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Workers' compensation is a century-old system in which employees are provided benefits for work-related injuries in lieu of tort damages irrespective of the fault of their employers. In exchange for what is essentially strict liability, employers receive insulation from traditional tort damages, and employees' benefits are limited to periodic indemnity payments and payment for all reasonable and necessary medical expenses. These benefits are established and defined primarily by state statutes, though there are some federal workers' compensation systems applicable to certain categories of workers such as federal employees and longshore and harbor workers. The workers' compensation "system" has been in continuous existence since 1911.

Originally, many workers' compensation systems were "elective" and employers were permitted not to participate in the statutory scheme. This voluntariness resulted from concern at the state level that the U.S. Supreme Court might invalidate statutes on due process grounds. Eventually nearly all states moved to mandatory systems after the Court upheld the constitutionality of the workers' compensation model in *New York Central Railroad v. White*.[1] Some states delayed in adopting mandatory systems, and one state, Texas, never did and remains entirely elective.

The era of near-universal, mandatory workers' compensation systems concluded when, in 2013, Oklahoma permitted by statute employers to opt out of workers' compensation.[2] The change was part of an effort facilitated by workers' compensation lobbying groups like the Association for Responsible Alternatives to Workers' Compensation (ARAWC), a development widely reported by news organizations, and especially by reporters Howard Berkes and Michael Grabell, of National Public Radio and ProPublica, respectively. One of the more subtle but critical issues emerging in the debate surrounding the wisdom or lawfulness of state-sanctioned, opt out programs has been whether "alternative benefit plans" authorized under the programs are, or would be, covered by the Employee Retirement Income Security Act of 1974 (ERISA).

This issue is thorny, subtle, and important. Imagine workers' compensation benefits paid from an employer benefit plan that also provides vacation pay. This "alternative" plan would be a kind of hybrid—both a workers' compensation and a vacation benefit plan. If the combination of the two plans creates an ERISA plan, it would arguably no longer be subject to state regulation because of ERISA preemption. Under ERISA, state laws "relating to" ERISA-eligible

[1] 243 U.S. 188, 255 (1917).
[2] OKLA. STAT. tit. 85A, §§ 201 *et seq.*

plans are preempted.[3] Because ERISA itself does not contain any *substantive* requirements for benefit levels—it merely requires that plans deliver what they promise to deliver—ERISA preemption is substantively empty. Handling payment of benefits under an ERISA plan means that employers would in effect be released from complying with any state-mandated substantive level of workers' compensation benefits. While an alternative plan *might* provide benefit levels that are substantively commensurate with state levels, it would not be required to do so as a matter of law. In effect, a previously mandatory benefit—one that was provided in exchange for relinquishment of tort rights—will have been converted to a discretionary benefit of the type ERISA was meant to regulate.

States that *have* authorized (Oklahoma), or are *considering* authorizing (Tennessee), alternative benefit plans argue, and even declare within the text of opt out statutes and bills, that alternative plans under their schemes are necessarily covered by ERISA.[4] However, the conclusion, though plausible, seems debatable given the significant impact that widespread employer opt out could have on the national employee benefit landscape and the self-interested nature of an involved state's declaration.

Surprisingly, there is no definitive legal authority on the question of whether such alternative plans are, or would be, covered by ERISA. One federal appellate court case, *Hernandez v. Jobe Concrete Products, Inc.*,[5] a handful of Texas trial-level cases, and a two-decades-old Department of Labor "Information Letter"[6] hold that such plans *are* covered by ERISA. However, all of that contextually weak authority arose in a period in which there was no sense that alternative plans might threaten to supplant traditional workers' compensation systems. In effect, different questions were being answered than the one being asked now. Will alternative benefit plans systematically deprive injured workers of adequate benefits for work-related injuries, thereby creating the potential for some federal involvement in an area that has historically been *exclusively* a matter of state regulation? Alternative plans create the potential for shifting costs through undercompensation of workplace injuries by less generous private plans to federal programs, and may additionally transfer disputes over the compensability of workplace injuries to federal courts.[7] All of these considerations are triggered if alternative benefit plans are covered by ERISA.

Alternative Benefit Plans as ERISA Plans

The definition of an ERISA-covered plan is extremely broad:

> [T]he terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day

[3] *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 8 (1987).
[4] *See* OKLA. STAT. tit. 85A, § 211(B)(5); S. 721, 109th Gen. Assemb., Reg. Sess. § 50-10-106 (Tenn. 2015).
[5] 282 F.3d 360 (5th Cir. 2002).
[6] Information Letter from U.S. Dep't of Labor to Howard Klein (Sept. 2, 1994).
[7] *See* 29 U.S.C. § 1132.

> care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title . . . .[8]

Alternative benefit plans probably qualify as ERISA plans under this definition as plans "established" or "maintained" for the purpose of providing participants or beneficiaries "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death." However, "[t]he precise coverage of ERISA is not clearly set forth in the Act," and when questions of statutory ambiguity arise, courts customarily give deference to the reasonable views of the secretary of labor, who is specifically authorized to define ERISA's "accounting, technical, and trade terms."[9]

The Workers' Compensation Exemption

Under ERISA, certain kinds of "employee welfare benefit plans" are exempted from ERISA coverage: "The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable *workmen's compensation laws* or unemployment compensation or disability insurance laws."[10]

It might be argued that under this provision opt out plans are, like traditional workers' compensation plans, excluded from coverage by ERISA. Opt out proponents contend, however, that the purpose of maintaining an alternative benefit plan is precisely *not* to comply with a "workmen's compensation law."[11] However, there is a logical conundrum at play around that negative purpose. It is arguably a "workmen's compensation law" that permits an opt out plan to "comply" with a workers' compensation law by authorizing opt out in the first place. In other words, state opt out authorization is arguably itself a "workmen's compensation law," and seeking state permission to opt out (or to opt in in the case of Texas) sounds like a form of compliance.[12] Furthermore, in Oklahoma the opt out law was enacted as part of a tripartite statute also containing the former "traditional" workers' compensation law and new statutory provisions pertaining to the arbitration of workers' compensation cases. In this context, it is not difficult to argue that the opt out law is in effect a "workmen's compensation law" subject to the ERISA exemption.

Definitions: "Workmen's Compensation Law" and "Solely"

Workmen's compensation law. Definitional problems are obviously presented by the relevant statutory language. The first problem is to determine what is meant by a "workmen's compensation law," a phrase that is not defined in ERISA. The Congress of 1974 would likely have understood such a law as a state statute mandating periodic indemnity benefits representing

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[8] *Id.* § 1002.

[9] Massachusetts v. Morash, 490 U.S. 107, 113, 116 (1989) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Watt v. Alaska, 451 U.S. 259, 272–73 (1981); Udall v. Tallman, 380 U.S. 1, 16 (1965)).

[10] 29 U.S.C. § 1003(b)(3) (emphasis added).

[11] *See generally* BILL MINICK, PARTNERSOURCE, OPTIONS TO WORKERS' COMPENSATION: PUBLIC POLICY ANALYSIS (2015), *available at* www.partnersource.com/media/25227/options%20to%20workers%20compensation%20-%20public%20policy%20analysis.pdf.

[12] *See* Gibbs v. Serv. Lloyds Ins. Co., 711 F. Supp. 874, 878 (E.D. Tex. 1989); Foust v. City Ins. Co., 704 F. Supp. 752, 753–54 (W.D. Tex. 1989).

a percentage of a worker's wage at the time of injury, payment of reasonable and necessary medical expenses, and directing that delivery of such benefits be the "exclusive remedy" for work-related injuries, the exclusivity representing a quid pro quo for employers' near-absolute liability under such a statute.[13] Indeed, exclusivity is at the heart of the essential Grand Bargain between employers and employees: employees' exclusive remedy from their employers for work-related injury is workers' compensation.[14] The understanding for decades has been that workers' compensation is a substitute for important or even quasi-fundamental tort rights.[15] It is very difficult to believe that ERISA's drafters would have failed to adjudge an alternative benefit plan a "workmen's compensation" plan if the result would have been to deprive an injured worker of *any* statutory workers' compensation benefit.

Moreover, an alternative benefit plan created under an opt out law that retained the exclusive remedy rule might well have seemed to the ERISA drafters and enactors to be on its face a plan maintained to comply with a "workmen's compensation" law. For example, Oklahoma's opt out statute both authorizes employers to opt out of workers' compensation and continues to immunize those opt out employers from tort suits.[16] Other proposed opt out schemes do not appear to retain the exclusive remedy rule,[17] and employers with plans under such arrangements would commonly be liable in tort suits. Opt out statutes eschewing exclusivity, accordingly, may have looked less like "workmen's compensation" laws to ERISA's drafters.

Solely for the purpose of complying—defensive application. The workmen's compensation exemption also states that in order to escape ERISA's coverage, a plan must be maintained "solely" for the purpose of complying with a workmen's compensation law. Most court interpretation of the exemption's meaning of "solely" has occurred in "defensive" contexts. States in such cases were *defending* some portion of their workers' compensation statutes against ERISA preemption challenges through which employers were attempting to escape statutory workers' compensation coverage, and the involved states were attempting to *prevent* the escape.[18]

States in "defensive" cases were arguing that the workers' compensation exemption saved various workers' compensation provisions from preemption. In *Employers Resource Management Co. v. James*, for example, the Fourth Circuit considered a challenge to the Virginia workers' compensation statute.[19] An employee suffered a work-related injury and became potentially entitled to benefits under a joint employer's employee welfare benefit plan if he were to prevail in an arbitration. Instead of participating in the arbitration, the employee filed a workers' compensation claim. The joint employers resisted the Virginia Workers' Compensation

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[13] *See* N.Y. Cent. R.R. v. White, 243 U.S. 188 (1917).
[14] 82 AM. JUR. 2D *Workers' Compensation* § 54 (2015).
[15] *See* Michael C. Duff, *Worse Than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. (forthcoming 2016).
[16] OKLA. STAT. tit. 85A, § 209(A).
[17] *See* S. 721, 109th Gen. Assemb., Reg. Sess. § 50-10-108(a) (Tenn. 2015).
[18] ERISA Section 514, 29 U.S.C. § 1144, provides in broad terms that ERISA supersedes any and all state laws insofar as they relate to any employee benefit plan. "State laws" include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA § 514(c)(1).
[19] 62 F.3d 627 (4th Cir. 1995).

Commission's attempts to assert jurisdiction over them. Eventually, the joint employers filed a complaint in federal district court seeking a ruling that the commission lacked jurisdiction over the workers' compensation claim because their plan provided employees benefits exceeding those provided by traditional workers' compensation and was therefore an ERISA plan. Accordingly, the joint employers contended the workers' compensation claim was preempted by ERISA. The crux of the issue became whether the commission could continue to require the joint employer's putative ERISA plans to provide the same financial security assurances to state authorities as were required under traditional workers' compensation plans. The court looked closely at the workers' compensation exemption:

> Appellants propose a narrow interpretation of this language, based on Congress's use of the word "solely" to modify the above-stated operative phrase, that would effectively preempt any plan that combines elements of ERISA and state workers' compensation laws. In effect, Appellants argue that ERISA preempts Virginia from directing employers to keep their workers' compensation coverage outside of their independent ERISA plan. We disagree. ERISA does not preempt plans; it preempts laws. When the state law only requires an employer to create a separate workers' compensation plan, as in this case, the law necessarily relates to an employee benefit plan "solely for the purpose of complying with applicable workmen's compensation laws."[20]

In other words, the employers attempted to argue that because the plan combined both ERISA and workers' compensation benefit components it was not maintained "solely" for the purpose of complying with a workers' compensation statute. The commission, for its part, was facing a situation in which employers could simply combine workers' compensation benefits with other "ERISA" benefits and escape the workers' compensation statute in its entirety because the plans in question were not created or maintained "solely" for the purpose of complying with a workers' compensation law. The commission resisted the attempt, and the court agreed that ERISA could not preempt a workers' compensation statute, which was the basis of the commission's demand for posting of a security bond.

In coming to this conclusion, the *Employers Resource* court relied heavily on the Supreme Court's opinion in *Shaw v. Delta Air Lines, Inc.*.[21] In *Shaw*, the employer challenged under ERISA two New York laws, a disability law and a human rights law. With respect to the disability law, the same ERISA exemption provision applicable to workers' compensation laws was at issue. While the Court found that only "separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3)," it went on to announce an important caveat:

> This is not to say, however, that the Airlines are completely free to circumvent the Disability Benefits Law by adopting plans that combine disability benefits inferior to those required by that law with other types of benefits. Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible.[22]

[20] *Id.* at 632.
[21] 463 U.S. 85 (1983).
[22] *Id.* at 108.

What cases like *Employers Resource* and *Shaw* emphasized is the legitimacy of a state's historic sphere of responsibility in workers' compensation and disability law, as recognized by the drafters of ERISA. The courts have refused to allow employers to tactically create plans for the purpose of evading explicitly protected state laws through artificial use of the term "solely." Other cases have been strongly in accord with the general view that state workers' compensation police power must be presumptively preserved.[23]

Solely for the purpose of complying—offensive application. Present opt out debates illustrate the workers' compensation exemption in an "offensive" context. States enacting opt out wish to *facilitate* rather than oppose employer escape from the workers' compensation statute. Not surprisingly, little authority on the workers' compensation exemption exists in this facilitative posture. States are not in the habit of creating laws that are not to be complied with. Texas has been the only opt out state during the post-ERISA period from 1974 through 2013, when Oklahoma enacted its opt out statute. Accordingly, Texas is exclusively where facilitative authority may be located. Only *one* appellate court in Texas has addressed the issue.

In *Hernandez*, Hernandez brought a suit in state court against his former employer, Jobe Concrete Products, after he suffered an on-the-job injury.[24] After Jobe successfully removed the case to federal court, the district court issued a judgment dismissing Hernandez's complaint and compelling arbitration between the parties. On appeal, Hernandez challenged the subject matter jurisdiction of the district court. The central challenge was whether the employer's plan fell within the workers' compensation exemption because it was "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws."[25] If the plan did not fall within the exemption, it was covered by ERISA and properly removable to federal court. The Fifth Circuit agreed with the employer's argument that because Texas did not require employers to provide workers' compensation insurance, either by subscribing to the state plan or by offering an equivalent alternative, the plan was not (and logically could not have been) maintained solely for the purpose of complying with Texas workers' compensation law. The court speculated, "Jobe has undoubtedly created and maintained its plan in order to avoid the high cost of insurance under the [Texas Workers' Compensation Act], and in an effort to limit its liability in the absence of such insurance."[26]

The case is notable in a number of respects. First, the *Hernandez* court was unable to cite *any* appellate authority, federal or state, in support of its conclusions. The court was required to cite Texas trial-level decisions because there had been no appellate court authority on the question.[27] Second, the court implicitly acknowledged that a *requirement* to provide an alternative plan *might* amount to a requirement by a state to provide workers' compensation insurance, bringing such a plan within the exemption. Third, the court read *Shaw* in an extremely cramped manner.

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[23] *See, e.g.*, Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008); Ciampi v. Hannaford Bros., 681 A.2d 4 (Me. 1996).

[24] Hernandez v. Jobe Concrete Prods., Inc. 282 F.3d 360 (5th Cir. 2002).

[25] *Id.* at 362.

[26] *Id.* at 363.

[27] *Id.* (citing Rojas v. DAJ Enters., Inc., No. EP-00-CA-313-DB, 2001 WL 682223, at *3 (W.D. Tex. Mar. 6, 2001); Guilbeaux v. 3927 Found, Inc., 177 F.R.D. 387, 393–94 (E.D. Tex. 1998); Pyle v. Beverly Enters.-Tex., Inc., 826 F. Supp. 206, 209–10 (N.D. Tex. 1993)).

With respect to the first point, it is not surprising that the *Hernandez* court was unable to cite supporting authority. Texas was at the time the only opt out/opt in—in any event "elective"—jurisdiction. Virtually all other states required employers either to carry workers' compensation insurance or to self-insure. Thus, in no other state could an "offensive" case have arisen. Texas is also unique because employers have historically enjoyed presumptive nonsubscriber status. Employers need only notify their employees and state authorities that they decline to participate in the workers' compensation system.[28]

The *Hernandez* court followed the reasoning from the trial-level cases it cited. Obviously, if an employer is not required to comply with a workers' compensation statute at all, one may argue that the employer could not have established a plan solely to comply with the statute. However, *Hernandez*, like most of the trial courts before it, failed to consider carefully the implications of deeming all elective plans ERISA plans. The deep question presented is whether alternative plans are de facto workers' compensation substitutes and, if they are, whether the fact that they may also superficially exist for another purpose should be sufficient to deem them covered by ERISA. The Jobe plan's classification as an ERISA plan deprived Hernandez of *both* a workers' compensation and a tort remedy.[29] He was forced to accept the plan's coverage for his injuries and, if they were inadequate, to resort to other public benefits systems or to charity. If Texas courts recognized these possibilities at the time, they certainly did not discuss them.

Texas employers are in a position to argue that they did not adopt alternative plans solely for the purpose of complying with a workers' compensation law because there is no workers' compensation law with which they must comply. Indeed, Texas employers need not even carry alternative plans and can choose to "go bare," exposing themselves to the possibility of a tort suit (though that risk may be significantly reduced if they also compel employees to sign arbitration agreements as a condition of hire). In an opt out system like Oklahoma's, on the other hand, employers are vulnerable to the argument that they are in fact complying with a state workers' compensation law by following rules for opt out. It is presumptively within the state workers' compensation system. Were the employer not to follow the opt out rules, it would be required by the state to purchase workers' compensation insurance,[30] and the *Hernandez* court seemed to hint at that possibility.

Third, with respect to *Shaw*, the case said much more than that the workers' compensation exemption "will apply only to plans which are both separately administered and maintained solely to comply with state law."[31] *Shaw* also made clear that a state could require an employer to create a separately administered workers' compensation plan:

> A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3). The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multibenefit ERISA plan does not make the state law wholly unenforceable as to employers who choose that option.[32]

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[28] *See Workers' Compensation Resources for Employers*, TEX. DEP'T OF INS., http://www.tdi.texas.gov/wc/employer (last updated Feb. 1, 2016).

[29] *See* Rodriguez v. Pacificare of Tex., Inc., 980 F.2d 1014 (5th Cir.) (holding state tort claims preempted by ERISA), *cert. denied*, 508 U.S. 956 (1993).

[30] *See* OKLA. STAT. tit. 85A § 203.

[31] *Hernandez*, 282 F.2d at 362 n.2.

[32] Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 108 (1983) (citation omitted).

In other words, if a state did *not* authorize an employer to create an alternative benefit plan outside of traditional workers' compensation, it *would* be able to *compel* an employer *both* to pay workers' compensation benefits through such an ERISA plan *and* to separately maintain the workers' compensation portion of the plan in a discrete administrative unit. As previously mentioned, a state could prevent an artful escape from its workers' compensation system through the manipulation of preemption. *Hernandez* significantly underread *Shaw*.

Additional Observations Concerning Legislative History

Shaw recognized that the primary legislative purpose of ERISA was to facilitate "national uniformity in benefit plan regulation in part to make it easier for employers to offer benefits free of patchwork local regulation. Congress feared that burdensome, overlapping regulation would discourage employers from providing benefits at all."[33] With that overriding legislative purpose in mind, it is difficult to agree that Congress would have countenanced an interpretation of ERISA permitting traditional state workers' compensation benefits to casually blur and dissolve into federal ERISA welfare benefit plans. Two principal arguments in support of this conclusion are the lack of national uniformity likely to be brought on by a significant opt out movement, and the litigation and cost shifting occasioned by a widespread opt out development.[34]

With respect to the lack of national uniformity, whatever one may think about the underlying merits of opt out, if ERISA preemption applies to alternative benefit plans, they will likely multiply in some states and not in others. For example, some authors are already contending the opt out movement will concentrate in the South, raising the specter of a regional race to the bottom.[35] It may be a significant challenge for businesses to deal with what is likely to be a confusing patchwork of occupational disability plans, a development that would be at odds with ERISA's underlying purpose and premises.[36] "Congress's primary concern when it enacted ERISA was to ensure that plans would be able to meet their obligation to participants and their beneficiaries. One of the most important ways in which ERISA advances this objective is by protecting plans from regulatory requirements that vary from state to state—or even from city to city."[37] While it may be true that Congress believed that federal preemption would establish that uniformity, it should not be doubted that the objective was the uniformity, not the preemption.

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[33] *See* Brian P. Goldman, Note, *The San Francisco Health Care Security Ordinance: Universal Health Care beyond ERISA's Reach?*, 19 STAN. L. & POL'Y REV. 361, 373 (2008) (citing *Shaw*, 463 U.S. at 99).

[34] *See* Congressional Letter to Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Oct. 20, 2015) (estimating $12 billion in costs being shifted from workers' compensation to the Social Security Disability Insurance system each year), *available at* https://assets.documentcloud.org/documents/2465674/letter-from-federal-lawmakers-to-labor-on.pdf.

[35] *See* David B. Torrey, The Opt-Out of Workers' Compensation Legislation in the Southern States, Paper Presented before MCLE New England (Nov. 20, 2015), *available at* http://www.davetorrey.info/files/Torrey.MCLE._Mass_Opt-out.10.26.15final.pdf.

[36] *See Shaw*, 463 U.S. at 98.

[37] Brief of the American Benefits Council *et al.* as *Amici Curiae* in Support of Respondent at 17–18, Gobeille v. Liberty Mut. Ins., No. 14-181 (S. Ct. Oct. 20, 2015), *available at*

With respect to cost shifting, there are obvious vehicles by which costs may be shifted from the states to the federal government. First, if opt out plans are covered by ERISA, disputes under the plans will be heard in federal courts.[38] Regardless of the merits of those claims, many claims may be brought. This increase in federal docketing activity will have its costs. Second, as opt out plans proliferate and result in a higher rate of denial of work-related injury claims, more injured individuals will apply, and possibly be found eligible for, Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits. Workers' compensation to SSDI cost shifts have been causing difficulties even under present law,[39] and it seems questionable to impose additional costs without a very clear indication that such was the intent of the Congress of 1974.[40] A third area of cost shifting, only beginning to be understood, concerns Medicare set-aside obligations. Alternative benefit plans mandating lump sum settlements of claims completely terminate the legal obligation of the employer at settlement, including the requirement to pay future medical expenses. The question of whether Medicare's interests can be adequately protected in the context of such settlements is an open one.[41]

The question accordingly is whether the Congress of 1974 would have meant for the workers' compensation exemption *not* to apply to opt out plans in light of risks such as these. I think the answer is no.

The Welfare and Pension Plans Disclosure Act of 1958. James Wooten, law professor at the State University of New York in Buffalo, and preeminent historian of ERISA, observes that the riddle of "solely" is not best answered by ERISA, a point missed in the prior authority cited in this article.[42] ERISA's Section 4(b), the workers' compensation exemption, is found verbatim in the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).[43] Section 4(b) of the WPPDA stated, "This act shall not apply to an employee welfare or pension benefit plan if . . . such plan was established and is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability insurance laws[.]"[44]

Accordingly, the workers' compensation exemption language in the WPPDA, like the subsequent language in ERISA, exempted only plans created or maintained "solely" for the purpose of complying with workmen's compensation laws. However, several preliminary bills leading up to the final version of WPPDA omitted the "solely" requirement. In other words, *any*

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www.scotusblog.com/wp-content/uploads/2015/10/14-181-bsac-American-Benefits-Council-et-al.pdf.

[38] *See* 29 U.S.C. § 1132.

[39] *See* NICK BUFFIE & DEAN BAKER, CTR. FOR ECON. & POLICY RESEARCH, RISING DISABILITY PAYMENTS: ARE CUTS TO WORKERS' COMPENSATION PART OF THE STORY? (2015), http://cepr.net/documents/rising-disability-payments-2015-10.pdf.

[40] *See* Congressional Letter to Thomas E. Perez, *supra* note 34.

[41] Jennifer C. Jordan, *Opt Outs to Workers' Compensation: The Real Disconnect in What Is Being Said and What Is Being Implemented*, LEXISNEXIS LEGAL NEWSROOM (Jan. 22, 2016), www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2016/01/22/opt-outs-to-workers-compensation-the-real-disconnect-in-what-is-being-said-and-what-is-being-implemented.aspx.

[42] Interview with James Wooten, Professor, State Univ. of N.Y. (Jan. 2016).

[43] Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1974); *see* 29 U.S.C. § 1031.

[44] WPPDA § 4(b)(2), 72 Stat. at 998.

"workmen's compensation" plan was subject to exemption.[45] The Senate version of the bill never contained the "solely" limitation. The House version of the bill also did not contain it until May 5, 1958.[46] The House bill omitted the limitation until a very late iteration of the bill.[47] Thus, the limitation was inserted during an 11-day period, 48 years ago, for reasons that are as yet unclear. (The author of this article is currently researching the question with Professor Wooten.)

WPPDA preemption was much narrower than Section 514 of ERISA.[48] Whereas ERISA preempts any law relating to any employee benefit plan not excluded under the workmen's compensation exemption,[49] WPPDA read as follows:

> The provisions of this Act, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.[50]

The distinction between WPPDA and ERISA preemption is important. Under weak WPPDA preemption, an employer might have sought to avoid WPPDA simply by paying employee benefits from a plan that also paid workers' compensation benefits. In the context of weak preemption, it would have made perfect sense for the WPPDA conference committee to agree to the House of Representatives' language making clear that only plans created "solely" for the purpose of complying with workmen's compensation laws were excluded from coverage by the new federal statute. The addition dealt in advance with the argument that the new federal scheme could not be "held" to conflict with state worker's compensation law. If a plan had been enacted "solely" to comply with a workmen's compensation law, fine—it was beyond the reach of the federal statute. Otherwise, it could be regulated. The limitation would have discouraged evasive enactment of hybrid plans to escape federal regulation. However, weak preemption meant that workers' compensation plans could not be negatively impacted by the "solely" limitation. Federal regulation of hybrid benefit plans would not oust a state from simultaneous regulation of the plan under its workers' compensation laws.

The legislative record is certainly devoid of evidence that "solely" was included under the WPPDA to facilitate conversion of traditional state workers' compensation plans to hybrid plans subject to federal regulation. The zeitgeist of early benefit regulation generally was to go slow and effect limited impacts on traditional state spheres of regulation. Indeed, the statute preserved some state latitude even within the contemplated federal objects of employee pensions and welfare benefits, reporting and disclosure.[51] Furthermore, given the speed with which the

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[45] H.R. 487, 85th Cong., 1st Sess. (1957); H.R. 4653, 85th Cong., 1st Sess. (1957); H.R. 6513, 85th Cong., 1st Sess. (1957); H.R. 6650, 85th Cong., 1st Sess. (1957); H.R. 7607, 85th Cong., 1st Sess. (1957); H.R. 8004, 85th Cong., 1st Sess. (1957).
[46] H.R. 12338, 85th Cong., 2d Sess. (May 5, 1958).
[47] H.R. 12176, 85th Cong., 2d Sess. (Apr. 24, 1958).
[48] 29 U.S.C. § 1144.
[49] *Id.* § 1003(b).
[50] WPPDA § 10(b), 72 Stat. at 1003.
[51] *See* James A. Wooten, *A Legislative and Political History of ERISA Preemption*, 15 J. PENSION BENEFITS 15, 16–17 (2008).

sweeping ERISA preemption provision was ultimately enacted in the summer of 1974,[52] it is difficult to imagine that the ERISA statute's architects foresaw, or had any intentions with respect to, the interplay of ERISA preemption and a single word within a WPPDA exclusion they do not appear to have explicitly considered.

Direct Reference to ERISA Plans

A final irony is that state opt out laws like Oklahoma's and the prior proposed law in Tennessee may themselves be preempted to the extent they "relate to" ERISA plans. Indeed, state laws referencing ERISA plans may be preempted *simply on the basis of that reference*.[53] States cannot have it both ways. Either state opt out laws are workers' compensation laws, in which case they are excluded from ERISA coverage; or, if they say anything at all about how the alternative plans are to operate, they are directly referencing federal ERISA-regulated employee benefit plans, in which case the opt out laws themselves are preempted.

Of course, it seems generally odd for a state legislature to attempt to determine in advance that any particular plan is, in fact, an ERISA plan. Even intuitively such a designation suggests the need for a federal role, and in fact the Supreme Court has said it is for the secretary of labor to define ERISA's "accounting, technical, and trade terms."[54] Ultimately, the secretary of labor would be considering the underlying purposes of ERISA in resolving ambiguous categorizations of benefit plans. "In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."[55] In light of this history, it would be surprising if the secretary were to interpret ERISA's ambiguous, technical "workmen's compensation" statutory language in a manner inconsistent with these employee-protective goals. Furthermore, the hybrid workers' compensation plans at issue bear little or no resemblance to the underfunded, discretionary multiemployer welfare plans that were at the heart of the commencement of federal employee benefit legislation.[56]

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[52] *See* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 264–70 (2004).

[53] District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130 (1992) (striking down District of Columbia law that "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted").

[54] Massachusetts v. Morash, 490 U.S. 107, 116 (1989) (citing ERISA § 505, 29 U.S.C. § 1135).

[55] *Id.* at 115 (citing Cal. Hosp. Ass'n v. Henning, 770 F.2d 856, 859 (9th Cir. 1985), *modified*, 783 F.2d 946 (9th Cir.), *cert. denied*, 477 U.S. 904 (1986); *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045 et al. before the Subcomm. on Labor of the H. Comm. on Education and Labor*, 91st Cong. 470–72 (1970) (testimony of Secretary of Labor concerning mismanagement of 22 pension and welfare funds); 120 CONG. REC. 4279–80 (1974) (remarks of Rep. Brademas); *id.* at 4277–78 (remarks of Rep. Perkins); 119 CONG. REC. 30,003 (1973) (remarks of Sen. Williams)).

[56] WOOTEN, *supra* note 52, at 91.

Conclusion

It is a venerable canon of statutory construction that the plain language of a statute should not be applied if it would lead to absurd results.[57] Prior federal employee benefits statutes drew a clear line between discretionary employee benefits and mandatory workers' compensation benefits that originate from a historical trade-off between employers and employees—a quid pro quo of statutory for common-law tort rights. The types of benefits that were in jeopardy in the late 1950s through the mid-1970s, when ERISA was enacted, were multiemployer health and welfare plans that had grown enormously in the late 1940s and early 1950s and which became "a fertile environment for mismanagement and corruption."[58]

It is very hard to accept that the drafters of ERISA, or of WPPDA, would have imagined that benefit plans predominately created or maintained for the purpose of delivering workers' compensation benefits would have in later epochs been found to have fallen within their federal benefits statutes meant to address fraud and abuse. In fact, the only way the conclusion can be reached is by completely ignoring the underlying purposes of the statutes and tortuously relying on the word "solely," a term thrown into incredible service by the gargantuan pull of ERISA preemption. "Solely" was a carryover term from a prior statute that had been given no previous judicial gloss so as to activate the canon of substantial reenactment.[59]

To allow hybrid "alternative benefit plans" to escape state workers' compensation systems simply because they were not created or maintained (one suspects tactically) "solely" for the purpose of complying with a state workers' compensation law, where the purpose for the insertion of the term under a *prior* statute is unknown is, in context, absurd. At minimum, such an interpretation will create a great deal of uncertainty in the short term about the structuring of employee benefits systems. In theory, the absurd interpretation could even result in a national benefits "race to the bottom," as unregulated alternative benefit plans pay fewer and fewer benefits and thus become ever more attractive to the cost-cutting activities of states mired in a battered economy.

Given the ambiguity of the term "solely," the administrator of pension and welfare benefit programs of the Department of Labor could avoid entirely the risk of results of the kind mentioned in the preceding paragraph by simply issuing an opinion letter clarifying the meaning of "workmen's compensation" laws.[60] A reasonable filling of a gap in this hazy and complex regulatory area would almost certainly be upheld by the federal courts.[61]

Of course, it is easy to cry out that the sky is falling. However, it should not be forgotten just how pervasive, yet ubiquitous, workers' compensation systems have become. Workers'

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[57] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (rejecting literal interpretation of Federal Rule of Evidence 609(a)(1) because it would produce absurd result); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (refusing to adhere to plain meaning of an immigration statute because it would have impacted adversely on clergy members).

[58] WOOTEN, *supra* note 52, at 45.

[59] *See* Saxbe v. Bustos, 419 U.S. 65, 74 (1974) (reasoning that where words in an amended section of a statute have been previously construed under a preamendment statute containing the same words, the words are ordinarily to be construed in the new statute in the same way as in the prior construction).

[60] ERISA Procedure 76-1, § 3, 41 Fed. Reg. 36,281 (Aug. 27, 1976).

[61] *See* Barnhart v. Walton, 535 U.S. 212 (2002).

compensation costs are rapidly approaching $100 billion per year. The original implementation of workers' compensation statutes occurred very quickly from roughly 1910 to 1920, when over 40 states established workers' compensation laws. When a great deal of money is at stake, events can unfold very, very quickly. And therein lies the danger.