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Unpopular But Not Unfair: The Fifth Circuit Considers the Terms But Ignores the Endearment in McGann v. H & H Music Co., 946 F.2d 410 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992)

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Note

Unpopular But Not Unfair: The Fifth Circuit Considers the Terms But Ignores the Endearment in
McGann v. H & H Music Co., 946 F.2d 410 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992)*

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* The author would like to thank Professor Steven Willborn and Steve Thomas for their helpful comments.
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I. INTRODUCTION

In *McGann v. H & H Music Co.*,1 the United States Court of Appeals for the Fifth Circuit enraged AIDS activists2 and alarmed employees nationwide when it ruled that an employer could effectively "discriminate," albeit indirectly, against employees with life threatening diseases by decreasing the caps on health benefits to nearly nothing. Recently, the United States Supreme Court denied certiorari in the matter allowing the decisions of the district and circuit courts to stand.3 This Note analyzes the decision and rationale of the Fifth Circuit. A brief factual background of the case is given, followed by a discussion of the basic requirements of the Employee Retirement Income Security Act of 19744 as it applies to employee benefit plans.

The Note will then address the proper scope, purpose, and effect of Section 510 of ERISA, upon which McGann based his claim. The Note will conclude that while the Fifth Circuit's decision may seem viscerally and fundamentally unfair, it would result in far greater unfairness to the majority of the participants of the plan to require plan benefits to vest. Thus, the circuit court's decision was a correct reading of the law, and for the United States Supreme Court to have ruled otherwise would have been an act of judicial legislation. The Note concludes by addressing the statutory responses to *McGann*5 and the possible effect of the Americans with Disabilities Act upon future similar situations.6

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1. 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992).
5. See infra notes 143-53 and accompanying text.
6. See infra notes 108-42 and accompanying text.
II. FACTUAL BACKGROUND

John McGann had been an employee of H & H Music Company since 1982. During his employment, McGann had been covered by H & H's group medical care plan, which was administered by Brook Mays Music Company. Prior to July 31, 1988, the General American Life Insurance Company provided medical benefits to the employees of H & H. H & H accordingly provided to its employees a Summary Plan Description ("SPD") of the plan. The plan provided lifetime coverage for up to $1,000,000 for a catastrophic illness; however, the SPD expressly stated that "the plan sponsor could terminate or amend the plan at any time or terminate any benefit under the plan at any time." Thus, the employees of H & H were put on notice that at any time their medical benefits could be changed or withdrawn.

In December of 1987, McGann discovered that he was afflicted with the Acquired Immune Deficiency Syndrome ("AIDS"). He soon thereafter made his condition known to H & H and submitted his first claims for reimbursement under the plan.

On July 28, 1988, Brook Mays exercised its right to terminate the health benefit plan covering H & H employees and announced that a new group medical plan was to supplant the original plan. Unlike the terminated plan, which was a fully insured group medical plan provided by General American, the new employee benefit plan was self-insured. Additionally, the new plan decreased benefits payable for AIDS related claims from the former lifetime benefits of $1,000,000 to $5,000.

McGann soon expended the $5,000 worth of benefits under the new plan. He then filed suit against H & H, Brook Mays, and General

7. Brook Mays Music Company was a named defendant in the case before the district court, the circuit court, and in the Petition for Certiorari.
8. General American was also a named defendant; however, this Note will not address the viability of the claims against General American.
13. The Respondents alleged several important additional changes in the policy; namely, deductible and "stop loss" increases, employee contribution increases, exclusion for treatment of substance abuse and the addition of a Preferred Provider Organization Network. See Brief of Respondent, supra note 10, at 5. The only illnesses which were excluded, however, were AIDS related illnesses.
American, alleging violations of ERISA Section 51014 and several state law claims.15 The defendants immediately moved for summary judgement,16 which the district court granted.17 McGann then appealed the decision to the United States Court of Appeals for the Fifth Circuit. The majority of this Note will analyze the decision of the circuit court and the propriety of its affirmance of the district court’s order of summary judgement.

A. Background of ERISA

ERISA was introduced into law in 1974, seven years after its initial introduction and three years after an intensive Congressional investigation into the abuses of private pension and employee benefit plans.18 The stated purpose of ERISA was to “protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies . . . and ready access to the Federal courts.”19 Congress enacted ERISA primarily to protect “the continued well-being and security of millions of employees and their dependents [who] are directly affected by [employee benefit] plans.”20

1. ERISA Preempts All State Laws Which Relate to Employee Benefit Plans.

Pursuant to the supremacy clause of the United States Constitution,21 federal law will preempt state law to the extent that the federal

15. The state law claims were not discussed in the district court’s order on the Respondent’s Motion for Summary Judgement; presumably, all state law claims were dismissed because they were preempted by ERISA. See ERISA § 514, 29 U.S.C. § 1144. See generally infra notes 21-35 and accompanying text. In any event, McGann did not raise the applicability of any state claims on appeal. See McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991).
16. In federal court, summary judgement is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. FED. R. CIV. P. 56. One commentator has expressed the view that the fact that McGann’s illness was the catalyst for the employer’s decision to modify the plan benefits in and of itself raises a genuine issue of material fact and that summary judgment was improper. See Greci, supra note 2, at 190-91.
21. U.S. CONST. art. VI, cl.2. The clause provides in pertinent part: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."
law clearly expresses Congress' preemptive intent.\textsuperscript{22} Federal preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."\textsuperscript{23} An explicit expression of preemptive intent is found in ERISA Section 514,\textsuperscript{24} which provides that ERISA "shall supersede any and all State laws insofar as they may ... relate to any employee benefit plan."\textsuperscript{25}

ERISA's sweeping preemption provision originated in the Conference Committee's resistance to the more limited preemption statutes originally proposed by the House and Senate. The House version of Section 514 originally limited the preemptive scope of the statute to only those areas of state regulation expressly covered by the bill.\textsuperscript{26} The initial Senate proposal provided for preemption of state laws relating to subject matters regulated by the bill.\textsuperscript{27}

The Conference Committee resolved the discrepancies between the two proposed versions by rejecting both alternatives in favor of the present language of Section 514(a).\textsuperscript{28} The Committee intended that the preemptive scope of Section 514(a) was to be as broad as possible, and both houses eventually accepted the conferees' proposal.\textsuperscript{29} The rationale for this type of broad, overriding preemption was expressed

\textsuperscript{25} Id.
\textsuperscript{26} H.R. 2, 93d Cong., 1st Sess. 7 (1974). The pertinent language of the proposed statute stated:

\begin{enumerate}
  \item It is hereby declared to be the express intent of Congress that ... the provisions of part 1 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities and fiduciary responsibilities . . . .

  \item It is hereby declared to be the express intent of Congress that the provisions of parts 2, 3 and 4 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof as they may now or hereafter relate to the nonforfeitability of a participant's benefits in employee benefit plans . . . , the funding requirement for such plans, the adequacy of financing such plans, portability requirements for such plans, or the insurance of pension benefits under such plans.
\end{enumerate}

120 CONG. REC. 5002 (1974).
\textsuperscript{27} H.R. 4200, 93d Cong., 1st Sess. (1973). The Senate version provided:

\begin{enumerate}
  \item PRE-EMPTION OF STATE LAWS - It is hereby declared to be the express intent of Congress that ... the provisions of this Act or the Welfare and Pensions Plans Disclosure Act shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act . . . .
\end{enumerate}

120 CONG. REC. 5002 (1974).
\textsuperscript{28} ERISA § 514(a), 29 U.S.C. § 1144(a)(1988).
\textsuperscript{29} 120 CONG. REC. 29216, 29963 (1974).
as the need to "eliminat[e] the threat of inconsistent State and local regulation of employee benefit plans,"\textsuperscript{30} and the necessity of avoiding "the possibility of endless litigation over the validity of State action that might impinge on Federal regulation."\textsuperscript{31} At least one commentator has concluded that Congress had a secondary, unexpressed intention—to motivate employers to offer benefits. Without strong federal preemption, the conflicting state regulation and the inevitable litigation over conflicting provisions of state and federal law would discourage employers from adopting or maintaining employee benefit plans.\textsuperscript{32}

The preemptive effect of ERISA is therefore noted for its breadth,\textsuperscript{33} and courts have consistently found preemption even if a state law only affects an employee benefit plan indirectly or peripherally.\textsuperscript{34} Thus, a state law which would restrict employers from denying benefits for AIDS, or which would prohibit employers from changing

\begin{itemize}
\item \textsuperscript{30} 120 CONG. REC. 29933 (1974).
\item \textsuperscript{31} Id. at 29942.
\item \textsuperscript{33} The Supreme Court has stated that "[t]he preempt-\textsuperscript{m}ation clause is conspicuous for its breadth." FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990). \textit{See also} Francis v. United Technologies Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978)(stating that ERISA is intended to effect the broadest possible preemption of state law). ERISA's preemptive effect is so broad that it preempts state law even in the absence of a federal remedy under ERISA: "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987). \textit{See also} First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc., 960 F.2d 1546, 1550 (11th Cir. 1992)(holding that argument that ERISA provides inadequate remedy will not overcome preemption); Lee v. E.I. DuPont de Nemours & Co., 894 F.2d 755, 757 (5th Cir. 1990)(ERISA preempts state law claims without regard to whether ERISA provides remedy for alleged wrong); Lister v. Stark, 890 F.2d 941, 946 (7th Cir. 1989), \textit{cert. denied}, 111 S. Ct. 579 (1990)("[w]hile our holding here will leave [the plaintiff] without a remedy, the availability of a federal remedy is not a prerequisite for federal preemption."); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989)(state law claims preempted despite claim that alleged employer misconduct constituted a "betrayal without remedy"); Olson v. General Dynamics Corp., 960 F.2d 1418, 1423 (9th Cir. 1991), \textit{cert. denied}, 112 S. Ct. 2368 (1992)(any gap between remedies provided under state vs. federal law is concern of Congress); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986), \textit{cert. denied}, 481 U.S. 1016 (1987)(ERISA preempts state law even in absence of federal remedy); Contra International Resources, Inc. v. New York Life Ins. Co., 950 F.2d 294, 298 (6th Cir. 1991), \textit{cert. denied}, 112 S. Ct. 2941 (1992)(ERISA will not preempt state law claims based on wrongs for which ERISA provides no remedy).
\item \textsuperscript{34} \textit{See, e.g.,} Shaw v. Delta Air Lines, 463 U.S. 85, 98 (1983)(stating that "[a] law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan"). \textit{See also} Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524-25 (1981)(holding that a state law prohibiting pension plans from offsetting workers' compensation benefits indirectly regulates an ERISA plan and therefore is preempted by ERISA).\
\end{itemize}
or terminating the terms of employee benefit plans would clearly "re-
late to" employee benefit plans and would be preempted by Section
514. 35

2. Employers Can Escape State Regulation of Insurance by Self-
Funding Employee Benefit Plans.

ERISA contains an important exception to its broad preemption
provision. Section 514(b)(2)(A), 36 commonly known as the "insurance
savings clause," exempts from federal preemption "any law of any
State which regulates insurance, banking or securities." 37 ERISA con-
tains another exception to the savings clause, referred to as the
"deemer clause," which provides that "an employee benefit plan . . .
shall [not] be deemed to be an insurance company or other insurer . . .
or to be engaged in the business of insurance . . . for purposes of any
law of any State purporting to regulate insurance companies, [or] in-
surance contracts." 38 The practical effect of the interaction between
the savings clause and the deemer clause is that ERISA prevents
states from indirectly regulating self-insured employee benefit plans
by treating those plans as insurers under state law.

The Supreme Court initially interpreted the insurance savings and
deemer clauses in Metropolitan Life Insurance Co. v. Massachusetts. 39
In Metropolitan Life, the Court held that a state statute which re-
quired minimum mental health care benefits in group health policies
"regulated insurance" within the meaning of ERISA and was there-
fore saved from preemption. 40 As part of its analysis, the Court in
dicta distinguished between insured and self-insured plans: Had Con-
gress intended preemption to reach state regulation of insurance con-
tracts, "it would have been unnecessary for the deemer clause
explicitly to exempt such laws from the saving clause when they are
applied directly to benefit plans." 41 In drawing the distinction, the
Court implicitly sanctioned a dichotomous treatment of fully insured
plans as opposed to self-funded plans, in that insured plans are subject
to indirect regulation by state law while self-insured plans escape such
state regulation. 42

What was merely hinted at in Metropolitan Life soon found ex-

cplicit expression in FMC Corp. v. Holliday. 43 In Holliday, the Court

37. Id.
40. Id. at 758.
41. Id. at 741.
42. Id. at 747.
expressly recognized the distinction between insured and self-insured plans: "By recognizing a distinction between insurers of plans and the contracts of those insurers, which are subject to direct state regulation, and self-insured employee benefit plans governed by ERISA, which are not, we observe Congress' presumed desire to reserve to the States the regulation of the 'business of insurance.' "

The result of the distinction between insured and self-insured plans has been that employers have escaped the mandates of state regulation by self-insuring their employee benefit plans. Therefore, the employee's exclusive remedy for alleged violations of self-funded plans is under ERISA's civil enforcement procedures, and unless ERISA itself prevents employers from changing the terms of employee benefit plans under Section 510, which contains no vesting provision, the employee will have no cause of action.

3. Civil Enforcement of ERISA

Section 502(a) of ERISA allows a plan participant to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights

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44. Id. at 63.
45. See, e.g., Gonzales v. Prudential Ins. Co. of Am., 901 F.2d 446, 454 (5th Cir. 1990)(holding that self-insured benefit plans are not subject to state regulation of insurance); Baxter v. Lynn, 886 F.2d 182, 184 (8th Cir. 1989)(self-funded plan not subject to even indirect state regulation). The result of § 514 has been described as "semi-preemption" because "the statute has been read to mean that the states can regulate employer-provided health insurance if the employer buys it from an insurance company but not if the employer self-insures." Daniel M. Fox & Daniel C. Schaffer, Semi-Preemption in ERISA: Legislative Process and Health Policy, 7 AMERICAN J. TAX POLICY 47, 48 (1988).

McCann offers an illustration of the attractions of self-funded plans. Subsequent to McGann, Texas enacted the following statute:

(a) ... [A]n insurer that delivers or issues for delivery an accident and sickness insurance policy in this state may not cancel that policy during its term because the insured has been diagnosed as having or has been or is being treated for HIV or AIDS. ... TEx. INS. CODE ANN. § 3.70-3A (Supp. 1993). There are two fundamental flaws in statutes of this kind. First, the language "during its term" suggests that the employer may reserve the right to terminate the plan, thus ending its term. To the extent that plan termination is prohibited, the employer may simply offer plans with very short terms. On a more practical level, an employer can simply self-fund its plans, as did H & H, and therefore escape state regulation through the preemptive effect of ERISA. See supra notes 21-35 and accompanying text.

46. "[T]he civil enforcement provisions of ERISA ... were meant to be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting ERISA violations, and that varying state causes of action for claims within the scope of § 1132(a) would pose an obstacle to the purposes and objectives of Congress." In re Life Ins. Co. of N. Am., 857 F.2d 1190, 1194 (8th Cir. 1988)(quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987)(citations omitted)).
to future benefits under the terms of the plan.”48 The procedures contained within ERISA are intended to be the exclusive remedies for violations of rights under ERISA.49 The language of Section 502 is critical and precise: If an employer denies an employee a benefit or right guaranteed under the terms of an existing plan, the employee may pursue a remedy under Section 502(a).

For Section 502(a) to apply, however, there must be an enforceable right under an existing plan.50 If an employer amends the benefits of an existing plan, and there are no restrictions on such a modification, the employee has no greater “rights” than the terms which the amended plan provides. This reasoning applies a fortiori to a situation where an employer terminates a plan. Presuming the termination of the plan is not itself a violation, upon termination of the plan there are no continued rights under the “terms” of the plan to enforce. Thus, a prerequisite to a successful suit under Section 502(a) is an enforceable right under an existing plan. The principles of vesting with regard to ERISA plans are central to the determination of the existence of an existing, enforceable right.

4. ERISA Requires No Vesting of Employee Benefits

ERISA covers both pension plans51 and welfare benefit plans52 and distinguishes between two types of plan benefits: retirement or pension benefits,53 which are vested, and ancillary or employment benefits, which are nonvested.54 The difference between vested and

50. In some instances, an employer’s act which is intended to keep an employee from becoming entitled to a benefit under a plan will trigger a cause of action under ERISA. For example, the Supreme Court has stated that the prototypical claim intended to be covered by Section 510 is one where the employee’s “termination [is] motivated by an employer’s desire to prevent a pension from vesting.” Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990). While the action of the employer in such a circumstance does not involve an existing benefit, it does involve an existing right to future, vested benefits. Furthermore, courts have not been reluctant to find a violation of § 510 in cases involving employee termination. See infra notes 79-92 and accompanying text.
51. Because McGann dealt solely with welfare benefit plans, pension plans and coverage thereof are beyond the scope of this Note.
52. ERISA describes a welfare benefit plan as “any plan, fund, or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care . . . or benefits in the event of sickness, accident, disability, [or] death.” ERISA § 3(1), 29 U.S.C. § 1002(1)(1988). A plan participant is “any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer.” ERISA § 3(7), 29 U.S.C. § 1002(7)(1988).
nonvested benefits is crucial to the employee attempting to recover under Section 510.

In enacting ERISA, Congress mandated that pension employees have vested, nonforfeitable rights to a certain percentage of their benefits depending on the number of years the employee had worked. Welfare benefits, in contrast, are nonvested benefits. The rationale for the exemption from the protection of vesting has been described as an inducement to employers to provide benefits. While vesting requirements would not deter employers from forming pension plans because the costs are easy to estimate, applying the vesting provision to the unpredictable and unforeseeable expenses of welfare benefits would discourage employers from offering these benefits in the first place.

ERISA regulates pension plans far more extensively than welfare plans. For example, welfare plans are expressly exempted from the Act's detailed minimum participation, vesting and benefit-accrual requirements and are not subject to ERISA's minimum-funding requirements. As explained by Committees of both the House and Senate, the term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

Another basic difference between pension benefits and welfare benefits is that unlike pension benefits, ERISA does not afford welfare benefits any special protection outside of the terms of the con-

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56. ERISA explicitly provides that the requirements of minimum vesting standards do not apply to employee benefit plans. See ERISA § 201(1), 29 U.S.C. § 1051(1) (1988).

McGann could not, however, claimed a breach of fiduciary duty under Section 402; courts have unanimously held that the termination or modification of a plan will not trigger ERISA's fiduciary standards. See Senn v. United Dominion Indus., Inc., 951 F.2d 806, 817 (7th Cir. 1992)(stating that the establishment, termination, or amendment of a benefit plan is not to be judged by fiduciary standards); Adams v. Avondale Indus., Inc., 905 F.2d 943, 948-49 (6th Cir. 1990), cert. denied, 111 S. Ct. 517 (1990)(employer violates no fiduciary duty by amending non-vested plan benefits); Sejman v. Warner-Lambert Co., 889 F.2d 1346, 1349 (4th Cir. 1989), cert. denied, 111 S. Ct. 43 (1990)(employer violates no fiduciary duty by amending non-vested plan benefits); Musto v. American Gen. Corp., 861 F.2d 897, 912 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989)("when an employer decides to establish, amend, or terminate a benefits plan . . . its actions are not to be judged by fiduciary standards"); Jones v. AT & T
tract between the employer and employee. \(^{60}\) Thus, the terms of the contract will govern the offering and termination of the benefits. The result of the exemption of vesting requirements is that in the absence of an enforceable agreement to the contrary, an employer remains free to amend or eliminate health plan benefits. \(^{61}\)

The contract referred to is comprised of the description of the plan, which is required to be distributed, as well as a detailed underlying plan. While ERISA contains no requirement that benefits under a welfare plan vest, an employer can create an enforceable, binding right to benefits under a plan through either a written obligation \(^{62}\) or by failing to preserve the right to terminate or amend benefits. \(^{63}\)

ERISA provides for explicit disclosure of the terms of plans on behalf of employers by mandating that each participant in the plan receive a Summary Plan Description. \(^{64}\) ERISA requires the SPD to include, among other things, a disclosure of benefits “sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.” \(^{65}\) The obligations and terms stated under the SPD and plan documents, however, exclusively govern an employer's obligations under ERISA welfare plans, \(^{66}\) and the mere termination of plan benefits, when not

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\(^{60}\) Anderson v. Alpha Portland Indus., Inc., 647 F. Supp. 1109, 1125 (E.D. Mo. 1986), aff'd, 836 F.2d 1512 (8th Cir. 1988).

\(^{61}\) See, e.g., Wise v. El Paso Natural Gas Co., 1993 WL 64170 (5th Cir. 1993)(employer possesses right to amend or terminate unvested benefits at any time absent contrary contractual provision); Owens v. Storehouse, Inc., 984 F.2d 394, 398 (11th Cir. 1993)("absent contractual obligation, employers may decrease or increase benefits") (citing Vasseur v. Halliburton Co., 950 F.2d 1002, 1005 (5th Cir. 1992)(employer may amend ERISA benefits absent contractual restriction)); Deibler v. United Food and Commercial Workers' Local Union 23, 973 F.2d 206, 210 (3d Cir. 1992)(under ERISA, nonvested benefits may be reduced or eliminated at any time); Reichelt v. Emhart Corp., 921 F.2d 425, 430 (2d Cir. 1990), cert. denied, 111 S. Ct. 2854 (1991)(stating that under ERISA employer has right at any time to amend or terminate severance benefit plan); Alday v. Container Corp. of Am., 906 F.2d 1039, 1045 (7th Cir.), cert. denied, 498 U.S. 981 (1991)(stating that an employer may unilaterally terminate or amend employee welfare benefit plan under ERISA).


\(^{63}\) See, e.g., Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988)(stating that an employer may alter a welfare benefit plan when the summary plan description reserves the right to amend or terminate benefits).


\(^{65}\) Id.

contrary to the terms of the SPD, will not create a cause of action.

The "summary plan description" booklet provides that [the employer], as the plan's administrator, "may terminate *** the plan in whole or in part at any time, subject to the applicable provisions of the group insurance policies." Clearly, [the employer] was under no contractual obligation to refrain from terminating the plan. . . . "ERISA does not create liability on the part of the employer who changes the kind of health plan provided to employees where no contract prohibits or prevents such a change." 67

Therefore, if a plan meets the SPD regulation requirements of ERISA, and if the SPD clearly provides that the employer may terminate the plan at any time, the termination of the plan will not constitute a violation of ERISA.

5. Section 510 Does Not Prohibit an Employer From Terminating or Altering Plan Benefits.

McGann brought his claim under ERISA Section 510, 68 which provides in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

. . . . 69

Section 510, therefore, contains two separate provisions under which employees may bring a suit: discrimination for exercising any right to which the participant is entitled under the provisions of the existing plan, and discrimination for the purpose of interfering with a right to which the participant may become entitled under an existing plan.

McGann claimed that the defendants discriminated against him within both prohibitions of Section 510. 70 An examination of the facts of McGann and the language of Section 510, however, reveals that there was no violation of ERISA.


69. Id.

70. McGann v. H & H Music Co., 946 F.2d 401, 403 (5th Cir. 1991).
B. Analysis of McGann

1. **McGann was not discriminated against for exercising a right to which he was entitled under the plan.**

Courts unanimously hold that in order to show that an employee was discriminated against within the prohibitions of either provision of Section 510, the employee first has the burden of proving not merely the intent to discriminate against him in the terms of a plan, but the employer's specific intent to discriminate in retaliation for the employee's exercise of rights under the plan. While it may seem disingenuous to allow discrimination in any form with regard to an ERISA plan, the distinction between discrimination in the terms of a plan and discrimination against an employee in retaliation for exercising rights is critical, albeit subtle. The First Circuit has articulated the difference.

[Section 510] relates to discriminatory conduct directed against individuals, not to actions involving the plan in general. The problem is with the word "discriminate." An overly literal interpretation of this Section would make illegal any partial termination, since such terminations obviously interfere with the attainment of benefits by the terminated group, and indeed, are expressly intended so to interfere.

Therefore, an employer may discriminate against an employee, but only in the terms of a benefit plan. If such discrimination were prohibited, then an employer would be forever prevented from altering the terms of a benefit plan, as some employees would potentially be adversely affected by any change.

There is really no doubt that the changes in the plan were aimed at McGann. However, the changes were made in a permissible fashion, as they affected all employees in the terms of the new health plan. Because the plan affected all employees, despite the fact that McGann

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73. Id. at 16.

74. McGann was the only employee afflicted with AIDS and thus was the only employee affected by the cap on AIDS-related illnesses. See Petition for a Writ of Certiorari, at 6, Greenberg v. H & H Music Co., 113 S. Ct. 482 (1992) (No. 91-1183) [hereinafter Petition]. See also McGann v. H & H Music Co., 946 F.2d 401, 404 n.4 (5th Cir. 1991), where the court accepted that for the purposes of the appeal that McGann was the only plan beneficiary known to have AIDS.
was the only employee immediately affected by the change, all employees were discriminated against by the change. This interpretation of "discrimination" is wholly consistent with Congress' intent in promulgating ERISA. Because the plan was an employee benefit plan rather than a pension plan, it was not subject to any vesting requirements. The difference between vested pension benefits and nonvested health benefits has consistently been recognized by the courts.

Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the market and, when appropriate, by federal legislation.

Courts have interpreted the legislative history of ERISA to state that Congress, in failing to provide vesting provisions with regard to benefit plans, and in specifically requiring SPDs, but at the same time declining to regulate the content of the SPDs, intended that benefit plans could be subject to change at the whim of the employer provided that the employer reserved that right in the SPD.

Furthermore, courts which have found violations of Section 510 have invariably found that the employment relationship was terminated, and not merely that the terms of the plan itself were changed. In virtually all Section 510 cases involving employment benefits, the challenged activity was not a change in the terms of the plan itself, but rather a change in the employment relationship.

In Seaman v. Arvida Realty Sales, the plaintiff sued her former employer, alleging a violation of Section 510 for her termination. The plaintiff argued that she was unlawfully terminated because she re-

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76. Pension plans, as opposed to employee benefit plans, are subject to strict vesting requirements. See ERISA § 201, 29 U.S.C. § 1051 (1988). It should be noted that even pension plans themselves may be terminated; the Single Employer Pension Plan Amendment Act of 1986 created two types of voluntary plan termination - standard and distress. Standard and distress termination are the exclusive means of voluntary termination of single-employer pension plans. ERISA § 4041(a)(1), 29 U.S.C. § 1341(a)(1)(1988). The assets of the plan are then distributed with the allocation initially made (1) to the portion of the participant's benefit derived from employee voluntary contributions and (2) to the portion of the participant's benefit derived from employee mandatory contributions. ERISA §§ 4044(a)(1), 4044(a)(2), 29 U.S.C. §§ 1344(a)(1), 1344(a)(2)(1988). Therefore, the employees' vested pension benefits are protected under ERISA even in the event of plan termination.


78. Id.

79. 985 F.2d 543 (11th Cir. 1993).
fused to change her employment status from employee to independent contractor. The change in status, in turn, would have eliminated her participation in the health benefit plan. The court found that the termination was a violation under Section 510.80

In Fitzgerald v. Codex Corp., the plaintiff brought suit pursuant to Section 510 and claimed that the defendant violated ERISA by firing him in retaliation for his former wife's making a claim under the existing plan. The court found that since the employment was terminated in direct violation of the prohibitions of Section 510, the plaintiff had stated a claim under ERISA.

Similarly, in Kross v. Western Electric Co., the court found a Section 510 claim based on the allegation that the plaintiff's employment was terminated to prevent the plaintiff's continued coverage under Western Electric's medical and dental plans.

Finally, in Folz v. Marriott Corp., the court found an employer liable under Section 510 for the discharge of a managerial level employee after the employer learned the employee suffered from multiple sclerosis. Relying on Kross, the court held that the employer had violated ERISA by terminating the employee for the sole reason of depriving him of continued participation in the existing plan. In all of the cited cases, the essential element of the cause of action was the termination of employment rather than the termination of plan benefits. The distinction has been succinctly articulated by the Seventh Circuit:

The exact parameters of § 510 have yet to be judicially established. It is clear from the text of the statute, however, that § 510 was designed to protect

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80. *Id.* at 546 n.4. The Seaman court distinguished the facts of its case from McGann: "The combined effect of our holding today and cases such as McGann is an interpretation of ERISA that prohibits employers from discharging employees to avoid paying benefits but permits employees to reduce or terminate non-vested benefits simply by changing the terms of the plan." *Id.* at 546.
81. 882 F.2d 586 (1st Cir. 1989).
82. The plaintiff originally brought a suit in state court which was promptly removed to federal court. The federal court construed the plaintiff's allegations under ERISA § 510, despite the fact that the plaintiff had argued for the purposes of defeating federal jurisdiction that no § 510 claim was intended. *Id.* at 588-89.
83. *Id.* at 589.
84. 701 F.2d 1238 (7th Cir. 1983).
85. *Id.* at 1242-43.
87. *Id.* at 1014-15.
88. Presumably, a flagrant suspension or imposition of a fine could also lead to a § 510 violation. If such were the case, the employment relationship may not itself be affected in a fundamental way. However, an event such as the imposition of a fine would fall, as would an employee termination, directly within the prohibitions of § 510.
89. Deeming v. American Standard, Inc., 905 F.2d 1124, 1127 (7th Cir. 1990)(emphasis omitted).
the employment relationship against actions designed to interfere with, or discriminate against, the attainment of a pension right. The language of the provision speaks specifically to discharge, fine, expulsion, suspension or discrimination. Presumably, an employer may not, for example, make working conditions so unbearable that an employee is forced to quit soon before his pension rights would, in normal course, vest. Simply put, § 510 was designed to protect the employment relationship which gives rise to an individual's pension rights. *West v. Butler*, 612 F.2d 240, 245 (6th Cir. 1980). This means that a fundamental prerequisite to a § 510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way.

Therefore, according to existing case law in order to recover under Section 510, a plaintiff must experience a detrimental change in the employment relationship itself rather than merely a reduction in the terms of a plan in order to maintain an action under Section 510. In *McGann*, that crucial change in the employment relationship was

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90. The *Deeming* court noted that "ERISA's legislative history . . . reveals that Congress was concerned with the acts of unscrupulous employers who discharged and harassed their employees in order to keep them from obtaining vested pension rights." 905 F.2d 1124, 1127 n.2 (quoting Lojek v. Thomas, 716 F.2d 675, 680-81 (9th Cir. 1983)).


92. See supra notes 79-91 and accompanying text. See also *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1327 (9th Cir. 1992)(antidiscrimination provision of ERISA does not apply unless employee is actively or constructively discharged). But see *Vogel v. Independence Federal Savings Bank*, 723 F. Supp. 1210 (D. Md. 1990). *Vogel* involved a situation where the employer changed the terms of the plan to deny the plaintiff benefits under the plan. The court found a violation of § 510. The Fifth Circuit, however, found that *Vogel* was factually dissimilar from *McGann* in that nothing in *Vogel* suggests that the change there had the potential to then or thereafter exclude any present or possible future plan beneficiary other than the plaintiff. *Vogel* therefore provides no support for the proposition that the alteration or termination of a medical plan could alone sustain a section 510 claim. Without necessarily approving of the holding in *Vogel*, we note that it is inapplicable to the instant case. *McGann v. H & H Music Co.*, 946 F.2d 401, 406 (5th Cir. 1991).

The court was correct in its reluctance to follow *Vogel*. *Vogel* involved a case where a plan was amended to include all employees save the plaintiff. The fact that the plaintiff in *Vogel* was expressly and exclusively prohibited from participating in the new plan provided a much stronger argument under § 510 and is clearly distinguishable from the facts of *McGann*, where the plan amendment did not specifically exclude one employee. See also *Taylor v. Bank One, Texas, N.A.*, 137 B.R. 624, 642-43 (S.D. Tex. 1992)(defendant who attempted to provide benefits to one specific group of participants while denying benefits to other participants violated § 510).
missing; McGann was never terminated or suspended within the prohibitions of Section 510. Furthermore, McGann’s rights to benefits ended when H & H terminated the original plan.93 Once the plan no longer existed, McGann could claim no rights to the benefits of the original plan, regardless of his employment relationship with H & H.

Further, because the SPD provided by H & H specifically reserved the right to terminate the existing plan at any time,94 McGann was entitled to no rights under that plan once it was terminated. McGann could show no specific intent on the part of H & H to discriminate against him in retaliation for exercising a right under the plan once the plan was terminated; therefore, the Fifth Circuit correctly held that McGann could not prevail under the first prong of Section 510.95

2. McGann did not have any right to permanent benefits under Section 510.

Under the second prong of Section 510, McGann claimed that H & H discriminated against him “for the purpose of interfering with the attainment of any right to which [McGann] may become entitled.”96 The Fifth Circuit correctly stated that “[t]he right referred to in the second clause of section 510 is not simply any right to which an employee may conceivably become entitled, but rather any right to which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the employer.”97 Thus, for there to be interference with the attainment of a right to which a beneficiary may become entitled there must first be a plan providing for those rights.

H & H had no obligation to provide to its employees under the new plan the same terms that were provided under the terminated plan. Nothing in ERISA requires employer’s to provide any particular benefits. The Supreme Court has observed that “ERISA does not mandate that employers provide any particular benefits, and does not itself prescribe discrimination in the provision of employee benefits.”98 The Sixth Circuit has similarly rejected the proposition that employers are restricted in choosing the terms of their employee pension plans.99

93. The terms of the SPDs provided by the employers in Seaman, Fitzgerald, Kross, and Folz were not set forth in the cases. Presumably, the employers could not change the benefits of an existing plan because the SPDs contained no express provisions providing for plan termination or modification, and therefore terminating the employees was the only possible way to keep the employees from receiving their plan benefits.
94. See supra note 10 and accompanying text.
In enacting ERISA, Congress continued its reliance on voluntary action by employers by granting substantial tax advantages for the creation of qualified retirement programs. Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer on their employees; these decisions are more appropriately influenced by forces in the marketplace and when appropriate, by federal legislation. Absent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan.\footnote{100}

The Fifth Circuit recognized that McGann’s interpretation of Section 510 would “prevent an employer from reducing or eliminating coverage for a particular illness in response to escalating costs of covering an employee suffering from that illness.”\footnote{101} McGann’s interpretation would alter the terms of the original plan offered by H & H, which contemplated the termination of the plan, to a plan offering permanent benefits. The court correctly refused to adopt such an interpretation.

Instead of making the $1,000,000 limit available for medical expenses on an as-incurred basis only as long as the limit remained in effect, the policy would make the limit permanently available for all medical expenses as long as they might thereafter be incurred because of a single event, such as the contracting of AIDS. Under McGann’s theory, defendants would be effectively proscribed from reducing coverage for AIDS once McGann had contracted that illness and filed claims for AIDS-related expenses.\footnote{102}

The rationale embraced by McGann flies in the face of the Congressional declination to require vesting of health benefits. Because Section 510 militates against a finding that employee benefits are permanent, the court was correct in finding that McGann was not dis-

\footnote{100. Id. at 456. While Reynolds Metals involved pension plans, its logic has been extended to cases involving welfare benefit plans. See, e.g., Musto v. American General Corp., 861 F.2d 897, 912 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989) (stating that the principle articulated in Reynolds Metals applies with at least as much force to welfare plans).}

\footnote{101. McGann v. H & H Music Co., 946 F.2d 401, 407-08 (5th Cir. 1991). The reference to cost-saving is interesting in light of the fact that neither H & H nor General American Life had argued strenuously in their briefs opposing certiorari that cost-saving was the crux of their argument in support of their position; rather, their argument, while certainly based upon cost savings, was that an employer has the absolute right to change or terminate benefits of a plan regardless of the reason. See generally Petition, supra note 74; Brief of General American, supra note 10. One reason H & H and General American may have avoided raising the issue of cost-savings is that it is not a particularly strong argument; a recent study reported that the estimated lifetime cost of HIV and AIDS, from initial infection to death, is $85,333 per victim. See Lawrence K. Altman, Cost of AIDS Care in U.S. Is Seen at $5.8 Billion in ’91, N.Y. Times, June 20, 1991, at A16. Compare those costs to other catastrophic illnesses and injuries: According to estimates from the mid-eighties, a case of kidney disease costs an average of $158,000, paraplegia resulting from a car accident costs an average of $68,000, and myocardial infarction costs an average of $66,000. See Arthur S. Leonard, AIDS, Employment and Unemployment, 49 Ohio St. L.J. 929, 959 n.220 (1989).}

\footnote{102. McGann v. H & H Music Co., 946 F.2d 401, 408 (5th Cir. 1991).}
criminated against for the purpose of interfering with a right to which he may have become entitled.

The Fifth Circuit concluded by expressing the employer's right to "discriminate" in the terms of a plan. "[Section 510] does not prohibit an employer from electing not to cover or continue to cover AIDS, while covering or continuing to cover other catastrophic illnesses, even though the employer's decision in this respect may stem from some 'prejudice' against AIDS or its victims generally."103 Because the actions of H & H did not operate to change the employee-employer relationship, the court was correct in its affirmance of the district court's order granting summary judgement.104 As General American argued, "[m]odification of employee benefits may present a hardship to some members of the plan, but the overall benefit is realized by the majority when the plan remains solvent."105

C. Conclusions from McGann

While McGann is sure to bring forth more fervent cries of discrimination from AIDS activists and employee groups, an examination of the purpose and provisions of ERISA reveals the soundness of the Fifth Circuit's holding. Health benefits are not insurance,106 and to the extent that employers see fit to offer benefit plans, there must remain the ability to amend or terminate those benefits to adapt to changing social and medical costs. Without this freedom, employers such as H & H would have a disincentive to offer any benefits. While a knee-jerk reaction to McGann is that the Supreme Court erred in refusing to hear the case, the current state of the law would have re-

103. Id. at 408.
106. Several post-McGann articles demonstrate that many columnists are unable or unwilling to differentiate between traditional insurance and ancillary employer-provided health benefits. One particularly shallow editorial described McGann as "[t]he latest horror: Your employer may be able to rewrite your insurance policy to cover every illness but yours." The editorial took the position that "[i]nsurance companies and employers shouldn't be allowed to refuse coverage for people who grow ill," and that "[i]f refusing coverage once people become ill is legal, then health insurance is worthless." Tragic Case Shows Need For New Health Rules, USA TODAY, May 27, 1992, at 08A. "The justices and lawmakers still have a chance to do the right thing for millions of others. They should make insurance do what it's supposed to do." Id. The author of the editorial was obviously unschooled in both the complexities of the federal statute as well as the facts of McGann. Had McGann been covered by "insurance" rather than an employer-sponsored welfare benefit plan, neither H & H nor the insurance company could have prevented his collection of benefits, provided McGann paid his premiums. Moreover, unlike employee benefits under an employer-sponsored health plan, insurance is generally renewable at the discretion of the insured. The USA TODAY article simply exemplifies the type of unfortunately fashionable rhetoric which comprised several other editorials subsequent to McGann.
quired the Court to reach the same conclusion as the district and circuit courts. The obvious response to employees is to purchase actual health insurance; if the purchase of insurance is impossible for AIDS victims, then the problem lies with the insurance industry, not with employee benefit plans. Perhaps President Clinton's emphasis on a revamped system of nationwide health care will lead to a reasonable and realistic solution for employees such as McGann. Requiring self-funded plan benefits to vest, however, is a giant step toward eliminating employer-offered benefit plans. Employers simply are not bound to offer permanent benefits to their employees, nor should they be.

D. The Americans With Disabilities Act Does Not Prohibit Employers From Terminating or Amending Plan Benefits.

Congress passed the Americans with Disabilities Act of 1990 ("ADA") for the salutary purpose of eliminating discrimination aimed at the forty-three million Americans with mental or physical disabilities. The ADA is intended to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." After the Supreme Court's denial of certiorari, several commentators and attorneys predicted that the passage of the ADA would prevent employers from terminating plan benefits in the future. An examination of the language, legislative

107. President Clinton has specifically criticized McGann: "I oppose the decision of the Bush Justice Department to support allowing employers to cut off insurance to employees with AIDS by rewriting the policies after AIDS is discovered." Dena Bunis and Timothy M. Phelps, A 'NO' for AIDS; Top Court Won't Take Insurance Case, NEWSDAY, Nov. 10, 1992, at 17.


111. "[T]he 1990 Americans with Disabilities Act should adequately protect employees who fall ill or incur huge medical bills because of accidents. The act, which prohibits employers from discriminating against disabled employees, could be interpreted to cover those with acute or chronic illnesses such as AIDS, experts say. Simply put, cutting off benefits would be a form of discrimination." James M. Gomez, Health Benefits Case May Spark Reform; Self-Insured Employer's Denial of Coverage of AIDS Seen As Catalyst to Change in Law, L.A. TIMES, Nov. 12, 1992, at 7. According to attorney Mary Lynn Eubanks of Chicago, "similar cases might well be decided differently starting next year, when the Americans with Disabilities Act, passed by Congress in 1990, begins to take effect. "The legislative history indicates that AIDS will be among the conditions protected' under the act, which will be binding on companies with 25 or more employers as of July 26." Court Lets Firm Slash AIDS Health Benefits, CHI. TRIB., Nov. 27, 1991, at M.
history and purpose of the ADA, however, establishes that the ADA does not prohibit employers from amending or terminating health benefit plans.

The ADA proscribes discrimination on the basis of a disability against "a qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."112 For the purposes of the ADA, discrimination includes:

(1) limiting, segregating, or classifying a[n] . . . employee in a way that adversely affects the opportunities or status of such . . . employee because of the disability of such . . . employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting [an employer's] qualified . . . employee with a disability to the discrimination prohibited [and] includes . . . providing fringe benefits . . . ;

(3) utilizing standards, criteria, or methods of administration . . . (A) that have the effect of discrimination on the basis of disability.113

The ADA also defines "qualified individual with a disability" as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the [employment]."114 An employer is required to make reasonable accommodations for qualified disabled individuals unless such accommodations would create an undue hardship on the employer.115

The ADA prevents an employer from denying employees equal access to group health care based on a disability.116 Therefore, an employee with a disability may not be denied the opportunity to participate in an employee benefit plan because of a disability.117 Similarly, the ADA mandates that a qualified applicant may not be denied employment simply because the employee benefit plan does not cover AIDS treatment or because the employer anticipated future increased


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expenses for such treatment.\textsuperscript{118}

The ADA also prohibits employers from denying coverage to disabled persons independent of "underwriting risks, classifying risks, or administering such risks."\textsuperscript{119} Therefore, an employee benefit plan may not restrict or limit coverage for an \textit{individual} employee with AIDS absent an actuarial or underwriting risk classification.\textsuperscript{120} Even if an employer denies coverage to a disabled employee based on basic principles of risk classification, the employer violates the ADA if the actions are a subterfuge to avoid the purposes of the ADA.\textsuperscript{121} No definition of "subterfuge" is given.

The absence of any case law leaves the door open for advocates of disabled employees to argue that the ADA would prevent employers from taking steps to eliminate or reduce plan benefits. Georgetown University Law Center Visiting Professor Chai R. Feldblum, who helped draft the original ADA introduced at the 101st Congress,\textsuperscript{122} believes that the ADA's requirement of an actuarial or risk classification\textsuperscript{123} will prevent employers from eliminating benefits in the future. Professor Feldblum contends that the ADA restricts an employer from putting a cap on "one disability and not another, absent actuarial evidence that one costs more than the other."\textsuperscript{124} The result, explains Professor Feldblum, is that an employer must have financial evidence that AIDS costs more than other long-term illnesses,\textsuperscript{125} and she believes, apparently correctly,\textsuperscript{126} that an employer may not be able to make such a showing.

Washington, D.C. attorney David A. Copus takes a different view of the effect of the ADA on an employer's right to eliminate or reduce benefits. According to Copus, "the ADA simply bars employers from using disability-specific limitations in benefit plans specifically to discriminate in non-fringe-benefit aspects of employment such as wages or hiring, but allows employers to continue other disability-specific limitations."\textsuperscript{127} In other words, Copus believes that an employer may not refuse to hire a person with HIV, nor may the employer pay an HIV-infected employee less; however, the employer \textit{may} decline to of-

\begin{itemize}
  \item \textsuperscript{120} House Report, supra note 117, at 71.
  \item \textsuperscript{122} \textit{See Employer Can Reduce Insurance Benefits of AIDS Victims}, [Nov.-Dec.] Emploi.
  \item \textsuperscript{123} Prac. Guide (CCH) No. 458, at 3 (Nov. 16, 1992) (hereinafter Employer).
  \item \textsuperscript{124} Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(c)(Supp. III 1991). \textit{See also supra} note 119 and accompanying text.
  \item \textsuperscript{125} Employer, supra note 122, at 3.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} For a comparison between AIDS and some other long-term injuries or conditions, see \textit{supra} text accompanying note 101.
\end{itemize}
fer or eliminate ancillary benefits for AIDS provided that the employer does not single out a specific employee in the denial or reduction of benefits.\textsuperscript{128}

The issue of the effect the ADA has upon ERISA has been raised both prior and subsequent to the Court's denial of certiorari in \textit{McGann}.\textsuperscript{129} Several other commentators have expressed the hope that the ADA would prevent an employer such as H & H from terminating welfare plan benefits for employees suffering from HIV or AIDS.\textsuperscript{130} Indeed, the language of the ADA seems on its face to prevent an employer such as H & H from changing the terms of an employee benefit plan. However, the view that the ADA prevents plan termination or modification fails to take into account the legislative history and purpose of the ADA, as well as prior case law interpreting statutes with similar language. A close examination of the Act reveals that the ADA was enacted with the intent that it be interpreted harmoniously with the provisions of ERISA.

The term "subterfuge" is hardly unique to the ADA. Language substantially similar to that used in the ADA was also used in the Age Discrimination in Employment Act of 1967 ("ADEA").\textsuperscript{131} The ADEA, unlike the ADA, has been subject to judicial interpretation. The analysis and conclusions reached by the Supreme Court in interpreting language similar to that used in the ADA indicate that should the Court continue interpretation a change in plan benefits would not in itself constitute a violation of the ADA.

In \textit{Public Employees Retirement System of Ohio v. Betts},\textsuperscript{132} the Court interpreted the term "subterfuge" as used in the ADEA. In \textit{Betts}, the Court stated that "subterfuge" is to be interpreted within its ordinary meaning as "a scheme, plan, strategem, or artifice of evasion."\textsuperscript{133} The Court then held that an employee benefit plan could not be considered a subterfuge for discrimination "unless it discriminates in a manner forbidden by the substantive provisions of the Act."\textsuperscript{134} Thus, "an employee benefit plan adopted prior to the enactment of the ADEA cannot be a subterfuge,"\textsuperscript{135} and in the case of post-ADEA

\begin{itemize}
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{McGann v. H & H Music Co.}, 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S.Ct. 482 (1992).
  \item \textsuperscript{130} \textit{See Gomez, supra} note 111 and accompanying text.
  \item \textsuperscript{131} 29 U.S.C. §§ 621-34 (1988), amended by 29 U.S.C. §§ 621-30 (Supp. III 1991). The ADEA provided in pertinent part that employers may "observe the terms of... any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter." \textit{Id.} § 623(f)(2). \textit{See generally Sohlgren, supra} note 2, at 1288-94.
  \item \textsuperscript{132} 492 U.S. 158 (1989).
  \item \textsuperscript{133} \textit{Id.} at 167 (quoting United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977)).
  \item \textsuperscript{134} \textit{Id.} at 176.
  \item \textsuperscript{135} \textit{Id.} at 168.
\end{itemize}
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plans, the employee must prove that a plan provision "actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation."\textsuperscript{136} The result of\textit{Betts} and\textit{United Air Lines, Inc. v. McMann},\textsuperscript{137} an earlier case construing the language of the ADEA, was that plans adopted before the enactment of the ADEA and plans that discriminated solely in some aspect of fringe-benefits did not violate the act and were within a "safe harbor."\textsuperscript{138}

Congress amended the ADEA by passing the Older Workers Benefit Protection Act of 1990,\textsuperscript{139} and several commentators suggest that the prior interpretations of the ADEA can not be used to interpret similar ADA terminology. However, while drafting the provisions of the ADA, Congress used virtually the identical language as contained in the ADEA. Congress was presumably aware of the prior Supreme Court interpretations of the "subterfuge" language;\textsuperscript{140} yet, it adopted that language in the ADA. Thus, Supreme Court precedent indicates that a similar definition of "subterfuge" would be assigned to the language of the ADA, and the \textit{McMann/Betts} safe harbor will apply. The ADA is not violated absent a showing of discrimination in a nonfringe-benefit aspect of employment.

Furthermore, the legislative history of the ADA reveals that Congress realized that the ADA and ERISA provisions would at times conflict; Congress therefore acknowledged ERISA's preemption of state laws which relate to self-insured plans. While self-insured plans are not expressly exempt from the prohibitions of the ADA, Senator Harkin explained that self-insured plans may still avail themselves of ERISA preemption of state law. "There was some concern raised on the part of those who administer self-insurance plans that the language of section [sic] 501(c)(92) [sic] could be read to affect the preemption doctrine of the Employee Retirement Income Security Act of 1974. Congress does not intend in this bill to affect in any way such preemption doctrine. . . ."\textsuperscript{141} Additionally, the House Committee on Education and Labor report states that "self-insured plans, which are currently governed by the preemption provisions of [ERISA], are still governed by that preemption provision . . . . Of course, under the ADA, the provisions of these plans must conform with the require-

\begin{footnotes}
\footnotetext{136}{Id. at 181 (emphasis added).}
\footnotetext{137}{434 U.S. 192 (1977).}
\footnotetext{138}{See generally David A Copus and Glen D. Nager, \textit{Discrimination Against Mental Disorders}, \textit{LEGAL TIMES}, Aug. 31, 1992, at 24.}
\footnotetext{139}{29 U.S.C. §§ 621-30 (Supp. III 1992).}
\footnotetext{141}{135 CONG. REC. S10,776 (daily ed. Sept. 8, 1989)(statement of Sen. Harkin).}
\end{footnotes}
ments of ERISA . . . ."\(^{142}\)

The statements of Senator Harkin and the language of the House Committee report raise the inference that by not affecting ERISA's preemption doctrine, Congress left self-funded plans free to amend or terminate plan benefits, provided that the termination or amendment does not violate the provisions of ERISA. Therefore, if a self-funded plan terminates or amends plan benefits consistent with the provisions of ERISA, there should be no violation of the ADA. The legislative history of the ADA bolsters the conclusion that the ADA would not prevent an employer from terminating or amending benefits under a plan. Because the prohibitions of the ADA do not affect the ERISA provisions regarding self-funded plans, McGann would have had no greater success had he made his claim under the ADA rather than ERISA.


U.S. Representative William J. Hughes of New Jersey apparently realized that the ADA was not intended to affect the employer's right to terminate or amend plan benefits. On February 18, 1993, Hughes introduced into Congress the Group Health Plan Non-Discrimination Act of 1993 ("Group Health Act")\(^{143}\). The purpose of the Bill was to amend ERISA in order "to ensure nondiscrimination in benefits provided under group health plans, and to provide for adequate notice of adoption of material coverage restrictions under group health plans and effective remedies for violations of such title with respect to such plans."\(^{144}\) In order to effectuate its stated purpose, the Group Health Act provides:

(1) It shall be unlawful discrimination for purposes of subsection (A) to take any action to cancel or reduce a benefit of a participant or beneficiary under a group health plan (by plan amendment, or plan termination, change in insured status of the plan, change of insurer under the plan, or any other means), if-

(A) such action is specifically related to one or more particular diseases or medical conditions,

(B) such participant or beneficiary is undergoing, at the time such action is taken, a course of treatment related to any such disease or medical condition, and

(C) a valid claim under the plan reasonably related to such course of treatment has been submitted to the plan by or on behalf of such parti-


pant or beneficiary prior to the taking of such action.145

The Act also implicates the levels of lifetime benefits under a plan:

... It shall be unlawful for a group health plan to discriminate among diseases or medical conditions with respect to levels of lifetime benefit coverage provided to similarly situated participants and beneficiaries under the plan.146

Finally, the Act allows a plan to escape the Act's "benefit vesting," but places the onus on the plan sponsors to show such relief is warranted:

The requirements of this paragraph are met if the sponsor of such group health plan demonstrates to the secretary by a preponderance of the evidence that such sponsor will be unable to continue such plan unless granted relief from the applicable requirements of [the Act] ... 147

The intent of Representative Hughes is certainly admirable. Good intentions, however, do not always create model legislation, and the passage of the Group Health Act, which is aimed at all changes in employee benefit plans, would have a devastating effect on employer-sponsored group health plans.

As costs of health care skyrocket,148 employers are faced with a dilemma: continue to provide benefit plans with traditional insurance and eventually be forced to abandon the plan due to increased costs, or attempt to insure the soundness of the plan by finding alternatives to traditional insurance. One cost-saving strategy has been for employers to switch from traditional insurance to self-insurance. In addition to availing themselves of preemption of state law,149 employers who self-fund their plans can expect to save between fifteen and twenty percent of the costs of traditionally insured plans.150 As a result of rising medical and health costs, and in light of the potential savings involved, employers in recent years have increasingly turned toward self-insurance to fund their employee-benefit plans. While the exact number of employers who self-fund their plans is unknown, most estimates are that about sixty-five percent of all employers have turned to self-insurance.151

The passage of the Group Health Act would have a significant im-

145. Id.
146. Id.
147. Id.
148. According to a recent study by the consulting firm of A. Foster Higgins & Company, the average rise in health care costs was four times the rate of inflation in 1991. The costs of indemnity plans, which is comprised of traditional insurance coverage, rose by thirteen percent. Frank Swoboda, Onward and Upward: Health Costs Kept Up Their Climb in '91, WASH. POST, Feb. 2, 1992, p. h02.
149. See supra notes 21-46 and accompanying text.
151. Swoboda, supra note 148.
pact on the self-funded employee benefit plans which now comprise over half of all plans. The attraction of self-funding is in the preemption of state law, while the necessity of self-funding results from the need to escape rising medical costs and the administrative expenses of traditionally insured plans. If passed, the Act would remove the attraction of self-funding by requiring plan benefits to effectively vest, while at the same time offering nothing to the small employers facing increased costs of employee benefit plans. Employer-sponsored health benefits do not fall from the heavens like manna, and therefore, the exemption from vesting is the only real incentive for employers to offer employee benefit plans. The Group Health Act seeks to remove that incentive from the employee benefit arena.

The shortcoming of the Group Health Act is that it fails to account for the effect vesting would have on all participants of the plan. In the case of H & H, a company with 300 employees, two groups may be recognized: those employees currently affected by AIDS who would draw benefits under the plan (representing 0.33% of potential participants), and those employees who are not currently affected (representing 99.67% of potential participants). To require benefits to "vest" would be to provide permanent benefits to the .33%, and could easily deplete the entire plan fund in the event of a truly catastrophic, unforeseen illness. If such a situation were to arise, all plan participants, rather than just McGann, may confront the spectre of having no available health benefits, a result due solely to a rule that a plan sponsor or fiduciary may not modify or amend a plan.

Currently, an employer such as H & H has incentives to offer self-funded plan benefits; self-funding saves money and it provides preemption of state statutes which mandate certain benefits. Absent the ability to amend the plan benefits to protect the majority of employees, an employer has little incentive to offer any benefits and actually has an incentive to terminate existing benefits, if possible, in which case 100% of employees would be harmed.

The likely effect of the passage of the Group Health Act would be twofold: (1) many employers who currently self-insure would elect to eliminate benefits altogether, and (2) plans which are retained would contain minimal benefits. Thus, the passage of the Group Health Act would harm the majority of the very group it endeavors to protect. An act which actually encourages employers to reduce total plan benefits to its participants could hardly be said to further the interest of employees in general. The rationale of the Group Health Act calls to mind the old adage that "the greatest folly is wisdom spun too fine."

To suggest that the passage of the Group Health Act would protect the

152. See Applegate, supra note 150 and accompanying text.
153. See, e.g., TEX. INS. CODE ANN. § 3.70-3A (West Supp. 1993); see also supra note 45 and accompanying text.
interests of employees by decreasing the likelihood that employers would offer benefits is indeed spinning the wisdom exceedingly fine.

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