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Multiple Employer Trusts, Preemption, and ERISA: A Case for Federal Regulation and a Proposal for Statutory Reform

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Note

Multiple Employer Trusts, Preemption, and ERISA: A Case for Federal Regulation and a Proposal for Statutory Reform

I. INTRODUCTION

The growth of multiple employer trusts (METs) has been an area of concern since the 1974 enactment of the Employee Retirement Income Security Act (ERISA).[1] A MET, which markets group health and life insurance to small employers,[2] differs from the typical employer-operated ERISA plan in that a MET is a profit-making enterprise that usually controls and administers the plan.[3] By providing group welfare benefits and assuming responsibility for ERISA compliance, the MET offers the advantages of group health and life insurance to businesses that could not otherwise afford such coverage for their employ-

1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1381 (1976 & Supp. III 1979)) [hereinafter ERISA]. *See also* Regulations Relating to Labor, 29 C.F.R. §§ 2509-2560, 2601-2615 (1979).

2. METs are entrepreneurial entities that offer group packages of welfare benefits to small businesses for the benefit of the businesses' employers. *See* Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23, 44-51 (1978); Turza & Halloway, *Preemption of State Laws Under ERISA—Part II*, 5 J. PENSION PLAN. & COMPLIANCE 441, 447-49 (1979). *See generally* Brummond, *The Legal Status of Uninsured Noncollectively-Bargained Multiple-Employer Welfare Trusts Under ERISA and State Insurance Laws*, 28 SYRACUSE L. REV. 701 (1977).

3. Although some commentators refer to METs in a broader sense, *see* Brummond, *supra* note 2, at 701-02, normally a MET is defined as a noncollectively bargained welfare trust. *See id.* at 701. These noncollectively bargained METs may be either self-insured or insured by other companies. *See* Brummond, *supra* note 2, at 701; David, *Employee benefit trusts' growth alarms officials; more failures feared*, Bus. Ins., Feb. 21, 1977, at 1. *Cf.* Comment, *ERISA Preemption and Indirect Regulation of Employee Welfare Plans Through State Insurance Laws*, 78 COLUM. L. REV. 1536 (1978).

METs are to be distinguished from ERISA multiemployer plans, defined in 29 U.S.C. § 1002(37) (1976), which involve only pension benefits. *See* 1 PENS. PLAN GUIDE (CCH) ¶ 2472 (Oct. 19, 1978). The Multiemployer Pension Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208, recently tightened regulation of these multiemployer plans. *See* 5 PENS. PLAN GUIDE (CCH) ¶ 22,862 (Oct. 3, 1980).

ees.[4] Although ERISA is responsible for the growth of multiple employer trusts,[5] it is unclear whether METs are subject to regulation by the federal government through ERISA or by the states through their varying insurance laws.[6]

Perceiving regulation under ERISA to be less stringent than state regulation,[7] proponents of METs have sought to avoid state control by structuring themselves to fall under the federal act and its broad preemption section.[8] Some states have chosen not to regulate METs,[9] while others have been

4. Without METs, small employers have great difficulty in finding an independent insurer. *See* David, *Congressional report backs state trust regulation*, Bus. Ins., May 2, 1977, at 14 ("'[g]enerally speaking, insurance companies have turned their backs on the small employers'") (quoting David Manley, Administrator of the Ohio Employers Trust, which at that time covered 31,000 employers and dependents). An IRS official reports that small employer plans account for "'98 percent of all the terminations that have been reported to us since ERISA.'" Lurie, Lanoff & Stuchinor, *Current Developments and a Preview of Things to Come*, 35 N.Y.U. INST. FED. TAX. 169, 174 (1977) (remarks of Alvin D. Lurie, the then Assistant Commissioner of the Internal Revenue Service for Employee Plans and Exempt Organizations). Thus, it appears that small employer plans to provide group benefits to employees often suffer financial setbacks. Insurance companies claim that small employers are underrepresented in insured plans because it is financially risky to insure them. David, *supra*, at 14.

5. METs are primarily important to small employers who cannot secure the favorable economies of scale, enjoyed by large employers, when developing ERISA plans. *See, e.g.*, David, *supra* note 4, at 14 (METs are "serving small employers who have been abandoned by insurance companies"); David, *State takes over insurer after severe trust losses*, Bus. Ins., July 11, 1977, at 1 (trust's primary target is groups of three to one hundred persons) [hereinafter cited as *Trust Losses*].

The use of METs in the small business sector appears to be increasing, but precise figures are unavailable. A series of articles in *Business Insurance* in 1977 reported substantial growth of METs. At least one underwriter, Old Republic Life Insurance Company of Illinois, expanded its multiemployer trust business 1500 percent after ERISA—from four million dollars in 1974 to over 60 million dollars in 1975. David, *supra* note 3, at 1, 32. One consultant in the MET field, George T. deHeuck, has estimated the market for insured and self-insured trusts at $2 billion a year. David, *supra* note 4, at 14. The number of individuals covered is estimated to range from 1.7 to 3 million employees. David, *Move against trusts, states urged*, Bus. Ins., June 27, 1977, at 2.

6. *See* text accompanying notes 30-55 *infra*.

7. *See, e.g.*, David, *Labor Limits trusts' use of commissions*, Bus. Ins., Nov. 14, 1977, at 1, 58 (METs "apparently believe that regulation will be lighter under ERISA than under state insurance law").

8. *See* notes 16, 32-36 *infra* and accompanying text.

9. Effective regulation of METs apparently has occurred in only a few states. *See* David, *California challenges four self-funded trusts*, Bus. Ins., Sept. 19, 1977, at 6. (regulatory efforts observed in California, Florida and Georgia). *See generally* Geisel, *More labor dept. edicts threaten self-funded METs*, Bus. Ins., Aug. 6, 1979, at 1 (aggressive enforcement efforts continue in California). For a discussion of the effectiveness of these state enforcement efforts, see notes 145-54 *infra* and accompanying text.

prevented from regulating them by federal courts.[10] When successful in avoiding state jurisdiction, METs have operated in a regulatory vacuum.[11] Several METs have gone bankrupt, leading to the loss of millions of dollars in employee benefits, the termination of small ERISA plans, and the creation of conflicting precedent.[12] Following legislative oversight hearings on ERISA,[13] the United States Department of Labor[14] recently attempted to give the states regulatory control of METs by declaring that most METs are not subject to federal supervision under ERISA.[15] In response to the Labor Department's decree, METs have restructured themselves and are seeking another round of court interpretation, claiming once again their status as ERISA-covered employee benefit plans.[16] Thus, the adapta-

10. *Compare* Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977) (Hawaiian Prepaid Health Care Act preempted by ERISA) *and* Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977) (California's Knox-Keene prepaid health insurance law preempted by ERISA), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 381 (1978) *with* Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977) (New Hampshire's mandatory coverage for mental disorders not preempted by ERISA), *cert. denied*, 435 U.S. 980 (1978) *and* Insurer's Action Council, Inc. v. Heaton, 423 F. Supp. 921 (D. Minn. 1976) (Minnesota Comprehensive Health Insurance Act not preempted by ERISA). Also, *compare* Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977) (MET not an employee benefit plan under ERISA and thus subject to state law) *and* Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977) (MET not an employee benefit plan under ERISA) *and* Hamberlin v. VIP Ins. Trust, 434 F. Supp. 1196 (D. Ariz. 1977) (MET not an employee benefit plan) *with* I.B.T. v. Security Health Plan, Bus. Ins., Feb. 19, 1979, at 2 (D. Cal. Jan. 1979) (consent judgment without written opinion) (MET an employee benefit plan).

11. The phrase "regulatory vacuum" has frequently been used to describe the status of METs and welfare plans under ERISA. *See, e.g.*, David, *Labor assists 2 states in action against trust*, Bus. Ins., June 13, 1977, at 40; Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 IOWA L. REV. 57, 118 (1976).

12. *See* notes 39-40 *infra* and accompanying text.

13. HOUSE COMM. ON EDUCATION AND LABOR, ACTIVITY REPORT, H.R. REP. No. 1785, 94th Cong., 2d Sess. 48 (1977) [hereinafter cited as ACTIVITY REPORT].

14. The Department of Labor and the Department of Treasury have coordinating regulatory roles under ERISA. *See* 29 U.S.C. § 1204 (1976). The Department of Labor, however, assumes responsibility for the major substantive provisions of ERISA, *see id.* at §§ 1021-1028, while the Treasury Department is responsible for the tax-related provisions of ERISA, *see* I.R.C. §§ 6057-6059, as well for the coordination of joint efforts with the Department of Labor. *See* 29 U.S.C. § 1002(14) (1976).

15. *See* Department of Labor News Release No. 553, 5 PENS. PLAN GUIDE (CCH) ¶ 22,194 (Aug. 10, 1979) [hereinafter cited as News Release].

16. *See, e.g.*, Brummond, *supra* note 2, at 701 ("a number of states have experienced problems with [MET] organizations which claim to be exempt from state insurance laws because of the preemption provision of that Act [ERISA]"); David, *supra* note 11, at 40 ("trusts usually provide medical and health benefits, file with the federal government as employee benefit plans under ERISA and argue they are exempt from state regulation"); Geisel, *Benefit trust*

bility of METs may continue to cause serious problems.

This Note will discuss the MET-ERISA problem and will explore possible judicial and administrative responses. It will then analyze ERISA's objectives and will apply them to the MET problem, demonstrating that federal regulation is both appropriate and necessary. Finally, three statutory reforms, to control METs and to impose order on a confused area of ERISA law, will be proposed. The proposed reforms include broadening ERISA's fiduciary and preemption sections, establishing minimum welfare benefits criteria applicable to METs, and changing the Act's reporting and disclosure requirements to ensure compliance with the first two reforms.[17]

II. ERISA AND METs: THE PROBLEM

ERISA is an ambitious statute intended to strengthen the pension[18] and welfare[19] rights of employees in the private sec-

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sues to regain its status as valid ERISA plan, Bus. Ins., Aug. 22, 1979, at 3. *See also* notes 32-36, 41-55 *infra* and accompanying text.

17. The position of this Note, that METs should be regulated through the auspices of ERISA, is contrary to the views of David J. Brummond, counsel to the National Association of Insurance Commissioners. *See generally* Amicus Curiae Brief, Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977); Brummond, *supra* note 10; Brummond, *supra* note 2. For a direct response to Brummond's analysis, see note 147 *infra.*

18. A "pension plan" is defined in ERISA as a plan that

> (A) provides retirement income to employees, or (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2) (1976).

19. Welfare plans are defined in ERISA as those programs

> established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (1976). Section 186(c), part of the Labor Management Relations Act, details similar welfare fringe benefits for union employees, including compensation for occupationally related illness or injury. 29 U.S.C. 186(c) (1976 & Supp. III 1979). In 1970 there were approximately 150,000 welfare plans covering hospitalization and about 138,000 plans covering surgery. Turza & Halloway, *Preemption of State Laws Under ERISA—Part I*, 5 J. PENSION PLAN. & COMPLIANCE 361, 363 n.6 (1979) (*citing* N. LEVIN, ERISA AND LABOR—MANAGEMENT BENEFIT FUNDS 18-19 (2d ed. 1975)).

tor.[20] In part the Act, was a response to the problems of corruption and insolvency that plagued certain pension and welfare funds.[21] ERISA's purpose was essentially twofold: to protect employees against the abuses related to employee benefit plans and to improve the equitable nature and financial soundness of these plans.[22] Pension and welfare plans must comply with the reporting and disclosure requirements of the Act[23] and must meet the fiduciary standard of section 1104.[24] In addition, both welfare and pension plans are subject to the civil enforcement[25] and preemption[26] provisions. In contrast to the detailed treatment given pension plans, however, welfare plans are treated perfunctorily by parts of the Act,[27] and are rarely

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20. *See* 29 U.S.C. § 1001(b)-(c) (1976 & Supp. III 1979).

21. One of the largest examples of mass pension fund termination occurred when the Studebaker plant closed in 1964 and more than 4,000 participants between ages 40 and 60 lost $14 million (85 percent of the current value) of their vested benefits. *See* Chadwick & Foster, *Federal Regulation of Retirement Plans: The Quest for Parity*, 28 VAND. L. REV. 641, 668-69, n.196 (1975); Turza & Halloway, *supra* note 19, at 364 n.17.

22. *See* 29 U.S.C. § 1001 (1976 & Supp. III 1979); HOUSE COMM. ON EDUCATION AND LABOR, EMPLOYEE BENEFIT SECURITY ACT OF 1973, H.R. REP. NO. 533, 93d Cong., 1st Sess. 8-9, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639, 4647 [hereinafter cited as H.R. REP. NO. 533]. *See also* Brummond, *supra* note 11, at 61-62; Turza & Halloway, *supra* note 19, at 363.

23. 29 U.S.C. §§ 1021-31, 1101-14 (1976 & Supp. III 1979).

24. *Id.* at § 1104(a)(1). ERISA's fiduciary section provides that

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
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> (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
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> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
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> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

Id. *See* notes 126-53 *infra* and accompanying text.

25. 29 U.S.C. § 1132 (1976). ERISA's broad civil enforcement capability complements its broad definitions of fiduciary and fiduciary responsibilities. By contrast, prior law had only one major enforcement weapon, and that weapon was often counterproductive to protection of employee benefits. *See* Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1, 2 (1977).

26. ERISA's preemption section declares the federal regulatory scheme exclusive and prohibits states from concurrent or conflicting enforcement efforts. *See* notes 62-110 *infra* and accompanying text.

27. *See, e.g.*, Brummond, *supra* note 11, at 116 (inclusion of welfare plans in preemption section given "almost no attention" by Congress). *See also* Little & Thrailkill, *supra* note 25, at 12 (fiduciary prudent man standard of 29

mentioned in the lengthy compilation of ERISA's legislative history.[28] Consequently, pension plan regulation under ERISA has developed much differently, and with more statutory guidance, than welfare plan regulations.[29]

Prior to ERISA, METs would have clearly been subject to state laws through the McCarran-Ferguson Act, which delegated primary responsibility for regulation of insurance to the states.[30] Under the McCarran-Ferguson Act, some states have mandated minimum benefit packages for METs, but these packages vary significantly from state to state.[31] To meet the

U.S.C. § 1104 (1976), and its applicability to welfare plans unexplained in 1974 congressional reports).

28. The legislative history of ERISA was recorded in SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, (Comm. Print 1976) [hereinafter cited as LEGISLATIVE HISTORY]. For a history of the events leading to the adoption of ERISA, *see* Chadwick & Foster, *supra* note 21, at 669.

29. Importantly, pension plans have minimum vesting standards under ERISA, *see* 29 U.S.C. § 1053 (1976), whereas welfare plans have no analogous minimum benefit requirements, *see* 29 U.S.C. § 1051(1) (1976). The difference is dramatic: while employers must carefully provide minimum pension benefits under ERISA, welfare benefits may be completely illusory. At least one court, however, has interpreted ERISA's broad remedial scope to imply minimum welfare benefit standards. *See* Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316 (N.D. Ind. 1977), *aff'd on other grounds*, 567 F.2d 692 (7th Cir. 1977).

A further difference between ERISA's treatment of pension and welfare plans is that a modified "entire portfolio" standard has been postulated for pension plan fiduciaries, but no such doctrine exists on the welfare side. 29 C.F.R. § 2550.404a-1 (1979); 5 PENS. PLAN GUIDE (CCH), ¶ 22,111 (June 26, 1979). *See* Bank of New York v. Spitzkev, 35 N.Y.2d 512, 323 N.E.2d 700, 364 N.Y.S.2d 164 (1974). *See generally* Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721, 766-67 (1976); Gerard & Schreiber, *Securities Investments Under ERISA*, 35 N.Y.U. INST. FED. TAX. 65, 104 (1977); Note, *Fiduciary Standards and the Prudent Man Rule Under the Employment Retirement Income Security Act of 1974*, 88 HARV. L. REV. 960, 968 (1975).

30. McCarran-Ferguson Act of 1945, Pub. L. No. 79-15, § 1, 59 Stat. 33 (codified at 15 U.S.C. § 1012 (1976)). Section One of the Act provides in part:

> [t]hat the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

See also Brummond, *supra* note 11, at 80.

31. For example, Connecticut and New Hampshire require each issuer of a group health insurance policy to provide coverage for the treatment of mental illnesses and emotional disorders. CONN. GEN. STAT. ANN. § 38-174(d) (West 1980); N.H. REV. STAT. ANN. § 415:18-a(I) (Supp. 1979). The neighboring New England states do not require such coverage. As a result, one union fund, with members in New Hampshire, Vermont, and Maine, was forced to drop fringe benefit dental and vision coverage for all of its members to provide the

varying minimum benefit requirements of several states, METs must provide broad coverage to all covered employees, thereby increasing the costs of both health coverage and administration.[32] Because varying state requirements are a clear financial burden to any multistate entity providing benefits to employee groups in different states, there is a strong incentive for METs to avoid such regulation by registering[33] as employee benefit plans under ERISA.[34] Such "ERISA trusts" are not subject to federal mandatory benefits schedules because, unlike pension plan vesting requirements,[35] ERISA does not specify minimum benefit requirements for welfare plans.[36] METs are therefore free to design the most profitable benefit packages—a freedom that has led to inadequate insurance coverage[37] and an exacerbation of the adverse selection phenomenon of private insurance.[38] Several self-insured, multiple employer trusts have

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mandatory mental health coverage for its New Hampshire subscribers. *See* David, *State regulation of benefits under attack*, Bus. Ins., Aug. 8, 1977, at 2.

Some states require disability pay for pregnant women. *See, e.g.*, N.Y. WORK. COMP. LAW § 201(9)(B) (McKinney Supp. 1980); R.I. GEN. LAWS § 28-41-8 (Supp. 1980). A comprehensive schedule for minimum benefits is provided in a few states. *See, e.g.*, CAL. HEALTH & SAFETY CODE, §§ 1340-1399.64 (West 1979 & Supp. 1980); HAWAII REV. STAT. § 393 (1979). This variation in state benefit requirements should be distinguished from the total lack of MET regulation found in some states. *See* notes 9 & 11 *supra* and accompanying text.

32. The multistate burden for an employer can be substantial. The Civil Service Commission estimated that compliance with each state's minimum regulations cost the federal government an additional 125 million dollars. David, *supra* note 31, at 1. The Council on Employee Benefits, representing 160 companies with six million covered employees, claimed that varying regulations cost its members over 200 million dollars a year. *Id.* at 2.

33. To register under ERISA, a MET must file a plan description, 29 U.S.C. § 1024(a)(1)(B) (1976), and a copy of the summary plan description, which is sent to participants and beneficiaries, with the Secretary of Labor. *Id.* at § 1024(a)(1)(C). For the statutorily required contents of both the plan description and the summary plan description, see *id.* at § 1022.

34. *See* note 16 *supra* and accompanying text.

35. *See* 29 U.S.C. § 1053 (1976); note 29 *supra*.

36. *See* note 29 *supra*. *See also* Electrical Workers v. I.B.E.W., 583 S.W.2d 154, 159 (en banc) (Mo. 1979) (holding Missouri law not preempted since ERISA contains no substantive welfare plan requirements); Brummond, *supra* note 2, at 703 ("[b]ecause ERISA was drafted primarily with a view toward preventing pension plan abuses, its regulation of welfare benefit plans leaves much to be desired").

37. *See* Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977) (no conversion privileges in MET plan); note 40 *infra*.

38. Adverse selection is the term used to describe the overinclusion of poor risk insureds in group insurance plans—a phenomenon that private insurance companies attempt to avoid. *See* H. DENENBERG, RISK INSURANCE 156-65 (2d ed. 1974); R. KEETON, BASIC TEXT ON INSURANCE LAW 8 (1971); E. PATTERSON, ESSENTIALS OF INSURANCE LAW 229 (2d ed. 1957). In order to avoid an "undue degree of adverse selection," R. KEETON, *supra* at 63, unregulated group insurers will seek protection through any of several devices. The insurer may

now gone bankrupt, jeopardizing millions of dollars in employee welfare benefits.[39] Employees faced with catastrophic illness or injury have been left without coverage.[40]

To avoid such problems, several states have argued that METs are not ERISA plans and are subject to regulation under state laws.[41] Some METs have responded by changing their structures to avoid state control.[42] For example, although most METs were once underwritten by insured carriers, events persuaded many METs to begin absorbing their risks internally.[43] In 1976, the Illinois Department of Insurance ordered the Old Republic Life Insurance Company of Chicago to shut down its trust business within sixty days[44] because it was "near bankruptcy."[45] The action left many multiple employer trusts without an underwriter.[46] Thus, the METs either had to find a new underwriter or file as ERISA self-insured trusts with the federal government.[47] Self-insurance became the more attractive

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require that "a high percentage of the persons within a group (e.g., all the employees of one employer) be participating in the insurance plan," thereby ensuring a financially sound average level of risk. *Id.* The insurers may also refuse to insure certain high risk groups or groups not susceptible to predictable loss measurement. H. DENENBERG, *supra* at 159. Each of these techniques excludes poor risk individuals before injury or disability occurs. But an unregulated insurer may find it more profitable to exclude such individuals after injury occurs (e.g., through inadequate benefit schedules or low coverage ceilings), and thereby collect a maximum premium with minimal risk of financial loss. In the present regulatory vacuum, some METs have created and exploited similar illusory benefit schemes. *See* note 11 *supra* and accompanying text.

39. A California MET, National Multiple Employers Foundation (NMEF), filed for bankruptcy on February 2, 1977. David, *supra* note 3, at 1. Another California group, Hospital Welfare Association Trust (HWA), collapsed in April 1977. David, *Self-funded trust collapses; deficit could be $4 million*, Bus. Ins., Apr. 4, 1977, at 1. A Massachusetts firm, Loyal Protective Life Insurance Co. of Boston, was taken over by its state insurance department after suffering considerable losses. *Trust Losses*, *supra* note 5, at 1. In early 1979, a Michigan MET, Associated Health Plans Inc., was placed in receivership of that state's insurance department. McKee, *First self-funded MET wins federal status*, Bus. Ins., Feb. 19, 1979, at 89.

40. The facts of Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977), in which a welfare policy underwriter went bankrupt, are illustrative even though the plaintiff eventually recovered benefits.

41. These states include California, Florida, and Georgia. *See* note 9 *supra*.

42. *See* note 16 *supra*. *See also* David, *Trusts retrench in wake of court decisions*, Bus. Ins., Oct. 17, 1977, at 1, 48.

43. *See* Comment, *supra* note 3, at 1544-45; Brummond, *supra* note 11, at 79.

44. *Trust Losses*, *supra* note 5, at 32.

45. *Id.* Illinois authorities hoped to prevent large in-state losses by restricting losses from the firm's primarily out-of-state trust business. *Id.* at 31.

46. *Id.* at 31.

47. *See id.* at 1, 31; David, *supra* note 11, at 1, 49. Many METs sought Na-

choice after a second important development: a decision by the United States Court of Appeals for the First Circuit in *Wadsworth v. Whaland*,[48] which subjected insured trusts to varying state control but left self-insured trusts under uniform, lenient federal control.[49] The court stated that ERISA only preempted states from directly regulating self-insured plans, but not from indirectly regulating insured plans by regulating their insurers.[50] The *Wadsworth* court then found that a New Hampshire insurance statute was not preempted by ERISA[51] because the state law only indirectly affected the federal regulatory scheme.[52] Consequently, many METs opted for self-funded status to avoid state regulation altogether.[53]

The marketing structure of MET plans also became a significant factor in several preemption decisions. Because METs originally sold employee benefit plans both to employers and directly to employees, several courts held they were not "employee benefit plans" within the meaning of ERISA.[54] METs subsequently abandoned direct marketing to employees and limited sales efforts to employers.[55]

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tional Multiple Employers Foundation as a new underwriter, but it went bankrupt also. *See* note 39 *supra*.

48. 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978). For a more detailed discussion of the factual background of this case, *see* notes 84-92 *infra* and accompanying text.

49. 562 F.2d at 77-78.

50. *Id.*

51. *See* notes 62-65 *infra* and accompanying text.

52. 562 F.2d at 76-79. For a criticism of the First Circuit's approach, *see* Comment, *supra* note 3, at 1538-49. *See also* Hutchinson & Ifshin, *supra* note 2, at 67, 76; Turza & Halloway, *supra* note 19, at 450-52.

53. The *Wadsworth* court noted that the plans before it were insured plans—not self-insured plans. The court stated that if the New Hampshire statute had tried to regulate the employee welfare plans as insurers, such direct regulation would clearly be preempted by ERISA. 562 F.2d at 76 (citing 29 U.S.C. § 1144(b)(2)(B) (1976) ("[a]n employee benefit plan . . . shall [not] be deemed to be an insurance company . . . for purposes of any law of any State purporting to regulate insurance companies")).

54. *See, e.g.*, Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382, 390-91 (D. Kan. 1977) (entrepreneurial agency that sold employee benefit plans to employers or self-employed workers not an "employee benefit plan" within the meaning of ERISA § 1002 and consequently was subject to state law); Hamberlin v. VIP Ins. Trust, 434 F. Supp. 1196, 1198-99 (D. Ariz. 1977) (employee benefit trust marketing benefits both through employers and directly to employees was entrepreneurial, solely in the interest of the insurance brokers, and not within the ambit of ERISA). *See also* David, *supra* note 11, at 40-41 (majority of Labor Department task force members studying self-funded trusts favor ruling that such trusts "are not employee benefit plans under ERISA").

55. *See* David, *supra* note 11, at 40-41; David, *supra* note 42, at 1, 48.

III. JUDICIAL AND ADMINISTRATIVE RESPONSES

These attempts to avoid state regulation have prompted a series of judicial and administrative actions.

A. JUDICIAL RESPONSES

The judicial efforts to control METs have focused on ERISA's preemption section and have resulted in narrowing the broad preemption language of the act. Congress was originally concerned with state regulatory efforts that might conflict with ERISA, and therefore enacted very broad preemption standards.[56] Section 1144 provides that "this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[57] That section's "deemer" provision further broadens ERISA's preemptive effect: "Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State."[58] The scope of preemption was somewhat restricted, however, by the "saving" clause: "[n]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities."[59] Nonetheless, by preempting all state laws "relating" to any employee benefit plan, and by forbidding an employee benefit plan from being "deemed" an insurance or investment company for state regulatory purposes, Congress created a broadly preemptive federal statutory scheme. The breadth of these provisions was aimed at preventing "endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws."[60] Nevertheless, a series of cases construing the preemp-

56. *See generally* Turza & Halloway, *supra* note 19, at 365.

57. 29 U.S.C. § 1144(a) (1976).

58. *Id.* at § 1144(b)(2)(B).

59. *Id.* at § 1144(b)(2)(A). The effect of this language is unclear, but some commentators think that the saving clause reflects the policy of the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1976), which left to the states the power to regulate the business of insurance. Comment, *Regulation of Employee Welfare Benefit Plans: The Scope of ERISA's Preemption and The State Power to Regulate Insurance*, 4 U. DAYTON L. REV., 177, 183 (1979).

60. LEGISLATIVE HISTORY, *supra* note 28, at 4770-71 (remarks of Senator Javits). Senator Javits went on to say that "on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displace-

tion provisions in the MET context has created precisely these problems.[61]

Various constitutional tests are used under the preemption doctrine[62] to determine whether a state law is preempted.[63] Regardless of the test employed, however, a court always looks for evidence of congressional intent in determining whether the federal law preempts the field;[64] other factors are considered only if the federal statute is silent on preemption.[65] Because ERISA expressly preempts state regulation affecting employee benefit plans,[66] the language of the Act itself presents a very strong case for broad preemption. Notwithstanding this express statutory provision, courts have shown a willingness to permit state regulation in several welfare plan cases, some of which involve METs.[67]

Courts commonly employ two approaches to permit state regulation of METs. The first approach erodes the scope of ERISA's preemption section by finding that the plan in question is not an ERISA employee benefit plan. Three cases are illustra-

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ment of State action in the field of private employee benefit programs." *Id.* at 4771. Congressman Dent noted "the crowning achievement of [ERISA in] the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans." 120 CONG. REC. 29197 (1974).

61. *See* notes 67-110 *infra* and accompanying text.

62. The doctrine derives from the supremacy clause of the Constitution. U.S. CONST. art. VI, cl. 2. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 127-34 (9th ed. 1975); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-24 to 6-28, at 376-94 (1978); Hutchinson & Ifshin, *supra* note 2, at 35.

63. The two most frequently employed tests are whether the state law conflicts or interferes with federal regulation and whether the federal law occupies the field. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Hirsh, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515; Turza & Halloway, *supra* note 19, at 372-75.

64. *See, e.g.*, City of Chicago v. Atchison T. & S.F. Ry., 357 U.S. 77, 87-89 (1958).

65. Turza & Halloway, *supra* note 19, at 373.

66. *See* 29 U.S.C. § 1144 (1976).

67. *See, e.g.*, Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692, 699 (7th Cir. 1977) (preemption does not apply because fund, a simple insurance plan, was not an ERISA plan); Old Stone Bank v. Michaelson, 439 F. Supp. 252, 256 (D.R.I. 1977) (ERISA does not preempt state banking commission's regulation of a bank's pension plan); Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977) (preemption does not apply if employee benefit plan can be characterized as simple insurance); Hamberlin v. VIP Ins. Trust, 434 F. Supp. 1196, 1200 (D. Ariz. 1977) (ERISA does not preempt state regulation of employee benefit plans); Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. 921, 926 (D. Minn. 1976) (ERISA does not preempt Minnesota Comprehensive Health Insurance Act). *But cf.* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 568 (1979) (ERISA's comprehensive regulation of pension plans preempts federal and state securities laws).

tive. In *Bell v. Employee Security Benefit Association*,[68] a Kansas federal district court held that a MET was not an "employee benefit plan" and thus was not covered by ERISA's preemption provision.[69] The defendant, Employee Security Benefit Association (ESBA), was a MET offering a "major medical" plan.[70] With the aid of insurance agents, ESBA marketed the plan directly to employees, including self-employed persons, rather than selling it to companies desiring to provide welfare plans for their workers. In determining that ERISA's definition of an employee benefit plan[71] was not satisfied, the *Bell* court found that ESBA was not an "employer"[72] within the meaning of the Act[73] and was not an "employee organization:"[74] ESBA did not satisfy the participation requirement of the definition[75] and there was no "commonality of interests among its employee members."[76] The effect of the court's holding was to undercut the broad preemptive character of ERISA.

In a second case, *Hamberlin v. V.I.P. Insurance Trust*,[77] an Arizona federal district court chose to focus on the entrepreneurial objectives of the MET defendant in finding ERISA inapplicable and the MET subject to state regulation. In

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68. 437 F. Supp. 382 (D. Kan. 1977).

69. *Id.* at 385-88. *See also* Hutchinson & Ifshin, *supra* note 2, at 48; Turza & Halloway, *supra* note 2, at 448-49.

70. 437 F. Supp. at 384.

71. Section 1002(3) provides: "The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3) (1976). Thus, to qualify as an employee benefit plan, ESBA would have to be an employee welfare benefit plan as defined in section 1002(1). *See* note 19 *supra*. In particular, to qualify as an employee welfare benefit plan ESBA would have to be "established or maintained by an employer or by an employee organization, or both." 29 U.S.C. § 1002(1) (1976).

72. Section 1002(5) provides: "The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5) (1976).

73. 437 F. Supp. 382, 393 (D. Kan. 1977).

74. "Employee organization" is defined as

> any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationship; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

29 U.S.C. § 1002(4) (1976).

75. 437 F. Supp. at 394.

76. *Id.*

77. 434 F. Supp. 1196 (D. Ariz. 1977).

Hamberlin, it was claimed that the MET had been established so as to circumvent state control. The court noted that the defendants had "caused the trust to be established under the belief that if the trust in form complied with [ERISA], it would be exempt from control and supervision by the State."[78] The court found, however, that the ERISA definition of "employer" was not satisfied because the trustees of the METs "were simply not acting as agents of or on behalf of the employers or employer groups;"[79] thus, the MET was not an ERISA employee benefit plan. Moreover, the court specifically refused to lend legitimacy to the formation of a MET for the sole purpose of circumventing state control.[80]

In a third MET case, *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*,[81] the Court of Appeals for the Seventh Circuit borrowed principles from both *Bell* and *Hamberlin* to hold that the MET was not an employee benefit plan for the purposes of ERISA. Even if it were such a plan, the court found that ERISA's preemption provisions did not apply to the case at bar because the employer was unaware that it was participating in a plan.[82] The court further reasoned that "Congress would have had no reason to exempt from state regulation insurance programs that are established and maintained by entrepreneurs for their own profit."[83]

A second preemption approach taken by courts is illustrated in *Wadsworth v. Whaland*[84] and *Insurers' Action Council, Inc. v. Heaton*.[85] In both cases, the courts viewed the substantive scope of preemption in narrow terms. In *Wadsworth*, the Court of Appeals for the First Circuit held that ERISA did not preempt regulation of group insurance policies purchased by ERISA employee benefit plans.[86] New Hampshire had enacted a statute requiring issuers of group health insurance policies to provide coverage for the treatment of

78. *Id.* at 1198.
79. *Id.*
80. *Id.* at 1199-1200.
81. 567 F.2d 692 (7th Cir. 1977).
82. *Id.* at 699. The circuit court modified a district court ruling in which the judge found that ERISA's preemption provisions applied and that federal common law regulated the activities of the MET. *See* Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316, 325 (N.D. Ind. 1977).
83. Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d at 699.
84. 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978). *See also* notes 44-46 *supra* and accompanying text.
85. 423 F. Supp. 921 (D. Minn. 1976).
86. 562 F.2d at 78.

mental illness and emotional disorders.[87] Administrators of several welfare funds that purchased group insurance brought a declaratory action seeking to enjoin enforcement of the statute based upon ERISA's preemption provision.[88] The administrators claimed that the New Hampshire law regulated the content of an employee welfare fund in conflict with ERISA.[89] The *Wadsworth* court found that the employee welfare plan was an insured entity, not a self-insurer, and thus not subject to the state's law.[90] The court noted that although the Federal Act's "deemer" clause may preclude a state from designating an employee benefit plan an insurance company for purposes of state insurance regulation, the "saving" clause allows a state to indirectly regulate an insured plan by regulating insurance purchased by the plan.[91] If a MET or welfare plan were operated as a self-funded trust, however, the *Wadsworth* court would hold the state law preempted.[92]

The court in *Insurers' Action Council, Inc. v. Heaton*,[93] seemed to exceed the ambit of the *Wadsworth* case by denying a preliminary injunction, but its recent companion case clearly endorsed the *Wadsworth* approach.[94] The court in *Insurers' Action Council* refused to grant a preliminary injunction on the ground that the plaintiffs had not demonstrated a substantial probability that the Minnesota Comprehensive Health Insurance Act[95] would be preempted by ERISA.[96] The Minnesota law requires employers to provide group insurance policies to

87. *Id.* at 72. For a discussion of this statute, see note 31 *supra*.

88. Wadsworth v. Whaland, 562 F.2d at 72-73.

89. *Id.* at 75-76.

90. *Id.* at 76. The court stated that only insurers were regulated by state law. *Id. See also* Comment, *supra* note 3, at 1544-45. For a criticism of the *Wadsworth* approach, see Comment, *supra* note 26, at 1536.

91. 562 F.2d at 78.

92. *Id.* at 76.

93. 423 F. Supp. 921 (D. Minn. 1976).

94. *See* St. Paul Electrical Workers Welfare Fund. v. Markman, 490 F. Supp. 931 (D. Minn. 1980). Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. 921 (D. Minn. 1976), was first heard before Judge Edward Devitt in December 1976. Plaintiffs moved for a preliminary injunction against implementation of the new Minnesota Comprehensive Health Insurance Act, MINN. STAT. §§ 62E.01-62E.55 (1976). Judge Devitt, in denying the preliminary injunction, discussed each of plaintiffs' five arguments: substantive due process, unconstitutional vagueness, equal protection, impairment of contract, and ERISA preemption. 423 F. Supp. at 923-27. By the time the case was heard on plaintiff's motion for a permanent injunction in April 1980, it had been combined with a companion case, *St. Paul Electrical Workers Welfare Fund v. Markman*. Judge Devitt again denied plaintiffs' motion for a permanent injunction in Insurers' Action Council, Inc. v. Markman, 490 F. Supp. 921 (D. Minn. 1980).

95. MINN. STAT. §§ 62E.01-62E.55 (1976 & Supp. 1979).

96. 423 F. Supp. at 926.

their employees that meet specified criteria. The court construed ERISA's preemption provision narrowly, stating that "the conflict between the challenged state insurance law and ERISA has to be very clear in order to trigger the preemption provision."[97] The court cited ERISA's "saving" clause, noted that the substantive provisions of ERISA did not specify the substance of the plans that employers are required to provide their employees, and maintained that ERISA was not intended to supersede the McCarran-Ferguson Act.[98]

Insurers' Action Council was later consolidated with *St. Paul Electrical Workers Welfare Fund v. Markman*.[99] The decision on the merits in *Insurers' Action Council*,[100] which upheld the constitutionality of the Minnesota Comprehensive Health Insurance Act, was silent on the ERISA preemption issue.[101] The *St. Paul Electrical Workers* decision, however, held that the statute, as it applied to plaintiffs, was preempted by ERISA.[102] The court reasoned that in attempting directly to regulate self-funded employee welfare benefit plans, the state act violated ERISA's "deemer" clause.[103] Following *Wadsworth*, the court suggested in dictum that indirect state regulation of insured plans through regulation of the issuers of insurance would be allowable.[104] The court, then, construed preemption very narrowly in the earlier *Insurers' Action Council* case[105] but later found a broader preemption standard consistent with the *Wadsworth* approach in *St. Paul Electrical Workers*. In both cases, however, the preemption line was at least as restrictively drawn as it was in *Wadsworth*, permitting indirect state regulation of insured welfare plans through regulation of the plans' insurers.[106]

97. *Id.* It is possible that Judge Devitt was voicing a special standard for preliminary injunctions against the enforcement of state insurance laws, but there is no indication of this in the text of his opinion. Devitt's approach was criticized in Hewlett-Packard Co. v. Barnes, 571 F.2d 502, 504-05 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

98. Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. at 926.

99. 490 F. Supp. 931 (D. Minn. 1980). *See* note 94 *supra*.

100. 490 F. Supp. 921 (D. Minn. 1980).

101. *See* note 94 *supra*.

102. 490 F. Supp. at 933-34.

103. *See* note 58 *supra* and accompanying text.

104. No. 3-78-269, slip op. at — (D. Minn. May 21, 1980).

105. The approach was followed in at least two state court actions concerning pregnancy benefit statutes. *See* Gast v. State, 36 Or. App. 441, 451-52, 585 P.2d 12, 23 (1978); Time Ins. Co. v. Department of Ind., Labor, and Human Relations, No. 154-423 (Wis. Cir. Ct., Jan. 3, 1978). *See generally* Hutchinson & Ifshin, *supra* note 2, at 56-58.

106. Each of the plaintiffs in *St. Paul Electrical Workers* were self-insurers.

Both the *Bell* and the *Wadsworth* approaches represent a retreat from the broad preemption principles of ERISA.[107] The cases conflict with other decisions that have continued to uphold the preemption mandate of the Act.[108] This confusing precedent is precisely what Congress sought to prevent.[109] Both *Bell* and *Wadsworth*, however, are attempts to address the regulatory void created by ERISA—a void pressuring courts to resolve problems left unanswered by the statute.[110] Lacking a practical alternative, courts are narrowing the preemption provision of ERISA to establish authority for state regulation.

B. ADMINISTRATIVE RESPONSES

Similar to the judicial responses to the problem, adminis-

No. 3-78-269, slip op. at 4 (D. Minn. May 21, 1980). The plaintiffs in the *Insurers' Action Council* suit were foreign insurance companies and an association of insurance carriers; no trust or employer plaintiffs were represented. 423 F. Supp. at 923. A possible reading of the two cases is that the self-insured ERISA trusts in *St. Paul Electrical Workers* were directly regulated by the Minnesota statute and hence preempted by ERISA, whereas the regulation of insurance companies in *Insurers' Action Council* only indirectly affected ERISA trusts and following *Wadsworth* the state law was not preempted. Such a reading, however, does not explain the earlier *Heaton* decision that seemed to focus not on the characterization of the plaintiffs, but on the conflict between the state insurance law and ERISA. Nor is it possible to determine from the three decisions what impact amendments to the Minnesota law had; several of the amendments increased the substantive and reporting obligations of self-insurers. *See* MINN. STAT. §§ 62E.10(1), 62E.02(21), 62E.035 (Supp. 1979).

107. *See* notes 56-66 *supra* and accompanying text.

108. *See, e.g.*, International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 568 (1979) (ERISA's comprehensive regulation of pension plans preempts federal and state securities laws); Standard Oil Co. v. Agsalud, 442 F. Supp. 695, 697 (N.D. Cal. 1977) (Hawaii Prepaid Health Care Act preempted by ERISA); Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1302 (N.D. Cal. 1977) (California Knox-Keene Health Care Service Plan Act preempted by ERISA); Azzaro v. Harnett, 414 F. Supp. 473, 475 (S.D.N.Y. 1976) (New York administrators preempted from exercising supervisory jurisdiction over pension plans), *aff'd without opinion*, 553 F.2d 43 (2d Cir. 1977)

109. *See* note 60 *supra* and accompanying text.

110. The Oregon Court of Appeals, when faced with this regulatory void in ERISA stated:

> [I]f we are to adopt the construction of 29 U.S.C. § 1144(a) advanced . . . we must import to Congress not only an intent to preempt state law, but also an intent to cease all governmental regulation, state or federal. . . . There is nothing in the legislative history suggesting such an intent. To the contrary, the legislative history indicates Congress was concerned with the inadequacy of governmental regulation.

Gast v. State, 36 Or. App. 441, 454, 585 P.2d 12, 21 (1978).

For a general discussion of the judicially created exceptions to ERISA preemption, see Hutchinson & Ifshin, *supra* note 2, at 23. "[C]ourts have begun to carve out exceptions. . . . There is a natural tendency to restrict the scope of preemption where it appears to produce an inequitable result in a particular case." *Id.* at 41.

trative responses have narrowed ERISA's scope. In August 1979 the Department of Labor issued a statement encapsulating the policies it had followed in earlier opinion letters on MET eligibility under ERISA.[111] The policies were quite restrictive, following a declaration by the House Committee on Education and Labor that ERISA was not intended to regulate METs.[112] The Committee, charged with oversight of ERISA, said in 1977 that

> these plans are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. They are not established or maintained by the appropriate parties to confer ERISA jurisdiction, nor is the purpose for their establishment or maintenance appropriate to meet the jurisdictional prerequisites of the Act.[113]

The Department of Labor's policies on MET eligibility under ERISA are in accordance with the Committee's views. The Department stated in August 1979 that

> a MET arrangement is not a plan under ERISA if unrelated employers have merely adopted identically worded agreements that are offered by an independent third party as a means to fund plan benefits. In this situation, each employer has its own plan and the organization which provides benefits under contract with the employer is not itself an employee benefit plan but is instead the provider of a funding arrangement for the various plans.[114]

The Department of Labor position thus removes METs from ERISA jurisdiction and makes the small employer in these transactions the responsible party under ERISA. The employer's individual contract with the MET becomes the ERISA plan upon which the employer—not the MET—is responsible for ERISA compliance. The MET, as the provider of the services, is not subject to federal law; it is subject only to state law.

Based on the Department of Labor's statement, it appears that a MET must satisfy two conditions to fall within ERISA's jurisdiction: employer control of the plan and commonality of interest among participants.[115] The tests were seemingly

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111. News Release, *supra* note 15. Several opinion letters issued by the Department of Labor have applied the guidelines. *See, e.g.*, Op. Letter 80-2A, Letter of Jan. 16, 1980, to Richard A. Block (regarding Michigan Ass'n of Timbermen) PENS. REP. (BNA) at R-29; Op. Letter 79-54, Letter of Aug. 9, 1979, to Richard B. Sanford (regarding Independent Businessmen's Association); Op. Letter 70-49, Letter of July 19, 1979, to Richard E. Carllson (regarding Mutual Assurance Trust).

112. ACTIVITY REPORT, *supra* note 13, at 48.

113. *Id.*

114. News Release, *supra* note 15.

115. *See id.* The two elements had appeared earlier in Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382, 389, 394 (D. Kan. 1977). *See* notes 68-76 *supra* and accompanying text. It became clear the Department was frequently

designed to exclude most METs from ERISA jurisdiction, although Labor Department determinations were to continue on a case by case basis.[116] At least one MET, Insurance Prepaid Benefits Trust (IBT), attempted to restructure itself within these new parameters. IBT created a board of employer trustees to control the trust and subdivided the organization into separate industry or trade subtrusts with alleged "commonality of interest among participants."[117]

Both the House Committee's declaration[118] and the Department of Labor's enunciated policies[119] fail to provide meaningful criteria for differentiating between those METs that should be subject to federal regulation under ERISA jurisdiction and those that should be subject to state regulation under state law. Two problems must be confronted. First, since the MET remains essentially unchanged when it is reorganized—the same members subscribe and the same benefit packages are offered—a mere change in MET form can trigger a major change in applicable law. Second, it is the large, easily manipulated METs that can circumvent the guidelines to take advantage of the federal law, yet it is these particular METs that states are most concerned about and that federal authorities are most anxious to turn over to aggressive state regulatory efforts. The crucial problem, therefore, is how to regulate these METs effectively without forcing them out of the market and thereby losing the services they provide for small employers.

IV. ERISA's OBJECTIVES

The House Committee's declaration that METs are not covered by ERISA can best be understood as a response to ERISA's current lack of substantive requirements for MET regulation, rather than as a conclusion that the underlying objectives of ERISA do not support federal regulation of METs.

using the requirements of employer control and commonality of interest in opinion letters issued on METs. *See* note 111 *supra*. The August 1979 policies again incorporated the two concepts of commonality and control, and it became clear the standards were a fundamental part of the Labor Department's position. *See* Geisel, *supra* note 9, at 2 (referring to the standards as the "two key tests" and attributing the statement to a Labor Department spokesperson). No elaboration on the meanings of either of these terms was proffered by the Department of Labor, and litigation ensued. *See* note 117 *infra* and accompanying text.

116. News Release, *supra* note 15.

117. David, *supra* note 42, at 48.

118. *See* note 13 *supra*.

119. *See* note 111 *supra*.

A careful analysis of the MET transaction reveals that ERISA was designed to cope with the types of problems generated by METs and that ERISA is the best vehicle for MET regulation. ERISA offers the potential for an expansive regulatory scheme that reaches beyond present state efforts. Moreover, any attempt to exempt METs from ERISA regulation subjects other ERISA welfare plans to conflicting regulations. An examination of the policies implicit in ERISA will help to illustrate how ERISA could effectively handle the MET problem and fill the regulatory void for welfare plans. ERISA has four major purposes: to combat the problem of illusory benefits, to place accountability for employee plans on the fiduciary, to avoid overlapping regulations, and to incorporate a broader "plan as process" notion into regulatory scope.

A. Illusory Benefits

One of the primary objectives of ERISA is to solve the problem of "illusory benefits."[120] The legislative hearings are replete with examples of employees who relied upon the benefits provided by their employers, only to find that those benefits were nonexistent.[121] Often the examples were of pension plans, the benefits of which were rendered illusory by an insolvent or unscrupulous employer.[122] Insolvent or unfair welfare plans were another subject of concern.[123] Removing the illusory aspect of employee benefits, therefore, appears to have been one of Congress' foremost priorities. An employee's misplaced reliance upon benefits that do not exist can lead to more serious problems than might have resulted if he or she knew there would be no benefits. In the latter situation, an employee knows that self-help will be necessary; in the former, even the

120. *See* Legislative History, *supra* note 28, at 1605 (remarks of Senator Williams).

121. *See* Brummond, *supra* note 11, at 59-61; Turza & Halloway, *supra* note 19, at 363-65.

122. *See, e.g.*, Legislative History, *supra* note 28, at 1635 (remarks of Senator Bentsen); *id.* at 1665 (remarks of Senator Taft).

123. Several long term employees were "abruptly terminated" by a plant in Dover, Ohio. The employees, ranging in tenure from 15 to 33 years, were all over 50 years of age and lost both accumulated pension and welfare benefits. *Id.* at 1666 (remarks of Senator Taft).

Another concern at the hearings was the rising cost of medical care for workers reaching retirement years. "While it is common to stress that upon retirement, a couple's income needs shrink, they do not shrink as much as some may believe. Medical costs go up and medicare meets only 40 percent of the medical expenditures of the elderly." *Id.* at 1770 (Remarks of Senator Hartke). *See also id.* at 1635 (Remarks of Senator Bentsen) (retired Minnesota worker unable to pay for wife's shock treatments and his own cancer treatments).

concerned employee is likely to be misled about the adequacy of his or her coverage.[124]

The problems encountered to date with METs are problems of "illusory benefits": sudden bankruptcies, surprise coverage exclusions, low coverage ceilings, and the like.[125] On its face, the illusory benefit problem would appear solvable by either an aggressive state or federal regulatory program. As will be discussed below, however, federal regulation is preferable.

B. FIDUCIARIES

A second objective addressed by Congress in enacting ERISA is also applicable to METs: the need to enlarge the scope and refine the responsibilities of plan fiduciaries. The ERISA definition of a fiduciary is purposely very broad:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[126]

The definition appears to be an attempt to return to broad common law notions of a fiduciary as "one who occupies a position of confidence or trust."[127] It includes any employer, administrator, officer, trustee, or custodian of a plan, any member of an investment or administrative committee of a plan, any officer or director of a plan sponsor if control is exercised over the plan,

124. This is why, for example, the disclosure requirements were considered essential in ERISA. *See* H.R. REP. No. 533, *supra* note 22, at 4639.

125. *See* notes 38-40 *supra* and accompanying text.

126. 29 U.S.C. § 1002(21)(A) (1976).

127. H.R. REP. NO. 533, *supra* note 22, at 4649-51. As a result of this philosophy, ERISA expressly prohibits fiduciary exculpatory clauses, 29 U.S.C. § 1110 (1976), and imposes a uniform prudent investment standard. *Id.* at § 1104. For the text of section 1104, see note 24 *supra*. In interpreting the prudent investor rule and other fiduciary standards, courts are instructed by Congress to "[bear] in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act." H.R. REP. No. 533, *supra* note 22, at 4650. Federal courts are vested with exclusive jurisdiction in all actions involving breach of fiduciary responsibility, *id.* at § 1112(e)(1) (1976), and "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." LEGISLATIVE HISTORY, *supra* note 28, at 4771 (remarks of Senator Javits). Hence, amid strong concern for the increasingly interstate nature of employee benefit plans and the inability of traditional trust law to safeguard employee rights, Congress passed a broad flexible statute designed to augment a new judicially created substantive law of ERISA fiduciary responsibility.

insurance salespersons who recommend the purchase of certain types of insurance, attorneys who counsel the employer, the plan actuaries, and stock brokers or dealers who recommend securities for the plan.[128] Should it so choose, the Labor Department has authority to exempt certain categories of fiduciaries and thereby refine the definition.[129]

ERISA subjects a fiduciary to liability for the breach of a co-fiduciary,[130] to personal surcharge for any losses to the plan,[131] or to any other equitable or remedial relief including removal.[132] Liability may arise from any act by the fiduciary that is not for the exclusive purpose of "(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."[133] A further refinement is the allocation of responsibilities among fiduciaries.[134] Thus, by first creating a broad fiduciary definition and then by limiting the statutory impact with administratively promulgated exemptions,[135] the drafters of ERISA created a flexible standard adaptable to varying situations.

Like the "illusory benefits" focus of ERISA, the fiduciary emphasis of the statutory scheme addresses the kinds of problems that surface in MET controversies. Application of ERISA to METs would consequently seem appropriate. The MET, in marketing to small employers, is playing a very spe-

128. *See* Little & Thrailkill, *supra* note 25, at 4-11. The Department of Labor has indicated that even a labor arbitrator can be deemed a fiduciary within the meaning of section 3(21)(A) of ERISA (29 U.S.C. § 1002(21)(A) (1976)), if the arbitrator exercises discretionary authority regarding the management and administration of the plan. ERISA Op. Letter No. 79-66A, 5 PENS. PLAN GUIDE (CCH) ¶ 25,307 (Oct. 19, 1979). In such circumstances, however, the duties of persons in other positions to the plan must be examined to determine whether they involve the performance of these same functions. *Id.*

129. The Department of Labor has two tools with which to narrow the broad scope of the fiduciary definition. First, by issuing an advisory opinion letter, the department can advise a fiduciary whether he or she falls within ERISA or whether the plan administered by the fiduciary falls within ERISA. *See* ERISA Employee Benefit Plans Advisory Opinion Procedure § 5.01, 41 Fed. Reg. 36,281, 36,282 (1976). For an example of such an opinion letter, *see* note 53 *supra*. Second, through its administrative variance procedure, the department can exempt certain transactions performed by the fiduciary. *See* 29 U.S.C. § 1108(a) (1976). For a critique of the variance procedure, see Note, *At Variance with the Administrative Exemption Procedures of ERISA; A Proposed Reform*, 87 YALE L.J. 760 (1978).

130. 29 U.S.C. § 1105 (1976).

131. 29 U.S.C. § 1109(a) (1976).

132. *Id.*

133. 29 U.S.C. § 1104(a)(1)(A) (1976).

134. *See* H.R. REP. NO. 93-533, *supra* note 22, at 4561, 4564.

135. *See* note 129 *supra*.

cialized role.[136] Health and life insurance[137] are notoriously complex and often generates consumer protection legislation to prevent exploitation of ignorant buyers.[138] To determine if an ERISA fiduciary should be held accountable for a poorly designed welfare benefits package, it is important to consider the relative expertise of the buyer and the seller.[139] In a typical multiple employer trust situation, the small employer (buyer) is likely to be unfamiliar with welfare plans or ERISA[140] and the employee (beneficiary) is likewise inexpert. The MET (seller), however, is an insurance expert and can therefore capitalize on this expertise. The relative expertise of these parties dictates holding the small employer[141] to a prudent person

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136. *See* note 4 *supra*.

137. These are the most common categories of welfare benefits, *see* 29 U.S.C. § 1002(1) (1976), but a welfare plan may also include fringe benefits such as holiday and vacation pay. *See generally* Electrical Workers Local 1 Credit Union v. I.B.E.W.-N.E.C.A. Holiday Trust Fund, 583 S.W.2d 154 (1979).

138. *See, e.g.*, MINN. STAT. §§ 72C.01-72C.13 (1978) (Readability of Insurance Policies Act, enacted "to provide that insurance policies and contracts be readable and understandable to a person of average intelligence, experience, and education"); MINN. STAT. §§ 60B.01-60B.61 (1978), (Insurers Rehabilitation and Liquidation Act, enacted for the "protection of the interests of insureds, creditors, and the public generally"); N.Y. INS. LAW §§ 154, 155, 168 (McKinney 1966 & Supp. 1980) (prescribing insurance forms, endorsements by administrative officials).

The common law of many states has always protected consumers from insurance companies and their representatives. For example, where the terms of an insurance contract are ambiguous, equivocal, or uncertain, the terms are to be construed strictly against the insurer and liberally in favor of the insured. *See generally* Great Lakes Transit Corp. v. Interstate S.S. Co., 301 U.S. 646 (1937); Trans-Continental Mut. Ins. Co. v. Harrison, 262 Ala. 373, 78 So.2d 917 (1955), Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 296 P.2d 801 (1956); Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 (1953). Under the law of New York, "[a]n insurance policy 'should be so plain and unambiguous that men of average intelligence who invest in these contracts may know and understand their meaning and import.'" Lumbermen's Mut. Casualty Co. v. Pound Ridge, 362 F.2d 430, 432 (2d Cir. 1966) (quoting Hartol Prods. Corp. v. Prudential Ins. Co., 290 N.Y. 44, 50, 47 N.E. 2d 687, 690 (1943)). *See also* Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

139. For example, one should consider whether the failure of the fiduciary to secure a financially sound insurance underwriter or to provide a sufficiently complete welfare plan should cause the fiduciary to be liable. *See* Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977) (failure of fiduciary to secure a convertability clause led to plaintiff's loss of insurability).

140. This lack of expertise among small employers may in part be the cause of numerous small plan terminations since ERISA's enactment. *See* Lurie, Lanoff, & Stuchinor, *supra* note 4, at 174 ("small plans also account for 98 percent of all the terminations that have been reported to us since ERISA").

141. An employer, whether in a small or large business, falls within the broad definition of fiduciary under ERISA: the employer has "discretionary au-

standard[142] and the MET[143] to a prudent expert standard.[144] The employer, when purchasing a benefits package from a MET, does not create the terms of the plan but rather accepts the terms offered by the MET.[145] The MET serves as a consultant or adviser to the employer, and the only discretionary decision made by the employer in the transaction is how much money will be spent on the employee benefit plan. Thus, the MET in a MET-employer transaction functions as a fiduciary within the meaning of the ERISA definition: it exercises discretionary authority as a result of special expertise.[146] In addition, the MET-employer transaction is a classic example of the allocation of responsibilities among co-fiduciaries. It therefore follows that fiduciary liability should be placed on both the MET and the employer because each exercises discretion over the plan.[147]

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thority or discretionary responsibility in the administration of [a] plan." 29 U.S.C. § 1002(21)(A) (1976).

142. 29 U.S.C. § 1104(a)(1)(13) (1976) sets out a prudent person standard, requiring "the care, skill, prudence, and diligence" of a prudent person "in a like capacity and familiar with . . . an enterprise of a like character and with like aims." Thus, the definition suggests a "sliding scale" notion of responsibility. While there is very little comment on this standard in the legislative history of ERISA, considerable discussion of a federal prudent person rule occurred in Congressional hearings held in 1970. *See Private Welfare and Pension Plan Legislation: Hearings on H.R. 16462 Before the Gen'l Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st & 2nd Sess., 521 (1969-70). The standard then under discussion was essentially the same as the subsequently enacted ERISA standard. *See* Little & Thrailkill, *supra* note 25, at 12-13; Note, *supra* note 29, at 968. Testifying at 1970 hearings, then Secretary of Labor Schultz stressed that the rule was intended to contain a built-in flexibility so that equitable standards would be applied both to small trusts and to financial institutions. *Id.* at 521.

143. The MET, as well as the employer, would appear to fall within the broad definition of fiduciary under ERISA because the MET exercises discretionary authority over many features of the plan. *See* 29 U.S.C. § 1002(21)(A) (1976). *See also* Little & Thrailkill, *supra* note 25, at 4.

144. Many feel that the prudent expert standard is the standard intended by the "like capacity" and "familiarity" terms of 29 U.S.C. § 1104 (1976) for those in a professional fiduciary position. *See* Little & Thrailkill, *supra* note 25, at 12.

145. For example, in Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977), the employer was not informed of a change in benefits or of a change in underwriters. The court held that the employer was not liable for the coverage omission. *Id.* at 695. *See* notes 81-83 *supra* and accompanying text.

146. *See* 29 U.S.C. § 1002(21)(A) (1976); notes 126-27 *supra* and accompanying text.

147. David Brummond, Counsel for the National Association of Insurance Commissioners, takes the opposite point of view. In an amicus curiae brief filed in the *Wayne Chemical* case, Brummond argued that state laws which traditionally regulate the business of insurance are a more appropriate forum for policing METs. Amicus Curiae Brief at 24-25, Wayne Chem., Inc. v. Columbus

In light of the above evaluation, the Department of Labor's 1979 statement[148] and the House Committee's 1977 declaration of policy[149] seem especially ill-advised. The Labor Department and the House Committee would remove fiduciary responsibility from the MET[150] and shift it to the small employer.[151] Instead of looking to the MET as fiduciary expert, the Department of Labor[152] focuses on the fiduciary nonexpert—the small employer, who in many cases has hired the MET's ERISA specialist services to deal with the mounting administrative burdens imposed by ERISA.[153] Thus, the fiduciary responsibility of the MET remains unregulated despite the MET's central role in creating a particular welfare plan. The failure to extend ERISA coverage to METs contradicts both the "illusory benefits" concern of Congress and the "fiduciary" emphasis of the statute.

C. Overlapping Regulation

Congress designed ERISA's broad preemption provision to

Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977). Since state insurance laws are designed to intervene where there is a disparity of bargaining power, he argued, they should be permitted to operate in this circumstance "to protect 'the weaker contracting party'—participating employers and employees—from the 'stronger' contracting parties—entrepeneurs like CASCO and NMEF [the METs]." *Id.* at 25. Brummond's analysis, however, fails to address the actual effect of ERISA on this three-party transaction. Even if state laws can police METs as insurers, the employer—the weaker contracting party—remains responsible for ERISA compliance. If the MET provides only illusory benefits, the employer is held responsible even though the employer is often in a weaker contracting position than the MET. Thus, the federal scheme of regulation appears preferable because it permits an allocation of responsibility among the three parties to the transaction consonant with their actual bargaining strength.

148. *See* notes 111-119 *supra* and accompanying text.

149. *See* note 13 *supra*.

150. While some states can be expected to respond by beginning aggressive MET regulation, the majority of states have not attempted to regulate fiduciary responsibility of METs. *See* note 9 *supra*. State regulation to date has involved the "business of insurance." *See* notes 30 & 56 *supra*. Furthermore, the McCarran-Ferguson Act appears to limit state regulatory power to these "business of insurance" areas. *See* E. Patterson, *supra* note 38, at 5.

151. The Labor Department clearly intends to shift focus from the MET to the employer:

> [A] MET arrangement is not a plan under ERISA if unrelated employers have merely adopted identically worded agreements that are offered by an independent third party as a means to fund plan benefits. In this situation, each employer has its own plan, and the [MET] . . . is instead the provider of a funding arrangement for the various plans.

News Release, *supra* note 15.

152. *See* note 111 *supra*.

153. *See* Lurie, Lanoff, & Stuchinor, *supra* note 4, at 178 (burdens of designing and operating a plan increased by ERISA).

preclude conflicting state regulatory efforts;[154] the "relate to"[155] and "deemer"[156] clauses evidence this expansive purpose.[157] The trend toward interpreting ERISA's preemption section narrowly in MET cases,[158] however, is contrary to ERISA's preemption policies for several reasons. First, conflicting state approaches to welfare plan regulation can cause serious administrative problems for multistate plans.[159] Multistate plans must meet both federal and state requirements rather than a uniform federal standard as envisioned by ERISA. Second, the self-interested actions of one state can harm another state. For example, when Illinois, trying to save its own state insurance business, forced Old Republic to shut down its out of state trust accounts, the termination of services had an adverse financial effect on several METs in other states.[160] Such ramifications appear inherent in a multiple-state regulatory effort. Third, state by state regulatory efforts fail to address fiduciary responsibilities in welfare plan transactions. Although state laws regulate the insurance aspects of METs,[161] they do not regulate METs as specialized fiduciaries to small employers.[162] Thus, ERISA's fiduciary emphasis, which is necessary if the misinformation and illusory benefits problems are to be avoided,[163] is lost when regulation is relinquished to the states.

D. PLAN AS "PROCESS"

The broad definition of the term "plan" in ERISA presents a final reason why METs are best left within the ambit of federal regulation. Several of the preemption decisions have limited the definition,[164] but given the overall function of the plan as a broadly regulated process within the ERISA framework,

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154. *See* notes 56-60 *supra* and accompanying text.

155. 29 U.S.C. § 1146(a) (1976). *See* note 57 *supra* and accompanying text.

156. 29 U.S.C. § 144(b)(2)(B) (1976). *See* note 58 *supra* and accompanying text.

157. LEGISLATIVE HISTORY, *supra* note 28, at 4770-71 (remarks of Senator Javits).

158. *See* notes 54-110 *supra* and accompanying text.

159. *See* note 32 *supra.*

160. *See Trust Losses*, *supra* note 5, at 31.

161. *See* Brummond, *supra* note 11, at 66; Hellner, *The Scope of Insurance Regulation: What is Insurance for Purposes of Regulation?*, 12 AM. J. COMP. L. 494, 495 (1963); Kimball, *The Purpose of Insurance Regulation, A Preliminary Inquiry into the Theory of Insurance Law*, 45 MINN. L. REV. 471, 475 (1961).

162. *See* note 150 *supra* and accompanying text.

163. *See* notes 126-38 *supra* and accompanying text.

164. *See generally* Wayne Chem., Inc., v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977); Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977); Hamberlin v. VIP Ins. Trust, 434 F. Supp. 1196 (D. Ariz. 1977).

such a narrowing is unwise. The better approach is to continue a flexible notion of "plan" so that it includes MET transactions as well as other ERISA transactions.

ERISA treats employee benefit plans much more like processes than products; the statute subjects a large range of activities associated with the plans to federal regulation. Use of multiple adjectival phrases in the statute demonstrates that a plan is more a process than a tangible thing. Thus when written, separate parts of a plan are termed plan documents.[165] An insurance policy can be part of a plan, but it is not the plan itself; the plan documents include the insurance contract.[166] When the plan is described, it becomes a "summary plan description."[167] All assets of a plan are held in a trust; the trustees are named either in the trust instrument or the plan instrument.[168] The trust is not the plan; rather it is a component of the plan.[169] Requisite features of a plan include procedures for funding, allocation of responsibilities, plan amendments, and payment specifications.[170] Hence, one can conclude that a distinguishing feature of an ERISA "plan" is temporal change. Each change is subject to ERISA regulation. Unlike a trust, which has a very discrete time of creation after which all documents, assets, and terms are fixed,[171] an ERISA plan can be any "plan, fund, or program"[172] and can become more particularized in its features over time. A plan might even be created by an employer before any of its terms exist.[173] "Plan" is really a label for a broad matrix of events.

This process notion of an ERISA plan permits the imposition of fiduciary duties during the early phases of a plan when

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165. LEGISLATIVE HISTORY, *supra* note 28, at 616.

166. *Id.* ("[i]n the case of insured plans, this would encompass the insurance contract or similar agreement").

167. 29 U.S.C. § 1022 (1976).

168. *Id.* at § 1103.

169. *Id.* at § 1144(b)(2)(B).

170. *Id.* at § 1102(b).

171. The essential elements of a trust are a designated beneficiary and trustee, a fund sufficiently identified to enable title to pass to the trustee, and actual delivery to the trustee with the intention of passing title. City Bank Farmers' Trust Co. v. Charity Organization Soc'y, 238 A.D. 720, 722, 265 N.Y.S. 267, 270 (1933).

172. 29 U.S.C. § 1002(1) (1976).

173. ERISA permits different "lag" times for various portions of the Act. *See* 29 U.S.C. § 1086 (1976). Initial reporting of a plan description does not occur until four months after creation. *Id.* at 1024(a)(1). Most periodic reports only occur annually, *id.* at § 1023, and certain exemptions or alternative means of compliance are also possible. *Id.* at § 1030. *See also* Regulations Relating to Labor, 29 C.F.R. §§ 2520.104-2 to 46 (1979).

particular details are being formulated. Although an employer may create a plan, responsibility to devise particular terms and benefits is assigned to the MET and these duties can be viewed as distinct from the creation of the plan itself. The MET should therefore be held responsible as a fiduciary to "discharge [its] duties with respect to a plan solely in the interest of the participants and beneficiaries."[174] As a fiduciary, the MET could be held liable for breach of its duty if it designed a patently inadequate benefits schedule.[175] Hence, the process notion of an ERISA plan supports an extension of ERISA fiduciary responsibilities to METs.

Recent efforts to exclude METs from ERISA jurisdiction are contrary to the illusory benefits and special fiduciary concerns of the statute. Moreover, such efforts frustrate the statute's preemption policies and treatment of the "plan" as a broad, decisional matrix or process. Only federal regulation of METs under ERISA will provide adequate and uniform controls.

V. PROPOSAL FOR LEGISLATIVE REFORM

It is beyond the scope of this Note to propose specific statutory amendments to ERISA. Three general changes, however, are suggested. First, ERISA's definition of a fiduciary should be amended clearly to include METs.[176] This would be consistent with the original purposes of the Act—to place responsibility on the person or agency most central to the plan's administration[177] and most able to remedy the problem of illusory benefits.[178] Second, minimum benefits requirements for welfare plans should be enacted to fill the present void in the Act, a void that has placed severe strain on the broad preemption policies of ERISA[179] and has unduly limited the definition

174. 29 U.S.C. § 1104(a)(1) (1976).

175. For example, in Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977), the MET failed to continue the plan's conversion privileges when switching underwriters. The omission led to a denial of benefits for plaintiff's disabled son. *Id.* at 693-96.

176. Even though this Note has advanced the theory that one can interpret the ERISA definition of "fiduciary" to include METs, *see* notes 126-35 *supra* and accompanying text, judicial attempts to narrow the statute's preemption and definition sections have led to a different result. *See* notes 68-109 *supra*.

177. *See* notes 126-35 *supra* and accompanying text.

178. *See* notes 120-24 *supra* and accompanying text.

179. *See* note 110 *supra* and accompanying text. *See also* Hutchinson & Ifshin, *supra* note 2, where the authors stated that "there is a natural tendency to restrict the scope of preemption where it appears to produce an inequitable result in a particular case." *Id.* at 42. The authors concluded that "although al-

of "plan" in the Act.[180] Adopting such requirements admittedly would be a difficult task but a study commission could be appointed to draft a schedule of requirements.[181] Several private and public agencies have already proposed model comprehensive health insurance packages designed to provide acceptable coverage,[182] and a number of states have initiated minimum requirements.[183] Given these past efforts to specify requirements, it should be possible to write a satisfactory proposal for ERISA purposes. Finally, the present reporting and disclosure requirements of ERISA[184] should be augmented to complement the new minimum benefits requirements. By requiring the plan administrator to inform each member employee of those benefits that are provided by the plan and those that are not, the illusory benefits problem could be partially alleviated.[185] Plan administrators could be required to set out the specific benefit package offered and recommend supplementary coverage to be purchased separately by the employee. This is a dimension of accountability not currently incorporated in the Act's reporting and disclosure requirements.[186]

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lowing state regulations of funding, vesting, and benefit provisions of these plans may appear to further the cause of employee protection, it would create immense difficulties for multistate plans." *Id.* at 57.

180. *See* notes 164-75 *supra* and accompanying text.

181. In a similar approach, Congress has directed that a task force be formed to study and make a report on "the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans." 29 U.S.C. § 1222(a)(5) (1976).

182. The Accident and Health Subcommittee of the National Association of Insurance Commissioners (NAIC), for example, has recently drafted a model comprehensive health insurance benefits package. *See* Brummond, *supra* note 11, at 84. The United States Department of Health, Education and Welfare (HEW) has also proposed a minimum benefits standard. *National Health Insurance Proposals: Hearings Before the House Comm. on Ways and Means, Pt. I*, 92d Cong., 1st Sess., 101-02 (Oct. 19 & 20, 1971).

183. *See, e.g.*, Minnesota Comprehensive Health Act, MINN. STAT. §§ 62E.01-62E.55 (1978 & Supp. 1979); Hawaii Prepaid Health Care Act, HAWAII REV. STAT. §§ 393-1 to 393-5 (1976 & Supp. 1979); California Knox-Keene Health Care Service Plan Act of 1975, CAL. HEALTH & SAFETY CODE, §§ 1340-1399 (West 1979 & Supp. 1980).

184. 29 U.S.C. §§ 1021-1031 (1976).

185. The concern that employees would not be on notice of the strengths and weaknesses of their plan benefits was expressed by the House Education and Labor Committee. *See* H.R. REP. No. 533, *supra* note 22, at 4646.

186. Current reporting and disclosure requirements are limited to a description of plan contents, 29 U.S.C. § 1022 (1976), a statement of the participants' accrued benefits, *id.* at § 1025, and a general statement of the employee's ERISA rights—called an ERISA Notice. *See* 29 C.F.R. § 2520.104b-5 (1979). No obligation is placed on the fiduciary to inform the employee of benefits he does *not* have but would be well-advised to purchase.

VI. CONCLUSION

ERISA was adopted to prevent illusory employee benefits through aggressive reporting, disclosure, delineation of fiduciary responsibilities, civil enforcement, and other requirements. Nevertheless, the lack of substantive requirements for welfare plans has led the Department of Labor, the House Legislative Oversight Committee, and some courts to narrow ERISA's preemption, definitional, and fiduciary sections to exclude multiple employer trusts from ERISA jurisdiction.[187] Foreclosure of the Act's liberal coverage and preemption provisions is unwise, however, and administrative and judicial decisions that narrowly define ERISA's provisions are adversely affecting other multistate welfare plans whose status is uncertain under ERISA.[188] A careful analysis of the MET transaction reveals that it is characterized by a number of serious problems that ERISA was designed to correct. A MET is a specialized fiduciary that reaches beyond state borders and is capable of avoiding regulation. These organizations often mislead unsuspecting employees and employers into purchasing illusory benefits packages. METs should be federally regulated under an amended ERISA with broad fiduciary regulations, new mandatory minimum benefits schedules, and more salient reporting and disclosure requirements. Failure to enact these types of statutory changes will result in inadequate protection for MET beneficiaries and further confusion in the developing body of ERISA law.

187. ERISA's preemption section recently escaped a further narrowing when a preemption rider was withdrawn in the final stages of congressional action on the Multiemployer Pension Plan Amendments Act. *See* note 3 *supra*. Hawaii attempted to secure an exemption for its Health Care System from the scope of ERISA preemption. Such an exemption would have permitted Hawaii to regulate the minimum benefit requirements of all ERISA plans in the state, including METs. The Senate, however, withdrew the proposal from its final bill. *See* H.R. REP. No. 1343, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 5924, 5925.

188. *See* note 32 *supra*.