



Spring 3-1-2005

The New Map: The Supreme Court's Guide To Curing Thirty Years of Confusion in ERISA Savings Clause Analysis

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Recommended Citation

Matthew O. Gatewood, *The New Map: The Supreme Court's Guide To Curing Thirty Years of Confusion in ERISA Savings Clause Analysis*, 62 Wash. & Lee L. Rev. 643 (2005).

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The New Map: The Supreme Court's Guide To Curing Thirty Years of Confusion in ERISA Savings Clause Analysis

Matthew O. Gatewood*

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I. Introduction

Imagine walking through a forest one afternoon in 1974. You come across a large cave and your curiosity coerces you to enter. As you walk through the cave, you realize that it contains a series of passageways and tunnels. Confident you will be able to find your way back, you decide to explore. In only a matter of minutes, however, you completely lose your way. For eleven years, you wander through the tunnels, but your efforts to get out seem hopeless. Finally, in 1985, you discover a map that appears to outline the entire tunnel system. Although the map helps you navigate the tunnels, you occasionally find tunnels that do not appear on the map. Each time you encounter a new tunnel, you draw it on the map. After several years, you have drawn so many new tunnels that your map has become illegible and your hopes dwindle.

In 2003, you make a startling discovery—you find a new map. You are convinced that this map, which is simpler and less confusing than the old one, will end your confusion and lead you out of the labyrinth. In order to succeed, however, you must be careful to make sure you correctly interpret the map as the drafter intended. If not, the confusion of the labyrinth will continue and you will remain lost without hope.

This Note will explain why the above situation is similar to the problem that lower courts face when trying to analyze the Insurance Savings Clause of the Employee Retirement Income Security Act (ERISA). The Insurance Savings Clause is an exception to ERISA preemption that "saves" state laws dealing with insurance from preemption. Since ERISA's passage in 1974, courts have been lost trying to interpret the meaning and scope of this clause.

This Note proceeds in four stages. Part II provides a brief background on general ERISA preemption and the purposes of the Insurance Savings Clause.¹ Part III introduces *Metropolitan Life Insurance Co. v. Massachusetts*,² which outlines the Supreme Court's original map for

1. See *infra* Part II (explaining the purposes of ERISA preemption and why the Insurance Savings Clause was necessary).

2. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985). In *Metropolitan Life*, the Supreme Court considered whether two employee benefit insurers (Metropolitan Life Insurance Co. and Travelers Insurance Co.) had to comply with a Massachusetts law that required all health insurance policies to include coverage for mental health. *Id.* at 727. The two insurers

Insurance Savings Clause analysis.³ This Part then analyzes how courts applied the original map following the *Metropolitan Life* decision in 1985.⁴ Two years after *Metropolitan Life*, in *Pilot Life Insurance Co. v. Dedeaux*,⁵ the Court tried to define the boundaries of the map to make the analysis easier; however, this confused lower courts more than it helped.⁶ *Pilot Life* will be discussed in Part III.⁷ To clear up the confusion in the lower courts, the Supreme Court tried to simplify the map in 1999 and 2002 in *UNUM Life Insurance Co. of America v. Ward*⁸ and *Rush*

argued that they did not have to comply with the Massachusetts law because ERISA preemption applied. *Id.* at 732–33. Massachusetts passed the mental health law to allow the mentally ill to be able to purchase affordable insurance. *Id.* at 731. Because the Massachusetts law restricted the type of insurance policies that a benefit plan could purchase and therefore related to employee benefit plans, the insurers argued that ERISA preempted the state law. *Id.* at 732–33. Massachusetts, however, argued that because the law regulated insurance, the Insurance Savings Clause saved it from preemption. *Id.* at 738. The Supreme Court decided that the mandated-benefit laws regulated insurance and ERISA preemption did not apply. *Id.* at 746–47.

3. *Id.* at 739–40 (setting forth a two-step analysis to determine when the Insurance Savings Clause should save a state law from ERISA preemption).

4. See *infra* Part III (tracing the development and application of the original map).

5. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). In *Pilot Life*, the Supreme Court decided whether ERISA preempted the common law tort and contract actions of a worker that claimed bad faith against his employer's insurer. *Id.* at 43. The worker was collecting permanent disability benefits from a long-term disability employee benefit plan after sustaining a job-related injury. *Id.* The insurance company terminated the benefits after two years, then reinstated them, but then terminated and reinstated them several more times during the next three years. *Id.* The employee asserted common law breach of contract and tort claims against the insurance company under Mississippi law, but the insurance company argued that ERISA preempted all of the claims. *Id.* at 43–45. The Supreme Court decided that ERISA did preempt any common law breach of contract or tort claims that asserted improper handling of a disability claim under an employee benefit plan. *Id.* at 57. Thus, the Insurance Savings Clause did not save the employee's claim from ERISA preemption. *Id.*

6. See Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105, 124–30 (2001) (explaining that *Pilot Life* limited the test set forth in *Metropolitan Life* by applying a narrower reading of the Insurance Savings Clause).

7. *Infra* Part III.B–C.

8. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999). In *Ward*, the Supreme Court clarified the Insurance Savings Clause analysis that had been set forth in *Metropolitan Life* and modified in *Pilot Life*. *Id.* at 373. An employee filed a permanent disability claim with his employer's insurer, but the claim was filed five months past the fifteen-month window set forth in the insurance contract. *Id.* at 364–66. The employee filed suit under California's notice-prejudice rule, which excuses an insured's failure to file a timely claim unless the insurance company can prove that it suffered prejudice because of the delay. *Id.* at 366–67. The district court ruled that the Insurance Savings Clause did not save the notice-prejudice rule from ERISA preemption, but the Ninth Circuit reversed. *Id.* at 365–66. By focusing on the common-sense analysis under the Insurance Savings Clause and holding that satisfaction of all three McCarran-Ferguson factors was not required for a law to be saved, the Supreme Court

*Prudential HMO, Inc. v. Moran*⁹ respectively, both of which will be explained in Part III.¹⁰

The Supreme Court's effort to alleviate the confusion of the old map proved unsuccessful, which caused the Court to throw the map away and create a new map in *Kentucky Association of Health Plans, Inc. v. Miller*.¹¹ Part IV of the Note examines the new map in detail.¹² Part V then explains that if lower courts correctly follow the new test, they may be able to alleviate the confusion that has existed in interpreting the Insurance Savings Clause for the past thirty years.¹³ This Note, however, will assert that lower courts are not following the map as its cartographers intended.¹⁴ It will explain that for the new map to be productive, courts must first recognize that it is different from the old map.¹⁵ This Note also will argue in Part V that courts must realize that the new map was intended to make the Insurance Savings Clause stronger than it had been post-*Pilot Life*.¹⁶ Part V will stress that if lower courts do not recognize that the new map is different than the old map and that it was intended to

agreed with the Ninth Circuit. *Id.* at 373–79.

9. *Rush Prudential, Inc. v. Moran*, 536 U.S. 355 (2002). In *Rush Prudential*, the Supreme Court considered whether ERISA preempted a section of the Illinois HMO Act. *Id.* at 359. An employee's spouse filed a claim against her husband's employer's insurer to pay for surgery on her shoulder. *Id.* at 360. Rush, the insurer, decided that the claim was not "medically necessary," and pursuant to the insurance contract with Moran's husband's employer, Rush denied the claim, and Moran filed suit under the state act. *Id.* at 360–62. The district court ruled that ERISA preempted Moran's claim, but the Seventh Circuit reversed on Insurance Savings Clause grounds. *Id.* at 363–64. The Supreme Court affirmed the Seventh Circuit and decided that the Insurance Savings Clause saved the Illinois HMO Act from ERISA preemption. *Id.* at 387. The Court also rejected an implied preemption argument that ERISA preempted the Illinois HMO Act because it provided for a remedy not authorized by ERISA's civil enforcement provisions. *Id.* at 375–87.

10. *Infra* Part III.D.

11. *Ky. Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003). In *Miller*, the Court had to decide whether ERISA preempted two of Kentucky's Any Willing Provider statutes. *Id.* at 1474. The district court and the Sixth Circuit ruled that the Insurance Savings Clause saved both laws from preemption because they regulated the business of insurance. *Id.* at 1474–75. The Supreme Court affirmed this ruling, but removed consideration of the McCarran-Ferguson factors from the Insurance Savings Clause analysis. *Id.* at 1478–79. The Court held that the Insurance Savings Clause saved both laws because they were specifically directed at the insurance industry and they substantially affected the risk-pooling arrangement between the insurer and the insured. *Id.* at 1479.

12. *Infra* Part IV.

13. *See infra* Part V (asserting that properly interpreting the map in the way the Supreme Court intended will clear up the Insurance Savings Clause analysis).

14. *See infra* Part V (noting that the lower courts are misapplying the *Miller* map).

15. *See infra* Part V (explaining the differences between the new *Miller* map and the original map set forth in *Metropolitan Life*).

16. *See infra* Part V (contending that the Insurance Savings Clause will apply to save more state laws under the new map than it did under the original map).

make the Insurance Savings Clause stronger, then confusion will continue in Insurance Savings Clause analysis and lower courts will remain lost.¹⁷ Finally, this Note will provide lower courts with a compass to help them interpret and follow the map provided by the Supreme Court's decision in *Miller*.¹⁸

II. Background

When Congress passed ERISA in 1974, the Act was intended to protect pension benefits for employees uniformly across the country.¹⁹ In order to facilitate this purpose, Congress designed ERISA to preempt state laws governing employee benefits.²⁰ The Preemption Clause preempted "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."²¹ This clause was much stronger than it had been in original drafts of ERISA.²² Congress created a broader clause because it believed that a weaker clause would lead to "endless litigation."²³ The new clause, however, did not achieve this objective, for ERISA preemption has been one of the most litigated legal areas of the past thirty years.²⁴ In addition to perplexing litigants, the broad standard also has confused the courts that must apply it.²⁵

17. *Infra* Part V.

18. *See infra* Part V (observing that the Insurance Savings Clause analysis will be cleared up if lower courts will follow the Supreme Court's lead).

19. *See* 120 CONG. REC. S29,942 (daily ed. Aug. 22, 1974) (outlining the purposes of ERISA).

20. *See* *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522–23 (1981) (finding ERISA's preemption provision to be an announcement of congressional intent to make the regulation of employee benefit plans to be exclusively a federal concern).

21. 29 U.S.C. § 1144(a) (2000).

22. *See* Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 619, 619 (1994) (suggesting that prior to being submitted to the conference committee, ERISA preempted state laws only insofar as they may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans or insofar as they may now or hereafter relate to the subject matters regulated by this Act (quoting H.R. 2, 93d Cong., 1st Sess. 114 (1973), reprinted in I SENATE COMM. ON LABOR & PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 51 (1976))).

23. *See id.* at 620 (setting forth statement of New York Senator Jacob Javits explaining the reasons that the conference committee altered the preemption clause).

24. A simple LEXIS search of any case law involving "ERISA preemption" returns more than 3000 hits.

25. *See* *Sanson v. Gen. Motors Corp.*, 966 F.2d 618, 625 (11th Cir. 1992) (Birch, J., dissenting) ("Perhaps I have entered the thicket and lost the path that my brothers have found and followed. However, if nothing else is clear it is that the 'path' is not; obviously the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket.");

General ERISA preemption contains an exception that appears in the subsection immediately following the Preemption Clause.²⁶ This exception is the Savings Clause.²⁷ The Savings Clause states that no part of ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."²⁸ The Savings Clause "saves" the listed areas from ERISA preemption, which allows states to continue regulating insurance, banking, and securities.²⁹ Like the bulk of the disputes involving the Savings Clause, this Note will focus on the part of the Savings Clause that refers to insurance (The Insurance Savings Clause). The Insurance Savings Clause allows states to pass laws that regulate insurance without falling victim to ERISA preemption.³⁰

Although Congress wanted ERISA to create uniformity in all areas that "relate to"³¹ employee benefit plans, the legislation's drafters knew that the Savings Clause was needed to serve as an exception to general preemption.³²

Gonzales v. Prudential Ins. Co. of Am., 901 F.2d 446, 451–52 (W.D. La. 1990) ("Obviously, any court forced to enter the ERISA preemption thicket sets out on a treacherous path.").

26. 29 U.S.C. § 1144(a) (2000) ("Except as provided in subsection (b) of this section, the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .").

27. *Id.* § 1144(b)(2)(A).

28. *Id.*

29. See Robert S. McDonough, Note, *ERISA Preemption of State Mandated-Provider Laws*, 1985 DUKE L.J. 1194, 1200 (contending that what appeared to be excepted through the Preemption Clause was actually restored to the states and considering whether mandated-provider laws are a part of regulating insurance that Congress intended to save).

30. Even the Insurance Savings Clause has an exception—the Deemer Clause. 29 U.S.C. § 1144(b)(2)(B) (2000). The Deemer Clause provides, "[N]either an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan" is an insurance company under the Insurance Savings Clause. *Id.* Specifically, the clause states that these plans will not "be deemed to be an insurance company or other insurer, bank, trust company, or investment company, or to be engaged in the business of insurance or banking for the purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." *Id.* This Note will not address the interplay between the Deemer Clause and the Insurance Savings Clause in detail.

31. See *id.* § 1144(a) (using the "relate to" language).

32. See 120 CONG. REC. 29,942 (1974) (statement of Sen. Javitz) ("[C]omprehensive and pervasive federal interest and the interest of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.") (emphasis added); 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams) ("It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations . . .") (emphasis added); 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent) ("The conferees, with the narrow exceptions specifically enumerated, applied [preemption] in its broadest sense to foreclose any

Specifically, because most areas of insurance "relate to"³³ employee benefit plans in some way and would fall under general ERISA preemption, the Insurance Savings Clause was necessary to avoid preemption of all state insurance laws. Outside of this broad purpose, the legislative history of the Insurance Savings Clause is not helpful.³⁴ Although Congress changed the wording of the general Preemption Clause just before ERISA's passage,³⁵ the Savings Clause remained the way it had been under the weaker Preemption Clause.³⁶ Justice Blackmun has stated that when the conference committee broadened the preemption doctrine,³⁷ there was "no indication in the legislative history that Congress was aware of the new prominence given the saving[s] clause in light of the rewritten pre-emption clause, or was aware that the saving[s] clause was in conflict with the [new] general pre-emption provision."³⁸ Despite Blackmun's criticism, the goal of the Insurance Savings Clause remained the same—"[T]o preserve a state's ability to regulate insurance."³⁹

III. The Original Map

A. The Creation: Metropolitan Life Insurance Co. v. Massachusetts

Once Congress passed ERISA in 1974, courts grappled constantly with questions of how to apply the Insurance Savings Clause within ERISA's general preemption scheme.⁴⁰ They had no guidance until 1985 when they

non-Federal regulation of employee benefit plans.") (emphasis added).

33. 29 U.S.C. § 1144(a) (2000).

34. See Robert N. Covington, *Amending ERISA's Preemption Scheme*, 8 KAN. J.L. & PUB. POL'Y 1, 10 (1999) (asserting that the true congressional purpose of the Savings Clause is hard to ascertain because of the limited legislative history).

35. See *supra* notes 22–23 and accompanying text (noting that Congress altered the wording of the general Preemption Clause just before passage).

36. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 745 (1985) (asserting that Congress did not consider the new Preemption Clause's effect on the Savings Clause).

37. See Conison, *supra* note 22, at 619–20 (explaining that the final version of ERISA's Preemption Clause was much stronger than the original drafts).

38. *Metro. Life*, 471 U.S. at 745.

39. Karen A. Jordan, *ERISA Pre-emption: Integrating Fabe into the Savings Clause Analysis*, 27 RUTGERS L.J. 273, 337 (1996).

40. See David J. Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 IOWA L. REV. 57, 93–122 (1976) (explaining how courts first attempted to deal with ERISA's many issues); Theodore Paul Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 TEMP. L.Q. 51, 63–69 (1979) (outlining the problems lower courts faced in early ERISA cases).

received a map from the Supreme Court.⁴¹ The Supreme Court created a map to govern the Insurance Savings Clause analysis in *Metropolitan Life Insurance Co. v. Massachusetts*.⁴² In *Metropolitan Life*, the Court attempted to explain the relationship of the Savings Clause to ERISA's general preemption scheme.⁴³ Justice Blackmun knew that trying to explain ERISA preemption presented an arduous challenge: "The two pre-emption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly pre-empts state law, the saving[s] clause appears broadly to preserve the States' lawmaking power over much of the same regulation."⁴⁴

In *Metropolitan Life*, the Massachusetts attorney general sued several insurers in Massachusetts state court to enforce a statute⁴⁵ that required health care plans to provide a minimum level of mental health services.⁴⁶ Metropolitan Life Insurance Co. and the other insurance providers argued that the state law "related to" employee benefit plans and should be preempted by ERISA. Massachusetts asserted that even though the law related to employee benefit plans, it was exempt from preemption because of the Insurance Savings Clause.⁴⁷ After deciding that the state law fit easily within the broad scope of ERISA's Preemption Clause,⁴⁸ the Court set forth the analysis to determine whether the Insurance Savings Clause applied to a law that otherwise would be preempted.⁴⁹

The first step in the analysis consisted of a basic common-sense component.⁵⁰ The Court explained that a law must "regulate" insurance according to common sense.⁵¹ The mandated-benefits law in *Metropolitan Life* regulated the terms of insurance contracts and thus satisfied the common-sense

41. See *Metro. Life*, 471 U.S. at 739–40 (creating a two-step analysis for courts to use when analyzing the Insurance Savings Clause).

42. *Id.* at 740.

43. See Bogan, *supra* note 6, at 120 (observing that the interplay between the Preemption Clause and the Savings Clause created a "difficult tension").

44. *Metro. Life*, 471 U.S. at 738–39.

45. It is not unusual for a state to require insurers to include coverage for services offered by a certain group of healthcare providers, such as a mental health provider. See *id.* at 729 n.9 (explaining that a majority of states require insurance plans to mandate, or at least offer, services offered by an optometrist).

46. *Id.* at 734.

47. *Id.* at 734–35.

48. *Id.* at 739.

49. *Id.* at 739–40.

50. See *id.* at 740 (analyzing the matter from a common-sense viewpoint).

51. *Id.*

component of the new analysis.⁵² To reinforce this contention, the Court looked at the "Deemer Clause," which states that an employee benefit plan is not an insurance company for purposes of any state law attempting to regulate insurance contracts.⁵³ Specifically, because the Deemer Clause only pertains to state laws applying directly to benefit plans, the Court explained that laws regulating insurance contracts that do not apply directly to benefit plans are not covered by the Deemer Clause.⁵⁴ Therefore, Congress intended these laws to be covered by the Insurance Savings Clause.⁵⁵

The second step in the analysis involved the weighing of three factors borrowed from *Union Labor Life Insurance Co. v. Pireno*,⁵⁶ a case involving the McCarran-Ferguson Act.⁵⁷ The *Pireno* Court used a three-factor test to determine what constituted the "business of insurance" for the purposes of the McCarran-Ferguson Act.⁵⁸ The three factors were: (1) whether the policy has the effect of transferring or spreading the policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry.⁵⁹ Although *Pireno* concerned the McCarran-Ferguson Act,

52. *Id.* at 740–41.

53. *Id.* at 740.

54. *Id.* at 740–41.

55. *Id.* at 741.

56. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). In *Pireno*, the Supreme Court considered whether an insurer's use of a peer review committee to determine the reasonableness of chiropractors' fees was the "business of insurance" under § 1012(b) of the McCarran-Ferguson Act. *Id.* at 122. New York law required the New York State Chiropractic Association's insurer, Union Labor Life Insurance Co. (ULL), to cover certain claims for chiropractic treatments. *Id.* at 122. ULL's procedures required that these claims be limited to reasonable charges for necessary medical care and services before any money was paid on them. *Id.* To decide whether the claims were reasonable, ULL used the assistance of the New York State Chiropractic Association's Peer Review Committee. *Id.* at 123. *Pireno* asserted that the practices used by the Peer Review Committee violated antitrust law, but ULL claimed that these practices were exempt from antitrust scrutiny because of being in the "business of insurance" under the McCarran-Ferguson Act. *Id.* The Court then employed reasoning from *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), to come up with the three-factor test set forth in the text. *Id.* at 129. The Court held that the use of the Peer Review Committee did not involve the "business of insurance." *Id.*

57. The McCarran-Ferguson Act was passed in 1945 and prevented the infringement of the states' right to regulate the business of insurance. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2117 (2002) (explaining the rules of interpretation in the McCarran-Ferguson Act).

58. McCarran-Ferguson Act, 59 Stat. 33, codified as amended at 15 U.S.C. §§ 1011–1015 (2000).

59. *Pireno*, 458 U.S. at 129.

Metropolitan Life applied these same factors to ERISA preemption.⁶⁰ In applying these factors to the mandated-benefit laws, *Metropolitan Life* concluded that the mandated-benefit laws involved the state regulation of the "business of insurance."⁶¹ Because the purpose of the mandated-benefit laws was to spread the risks of mental health, it met the first factor of the test.⁶² Mandated-benefit laws also played an integral role in the insurer-policyholder relationship by limiting the types of insurance that an insurer could sell the policyholder.⁶³ Therefore, the Court found that the mandated-benefit laws met the second McCarran-Ferguson factor.⁶⁴ Because the regulation applied only to insurers and not policyholders, the mandated-benefit laws also met the third factor.⁶⁵

It was a logical step for the Supreme Court to look to the McCarran-Ferguson Act as it tried to flesh out the meaning of ERISA's Savings Clause because one of the main purposes of the McCarran-Ferguson Act was to ensure that states would still be able to regulate the business of insurance.⁶⁶ Furthermore, the Insurance Savings Clause is worded similarly to the McCarran-Ferguson Act's statement that the business of insurance will be "subject to the laws of the several States."⁶⁷ In *Metropolitan Life*, the Court determined that the "saving[s] clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States. . . . Thus application of the McCarran-Ferguson Act lends further support to our ruling that Congress did not intend mandated-benefit laws to be pre-empted by ERISA."⁶⁸

The Supreme Court advanced a broad reading of the Insurance Savings Clause in *Metropolitan Life* by considering basic common sense and the three McCarran-Ferguson factors. *Metropolitan Life Insurance Co.* and the other insurers argued that the Court should undertake a more restrictive reading of the clause, but the Court pointed to a "complete absence of evidence" that

60. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 743 (1985).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 (1979) (asserting that the "primary concern" in enacting the McCarran-Ferguson Act was to "ensure that the States would continue to have the ability to tax and regulate the business of insurance").

67. 15 U.S.C. § 1012(a) (2000); see *Metro. Life*, 471 U.S. at 744 n.21 (finding that the Insurance Savings Clause was designed to preserve the regulation of the business of insurance for the states, just as the McCarran-Ferguson Act did).

68. *Metro. Life*, 471 U.S. at 744 n.21.

Congress intended the clause to necessitate such a narrow reading.⁶⁹ In fact, under the Court's broad approach, the presumption was against preemption whenever a law having to do with insurance was in dispute.⁷⁰ As Justice Blackmun explained, "The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope."⁷¹

B. *Defining the Boundaries: Pilot Life Insurance Co. v. Dedeaux*

In *Pilot Life Insurance Co. v. Dedeaux*,⁷² decided just two years after *Metropolitan Life*, the Supreme Court changed course and undertook a narrower reading of the Insurance Savings Clause.⁷³ In *Pilot Life*, the issue before the Court was whether ERISA preempted state common law tort and contract suits filed because of an insurance company's mishandling of benefit claims.⁷⁴ Everate Dedeaux was an employee of Entex, Inc. (Entex) in Gulfport, Mississippi, when he injured his back during the course of his employment.⁷⁵ He filed a claim for permanent disability benefits with Entex, which filed a claim with its insurer, Pilot Life Insurance Co. (Pilot Life).⁷⁶ Pilot Life terminated Dedeaux's benefits after two years.⁷⁷ Pilot Life then reinstated his benefits several times after the initial termination, but eventually terminated the benefits entirely.⁷⁸ Dedeaux sued Pilot Life in federal district court under

69. *Id.* at 745–46. The Court went on to say, "We therefore decline to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it." *Id.* The Court stressed, "Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause, whether it be the Supreme Judicial Court's attempt to save only state regulations unrelated to the substantive provisions of ERISA, or the insurers' more speculative attempt to read the saving clause out of the statute." *Id.* at 746–47.

70. *Id.* at 741.

71. *Id.* Other judges in this time period did not agree with this interpretation. *See, e.g.,* *Att'y General v. Travelers Ins. Co.*, 463 N.E.2d 548, 552 (Mass. 1984) (Wilkens, J., dissenting) (suggesting the Savings Clause needs to be construed narrowly to promote uniformity across the board).

72. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

73. *See* Bogan, *supra* note 6, at 124–30 (asserting *Pilot Life* limited the scope of the Insurance Savings Clause compared to *Metropolitan Life*).

74. *Pilot Life*, 481 U.S. at 43.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

common law breach of contract and tort principles that amounted to a claim of bad faith.⁷⁹ The district court granted summary judgment to Pilot Life because it believed that ERISA preempted the bad faith claim.⁸⁰ Relying on the Supreme Court's decision in *Metropolitan Life*, the Court of Appeals for the Fifth Circuit reversed.⁸¹

The Supreme Court, in a unanimous decision authored by Justice O'Connor, noted that there was no question that Dedeaux's claim fell within the purview of express ERISA preemption.⁸² The Court then analyzed the bad faith cause of action⁸³ to determine whether the Insurance Savings Clause saved it from preemption under the *Metropolitan Life* analysis.⁸⁴

First, the Court employed the common-sense part of the analysis.⁸⁵ The Court focused on the phrase "regulates insurance" to determine whether the Mississippi bad faith law fell within the scope of the phrase's intended meaning.⁸⁶ The Court stated that a common-sense view of the word "regulates" implied that a law actually must be directed toward the insurance industry.⁸⁷ Merely having an impact on the insurance industry, according to the Court, would not cause a law to fall under the Insurance Savings Clause.⁸⁸ The Mississippi bad faith regime, despite the Mississippi Supreme Court's opinion that the law was linked to the insurance industry, was replete throughout the state's contract and tort jurisprudence.⁸⁹ Because Mississippi's bad faith law was not specifically directed at the insurance industry, the Court concluded that the Mississippi law of bad faith was not a state law that "regulates insurance" according to common sense.⁹⁰

79. *Id.* The district court had jurisdiction based on diversity. *Id.*

80. *Id.* at 44.

81. *Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311, 1317 (5th Cir. 1985).

82. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987).

83. *See id.* at 48 n.1 (explaining that to be a law that "regulates insurance" and thus fall under the Savings Clause, a discrete statute is not necessary). For the purposes of the Insurance Savings Clause, "the term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1) (2000).

84. *See supra* Part III.A (setting forth an analysis to be used when determining whether the Insurance Savings Clause saves a state statute from ERISA preemption).

85. *Pilot Life*, 481 U.S. at 50.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 49-50.

Second, the Court looked at the three McCarran-Ferguson factors.⁹¹ The Court concluded that the factors did not weigh in favor of finding that the state law regulated insurance.⁹² Because "the Mississippi common law of bad faith [did] not effect a spreading of policyholder risk," the state law failed the first factor.⁹³ Although the Court said the state common law of bad faith possibly met the second factor, which requires the practice to be an integral part of the policy relationship between the insurer and the insured, the law probably did not meet the second factor because it failed to define the terms of the insurer-insured relationship.⁹⁴ The Mississippi common law of bad faith certainly was not limited to entities within the insurance industry and thus failed the third factor as well.⁹⁵ Therefore, because the Mississippi bad faith law met one of the three factors at most, the analysis of the McCarran-Ferguson factors did not support an assertion that the Mississippi bad faith regime "regulates insurance."⁹⁶

In addition to the common-sense interpretation of the Savings Clause and the McCarran-Ferguson factors, the Supreme Court considered ERISA as a whole.⁹⁷ The Court found additional support for its holding in ERISA's civil enforcement provisions.⁹⁸ Under the ERISA provisions, relief can consist of accrued benefits due, a declaratory judgment on the right to benefits, an injunction against a plan administrator for improperly failing to pay benefits,

91. *Id.* at 50–51.

92. *Id.* at 51.

93. *Id.*

94. *See id.* at 51 ("In contrast to the mandated-benefits law in *Metropolitan Life*, the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages."). Therefore, the law of bad faith is not any more integral to the policy relationship than general contract law is to any contract made within the state. *Id.*; *see also* *Anschultz v. Conn. Gen. Life Ins. Co.*, 850 F.2d 1467, 1468–69 (11th Cir. 1988) (finding that despite satisfying the common-sense requirement by being directed specifically at the insurance industry, a Florida law similar to the Mississippi bad faith law in *Pilot Life* did not meet the second McCarran-Ferguson factor). *But see* *Bogan*, *supra* note 6, at 135 (suggesting that decisions such as *Anschultz* defy common sense by asserting that laws such as the unfair practice statute at bar in that case were not integral to the insurer-insured relationship).

95. *See Pilot Life*, 481 U.S. at 51 (noting that the Mississippi law of bad faith, despite possibly being associated with the insurance industry, "has developed from general principles of tort and contract law available in any Mississippi breach of contract case").

96. *Id.* at 50–51.

97. *Id.* at 51–57.

98. *Id.* at 52–54; *see also* 29 U.S.C. § 1132 (2000) (outlining the potential relief available for violations of ERISA on the part of either an employee benefit plan participant or beneficiary).

the removal of a fiduciary if the claim is for breach of fiduciary duty, and the potential awarding of attorney fees.⁹⁹ Dedeaux, however, sought a remedy not contained in ERISA's civil enforcement provisions.¹⁰⁰ The Court construed the civil enforcement provisions to include the exclusive remedies available under ERISA and stated that individuals who asserted claims based on different state laws would create an unnecessary obstacle to the purposes of Congress.¹⁰¹ Justice O'Connor wrote, "[T]he detailed [civil enforcement] provisions . . . set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."¹⁰² The Court suggested that ERISA impliedly preempted state laws that provided remedies not listed explicitly in the civil enforcement provisions.¹⁰³ Because Dedeaux sought treble and punitive damages, which were not available under ERISA's civil enforcement provisions, ERISA impliedly preempted his claims.¹⁰⁴

Pilot Life limited the effect of the Insurance Savings Clause and broadened the scope of ERISA preemption.¹⁰⁵ The Court pointed to a conference committee report on ERISA that compared the preemption regime of ERISA to the preemption regime of the Labor-Management Relations Act of 1947 (LMRA).¹⁰⁶ Section 301 of the LMRA preempted all state actions asserting violations of contracts between employers and labor organizations,

99. *Pilot Life*, 481 U.S. at 53–54.

100. See Bogan, *supra* note 6, at 127 (describing ERISA's civil enforcement provisions and noting that Dedeaux's claim asked for a remedy not contained in them).

101. See *id.* at 52 (basing this conclusion on the language and structure of the enforcement provisions and the legislative history); see also Brief of Amicus Curiae the United States at 18–10, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (No. 85-1043) ("[W]e think that Congress intended ERISA's provisions relating to enforcement of participants' rights under benefit plans to be exclusive.").

102. *Pilot Life*, 481 U.S. at 54.

103. See Bogan, *supra* note 6, at 127 (describing the Court's implied preemption analysis); see also *Pilot Life*, 481 U.S. at 57 (distinguishing *Metropolitan Life* by asserting that in *Pilot Life*, the Court is considering "whether Congress might clearly express, through the structure and legislative history of a particular substantive provision of ERISA, an intention that the federal remedy provided by that provision displace state causes of action").

104. See *Pilot Life*, 481 U.S. at 54 (stating that "ERISA's civil enforcement remedies were intended to be exclusive").

105. See Bogan, *supra* note 6, at 127–28 (suggesting that *Pilot Life* narrowed *Metropolitan Life's* interpretation of the Insurance Savings Clause by using the legislative history of the Preemption Clause to infer a broad congressional intent to preempt).

106. H.R. CONF. REP. NO. 93-1280, at 327 (1974), quoted in *Pilot Life*, 481 U.S. at 55.

even if the state action authorized a remedy that was otherwise unavailable under the federal act.¹⁰⁷

By narrowing *Metropolitan Life's* interpretation of the Insurance Savings Clause, *Pilot Life*, at least in the area of common law bad faith claims, limited the value of the Savings Clause.¹⁰⁸ In the aftermath of *Pilot Life*, courts have ruled that ERISA preempts a wide range of state common law tort and contract claims.¹⁰⁹ Had the *Pilot Life* Court stopped its discussion after its express preemption analysis, the Savings Clause would have retained its previous importance. By holding, however, that Dedeaux's claims were impliedly preempted because ERISA's civil enforcement provisions did not contain the remedy asked for, the Court basically eliminated the viability of any state-law claims for extracontractual damages made under employee benefit plans.¹¹⁰

C. No Map Can Cover Everything: The Effect of Implied Preemption

Pilot Life's analysis of implied preemption has been sharply criticized because it was not confined exclusively to pension plan cases.¹¹¹ Because it

107. See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983) (finding § 301 of the Labor-Management Relations Act has "pre-emptive force . . . so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law . . ."). Commentators have offered three possible explanations for the reference to the Labor-Management Relations Act: (1) courts should look to pre-ERISA cases dealing with the Labor-Management Relations Act when formulating ERISA's federal common law; (2) courts should use state law as a source of rules; or (3) courts should employ the common law under ERISA as they do under the Labor-Management Relations Act. See generally George Lee Flint, Jr., *ERISA: Reformulating the Federal Common Law for Plan Interpretation*, 32 SAN DIEGO L. REV. 955, 973-78 (1995).

108. See Bogan, *supra* note 6, at 129 (asserting that *Pilot Life's* interpretation of the Insurance Savings Clause was narrower than *Metropolitan Life's*).

109. See Troy A. Price, *Preemption "Between the Poles: ERISA's Effect on State Common Law Actions Other than Benefit Claims*, 19 U. ARK. LITTLE ROCK L.J. 541, 541 (1997) (noting that in the decade since *Pilot Life*, ERISA has "swept with extraordinary force across the field of state common laws regulating relationships between those who seek to collect health, life, disability, or other job-related benefits and those who either sponsor such benefits or play some role in deciding benefit claims").

110. See Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 951, 993 (2000) ("The result of the Court's implied preemption analysis was to eliminate plan participants' state-law claims for extracontractual damages, including punitive damages and treble damages, and to put plan participants in a significantly worse position than they were prior to ERISA.").

111. See *id.* at 995-96 (suggesting that *Pilot Life's* implied preemption analysis "put the cart before the horse" and that it should have been limited to pension plan cases). "The Supreme Court's opinion in *Pilot Life* was flawed from the outset." *Id.* at 995.

operates beyond the scope of ERISA's actual language, implied preemption infringes on even more areas of traditional state regulation than express preemption.¹¹² Although this Note is concerned primarily with the Insurance Savings Clause and its role in express preemption, implied preemption is still important because it applies to all claims, even those that would be "saved" from express preemption.¹¹³ Two key cases are particularly helpful in examining this issue in detail.¹¹⁴ First, *Ramirez v. Inter-Continental Hotels*¹¹⁵ demonstrated that a court would use the *Pilot Life* implied preemption analysis to find preemption of a state statute even if express preemption did not apply.¹¹⁶ Second, *Tri-State Machine, Inc. v. Nationwide Life Insurance Co.*¹¹⁷

112. *Id.* at 1003.

113. *See id.* at 1002–03 (explaining that implied preemption analysis has a negative effect for consumers because it most often preempts claims for bad faith or unfair practices that seek extracontractual remedies, which limits the manner that a court may punish an insurance company).

114. For more cases that applied *Pilot Life*'s implied preemption analysis, see *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988) (finding preemption of a California statute prohibiting unfair processing of claims); *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190 (8th Cir. 1988) (concluding that ERISA preempted a Missouri statute prohibiting continuous refusal to pay insurance claims); *Juckett v. Beecham Home Improvement Prod.*, 684 F. Supp. 448 (N.D. Tex. 1988) (holding that ERISA preempted a Texas statute that penalized delaying the payment of insurance benefits); and *Rasmussen v. Metro. Life Ins. Co.*, 675 F. Supp. 1497 (W.D. La. 1987) (finding that ERISA preempted a Louisiana statute prohibiting improper handling of insurance claims).

115. *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760 (5th Cir. 1989). In *Ramirez*, the Fifth Circuit considered whether ERISA preempted Peter Ramirez's claims for breach of contract, breach of fiduciary duty, negligence, and other alleged violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act. *Id.* at 761–62. Peter Ramirez, a restaurant manager for Inter-Continental Hotels, received insurance coverage from Travelers Insurance Co. under an employee benefit plan. *Id.* at 761. Ramirez suffered medical expenses for a prolonged illness that began in 1986, and he filed suit against his employer and Travelers when Travelers refused to reimburse him. *Id.* at 761–62. Ramirez argued that the applicable section of the Texas Insurance Code was a statute that "regulates insurance" and should not fall under ERISA preemption. *Id.* at 763. The court, despite admitting the possibility that the Texas statute could be saved by the Insurance Savings Clause, reasoned that even if it was, ERISA still preempted his claims because Ramirez was seeking to recover remedies not available under ERISA. *Id.*

116. *See id.* at 762–63 (explaining that the implied preemption analysis and the express preemption analysis should be conducted separately).

117. *Tri-State Mach., Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309 (4th Cir. 1994). In *Tri-State Machine*, the Fourth Circuit decided whether ERISA preempted Tri-State Machine's state-law claims asserting improper claims processing. *Id.* at 310. Nationwide Life Insurance Co. insured Tri-State Machine's employees for benefit claims exceeding \$25,000 per employee per year with an employee benefit plan explicitly governed by ERISA. *Id.* at 311. Tri-State Machine sued Nationwide Life on various common law grounds and for violation of the West Virginia Unfair Trade Practices Act in West Virginia circuit court after Nationwide Life terminated its contract on July 1, 1989. *Id.* Despite the West Virginia Legislature's attempts to

demonstrates the outer limits of *Pilot Life* application.¹¹⁸

In *Ramirez*, the Fifth Circuit reviewed an employee's claim against his former employer and its insurance provider.¹¹⁹ The employee claimed compensatory and punitive damages based on alleged violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act.¹²⁰ Because his claims "relat[ed] to an employee benefit plan" and ordinarily would be preempted by ERISA,¹²¹ the court had to determine whether the claim escaped preemption under the Insurance Savings Clause.¹²² The court reviewed the section of the Texas Insurance Code providing a private right of action to persons damaged by unfair practices in the business of insurance.¹²³ Under *Metropolitan Life's* common-sense approach, the Texas statute was specifically directed at the business of insurance.¹²⁴ *Ramirez* then examined the three McCarran-Ferguson factors. The court stated that the Texas statute "plainly fails to satisfy" the factors requiring a spreading of policyholder risk and an integral relationship between the insurer and the insured.¹²⁵ Although the statute was specifically related to the insurance industry, this was the only McCarran-Ferguson factor that was potentially satisfied.¹²⁶

Had the court stopped after performing its express preemption analysis and ruled that preemption applied because the Insurance Savings Clause did not save the Texas statute, this case would be of little importance in the understanding of the evolution of the Insurance Savings Clause analysis.

place the statute within the meaning of the "business of insurance," the court ruled that the law was not specifically directed at the insurance industry. *Id.* at 314–15. The court stated that "this type of regulation is not unique to the business of insurance, and it does not target, at least in these provisions, the core business of insurance which involves contracts of protection under which risk is spread among policy holders." *Id.* at 314.

118. *See id.* at 310–16 (asserting that lower courts were not interpreting *Metropolitan Life* in the way the Supreme Court intended).

119. *Ramirez*, 890 F.2d at 761.

120. *Id.* at 762.

121. *See id.* ("Ramirez's efforts to collect his medical benefits 'relate to an employee benefit plan' and thus come within the scope of ERISA's express preemption provision . . . which declares that ERISA 'supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan'").

122. *Id.* at 763.

123. *See id.* at 763 (noting that Section 16 of the Texas Insurance Code allows treble damages and attorneys' fees to persons injured by "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance").

124. *Id.* at 762–63.

125. *Id.* at 763.

126. *See id.* ("At most, therefore, [the Texas statute] satisfies one of three criteria used to interpret the phrase 'regulates insurance' in the ERISA savings clause.").

Despite finding that the Texas statute met one McCarran-Ferguson factor at most, the court explained that this law was more closely related to the insurance industry than *Pilot Life's* Mississippi bad faith law.¹²⁷ The court noted that even if the law would have met the three McCarran-Ferguson factors and been saved by the Insurance Savings Clause, it would still be preempted because of the implied preemption theory announced in *Pilot Life*.¹²⁸ Implied preemption applied here for the same reason it did in *Pilot Life*—because the employee sought remedies not available under ERISA.¹²⁹

Over the next five years, the courts of appeals continued to apply implied preemption, even when courts found statutes saved from express preemption by the Insurance Savings Clause. The Fourth Circuit broadly applied this doctrine in *Tri-State Machine*.¹³⁰ *Tri-State Machine, Inc.* (*Tri-State*) maintained an employee benefit plan insured by Nationwide Life Insurance Co. (*Nationwide*).¹³¹ In addition to a group policy, *Tri-State* had an agreement with *Nationwide* whereby *Tri-State* paid claims up to \$25,000 per employee per year, and *Nationwide* insured against any additional amounts.¹³² When *Nationwide* terminated this agreement, *Tri-State* sued for improper management and processing of claims under the West Virginia Unfair Trade Practices Act.¹³³ *Tri-State* argued that its claims arose from the West Virginia Unfair Trade Practices Act and because that act was designed to regulate insurance companies, *Tri-State's* claims should be saved from preemption by the Insurance Savings Clause.¹³⁴

Despite the West Virginia Legislature's attempt to place the Unfair Trade Practices Act within the meaning of "the business of insurance,"¹³⁵ the court

127. *Id.*

128. *Id.*; see *supra* notes 96–103 and accompanying text (finding that ERISA impliedly preempted an employee's claim because he sought a remedy not contained in ERISA's civil enforcement provisions).

129. *Ramirez*, 890 F.2d at 763–64.

130. *Tri-State Mach., Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309 (4th Cir. 1994).

131. *Id.* at 310.

132. *Id.* at 311.

133. See *id.* at 311 (noting that *Tri-State* sued *Nationwide* for failing to abide by the agreement, mismanaging claims by paying the wrong medical providers, issuing coverage cards in the names of non-*Tri-State* employees, paying claims not covered, and failing to pay claims that were covered).

134. *Id.* at 313.

135. *Id.* at 314. The West Virginia Unfair Trade Practices Act states:

The purpose of this article is to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

stated that the Act did not target the business of insurance, nor was it unique to the business of insurance.¹³⁶ The court followed an earlier West Virginia case that had decided that the Unfair Trade Practices Act did not regulate the business of insurance.¹³⁷ In making this determination, however, the court did not employ the *Metropolitan Life* analysis—in other words, asking if the statute was specifically directed at the business of insurance.¹³⁸ Instead, the Fourth Circuit asserted that the *Metropolitan Life* Court had concluded "that Congress intended to save from preemption only those state laws that regulate the traditional business of insurance to the extent that it involves contractual arrangements for protection against financial loss through the spreading of risk."¹³⁹ The *Metropolitan Life* Court did not reach this conclusion.¹⁴⁰ *Tri-State Machine* interpreted the spreading of policyholder risk to be the only determinate factor when applying the Insurance Savings Clause.¹⁴¹ As previously stated, however, the spreading of policyholder risk represents only one of three factors adopted from the caselaw surrounding the McCarran-Ferguson Act.¹⁴² By ruling that ERISA preempted all of *Tri-State's* claims without correctly applying the map set forth by the Supreme Court in *Metropolitan Life*, *Tri-State Machine* highlighted the fact that lower courts were having trouble applying the Insurance Savings Clause.

This problem did not go unnoticed. Judge Luttig's dissent in *Tri-State Machine* sharply criticized the majority's conclusions.¹⁴³ Judge Luttig asserted

W. VA. CODE § 33-11-1 (2003).

136. *Tri-State Mach., Inc.*, 33 F.3d at 314.

137. *Id.*; see *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 419–22 (4th Cir. 1993) (asserting that because the West Virginia Unfair Trade Practices Act does not exclusively regulate the business of insurance as defined in *Metropolitan Life*, the Act was not saved from preemption).

138. See *supra* Part III.A (setting forth an analysis to be used when applying the Insurance Savings Clause).

139. *Tri-State Mach., Inc.*, 33 F.3d at 312.

140. See Bogan, *supra* note 6, at 138 (explaining that the *Metropolitan Life* Court expressly rejected the argument that the Savings Clause only exempts "traditional" insurance laws from ERISA preemption); see also *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 741–42 (1985) (asserting that there is no indication in the legislative history that Congress had in mind a distinction between traditional and innovative insurance laws).

141. *Tri-State Mach., Inc.*, 33 F.3d at 314; see also Bogan, *supra* note 6, at 139 (contending that the *Tri-State Machine* majority placed the spreading of policyholder risk factor not only above just the other two McCarran-Ferguson Act factors, but also above the common-sense analysis originally outlined in *Metropolitan Life*).

142. See *supra* note 59 and accompanying text (listing the three McCarran-Ferguson factors).

143. *Tri-State Mach., Inc.*, 33 F.3d at 316–19 (Luttig, J., dissenting).

that the majority confused the Savings Clause analysis by applying the *Pilot Life* holding too broadly.¹⁴⁴ Specifically, Luttig argued that the majority erroneously construed *Pilot Life* to preempt all state law actions for the improper processing of claims.¹⁴⁵ *Pilot Life*, however, only dealt with the question of whether ERISA preempted a plan participant's claim under a Mississippi bad faith law.¹⁴⁶

Judge Luttig stressed that if the majority had applied the map set forth in *Metropolitan Life*, the court would have found that the Insurance Savings Clause saved the West Virginia Unfair Trade Practices Act from preemption.¹⁴⁷ Unlike the bad faith law in *Pilot Life*, the law in *Tri-State* was specifically directed at the business of insurance. Judge Luttig wrote, "If any law can be said to be 'specifically directed toward [the insurance] industry,'¹⁴⁸ it is this statute, which by terms, was enacted to, and does, 'regulate trade practices in the business of insurance.'¹⁴⁹ Judge Luttig also reached a conclusion that was different than the majority's when he considered the McCarran-Ferguson factors. The Act did affect the spreading of policyholder risk because it explained how and when liability was to be transferred from Tri-State to Nationwide.¹⁵⁰ In addition, the application of the Act to determine which of Tri-State's claims were covered by Nationwide's stop-loss insurance policy affected an integral part of the insurer-insured relationship.¹⁵¹ The Act also regulated insurance, which allowed it to satisfy the third factor.¹⁵² Judge Luttig also noted that implied preemption would not be applicable in this case because, although the civil enforcement provisions provide exclusive remedies for beneficiaries and plan participants, the provisions do not apply to employers such as Tri-State.¹⁵³

144. See *id.* at 316 (Luttig, J., dissenting) ("In my view, *Pilot Life* did not sweep quite so broadly, and applying here the saving clause analysis undertaken by the Supreme Court in *Pilot Life* requires us to hold that Tri-State's state action is saved from preemption.").

145. *Id.* at 317 (Luttig, J., dissenting).

146. *Id.* (Luttig, J., dissenting); see also *supra* Part III.B (finding that ERISA preempted Mississippi's bad faith regime).

147. *Tri-State Mach., Inc.*, 33 F.3d at 317-18 (Luttig, J., dissenting).

148. *Id.* at 318 (Luttig, J., dissenting) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).

149. *Id.* (Luttig, J., dissenting) (quoting W. VA. CODE § 33-11-1 (2003)).

150. *Id.* (Luttig, J., dissenting).

151. *Id.* (Luttig, J., dissenting).

152. See *id.* (Luttig, J., dissenting) ("Tri-State's action plainly does, therefore, regulate 'the business of insurance' in accordance with the McCarran-Ferguson Act.").

153. *Id.* (Luttig, J., dissenting).

The Supreme Court responded to cases like *Tri-State Machine* less than a year later when it decided *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*¹⁵⁴ Although *Travelers* did not specifically concern the Insurance Savings Clause, the case is important because the Court attempted to reign in the overly broad ERISA preemption doctrine that was evolving in lower courts.¹⁵⁵ The Court focused on the tenet of statutory construction that dictated that federal statutes should not preempt areas traditionally legislated by the states unless the federal act directly required such preemption.¹⁵⁶ Even though *Metropolitan Life* used this tenet of statutory construction in Savings Clause jurisprudence,¹⁵⁷ lower courts were forgetting this important fact.¹⁵⁸ Despite *Travelers*'s clear message, lower courts failed to apply this tenet of statutory construction to Savings Clause cases, forcing the Supreme Court to directly address the problem.¹⁵⁹

D. The Mapmaker Attempts To Clarify

1. UNUM Life Insurance Co. v. Ward

In its 1999 decision, *UNUM Life Insurance Co. of America v. Ward*, the Supreme Court seized the opportunity to clarify the Savings Clause analysis.¹⁶⁰ Management Analysis Co. (MAC) was covered by a long-term employee

154. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). In *Travelers*, the Supreme Court had to determine whether ERISA preempted a New York statute that exacted surcharges for hospital care. *Id.* at 649. The Court ruled that ERISA did not preempt such a state statute because it did not "relate" to employee benefit plans. *Id.* at 662–64. The statutes did not mention any employee benefit plan that would be covered by ERISA and there was no connection between the statutes and ERISA plans. *Id.* at 663–64. The Court also noted that the history of Medicare regulation confirmed that Congress did not intend for ERISA to preempt state regulation of health care cost control. *Id.* at 665–67.

155. See Bogan, *supra* note 6, at 140–41 (describing the problems facing the lower courts in applying the Insurance Savings Clause).

156. See *Travelers*, 514 U.S. at 655 ("[W]here federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

157. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 735–47 (1985).

158. See Bogan, *supra* note 6, at 141 ("The lower federal courts did not immediately recognize that the Court's shift away from a very broad view of ERISA preemption under the statute's preemption clause in *Travelers* should inform the savings clause analysis.").

159. *Id.*

160. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999).

benefit plan by UNUM Life Insurance Co. (UNUM), which specified that all claims must be filed within one year and 180 days from the commencement of a disability.¹⁶¹ John Ward, an employee of MAC, was permanently disabled because of severe leg pain diagnosed as diabetic neuropathy in December 1992.¹⁶² Although Ward filed a claim with MAC, UNUM did not receive the claim until April 11, 1994.¹⁶³ Because UNUM did not receive the claim within a year and 180 days, the claim was untimely and UNUM asserted that it was not contractually obligated to pay the claim.¹⁶⁴ Ward brought suit under California's notice-prejudice rule,¹⁶⁵ a rule that excused untimely insurance claims unless the insurance company could prove that the delay caused actual prejudice.¹⁶⁶

The Supreme Court focused on whether the Insurance Savings Clause saved California's notice-prejudice rule from preemption.¹⁶⁷ Rather than conduct a common-sense analysis of its own, the Court borrowed the Ninth Circuit's conclusion reached when interpreting the same notice-prejudice rule in *Cisneros v. UNUM Life Insurance Co.*¹⁶⁸ In *Cisneros*, the Ninth Circuit stated that "by requiring the insurer to prove prejudice before enforcing proof-of-claim requirements, the notice-prejudice rule dictates the terms of the relationship between the insurer and insured and so seems . . . to 'regulate insurance.'"¹⁶⁹ The fact that the law was specifically directed at the insurance

161. *Id.* at 364.

162. *Id.* at 364–65.

163. *Id.* at 365.

164. *Id.*

165. *Id.* at 365–67.

166. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 760–61 (1993) ("[A] defense based on an insured's failure to give timely notice [of a claim] requires the insurer to prove that it suffered actual prejudice. Prejudice is not presumed from delayed notice alone. The insurer must show actual prejudice.").

167. *See Ward*, 526 U.S. at 367 (noting that both parties agreed that the notice-prejudice rule would be preempted by ERISA if not saved by the Insurance Savings Clause).

168. *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998). In *Cisneros*, the Ninth Circuit concluded that the Insurance Savings Clause saved California's notice-prejudice rule from ERISA preemption. *Id.* at 945. In this case, an employee filed a claim for disability benefits, but did not do so within the required time frame set forth by the insurance contract. *Id.* at 942. UNUM denied the employee's claim, which caused the employee to file suit against UNUM. *Id.* Although UNUM argued that ERISA preempted any claim under the California law, the Ninth Circuit decided that the Insurance Savings Clause saved the law because it was a law that "regulates insurance." *Id.* at 945.

169. *Id.* at 945.

industry and also exclusively regulated insurance contracts aided the analysis.¹⁷⁰

UNUM contended that the Supreme Court should not adopt the Ninth Circuit's common-sense conclusion because, although the California law was industry-specific, it was just a restatement of the general contract principle to avoid disproportionate forfeitures.¹⁷¹ The Court acknowledged that the California law in dispute was designed to prevent disproportionate forfeitures,¹⁷² but noted that the law was "an application of a special order, a rule mandatory for insurance contracts, not a principle a court may plially employ when the circumstances so warrant."¹⁷³ The Court went on to distinguish this California law from other contract cases.¹⁷⁴ For example, under the notice-prejudice law, the party trying to enforce the contract ordinarily has the burden of justification.¹⁷⁵ In contrast, in cases outside the notice-prejudice context, the party trying to enforce the contract does not have the burden of justification—instead, the burden of justifying a departure from the contract rests with the party seeking the departure.¹⁷⁶

The most important facet of the *Ward* case was the Supreme Court's treatment of the McCarran-Ferguson factors.¹⁷⁷ Prior to *Ward*, several circuits had held that in order to fall under the Insurance Savings Clause, a state law must pass the common-sense analysis *and* meet each of the three McCarran-Ferguson factors.¹⁷⁸ *Ward*, however, rejected this view and ruled that the McCarran-Ferguson factors were merely "guideposts."¹⁷⁹ As guideposts, each

170. *Id.*

171. *See* UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 368–69 (1999) (stating that UNUM believed that the California law resembles the Mississippi bad faith law at bar in *Pilot Life*).

172. *Id.* at 370–71.

173. *Id.* at 371.

174. *Id.*

175. *Id.*

176. *Id.*

177. The McCarran-Ferguson factors were first used in Insurance Savings Clause jurisprudence in *Metropolitan Life*. For a discussion of *Metropolitan Life*, see *supra* Part III.A.

178. *See* CIGNA Healthplan of La., Inc. v. Louisiana, 82 F.3d 642, 650 (5th Cir. 1996) (finding that a court had to be able to answer "yes" to each of the three McCarran-Ferguson factors); *Tingle v. Pac. Mut. Ins. Co.*, 996 F.2d 105, 110 n.25 (5th Cir. 1993) (noting several cases where state laws failed to fall under the Savings Clause because they met only one McCarran-Ferguson factor); *DeBruyne v. Equitable Life Assurance Soc'y of the U.S.*, 920 F.2d 457, 468–70 (7th Cir. 1990) (asserting that the McCarran-Ferguson factors are more stringent than the common-sense analysis).

179. *See* UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 374 (1999) (stating that the Ninth Circuit properly looked to the factors as guideposts).

of the factors were relevant, but satisfying one particular factor, or all three factors, was not required for the Insurance Savings Clause to apply.¹⁸⁰ The Court explained that to determine whether the Insurance Savings Clause applies, courts must first use the common-sense analysis and then look to the McCarran-Ferguson factors to aid the common-sense analysis.¹⁸¹ Based on this analysis, the Court contended that the notice-prejudice rule possibly met the spreading of policyholder risk factor.¹⁸² Whether it did or not, however, was not important because the law easily met the other two factors of the test and was thus saved from preemption.¹⁸³

2. Rush Prudential HMO, Inc. v. Moran

Ward's clarification of the Insurance Savings Clause analysis made it easier for a state law to be saved from ERISA preemption.¹⁸⁴ *Ward* simplified the analysis and made it easier for lower courts to apply the analysis, even in complicated cases such as *Rush Prudential HMO, Inc. v. Moran*.¹⁸⁵ In *Rush*, the Supreme Court decided whether the Insurance Savings Clause was applicable to health maintenance organizations (HMOs), despite the fact that HMOs were medical providers in addition to insurers.¹⁸⁶ The Supreme Court held that the Insurance Savings Clause applied "as long as providing insurance fairly accounts for the application of state law."¹⁸⁷ Thus, for the purposes of the Insurance Savings Clause, the state law in question did not have to be directed

180. *Id.* at 373; see also *O'Connor v. UNUM Life Ins. Co. of Am.*, 146 F.3d 959, 963 (D.C. Cir. 1998) ("That the factors are merely 'relevant' suggests that they need not all point in the same direction, else they would be 'required.'").

181. See *Ward*, 526 U.S. at 373–74 ("As the Ninth Circuit correctly recognized, *Metropolitan Life* asked first whether the law there in question 'fit a common-sense understanding of insurance regulation,' . . . and then looked to the McCarran-Ferguson factors as checking points or 'guideposts, not separate essential elements . . . that must each be satisfied' to save the State's law." (quoting *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939, 945–46 (9th Cir. 1998))).

182. *Id.* at 374.

183. See *id.* at 374–75 (finding that the notice-prejudice rule serves an integral part of the insurer-insured relationship and is limited to the insurance industry).

184. See *Bogan*, *supra* note 6, at 139–41 (suggesting that after *Travelers* and *Ward*, the presumption against preemption is strong in nonpension employee benefits cases, including those claims that fall under the Insurance Savings Clause).

185. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

186. *Id.* at 367. *Rush* argued that the Insurance Savings Clause could not save laws affecting HMOs because HMOs are not specifically a part of the insurance industry. *Id.*

187. *Id.* at 367.

exclusively at entities that only regulate insurance.¹⁸⁸ The Supreme Court cited congressional intent at length to aid the conclusion that the Insurance Savings Clause was applicable to HMOs.¹⁸⁹

In *Rush Prudential*, Rush Prudential HMO, Inc. (Rush) insured the employer of Debra Moran's husband through an employee welfare benefit plan.¹⁹⁰ According to the plan, Rush was responsible for paying for "medically necessary" services.¹⁹¹ After suffering from continual pain and numbness in her right shoulder, Debra Moran's physician requested that she undergo a specialized type of surgery to repair the condition.¹⁹² Rush, however, did not classify the specialized surgery as "medically necessary," and Rush denied coverage for the specialized surgery.¹⁹³ Rush instead informed Moran that she needed to undergo a more standardized procedure to be performed by a Rush-affiliated physician.¹⁹⁴ Moran then sued Rush under the Illinois HMO Act.¹⁹⁵

After determining that ERISA would preempt Moran's claim, the Supreme Court had to determine whether the Insurance Savings Clause applied.¹⁹⁶ Once the Court determined that HMOs were "risk-bearing

188. *See id.* ("Nothing in the saving clause requires an either-or choice between health care and insurance in deciding a preemption question . . .").

189. *See id.* at 367–72 (examining Congress's intent behind HMO legislation). When Congress passed the HMO Act of 1973, health maintenance organizations were intended to be an alternate means for bearing risk that would become an important part of the insurance industry. *See* HMO Act of 1973, § 1301(c), 87 Stat. 916, *as amended*, 42 U.S.C. § 300e(c) (2000) (noting that when Congress specified that the new HMOs would have to meet certain federal requirements, that HMOs would be required to bear and manage risk). Congress defined HMOs by referencing risk, management of risk, and recognition that states regulated HMOs as insurers. *Rush Prudential*, 536 U.S. at 369.

190. *Rush Prudential*, 536 U.S. at 359.

191. *Id.*

192. *See id.* at 360 (noting that Moran's doctor, Dr. Arthur LaMarre, recommended an unconventional surgery by a nonaffiliated Rush physician, Dr. Julia Terzis).

193. *Id.*

194. *Id.* at 361.

195. *Id.* Section 4-10 of the Act provides:

Each Health Maintenance Organization shall provide a mechanism for the timely review by a physician holding the same class of license as the primary care physician, who is unaffiliated with the Health Maintenance Organization, jointly selected by the patient . . . , primary care physician and the Health Maintenance Organization in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service proposed by a primary care physician. In the event that the reviewing physician determines the covered service to be medically necessary, the Health Maintenance Organization shall provide the covered service.

215 ILL. COMP. STAT., ch. 125, § 4-10 *et seq.* (2000).

196. *See Rush Prudential*, 536 U.S. at 365 (noting that there really was no dispute that

organizations" that "are almost universally regulated as insurers under state law,"¹⁹⁷ it held that the Illinois HMO Act passed the common-sense analysis.¹⁹⁸ The Court then looked at the McCarran-Ferguson factors, but only as guideposts.¹⁹⁹ Following *Ward*, the *Rush Prudential* Court reiterated that each one of the three McCarran-Ferguson factors did not have to be satisfied for a state law to fall under the Insurance Savings Clause.²⁰⁰ In doing so, the Court made it easier for lower courts to find that state laws were saved from ERISA preemption by the Insurance Savings Clause.

Rush also argued that ERISA preempted the Illinois HMO Act based on the implied preemption argument originally set forth in *Pilot Life*.²⁰¹ The Court, over a strong four-person dissent,²⁰² explained that the Illinois HMO Act did not provide a new cause of action under state law, nor did it authorize a new form of relief not set forth in ERISA's civil enforcement provisions.²⁰³ Therefore, neither express nor implied preemption applied.²⁰⁴

IV. *The New Map*: Kentucky Ass'n of Health Plans, Inc. v. Miller

A. *The Situation*

Despite the Supreme Court's efforts in *Ward* and *Rush Prudential* to clear up Insurance Savings Clause analysis, lower courts continued to struggle with its application. The two-tiered analysis originally set forth in *Metropolitan Life* that considered common sense and the three McCarran-Ferguson factors proved unworkable. Justice Scalia, speaking for a unanimous Court in *Kentucky Ass'n of Health Plans, Inc. v. Miller*,²⁰⁵ created a new map to replace the analysis that courts had followed the previous eighteen years.

ERISA would preempt the Illinois HMO Act because it was an act that "relates to" employee benefit plans).

197. *Id.* at 372.

198. *See id.* at 373 (finding that the Illinois HMO Act was "directed toward" the insurance industry and was regulating insurance).

199. *Id.*

200. *Id.*

201. *See id.* at 377 ("Rush says that the day has come to turn dictum into holding by declaring that the state insurance regulation, § 4-10, is preempted for creating just the kind of 'alternative remedy' we disparaged in *Pilot Life*.").

202. *Id.* at 388 (Thomas, J., dissenting).

203. *Id.* at 375-87.

204. *See id.* at 387 ("The saving clause is entitled to prevail here.").

205. Ky. Ass'n of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 (2003).

Miller concerned two Any Willing Provider (AWP) statutes passed by the Kentucky General Assembly.²⁰⁶ The first AWP statute was part of the Kentucky Health Care Reform Act of 1994.²⁰⁷ This statute prohibited an insurer from discriminating against any provider that was willing to meet terms designated by the insurer.²⁰⁸ The second AWP statute was passed in 1996 and was specific to chiropractic benefits.²⁰⁹ Several Kentucky HMOs had contracted with a select group of doctors and hospitals to form "exclusive provider networks."²¹⁰ The AWP laws infringed on the ability of these HMOs to continue these exclusive provider networks.²¹¹ Kentucky Association of Health Plans, Inc., a nonprofit organization created to promote the interests of its HMO members,²¹² and a group of Kentucky HMOs brought suit claiming that ERISA preempted both AWP statutes.²¹³ Both the district court²¹⁴ and the Sixth Circuit²¹⁵ determined that the Insurance Savings Clause saved the AWP statutes from ERISA preemption.²¹⁶ The HMOs appealed to the Supreme Court.²¹⁷

206. *Id.* at 1473–74.

207. Ky. Ass'n of Health Plans, Inc. v. Nichols, 227 F.3d 352, 355 (6th Cir. 2000).

208. *Miller*, 123 S. Ct. at 1473–74. The first AWP statute provides, "A health insurer shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and who is willing to meet the terms and conditions for participation established by the health insurer, including the Kentucky state Medicaid program and Medicare partnerships." KY. REV. STAT. ANN. § 304.17A-270 (Michie 2001 & Supp. 2004).

209. *Miller*, 123 S. Ct. at 1474. This AWP statute provides, "A health benefit plan that includes chiropractic benefits shall . . . [p]ermit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan." KY. REV. STAT. ANN. § 304.17A-171(2) (Michie 2001 & Supp. 2004). In Kentucky, "health benefit plan" includes "any hospital . . . a self-insured plan, or a plan provided by a multiple employer welfare arrangement, to the extent permitted by ERISA; health maintenance organization contract; or any health benefit plan that affects the rights of a Kentucky insured and bears a reasonable relation to Kentucky . . ." KY. REV. STAT. ANN. § 304.17A-005(18) (Michie 2001 & Supp. 2004).

210. *Miller*, 123 S. Ct. at 1474.

211. *Id.*

212. *Nichols*, 227 F.3d at 355.

213. *Miller*, 123 S. Ct. at 1474. This group of HMOs brought the suit because they would not be able to give their customers low-cost healthcare. Low-cost healthcare was possible through the provider networks because the doctors and hospitals in the networks agreed to offer their services at discounts in exchange for the HMOs supplying them with an increased number of patients. *Miller*, 123 S. Ct. at 1474.

214. Cmty. Health Partners, Inc. v. Nichols, 14 F. Supp. 2d 991 (W.D. Ky. 1998).

215. *Nichols*, 227 F.3d 352.

216. *Id.* at 372.

217. On appeal, the HMOs argued that the AWP statutes did not regulate insurance

B. Original Map Thrown Away

The Supreme Court began its analysis by noting that its opinions in *Ward* and *Rush Prudential* had led to confusion among the lower courts. Justice Scalia wrote that these decisions, which together held that a state law did not have to meet each of the three McCarran-Ferguson factors, "raise more questions than they answer and provide wide opportunities for divergent outcomes."²¹⁸ Scalia noted that the Supreme Court had not yet provided adequate guidance on how courts should implement the McCarran-Ferguson factors into the Insurance Savings Clause analysis.²¹⁹ He asked, "May a state law satisfy *any* two of the three McCarran-Ferguson factors and still fall under the savings clause? Just one? What happens if two of three factors are satisfied, but not 'securely satisfied' or 'clearly satisfied' . . . ?"²²⁰ Scalia then traced the development of the McCarran-Ferguson factors in Insurance Savings Clause jurisprudence.²²¹ He explained that in *Metropolitan Life*,²²² the Court had used the factors merely to help bolster the common-sense analysis.²²³ Since *Metropolitan Life*, the Court had referred to the McCarran-Ferguson factors as "considerations,"²²⁴ "checking points,"²²⁵ and "guideposts."²²⁶ According to Scalia, the Court had "never held that the McCarran-Ferguson factors [were] an essential component of the [Insurance Savings Clause] inquiry."²²⁷

because they did not affect risk spreading, change the terms of insurance contracts, or alter the insurer-insured relationship. Oral Argument of Robert N. Eccles on Behalf of the Petitioners at 6, *Ky. Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003) (No. 00-1471). The focus of the HMOs argument was that the AWP laws only regulated noninsurance relationships. *Id.* at 26.

218. *Miller*, 123 S. Ct. at 1478.

219. *Id.*

220. *Id.*; see also *Rush Prudential, Inc. v. Moran*, 536 U.S. 355, 373 (2002) ("For in any event, the second and third factors are clearly satisfied . . ."); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 374 (1999) (noting that "the remaining McCarran-Ferguson factors, verifying the common-sense view, are securely satisfied").

221. *Miller*, 123 S. Ct. at 1478-79.

222. *Supra* Part III.A.

223. *Miller*, 123 S. Ct. at 1479.

224. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 49 (1987).

225. *Ward*, 526 U.S. at 374.

226. *Rush Prudential, Inc. v. Moran*, 536 U.S. 355, 373 (2002).

227. *Miller*, 123 S. Ct. at 1479. The attorney for the United States, on behalf of Kentucky, argued to the Court that the McCarran-Ferguson Act and the Insurance Savings Clause were argued differently, which was ample reason to "give them a somewhat different scope." Oral Argument of James A. Feldman on Behalf of the United States, as Amicus Curiae, Supporting the Respondent at 52, *Miller* (2003) (No. 00-1471).

The Supreme Court announced in *Miller* that the use of the McCarran-Ferguson factors in the context of ERISA's Insurance Savings Clause had led only to confusion and had caused courts to lose focus.²²⁸ The factors concerned what constituted the business of insurance, whereas the Insurance Savings Clause concerned regulating insurance.²²⁹ The problems that the factors caused were not counterbalanced by any benefits, for their use had "added little to the relevant analysis."²³⁰ As a result, the Court decided to "make a clean break" from the McCarran-Ferguson factors.²³¹

C. The Solution

The *Miller* Court rejected the old analysis and formulated a completely new framework for courts to use when analyzing whether a state law is saved by ERISA's Insurance Savings Clause. Once the Court took the McCarran-Ferguson factors out of the analysis, it was left with only the common-sense portion of the test. Although not stated explicitly in the opinion, the Court was not content with the idea of leaving the lower courts with nothing more than a broad common-sense analysis to determine when the Insurance Savings Clause was applicable. In oral argument, Justice Scalia expressed his reluctance with this part of the analysis by pronouncing, "I—I don't trust common sense."²³² He explained that he wanted "some rule of law that—that I can adhere to."²³³ As a result, when the Court formulated the new test, it set forth two explicit requirements that a state law had to satisfy to be saved from preemption.²³⁴ If a

228. *Miller*, 123 S. Ct. at 1478 ("We believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts . . .").

229. *Id.*

230. *Id.*

231. *Id.* at 1479. Scalia also pointed out that there were substantial differences between the McCarran-Ferguson Act and ERISA's Insurance Savings Clause. For example, the McCarran-Ferguson Act characterized conduct through private actors, not state laws. *Id.* at 1478. Also, the McCarran-Ferguson Act dealt with the "business of insurance" whereas the Insurance Savings Clause is concerned with whether a state law "regulates insurance." *Id.* This latter difference was especially important in *Miller* because no one argued that the Kentucky law was part of the "business of insurance." Oral Argument of Robert N. Eccles on Behalf of the Petitioners at 18, *Miller* (No. 00-1471).

232. Oral Argument of Elizabeth A. Johnson on Behalf of the Respondent at 41, *Miller* (No. 00-1471). Scalia explained, "And I don't like the, you know, common sense test, I know it when I see it. What I worry about, the—the common sense test is that we will approve those things that we like, and disapprove those things that we don't like." *Id.*

233. *Id.* at 42.

234. *Miller*, 123 S. Ct. at 1479.

state law meets these two requirements, the Insurance Savings Clause saves it from preemption.²³⁵ There is no longer any broad, common-sense analysis or any reference to the McCarran-Ferguson factors.²³⁶ The new requirements are that the state law must: (1) be specifically directed at entities engaged in insurance and (2) substantially affect the risk-pooling arrangement between the insurer and insured.²³⁷

The HMOs in *Miller* argued that the AWP statutes were not specifically directed at insurers because in addition to regulating the insurance industry, the statutes regulated doctors seeking to participate in provider networks.²³⁸ The Court, however, focused on the wording of the statutes and explained that both AWP statutes were directed at health insurers or benefit plans.²³⁹ Even though the laws may have affected entities outside the insurance industry such as health-care providers, the statutes were not specifically directed at those entities.²⁴⁰ Therefore, the AWP statutes met the first requirement of the Supreme Court's new test.

The HMOs also contended that ERISA should preempt the AWP statutes because they focus on the relationship between insurers and third-party providers, not the terms of an actual insurance policy.²⁴¹ This argument, however, was based on a case involving the McCarran-Ferguson Act in which the Supreme Court had held that the relationship between insurers and third parties (pharmacies) did not constitute the "business of insurance."²⁴² The Court rejected this argument because ERISA's Insurance Savings Clause does not require the state law to pertain to the "business of insurance"; the Savings Clause only requires that a state law "regulate insurance."²⁴³ The AWP laws

235. *Id.*

236. *Id.*

237. *Id.* It is important to note that *Miller* did not alter the concept of implied preemption. If a state statute provides for remedies outside the scope of ERISA's civil enforcement provisions, then ERISA will still preempt it. *See supra* notes 96–109 and accompanying text (explaining implied preemption).

238. *Miller*, 123 S. Ct. at 1475.

239. *Id.* at 1475–76.

240. *Id.* "Regulations 'directed toward' certain entities will almost always disable other entities from doing, with the regulated entities, what the regulations forbid; this does not suffice to place such regulation outside the scope of ERISA's savings clause." *Id.* at 1476.

241. *Id.*

242. *See id.* (stating that the petitioners rely on *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), to support their second argument).

243. *Id.* at 1477.

regulated insurance by imposing conditions on insurers that prevented them from discriminating against any willing provider.²⁴⁴

The Court explained that the conditions that were imposed on the right to engage in the insurance business must substantially affect the risk-pooling arrangement.²⁴⁵ The requirement that a state law affect the risk-pooling arrangement was necessary or any state law having to do with insurance would fall under the Savings Clause, which was supposed to save only those laws that specifically "regulate insurance."²⁴⁶ The Court rejected the HMOs' argument that in order to satisfy the risk-pooling requirement, a law had to alter or affect the terms of the insurance policies.²⁴⁷ The AWP statutes substantially affected the risk-pooling arrangement between insurers and the insured and, therefore, met the second requirement of the new test.²⁴⁸ For support, the Court explained that the AWP statutes impacted the risk-pooling arrangement similarly to the *Metropolitan Life* mandated-benefit law, the *Ward* notice-prejudice rule, and the *Rush Prudential* independent-review provision.²⁴⁹

V. Following the Map

A. The New Map Is Stronger

The discovery of a new and arguably better map should increase your chances of finding a way out of the cave, but success is not guaranteed. The only way the map will help is if it can be understood as it was intended; otherwise, it will be meaningless. Similarly, the Supreme Court's new map in *Miller* should help alleviate the lower courts' confusion about the Insurance Savings Clause analysis. This, however, will only occur if the lower courts interpret the new map in the way that the Supreme Court intended. The new

244. *Id.*

245. *Id.* Note that the Court announced the new test in the last paragraph of the opinion after it had established that the Kentucky laws were specifically directed at insurance entities and that they substantially affected the risk-pooling arrangement. *See id.* at 1479 (announcing the new test).

246. *See id.* (noting, for illustration, that if substantially affecting the risk-pooling arrangement was not required, then laws requiring insurance companies to pay their janitors twice the minimum wage fall under the Insurance Savings Clause).

247. *Id.*

248. *Id.* at 1478. *But see* Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 UCLA L. REV. 457, 533 (2003) (suggesting that the Kentucky AWP laws did not meet substantially affect the risk-pooling arrangement between the insurer and the insured).

249. *Miller*, 123 S. Ct. at 1477–78.

test set forth in *Miller* is simple and to the point.²⁵⁰ The Supreme Court's message to lower courts was clear: If a state statute meets both prongs of the new test, then the Insurance Savings Clause saves the statute from express preemption.²⁵¹

In order for lower courts to correctly interpret the new map, they must realize that this map is different from the old one. Under *Miller*'s first prong, a state statute must be "specifically," not exclusively, directed at entities engaged in insurance.²⁵² In the old test that considered the McCarran-Ferguson factors, one of the factors that went into the analysis asked whether the law was "limited" to entities within the insurance industry.²⁵³ For example, a law could be directed toward the insurance industry, but the law could also have effects in other industries. This kind of law would not meet the old test, which required the law to be "limited" to entities within the insurance industry; however, it would meet the first prong of *Miller*. In determining whether the AWP statutes considered in *Miller* were specifically directed toward entities engaged in insurance, Scalia suggested that this prong could be met without the statute necessarily constituting the business of insurance.²⁵⁴ For example, laws requiring attorneys to take continuing legal education classes are specifically directed toward entities engaged in the legal profession (lawyers); however, taking continuing legal education classes is not the "business" of law.²⁵⁵

The more obvious difference in the new map and the old one, however, involves *Miller*'s second prong, which requires the state law to substantially affect the risk-pooling arrangement between the insurer and the insured.²⁵⁶ The *Miller* Court explicitly stated that this prong is different than the McCarran-Ferguson factor that required a state statute to spread risk.²⁵⁷ Scalia explained that the state statute only has to substantially affect the risk-pooling arrangement and does not have to alter or control the actual insurance policy.²⁵⁸ By not having to alter or control the terms of the actual policy, the Insurance

250. *Id.* at 1479 (setting forth only two prongs in the test).

251. *Id.* ("[F]or a state law to be deemed a 'law . . . which regulates insurance' under § 1144(b)(2)(A), it must satisfy two requirements.").

252. *See supra* note 229 and accompanying text (outlining the *Miller* test).

253. *See supra* note 59 and accompanying text (describing the three factors borrowed from the McCarran-Ferguson Act).

254. *Miller*, 123 S. Ct. at 1477.

255. *Id.*

256. *Id.* at 1479.

257. *Id.* at 1477 n.3.

258. *Id.*

Savings Clause should be applicable to a wider variety of statutes than it previously had been after cases such as *Pilot Life*.²⁵⁹

Most lower courts have understood that the map set forth in *Miller* not only "substantially clarified,"²⁶⁰ but also "dramatically changed"²⁶¹ the old analysis.²⁶² Some courts, however, are clinging to pre-*Miller* principles and have not yet recognized that the *Miller* map replaced the old one provided in *Metropolitan Life*. For example, the Fourth Circuit has noted that *Miller* "did not work any fundamental change" in the Insurance Savings Clause analysis.²⁶³ Additionally, the Ninth Circuit has stated that the *Miller* prongs are merely "remnants" of the original test from *Metropolitan Life*.²⁶⁴ Although in a loose sense the new test's prongs could be considered "remnants" of the old test, this phrasing does not address the key fact that the new test bolsters the Insurance Savings Clause.

The lower courts must recognize the *Miller* map as a new test and understand that it is an improvement on the old map. It is an improvement because *Miller* simplified the analysis and made the Insurance Savings Clause stronger.²⁶⁵ The old analysis considered common sense and three factors that were relevant, but not required.²⁶⁶ The new analysis replaces this confusing inquiry with two distinct factors.²⁶⁷ If those two factors are met, the Insurance

259. See *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1145 (9th Cir. 2003) (explaining that risk spreading can potentially "be found in a much wider variety of statutes than *Pilot Life* suggested").

260. *Kidneigh v. UNUM Life Ins. Co. of Am.*, 345 F.3d 1182, 1186 (10th Cir. 2003); see also *Morales-Ceballos v. First UNUM Life Ins. Co. of Am.*, No. 03-CV-925, 2003 U.S. Dist. LEXIS 9801, at *7 (E.D. Pa. 2003) ("By reducing the multi-factored test to a two-prong analysis, *Miller* clarified the factors that federal courts should consider in determining whether ERISA preemption is warranted.").

261. *Rosenbaum v. UNUM Life Ins. Co. of Am.*, No. 01-6758, 2003 U.S. Dist. LEXIS 15652, at *2 (E.D. Pa. 2003).

262. See *Bonnell v. Bank of Am.*, 284 F. Supp. 2d 1284, 1287 (D. Kan. 2003) (explaining that *Miller* set forth a "new two-part test"); *Rosenbaum*, 2003 U.S. Dist. LEXIS 15652, at *3 (asserting that *Miller* "significantly altered the applicable test for determining whether state legislation qualifies for protection" by the Insurance Savings Clause); *Hollaway v. UNUM Life Ins. Co. of Am.*, 2003 OK 90, at *16-17 (Okla. 2003) (contending that the Supreme Court had created a new test that specifically rejected a test that had previously been followed).

263. *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 286 (4th Cir. 2003).

264. See *Elliot*, 337 F.3d at 1143 (suggesting that this is "immediately apparent").

265. See *supra* note 251 and accompanying text (explaining that *Miller* simplified the analysis).

266. See *supra* notes 54-69 and accompanying text (describing the original map set forth in *Metropolitan Life*).

267. See *supra* note 229 and accompanying text (outlining the two factors in the new *Miller* test).

Savings Clause is applicable. Under the new map, it should be easier for a state law to be "saved" from preemption.²⁶⁸

B. *Interpreting the Map*

Just as you will remain lost in the cave if you are unable to read your map, lower courts will remain lost in the confusion of the Insurance Savings Clause if they do not interpret the *Miller* map correctly. Some lower courts are unwilling to interpret *Miller* in the way it was intended. The case most illustrative of this problem is *Kidneigh v. UNUM Life Insurance Co. of America*,²⁶⁹ which was decided in October 2003. In *Kidneigh*, UNUM Life Insurance Co. (UNUM) was administrator of an employee disability plan for the law firm of Kidneigh & Kaufman, P.C.²⁷⁰ An employee of the firm, Jon Kidneigh, filed a claim for disability benefits with UNUM following multiple back and hernia surgeries.²⁷¹ Although UNUM paid these benefits initially, it cut them off on March 31, 1999, after deciding that Kidneigh was able to return to work.²⁷² Kidneigh brought suit under ERISA, but also brought a bad faith claim under Colorado state law.²⁷³ UNUM argued that ERISA preempted the bad faith claim, but Kidneigh asserted that the Insurance Savings Clause applied to save it from preemption.²⁷⁴

The Tenth Circuit analyzed the bad faith claim and determined that the state statute authorizing this claim was expressly preempted because it did not meet the *Miller* test.²⁷⁵ The court ruled that the Colorado law was not

268. See *supra* notes 249–50 and accompanying text (explaining that the Insurance Savings Clause potentially can now apply to save more laws than pre-*Miller*).

269. *Kidneigh v. UNUM Life Ins. Co. of Am.*, 345 F.3d 1182 (10th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1133 (Feb. 23, 2004). In *Kidneigh*, the Tenth Circuit had to decide whether ERISA preempted a Colorado bad faith law. *Id.* at 1183–84. An employee sued his employer's insurance provider for stopping disability payments. *Id.* at 1183. The court found that ERISA preempted the claim and that the Insurance Savings Clause did not save it from preemption. *Id.* at 1185–86. Although the court held that the Colorado law was impliedly preempted because it provided additional remedies outside of ERISA's civil enforcement scheme, the court went on to assert that the law was also expressly preempted under the *Miller* test. *Id.* at 1185–88. Above a strong dissent, the court decided that the Colorado law was not specifically directed toward entities engaged in insurance, nor did it substantially affect the risk-pooling arrangement between the insurer-insured. *Id.* at 1189.

270. *Id.* at 1183.

271. *Id.*

272. *Id.*

273. *Id.* Kidneigh's wife also brought a loss of consortium claim under Colorado law. *Id.*

274. *Id.* at 1184–85.

275. *Id.* at 1189.

specifically directed toward entities engaged in insurance and that it did not substantially affect the risk-pooling arrangement of the insurer-insured.²⁷⁶ In conducting the express preemption analysis, the majority failed to follow the Supreme Court's lead—had it done so, the express preemption analysis would have led to a different conclusion.²⁷⁷ The court already had stated that implied preemption applied because the Colorado law provided remedies beyond the scope of ERISA's civil enforcement provisions.²⁷⁸ Because the court already had decided that implied preemption applied, there was no reason to consider whether the Colorado law was saved from express preemption.²⁷⁹ Although unnecessary, the court's express preemption analysis is relevant to Insurance Savings Clause jurisprudence because it provides a clear example of a lower court not following the new map in the way the Supreme Court intended.²⁸⁰ To explain this contention, the court's analysis of each prong of the *Miller* test will be considered separately.

1. The First Prong

The *Kidneigh* court merely glossed over the first prong of *Miller* in its analysis concerning whether the Colorado state law that authorized the bad faith cause of action was specifically directed at entities engaged in insurance.²⁸¹ The majority noted that Colorado courts have not exclusively confined bad faith causes of action to insurance entities.²⁸² For example, bad faith causes of action have been applied to many noninsurance areas²⁸³ and to all contracts in general under an implied duty of good faith and fair dealing.²⁸⁴

276. *Id.*

277. *See infra* notes 272–334 and accompanying text (asserting that the majority's analysis of each *Miller* prong was incorrect).

278. *Kidneigh*, 345 F.3d at 1185.

279. *See id.* at 1189 (Henry, J., dissenting) (explaining that the majority's direct preemption analysis was unnecessary to its holding).

280. *See id.* (Henry, J., dissenting) (noting that the majority's conclusion after conducting its unnecessary express preemption analysis was problematic).

281. *See id.* at 1185–86 (noting that the Colorado law was expressly preempted, but then going on to analyze the second *Miller* factor before thoroughly explaining the first).

282. *Id.* at 1186.

283. *See Rogers v. Westerman Farm Co.*, 29 P.3d 887, 908 (Colo. 2001) (finding that the implied duty of good faith and fair dealing has developed through implied covenants and is applicable to oil and gas leases).

284. *See Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (explaining that in Colorado, like most other jurisdictions, all contracts contain an implied duty of good faith and fair dealing).

The majority went on to say that even if bad faith claims had been limited to the insurance setting, ERISA preemption would still apply.²⁸⁵ For this proposition, the majority cited *Pilot Life*.²⁸⁶ The majority explained that *Pilot Life* was cited with approval in *Miller* and that it had not been overruled.²⁸⁷ It also noted that although "the test for analyzing ERISA preemption cases has evolved," the pre-*Miller* holdings concerning preemption of bad faith claims were still valid.²⁸⁸ The majority's decision to place great stock in *Pilot Life* is problematic because later cases such as *UNUM Life Insurance Co. of America v. Ward*²⁸⁹ undercut *Pilot Life*'s reasoning.²⁹⁰

The first *Pilot Life* principle that *Ward* questioned was the exact principle that *Kidneigh* relied on in determining whether the Colorado law met the first *Miller* prong. *Pilot Life* stated that bad faith laws were not specifically directed at insurance if bad faith claims could be made in noninsurance settings.²⁹¹ "[*Ward*] took a much more generous approach than did *Pilot Life* in analyzing whether a law was specifically directed at insurance."²⁹² *Ward* focused on the fact that California's notice-prejudice rule was directed at insurance by its very terms and that it contained provisions applicable only to insurance companies.²⁹³ The fact that similar claims could be made in other areas was irrelevant, which was a substantive change from *Pilot Life*.²⁹⁴ Therefore, the *Kidneigh* majority's reliance on *Pilot Life* to find that bad faith causes of action were not specifically directed at entities engaged in insurance if they also could be made in noninsurance settings was problematic.

285. See *Kidneigh*, 345 F.3d at 1186 ("Even if the Colorado state courts had limited bad faith claims to the insurance context, however, that fact alone would not save Colorado bad faith claims from ERISA preemption.").

286. *Id.*

287. *Id.* at 1188 ("Had the Supreme Court intended *Miller* to overrule *Pilot Life* or, in the *Kidneigh*'s words, eviscerate its precedential value, the Court could have said as much; the fact that *Pilot Life* is still cited in *Miller* with approval suggests otherwise.").

288. *Id.*

289. *Supra* Part III.D.1.

290. See *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1144 (9th Cir. 2003) (stating that *Ward* is the principal case challenging some of *Pilot Life*'s conclusions).

291. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). The other *Pilot Life* principles that *Ward* questioned are also important and will be discussed in a later section. *Infra* Part V.B.2.

292. *Elliot*, 337 F.3d at 1145. The *Kidneigh* majority calls *Elliot*'s discussion of the evolution of ERISA preemption "interesting." *Kidneigh*, 345 F.3d at 1189.

293. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368-73 (1999).

294. See *Pilot Life*, 481 U.S. at 50 (finding that the Mississippi common law of bad faith could be applicable to other areas outside of insurance, even though the Mississippi Supreme Court had identified the law with the insurance industry).

In analyzing the first *Miller* prong, the *Kidneigh* majority failed to distinguish between Colorado's two different bad faith causes of action, one that arises in contract and the other in tort.²⁹⁵ The contract bad faith claim is inherent in all contracts because of the implied duty of good faith and fair dealing.²⁹⁶ The tort bad faith claim, however, is unique to a surety-insured relationship.²⁹⁷ The dissent explained that the Colorado bad faith claim at issue in *Kidneigh* was for the breach of an insurance contract and thus was derived in tort.²⁹⁸ Therefore, it "'exist[s] independently of the liability imposed by an insurance contract.'"²⁹⁹ This is important because Colorado courts have analyzed insurance bad faith claims differently from other general bad faith claims.³⁰⁰ They have adopted specific policy considerations and a separate set of laws to govern insurance bad faith claims.³⁰¹ The dissent asserted that Colorado courts have not extended these same considerations to contexts beyond insurance.³⁰² However, even if these considerations did have effects on areas outside of the insurance context, as long as the effects were de minimis, the law still should be saved from preemption.³⁰³ Had the majority understood that for a law to be specifically directed at entities engaged in insurance it did not have to be limited exclusively to the insurance industry, it would have found that the statutory Colorado bad faith cause of action met the first prong of the test.³⁰⁴

295. See *Kidneigh v. UNUM Life Ins. Co. of Am.*, 345 F.3d 1182, 1193 (10th Cir. 2003) (Henry, J., dissenting) (asserting that the majority "erroneously conflate[d] two separate causes of action . . . [that] are quite distinct under well-settled Colorado law").

296. *Id.* (Henry, J., dissenting).

297. *Id.* (Henry, J., dissenting).

298. *Id.* (Henry, J., dissenting).

299. *Id.* (Henry, J., dissenting) (quoting *Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567, 571 (Colo. Ct. App. 2003)).

300. *Id.* at 1194 (Henry, J., dissenting).

301. See *id.* at 1194–95 (Henry, J., dissenting) (explaining that the motivations of an insured entering into insurance contracts is different than that of a party entering a basic commercial contract). The dissent also conducts a thorough overview of the laws in this area in the last twenty years and explains how the state legislature has amended them. *Id.* at 1194–95 (Henry, J., dissenting).

302. *Id.* at 1195 (Henry, J., dissenting).

303. *Id.* (Henry, J., dissenting); see also *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 373–74 (2002) (explaining that although the Illinois independent review laws may affect contexts other than insurance, this would not be enough to prevent the law from being saved).

304. See *Kidneigh*, 345 F.3d at 1196 (Henry, J., dissenting) ("[I]t is clear that Colorado's insurance bad faith law is 'specifically directed toward entities engaged in insurance.'" (quoting *Miller*, 123 S. Ct. 1471, 1479 (2003))).

2. *The Second Prong*

Kidneigh also found that the Colorado bad faith claim failed to meet the second *Miller* prong.³⁰⁵ The second *Miller* prong requires a state statute to substantially affect the risk-pooling arrangement between the insurer and the insured.³⁰⁶ The *Kidneigh* majority asserted that *Pilot Life* and "other" ERISA preemption cases demonstrate that state bad faith claims cannot substantially affect the risk-pooling arrangement.³⁰⁷ It cited a passage from *Pilot Life* explaining that a bad faith claim does not define the terms of the insurer-insured relationship.³⁰⁸ The majority also announced that it was following the holding of another Tenth Circuit case that held that ERISA preempted a Colorado bad faith claim on the grounds that it was substantively similar to the Mississippi bad faith claim in *Pilot Life*.³⁰⁹ Although the *Kidneighs* argued correctly that the precedential weight of the holdings of *Pilot Life* and other pre-*Ward* Tenth Circuit cases had been diminished by *Ward* and *Miller*, the majority did not agree.³¹⁰

The *Kidneigh* majority was correct in asserting that *Pilot Life* had held that claims processing laws did not substantially affect risk-pooling arrangements.³¹¹ This point, however, was another *Pilot Life* principle that was challenged by later Supreme Court jurisprudence.³¹² In *Ward*, the Supreme Court found that because the notice-prejudice rule occasionally shifted the "risk of late notice

305. *Id.* at 1186.

306. *Ky. Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471, 1479 (2003).

307. *Kidneigh*, 345 F.3d at 1186. Other lower courts agree with the *Kidneigh* majority that the risk-pooling arrangement is not substantially affected by bad faith claims. *See* *Hollaway v. UNUM Life Ins. Co. of Am.*, 2003 OK 90, at *25 (Okla. 2003) (finding that Oklahoma's cause of action for breach of the implied covenant of good faith and fair dealing did not substantially affect the risk-pooling arrangement).

308. *Kidneigh*, 345 F.3d at 1186; *see also* *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (contrasting the Mississippi bad faith common law with the mandated-benefits law from *Metropolitan Life*).

309. *Kidneigh*, 345 F.3d at 1187–88. The court referred to *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 456 (10th Cir. 1989). *Kelley* held Colorado's law of bad faith did not regulate insurance because it does not spread or transfer policyholder risk, it does not control the substance of the insurer-insured relationship, it developed from the general principles of tort and contract law, and it conflicts with ERISA's civil enforcement provisions. *Kelley*, 882 F.2d at 456.

310. *See Kidneigh*, 345 F.3d at 1188 ("The *Kidneighs* fail to overcome *Kelley's* precedential value in this case.").

311. *See Pilot Life*, 481 U.S. at 50 ("[The] common law of bad faith does not affect a spreading of policyholder risk.").

312. *See supra* notes 277–81 and accompanying text (explaining that later cases have undercut some of *Pilot Life's* principles).

and stale evidence from the insured" to the insurer, risk was spread among policyholders because it led to higher premiums.³¹³ *Miller* noted that the notice-prejudice rule considered in *Ward* would meet the new test's second prong.³¹⁴ Both *Ward* and *Miller* suggest that the Supreme Court's new test contains "potentially broader concepts of risk-pooling," which would make the Insurance Savings Clause apply to more state statutes.³¹⁵

As the *Kidneigh* dissent explained, *Pilot Life*'s "precedential value on the precise issue of the 'substantially affect' prong has been seriously eroded, if not eviscerated, by *Miller*."³¹⁶ *Pilot Life* focused on the McCarran-Ferguson factor that required a state statute to have an effect of spreading policyholder risk; and thus, the Court held that the Mississippi common law of bad faith did not spread risk.³¹⁷ *Miller*, however, specifically rejected the use of the McCarran-Ferguson factors.³¹⁸ As stated above, *Miller* explicitly stated that the new test's second prong was different than the McCarran-Ferguson factor that required a statute to spread risk.³¹⁹ "[O]ur test requires only that the state law substantially affect the risk-pooling arrangement between the insurer and insured; it does not require that the state law actually spread risk."³²⁰ Scalia's use of the word "only" suggests that the new test is easier to meet than the old one and follows

313. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 374 (1999).

314. *See Ky. Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471, 1477 n.3 (2003) (discussing the risk allocation requirement) The Court stated:

The notice prejudice rule governs whether or not an insurance company must cover claims submitted late, which dictates to the insurance company the conditions under which it must pay the risk that it has assumed. This certainly qualifies as a substantial effect on the risk-pooling arrangement between the insurer and insured.

Id.

315. *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1145 (9th Cir. 2003). In *Elliot*, the Ninth Circuit had to determine whether an employee's claim for disability benefits under non-ERISA state statutes seeking compensatory and punitive damages was preempted. *Id.* at 1140. Although the court explained that the Montana Unfair Trade Practices Act might substantially affect risk-pooling, it did not have to reach that question because the court found the claim preempted based on an implied preemption theory. *Id.* at 1145-46. The Unfair Trade Practices Act might have substantially affected risk-pooling because it obligates insurers to make payments before the policy triggers a duty to indemnify and it requires insurers to pay any excess judgments for their insureds in the case of a violation. *Id.* at 1145.

316. *Kidneigh v. UNUM Life Ins. Co. of Am.*, 345 F.3d 1182, 1196 (10th Cir. 2003) (Henry, J., dissenting).

317. *See supra* Part III.B (explaining *Pilot Life*).

318. *See supra* Part IV.B (rejecting explicitly the use of the McCarran-Ferguson factors in composing a new map).

319. *Ky. Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471, 1477 n.3 (2003).

320. *Id.*

the Supreme Court's trend to curtail ERISA preemption.³²¹ The Colorado law under consideration in *Kidneigh* required that insurers make an attempt to settle when liability was reasonably clear and forbade them from offering anything less than a reasonable amount.³²² The risk of nonperformance in settlement was with the insurer under the statute; as the dissent stated, the "statute thus changes the conditions under which an insurer will 'pay for the risk it has assumed.'"³²³ Because the law gave the insureds protection in settlement negotiations that they did not previously possess, it substantially affected the risk-pooling arrangement.³²⁴

It is not surprising that a lower court could misapply *Miller's* second prong. One commentator has noted, "In short, *Miller's* second requirement is in equal parts elastic and opaque, and provides little principled guidance to the lower courts."³²⁵ This commentator suggests that more litigation will be necessary to determine whether state statutes have to affect premium calculations, impose obligations on insurers, or prohibit certain practices in order to substantially affect the risk-pooling arrangement.³²⁶

As long as courts understand that the new test's second prong is different than the McCarran-Ferguson factor dealing with the spreading of risk, then courts should be able to apply the *Miller* test consistently. *Kidneigh*, however, is not the only court that has muddled this analysis. Within two months of *Miller*, the U.S. District Court for the Eastern District of Pennsylvania decided two cases under an analysis similar to *Kidneigh*. In *McGuigan v. Reliance Standard Life Insurance Co.*³²⁷ and *Morales-Ceballos v. First UNUM Life*

321. See *Kidneigh*, 345 F.3d at 1197 (Henry, J., dissenting) (explaining that *Miller*, like *Ward* and *Rush*, concluded that the risk analysis did not result in ERISA preemption). For a discussion of *Ward*, see *supra* Part III.D.1; for a discussion of *Rush*, see *supra* Part III.D.2.

322. *Kidneigh*, 345 F.3d at 1198 (Henry, J., dissenting).

323. *Id.* (Henry, J., dissenting).

324. *Id.* at 1199 (Henry, J., dissenting).

325. Jason S. Mazer, *Features: Pilot Life Pushed ERISA's Preemption Pendulum to the Top of Its Arc, But Didn't Suspend the Law of Gravity*, 78 FLA. BAR J. 10, 14 (2004), available at http://web2.infotrac-custom.com/pdfserve/get_item/1/S3661ffw7_1/SB711_01.pdf; see also *Nguyen v. Healthguard of Lancaster, Inc.*, 282 F. Supp. 2d 296, 305 (E.D. Pa. 2003) ("*Miller* does not provide much guidance in construing the meaning of the test that it announces.>").

326. Mazer, *supra* note 325, at 14. Mazer also asks, "how substantially must the risk pooling arrangement be affected?" *Id.*

327. *McGuigan v. Reliance Standard Life Ins. Co.*, 256 F. Supp. 2d 345 (E.D. Pa. 2003). In *McGuigan*, decided only seven days after *Miller* was announced, the court had to determine whether ERISA preempted Pennsylvania's bad faith statute. *Id.* at 346. Francis McGuigan filed a bad faith claim against Reliance because of its refusal to pay him long-term disability benefits pursuant to an employee benefit plan it had with McGuigan's employer, Heraeus Electro-Nite. *Id.* The court conducted the two-part *Miller* test and found the first prong satisfied. *Id.* at 347-48. In reviewing the second prong, the court found that it was not met. *Id.* at 348. The court

Insurance Co. of America,³²⁸ the court held that Pennsylvania's bad faith statute³²⁹ did not substantially affect the risk-pooling arrangement between the insurer and the insured.³³⁰ In *Morales-Ceballos*, the court based its conclusion entirely on *Pilot Life*,³³¹ which is the same mistake that the *Kidneigh* court made.³³² Likewise, in *McGuigan*, the court based its conclusion on a case³³³ that was decided using the McCarran-Ferguson factors, not the new *Miller* test.³³⁴

The Pennsylvania district court, however, later realized that this analysis was incorrect and changed course in *Rosenbaum v. UNUM Life Insurance Co. of America*.³³⁵ *Rosenbaum* did not make the same mistake that *McGuigan* and *Morales-Ceballos* did by requiring the state statute to spread risk in order to

noted that the second prong was absent because of the same reasons in *Pilot Life*. *Id.* *Pilot Life*, however, applied the test set forth in *Metropolitan Life* that included the McCarran-Ferguson factors; *McGuigan* was applying a test in which the McCarran-Ferguson factors had been extracted. See *Rosenbaum v. UNUM Life Ins. Co. of Am.*, No. 01-6758, 2003 U.S. Dist. LEXIS 15652, at *14–15 (E.D. Pa. 2003) (explaining the test as applied in both cases).

328. *Morales-Ceballos v. First UNUM Life Ins. Co. of Am.*, No. 03-CV-925, 2003 U.S. Dist. LEXIS 9801 (E.D. Pa. 2003). In *Morales-Ceballos*, the court considered whether ERISA preempted Pennsylvania's bad faith statute. *Id.* at *1–2. The case involved a claim by Diego Morales-Ceballos seeking punitive damages from his employer's insurer under the state's bad faith law. *Id.* at *1. In applying *Miller* to determine whether the Insurance Savings Clause saved the law from preemption, the court found that the test's second prong was not met. *Id.* at *8. For support, the court focused on the discussion of risk spreading in *Tutelo v. Independence Blue Cross Instructive*, No. 98-CV-5928, 1999 U.S. Dist. LEXIS 6335, at *7 (E.D. Pa. 1999). Because *Tutelo* said that the bad faith law did not spread risk, *Morales-Ceballos* said it followed that the bad faith law did not substantially affect the risk-pooling arrangement between the insurer and the insured. *Morales-Ceballos*, 2003 U.S. Dist. LEXIS 9801, at *8.

329. The Pennsylvania bad faith statute provides: "In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may" offer any of the following remedies: "(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%; (2) Award punitive damages against the insurer; (3) Assess court costs and attorney fees against the insurer." 42 PA. CONS. STAT. § 8371 (2003).

330. *McGuigan*, 256 F. Supp. 2d at 348; *Morales-Ceballos*, 2003 U.S. Dist. LEXIS 9801, at *8.

331. For a discussion of *Pilot Life*, see *supra* Part III.B–C.

332. See *supra* notes 277–81 and accompanying text (explaining that later cases have undercut some of *Pilot Life*'s principles).

333. *Tutelo*, 1999 U.S. Dist. LEXIS 6335.

334. See *Rosenbaum v. UNUM Life Ins. Co. of Am.*, No. 01-6758, 2003 U.S. Dist. LEXIS 15652, at *14 (E.D. Pa. 2003).

335. *Id.* In *Rosenbaum*, the court again had to consider whether ERISA preempted the Pennsylvania bad faith statute. *Id.* at *1. Joel Rosenbaum initially brought suit against UNUM for bad faith in handling his long-term disability claim. *Id.* The court found that the Pennsylvania law met both *Miller* prongs and would be saved from ERISA preemption. *Id.* at *10–18. The court also notes that the law is not subject to implied preemption. *Id.* at *18–26.

satisfy *Miller*.³³⁶ "While both [*McGuigan* and *Morales-Ceballos*] correctly recite the second prong of the *Miller* test, neither actually applies the standard as presented by *Miller*."³³⁷ Instead, both of these cases relied on the risk-spreading requirement from the McCarran-Ferguson factors, which was distinguished from *Miller*'s second prong by the *Miller* Court.³³⁸ Had *McGuigan* and *Morales-Ceballos* looked at whether the state statute substantially affected the risk-pooling arrangement and not whether it resulted in the spreading of risk, then the Pennsylvania law would have met the second *Miller* factor.³³⁹ By creating disincentives for the insurer to deny claims in bad faith, the Pennsylvania law altered the risk-pooling arrangement, for the insured's risk that the insurer will deny a claim in bad faith was inherent in any insurer-insured risk-pooling arrangement.³⁴⁰ Also, like the Colorado law at issue in *Kidneigh*,³⁴¹ the Pennsylvania law gave insureds greater protection in settlement discussions because it gave insurers more incentive to settle rather than risk a costly verdict at trial.³⁴² The Pennsylvania law also prevented insurers from deflecting the risk in the insured's policy by nullifying any risk-deflection provisions that the insurer creates.³⁴³ Both the Colorado and Pennsylvania bad faith laws substantially affected the risk-pooling arrangement and met the second *Miller* prong.³⁴⁴

V. Conclusion

Courts have struggled with the Insurance Savings Clause's role in ERISA preemption since Congress passed ERISA in 1974.³⁴⁵ Eleven years later in

336. *Id.* at *13.

337. *Id.* at *15.

338. See *supra* notes 248–50 and accompanying text ("[The new test] requires only that the state law substantially affect the risk pooling arrangement between the insurer and the insured; it does not require that the state law actually spread risk.").

339. See *Rosenbaum*, 2003 U.S. Dist. LEXIS 15652, at *17 ("Just as California's notice-prejudice rule [in *Ward*] substantially affects the allocation of risk between an insurer and an insured by limiting an insurer's ability to deflect risk, [the Pennsylvania bad faith law] does the same.").

340. *Id.*

341. See *supra* notes 260–71 and accompanying text (describing the Colorado law at issue in *Kidneigh*).

342. See *Rosenbaum*, 2003 U.S. Dist. LEXIS 15652, at *17 (explaining that the Pennsylvania law "shows a significant shift of risk from the insured to the insurer").

343. *Id.* at *18.

344. Even though the Colorado bad faith law should have met the second *Miller* prong, the *Kidneigh* majority decided that it did not. See *supra* notes 260–71 and accompanying text (explaining the majority's analysis).

345. See *supra* note 40 (explaining the problems that courts faced in the years immediately following ERISA's enactment).

Metropolitan Life, the Supreme Court set forth a map for lower courts to use to determine whether the Insurance Savings Clause should apply to save a state statute from ERISA preemption.³⁴⁶ The original map explained to lower courts that they first must employ their common sense and ask if the state law regulated insurance.³⁴⁷ They then had to apply three factors borrowed from the McCarran-Ferguson Act:³⁴⁸ (1) whether the policy has the effect of transferring or spreading the policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry.³⁴⁹

After the Supreme Court set forth the original map, it had to adapt it as new situations surfaced.³⁵⁰ In 1987, *Pilot Life* limited the scope of the Insurance Savings Clause and also introduced the concept of implied preemption.³⁵¹ Lower courts continued to have problems applying the original map, which led the Supreme Court to attempt to clarify the map in *Ward*³⁵² and *Rush Prudential*.³⁵³ These attempts, however, did not cure the confusion. In 2003, the Supreme Court decided to throw out the old map and create a completely different one.³⁵⁴ In *Miller*, the Court drafted the new map.³⁵⁵ For the Insurance Savings Clause to save a state statute from preemption under the new analysis, the statute has to meet two prongs: First, it has to be specifically directed at entities engaged in insurance and second, it must substantially affect the risk-pooling arrangement between the insurer and the insured.³⁵⁶

The new map announced in *Miller* represents a significant change from the old map first introduced in *Metropolitan Life*.³⁵⁷ The new map is simpler and makes it

346. See *supra* Part III.A (examining *Metropolitan Life*).

347. See *supra* notes 50–55 and accompanying text (describing the first step of the *Metropolitan Life* analysis).

348. See *supra* notes 56–68 and accompanying text (describing the second step of the *Metropolitan Life* analysis).

349. *Supra* note 59 and accompanying text.

350. See *supra* Part III.B–D (tracing the development of the original map from 1985–2003).

351. See *supra* Part III.B–C (discussing *Pilot Life*).

352. See *supra* Part III.D.1 (discussing *Ward*).

353. See *supra* Part III.D.2 (discussing *Rush Prudential*).

354. See *supra* Part IV (explaining the Supreme Court's effort to clear up the confusion involved in the Insurance Savings Clause analysis).

355. See *supra* note 229 and accompanying text (outlining the new test).

356. *Supra* note 229 and accompanying text.

357. See *supra* notes 244–55 and accompanying text (explaining how the *Miller* test is different from the old test).

easier for a state law to be saved by the Insurance Savings Clause.³⁵⁸ Lower courts such as *Kidneigh* that have not recognized *Miller* as a different test have failed to interpret the map as the Supreme Court intended.³⁵⁹ These courts continue to apply reasoning that the Supreme Court set forth in *Pilot Life*, even though this reasoning has been criticized by more recent Supreme Court cases.³⁶⁰ If lower courts acknowledge that *Miller* is a new map and that it completes a trend by the Supreme Court to make it easier for the Insurance Savings Clause to apply, the rampant confusion that has existed in Insurance Savings Clause analysis for the past thirty years will be cured.³⁶¹ If they do not, however, then just as you may never surface from your spelunking expedition, the courts may remain lost indefinitely.³⁶²

358. See *supra* notes 256–59 and accompanying text (asserting that the Insurance Savings Clause will save more statutes under the *Miller* test than it had pre-*Miller*).

359. See *supra* Part V.B (discussing *Kidneigh*).

360. See *supra* notes 277–81 and accompanying text (explaining that some of *Pilot Life*'s principles have been undercut by more recent cases).

361. See *supra* Part V (explaining how lower courts should interpret the *Miller* map).

362. See *supra* Part I (comparing the history of Insurance Savings Clause analysis with being lost in a cave).