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ERISA—Escape Clauses In Employee Benefit Plans are Unenforceable Under ERISA


In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA)\(^1\) to regulate the rapidly growing number of employee benefit plans.\(^2\) ERISA was designed to ensure that employee

1. 29 U.S.C. §§ 1001-1461 (1982). The primary purpose of ERISA was to protect employees' individual pension rights by establishing comprehensive federal standards to govern private employee benefit and pension plans. H.R. Rep. No. 533, 93d Cong., 1st Sess. 1, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4639. These federal standards provide for: (1) the disclosure and reporting of financial and other information with respect to employee benefit plans; (2) the standard of care owed by fiduciaries of employee benefit plans; (3) the appropriate remedies and right of access to federal courts for participants, beneficiaries, and fiduciaries and (4) the mandatory vesting of accrued employee benefits after a significant period of service. ERISA § 2, 29 U.S.C. § 1001 (1982).

2. See ERISA § 2(a), 29 U.S.C. § 1001(a) (1982) (“Congress finds that the growth in size, scope, and numbers of employee benefit plans... has been rapid and substantial”). From 1940 to 1974 the private pension system experienced an extraordinary rate of growth: from 4.1 to 35.0 million employees covered and from 2.4 to 150.0 billion dollars in plan assets. The Employee Retirement Income Security Act of 1974: Policies and Problems, 26 SYRACUSE L. REV. 539, 542 (1975). This expansion placed the private pension system in a position to influence the level of savings, the operation of capital markets, and the financial security of millions of consumers. H.R. Rep. No. 533, 93d Cong., 1st Sess. 2, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4639, 4640. Congress enacted ERISA to assure equitable and fair administration of all pension plans. Id. at 3, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 4641.

The enactment of ERISA followed years of effort at the federal level to regulate employee benefit plans. Id., reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 4641. Various aspects of employee pension plans already had been affected to some degree by most of the major labor legislation of the twentieth century, including the National Labor Relations Act (1935), the Labor Management Relations Act (1947), and the Labor Management Reporting and Disclosure Act (1959). Id., reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 4641. However, not until the passage of the Welfare and Pension Plans Disclosure Act (WPPDA) in 1958 was legislation specifically enacted to regulate pension and welfare funds. Id., reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 4641 (citing 29 U.S.C. § 301-09 (repealed 1974)).

Prior to the WPPDA, employee pension and welfare benefit plans generally had been regulated at the state level. Lanam, Public Regulation of Self-Insured and Uninsured Employee Benefit Plans—Who Is to Be Protected? A State Regulator’s Perspective, 19 FORUM 309, 310 (1983). The WPPDA imposed disclosure and reporting requirements upon plan administrators but reserved to the states the detailed regulations relating to the plans. Id. at 311. It was expected that the information disseminated by plan administrators would enable participants to police their plans. H.R. Rep. No. 533, 93d Cong., 1st Sess. 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4639, 4642. However, it became evident that the WPPDA was inadequate to protect workers’ rights and benefits because the

(1192)
benefit plan participants would not be deprived of their anticipated benefits. Toward that end, section 502 of ERISA grants participants, beneficiaries and fiduciaries the right to bring civil actions in federal court.

The circuits presently disagree on whether parties not expressly granted this right, such as benefit plans, may nevertheless bring an action under section 502 of ERISA. Addressing this jurisdictional issue

WPPDA contained only limited disclosure requirements and completely lacked any substantive fiduciary standards. Id., reprinted in 1974 U.S. Code Cong. & Ad. News at 4642. ERISA was enacted in response to the perceived failure of the WPPDA to regulate the private pension system. Lanam, supra, at 312.

3. ERISA § 2(a), 29 U.S.C. § 1001(a) 1982. ERISA's declaration of policy states:

that despite the enormous growth in [employee benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.


4. ERISA § 502, 29 U.S.C. § 1132 (1982). Section 502(a) of ERISA provides in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Id. Section 502(e)(1) confers federal jurisdiction over the civil actions authorized in § 502(a) by providing:

Except for actions under section (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.


5. Compare Fentron Indus. v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982) (employer has standing to sue under ERISA notwithstanding the omission of "employers" from § 502 of ERISA) and International Ass'n
in Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, the United States Court of Appeals for the Third Circuit decided that, lacking a specific grant, federal jurisdiction over an action brought by a benefit plan cannot be predicated on section 502 of ERISA. The court, however, found general federal question jurisdiction over the action and proceeded to address the merits of the case, which presented an issue of first impression under the federal common law of benefit plans covered by ERISA. In deciding which of two employee benefit plans was obligated to pay the medical bills of a woman covered by both plans, the Third Circuit was required to rule on the enforceability of "other insurance" provisions that purported to allocate coverage between the overlapping plans. The court concluded

of Bridge, Structural, and Ornamental Iron Workers Local No. 111 v. Douglas, 646 F.2d 1211 (7th Cir.) (union has standing to sue under § 502(a)(1)(B) even though unions are not enumerated among persons or entities that may bring suit), cert. denied, 454 U.S. 866 (1981) with New Jersey State AFL-CIO v. New Jersey, 747 F.2d 891 (3d Cir. 1984) (labor unions may not sue under § 502(a)(1)(B) of ERISA because they are not one of parties authorized to sue under that section) and Tuvia Convalescent Center v. National Union of Hospital & Health Care Employees, 717 F.2d 726 (2d Cir. 1983) (employer has no standing to sue under § 502 because not specifically listed) and Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.) (benefit fund cannot sue under ERISA because Congress did not intend entities other than those expressly listed in § 502 to have a cause of action under ERISA), cert. dismissed, 466 U.S. 1233, cert. denied, 464 U.S. 845 (1983). For a further discussion of the split among the circuits concerning the interpretation of § 502, see infra notes 34-38 & 89-92 and accompanying text.

6. 764 F.2d 147 (3d Cir. 1985). The case was heard by Judges Sloviter and Becker of the Third Circuit Court of Appeals, and Judge Fullam of the Eastern District Court of Pennsylvania, sitting by designation. Id. at 149. Judge Becker delivered the opinion of the court, and Judges Sloviter and Fullam filed concurring opinions. Id. at 149, 164 (Sloviter, J., concurring); id. at 166 (Fullam, J., concurring).

7. 764 F.2d at 154.

8. Id. at 151. Although the court was unanimous in concluding that federal jurisdiction existed over the action, each judge based his conclusion on a different theory. Id. Judges Sloviter and Becker agreed that the district court had jurisdiction over the action pursuant to the general federal question statute, although they disagreed as to the rationale for that conclusion. Id. at 154-59; id. at 164-66 (Sloviter, J., concurring). The general federal question statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331(a) (1982). For a discussion of Judge Becker's view, see infra notes 45-51 and accompanying text. For a discussion of Judge Sloviter's view see infra notes 52-64 and accompanying text. For a discussion of Judge Fullam's view see infra notes 65-66 and accompanying text.

9. 764 F.2d at 159. For a discussion of why federal common law governed the outcome of the dispute, see infra notes 46-51 & 97 and accompanying text.

10. For a further discussion of the facts that gave rise to the dispute, see supra notes 13-21 and accompanying text.

11. 764 F.2d at 160-64. An "other insurance" clause is language within an insurance policy that attempts to limit or eliminate the liability of the insurer if the insured is covered by another insurance policy or plan. 16 COUCH ON INSUR-
that one such provision, an escape clause, is unenforceable as a matter of law under ERISA.\textsuperscript{12}

The issues in \textit{ILGWU} arose from an action seeking a declaratory judgment of the rights and obligations of two employee benefit plans regarding the medical expenses of Ruth Fazio, an employee in the garment industry.\textsuperscript{13} Mrs. Fazio was eligible for medical benefits as a participant in the garment industry’s local employee benefit plan, the Northeast Department International Ladies Garment Workers’ Union Health and Welfare Fund (ILGWU Fund).\textsuperscript{14} She was also eligible for medical benefits as a beneficiary of her husband’s employee benefit plan.

\footnotesize{ANCE 2d § 62:41 at 475 (rev’d ed. 1983). In the event of duplicate or overlapping insurance, the “other insurance” clause purports to determine which plan is primarily liable for the insured’s loss. 8A C. \textit{Appleman}, \textit{Insurance Law and Practice} § 4906 at 341 (1981). These provisions generally fall into three categories: pro rata, excess, and escape clauses. 764 F.2d at 160. Pro rata clauses require both insurers to allocate the loss, generally in proportion to each insurer’s share of the total coverage provided by both policies. C. \textit{Appleman}, \textit{supra}, at § 4906. An excess clause in a policy generally provides that if another valid and collectible insurance policy covers the occurrence in question, then that policy must provide primary coverage to the extent of its policy limits and the policy containing the excess clause must pay only for losses above the policy limits of the primary policy. \textit{Id.} at § 4909. A basic escape clause in a policy attempts to avoid all liability by providing that the policy shall not provide any coverage if there is other valid and collectible insurance. \textit{Id.} at § 4910. For a further discussion of such provisions, and the relevant text of the “other insurance” provisions in the employee benefit plans at issue in this dispute, see infra notes 22-26 and accompanying text.

12. 764 F.2d at 162-64. In explaining its reasoning, the court stated that the trustees of an ERISA plan must conform with ERISA’s standard of fiduciary conduct. \textit{Id.} at 162 (citing ERISA § 404, 29 U.S.C. § 1104 (1982)). Under a prior Third Circuit ruling, a decision by the trustees of an ERISA plan to deny benefits to plan participants meets the fiduciary requirements of ERISA provided the decision is not arbitrary and capricious. 764 F.2d at 162 (citing Struble v. New Jersey Brewery Employees’ Welfare Trust Fund, 732 F.2d 325, 333-34 (3d Cir. 1984)). The \textit{ILGWU} court decided that a decision to include an escape clause in an ERISA plan was arbitrary and capricious in violation of ERISA’s standard of fiduciary conduct because the clause attempted to defer liability to another plan without regard to the level of benefits provided by the other plan. 764 F.2d at 163. The court, therefore, concluded that escape clauses are unenforceable as a matter of law under ERISA. \textit{Id.} For a further discussion of the court’s reasoning regarding the unenforceability of escape clauses in ERISA plans, see infra notes 81-85 and accompanying text. For a further discussion of ERISA’s standard of fiduciary conduct and the text of § 404 of ERISA, see infra notes 75-80 and accompanying text.

13. 764 F.2d at 150.

14. \textit{Id.} ERISA defines a participant as any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 3(7), 29 U.S.C. 1002(7) (1982).}
the Teamsters Local Union No. 229 Welfare Fund (Teamsters Fund). 15 Both the ILGWU Fund and the Teamsters Fund were employee benefit plans covered by ERISA. 16 Mrs. Fazio incurred medical expenses which she subsequently attempted to recover, but both plans denied payment, 17 each plan contending that the other was obligated to pay for her expenses. 18

Unable to recover any of her medical expenses, Mrs. Fazio filed suit in the United States District Court for the Middle District of Pennsylvania naming both funds as defendants. 19 At the suggestion of the district court, the ILGWU Fund paid Mrs. Fazio's claim and contemporaneously filed a complaint against the Teamsters Fund seeking a declaration of the rights and obligations of the two funds regarding Mrs. Fazio's claim and the claims of others similarly situated. 20 The ILGWU Fund added its trustee, Sol Hoffman, as a party plaintiff, and predicated federal jurisdiction over the new suit on two provisions of ERISA. 21

15. 764 F.2d at 150. ERISA defines a beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8) (1982). Mrs. Fazio was a beneficiary under the terms of the Teamsters Fund because the plan provided medical coverage for the spouse and children of covered employees. 764 F.2d at 150.


17. 764 F.2d at 150. Mrs. Fazio first submitted her bills to the ILGWU Fund. Id. The ILGWU Fund advised her that she was not eligible for benefits under her plan because she was covered by the Teamster's plan. Id. Mr. Fazio thereupon submitted his wife's medical bills to the Teamsters Fund. Id. The Teamsters Fund subsequently advised Mrs. Fazio that it would not pay her bills because she was covered by the ILGWU plan. Id.

18. Id. Each plan contained "other insurance" provisions that purported to defer coverage of a participant or beneficiary if the participant or beneficiary was covered by another insurance policy or plan. Id. For a discussion of "other insurance" provisions, see supra note 11 and accompanying text. For the text and a discussion of the pertinent provisions of the "other insurance" clauses in the ILGWU's Fund's and Teamsters Fund's policies, see infra notes 23-26 and accompanying text.

19. 764 F.2d at 150.

20. Id. The district court observed that Mrs. Fazio was entitled to reimbursement of her medical expenses from one of the funds. Id. Finding it unfair for Mrs. Fazio to wait for payment and incur counsel fees while the court decided which fund was liable for her bills, the district court suggested, and the defendants agreed, that: (1) the ILGWU Fund would pay Mrs. Fazio's claim; (2) Mrs. Fazio's action would then be dismissed and (3) the ILGWU Fund would file, contemporaneously with the dismissal, a complaint in federal court against the Teamsters Fund to settle the dispute. Id.

21. Id. Sol Hoffman was the chairman of the ILGWU Fund's trustees. Id. He was added as a plaintiff apparently in an attempt to provide an additional
In the district court, the ILGWU Fund contended that an escape clause in its plan relieved the ILGWU Fund of all liability because Mrs. Fazio was covered as a beneficiary of the Teamsters Fund. The Teamsters Fund contended that an excess clause in its plan rendered the basis for jurisdiction under ERISA. 

The district court did not set forth its basis for finding federal subject matter jurisdiction over the new suit. See Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 584 F. Supp. 68 (M.D. Pa. 1983). The Third Circuit noted, however, that jurisdiction in the district court was predicated upon ERISA § 502(a)(1)(B) (covering suits by participants or beneficiaries to recover benefits) and § 502(a)(3) (covering equitable actions by participants, beneficiaries, or fiduciaries). 764 F.2d at 150. For the relevant provisions and a further discussion of § 502, see supra note 4.

22. 584 F. Supp. at 69. The parties stipulated to the facts before the district court and made cross-motions for summary judgment. Id.

23. 764 F.2d at 150. The ILGWU Fund’s escape clause was included in a section entitled “Exception to Eligibility” and provided:

Exception to Eligibility—You are not eligible for hospital, medical-surgical, or Major Medical benefits under this plan if there exists at your spouse’s place of employment a group plan which provides for family coverage of these types of benefits so long as 50% or more of the cost of such family coverage is paid for by other than you or a member of your family.

Id. at 151 (quoting Appellant’s Appendix at 54a).

The ILGWU plan also contained a “Coordination of Benefits” clause that specified when the plan was to be the primary insurer of a participant or beneficiary and when the plan was to be a secondary or excess insurer. Id. The ILGWU Fund “Coordination of Benefits” clause did not address the situation where, as here, a participant was also a potential beneficiary of a spouse’s plan. Id. at 150-51.

24. Id. at 150.

25. Id. The Teamsters plan contained a “Coordination of Benefits” section in the form of an excess clause that provided:

Our Group Insurance Plan contains a non-profit provision coordinating it with other plans under which an individual is covered so that the total benefits available will not exceed 100% of the allowable expenses.

An “allowable expense” is any necessary, reasonable and customary expense covered, at least in part, by one of the plans. “Plans” means these types of medical and dental care benefits: (a) coverage (other than Medicare) under a governmental program or provided or required by statute, including no fault coverage to the extent required in policies or contracts by a motor vehicle insurance statute or similar legislation, and (b) group insurance or other coverage for a group of individuals, including student coverage obtained through an educational institution above the high school level.

When a claim is made the primary plan pays its benefits without regard to any other plans. The secondary plans adjust their benefits so that the total benefits available will not exceed the allowable expenses. No plan pays more than it would without the coordination provision. A plan without a coordinating provision is always the primary plan. If all plans have such a provision: (1) the plan covering the patient directly, rather than as an employee’s dependent, is primary and the other is secondary, (2) if a child is covered under both parents’ plans, the father’s is primary, (3) if neither (1) nor (2) applies, the plan covering the patient longest is primary.
Teamsters Fund liable only for the portion of Mrs. Fazio’s medical expenses that exceeded the policy limits of the ILGWU plan.\textsuperscript{26} The district court found the escape clause of the ILGWU plan controlling, thereby rendering the Teamsters Fund liable for all of Mrs. Fazio’s medical bills.\textsuperscript{27} The Teamsters Fund appealed.\textsuperscript{28}

In reviewing the district court’s decision, the Court of Appeals for the Third Circuit initially addressed the jurisdictional issues.\textsuperscript{29} The

\begin{quote}
When ours is the secondary plan and its payment is reduced to consider the primary plan’s benefits, a record is kept of the reduction. This amount will be used to increase our Group Insurance Plan’s payments on the patient’s later claims in the same calendar year—to the extent that there are allowable expenses that would not otherwise be fully paid by our Group Insurance Plan and the others.
\end{quote}

\textit{Id.} at 160 n.9 (quoting Appellant’s Appendix at 88a).

\textsuperscript{26} \textit{Id.} at 150. Moreover, the Teamsters Fund claimed that if the ILGWU Fund’s escape provision operated to relieve the ILGWU Fund of liability, the ILGWU Fund trustees were acting in an arbitrary and capricious manner in violation of their fiduciary duties under ERISA. \textit{Id.} The basis of this claim was that the ILGWU Fund’s escape clause discriminated among participants on the basis of sex and marital status. \textit{Id.} In addressing this claim, the district court determined that the escape provision in the ILGWU plan did not discriminate on the basis of sex or marital status. \textit{Id.} The district court reasoned that the language of the ILGWU Fund’s escape clause excluded coverage of employees if alternative coverage existed, whereas the language of the Teamsters plan provided that it would be an excess insurer only if a beneficiary was covered by another plan. \textit{Id.} The district court reasoned that since the Teamsters Fund existed, the ILGWU Fund’s escape clause relieved the ILGWU Fund of liability. \textit{Id.} Because the ILGWU Fund was not liable, the court found that there was no alternative coverage to the Teamsters Fund and, therefore, that the excess clause in the Teamsters plan had no effect. \textit{Id.} Consequently, the district court concluded that the Teamsters Fund was liable for all of Mrs. Fazio’s medical expenses. \textit{Id.} at 73.

\textsuperscript{27} 584 F. Supp. at 72. The district court reasoned that the language of the ILGWU Fund’s escape clause excluded coverage of employees if alternative coverage existed, whereas the language of the Teamsters plan provided that it would be an excess insurer only if a beneficiary was covered by another plan. \textit{Id.} The district court reasoned that since the Teamsters Fund existed, the ILGWU Fund’s escape clause relieved the ILGWU Fund of liability. \textit{Id.} Because the ILGWU Fund was not liable, the court found that there was no alternative coverage to the Teamsters Fund and, therefore, that the excess clause in the Teamsters plan had no effect. \textit{Id.} Consequently, the district court concluded that the Teamsters Fund was liable for all of Mrs. Fazio’s medical expenses. \textit{Id.} at 73.

Underlying the district court’s reasoning was its recognition of the fact that members of the ILGWU generally have lower salaries than members of the Teamsters Union. \textit{Id.} at 71 n.6. Consequently, the district court stated that the ILGWU Fund had more limited financial resources from which to draw in distributing benefits. \textit{Id.}

The Third Circuit pointed out the negative public policy implications of the district court’s decision by observing “that even a qualified endorsement of escape clauses might encourage benefit plans with excess clauses to replace such clauses with those of the escape variety in order to ‘fight fire with fire.’ ” 764 F.2d at 164 n.17.

\textsuperscript{28} 764 F.2d at 151.

\textsuperscript{29} \textit{Id.} Both funds contended that there was federal jurisdiction over the suit. \textit{Id.} The court of appeals expressed concern over this issue at oral arguments and requested supplemental briefs from both funds on this issue. \textit{Id.}
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The court noted that section 502(a)(1)(B) of ERISA expressly empowers participants and beneficiaries to bring suit to recover benefits, enforce rights, and clarify rights to future benefits under the terms of an ERISA plan. Arguing that this section provided jurisdiction over the action, both funds contended that the ILGWU Fund should be viewed as a representative of all of its participants and beneficiaries and, therefore, the suit should be viewed as one brought by a participant in or beneficiary of an ERISA plan. In the alternative, the parties contended that federal jurisdiction was authorized under section 502(a)(3) which provides fiduciaries with a federal cause of action to enforce the terms of an ERISA plan. The parties argued that the suit could be characterized as one brought by the ILGWU Fund trustee, Sol Hoffman, who was a fiduciary under ERISA.

Judges Sloviter and Becker concluded that section 502(a)(1)(B) of ERISA, which grants federal jurisdiction over actions brought by participants and beneficiaries, did not extend to an action brought by an employee benefit plan. They recognized that the Seventh and Ninth Circuits had interpreted section 502(a)(1)(B) more liberally, by allowing a labor union and an employer to bring federal actions under that section of ERISA, notwithstanding the fact that they were not specifically enumerated among the parties entitled to bring suit. Never-
Circuit held that the labor union was entitled to bring an action to clarify its members' rights to future benefits under § 502(a)(1)(B). Id. at 1214. The court reasoned that since the labor union members' "right... to future benefits would be affected by the amendment," there was jurisdiction. Id. (citing ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1982)). In *ILGWU*, the Third Circuit criticized this reasoning by noting that the Seventh Circuit had made no attempt to reconcile its holding with the fact that the express words of § 502 did not include unions among the list of parties authorized to bring suit. 764 F.2d at 152.

In *Fentron*, the Ninth Circuit held that an employer had standing to sue a pension plan on behalf of its employees, notwithstanding the fact that employers are not included among the list of parties entitled to sue under § 502. 674 F.2d at 1304-05. The *Fentron* court stated that a plaintiff has standing to sue for violation of a federal statute if the plaintiff: (1) has suffered an injury in fact; (2) falls arguably within the zone of interests protected by the statute and (3) can show that the statute itself does not preclude the suit. Id. at 1304. After determining that the plaintiff had suffered an injury in fact and was within the zone of interests that Congress intended to protect when it enacted ERISA, the court focused on whether ERISA itself precluded the suit. Id. at 1304-05. The court determined that the employer had standing to sue under § 502 because the legislative history did not suggest that the jurisdictional grant of ERISA was exclusive or that Congress intentionally omitted employers from the list of parties entitled to bring suit. Id. at 1305.

38. 764 F.2d at 152-53 (citing New Jersey State AFL-CIO v. New Jersey, 747 F.2d 891 (3d Cir. 1984)). In *AFL-CIO*, a labor union sued the State of New Jersey seeking a declaratory judgment that four New Jersey statutes enacted in 1983 were invalid because they were preempted by the previously enacted provisions of ERISA. 747 F.2d at 892. The Third Circuit held that the plaintiff labor union was not a participant or beneficiary as defined in ERISA and, therefore, dismissed the case for lack of federal jurisdiction. Id. at 893. Supporting its holding, the Third Circuit stated that only participants and beneficiaries may bring suit (in either state or federal court) to clarify rights to future benefits under the terms of the plan. The statute defines "participants" as employees or former employees who are, or may be, eligible to receive benefits and "beneficiaries" as people designated by a participant who may become eligible to receive benefits. Id. It is clear from the statute that labor unions are neither participants nor beneficiaries, and consequently plaintiff does not fall within this provision.

Id. at 892 (citations omitted).

Judges Sloviter and Becker noted that the Second Circuit had similarly concluded that an employee benefit fund did not have standing to sue under § 502. Id. (citing Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.), cert. dismissed, 463 U.S. 1233, cert. denied, 464 U.S. 845 (1983)). For a further discussion of Pressroom, see infra note 90 and accompanying text.
After concluding that the ILGWU Fund could not bring a federal suit as a participant or beneficiary under ERISA, Judges Sloviter and Becker addressed the parties’ alternative argument that jurisdiction was authorized under section 502(a)(3) of ERISA, which empowers fiduciaries to bring suit to enforce the terms of a plan. 39 Both judges reasoned that the clear intent of the statute was to provide jurisdiction only when there was a fiduciary relationship between the fiduciary bringing suit and the fund being sued. 40 Since the ILGWU Fund’s trustee Hoffman owed no fiduciary duty to the Teamsters plan, 41 and since Hoffman was not suing to enforce the terms of the ILGWU Fund, 42 Judges Sloviter and Becker concluded that jurisdiction could not be based on Hoffman’s status as a fiduciary. 43 Accordingly, they stated that none of the express jurisdictional provisions of ERISA authorized federal jurisdiction over a suit brought by a pension fund and its trustee against another pension

Judges Sloviter and Becker also stated that the AFL-CIO holding was not inconsistent with the Third Circuit’s prior decision that an employer who was also a fiduciary under ERISA could sue pursuant to § 502(a)(3). 764 F.2d at 153 n.3 (citing United States Steel Corp. v. Pennsylvania Human Relations Comm’n, 669 F.2d 124 (3d Cir. 1982)). The court explained that in United States Steel it had not literally construed § 502(a)(1)(B) to include employers. 764 F.2d at 153. Rather, the court stated, it had simply held in United States Steel that a fiduciary had standing to sue under § 502(a)(3), notwithstanding that the fiduciary was also an employer. See 669 F.2d at 128.

39. 764 F.2d at 153. For the pertinent provisions of § 502(a)(3) of ERISA, see supra note 4.

40. Id. In interpreting the jurisdictional grant, the court referred to the statutory definition of “fiduciary,” which provides that one’s status as a fiduciary is dependent upon one’s relationship to a particular plan. 764 F.2d at 154 (citing ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1982)). For the statutory definition of a fiduciary, see supra note 33. Relying on this definition, the court concluded that § 502(a)(3) of ERISA grants jurisdiction over equitable actions by fiduciaries only when the fiduciaries are suing the plan to which they owe a fiduciary duty. Id.

41. 764 F.2d at 154. The parties argued that the action could be viewed as a suit by Hoffman, a fiduciary of the ILGWU Fund, to enforce the terms of the Teamsters Fund, thereby bringing the suit within the jurisdictional grant of § 502(a)(3) of ERISA. Id.

42. Id. The parties also argued that the suit could be viewed as one brought by ILGWU trustee Hoffman to enforce the terms of the ILGWU Fund against the Teamsters Fund. Id. The court rejected this argument, reasoning that the only persons who had the power and the duty to enforce the ILGWU plan were the ILGWU Fund trustees themselves. Id.

43. Id. The court stated that “[j]urisdiction cannot be predicated on the mere coincidence that Hoffman is a fiduciary of a benefit plan unrelated to the one he seeks to enforce.” Id. (footnote omitted). Although the parties had not raised the issue, the court noted that § 502(a)(3) of ERISA also authorizes fiduciaries to sue to enforce the provisions of ERISA. Id. at 154 n.5. The court observed that jurisdiction could not be found under this section because it also required the existence of a fiduciary duty between the fiduciary bringing suit and the fund being sued. Id. For the pertinent portions of § 502(a)(3) of ERISA, see supra note 4.
After failing to find federal jurisdiction under ERISA, Judges Sloviter and Becker presented different theories supporting their conclusion that the federal court nevertheless had jurisdiction over the case. Judge Becker stated that if the ILGWU Fund's claim was controlled by federal common law, jurisdiction could be found pursuant to the general federal question statute, which provides federal jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." He next considered whether there existed a fed-

44. 764 F.2d at 154.

45. Id. at 151. The court unanimously concluded that the district court had properly exercised jurisdiction; however, each judge based that conclusion on a different theory. Id. Judges Sloviter and Becker agreed that jurisdiction could not be founded upon the express grant of ERISA. Id. at 151-54; id. at 164 (Sloviter, J., concurring). They also agreed that jurisdiction over the suit was authorized under the federal question statute, but upon different theories. Id. at 154-59; id. at 165-66 (Sloviter, J., concurring) (citing 28 U.S.C. § 1331(a) (1982)). Judge Fullam maintained that § 502 of ERISA provided jurisdiction. Id. at 166 (Fullam, J., concurring). For a discussion of Judge Becker's view of how the federal question statute provided jurisdiction, see infra notes 45-51 and accompanying text. For a discussion of Judge Sloviter's view of how the federal question statute provided jurisdiction, see infra notes 52-64 and accompanying text. For a discussion of Judge Fullam's view that § 502 of ERISA provided jurisdiction, see infra notes 65-66 and accompanying text.

46. 764 F.2d at 154 (quoting 28 U.S.C. § 1331 (1982)). Judge Becker noted that the Supreme Court in Illinois v. City of Milwaukee conclusively established that the federal question statute provided jurisdiction over "claims founded upon federal common law as well as those of a statutory origin." 764 F.2d at 154 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972)).

In Illinois, the state alleged that Milwaukee was causing a public nuisance by dumping raw sewage into Lake Michigan. 406 U.S. at 93. In examining the federal question statute as a possible basis for jurisdiction, the Supreme Court stated: "We see no reason not to give 'laws' its natural meaning . . . and therefore conclude that [federal question] jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." Id. at 100. The Court then noted that Congress had legislated extensively in the area of interstate water pollution, most specifically through the Federal Water Pollution Control Act. Id. at 101. Even though jurisdiction over the suit was not expressly authorized by the Act, the Supreme Court determined that there existed a federal common law of nuisance, separate from and co-existing with the statutory law, which governed the dispute. Id. at 106-07. The Supreme Court decided that the state's claim arose under this body of federal common law and, therefore, held that the federal question statute provided jurisdiction even in the absence of an express jurisdictional grant in the Federal Water Pollution Control Act. Id. at 107-08.

Judge Becker stated that under the rationale of Illinois, federal jurisdiction existed if the ILGWU Fund's claim arose under federal common law, even in the absence of an express jurisdictional grant in ERISA. 764 F.2d at 155 (citing Jersey Cent. Power & Light Co. v. Local Unions of the Int'l Bhd. of Elec. Workers, 508 F.2d 687, 699 (3d Cir. 1975) ("inasmuch as the EEOC agreement must be interpreted according to federal substantive [common] law, . . . the company's cause of action 'arises under' laws of United States.").), vacated and remanded on other grounds, 425 U.S. 987 (1976)).

Judge Becker conceded that a recent Supreme Court decision cast doubt on
eral common law of employee benefit plans that governed the dispute
the applicability of the Illinois rationale to ERISA cases. 764 F.2d at 155 (citing Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)). In Franchise Tax Board, a state taxing authority filed suit in state court seeking: (1) damages for a benefit trust fund’s failure to comply with tax levies and (2) a declaration that the tax board’s authority to levy taxes was not preempted by ERISA. 463 U.S. at 7. The benefit trust fund removed the case to federal court. Id. The district court denied the tax board’s motion for remand to the state court and then found for the tax board on the merits. Id. The benefit trust fund appealed, and the Ninth Circuit reversed. 679 F.2d 1307 (9th Cir. 1982). On appeal to the Supreme Court the tax board renewed its argument that the district court lacked jurisdiction over the action. 463 U.S. at 7. The Supreme Court noted that since there was no diversity of citizenship between the parties, removal jurisdiction would exist only if there would have been federal question jurisdiction over the action had it originally been brought in federal court. Id. at 7-8 (citing 28 U.S.C. § 1441 (1982)). The Court stated that under the well-pleaded complaint rule, a defendant may not remove a case to federal court unless the plaintiff’s complaint establishes that the case arises under federal law. Id. at 9-10 (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)). The Court also stated that a defendant may not establish federal jurisdiction by raising a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff’s complaint and both parties admit that the defense is the only question truly at issue. Id. at 12 (citing Gully v. First Nat’l Bank, 299 U.S. 109, 116 (1936)).

In applying these principles in Franchise Tax Board, the Court determined that since the law that created the plaintiff’s causes of action was state law, original federal question jurisdiction was unavailable “unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is ‘really’ one of federal law.” Id. at 13.

The Court concluded that neither of the state tax board’s claims involved a substantial question of federal law. Id. at 13-22. As for the state tax board’s first cause of action, the Court determined that a straightforward application of the well-pleaded complaint rule precluded original federal court jurisdiction because federal law became relevant only by way of the benefit trust fund’s defense of preemption. Id. at 13-14. The Court determined that the tax board’s second cause of action also was not removable because original federal jurisdiction would have been barred. Id. at 14-22 (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)). For a discussion of the rule of Skelly Oil, see infra note 51.

The Court then addressed the benefit trust fund’s alternative argument that the state tax board’s claims were, in substance, federal claims. 463 U.S. at 22. The Court noted that although it is true that “the party who brings a suit is master to decide what law he will rely upon,” it is also true that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. Id. at 22 (quoting The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)). The Court noted that if a federal cause of action completely preempts a state cause of action, any well-pleaded state claim that comes within the scope of the federal cause of action necessarily “arises under” federal law and federal question jurisdiction is therefore available. Id. at 22-24 (citing Avco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinists, 390 U.S. 557 (1968)). Seeking to come within this rule, the benefit trust fund argued that ERISA was meant to create a body of federal common law, and that “any state court action which would require the interpretation or application of ERISA to a plan document ‘arises under’ the laws of the United States.” 463 U.S. at 24 (quoting Brief for Appellees at 20-21). The Court conceded that any state action coming within the scope of one of ERISA’s causes of action might be removable to federal
between the ILGWU and Teamsters Funds.\textsuperscript{47} Noting that section 514(a) of ERISA provided for the preemption of "any and all state laws insofar as they . . . relate to any employee benefit plan"\textsuperscript{48} and relying on the Supreme Court's determination that Congress intended federal courts to create federal common law to regulate ERISA plans,\textsuperscript{49} Judge Becker concluded that the ILGWU Fund's complaint presented a claim that required the application of the federal common law of welfare funds
district court even if the plaintiff had pleaded an adequate state cause of action without reference to federal law. \textit{Id.} at 24. However, the Court concluded that, in this case, neither of the state tax board's claims came within the scope of one of ERISA's causes of action as set forth in § 502(a). \textit{Id.} at 24-27. In reaching this conclusion, the court stated:

\begin{quote}
ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision. \textit{Id.} at 27 (footnote omitted). The Court, therefore, vacated the judgment of the court of appeals and ordered that the case be remanded to the state court. \textit{Id.} at 28. \textit{See generally Note, Federal Jurisdiction Not Present When State Seeks Declaration That Federal Law Does Not Preempt State's Regulation, 62 WASH. U.L.Q. 307 (general discussion of \textit{Franchise Tax Board}).

Although he acknowledged that \textit{Franchise Tax Board} cast some doubt on his theory of jurisdiction, Judge Becker maintained that in \textit{Franchise Tax Board} the Supreme Court had not been presented with, and therefore had not considered, the possibility of jurisdiction based upon federal common law in accordance with \textit{Illinois}. 764 F.2d at 155-56. Judge Becker stated that the Court in \textit{Franchise Tax Board} determined only that the suit had not "arisen under" one of ERISA's causes of action as set forth in § 502 and not whether the suit had arisen under federal common law. \textit{Id.} Thus, he stated that \textit{Franchise Tax Board} had not foreclosed such a possibility in ERISA-related actions. \textit{Id.} at 156. Accordingly, Judge Becker concluded that if the ILGWU's claim arose under federal common law, there would be jurisdiction under the federal question statute. \textit{Id.}

\textbf{47.} \textit{Id.} Judge Becker noted that an action arises under federal law "if and only if the complaint seeks a remedy expressly granted by a federal law or if it requires the construction of a federal statute or a distinctive policy of a federal statute requires the application of federal legal principles for its disposition." \textit{Id.} at 157 (quoting \textit{Lindy v. Lynn}, 501 F.2d 1367, 1369 (3d Cir. 1974)). He therefore concluded that in order to determine whether the ILGWU's claim "arose under" federal law, it was necessary to first determine whether there existed a federal common law that governed the dispute between the two employee benefit plans. 764 F.2d at 157.


\textbf{49.} 764 F.2d at 157 (citing \textit{Alessi v. Raybestos-Manhattan, Inc.}, 451 U.S. 504 (1981)). Judge Becker noted that in \textit{Alessi}, the Supreme Court read § 514(a) of ERISA as indicating that Congress intended to establish exclusive federal control over pension plan regulation. 764 F.2d at 157. He further noted that in \textit{Franchise Tax Board}, the Supreme Court had stated that "the meaning and enforceability of provisions in a trust agreement . . . [come] within the class of questions for which Congress intended that federal courts create federal common law." \textit{Id.} (quoting 463 U.S. at 27).
authorized by section 514(a) of ERISA. Accordingly, Judge Becker reasoned that jurisdiction over the action was authorized by the federal question statute because the suit arose under the federal common law of ERISA-related employee benefit plans, which was part of the laws of the United States for the purposes of federal question jurisdiction.

50. 764 F.2d at 158. Judge Becker noted that the general preemption of state laws authorized by § 514(a) of ERISA is substantially qualified by the saving clause, which provides: "[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." Id. at 158 n.8 (quoting ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1982)). Although counsel had not raised the issue, Judge Becker explained that one could argue that state court decisions regarding "other insurance" provisions are laws which regulate insurance and, therefore, were intended to be saved from preemption. Id. Judge Becker stated that if state court decisions interpreting "other insurance" provisions were within the saving clause and thereby saved from preemption, federal common law would not apply and the suit would have to be dismissed for lack of jurisdiction. Id.

Judge Becker observed that the scope of the saving clause was then under review by the Supreme Court. Id. Without benefit of the Supreme Court's decision, Judge Becker concluded that state court decisions regarding "other insurance" provisions did not appear to be within the saving clause and were, therefore, intended by Congress to be preempted. Id.

In support of his conclusion, Judge Becker set forth three alternative arguments. Id. First, he stated that judge-made rules regarding the interpretation of insurance contracts were not the kind of state insurance regulations that Congress intended to save from preemption. Id. Second, he stated that the saving clause saves from preemption only those state laws which do not conflict with the policies or operation of ERISA. Id. (citing Attorney Gen. v. Travelers Ins. Co., 391 Mass. 730, 732, 463 N.E.2d 548, 550 (1984), aff'd sub nom. Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380 (1985)). Finally, Judge Becker indicated that when the state court decisions regarding "other insurance" provisions were applied to employee benefit plans, they were excluded from the operation of the saving clause by § 514(b)(2)(B) of ERISA. Id. (citing Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978)). Section 514(b)(2)(B) of ERISA, the deemer clause, is an exception to the saving clause which states in relevant part that no employee benefit plan "shall be deemed to be an insurance company or other insurer,... or to be engaged in the business of insurance... for purposes of any law of any state purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1982). Judge Becker indicated that the effect of the deemer clause is to preclude a state from subjecting an employee benefit plan to its general insurance laws. 764 F.2d at 158 n.8. Thus, Judge Becker concluded that state court decisions regarding "other insurance" provisions were not within the saving clause by virtue of the deemer clause when they were applied to employee benefit plans and, therefore, they were not saved from preemption. Id.

It is submitted that the pending Supreme Court decision noted by Judge Becker subsequently clarified the scope of the saving clause. See Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2390 (1985) (stating in dictum that state laws regulating insurance contracts that apply directly to benefit plans are exempt from saving clause by virtue of deemer clause and are, therefore, preempted). For a further discussion of Metropolitan Life and its impact on Judge Becker's analysis in ILGWU, see infra note 97.

51. Id. at 158. Before reaching this conclusion, Judge Becker noted that since the case was an action for declaratory judgment, he had to insure that the action did not violate the well-pleaded complaint rule. Id. Judge Becker stated
Although her reasoning was different, Judge Sloviter agreed with Judge Becker that the federal question statute provided jurisdiction.\(^{52}\) She stated that in *Franchise Tax Board v. Construction Laborers Vacation Trust*,\(^ {53}\) the Supreme Court had expressly rejected the view that federal question jurisdiction could be conclusively established in ERISA actions merely because federal common law provided the rule of decision.\(^ {54}\) She noted, however, that in *Franchise Tax Board*, the Court had not entirely precluded the possibility of federal question jurisdiction in ERISA actions.\(^ {55}\)

In the instant case, Judge Sloviter concluded that federal question jurisdiction existed over the ILGWU Fund’s declaratory judgment action for the following reasons. First, she noted that it had been long settled that an action does not arise under federal law for federal question jurisdiction purposes when federal law is merely raised as a defense. \(^{Id.}\) (citing Louisville & N. R.R. v. Mottley, 211 U.S. 149 (1908)). Judge Becker noted that, consistent with this requirement, the Supreme Court had held that federal question jurisdiction over a declaratory judgment action does not exist, where the plaintiff’s federal claim is based on what would normally be a defense. \(^{Id.}\) at 158 (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950)). Judge Becker explained that the rule of *Skelly Oil* was based on the Supreme Court’s conclusion that Congress did not intend for the Federal Declaratory Judgment Act to extend the jurisdiction of the federal courts. \(^{Id.}\) (citing 28 U.S.C. § 2201 (1982)). Judge Becker indicated that the rule of *Skelly Oil* precludes federal jurisdiction over a case where the plaintiff seeks a declaration that state law is not preempted by federal law. \(^{Id.}\) at 158-59 (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13-22 (1983); *Public Serv. Comm’n v. Wycoff Co.*, 343 U.S. 237 (1952)). In contrast, he noted that federal jurisdiction is not precluded by *Skelly Oil* where a plaintiff seeks a declaration that a state law is preempted by federal law. 764 F.2d at 158-59 (citing *Shaw v. Delta Airlines*, 463 U.S. 85, 96 n.14 (1983); *Stone & Webster Eng’g Corp. v. Ilsley*, 690 F.2d 323, 326-27 (2d Cir. 1982), aff’d sub nom. *Arcudi v. Stone & Webster Eng’g Corp.*, 463 U.S. 1220 (1983)). For a further discussion of *Shaw*, see infra notes 56-64 and accompanying text. \(^{See generally 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2767 (2d ed. 1983)}\) (discussing question whether an action for declaratory judgment comes within federal question jurisdiction).

Judge Becker concluded that although the scope of the *Skelly Oil* holding is unclear, it did not bar the ILGWU Fund’s declaratory judgment action. \(^{764 F.2d at 159}\). In support of this conclusion, Judge Becker stated that the ILGWU Fund’s complaint directly invoked federal law in an effort to obtain affirmative relief. \(^{Id.}\) Even if the complaint had been fashioned as a request for an injunction or as an action for damages, Judge Becker stated, it would have implicated federal common law, and, therefore, there would still have been federal jurisdiction. \(^{Id.}\) Finally, Judge Becker noted that the scope of federal jurisdiction over ERISA-related actions would be only minimally expanded by virtue of his jurisdictional analysis because the vast majority of ERISA cases fall within the express jurisdictional provisions of § 502 of ERISA. \(^{Id.}\) He concluded that by finding federal question jurisdiction for the unusual case, such as *ILGWU*, which does not come within § 502, the court would promote certainty and uniformity by having federal courts decide issues of federal common law. \(^{Id.}\)

\(^{52}\) 764 F.2d at 165 (Sloviter, J., concurring).


\(^{54}\) 764 F.2d at 165.

\(^{55}\) Id. Judge Sloviter noted that although the court in *Franchise Tax Board* did not find federal question jurisdiction over the suit brought by the state tax-
question jurisdiction existed over the ILGWU claim by virtue of the Supreme Court's decision in *Shaw v. Delta Airlines*, in which the Court held that federal question jurisdiction extended to suits brought by employers seeking to invalidate certain state law benefit requirements on the grounds that they were preempted by ERISA. Judge Sloviter reconciled *Shaw* and *Franchise Tax Board* by noting the significant difference between the interests at stake in the underlying suits. She concluded that where, as in *Shaw*, the plaintiffs were responsible for paying benefits under an ERISA plan and their claims related to their enforcement or payment responsibilities, jurisdiction would be found under the federal question statute. In contrast, she explained that where, as in *Franchise Tax Board*, the plaintiffs' claims were only tangential to their enforcement or payment responsibilities, the federal question statute would not provide jurisdiction. Judge Sloviter then concluded that because the ILGWU Fund was responsible for the payment of benefits under the terms of its plan, there was federal ques-

56. 463 U.S. 85 (1983). In *Shaw*, the corporate plaintiffs brought a declaratory judgment action in federal court seeking a judgment that the New York Human Rights law and the New York Disability Benefits Law were preempted by ERISA. *Id.* at 92. The challenged state laws required employers to pay sick leave benefits to employees who were unable to work because of pregnancy. *Id.* at 90. The plaintiffs had welfare benefit plans subject to ERISA, which did not provide employees such benefits during pregnancy. *Id.* at 92. If the state laws were not preempted by ERISA, the plaintiffs would have been required to provide additional benefits to comply with the state laws. *See id.* at 88-89.

57. 764 F.2d at 165 (Sloviter, J., concurring). Judge Sloviter stated that, in *Shaw*, the Supreme Court decided that the federal question statute provided jurisdiction because the plaintiff's were "companies subject to ERISA regulation" who sought "injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute." *Id.* (quoting *Shaw*, 463 U.S. at 96 n.14). For a discussion of Judge Becker's views regarding the Supreme Court's basis for jurisdiction in *Shaw*, see *infra* note 101.

58. 463 U.S. 85 (1983) (finding federal question jurisdiction over declaratory judgment action brought by employers with ERISA plans seeking declaration that state laws regarding employee benefits are preempted by ERISA).

59. 463 U.S. 1 (1983) (finding no federal question jurisdiction over suit brought by state taxing authority seeking declaration that its right to levy taxes on benefit fund is not preempted by ERISA).

60. 764 F.2d at 166 (Sloviter, J., concurring). Judge Sloviter noted that *Shaw and Franchise Tax Board* were decided on the same day and, therefore, that they should be read together. *Id.* at 165-66.

61. *Id.* For a further discussion of the plaintiff's claims in *Shaw*, see *supra* note 56.

62. 764 F.2d at 166 (Sloviter, J., concurring). For a further discussion of the plaintiff's claims in *Franchise Tax Board*, see *infra* notes 100-01.

63. 764 F.2d at 166 (Sloviter, J., concurring). Judge Sloviter noted that the...
tion jurisdiction over the ILGWU Fund's claim in accordance with Shaw. 64

Rendering yet another theory of jurisdiction, Judge Fullam stated that federal jurisdiction could be predicated upon the express jurisdictional grant of ERISA. 65 Because the court had express jurisdiction over Mrs. Fazio's original claim and because no one intended to deprive the court of jurisdiction, Judge Fullam concluded that section 502 of ERISA provided jurisdiction, regardless of whether the action was maintained in the name of a plan beneficiary, or in the name of the personal representative, assignee, or subrogee of the beneficiary. 66

instant suit was originally brought by a participant and beneficiary of the respective plans in order to recover benefits. Id. She concluded that the mere fact that the ILGWU Fund had agreed to pay Mrs. Fazio's claim and then sue the Teamsters Fund to recover the benefits, had not fundamentally changed the character of the action. Id.

64. Id. Judge Becker disagreed with Judge Sloviter's theory of how the federal question statute provided jurisdiction over the ILGWU Fund's claim in light of Franchise Tax Board and Shaw. Id. at 156 n.7. Judge Becker stated that the Supreme Court distinguished the two cases by noting that Franchise Tax Board was a case "seeking a declaration that state laws were not preempted by ERISA." Id. at 157 n.7 (quoting Shaw, 463 U.S. at 96 n.14 (emphasis in original)). Judge Becker stated that, in Franchise Tax Board, the Court held that federal question jurisdiction did not arise over such a claim in part because it violated the rule of Skelly Oil. Id. For a further discussion of Judge Becker's reasoning concerning the jurisdictional issue and the rule of Skelly Oil, see supra note 51. Judge Becker noted that, in contrast to Franchise Tax Board, the claim in Shaw sought a declaration that state laws "are preempted by ERISA." Id. (quoting Shaw, 463 U.S. at 96 n.14 (emphasis in original)). Judge Becker stated that the Shaw court held that the plaintiff's preemption claim clearly presented a federal question because it directly implicated the supremacy clause of the Constitution. Id. Judge Becker therefore concluded:

The claim in Shaw was thus held to be jurisdictional under [the federal question statute], not because of the strength of the plaintiff's ERISA claim, as Judge Sloviter would have it, but because it was a preemption claim arising under the Constitution. . . . But, because Shaw relied on the Supremacy Clause as the basis for jurisdiction over a pre-emption claim, and there is no pre-emption issue in the case before us, Shaw does not provide a specific rationale for [federal question] jurisdiction here.

Id.

65. Id. at 166 (Fullam, J., concurring). Judge Fullam explained that in the original action brought by Mrs. Fazio, each of the defendant plans had had the right to attempt to shift liability to the other, whether by way of contribution, indemnity, or declaratory judgment. Id. He stated that § 502 plainly provided jurisdiction over all aspects of the original controversy. Id. at 166-67 (Fullam, J., concurring). Accordingly, Judge Fullam indicated that the federal question jurisdictional issue did not need to be addressed. Id. at 167 (Fullam, J., concurring). Judges Becker and Sloviter disagreed with Judge Fullam's conclusion that § 502 of ERISA provided jurisdiction. Id. at 154. For a discussion of Judge Becker's theory of federal jurisdiction, see supra notes 46-51 and accompanying text. For a discussion of Judge Sloviter's theory of federal jurisdiction, see supra notes 52-64 and accompanying text.

66. Id. Since there was jurisdiction over the original action brought by Mrs. Fazio, Judge Fullam stated that it was necessary to decide whether the proce-
Turning to the merits of the case, the court noted that the conflict between the "other insurance" provisions presented an issue of first impression under the federal common law of benefit plans covered by ERISA. Borrowing from state common law, the court formulated a two-pronged analysis for resolving disputes concerning the coverage of overlapping employee benefit plans. First, the Third Circuit stated that the courts should uphold the intent of the trustees of the competing benefit plans by enforcing the "other insurance" provisions if the provisions are compatible. Second, the court stated that the provisions of a benefit plan should be enforced only if they do not conflict with the laws and policies of ERISA.

Applying this analysis, the court first tried to discern the intent of the trustees of each plan by examining the "other insurance" provisions. The court noted that the excess clause in the Teamsters plan purported to shift primary liability for Mrs. Fazio's bills to the ILGWU plan if the ILGWU plan provided Mrs. Fazio with any coverage. The court observed, however, that the escape clause in the ILGWU plan pur-

67. For a discussion of the basis for the federal common law of benefit plans, see supra notes 46-51 and accompanying text.

68. 764 F.2d at 159. The Court recognized that this type of dispute was a common occurrence in the insurance industry and was the subject of extensive state common law jurisprudence and, therefore, the court looked to state common law for guidance. Id.

69. Id. The general rule under state common law treatment of insurance clauses is that "the liability of insurers under overlapping coverage policies is to be governed by the intent of the insurers as manifested by the terms of the policies which they have issued." 16 COUCH ON INSURANCE 2d § 62:44 at 480 (rev'd ed. 1983); see, e.g., Starks v. Hospital Serv. Plan, 182 N.J. Super. 342, 351, 440 A.2d 1353, 1358 (App. Div. 1981) ("the judicial task is first to determine from the contracts themselves what obligations the respective obligors intended to assume") aff'd, 91 N.J. 433, 453 A.2d 159 (1982).

70. 764 F.2d at 159. The second inquiry under state common law regarding competing insurance clauses is to determine whether the enforcement of a clause would be against public policy. 8A C. APPLEMAN, supra note 11, § 4907.65 at 367 ("where such contractual provisions are not inconsistent with public policy, they will be enforced"). The Third Circuit accepted ERISA as the source of public policy concerning employee benefit plans. See 764 F.2d at 159.

71. Id. at 160-61. For the text of the other insurance provisions in these policies, see supra notes 23-26.

72. Id. at 161. The pertinent provision in the Teamsters plan indicated that if "an individual is covered" by another group insurance plan, and that plan covers "the patient directly, rather than as an employee's dependent," then that plan is the primary insurer and the Teamsters Fund is the excess insurer. Id. at
ported to provide coverage only if the Teamsters plan did not. Based on the language of the plans' "other insurance" provisions, the court concluded that the provisions were plainly incompatible and, therefore, provided no basis for determining which plan should provide coverage.

In applying the second prong of its analysis, the court again relied on state common law, this time reviewing judicial treatment of escape clauses in insurance contracts. The court observed that, when faced with a conflict between an excess clause and an escape clause, the majority of state courts have held that excess clauses should prevail. The

160. For the complete text of the Teamsters plan's Coordination of Benefits provision, see supra note 25.

73. 764 F.2d at 161. The "Exception to Eligibility" clause of the ILGWU plan indicated that the ILGWU Fund intended to escape all liability whenever a participant or beneficiary was covered by his or her spouse's group insurer, if less than 50% of the cost of such coverage was paid for by the insured. Id. For the complete text of the ILGWU plan's "Exception to Eligibility" clause, see supra note 23. The parties stipulated to the fact that the entire cost of Mr. Fazio's coverage was paid for by his employer. 764 F.2d at 161 n.12. Thus, Mrs. Fazio came within the "Exception to Eligibility" clause. Id.

74. 764 F.2d at 161. The court noted that in light of the two "other insurance" provisions, each plan, in effect, intended to provide primary coverage unless the other plan provided primary coverage. Id.

75. Id. at 162. The court focused its analysis on the ILGWU Fund's escape clause because the Teamsters Fund claimed that this clause conflicted with the laws and policies of ERISA. Id. at 150. The court did not analyze the Teamsters Fund's excess clause because the ILGWU Fund had not challenged its validity. Id. at 162 n.13. Moreover, the court noted that there was nothing on the face of the Teamsters' excess provision to indicate that the Teamsters' trustees had violated ERISA. Id.

76. Id. at 162. Some state courts, when faced with a conflict between an excess and an escape clause, have relied on both contract principles and public policy considerations to hold that the excess clause prevails. See, e.g., Insurance Co. of N. Am. v. Continental Casualty Co., 575 F.2d 1070 (3d Cir. 1978) (court refuses to enforce escape clause over excess clause in order to fully protect insured up to total coverage of both policies); Rocky Mountain Fire & Casualty Co. v. Allstate Ins. Co., 107 Ariz. 227, 485 P.2d 552 (1971) (escape clause unenforceable as violative of public policy); Grasberger v. Liebert & Obert, Inc., 335 Pa. 491, 6 A.2d 925 (1939) (since policy with excess clause does not cover insured's primary loss, policy with escape clause must be primary insurer). Other state courts when faced with incompatible "other insurance" clauses have declared the clauses to be "mutually repugnant" and have held both insurers primarily liable for the insured's loss on a pro-rata basis. See, e.g., Union Ins. Co. v. Iowa Hardward Mut. Ins. Co., 175 N.W.2d 413 (Iowa 1970); Cotton v. Associated Indem. Corp., 200 So.2d 75 (La. App.), cert. denied, 251 La. 71, 203 So.2d 88 (1967).

The Third Circuit doubted whether a state court could conclude that an excess clause was controlling simply from contract principles. Id. at 162 n.14. The court noted that those state courts that purportedly had relied on contract analysis in finding that the excess clause prevailed had reached their conclusions by starting from the premise that the policy with the excess clause does not cover the insured's primary loss. Id. The court explained that this premise begs the question because the policy with the excess clause does not cover the insured's primary
Third Circuit recognized that the policy underlying these decisions was to ensure that people do not lose the level of coverage that they reasonably expect to receive under their own insurance policy merely because their insurer has attempted to shift liability to another policy, which may contain terms that are less favorable to the insured.77 With this policy in mind, the court proceeded to determine whether “other insurance” clauses violate the provisions and policies of ERISA and are, therefore, unenforceable.78 The court explained that the responsibility for administering a plan rests with the plan’s trustees, who are required to act in accordance with ERISA’s standard of fiduciary conduct.79 The court stated that under that standard, a decision by plan trustees to deny benefits to participants or beneficiaries is valid unless it was arbitrary and capricious.80

loss only if the policy with the escape clause does. But the escape clause, of course, purports to deny coverage to the insured in the presence of the other policy. It may be that in terms solely of contract principles the proper conclusion when faced with a conflict between two such clauses is to hold that they are incompatible.

Id.

77. Id. at 162 (citing Insurance Co. of N. Am. v. Continental Casualty Co., 575 F.2d 1070, 1074 n.6 (3d Cir. 1978)).
78. Id. at 162.
79. Id. Regarding the fiduciary duty of trustees, ERISA provides in pertinent part that
a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
(A) for the exclusive purpose of:
   (i) providing benefits to participants and their beneficiaries;
and
   (ii) defraying reasonable expenses of administering the plan;
(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 . . .
80. 764 F.2d at 163 (citing Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984)). In Struble, the Third Circuit discussed the different standards to which fiduciaries are held under ERISA. 732 F.2d at 332-34. The Struble court noted that ERISA requires that all fiduciaries act "solely in the interest of the participants and beneficiaries" (the "duty of loyalty") and with the "care, skill, prudence, and diligence" of a prudent man acting in like circumstances (the "duty of care"). Id. at 392-93 (quoting ERISA § 404(a), 29 U.S.C. § 1104(a) (1982)). The Struble court stated that a decision by trustees to deny benefits to particular claimants meets the ERISA standards unless that decision is "arbitrary and capricious." Id. at 393. The "arbitrary and capricious" standard is derived from § 302(c)(5)(B) of the Labor Management Relations Act. Id. (citing 29 U.S.C. § 186(c)(5)(B) (1982)). Since ILGWU involved the denial of benefits to a particular claimant, the Third Circuit applied the "arbitrary and capricious" standard to assess the fiduciary's decision. 764 F.2d at 163.

The court recognized that trustees are required to strike a balance between the interests of present beneficiaries and the interests of future beneficiaries. Id. at 163 (citing Edwards v. Wilkes-Barre Publishing Co. Pension Trust, 757 F.2d
In determining whether the incorporation of escape clauses in benefit plans constituted arbitrary and capricious conduct, the court first noted that an important congressional policy underlying ERISA was to insure that employees enrolled in a benefit plan receive all the compensation that they reasonably anticipated under the plan’s purported coverage.\(^{\text{81}}\) The court observed that escape clauses, unlike excess clauses, purport to shift all liability to an alternative plan and do not allow a participant to return to his original plan for the difference in coverage.\(^{\text{82}}\) The court reasoned, therefore, that an employee covered by a plan with an escape clause would lose coverage under his original plan if he happened to be covered under another benefit plan, even if the benefits he is entitled to receive under the other plan are much less favorable than those of his original plan.\(^{\text{83}}\) Such a loss of coverage, the court stated, would be a denial of reasonably anticipated benefits, contravening the congressional policy underlying ERISA.\(^{\text{84}}\) Accordingly, the court held that escape clauses in ERISA-covered employee benefit plans reflect arbitrary and capricious conduct by the trustees and are, therefore, unenforceable as a matter of law.\(^{\text{85}}\)

52, 56 (3d Cir.), cert. denied, 106 S. Ct. 130 (1985)). In Edwards, beneficiaries of a retirement plan, filed suit to compel a recalculation of their pension benefits. \(\text{id.}\) at 54. The court, realizing that any increase in benefits to this group of beneficiaries would result in less money being available for other beneficiaries, held that the trustees had not acted in an arbitrary and capricious manner. \(\text{id.}\) at 58. The court stated that “trustees are under no obligation to interpret the Plan in such a way as to benefit any particular group of beneficiaries to the detriment of others, and the mere fact that they choose not to do so is not, standing alone, any indication of arbitrary or capricious conduct.” \(\text{id.}\) at 57. Based on this reasoning, the ILGWU court concluded that an “other insurance” clause in an ERISA-covered benefit plan is enforceable unless it reflects arbitrary and capricious judgment by the plan’s trustees. 764 F.2d at 163.

81. \(\text{id.}\) (quoting ERISA § 2(a), 29 U.S.C. § 1001(a) (1982)). For the text of Congress’ declaration of policy supporting ERISA, see supra note 3 and accompanying test.

82. 764 F.2d at 163. For a further discussion of excess and escape clauses, see supra note 11.

83. 764 F.2d at 163. The court acknowledged that a participant or beneficiary who was enrolled in a benefit plan containing an escape clause could protect himself by declining to participate in a plan with inferior coverage. \(\text{id.}\) at 164 n.16. The court believed, however, that given the complexity of “other insurance” law, most participants would not make informed choices but would instead become eligible for benefits from overlapping plans without realizing the potential problems until one plan refused to pay for costs apparently within its coverage. \(\text{id.}\)

84. \(\text{id.}\) at 163.

85. \(\text{id.}\) at 164. The court recognized that if escape clauses were enforceable, trustees who incorporated such clauses would be able to defer liability to other plans and might be able to use the money saved to provide their participants and beneficiaries with better coverage. \(\text{id.}\) at 163-64 n.16. The court stated, however, that “trustees may not, consistent with their fiduciary responsibilities, sacrifice the welfare of some participants—who find that they are entitled only to the inferior coverage provided by another plan—in order to benefit other participants and beneficiaries.” \(\text{id.}\) at 164 n.16.
After finding the escape clause unenforceable, the court determined that the incompatibility between the two plans had disappeared.\textsuperscript{86} The court then determined that the ILGWU plan was liable for Mrs. Fazio's medical expenses under both its own terms and the terms of the Teamsters plan.\textsuperscript{87} Accordingly, the court reversed the district court's judgment and remanded the case with directions to enter judgment in favor of the Teamsters Fund.\textsuperscript{88}

In reviewing the court's jurisdictional analysis, it is submitted that the Third Circuit correctly refused to follow the liberal interpretations of section 502 adopted by the Seventh\textsuperscript{89} and Ninth Circuits.\textsuperscript{90} Instead,

\textsuperscript{86} Id. at 161.

\textsuperscript{87} Id. at 164. With the escape clause in the ILGWU plan unenforceable, the remaining provisions of the plan provided primary coverage. \textit{Id.} at 161. The Teamsters plan, with its excess clause intact, provided secondary or excess insurance in the face of the primary coverage afforded by the ILGWU plan. \textit{Id.} at 164. For the relevant text of the ILGWU plan, see supra note 23. For the relevant text of the Teamsters plan, see supra note 25.

\textsuperscript{88} 764 F.2d at 164.

\textsuperscript{89} International Ass'n of Bridge, Structural and Ornamental Iron Workers Local No. 111 v. Douglas, 646 F.2d 1211 (7th Cir.), \textit{cert. denied}, 454 U.S. 866 (1981). For a discussion of \textit{Iron Workers}, see supra note 37. In \textit{Iron Workers}, the Seventh Circuit made no attempt to reconcile its holding that a labor union had standing to sue under § 502(a)(1)(B) of ERISA with the fact that the express words of the statutory provision do not include unions among the persons or entities that are entitled to bring suit. \textit{See} 646 F.2d at 1214.

\textsuperscript{90} Fentron Indus. v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982). For a discussion of \textit{Fentron}, see supra note 37. The Second Circuit has expressly rejected the jurisdictional analysis followed in \textit{Fentron}. \textit{See} \textit{Pressroom} Unions-Printers League Income Sec. Fund v. Continental Assurance Co., 700 F.2d 889, 892 (2d Cir.), \textit{cert. dismissed}, 463 U.S. 1293, \textit{cert. denied}, 464 U.S. 845 (1983). In \textit{Pressroom}, a pension fund sued officers and stockholders of a consulting firm which allegedly caused the pension fund to enter into insurance contracts at exorbitant rates. \textit{Id.} at 891. Jurisdiction over the action was predicated on § 502 of ERISA. \textit{Id.} After noting that the jurisdictional provisions of ERISA do not expressly authorize a pension fund to assert a cause of action, the court rejected the pension fund's argument that jurisdiction over the action nevertheless existed in accordance with the Ninth Circuit's decision in \textit{Fentron}. \textit{Id.} at 891-92. In \textit{Pressroom}, the Second Circuit agreed with the Ninth Circuit that the legislative history was silent as to whether Congress intended to grant federal jurisdiction over suits by parties not specified in § 502. \textit{Id.} at 892. The Second Circuit, however, chose to read that silence as indicating that federal jurisdiction did not, rather than did, exist. \textit{Id.} Accordingly, the \textit{Pressroom} court dismissed the action for lack of subject matter jurisdiction. \textit{Id.} at 893.

The Second Circuit again criticized the \textit{Fentron} analysis in \textit{Tuvia Convalescent Center v. National Union of Hosp. & Health Care Employees}, 717 F.2d 726 (2d Cir. 1983). In that case a nursing home brought suit against an employee welfare benefit plan and its trustees alleging that the trustees had violated their fiduciary duties. \textit{Id.} at 727-28. The nursing home, relying on \textit{Fentron}, claimed that it had standing to sue under § 502 of ERISA by virtue of its status as an employer. \textit{Id.} at 730. Relying on \textit{Pressroom}, the Second Circuit again refused to follow \textit{Fentron} and dismissed the suit for lack of jurisdiction. \textit{Id.} at 730 (citing \textit{Pressroom}, 700 F.2d 889; \textit{Fentron}, 674 F.2d 1300).

Subsequently, the Ninth Circuit declined an opportunity to expand the scope of \textit{Fentron}. \textit{See} \textit{Chase v. Trustees of W. Conference of Teamsters Pension
the court appropriately recognized that the federal courts are courts of limited jurisdiction and focused on whether Congress intended to grant, rather than preclude subject matter jurisdiction over suits brought by parties not listed in section 502.91 Because section 502 of ERISA does not expressly authorize jurisdiction over an action brought by a pension fund and because there is no indication in the legislative history of ERISA that Congress intended to grant jurisdiction over such an action,92 it is suggested that the Third Circuit correctly concluded that the jurisdictional provisions of ERISA did not authorize federal jurisdiction over the ILGWU Fund’s claim.

Because the procedures suggested by the district court inadvertently deprived the parties of jurisdiction pursuant to ERISA,93 it is suggested that the Third Circuit was eager to find alternative grounds for federal jurisdiction over the action. In comparing each judge’s theory of

Trust Fund, 753 F.2d 744, 748 (9th Cir. 1985). In Chase, a suit was brought by approximately one hundred taxi-cab drivers for restitution of funds paid to a pension fund. Id. at 746. The Chase court noted that the plaintiff in Fentron was a single, undivided corporate entity while the plaintiffs in Chase comprised only a part of a larger corporate entity. Id. at 748. For this reason the court declined to apply the Fentron analysis and instead remanded the action to the district court with directions to consider whether the plaintiffs could be considered participants of the trust and therefore entitled to sue under ERISA. Id. By refusing to apply the Fentron analysis in Chase, it is suggested that the Ninth Circuit may have indicated its reluctance to rely on Fentron and at least indicated that it intends to construe the Fentron holding narrowly.

91. See, e.g., Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co., 700 F.2d 889, 892 (2d Cir.), cert. dismissed, 463 U.S. 1233, cert. denied, 464 U.S. 845 (1983). For a discussion of Pressroom, see supra note 90. In rejecting the pension fund’s argument that federal jurisdiction over the action existed despite the lack of an express grant of jurisdiction in ERISA, the Second Circuit stated: “[i]t is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that courts are not to infer a grant of jurisdiction absent a clear legislative mandate.” 700 F.2d at 892 (citing Rice v. Railroad Co., 66 U.S. (1 Black) 358, 374 (1862); Dalehite v. United States, 346 U.S. 15, 30-31 (1953)). After determining that there was no evidence that Congress intended to grant jurisdiction over the pension fund’s claim, the court dismissed the action. Id. at 893.

Additionally, in Franchise Tax Board, the Supreme Court impliedly affirmed the Second Circuit’s strict reading of § 502 of ERISA. See 463 U.S. 1. In remanding the state taxing authority’s suit to the state court for lack of jurisdiction, the Supreme Court stated that “ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case.” Id. at 27. For a further discussion of Franchise Tax Board, see supra note 46.


93. For a discussion of the procedures followed in the district court, see supra note 20 and accompanying text.
federal jurisdiction, it is submitted that Judge Becker's view is the most sound.94 Judge Sloviter disagreed with Judge Becker's view that the federal question statute provides jurisdiction over ERISA actions when the plaintiff's claims arise under federal common law, because she believed that the Supreme Court had expressly rejected that possibility in Franchise Tax Board.95 However, in Franchise Tax Board, the Court determined that a defendant could not establish removal jurisdiction over the plaintiff's state law claims, in part because the plaintiff's claims did not arise under one of ERISA's causes of action. The Court did not address the issue of whether original federal question jurisdiction is available when a plaintiff's claims arise under the federal common law developed pursuant to ERISA.96 It is submitted, therefore, that Franchise Tax Board did not foreclose such a possibility and that federal question jurisdiction existed over the ILGWU Fund's claim because it arose under federal common law.97

94. For a discussion of Judge Becker's theory of federal jurisdiction, see supra notes 45-51 and accompanying text.
95. 764 F.2d at 165 (Sloviter, J., concurring). For a discussion of Franchise Tax Board and Judge Becker's view on how Franchise Tax Board could be distinguished, see supra note 46. Judge Sloviter supported her position by stating:

Judge Becker's broad view that merely because federal common law supplies the rule of decision, there is "arising under" jurisdiction under 28 U.S.C. § 1331 was before the Supreme Court and expressly rejected in Franchise Tax Board v. Construction Laborers Vacation Trust. The Court stated that, "CLVT [the state tax board] (sic) argues by analogy that ERISA . . . was meant to create a body of federal common law, and that "any state court action which would require the interpretation or application of ERISA to a plan document 'arises under' the laws of the United States." The Court concluded, however, that this did not suffice to create federal subject matter jurisdiction.

764 F.2d at 165 (Sloviter, J., concurring) (citations omitted). However, in Franchise Tax Board, "CLVT" was not the state tax board, as Judge Sloviter indicated, but was rather the defendant benefit trust fund who was seeking to establish removal jurisdiction. See 463 U.S. at 4-5. It is submitted, therefore, that the Court in Franchise Tax Board was not presented with the issue of whether federal question jurisdiction is available when a plaintiff's claims arise under the federal common law developed pursuant to ERISA.
96. For a discussion of Franchise Tax Board, see supra note 46.
97. A Supreme Court case decided after ILGWU supports Judge Becker's conclusion that the applicable state law was preempted and that federal common law governed the dispute. See Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380 (1985). For a discussion of Judge Becker's reasoning on this issue, see supra notes 45-51 and accompanying text.

In Metropolitan Life, the Massachusetts Attorney General sued several insurance companies to enforce a state law which required insurers to include certain minimum health care benefits in their general insurance policies. Id. at 2386. The insurance companies claimed that the state law was preempted by ERISA. Id. at 2385. In reviewing the applicable statutory provisions of ERISA, the Court explained that ERISA contains a broad preemption provision, which declares that the federal statute shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Id. (quoting ERISA § 514(a), 29 U.S.C. § 1144(a)(1982)). The Court stated that the general preemption provision of § 514(a) was substantially qualified by the saving clause
It is submitted that support is lacking for Judge Sloviter's view that found in § 514(b)(2)(A), which provides that, with one exception, nothing in ERISA “shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.” *Id.* at 2385-86 (quoting ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1982)). The court further explained that the one exception to the saving clause is found in § 514(b)(2)(B), the deemer clause, which provides that no employee benefit plan “shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.” *Id.* at 2386 (quoting ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1982)). In *Metropolitan Life*, the insurers argued that the mandated benefits law was a law that “relate[s] to” an employee benefit plan and was, therefore, preempted by § 514(a) of ERISA. *Id.* at 2385 (quoting ERISA § 514(a), 29 U.S.C. § 1144(a) (1982)). The Commonwealth argued that its mandated benefits law was a “law . . . which regulates insurance” within the meaning of the saving clause, and was, therefore, saved from the general preemption clause of ERISA. *Id.* at 2386 (quoting ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1982)).

The Supreme Court determined that the state mandated benefits law fell within the scope of the general preemption clause of § 514(a), and then considered whether the law nevertheless was saved from preemption by the saving clause of § 514(b)(2)(A). 105 S. Ct. at 2389. In determining the relationship between these provisions the Court observed:

> The two pre-emption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.

*Id.* (footnote omitted). The Court stated that because the mandated benefits law regulated the terms of certain insurance contracts, it seemed to be saved from preemption based on the plain meaning of § 514(b)(2)(A), as a law “which regulates insurance.” *Id.* at 2390 (quoting ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1982)). Additionally, the Court looked beyond the plain meaning of the statute to the McCarran-Ferguson Act's definition of “business of insurance” in order to determine the intent of Congress when it drafted ERISA. *Id.* at 2391 (citing 15 U.S.C. §§ 1011-1015 (1982) (providing for the continued regulation and taxation of the business of insurance by the states)). The Court stated that the Act strongly supported the conclusion that regulations regarding the substantive terms of insurance contracts are squarely within the saving clause as laws “which regulate insurance.” *Id.* at 2391. Because of the plain language of the saving clause and the traditional understanding of insurance regulations as evidenced by the McCarran-Ferguson Act, the Court concluded that the state-mandated benefits law was saved from preemption by the operation of the saving clause. *Id.* at 2391-92. The Court stressed that nothing in the language, structure, or legislative history of ERISA supported a narrow reading of the saving clause, and the Court, therefore, declined to impose any limitations on the savings clause beyond those imposed in the clause itself. *Id.* at 2393.

In *ILGWU*, Judge Becker noted that, although the parties had not raised the issue, one could argue that state laws regarding “other insurance” provisions are laws “which [regulate] insurance” and are therefore saved from preemption. 764 F.2d at 158 n.8. Without benefit of the Supreme Court's subsequent decision in *Metropolitan Life*, Judge Becker concluded that the saving clause was inapplicable in *ILGWU* and, therefore, that the state laws were preempted by...
§ 514(a) by ERISA. \textit{Id.} For a discussion of Judge Becker's reasoning regarding the inapplicability of the saving clause, see \textit{supra} note 50.

Examining Judge Becker's reasoning in light of the subsequent \textit{Metropolitan Life} decision, it is submitted that although his ultimate conclusion remains sound, only one of his three supporting arguments is valid. Judge Becker's first contention that judge-made rules concerning the interpretation of insurance contracts are not within the saving clause is contradicted by \textit{Metropolitan Life} and ERISA itself. \textit{See Metropolitan Life,} 105 S. Ct. 2380, 2389-93; \textit{see also} ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1) (1982) (defining "state laws" for purposes of the preemption provisions as including "all laws, decisions, rules, regulations, . . . of any state"). It is submitted that this definition communicates Congress' intent to subject state decisional laws to the preemption provisions of § 514. It is also submitted that applying the criteria set forth in \textit{Metropolitan Life}, state laws regarding other insurance provisions are laws "which [regulate] insurance" within the meaning of the saving clause. \textit{See Metropolitan Life,} 105 S. Ct. 2389-93. In \textit{Metropolitan Life}, the Supreme Court relied on the McCarran-Ferguson Act's definition of "business of insurance" to determine the scope of ERISA's saving clause. 105 S. Ct. at 2391. The Court stated:

\begin{quote}
Congress was concerned [in the McCarran-Ferguson Act] with the type of state regulation that centers around the contract of insurance. . . . The relationship between the insurer and insured, the type of policy which could be issued, its reliability, its interpretation, and enforcement—these were the core of the 'business of insurance.' [T]he focus [of the statutory term] was on the relationship between the insurance company and the policy holder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the 'business of insurance.'
\end{quote}

\textit{Id.} (quoting SEC v. National Sec., Inc., 393 U.S. 453, 460 (1969) (emphasis added)). It is suggested that state laws regarding "other insurance" provisions likewise center around the contract of insurance by deciding issues of policy interpretation and enforcement and, therefore, are laws "which [regulate] insurance" within the meaning of the saving clause.

Judge Becker's second contention that the saving clause saves from preemption only those state laws which do not conflict with the policies or operation of ERISA was expressly rejected in \textit{Metropolitan Life}. 105 S. Ct. at 2393 (refusing to adopt Supreme Judicial Court of Massachusetts's interpretation that saving clause saves from preemption only those laws unrelated to substantive provisions of ERISA).

It is submitted that Judge Becker's conclusion that the saving clause was inapplicable in \textit{ILGWU} remains valid after \textit{Metropolitan Life} because, as Judge Becker finally contended, the deemer clause exempts state laws regarding "other insurance" provisions from the operation of the saving clause when the state laws are applied directly to employee benefit plans. \textit{See Metropolitan Life,} 105 S. Ct. at 2390 (stating that deemer clause exempts from saving clause all state laws regulating insurance contracts when state laws apply directly to benefit plans). Because the state laws regarding "other insurance" provisions in \textit{ILGWU} were to be applied directly to the competing benefit plans in order to resolve the dispute, it is submitted that Judge Becker was correct in determining that the deemer clause exempts these laws from the operation of the saving clause. Consequently, it is submitted that Judge Becker properly determined that these state laws are preempted by the general preemption provision of § 514(a), and that federal common law should govern the dispute. For a further discussion of Judge Becker's reasoning and conclusion on the preemption issue in \textit{ILGWU}, see \textit{supra} note 50.

98. For a discussion of \textit{Shaw}, see \textit{supra} note 56.
sponsible for the payment of benefits under an ERISA plan. In Shaw the Court stated that because the plaintiff had asked for a declaration that ERISA preempted certain state laws, the claim invoked the supremacy clause of the Constitution. The claim in Shaw, therefore, was held to present a federal question, not because of the nature of the plaintiffs' ERISA claim as Judge Sloviter suggested, but because the action arose under the Constitution. Because the ILGWU claims did not raise a preemption issue, it is submitted that Shaw does not provide a basis for jurisdiction in the instant case.

It is submitted that Judge Fullam's view that jurisdiction existed under section 502 of ERISA also lacks support. Even though the parties intended that the ILGWU Fund should be subrogated to Mrs. Fazio's rights as Judge Fullam suggested, no assignment was, in fact, made. Because the federal courts are courts of limited jurisdiction, it is submitted that the express jurisdictional grant of ERISA cannot be interpreted based on the parties' intent and that jurisdiction over the ILGWU Fund's claim cannot be found in section 502.

Addressing the court's decision on the merits, it is noted that the Third Circuit proclaimed that under state common law the "majority rule is that escape clauses are disfavored and are not enforced as against

99. For a discussion of Judge Sloviter's theory of jurisdiction, see supra notes 52-64 and accompanying text.

100. 463 U.S. at 96 n.14. The Court in Shaw distinguished Franchise Tax Board by noting that the plaintiff in Franchise Tax Board had brought "an action seeking a declaration that state laws were not preempted by ERISA." Id. at 96 n.14 (emphasis in original). The Court in Franchise Tax Board held that the claim did not present a federal question, in part, because the claim violated the rule of Skelly Oil. 463 U.S. at 15-24; see generally Mann, Federal Jurisdiction over Preemption Claims: A Post-Franchise Tax Board Analysis, 62 TEX. L. REV. 893 (1983-84) (discussion of preemption claims in light of Franchise Tax Board). For a discussion of the rule of Skelly Oil, see supra note 51.

101. 463 U.S. at 96 n.14.

102. The ILGWU Fund did not challenge the validity of the Teamsters Fund's excess clause. 764 F.2d at 162 n.13. However, because the Teamsters Fund claimed that the trustees of the ILGWU Fund had violated their fiduciary duty under ERISA by incorporating the escape clause, it is submitted that, had the district court directed the Teamsters Fund to pay Mrs. Fazio's claims and then institute suit against the ILGWU Fund, a preemption issue would have been raised and jurisdiction over the action could have been predicated upon Shaw.

103. Judge Becker, in rejecting Judge Sloviter's argument, concluded that "because Shaw relied on the Supremacy Clause as the basis for jurisdiction over a pre-emption claim, and there is no pre-emption issue in the case before us, Shaw does not provide a specific rationale for [federal question] jurisdiction here." 764 F.2d at 157 n.7.

104. Id. at 167 (Fullam, J., concurring).

105. Id. at 154 n.6.

106. For a discussion of why the jurisdictional grant of ERISA must be read narrowly and literally, see supra notes 89-92 and accompanying text.

107. For the text of the jurisdictional grant of § 502 of ERISA, see supra note 4.
excess clauses..." In reaching this conclusion, the court did not discuss the fact that, in certain situations, state courts have viewed escape clauses as appropriate and have enforced them over excess clauses. These situations generally arise when an insurer, as a convenience to its insured, extends a limited amount of coverage in unusual circumstances, for instance when a totally uninsured driver borrows the insured's car. In such circumstances, if it is later determined that the person who borrowed the car had valid insurance, state courts have honored escape clauses in the owners' insurance policies in order to encourage insurance companies to continue to extend such coverage. Similarly, it is suggested that trustees of an ERISA benefit plan might decide to provide limited coverage in unusual situations if the plan could escape liability when alternative coverage was available. The court, however, precluded this possibility by concluding that all escape clauses violate ERISA as a matter of law and are, therefore, unenforceable. It is suggested that this conclusion precludes the emergence of permissible ERISA escape clauses, notwithstanding the fact that, in limited situations, state courts permit escape clauses as a matter of public

108. 764 F.2d at 162.
109. See id.
110. See generally 8A C. APPLEMAN, supra note 11, § 4910; 16 COUCH ON INSURANCE 2d § 62:76 (2d ed. 1984). One of the most common of these situations arises when a garage, engaged in repairing a customer's automobile, permits the customer to drive one of the garage's vehicles during the repair period. C. APPLEMAN, supra, at 351. If the customer's coverage continues while he is driving the borrowed car, some state courts have honored the exclusion in the garage's policy which specifically denies coverage over loaned automobiles if other insurance is available. Id. Similarly, escape clauses have been held valid and controlling under state common law treatment of automobile insurance in a number of other situations including coverage of automobile dealers and newly acquired autos. Id. at 462.

111. See, e.g., Faltersack v. Vanden Boogaard, 39 Wis. 2d 64, 158 N.W.2d 322 (1968) (escape clause in garage's liability policy upheld when garage's vehicle loaned to customer who was having his own car serviced); State Farm Mut. Auto. Ins. Co. v. Auto-Owners Ins. Co., 331 So. 2d 638 (Ala. 1976) (holding enforceable and controlling a garage owner's policy that extended coverage to additional insureds only if they had no other coverage available).

112. 764 F.2d at 164. It is suggested that earlier in the opinion the Third Circuit implied that some escape clauses in ERISA benefit plans may be enforceable. The court had stated:

Finally, we conclude that the decision of trustees to incorporate an escape clause in a benefit plan—through which the plan attempts to escape all liability if a participant or beneficiary is covered by another plan, regardless of the level of benefits provided by the other plan—constitutes arbitrary and capricious conduct.

Id. at 149-50. Thus, the court implied that an escape clause which deferred liability only to other plans which provided the insured with a similar level of benefits may be enforceable. However, the court dispelled any such implication when, later in the opinion, the court clearly stated that "escape clauses in ERISA covered employee benefit plans are unenforceable as a matter of law." Id. at 164.
policy. By virtue of the \textit{ILGWU} decision, trustees of plans that have incorporated escape clauses undoubtedly will recast their escape clauses into excess clauses in an attempt to enforceably shift some of their liability to alternative plans. In the event that plans dispute their liability under these newly written excess clauses, it is submitted that courts will find similarly worded excess clauses incompatible under the federal common law governing ERISA plans. The Third Circuit has indicated that incompatible clauses should be declared "mutually repugnant" and that both plans should be held primarily liable for the insured’s loss on a pro-rata basis. If state law is once again relied on, the Third Circuit will require that both plans prorate the loss up to the total of both policies, thereby accomplishing one of the primary goals of ERISA: that plan participants or beneficiaries "not be deprived of compensation that they reasonably anticipate under the plan’s purported coverage."

Wayne Dillahey

\footnote{113. For a discussion of the limited permissibility of escape clauses under state common law, see supra notes 109-111 and accompanying text.}

\footnote{114. It is noted that the court desired this result and anticipated that plan trustees who rewrote their plans would give their participants proper notice of the revisions. See \textit{id.} at 164 n.17.}

\footnote{115. It is submitted that courts will reach this conclusion for reasons similar to those stated by the Third Circuit in \textit{ILGWU} in finding excess clauses and escape clauses incompatible. For a discussion of the Third Circuit’s reasoning, see supra notes 67-74 and accompanying text. It is submitted that conflicting excess clauses provide no basis for determining which of the two plans should be liable since each plan purports to make the other plan primarily liable. For a discussion of excess and escape clauses, see supra note 11.}

\footnote{116. 764 F.2d at 161 n.13. The court implied that it would reach this conclusion by noting that state courts faced with incompatible “other insurance” clauses have followed this analysis. \textit{id.}}

\footnote{117. \textit{id.} Under state law, even if each insurer attempted to make his coverage excess, the courts would still protect the insured up to the total of all applicable policies. See C. \textit{APPLEMAN}, supra note 11, § 4909 (“The courts, which found the insured with two policies, will not leave him with none, but will require the insurers, in the ordinary instance, to prorate the loss.”).}

\footnote{118. 764 F.2d at 163 (footnote omitted).}