d at 91; *Reilly*, 846 F.2d 425-26.

70. See *supra* note 36. Because the case involved only plans that purchased insurance, Massachusetts' treatment of self-insured plans was irrelevant, at least with respect to the law's application to those plans.

71. Note how *Reilly* cites the *Metropolitan Life* Court: "If a plan purchases insurance, as opposed to being self-insured, it is 'directly affected by state laws that regulate the insurance industry.' *Metropolitan Life Insurance Co. v. Massachusetts*." *Reilly*, 846 F.2d at 425 (emphasis added).

72. See *supra* note 26.

73. "The substitute provides that the congressional Pension Task Force is to study this provision and report back to the labor committees." CONFERENCE REPORT ON H.R. 2, PENSION REFORM, H.R. REP. NO. 1280, 93d Cong., 2d Sess. 383 (1974), reprinted in ERISA LEGISLATIVE HISTORY, *supra* note 26, at 4650.

74. For a summary of the Pension Task Force study, see *supra* note 28.

75. For circumstances surrounding Senate bill S-209, see *supra* note 28.

76. See *supra* note 28.

77. *Hewlett Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir. 1978). For an explanation of the significance of this decision, see *supra* note 28.

result reached in *Reilly*.<sup>78</sup> Finally, a common sense reading of the statute's text illustrates *Reilly's* conclusion.<sup>79</sup>

Another flaw in the approach the Seventh Circuit took is the clause it chose to interpret. The Supreme Court has never addressed the deemer clause on the merits.<sup>80</sup> The Court has, however, spoken on the scope of the savings clause.<sup>81</sup> In *Pilot Life*,<sup>82</sup> the Court held ERISA preempts state tort laws regulating insurance contracts, despite the savings clause.<sup>83</sup> Although *Pilot Life* concerned a plan purchasing its insurance, rather than a self-insured plan,<sup>84</sup> this distinction does not alter *Pilot Life's* application to the *Reilly* facts.<sup>85</sup> Thus, the *Reilly* court could have

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78. Engel, *supra* note 15, at 431; Note, *ERISA Preemption of State Mandated-Provider Laws*, 1985 DUKE L. J. 1194, 1196; Note, *supra* note 12, at 600.

79. The court in *Northern Group Services, Inc. v. Auto Insurance Co.*, 833 F.2d 85 (6th Cir. 1987), *see supra* notes 50-56 and accompanying text, chose to see the savings and deemer clauses as conflicting and requiring a balancing test. *See supra* note 53. A careful reading of the two clauses reveals, however, that they are perfectly consistent under *Reilly's* solution.

The preemption clause announces the general rule that ERISA preempts all state laws relating to a plan in any way. The savings clause then excepts from this general rule areas of traditional state regulation, namely the fields of insurance, banking and securities regulation. The deemer clause carefully circumscribes this exception by disallowing classification of a plan as an insurance company for the purposes of regulation. Balancing the savings and deemer clause is not necessary under this reading.

Further, one can compare the decision in *Northern Group* to *Reilly* despite the different laws involved. *Northern Group* concerned a mandated-provider type law (*see supra* note 51) whereas *Reilly* involved a transaction regulation. Nevertheless, *Reilly's* solution would still be appropriate for *Northern Group*. The question presented by each is whether a state can regulate directly a benefit plan (a statutory regulation in *Northern Group*, a decisional law in *Reilly*). The deemer clause appears to make no distinction between the two. *See supra* text accompanying notes 19-22. Also, at least one commentator feels the courts should treat these two types of laws the same. *See Engel, supra* note 15, at 439-43.

80. *Supra* notes 68-71 and accompanying text.

81. In *Metropolitan Life* and *Pilot Life*, the Court discussed the scope of the savings clause. *See supra* notes 35-43 and accompanying text.

82. The Court decided *Pilot Life* in April, 1987, more than a year before the *Reilly* decision. 107 S. Ct. 1599.

83. In *Pilot Life*, appellee argued that the Mississippi law of bad faith regulates insurance. *Id.* at 1553. Although Mississippi identified the bad faith tort with the insurance industry, *id.*, Justice O'Connor found its roots were general tort and contract principles. *Id.* at 1554. Therefore, "[a]ny breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law." *Id.* For this reason the Court held the law did not specifically regulate insurance.

84. There is no reason to believe the Court would treat such tort claims differently in the case of a self-insured plan like the one in *Reilly*. The deemer clause itself makes the only distinction between self-insured and insured plans, and then only to enhance preemption for the self-insured plans. Hence, the rationale in *Pilot Life* is equally persuasive when applied to a self-insured plan.

85. Although the common law progression in Wisconsin was different from Mississippi's as O'Connor described it, *see supra* note 11, the basis for such principles of tort and contract interaction

rebutted the plaintiffs' claim without ever reaching the question of the deemer clause.<sup>86</sup>

The controversy over interpretation of the deemer clause has far-reaching effects on many employers utilizing self-insured plans.<sup>87</sup> Likewise, a Supreme Court ruling in line with *Reilly* could severely limit a plaintiff's chances for punitive damages in a suit against a self-insured plan.<sup>88</sup> Despite the cursory analysis<sup>89</sup> presented by the Seventh Circuit on the deemer clause, *Reilly* does appear to proffer the correct interpretation of the clause.<sup>90</sup> Through the deemer clause, Congress intended to

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existed long before the *Anderson v. Continental Insurance Co.* opinion, 85 Wis. 2d 675, 271 N.W. 2d 368 (Wis. 1979); see *supra* note 11. That the Wisconsin court reads *Anderson* as merely a specific instance of the general applicability of punitive tort damages in certain contract breaches is now clear after the decision in *Autumn Grove Joint Venture v. Rachlin*, 138 Wis. 2d 273, 405 N.W.2d 759 (Wis. App.), *reh'g denied*, 416 N.W. 2d 65 (1987), see *supra* note 11. O'Connor and the Court would therefore reach the same conclusion had the Wisconsin law of bad faith been before them.

86. This approach would have been advantageous for two reasons. First, the *Reilly* court would have had a clear Supreme Court precedent to cite. Second, a sequential reading of the preemption clauses would suggest this response. Having found the law does "relate to" a benefit plan, the court would then have read the savings clause. Although this clause does begin with the phrase "(e)xcept as provided in subparagraph (B) [the deemer clause]," the court should nevertheless have addressed the savings clause first. If the clause did not apply, the court had no reason to reach the exception to this exclusion.

87. Prior to the *Northern Group* decision, employers choosing to self-insure their benefit plans were confident that they needed worry about only one set of regulations applied by the federal ERISA law. Logically, many employers chose self-insured plans for the advantages thus presented: a uniform regulation in any state, freedom from state interference, and little likelihood of an adverse award of punitive damages. *Northern Group*, with its balancing test, would destroy this confidence, leaving in its place a constant question as to which state laws outweigh the federal interest in uniformity. *Reilly* returned to the majority view that the deemer clause will invoke preemption of state laws as applied to self-insured plans. Assuredly, many employers and employee associations await the Supreme Court's resolution.

88. Members of the Supreme Court are acutely aware of the problem of eroding plaintiffs punitive damage opportunities under ERISA. In *Massachusetts Mutual Life Ins. v. Russell*, 473 U.S. 134 (1985), the concurring opinion noted with approval that the Court explicitly left unanswered whether § 502(a)(3) allowed a plaintiff punitive damages. *Id.* at 157-58 (Brennan, J., concurring). See *supra* note 12.

89. *Supra* notes 61-64 and accompanying text.

90. See *supra* notes 72-82 and accompanying text. The reasoning in *Northern Group* can be criticized on several grounds. For example, the court in *Northern Group* reasoned that ERISA § 514(a), 29 U.S.C. § 1144(d) (1982), which insists ERISA not be construed to impair any federal law, barred the deemer clause from preempting state regulation of the business of insurance, as the McCarran-Ferguson Act leaves the regulation of insurance to the states. 833 F.2d at 92. Such a reading makes little sense, as Congress has not altered the state regulation of insurance. The deemer clause merely removes self-insured benefit plans from the scope of state insurance regulation. Also, the Sixth Circuit in *Northern Group* gave inadequate weight to the Pension Task Force report explaining the deemer clause. 833 F.2d at 92. See *supra* note 28. Congress chose not to amend the deemer clause while aware of the Task Force's statement on the deemer clause. See *supra* note 28.

protect benefit plans from direct state regulation. Their effort, however, eliminates one more device protecting employees against fraudulent plan operation.<sup>91</sup> The problem grows worse as the courts remove more and more policing devices for administrative abuse of self-insured plans. Faced with employees who are ever more helpless against abuse, Congress may soon be forced to take action to put teeth back into ERISA.

*J.G.*

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91. Preempting state law entirely eliminates many common law actions allowing punitive damages. This limitation in turn decreases the incentive for plan administrators to operate in good faith.

