Simas v. Quaker Fabric Corp.: ERISA Preemption of Statutory Tin Parachutes

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ERISA PREEMPTION OF STATUTORY TIN PARACHUTES 

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Abstract: In Simas v. Quaker Fabric Corp., the First Circuit invalidated Massachusetts's innovative tin parachute statute, designed to assist workers displaced by corporate takeovers, by finding it preempted by ERISA. After examining the relationship between the tin parachute and ERISA and the analysis in Simas, this Note argues that preemption was mandated neither by ERISA itself nor by decisions interpreting its preemptive reach. In light of the state interest at stake, the Simas decision is unfortunate and suggests the need for a legislative solution.

The merger mania of the 1980s affected the lives of millions of workers, consumers, and investors.1 Frequent news accounts of mass layoffs following takeovers led to increasing public concern with the plight of employees whose companies were the subject of takeovers.2 The absence of a federal response to takeover-related dislocation prompted numerous states to enact measures intended to curb takeover activity.3

Massachusetts was no exception. In response to takeovers or attempted takeovers of several of the state's major corporations,4 Massachusetts legislators in 1989 enacted a package of measures designed to make Massachusetts companies among the hardest in the

2. See, e.g., Alan E. Garfield, Helping the Casualties of Creative Destruction: Corporate Takeovers and the Politics of Worker Dislocation, 16 J. Corp. L. 249, 254 (1991) (noting, among other examples of dislocation, that 10,000 employees of Gulf Oil were laid off after Gulf was acquired by Chevron).
The most controversial aspect of the package was a provision requiring an acquiring corporation to pay two weeks of severance pay for each year of employment to any employee of the target corporation laid off as a result of the acquisition.\(^5\)

Legislators intended this provision, known as a tin parachute,\(^7\) either to serve as a strong deterrent to acquirers planning to reduce the target company's work force in order to reduce costs or help finance the purchase or, in the event that a takeover occurred, to compensate dislocated workers. Massachusetts thus landed squarely in the middle of an ongoing debate about the proper role of states in regulating corporate takeover activity.\(^8\) In *Simas v. Quaker Fabric Corporation*,\(^9\) the First Circuit Court of Appeals invalidated the Massachusetts statute by finding it preempted by the federal Employee Retirement Income and Security Act (ERISA).\(^10\) This Note will argue that the *Simas* court's conclusion was both unnecessary and unwise. Part I discusses Massachusetts's tin parachute statute against the larger backdrop of state anti-takeover regulation. Part II examines ERISA's preemptive scope, and Part III explains the First Circuit's analysis in *Simas*. Part IV argues that the First Circuit's decision was not compelled by precedent or policy and should be criticized for failing to limit the preemptive reach of ERISA when such a limitation could have avoided negative policy implications. Finally, Part V examines an alternative judicial approach as well as a suggested legislative solution.

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7. Tin parachutes have been called the blue collar analog to the lucrative golden parachute severance packages guaranteed to some executives in the event of a takeover. Stone, *supra* note 2, at 59.
8. Some commentators argue that any in-state benefits achieved by state anti-takeover statutes come at the expense of out-of-state constituencies in violation of the dormant Commerce Clause. For example, it can be argued that by impeding the acquisition of an in-state corporation, a state is preventing shareholders in that corporation from realizing the maximum value on their shares. See, e.g., J. Gregory Sidak & Susan E. Woodward, *Corporate Takeovers, the Commerce Clause, and the Efficient Anonymity of Shareholders*, 84 Nw. U. L. Rev. 1092 (1990); Jonathan R. Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 Wis. L. Rev. 467.
9. 6 F.3d 849 (1st Cir. 1993).
I. THE MASSACHUSETTS TIN PARACHUTE STATUTE IN CONTEXT

Ironically, Simas v. Quaker Fabric Corp. pitted two sources of statutory assistance for American workers against one another. The plaintiffs sought benefits pursuant to Massachusetts's tin parachute statute, created to protect employees harmed by takeovers. The defendants successfully avoided their tin parachute obligations by invoking the preemption clause of ERISA, a statute also designed to protect employees. The determination of how these two statutes relate to one another is the critical inquiry in Simas.

A. State Regulation of Takeovers

Concern over the consequences of corporate takeovers has prompted a series of state attempts to regulate takeover activity. Early attempts at regulation subjected tender offers to disclosure requirements and state administrative review. The United States Supreme Court in Edgar v. MITE Corp. curtailed these first attempts to limit takeovers, however, by holding that the burden such regulations imposed on interstate commerce violated the Commerce Clause.

States quickly responded to the MITE decision by adopting “second generation” anti-takeover statutes designed to overcome the Commerce Clause problems. The Court endorsed the approach of these statutes in

11. Garfield, supra note 2, at 254 n.32, provides a sampling of news sources detailing large dislocations resulting from takeovers.
13. 457 U.S. 624 (1982). The Illinois statute held unconstitutional in this case required a tender offeror to notify the target corporation and the Secretary of State of an intended offer 20 days prior to the effective date of the offer. During this period, the target company could communicate with its shareholders regarding the offer, while the offeror was prohibited from doing so.
14. Three justices also agreed that the takeover law was preempted by the Williams Act, 82 Stat. 454, codified at 15 U.S.C. §§ 78m(d)–(e) and 78n(d)–(f), which amended the Securities Exchange Act of 1934, 15 U.S.C. § 78 (1988), by adding certain disclosure requirements. These justices reasoned that the Williams Act struck a balance between targets and bidders in the takeover contest, ensuring that neither enjoyed an unfair advantage. Because the statute in MITE tipped the scale in favor of the target, the objectives of the Williams Act were frustrated and preemption was necessary, 457 U.S. at 634–40.
15. For example, the second generation statutes largely apply only to domestically incorporated companies and impose substantive requirements less burdensome on interstate commerce. Roberta Romano, The Political Economy of Takeover Statutes, 73 Virg. L. Rev. 111, 114–17 (1987) (explaining three different regulatory approaches taken by states following MITE).
CTS Corp. v. Dynamics Corp. of America,16 upholding Indiana’s control share acquisition act17 against challenges based on the Commerce and Supremacy Clauses. The Court’s decision reaffirmed the right of states to promulgate corporation law.

Commentators suggest that the CTS decision encouraged state legislators to take anti-takeover regulation even further.18 More than fifty percent of states, for example, have subsequently adopted measures allowing corporate directors to consider factors beyond the maximization of share value when evaluating a takeover offer.19 Other innovative approaches specifically address the plight of employees dislocated following a takeover.20

B. The Massachusetts Approach to Takeover Regulation

Massachusetts legislators in 1987 created a commission to study the effects of takeover activity in Massachusetts and to make legislative recommendations to address perceived problems.21 Legislation reflecting

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17. Control share acquisition laws require a majority of shareholders to approve any acquisition of a controlling share in the target corporation and were a popular form of anti-takeover legislation following MITT. Romano, supra note 15, at 113-16.

18. See Anti-Bidder Stance, supra note 3.

19. Marleen A. O’Connor, Restructuring the Corporation’s Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers, 69 N.C. L. Rev. 1189, 1229 (1991). Such non-monetary factors may include long- and short-term effects of a takeover on the corporation, shareholders, employees, and the community. This trend has been encouraged by labor constituencies within a state.

20. Id. Examples include mandating severance pay in the event of takeover-related plant closings or layoffs or requiring acquirers to assume the collective bargaining agreements of the target corporation. Because shareholders of a target frequently gain from a takeover, scholars argue that states should focus their regulatory efforts on protecting employees and others who experience losses rather than gains. Indeed, some argue that this may be the only legitimate role for state regulation of takeovers. See Davis, supra note 8; see also John C. Coffee, Jr., The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups, 1988 Wis. L. Rev. 435, 460 (recommending that this protection be limited to middle managers).

21. The Commission to Review Massachusetts Anti-Takeover Laws made recommendations designed to deter “financial” takeovers whose social and economic costs outweighed their potential benefits and to minimize the disruptive consequences of takeovers on stakeholder interests. Brief for Intervenor-Appellant, Legislative History Addendum at 6, Simas v. Quaker Fabric Corp., 6 F.3d 849 (1st Cir. 1993) (Nos. 93-1098, 93-1103, 93-1104, and 93-1249). Stakeholders may include employees, communities, consumers, suppliers, creditors, etc.
the commission’s recommendations included a novel tin parachute provision, specifically designed to deter those under-financed or over-leveraged takeovers that rely on layoffs for financing.

The tin parachute provision provided that employees who were terminated within twenty-four months of their employer’s acquisition would receive from the acquiring corporation a one-time lump sum payment of twice their weekly compensation for each year of

22. The legislation also contained several anti-takeover provisions already adopted by a number of states. See id., Legislative History Addendum at 16–17. For a general overview of how these and other state anti-takeover statutes function, see Alan E. Garfield, State Competence to Regulate Corporate Takeovers: Lessons From State Takeover Statutes, 17 Hofstra L. Rev. 535, 540–57 (1989).

23. Brief for Intervenor-Appellant, Legislative History Addendum at 17, Simas (Nos. 93-1098, 93-1103, 93-1104, and 93-1249). An example of the type of takeover Massachusetts sought to discourage is the acquisition of Federated Department Stores by Campeau Corp. The acquisition of Federated saddled Campeau with a debt load of almost $10 billion. To slash its huge debt, Campeau terminated approximately 6,500 Federated employees. Carol Hymowitz et al., Wall St. J., Dec. 14, 1988, at A1, cited in Garfield, supra note 2, at 254 n.32.


(b) Any employee of a control transferor whose employment is terminated within twenty-four calendar months after the transfer of control of his employer is entitled to a one time lump sum payment from the control transferee equal to the product of twice his weekly compensation multiplied by each completed year of service...

(c) Any employee of a control transferor whose employment is terminated within the shorter of the following periods prior to a control transfer: (1) twelve calendar months; or (2) the period of time between which the control transferee obtained a five percent or greater interest in the voting securities of the control transferor and consummated a control transfer by obtaining a fifty percent or greater interest pursuant to a transfer of control as defined herein, is entitled to a one time lump sum payment from the control transferee equal to the product of twice his weekly compensation multiplied by each completed year of service...

(d) There shall be no liability for the one time payment to an otherwise eligible employee if:

(1) The employee is covered by an express contract providing for such payment in the event of termination of employment in excess of that provided by this section;

(2) The employee has been employed by the control transferor for less than three years.

A transfer in control occurs upon the acquisition of 50 percent or more of the voting securities of a corporation. Mass. Ann. Laws ch. 149, § 183(a) (Law. Co-op. Supp. 1994). The control transferee is defined as the entity that assumes control following a transfer, while the control transferor refers to the entity possessing control prior to the acquisition. Id. Termination of employment is defined as the involuntary termination of an employee’s employment consistent with the eligibility standards for unemployment benefits. Id.
employment. For example, an employee who worked for "A" Corporation for 10 years, earning $600 per week, would be owed $12,000 by "B" Corporation if "B" acquired "A" and the employee was terminated within two years. To qualify, an employee would have to meet eligibility standards for state unemployment benefits and could not have been covered by a severance plan with more generous benefits. The tin parachute statute combined two of the commission's articulated goals: to deter speculative financial takeovers dependent on layoffs for financing and, in the event that a takeover succeeded, to charge the costs of takeover-related dislocations of stakeholders back to the acquirer.

From a public policy standpoint, given goals similar to those enumerated by the Massachusetts Commission, tin parachutes seem to be an effective tool. First, they are a highly selective takeover deterrent. Only when a bidder intends significant layoffs would the tin parachute have any effect. Moreover, tin parachutes may increase the efficiency of takeover bids by encouraging acquirers to seek targets that complement existing operations and thereby avoid costs imposed by tin parachutes. Any advantage an acquirer gains by a "quick fix" of employee layoffs to boost profits would be reduced by the costs triggered by a tin parachute. Finally, beyond selective deterrence and improved efficiency, tin parachutes provide needed relief to workers dislocated by a takeover. Despite the legislation's admirable aim of assisting dislocated workers, however, the First Circuit concluded that Massachusetts's tin parachute infringed on a field expressly reserved for federal regulation by ERISA.

25. Mass. Ann. Laws ch. 151A, § 25 (Law. Co-op. Supp. 1994). This provision ensures that employees who quit or are fired for willful misconduct or because of a felony or misdemeanor conviction will not be eligible for tin parachute benefits.
27. Ryan, supra note 26, at 38. For example, a bidder planning few, if any, layoffs would be liable for minimal tin parachute benefits. In contrast, a bidder intending to implement significant layoffs may be deterred from the acquisition.
28. Id. at 21. A corollary of this argument is that tin parachutes require the bidder to factor layoff costs into the bidding process. Id. at 23. Ryan stops short of endorsing the tin parachute device, instead discussing its attributes and application. He faults the typical parachute in that it does not protect employees terminated because of friendly takeovers or corporate restructuring in response to a hostile bid. Id. at 48-49. Ryan also indicates that legislated tin parachutes applicable only to hostile bids could conflict with the neutrality principles mandated by the Williams Act. Id. at 64-65, n.222; see also supra note 14. The Massachusetts statute, however, is not limited to hostile takeovers. Although job loss due to management restructuring could not trigger benefits (unless a takeover occurred within the next 12 months), the statute would protect job loss associated with layoffs following a friendly change in control.
II. PROTECTION OF EMPLOYEE BENEFITS THROUGH ERISA

ERISA is intended to protect employees, though on a much broader scale than a tin parachute.\(^\text{29}\) This federal statute, enacted in 1974, contains numerous protections designed to ensure the integrity of pension and other employee benefit plans.\(^\text{30}\) The impetus for ERISA was increasing national concern over the plight of Americans deprived of anticipated retirement benefits due to abuse and mismanagement of pension funds by plan administrators and trustees.\(^\text{31}\)

A. ERISA's Preemption of State Law

In addition to ensuring the integrity of employee benefit plans, federal legislators intended ERISA to foster the growth of such plans.\(^\text{32}\) To accomplish this objective, Congress declared that ERISA "shall supersede any and all State laws insofar as they may now or hereafter

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29. ERISA was signed into law by President Ford on Labor Day of 1974. It has been noted that the day was appropriate given that the legislation had been proclaimed to be "the greatest development in the life of the American worker since the Social Security Act of 1935." 120 Cong. Rec. 15,742 (1974) reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974, at 4747 (statement of Sen. Javits, a primary sponsor of ERISA).


Pension plans are heavily regulated by ERISA and are subject to all of the above requirements. By contrast, ERISA does not regulate the substantive content of employee welfare benefit plans, which are subject only to reporting and disclosure requirements and to ERISA's fiduciary standards. See generally David J. Brummond, Federal Preemption of State Insurance Regulation Under ERISA, 62 Iowa L. Rev. 57 (1976).


32. See William J. Kilberg & Catherine L. Heron, The Preemption of State Law Under ERISA, 1979 Duke L.J. 383, 388 (1979) (explaining that this goal is achieved "through the positive inducement of tax advantage and the negative inducement of avoidance of multitudinous state laws").

It must be remembered, however, that any other goals of ERISA are secondary to the primary goal of protecting employee interests. See Rettig v. Pension Ben. Guar. Corp., 744 F.2d 133, 155 (D.C. Cir. 1984).
relate to any employee benefit plan . . . .” By preventing states from imposing conflicting or varying regulations, this provision encourages employers to implement pension and benefit plans by ensuring that employers need comply with only one set of rules.

ERISA’s legislative history strongly suggests that Congress intended the preemptive reach of the Act to be expansive, and the U.S. Supreme Court has noted that ERISA’s preemption clause is conspicuously broad. However, Congress may not have anticipated the full impact that rigid judicial construction of the preemption provision would have on employee welfare benefit plans. In fact, legislative history indicates that legislators recognized that the preemption language was perhaps an overinclusive starting point and “undoubtedly warrant[ed] further attention.” ERISA even established a task force to study the practical effects and desirability of federal preemption. Furthermore, given that

33. 29 U.S.C. § 1144(a) (1988). Subsection (b) of § 1144 goes on to exempt a number of state laws from preemption, including those that regulate insurance, banking, or securities, 29 U.S.C. § 1144(b)(2)(A); generally applicable criminal laws, 29 U.S.C. § 1144(b)(4); the Hawaii Prepaid Health Care Act, 29 U.S.C. § 1144(b)(5) and infra note 44; certain laws relating to multiple employer welfare plans, 29 U.S.C. § 1144(b)(6); and state qualified domestic relations orders, 29 U.S.C. § 1144(b)(7) and infra note 43.

34. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990). The majority of cases require courts to determine whether a state law relates to an employee welfare benefit plan. Preemption is appropriate if the law has a connection with or reference to such a plan. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983). Preemption occurs even if the state law is not designed to affect such employee benefit plans, the effect is indirect, and even if the law is consistent with ERISA’s substantive provisions. District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580 (1992).


the primary focus of Congress in enacting ERISA was the abuse of private pension plans, and not employee welfare benefit plans, it is doubtful that Congress intended to broadly preempt state laws regulating employee welfare benefit plans.39

Courts have expressed frustration with the sheer breadth of ERISA's preemption language. One court noted that by preempting the authority of states to regulate even where ERISA does not, the federal statute creates an "enormous regulatory vacuum" in areas traditionally of vital state concern.40 Another court expressed similar displeasure with the clause, stating that the "ERISA quicksand is fast swallowing up everything that steps in it or near it. . . . There is a growing phalanx of courts expressing the fear that ERISA will continue to expand and to preempt everything in its meandering path."41

Congress and the courts have tried to restrict this broad preemption. For example, a number of courts have held that state laws allowing ex-spouses to garnish a pension plan to satisfy a support claim were not preempted by ERISA.42 Congress codified these decisions by amending ERISA to exempt from preemption a type of state property settlement known as a qualified domestic relations order (QDRO).43 On a limited basis, Congress has amended ERISA to avoid inadvertent preemption of innovative state legislation and to exempt areas of traditional state regulation.44

39. Brummond, supra note 30, at 116 (noting that only a fraction of the legislature’s time was devoted to welfare plans in comparison to pension plans); Irish & Cohen, supra note 36, at 147 (arguing that the “paucity” of federal regulation of welfare benefit plans compared to pension plans supports this position).

40. Gast v. State, 585 P.2d 12, 23 (Or. Ct. App. 1978) (declining to preempt state civil rights laws setting pregnancy-related content of benefit plans). See also Gabrielle Lessard, Comment, Conflicting Demands Meet Conflict of Laws: ERISA Preemption of Wisconsin’s Family and Medical Leave Act, 1992 Wis. L. Rev. 809, 822-23 (echoing this point and arguing that policy considerations support the exemption of this state law from ERISA preemption).


42. Despite ERISA’s broadly worded preemption clause, these courts reasoned that family matters were an area of strong state interest, that private support agreements had an impact on both state and federal treasuries, and that ERISA was designed to protect plan beneficiaries as well as employees. Irish & Cohen, supra note 36, at 130–32.


44. For example, in response to a judicial finding that Hawaii’s Prepaid Health Care Act was preempted by ERISA, Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal 1977), aff’d, 633 F.2d 760 (9th Cir. 1980), aff’d mem., 454 U.S. 801 (1981), Congress amended ERISA to address
B. Triggering ERISA Preemption: Severance Pay as an ERISA Benefit Plan

ERISA preempts state regulation of any "plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries" a variety of benefits including medical benefits or benefits in the event of sickness, accident, disability, death, or unemployment, or vacation benefits. This definition is particularly troublesome with respect to severance plans, which are not specifically mentioned in the definition and which may not have the ongoing qualities of other benefit plans. Courts have held, however, that both funded and unfunded severance plans fall within ERISA's preemptive reach.


Even as federal legislators currently debate national health care reform, there are attempts to amend ERISA's preemption provision to allow states greater latitude in effecting their own health care reforms. 139 Cong. Rec. E3126, Nov. 24, 1993 (statement of Rep. Wyden that ERISA is "smothering" many state proposals that would allow the uninsured access to health care).

45. Specifically, the terms "employee welfare benefit plan" and "welfare plan" refer to:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 USCS §186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).


Also included in the definition are those plans described in section 302(c) of the Labor Management Relations Act (LMRA), which provides that money paid by an employer to a trust fund for "pooled vacation, holiday, severance or similar benefits" also constitutes an employee welfare benefit plan. 29 U.S.C. § 186(c)(6) (1988). A Department of Labor regulation clarifies that the effect of ERISA's reference to section 302(c) of the LMRA is to include within the definition of "welfare plan" those plans that provide holiday and severance benefits. 29 C.F.R. § 2510.3-1(a)(3) (1992).

46. Unfunded severance benefit plans include those in which funds do not accumulate but are instead paid out of the employer's general assets.

To trigger preemption, however, a court must find that a state law relates to a severance plan and not merely to severance benefits. In *Fort Halifax Packing Co. v. Coyne*, the U.S. Supreme Court upheld a Maine statute mandating that an employer provide severance pay for eligible employees in the event of a plant closing. The employer argued that any state law relating to an employee benefit covered by ERISA must be preempted. The Court disagreed, holding that ERISA preemption is triggered only when state legislation relates to a "plan." The *Fort Halifax* decision established a significant limitation on the reach of ERISA preemption by requiring evidence of a plan. The Court reasoned that because the preemption provision uses the word "plan," and because the purpose of the provision was to eliminate the threat of conflicting regulation of such plans, the existence of a plan must be established.

The Court further limited ERISA preemption by crafting a narrow definition of a plan. The Court found that when an employer did not face periodic demands for the disbursement of benefits, there was no need for a plan for coordinating such demands: "To do little more than write a check hardly constitutes the operation of a benefit plan.... The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits."

After *Fort Halifax*, courts attempting to determine whether severance benefits constitute an ERISA plan have focused on several factors,
including (1) whether or not the benefits are contingent in nature,\textsuperscript{55} (2) the degree to which such benefits require an ongoing administrative scheme to monitor and distribute funds,\textsuperscript{56} and (3) the degree to which the disbursement of benefits requires discretionary decision-making by the employer.\textsuperscript{57} The presence of the second and third factors persuaded the First Circuit to conclude that the Massachusetts’s tin parachute statute created an ERISA plan subject to preemption.

III. THE CASE: SIMAS v. QUAKER FABRIC CORP.

In Simas v. Quaker Fabric Corp. of Fall River,\textsuperscript{58} two long-time employees,\textsuperscript{59} discharged from their jobs within twenty-four months of the acquisition of their employer by another corporation,\textsuperscript{60} filed claims for severance pay under Massachusetts’s tin parachute statute.\textsuperscript{61} The district

\textsuperscript{55} Compare Fontenot v. NL Indus., 953 F.2d 960 (5th Cir. 1992) (finding no plan because the offered golden parachute severance package, which promised substantial cash payment if an employee was terminated within two years of takeover, was a contingency that might never materialize) with Akau v. Tel-A-Com Hawaii, Inc., 1990 U.S. Dist. LEXIS 4647 (D. Haw. 1990) (distinguishing Fort Halifax contingency with Hawaii statute that triggered severance benefits on plant closing, relocation, or even partial closing). The Hawaii statute in this case was triggered by a sale of just 1.68 percent of a business, thus demonstrating that the employer would be subject to the statute, repeatedly, in almost any business transaction. Id.

\textsuperscript{56} See, e.g., James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d 463 (2d Cir. 1993) (no plan existed despite varying termination dates and eligibility, and despite necessity of making calculations for social security taxes, health and medical benefits, and 401k plans for each employee). The court found that the employer assumed no responsibility to pay benefits on a regular basis and that the simple arithmetical calculations were no more than those found not to be a plan in Fort Halifax. Id. at 466–67. Compare Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989) (two-year installment payment option for severed employees did not create plan), cert. denied, 495 U.S. 923 (1990) with Akau v. Tel-A-Com Hawaii, Inc., 1990 U.S. Dist. LEXIS 4647 (D. Haw. 1990) (plan existed when method of payment called for weekly allowances amounting to difference between unemployment benefits and employees’ average weekly wages prior to termination).

\textsuperscript{57} See, e.g., Bogue v. Ampex Corp., 976 F.2d 1319 (9th Cir. 1992) (holding that golden parachute plan denying benefits if employee received “substantially equivalent employment” from acquiring corporation constituted a plan), cert. denied, 113 S. Ct. 1847 (1993). The court based its decision on the fact that the employer, on a case-by-case basis, was required to compare a new employment situation with a pre-acquisition position. Id. at 1323. The court concluded that this comparison would mandate some administrative scheme to carry out. Id.

\textsuperscript{58} 6 F.3d 849 (1st Cir. 1993).

\textsuperscript{59} Plaintiff John Simas had been with company for 18 years and plaintiff James Gray had been employed for 12 years. Gray v. Quaker Fabric Corp. of Fall River, 809 F. Supp. 163, 165 (D. Mass. 1992), aff'd, Simas v. Quaker Fabric Corp., 6 F.3d 849 (1st Cir. 1993).

\textsuperscript{60} 6 F.3d at 851. Although the employer alleged that the plaintiffs were terminated because of their performance, the Department of Employment and Training of the Commonwealth of Massachusetts (DET) determined that their terminations were “not solely attributable” to willful misconduct and, therefore, that they were eligible for unemployment benefits. 809 F. Supp. at 165.

\textsuperscript{61} See supra note 24 and accompanying text.
court found that the statute was preempted by ERISA and granted summary judgment for the defendants. Plaintiffs, joined by the Commonwealth of Massachusetts, appealed, arguing that the tin parachute statute did not create a plan.

The *Simas* court began by recognizing the resemblance of the Massachusetts tin parachute to the statute at issue in *Fort Halifax*. Nevertheless, two particular features of the Massachusetts statute caused the court to determine that it went beyond *Fort Halifax* enough to create an ERISA plan. First, the court reasoned that, unlike the one-time-only triggering event in *Fort Halifax*, benefits due under the Massachusetts statute could be triggered separately by each employee laid off during a defined period. Second, the statute effectively required a terminated employee to be eligible for unemployment benefits. The court found that this provision, which excluded employees terminated for cause, would require the employer to go beyond a simple arithmetical calculation to determine eligibility.

These features, the court reasoned, would require an “ongoing administrative mechanism” to distribute the state-mandated benefits. Unlike the one-time calculation needed in *Fort Halifax*, a Massachusetts employer would, for each discharged employee, have to determine whether the discharge occurred during the statute’s application period and, if so, whether the employee was eligible for unemployment benefits (i.e., had not been terminated “for cause”).

The court concluded that because the period of applicability of the tin parachute statute was lengthy, and because discretionary, individualized decisions were necessary, the statute created a plan triggering ERISA preemption. “[S]o long as *Fort Halifax* prescribes a definition based on

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63. Plaintiffs argued in the alternative that even if the statute did create a plan, it was not an employee plan regulated by ERISA. Because the statute placed the tin parachute obligations on the acquiring entity, or “control transferee,” as opposed to the employer, plaintiffs contended that it did not create an employee plan, which would trigger ERISA preemption. Brief for Intervenor-Appellant at 14–24, *Simas* (Nos. 93-1098, 93-1103, 93-1104, and 93-1249). This argument was rejected by the First Circuit, 6 F.3d at 855, and is beyond the scope of this Note.
64. 6 F.3d at 853–54.
65. The court found this eligibility requirement to constitute a cross-reference to other statutory requirements, most importantly that the employee not have been discharged for cause. *Id.* (citing state criteria for unemployment benefits codified at Mass. Ann. Laws ch. 151A, § 25(e)(2) (1994)).
66. 6 F.3d at 853–854.
67. *Id.* at 853.
68. The court noted that the “for cause” determination, in particular, would be “likely to provoke controversy” and, therefore, went beyond a clerical decision. *Id.*
the extent and complexity of administrative obligations,” the court held, "line drawing of this kind is necessary and close cases will approach the line from both sides."\(^{69}\)

Because of ERISA’s “manifestly broad” preemption provision, the court found itself unable to weigh the benefits and faults of the tin parachute statute.\(^{70}\) But the court added a parting shot, seemingly to call Congress’s attention to the two ironies resulting from its decision: first, that anti-takeover legislation, which had recently survived Commerce Clause and Williams Act challenges, should perish under ERISA’s preemption clause when the full ramifications of this clause may not have been appreciated by Congress, and second, that a federal law expressly designed to protect workers should preempt a state statute providing benefits to dislocated workers.\(^{71}\) Ultimately, however, the First Circuit implied that preemption of the Massachusetts statute was the only conclusion that the court could have reached.

IV. ANALYSIS OF THE \textit{SIMAS} DECISION: AN UNWARRANTED EXPANSION OF ERISA’S PREEMPTIVE SCOPE

Courts and commentators have criticized ERISA’s preemptive breadth when it operates to compel preemption of state laws bearing only a tangential relationship to ERISA’s regulatory field.\(^{72}\) While the ultimate responsibility for many of the negative effects of ERISA’s preemption provision rests with Congress, courts such as the \textit{Simas} court can and should be criticized for failing to limit the scope of preemption whenever possible. The preemption of Massachusetts’s tin parachute statute was compelled neither by judicial precedent nor by the statutory provisions or policies of ERISA itself.

A. \textit{Judicial Precedent Does Not Mandate ERISA’s Preemption of Massachusetts’s Tin Parachute Statute}

Courts have long recognized a strong presumption against federal preemption of state law. Even when federal legislation includes an express preemption provision, a court should not find that federal law preempts state law unless that court determines that Congress has made

\(^{69}\) Id. at 854.
\(^{70}\) Id. at 856.
\(^{71}\) Id.
\(^{72}\) See generally Irish & Cohen, supra note 36.
its intent to do so unmistakably clear. ERISA’s preemption clause does express a clear intention to preempt a multitude of state laws in pension and benefit plan related areas. Still, the Supreme Court has interpreted the clause to require at a minimum the existence of an ERISA plan. Respectful of the authority of the states, and cognizant of the important state interest at stake, the Supreme Court in Fort Halifax declined to preempt state law when the statute at issue did not sufficiently implicate ERISA’s concerns to make preemption necessary.

When, as the Simas court conceded, the facts presented a close question on the existence of a plan, the court could have relied upon Fort Halifax to conclude that preemption of the tin parachute was not warranted. Like the plant closing statute at issue in Fort Halifax, the tin parachute statute was a response to employee dislocation that implicated ERISA in a limited sense, if at all. Instead of drawing these comparisons, the Simas court asserted that Fort Halifax actually supported preemption and proceeded to mechanically compare the Massachusetts statute to other cases involving severance benefits to determine whether the state created an ERISA plan.

The cases relied upon by the First Circuit, however, fall far short of compelling the court to preempt a tin parachute statute. The court relied heavily on Bogue v. Ampex Corp., in which the Ninth Circuit found a corporate golden parachute agreement to constitute an ERISA plan. In that case, severance benefits were due only if the employee did not receive “substantially equivalent employment” following the acquisition of the employer, a determination to be made by the employer. The Ninth Circuit concluded that the employer’s need to make a case-by-case comparative analysis of an employee’s pre- and post-takeover

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75. Id. at 19.
76. The Court made reference to statistical data indicating that between 1971 to 1981, approximately 49,219 jobs in Maine were lost as a result of plant closings. These losses resulted in a significant burden on public and private social service agencies. Id. at 19 n.13. Of course, the Court required more than a strong state interest to overcome preemption. But “[i]f a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems.” Id. at 19.
77. Id. at 14–15.
78. See supra note 76.
79. 976 F.2d 1319 (9th Cir. 1992), cert. denied, 113 S.Ct. 1847 (1993).
employment required the kind of discretionary decision-making indicating the existence of a plan.\(^80\)

The Simas court determined that the discretionary decision-making required of an employer under the Massachusetts statute, due to the “involuntary termination” condition, created an administrative plan. But the mere possibility of a discretionary decision under the statute does not rise to the level of discretion required in Bogue; thus the First Circuit effectively made an unwarranted expansion of the interpretation of “discretionary.” Unlike the case-by-case appraisal of “substantially equivalent employment” necessary in Bogue, an appraisal expressly reserved for the employer, the eligibility determination under the tin parachute turned on whether the ex-employee qualified for state unemployment benefits, a determination made by the state’s Department of Employment and Training. Although a limited number of cases may arise in which an employer must make its own determination,\(^81\) in virtually all cases any potentially discretionary decision would rest with a state agency, making the court’s reliance on Bogue misplaced.

In the vast majority of cases under the tin parachute statute, an employer would make only simple eligibility determinations and mathematical calculations to determine the benefits owed to each employee. The simple application of such criteria is insufficient to render a disbursement procedure for tin parachute benefits discretionary. In a Second Circuit case, the court held that even under the Bogue “managerial discretion” approach, simple arithmetical calculations and clerical determinations are a far cry from what the Ninth Circuit described as the “ongoing, particularized, administrative, discretionary analysis” involved in Bogue.\(^82\)

The duration of the eligibility period for tin parachute benefits, which extended for twenty-four months following a takeover, was the other feature of the statute deemed by the First Circuit to support ERISA preemption. Again, however, the case law does not mandate a finding of preemption. Certainly, the fact that the statute could be triggered for twelve months prior to and twenty-four months following a change in control is distinguishable from the one-time trigger in Fort Halifax. The Fifth Circuit, however, has held that no ERISA plan existed despite the

\(^{80}\) Id. at 1323.

\(^{81}\) For example, this could occur where an employee never applies for state unemployment benefits or where the tin parachute benefits become due before the DET decision is made.

\(^{82}\) James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d 463, 468 (2d Cir. 1993) (quoting Bogue, 976 F.2d at 1323).
potential for administrative activity extending for five years beyond a takeover: employees terminated within twenty-four months of a takeover could qualify for golden parachute benefits that would continue for thirty-six months. Even in Bogue, the Ninth Circuit found that the seventeen-month duration of the employer’s liability was short.

Certainly, these decisions could have been read by the First Circuit as grounds to avoid preempting Massachusetts’s tin parachute. The facts of Simas alone did not compel preemption, and an analysis of ERISA does not adequately support the court’s conclusion that the administrative obligations imposed by the tin parachute exceeded Fort Halifax, and thus implicated ERISA.

B. Statutory Provisions and Policy of ERISA Do Not Compel Preemption of Massachusetts’s Tin Parachute Statute

Because Congress failed to adequately define what constitutes an ERISA plan, the Simas court, consistent with the approach of other courts, attempted to interpret this term in keeping with the purposes and policies of ERISA. As the Supreme Court recognized in Fort Halifax, when a state statute fails to implicate the concerns of ERISA’s preemption provision or the regulatory concerns of ERISA itself, preemption is unnecessary. The First Circuit failed to recognize that Massachusetts’s tin parachute has only a minimal relation to ERISA’s objectives.

1. Massachusetts’s Tin Parachute Statute Does Not Implicate ERISA’s Regulatory Goals

In enacting ERISA, Congress’s primary concern was to prevent the mismanagement of funds accumulated to finance employee benefits and the consequent failure to pay employees benefits from accumulated

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83. Fontenot v. NL Indus., 953 F.2d 960, 961 (5th Cir. 1992); see also Wells v. General Motors Corp., 881 F.2d 166, 175–76 (5th Cir. 1989) (holding that no ERISA plan was created when severance benefits and two-year continuation of benefits was part of voluntary resignation program), cert. denied, 495 U.S. 923 (1990).
84. 976 F.2d at 1323. The court found an ERISA plan was required based upon the necessity of a case-by-case, discretionary eligibility determination.
85. See supra note 48.
86. 482 U.S. 1, 14 (1986).
It is not readily apparent that Congress intended to include severance benefits in ERISA's regulatory framework, but the rationale employed by courts to include severance plans stems from the nature of such plans. Because severance pay accumulates each year that an employee is with an employer, an employer's severance fund may accumulate into a significant amount of money. Such accrued funds are subject to the type of mismanagement and abuse that ERISA was intended to prevent and, therefore, are appropriate for ERISA regulation.

However, the judicial justifications for including traditional severance plans in ERISA's regulatory framework are less applicable to tin parachute benefits. Tin parachutes do not involve funds that accumulate during the years employees remain with a company, and would therefore be vulnerable to mismanagement or misappropriation. Tin parachute benefits are not accrued by an employer at all; they are a cost imposed upon an acquiring corporation as an acquisition cost when a change in control results in layoffs. Such benefits are then paid within a short period to any of the target company's employees terminated within a brief time span following a change in control. Because tin parachute funds neither accumulate for a long period nor are held for employees for a long period, the First Circuit should have recognized that they are not vulnerable to the mismanagement or fraudulent abuses that make ERISA regulation of severance plans necessary.

2. Massachusetts's Tin Parachute Statute Does Not Implicate the Problem ERISA's Preemption Provision is Designed to Address

ERISA's goal of minimizing conflicting state regulation of benefit plans is not implicated when the disbursement of benefits requires no


88. ERISA does not specifically mention severance benefits in the definition of an employee welfare benefit plan. See supra note 46 and accompanying text.

89. See, e.g., Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985); see also Massachusetts v. Morash, 490 U.S. at 115–16 (distinguishing accumulated severance plans from unfunded vacation benefits, which were held not to be preempted).

90. If tin parachute benefits do accrue, they are held only by the acquiring corporation and only from the point immediately following an acquirer's decision to terminate employees until such employees are actually terminated. Under the Massachusetts statute, this is a very limited time period.
ongoing administrative scheme. Like the plant closing statute upheld in *Fort Halifax*, the tin parachute statute differs dramatically from a requirement that an employer pay ongoing benefits. While a continuous, formal severance plan must have a mechanism to determine which employees become eligible, to monitor the availability of funds, and to comply with reporting requirements, tin parachute benefits are paid over a short, finite period of time, apply to all employees terminated within that time, and require comparatively minimal effort to disburse. The nature of such benefits minimizes any possibility of burdensome and conflicting state regulation.

Additionally, although ERISA's legislative history articulates the goal of minimizing conflicting state regulation, Congress has already indicated that this aim will not be pursued at all costs. ERISA expressly exempts from preemption protective state legislation relating to workmen's compensation, unemployment compensation, and disability insurance, demonstrating that uniformity will yield to important state worker protections. The congressional approach of reserving employee "safety net" matters for the states suggests that, in close cases like *Simas*, courts should use restraint in preempting state law in these areas.

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92. 482 U.S. at 14. The Court distinguished the plant closing benefits from an employer plan providing death benefits. Although death benefits may be seen as a lump-sum payment, an employer must foresee the need to make ongoing disbursements to survivors on a periodic basis. *Id.* at 14 n.9. Tin parachute benefits, in contrast, may never be necessary and, even if triggered, are paid out during a limited time.

*See also supra* part IV.

93. Employees terminated for cause may be excluded. *See supra* note 25 and accompanying text.

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

95. 29 U.S.C. § 1003(b)(3) (1988). Like tin parachute benefits, these forms of regulation allow states to impose on employers a portion of the burden resulting from worker dislocation. Indeed, it was argued that Maine's plant closing statute was a form of unemployment insurance exempt from ERISA, Brief for the Employment Law Center and the Plant Closures Project, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1986) (No. 86-341), but the Court decided the case on other grounds.

96. Congress's failure to expressly exempt takeover-related dislocation problems is not surprising given that much of the takeover activity contributing to such dislocation occurred during the 1980s, long after the enactment of ERISA.

97. For a related argument, see Lessard, *supra* note 40, at 844. In a clearer case of preemption than presented by the Massachusetts statute, the author predicts that ERISA will preempt the Wisconsin Family and Medical Leave Act and urges that Congress exempt this "safety net" legislation from ERISA's preemptive reach.
C. Policy Implications of the Simas Decision

Preemption of the Massachusetts statute by ERISA will likely prompt states to react in one of two ways. First, after Simas, state legislators may eliminate involuntary termination requirements in tin parachute statutes because they involve administrative determinations that may cause ERISA preemption. But this is undesirable from a public policy standpoint because the requirements help to ensure that only those employees who are terminated through no fault of their own receive benefits. Elimination of this requirement would result in the compensation of workers who were not actually injured because they immediately secured other employment, or who were fired based on their performance. Excluding these individuals is better policy because it does not unjustly enrich those who were not the intended beneficiaries of the statutes and ensures that the acquiring corporation is liable only for the dislocation it creates. Any slight increase in the acquirer's administrative burden is outweighed by the benefit from compensating only those who are involuntarily terminated and who remain unemployed.

Alternatively, state legislators may include very short eligibility requirements in tin parachute statutes. The First Circuit reasoned that a longer eligibility period increases the administrative burden that can trigger preemption. Using very short eligibility periods, however, will make it easy for acquirers to evade liability under the tin parachute statute altogether. For example, if an eligibility period is only one month, an acquiring corporation could simply delay layoffs for a month. Additionally, if the eligibility period did not begin just before a change in control, an acquirer could make layoffs prior to a change in control a condition of the acquisition.

Finally, states may refrain altogether from assisting dislocated workers via the imposition of tin parachute obligations. Such benefits address important state interests, however, as indicated by the legislative history of the statute. The significance of the state interest addressed by the statute makes the unnecessary preemption of this law regrettable.

98. For example, if employees knew that they were entitled to benefits even if fired, there may be a perverse incentive to perform their jobs poorly. See Stone, supra note 2, at 60–61 (explaining this “shirking” effect if tin parachute eligibility provisions are drafted too broadly).

99. See supra note 21 and accompanying text. Similarly, it was evidence that nearly 50,000 workers in Maine lost jobs due to plant closings that prompted Maine to enact the severance statute upheld in Fort Halifax.
V. SEARCHING FOR A MORE REASONED APPROACH TO DEFINING AN ERISA PLAN

Congress's failure to adequately define the term "plan" in ERISA presents a challenge for courts attempting to interpret this term for preemption purposes. Certainly, courts can look to ERISA policies and provisions, as well as other judicial interpretations, for assistance. Any analysis of ERISA's scope, however, must also be guided by "respect for the separate spheres of governmental authority preserved in our federalist system."101

A reasoned approach to interpreting the meaning of an ERISA plan would involve recognition of the state interest at stake, particularly when a state's traditional police powers are implicated.102 When neither statute, policy, nor precedent mandates preemption of a state law, respect for the separate sphere of state authority should compel courts to refrain from expanding ERISA's scope. The already expansive borders of ERISA preemption are not well defined; in deciding what constitutes an ERISA plan, courts should take care not to expand those borders to unnecessarily preempt vital or innovative state laws.103 Of course, a state law that clearly creates an ERISA plan cannot survive a preemption challenge no matter how strong the state interest; no balancing of state and federal interests may be undertaken. Only when there is a question of whether ERISA is implicated at all would there be an opportunity to consider alternative state concerns.

Courts should hold that tin parachute statutes address concerns appropriate for state legislation. First, assisting dislocated workers is an area traditionally addressed by state regulation.104 Second, benefits for

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100. See supra note 48.
103. In the famous words of Justice Brandeis:
   Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.
104. See New York Tel. Co. v. State Dep't of Labor, 440 U.S. 519, 539 (1979) (recognizing Congress's sensitivity to the importance of state's interest in providing unemployment benefits, an interest "deeply rooted in local feeling and responsibility") (citation omitted); see also supra note 95.
dislocated workers have a direct impact on state treasuries. An employee terminated following a takeover may need to resort to government assistance programs in the absence of tin parachute benefits until new employment is secured.\textsuperscript{105} The minimal administrative calculations required by the tin parachute statute are minor in comparison to the burden on state treasuries created by mass layoffs.

However, because ERISA contains such a far-reaching preemption clause, congressional action may be required to mitigate the effect of Simas. Congress may pursue several options to prevent preemption of state legislation similar to Massachusetts's tin parachute statute, including a wholesale revision of ERISA's preemption clause, a more concise definition of what constitutes an ERISA “plan,” or a specific exemption from preemption for defined tin parachute statutes.

If ERISA's preemption clause were amended to preempt only state laws that conflict with ERISA's provisions, courts could ensure that the federal statute achieved its purpose while finding room for supplemental state legislation where necessary.\textsuperscript{106} Although appealing, this approach would likely generate great resistance from employers opposed to increased state regulation of employee benefits\textsuperscript{107} and thus is probably an unrealistic option.

Second, Congress might amend ERISA to adequately define an ERISA “plan” for preemption purposes by, for example, specifying exactly what level, type, and duration of activity constitute a plan. This would allow states to address local concerns while ensuring that state

\textsuperscript{105} One court recognized with respect to family support obligations that, when balanced against the heavy burden on government resources, the increase in an employer's administrative costs is a slight consideration. American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 125 (2d Cir. 1979).

\textsuperscript{106} This was the approach recommended by the task force charged with evaluating ERISA's preemption ramifications. See supra note 38 and accompanying text.

\textsuperscript{107} This likelihood is demonstrated by the legislative history of the narrow exemption created for Hawaii's health care law. For example, Irish & Cohen, supra note 36, at 150–52, discuss anti-labor pressures and point to an earlier draft of that amendment which required the Secretary of Labor to submit a report within two years to Congress detailing the feasibility of extending the exemption to similar laws of other states. This requirement, however, was deleted and the final amendment stated that the exemption “shall not be considered a precedent with respect to extending such amendment to any other State law.” See Pub. L. No. 97-473, § 301(b), 96 Stat. 2605, 2612 (1983). This language was justified as intending to “help allay the fears of those who might otherwise view this action as the beginning of a weakening of Federal preemption under ERISA.” Irish & Cohen, supra note 36, at 152 n.198 (quoting statement of Rep. Erlenborn, 128 Cong. Rec. H9610 (daily ed. Dec. 13, 1982)).
regulation would not impair ERISA's aim of minimizing the administrative burden. Such an approach would reduce the kind of arbitrary judicial line-drawing undertaken in Simas and similar cases. Like the option suggested above, however, it could generate vocal opposition by employers. Another drawback is that legislators might be forced to engage in the very line-drawing sought to be prevented.

The most viable option is for Congress to amend the ERISA preemption clause to specifically exempt designated state tin parachute statutes. Although an exemption could be limited to the Massachusetts statute, as Congress did for the Hawaii health care law, a better approach would be to allow any state to enact such a statute within specified limitations designed to ensure that the administrative burden on employers be insignificant.

In drafting such an amendment, Congress should require that tin parachute benefits be triggered by a change in the control of the employer. This will ensure that a statute is narrowly tailored to address takeover-related dislocation. In addition, a limit on the duration of the eligibility period for benefits would ensure that an employer's obligations would not be ongoing. The time period must not be so short, however, that it is easily evaded. Despite the potential for a slight increase in administrative burdens, Massachusetts's requirement that a terminated employee qualify for unemployment benefits serves an important policy interest and should be permitted.

VI. CONCLUSION

The preemptive reach of ERISA is notoriously vast. In light of this, Congress's failure to adequately define what constitutes an ERISA plan creates difficulties for courts attempting to determine exactly where to draw the line beyond which states may not regulate. In cases approaching that line, if preemption is not clearly mandated by statute or precedent, courts should refrain from extending ERISA's already expansive preemption borders when significant state interests are at

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stake. The failure to do so in *Simas* reversed the traditional presumption against preemption of state law and foreclosed an innovative attempt to assist dislocated workers. This unfortunate result provides additional impetus for Congress to return to the issue of ERISA preemption of employee welfare benefit plans and, specifically, to permit certain tin parachute provisions.