COMMENT

Preemption Gone Wrong: Reconsidering ERISA Preemption of Wrongful Termination Claims in the Ninth Circuit

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INTRODUCTION

Imagine a fictional employee, "Walter," who has worked at the same company for thirty years. Months before Walter reaches retirement age, Walter's boss fires him because of his religious beliefs. Walter hires an attorney out of the yellow pages who files a complaint containing a single count under California's Fair Em-

ployment and Housing Act.[1] Like most lawyers, Walter's is not well versed in the intricacies of the Employee Retirement Income Security Act of 1974 ("ERISA").[2] Therefore, the attorney files what she believes is a purely state law claim. However, in addition to asserting that the employer fired Walter because of his religion, Walter's attorney alleges that the employer acted with willful disregard for Walter's rights under his pension plan.[3] Based on the language of this assertion, the defendant employer successfully argues that ERISA transforms, or completely preempts, Walter's entire complaint into a single ERISA claim. Thus, Walter must resort solely to an ERISA cause of action. As a result, Walter cannot recover for emotional distress or obtain punitive damages as such remedies are unavailable under ERISA.[4]

Currently, in the United States Court of Appeals for the Ninth Circuit, this result is a real possibility. In 1997, the Ninth Circuit in *Campbell v. Aerospace Corp.*[5] reformulated the test for ERISA preemption of state law wrongful termination claims.[6] *Campbell* directs trial courts to determine an employee's principal theory of liability.[7] If the court finds that the employee's principal theory is that the employer sought to avoid making benefit payments, then

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[1] CAL. GOV'T CODE §§ 12900-12996 (West Supp. 1999). The Act prohibits discrimination in employment based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person." *Id.* § 12940.

[2] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1994)). Many attorneys are not familiar with even the most fundamental aspects of ERISA law. *See* William K. Carr & Robert L. Liebross, *Wrongs Without Rights: The Need for a Strong Federal Common Law of ERISA*, 4 STAN. L. & POL'Y REV. 221, 225 (1993) (suggesting plaintiffs' attorneys are generally ignorant of basic ERISA mechanics and procedure).

[3] This allegation is similar to an allegation in the plaintiff's complaint in *Campbell v. Aerospace Corp.*, 123 F.3d 1308, 1310 (9th Cir. 1997). The facts of *Campbell* are described *infra* in notes 80-85 and accompanying text.

[4] *See, e.g.*, Harsch v. Eisenberg, 956 F.2d 651, 652 (7th Cir. 1992) (holding that extra-contractual damages are unavailable under ERISA); Amos v. Blue Cross-Blue Shield, 868 F.2d 430, 431 (11th Cir. 1989) (interpreting ERISA as denying recovery for extra-contractual and punitive damages); Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986) (denying extra-contractual damages against ERISA plan administrator as outside scope of ERISA enforcement scheme); *see also* David M. Lester, *A Preemptive Strike: Removing Wrongful Discharge Claims to Federal Court Based on Damage Allegations*, 5 LAB. LAW. 641, 651 (1989) (discussing damages available under ERISA).

[5] 123 F.3d 1308 (9th Cir. 1997).

[6] *See infra* notes 89-90 and accompanying text (describing how *Campbell* changed test for ERISA preemption).

[7] *See Campbell*, 123 F.3d at 1313-14 (analyzing claim in terms of plaintiff's principal theory).

ERISA preempts the entire claim.[8] If, however, the principal theory is that the employer fired the employee on the basis of race, sex, or some other motive unrelated to the employee's benefit plan, then the entire state law claim survives preemption.[9]

Campbell is the latest in a series of Ninth Circuit ERISA cases departing from traditional preemption principles.[10] This Comment argues that the *Campbell* test is both unworkable and inconsistent with sound preemption principles. In its place, the Ninth Circuit should return to the test articulated in *Sorosky v. Burroughs Corp.*[11] in 1987. Part I of this Comment discusses the preemption doctrine generally and the particular problems raised by ERISA's preemption clause. Part II discusses the important Ninth Circuit cases that have attempted to solve these problems. Part II further argues that *Sorosky*, the first of these cases, which holds that ERISA only preempts allegations of a benefit-related motive, contains the proper test for ERISA preemption. Finally, Part III proposes a return to the preemption analysis of *Sorosky*.

I. BACKGROUND

A. ERISA

In 1974, Congress passed ERISA, a comprehensive statutory scheme designed to reform pension and benefit law.[12] Congress enacted ERISA in response to widespread public fears of fraud in the administration of pension plans.[13] ERISA does not mandate that employers provide benefit plans to employees.[14] Rather,

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[8] *See id.* at 1313 (stating that ERISA preempts claims in which benefit-related theory predominates).

[9] *See id.* at 1315 (remanding entire case to state court because claims are not preempted where principal theory is not unrelated to benefits).

[10] *See infra* note 78 and accompanying text (describing cases preceding *Campbell*).

[11] 826 F.2d 794 (9th Cir. 1987).

[12] ERISA, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1994)). Section 2 of ERISA describes in detail the purposes of ERISA. *See* 29 U.S.C. § 1001.

[13] *See* 29 U.S.C. § 1001(a) (summarizing congressional findings regarding fraudulent administration of benefit plans); Robert A. Cohen, Note, *Understanding Preemption Removal Under ERISA § 502*, 72 N.Y.U. L. REV. 578, 588-89 (1997) (describing anecdotal evidence of fraudulent plan administration leading to enactment of ERISA).

[14] *See, e.g.*, Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983) (indicating that ERISA does not require employers to provide any particular benefits to employees); McGann v. H & H Music Co., 946 F.2d 401, 406 (5th Cir. 1991) (citing *Shaw* for proposition that ERISA does not make benefit plans mandatory); Sejman v. Warner-Lambert Co., 889 F.2d 1346, 1348-49 (4th Cir. 1989) (stating that employers need not provide any benefits under ERISA).

ERISA attempts to provide assurance to plan participants and their beneficiaries that they will actually receive the benefits promised.[15] ERISA achieves this goal through strict requirements regarding plan funding and administration[16] as well as through rules governing reporting and disclosure of rights and benefits to plan participants.[17] In addition, ERISA provides a private right of action for such employer violations as denial of benefits and retaliation for exercising rights under the plan.[18]

Because of wide discrepancies in state law, Congress believed that national uniformity in employee pension and benefit law was necessary to effectuate ERISA's goals.[19] To achieve national uniformity, section 514(a) of ERISA expressly states that ERISA preempts any state law that "relates to" an employee benefit plan.[20] Traditional preemption principles shed light on the breadth of section 514(a).

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[15] *See* 29 U.S.C. § 1001 (declaring one purpose of ERISA is to protect participants' and beneficiaries' interests in private pension plans); *McGann*, 946 F.2d at 405 (stating that ERISA intended to ensure that beneficiaries receive promised benefits).

[16] *See* 29 U.S.C. §§ 1051-1061, 1081-1086 (requiring employee benefit plans to meet specified standards regarding participation, funding, and vesting); *Shaw*, 463 U.S. at 91 (describing ERISA's plan funding and vesting requirements).

[17] *See* 29 U.S.C §§ 1021-1031 (imposing reporting and disclosure duties on plan administrators); Shea v. Road Carriers Local 707 Welfare Fund, 818 F. Supp. 631, 634 (S.D.N.Y 1993) (holding that ERISA requires that plan documents must disclose essential plan information to employees in comprehensible format).

[18] *See* 29 U.S.C. §§ 1132(a), 1140. Section 502(a)(1)(B) of ERISA provides that participants and beneficiaries may bring an action (1) to recover benefits due under the plan, (2) to enforce rights under the plan, or (3) to clarify rights under the plan. *See id.* § 1132(a)(1)(B). Section 502(a)(3) of ERISA authorizes participants and individuals to bring suit (1) to enjoin practices in violation of ERISA or the terms of the plan, or (2) for other equitable relief. *See id.* § 1132(a)(3). Section 510 of ERISA prohibits employers from discharging, fining, suspending, or otherwise discriminating against participants for the purpose of interfering with participants' rights under the plan and under ERISA. *See id.* § 1140. Section 510 authorizes the use of the enforcement provisions of section 502 in enforcing its provisions. *See id.* For a detailed discussion of ERISA's civil enforcement provisions, see generally Karl J. Stoecker, *ERISA Remedies After* Variety Corp. v. Howe, 9 DEPAUL BUS. L.J. 237, 238-40 (1997).

[19] *See* Presti v. Connecticut General Life Ins. Co., 605 F. Supp. 163 (N.D. Cal. 1985) (discussing legislative history indicating Congress viewed national standards and uniform fiduciary duties as necessary to assure workers that they would receive promised benefits); *see also* 120 CONG. REC. 29,942 (1974), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4771 (1976) (statement of Sen. Javits) (asserting that interests of uniformity require preemption of state law).

[20] *See* 29 U.S.C. § 1144(a).

B. Fundamentals of Preemption

Under the Supremacy Clause of the Constitution, federal law is the supreme law of the land.[21] As a result, a federal law preempts all directly conflicting state laws.[22] In addition, federal law preempts state laws that attempt to regulate a field that Congress has made the exclusive domain of federal law.[23]

Federal preemption has one of two effects on a preempted state law.[24] Usually, federal preemption is merely a defense against a state law claim.[25] Commentators often term this "defensive preemption."[26] Defensive preemption does not give rise to federal

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[21] *See* U.S. CONST. art. VI, cl. 2; U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 854-55 (1995) (stating that supremacy of federal law has been settled for 175 years); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326-27 (1819) (holding that Supremacy Clause dictates that state tax law inconsistent with federal bank charter is invalid).

[22] *See, e.g.*, Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (holding that state law conflicts with federal law, and is, therefore, preempted if party cannot comply fully with both federal and state law); Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493, 509 (1989) (holding that federal law preempts conflicting state laws); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988) (basing preemption doctrine on Supremacy Clause); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) (tracing preemption doctrine back to 1824); *see also* William W. Schwarzer, *Federal Preemption — A Brief Analysis*, SC01 ALI-ABA 693, 695 (1997) (explaining mechanics and rationale of preemption).

[23] *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (stating that comprehensive scheme of federal legislation may preempt inconsistent state laws). Congress can preempt the field either explicitly, by including an express preemption provision, or impliedly, by enacting a comprehensive regulatory scheme. *See, e.g., id.*; CSX Transp., Inc., v. Easterwood, 507 U.S. 658, 676 (1993) (holding that comprehensive federal regulation under Federal Railroad Safety Act impliedly preempted state law negligence claims); Hodges v. Delta Airlines, Inc., 44 F.3d 334, 338-40 (5th Cir. 1995) (en banc) (finding state law personal injury claim against airline is preempted by express provision of Americans with Disabilities Act); *see also* Schwarzer, *supra* note 22, at 698 (distinguishing express and implied preemption); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 19-23 (1995) (criticizing implied preemption doctrine).

[24] *See* Rice v. Panchal, 65 F.3d 637, 643-46 (7th Cir. 1995) (distinguishing complete and defensive preemption and their effects on state law claims); Adkins v. General Motors Corp., 946 F.2d 1201, 1207-08 (6th Cir. 1991) (identifying separate effects of two types of preemption).

[25] *See, e.g.*, Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804 (1986) (finding preemption of state claim under Federal Food, Drug and Cosmetic Act is merely defensive and not grounds for federal question jurisdiction); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) (holding that federal preemption merely serves as defense to state law attachment action).

[26] *See* Schwarzer, *supra* note 22, at 699 (defining defensive preemption). Defensive preemption is a corollary of the well-pleaded complaint rule, which states that federal question jurisdiction must be based on the necessary allegations of the plaintiff's complaint; it may not be based on a federal defense or on the plaintiff's anticipation of a federal defense. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (formulating well-pleaded complaint rule). *See generally* Richard E. Levy, Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 636-46 (1984) (tracing history and describing justification of rule). The well-pleaded complaint rule, in turn, is based

subject matter jurisdiction over the plaintiff's claim.[27] As a result, the defendant cannot remove the plaintiff's claim to federal court.[28] Thus, the parties must litigate the issue of whether federal law preempts the plaintiff's claim in state court.[29] The state court must dismiss all preempted claims and adjudicate any remaining claims.[30] However, defensive preemption does not preclude the plaintiff from later asserting a federal claim based on the same facts.[31]

In extraordinary circumstances, preemption has a more drastic effect on the preempted state law. Federal law can so comprehensively regulate a particular field that it transforms a plaintiff's state law claim into a federal claim.[32] This type of preemption is usually termed "complete preemption."[33] Because it transforms the plaintiff's claim into one arising under federal law, complete preemption gives rise to federal subject matter jurisdiction.[34] As a result,

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on Congress's grant of federal jurisdiction over all cases "arising under the Constitution, the laws, or treaties of the United States." 28 U.S.C. § 1331 (1994); *see* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983) (stating that well-pleaded complaint rule is required by statutory grant of jurisdiction); *see also* Cohen, *supra* note 13, at 580-83 (describing theoretical foundation of well-pleaded complaint rule).

[27] *See, e.g., Franchise Tax Bd.*, 463 U.S. at 28 (holding that ERISA preemption defense against state action to levy taxes does not create federal subject matter jurisdiction); Lister v. Stark, 890 F.2d 941, 943 (7th Cir. 1989) (stating that defensive preemption cannot be basis for federal jurisdiction); *see also* Schwarzer, *supra* note 22, at 699 (describing effects of defensive preemption).

[28] *See* 28 U.S.C. § 1441 (1994) (authorizing removal only of actions within original subject matter jurisdiction of federal district courts); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (stating that defensive preemption is not grounds for removal); Foy v. Pratt & Whitney Group, 127 F.3d 229, 236-37 (2d Cir. 1997) (holding that removal on basis of federal preemption was improper).

[29] *See* Warner v. Ford Motor Co., 46 F.3d 531 (6th Cir. 1995) (noting that state court must rule on federal preemption defenses in nonremovable cases); Holman v. Laulo-Rowe Agency, 994 F.2d 666, 669 (9th Cir. 1993) (upholding dismissal of federal claim and stating that state court must resolve federal preemption defense).

[30] *See* Hunter v. United Van Lines, 746 F.2d 635, 641 (9th Cir. 1984) (stating that successful federal preemption defense results in dismissal on merits by state court); International Bd. of Elec. Workers v. Morton, 428 So. 2d 15, 16 (Ala. 1983) (holding that federal preemption of state claim destroys jurisdiction of state court and requires dismissal).

[31] *See* Carlis v. Sears, Roebuck & Co., No. 90-5237 1991 WL 216470, at *2 (10th Cir. Oct. 23, 1991) (finding that defensive preemption of state law claim had no preclusive effect on future federal claim based on same facts); *see also* Sinicropi v. Nassau County, 634 F.2d 45, 47 (2d Cir. 1980) (holding that dismissal of state claim did not bar subsequent federal claim on same facts).

[32] *See Metropolitan Life*, 481 U.S. at 63-67 (finding ERISA preemption provision so powerful that state claims within its scope become federal claims); Bruneau v. FDIC, 981 F.2d 175, 179 (5th Cir. 1992) (describing complete preemption as narrow exception to defensive preemption, which transforms plaintiff's claim into claim arising under federal law).

[33] *See* Schwarzer, *supra* note 22, at 699-700 (defining complete preemption).

[34] *See* 28 U.S.C. § 1331 (1994) (granting district courts original jurisdiction over claims

the defendant may remove the plaintiff's transformed claim to federal court.[35] The defendant can then argue that the plaintiff's claim is legally insufficient under federal law and should be dismissed.[36] Moreover, complete preemption precludes the plaintiff from later asserting other state law claims based on the same facts.[37] Thus, complete preemption has a much more drastic effect on the plaintiff's claim than defensive preemption.

C. ERISA Preemption

ERISA does not expressly state whether its preemptive powers are complete or defensive.[38] Section 514(a) simply states that ERISA preempts all state laws that "relate to" an employee benefit plan.[39] ERISA's legislative history highlights the intentionally broad scope of section 514(a), but does not indicate whether Congress intended that ERISA preemption be complete or defensive.[40] Nev-

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arising under federal law); *Metropolitan Life*, 481 U.S. at 63-64 (holding that complete preemption confers federal question jurisdiction over preempted claims); Custer v. Sweeney, 89 F.3d 1156, 1165 (4th Cir. 1996) (describing complete preemption as narrow doctrine creating federal question jurisdiction over preempted claims); *Bruneau*, 981 F.2d at 179 (finding that complete preemption gave rise to federal subject matter jurisdiction); *see also* Schwarzer, *supra* note 22, at 699 (explaining rationale of complete preemption and describing difference between defensive and complete preemption).

[35] *See* 28 U.S.C. § 1441(a) (1994) (granting defendants' right to remove actions over which federal district courts have original jurisdiction); *Metropolitan Life*, 481 U.S. at 63-64 (upholding removal on basis of complete preemption); Toumajian v. Frailey, 135 F.3d 648, 653-55 (9th Cir. 1998) (explaining complete preemption doctrine as basis for federal question jurisdiction and, thus, removal).

[36] *See* Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1485 (7th Cir. 1996) (affirming removal of plaintiff's claim on ERISA complete preemption grounds and affirming dismissal of same claim because no relief was available under ERISA); Makar v. Health Care Corp. of the Mid-Atlantic, 872 F.2d 80, 82-83 (4th Cir. 1989) (holding that claim was properly removed on complete preemption grounds and remanding for dismissal because plaintiff failed to exhaust administrative remedies).

[37] *See* Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1375-76 (9th Cir. 1987) (holding that federal court's judgment on completely preempted claim has res judicata effect on future state law claims); *see also* Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 370 (5th Cir. 1995) (stating in dicta that complete preemption terminates possibility of future state law claims).

[38] *See* 29 U.S.C. § 1144(a) (1994). Section 514 states only that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.*

[39] *See id.* State laws relate to benefit plans if they have a "connection with or reference to" such plans. *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983) (interpreting ERISA's preemption language).

[40] *See* 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 3820, 4058 (1976) (containing similar proposed Senate version and detailing proposed House of Representatives version of ERISA). Both the Senate and the House considered versions of ERISA containing limited preemption clauses, and ultimately rejected those

ertheless, the Supreme Court has held that Congress intended that ERISA preemption be complete rather than merely defensive.[41] Because complete preemption authorizes removal, complete preemption increases the likelihood that federal courts will decide questions of ERISA preemption.[42] The Court reasoned that complete preemption would, therefore, result in greater consistency in ERISA's application.[43] Thus, the Court viewed complete preemption as necessary to achieve ERISA's goal of national uniformity.[44]

A more difficult issue, and the focus of this Comment, is determining the reach of ERISA complete preemption over various types of state law. While Congress enacted ERISA to achieve national uniformity, it also intended to limit ERISA's reach to certain areas of employment law.[45] Legislative history indicates that while

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versions in favor of the "relate to" language. *See id.* Representative Dent, a primary House sponsor of ERISA, called section 514(a) "the crowning achievement of this legislation" and asserted that the provision granted "federal authority the sole power to regulate the field of employee benefit plans . . . [and] eliminat[ed] the threat of conflicting and inconsistent State and local regulation." 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent). The leading Senate supporter of ERISA advocated a broad preemption clause to avoid the "possibility of endless litigation over the validity of State action that might impinge on Federal regulation." *Id.* at 29,942 (statement of Sen. Javits). One commentator has called section 514(a) "one of the most sweeping preemption clauses ever included in any federal legislation." David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 431-32 (1987).

Another commentator argues that the mere existence of an explicit preemption provision indicates that Congress intended section 514(a) to have a broad scope. *See* David T. Shapiro, Note, *The Remission of ERISA Preemption: An Examination of* Blue Cross/Blue Shield v. Travelers Insurance Co., 28 CONN. L. REV. 917, 945 (1996). Because federal law is supreme, federal law preempts inconsistent state law regardless of whether the federal law contains a preemption clause. *See supra* note 23 and accompanying text (explaining implied preemption doctrine). Thus, Shapiro argues that by including an explicit preemption clause, Congress intended to broaden the preemptive force of ERISA. *See* Shapiro, *supra*, at 945.

[41] *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (finding complete preemption based on legislative history and calling section 514(a) deliberately expansive); *see also* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987) (holding that section 502(a) is basis for complete preemption); *Shaw*, 463 U.S. at 98-99 (emphasizing intended breadth of ERISA preemption based on legislative history).

[42] *See* Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 246 (1970) (suggesting that purpose of federal question removal is to achieve more accurate application of federal law).

[43] *See Dedeaux*, 481 U.S. at 56 (citing favorably ERISA's legislative history indicating that complete preemption would result in increased uniformity).

[44] *See id.* at 54 (finding complete preemption under ERISA). The Court stated that 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." *Id.*

[45] *See* 29 U.S.C. § 1001 (1994) (declaring policy goals of ERISA regarding pension plan regulation and making no reference to substantive state wrongful discharge law); Shapiro,

Congress intended that ERISA preempt laws regulating benefit plans, Congress did not intend that ERISA preempt state wrongful discharge actions.[46]

D. Significance of ERISA Preemption

In addition to transforming state law claims into ERISA claims, ERISA preemption of a wrongful discharge claim dramatically effects the remedies available to a plaintiff.[47] For example, an ERISA claim for discharge in retaliation for exercising rights under a benefit plan limits recovery to the value of lost benefits.[48] Conversely, state law wrongful discharge claims usually permit recovery of extra-contractual damages such as punitive damages and damages for emotional distress.[49] Thus, in terms of remedies, state law favors plaintiffs, while ERISA favors defendants.

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supra note 40, at 918 (describing expansion of ERISA preemption over many types of state law as beyond Congress's expectations).

[46] *See* 120 CONG. REC. 29,940-30,120 (1974) (containing statements of ERISA's sponsors addressing concerns about section 514(a)). Senator Williams promised that "[i]f it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." *Id.* at 29,942 (statement of Sen. Williams). A House of Representatives ERISA supporter noted that "some consequences are almost certainly unforeseen and some problems will arise, but we will continue vigorous oversight of the act." *Id.* at 29,193 (statement of Rep. Perkins). However, Congress has not acted, and ERISA's preemption clause remains unchanged. *See* 29 U.S.C. § 1001.

[47] *See, e.g.*, Cohen, *supra* note 13, at 593 (arguing that courts tend to interpret section 502 narrowly to limit available remedies); Richard Rouco, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631, 632-39 (1994) (criticizing Supreme Court's exclusion of extra-contractual damages under ERISA); Karl J. Stoecker, *ERISA Remedies After* Varity Corp. v. Howe, 9 DEPAUL BUS. L.J. 237, 241 (1997) (asserting that courts are reluctant to extend ERISA recovery beyond value of lost benefits).

[48] *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 256-57 (1993) (holding that language of ERISA's civil enforcement provision authorizing equitable relief does not include monetary damages); Sokol v. Bernstein, 803 F.2d 532, 538 (9th Cir. 1986) (interpreting same language to exclude extra-contractual and punitive damages). However, in some cases ERISA plaintiffs may be entitled to attorneys' fees. *See* Gray v. New England Telephone and Telegraph Co., 792 F.2d 251, 257-59 (1st Cir. 1986) (describing test for award of attorneys' fees to successful ERISA plaintiff).

[49] *See, e.g.*, CONN. GEN. STAT. § 31-290(a) (1997) (creating cause of action for retaliatory discharge and authorizing award of punitive damages); Maine Bonding & Cas. Co. v. Douglas Dynamics, Inc., 594 A.2d 1079, 1082 (Me. 1991) (upholding award of damages for emotional distress resulting from wrongful discharge); Wilmot v. Kaiser Aluminum & Chem. Corp., 821 P.2d 18, 24-25 (Wash. 1991) (en banc) (holding that damages for emotional distress based on wrongful discharge are recoverable); Dzinglski v. Weirton Steel Corp., 445 S.E.2d 219, 228 (W. Va. 1994) (granting plaintiff leave to amend wrongful discharge complaint to seek recovery for emotional distress); Leithead v. American Colloid Co., 721 P.2d 1059, 1065-66 (Wyo. 1986) (recognizing tort of wrongful discharge and allowing recovery for emotional distress); *see also* Martha S. West, *The Case Against Reinstatement in Wrongful Dis-*

ERISA favors defendant employers and disfavors plaintiff employees for other reasons as well. Plaintiffs' attorneys typically are unfamiliar with litigation procedures in federal courts,[50] the forum to which defendants may remove preempted claims.[51] Moreover, the large majority of ERISA experts are defense attorneys.[52] For these reasons, plaintiffs typically argue against ERISA preemption while defendant employers argue in favor of preemption.[53]

II. ERISA PREEMPTION OF WRONGFUL TERMINATION SUITS IN THE NINTH CIRCUIT

For the first decade after ERISA's enactment, courts almost universally read ERISA's preemption clause broadly.[54] During this

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charge, 1988 U. ILL. L. REV. 1, 3 n.4 (citing surveys indicating that juries awarded punitive damages in 41% of 41 wrongful discharge verdicts). *But see* Dagel v. City of Great Falls, 819 P.2d 186, 194 (Mont. 1991) (holding that wrongful discharge statute precludes recovery for emotional distress).

[50] *See* Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 AM. J. TRIAL ADVOC. 435, 435 n.2 (1992) (asserting that plaintiff tort lawyers are often unfamiliar with complexities of federal discovery and other pretrial procedures); Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1088-89 (1989) (arguing that plaintiffs' attorneys usually find federal forum unfamiliar or inconvenient).

[51] *See supra* notes 34-35 and accompanying text (describing how complete preemption is basis for removal).

[52] *See* Eric T. Berkman, *Suits Vs. HMOs 'Unexplored,' But Can Be Fruitful*, MASS. LAW. WKLY., Dec. 1, 1997, at 1, 36 (noting that trial attorneys and even trial judges are often unfamiliar with ERISA mechanics and preemption); Randall Samborn, *Top 10 Reasons to Be an ERISA Lawyer*, NAT'L L.J., Apr. 17, 1995, at A26, A26 (describing efforts by National Employers Lawyers Association to address shortage of ERISA experts in plaintiffs' bar).

[53] *See* Corboy & Smith, *supra* note 50, at 435 (describing preemption as devastating trap for unprepared plaintiffs' lawyers); Charles F. Preuss, *Federal Preemption of State Tort Actions: When and How*, 57 DEF. COUNS. J. 434, 444 (Oct. 1990) (urging defense attorneys to raise ERISA and other preemption issues early and often in litigation). The former President of the Association of Trial Lawyers of America states that the "preemption battle may chart the future of tort law." Michael Maher, *Pre-emption: Doctrine Is Source of Debate*, NAT'L L.J., July 29, 1991, at 21, 22.

[54] *See, e.g.*, Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98-99 (1983) (relying on legislative history to interpret section 514(a) broadly). *Shaw* arose out of New York's 1982 enactment of the Human Rights Law, "a comprehensive antidiscrimination statute prohibiting, among other things, discrimination in employment on the basis of sex." *Id.* at 88. New York courts had consistently held that an employer that treats pregnancy differently than other disabilities violates the Human Rights Law. *See id.* These rulings in effect required that New York employers that provide disability plans to their employers also provide pregnancy benefits. *See id.* at 89-90. After suffering such adverse rulings in the New York courts, Delta Airlines sued in federal court seeking a declaration that ERISA preempted the Human Rights Law. *See id.* at 92.

Relying on ERISA's text and legislative history, the Supreme Court concluded that a state law relates to a benefit plan within the meaning of ERISA section 514(a) if it has a connection with or reference to such a plan. *Id.* at 96-97; *see also* Pilot Life Ins. Co. v.

time, courts found that ERISA preempted virtually any state law discrimination claim seeking to recover the value of lost benefits.[55] Some observers opined that courts were stretching ERISA's preemptive powers beyond the intent of Congress.[56] Finally, in 1987, the Ninth Circuit narrowed the scope of ERISA preemption in *Sorosky*.[57]

A. Sorosky *and the Motivation Test*

The Burroughs Corporation fired John Sorosky after twenty-five years of employment as a systems manager.[58] Sorosky sued Burroughs in state court alleging, among other claims, wrongful termination and age discrimination.[59] Sorosky sought to recover the value of his retirement benefits.[60] Burroughs removed the case to federal court on the basis of ERISA preemption and ultimately prevailed on all claims.[61]

On appeal, the Ninth Circuit held that the question of whether ERISA preempted Sorosky's claims turned on Sorosky's theory of why the termination occurred.[62] Noting that Sorosky's complaint advanced several different theories, the court analyzed each theory separately.[63] Some of Sorosky's allegations suggested that Bur-

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Dedeaux, 481 U.S. 41, 47-48 (1987) (noting that state law may relate to plan even if law is not designed to affect benefit plans).

[55] *See, e.g.*, Fitzgerald v. Codex Corp., 882 F.2d 586, 588 (1st Cir. 1989) (finding ERISA preemption of wrongful discharge claim seeking value of lost benefits); Pane v. RCA Corp., 868 F.2d 631, 635 (3rd Cir. 1989) (holding that ERISA preempts wrongful termination claim alleging interference with benefit plan rights); Barbagallo v. General Motors Corp., 818 F. Supp 572, 577-78 (S.D.N.Y. 1993) (finding state law age discrimination suit preempted by ERISA); Warren v. Oil, Chem. & Atomic Workers, 729 F. Supp. 563 (E.D. Mich. 1989) (holding that ERISA preempts state law discrimination claims brought beyond limitations period of federal discrimination law); Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 427 (W. Va. 1986) (finding suit for plan benefits preempted).

[56] *See* California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 335-36 (1997) (Scalia, J., concurring) (stating that if "relate to" language is taken literally, all state laws would be preempted); Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 319 (1993) (raising constitutional concerns regarding overbroad preemption). *But see* Lester, *supra* note 4, at 650 (arguing that prayer for value of benefits should be sufficient grounds for preemption).

[57] 826 F.2d 794 (9th Cir. 1987).

[58] *See id.* at 798.

[59] *See id.*

[60] *See id.* at 800.

[61] *See id.* at 798, 805-06. Burroughs won summary judgment on two claims and prevailed on the remaining claims in a jury trial. *See id.* at 805-06.

[62] *See id.* at 799-800.

[63] *See id.* at 800-04. Sorosky pleaded causes of action for breach of contract, wrongful discharge, misrepresentation, breach of implied covenants of good faith, conspiracy to

roughs terminated him to prevent his pension from vesting.[64] The court held that these allegations related to a benefit plan and, thus, fell within ERISA preemption.[65] Sorosky's other allegations suggested that Burroughs fired him for reasons unrelated to the benefit plan, such as his age.[66] The court found that these allegations constituted valid state law claims outside the scope of ERISA preemption.[67] As a result, the court remanded the entire case to the district court to determine whether it could exercise supplemental jurisdiction over the unpreempted claims.[68]

In reaching its conclusions, the Ninth Circuit held that whether ERISA preempts a particular claim turns on the employer's alleged motivation in terminating the employee.[69] If the employee alleges a benefit-related motive for his termination, then ERISA preempts that claim.[70] If the employee alleges a motive independent of the benefit plan, then ERISA does not preempt that claim.[71]

Furthermore, the court held that each theory of motivation alleged by the plaintiff constitutes a separate claim.[72] The court reasoned that whether ERISA preempts the plaintiff's claims should

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interfere with a protected property interest, and employment discrimination on the basis of age. *See id.* at 798.

[64] *See id.* at 800.

[65] *See id.*

[66] *See id.*

[67] *See id.* The court stated that ERISA was not intended to preempt state laws prohibiting employers from discrimination on the basis of age, race, sex, or religion. *See id.*

[68] *See id.* at 799. The court did not analyze Sorosky's age discrimination claim, because Burroughs did not argue that ERISA preempted this claim. *See id.* at 800. The court's language suggested that ERISA would never preempt claims that plaintiffs bring under state antidiscrimination statutes. *See id.* (stating that ERISA does not preempt provisions of state law prohibiting discrimination on basis of age, sex, or religion).

[69] *See id.* at 799-800 (framing test for preemption).

[70] *See id.* at 800. The court based this conclusion on section 510 of ERISA, which prohibits an employer from "discharg[ing] . . . or discriminat[ing] against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right . . . under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. § 1140 (1994); *see Sorosky*, 826 F.2d at 800 (quoting section 510). In addition, section 510 states that section 502(a)'s civil enforcement provisions are applicable to section 510. *See* 29 U.S.C. § 1140; *Sorosky*, 826 F.2d at 800 (quoting section 510); *supra* note 18 (describing civil enforcement scheme under section 502(a) and its application to section 510). As a result, the *Sorosky* court concluded that allegations of termination for the purpose of defeating benefit rights fell within ERISA's civil enforcement scheme and were, therefore, preempted. *See Sorosky*, 826 F.2d at 800.

[71] *See Sorosky*, 826 F.2d at 800. The court reasoned that such claims have no relationship to the benefit plan and, thus, do not "relate to" a benefit plan within the meaning of section 514(a) of ERISA. *See id.*; *supra* note 20 and accompanying text (giving language of section 514(a)).

[72] *See Sorosky*, 826 F.2d at 800 (treating Sorosky's claims for breach of contract, wrongful discharge, and other torts as multiple claims based on theories alleged).

turn on the complaint's substantive allegations rather than its format.[73] Thus, under *Sorosky*, a court would treat a complaint containing only one count, but two theories of motivation, as two separate claims for relief.[74] The court would then apply the motivation test to each claim.[75]

The *Sorosky* test clearly defined the breadth of ERISA preemption. Under *Sorosky*, ERISA only preempts allegations of a benefit-related motive.[76] Thus, motive allegations unrelated to the benefit plan survive ERISA preemption.[77] In several cases following *Sorosky*, however, the Ninth Circuit began to ignore certain motive allegations, thereby expanding the scope of ERISA preemption.[78] The Ninth Circuit culminated this retreat from *Sorosky* in 1997 in *Campbell*.[79]

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[73] *See id.* at 799-806.

[74] *See id.* at 800 (analyzing Sorosky's first claim as three different theories). It is not unusual for courts to treat a single count as several claims. *See* Universal Towing Co. v. Barrale, 595 F.2d 414, 419 (8th Cir. 1979) (stating that allegations of third party indemnity transformed single claim into two claims); Helena Marine Serv., Inc. v. Sioux City, 564 F.2d 15, 18-19 (8th Cir. 1977) (finding that facially single claim based on two distinct theories was actually two claims).

[75] *See Sorosky*, 826 F.2d at 800 (applying motivation test to each theory alleged).

[76] *See supra* notes 69-71 and accompanying text (describing *Sorosky*'s motivation test).

[77] *See Sorosky*, 826 F.2d at 800 (finding claims lacking benefit-related allegations survive preemption).

[78] The two principal cases expanding ERISA preemption in this manner were *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991), and *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992).

In *Felton*, Don Felton sued the Unisource Corporation in state court alleging that Unisource fired him in violation of state antidiscrimination statutes. *See Felton*, 940 F.2d at 505-06. Unisource removed the case to federal court on ERISA preemption grounds and eventually won summary judgment. *See id.* at 506.

On appeal, Felton argued that removal was improper because, unlike Sorosky, his complaint contained no allegations indicating Unisource's motives for firing him. *See id.* at 507. However, during his deposition, Felton stated that Unisource terminated him in order to avoid paying his medical costs. *See id.* Based on Felton's deposition, the Ninth Circuit held that ERISA preempted Felton's state law claims. *See id.* at 509-10. *Felton* thus authorizes courts to look beyond the allegations in the pleadings to find a benefit-related theory. *See id.*

Tingey involved similar facts. *See Tingey*, 953 F.2d at 1127. Pixley-Richards fired employee Bradley Tingey after Tingey submitted his son's extensive medical bills to Pixley-Richards's benefit plan. *Id.* When Tingey sued, alleging several violations of state insurance laws, Pixley-Richards successfully removed the case to federal court on ERISA preemption grounds. *See id.* at 1128.

On appeal, the Ninth Circuit upheld ERISA preemption of all of Tingey's claims, even though some of his claims did not explicitly allege a benefit-related motive. *See id.* at 1131. The court held that by failing to allege an alternative theory, Tingey had implicitly alleged a benefit-related motive. *See id.* Thus, *Tingey* places a burden on plaintiffs seeking to avoid preemption to clearly allege a theory independent of the benefit plan.

[79] Campbell v. Aerospace Corp., 123 F.3d 1308 (9th Cir. 1997).

B. Campbell: *Determining the Plaintiff's Principal Theory*

Fred Campbell sued his former employer, the Aerospace Corporation, in California state court after Aerospace fired him.[80] In the body of his complaint, Campbell alleged that Aerospace terminated him in retaliation for "blowing the whistle" on illegal activities by Aerospace.[81] However, in a prayer for punitive damages, Campbell asserted that by firing him, Aerospace willfully caused Campbell to lose pension benefits.[82] Based on this allegation, Aerospace removed the entire case on ERISA preemption grounds.[83] After Aerospace prevailed on the merits,[84] Campbell appealed, challenging the district court's subject matter jurisdiction.[85]

On appeal, the Ninth Circuit held that ERISA did not preempt Campbell's claim and, thus, removal was improper.[86] Citing *Sorosky* and other cases, the court reiterated that the employer's alleged motivation for terminating the employee is the critical factor in determining ERISA preemption.[87] However, unlike *Sorosky*, the court did not treat each theory of motivation as a separate claim.[88] Rather, the court held that ERISA preempts state law wrongful termination claims only when the plaintiff's principal theory involves a benefit-related motive.[89] According to the court, ERISA does not preempt a state law claim if the loss of benefits is a mere

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[80] *See id.* at 1310.

[81] *See id.*

[82] *See id.* The punitive damages claim read as follows: "In doing the acts set forth above, defendants knew that terminating plaintiff after long years of service would minimize plaintiff's right to recover and to build adequate retirement benefits, would require plaintiff to be without certain benefits . . . . Defendants conduct warrants the assessment of punitive damages." *Id.*

[83] *See id.*

[84] *See id.* The parties stipulated to dismissal of two claims of age discrimination. *See id.* Aerospace won summary judgment on Campbell's claims of tortious discharge in violation of public policy and defamation. *See id.* at 1311. The court ruled that the two remaining claims — breach of implied contract and breach of implied covenant of good faith and fair dealing — must be tried in federal court due to ERISA. *See id.* These claims went to trial, where a jury found Aerospace not liable. *See id.*

[85] *See id.* at 1311.

[86] *See id.* at 1314.

[87] *See id.* at 1312-13.

[88] *See id.* at 1313 (acknowledging that Campbell asserted two possible motives in his claim for wrongful discharge).

[89] *See id.* at 1313-14 (holding that preemption depends on substance of claim, not on allegations regarding consequences of action).

consequence of the termination rather than the principal motivating factor.[90]

Applying this framework, the court found that Campbell's principal theory was that Aerospace fired Campbell in retaliation for whistleblowing.[91] The court found that Campbell's allegations regarding willful termination of benefits were secondary to his allegations of retaliation.[92] As a result, Campbell's loss of benefits was a mere consequence of his termination and, therefore, Campbell's entire complaint survived preemption.[93] Consequently, the Ninth Circuit remanded the entire case to the district court with instructions to remand back to state court.[94]

C. Analysis

During ERISA's early years, courts held that ERISA preempted a wide range of state law claims.[95] In order to comport with congressional intent and traditional preemption principles, the Ninth Circuit attempted to place sensible limits on ERISA preemption. *Sorosky* provided an effective means for achieving this goal. In contrast, the current test embodied by *Campbell* fails to provide a satisfactory

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[90] *See id.*

[91] *See id.* at 1313.

[92] *See id.* Alternatively, the court suggested that Campbell merely alleged that Aerospace knew that Campbell would lose his benefits. *See id.* Thus, Campbell did not allege a benefit-related theory. *See id.* at 1313-14. However, as the dissent pointed out, Campbell's benefit-related allegations were part of a prayer for punitive damages. *See id.* at 1316 (Thomas, J., dissenting). Under California law, a plaintiff may only recover punitive damages if the defendant acted intentionally in harming the plaintiff. *See* CAL. CIV. CODE § 3294(a), (c)(1) (1992) (stating that punitive damage award must be based on showing of intent to injure or willful conduct); *Campbell*, 123 F.3d at 1316 (Thomas, J., dissenting) (quoting section 3294 of California Civil Code). Thus, Campbell at least implicitly alleged that Aerospace intended to deny him benefits.

[93] *See Campbell*, 123 F.3d at 1313-14. The court remanded the case to the district court with instructions to remand it to the California Superior Court in which it was originally filed. *See id.* at 1315.

Interestingly, the court relied on *Rozzell v. Security Services, Inc.*, 38 F.3d 819 (5th Cir. 1994), in reaching its result. *See Campbell*, 123 F.3d at 1313. In *Rozzell*, the plaintiff alleged that his employer fired him in retaliation for seeking workers compensation benefits. *See Rozzell*, 38 F.3d at 820. In his prayer for punitive damages, the plaintiff claimed that he was fired in order "to willfully deprive plaintiff of the compensation and benefits of [his] job." *Id.* at 821. Nevertheless, the Fifth Circuit looked "past the words" and found that the "substance of his claim [was] limited to the state law . . . cause of action." *Id.* at 822. *Rozzell*'s reasoning is at odds with *Sorosky*'s motivation test. *See supra* notes 68-69 (describing application of *Sorosky*'s test to all allegations contained in complaint).

[94] *See Campbell*, 123 F.3d at 1315.

[95] *See supra* notes 54-55 and accompanying text (giving examples of broad ERISA preemption of state law claims).

preemption framework. Thus, the Ninth Circuit should abandon *Campbell* and return to the preemption analysis of *Sorosky*.

1. The Need to Limit ERISA Preemption

Given ERISA's goal of national uniformity, the Supreme Court was justified in finding complete, rather than defensive, preemption under ERISA.[96] However, the drastic procedural consequences of complete preemption dictate that courts place sensible limits on the scope of such preemption.[97] One category of laws outside the intended scope of ERISA preemption is laws regulating wrongful termination and employment discrimination.[98] Such laws are not aimed at regulating benefit and pension law, and nothing in ERISA's text or history indicates that Congress intended to intervene in these areas.[99] Thus, ERISA should not preempt these

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[96] *See supra* notes 41-44 (describing Supreme Court's rationale for finding complete preemption under ERISA). However, one commentator has questioned whether ERISA's language and legislative history supports a finding that Congress intended complete preemption rather than merely defensive preemption. *See* Cohen, *supra* note 13, at 604-08 (suggesting that Congress may not have considered issue of complete versus defensive removal). Even if Congress did not affirmatively intend ERISA to completely preempt state laws, Congress may have intentionally left the issue to the courts to decide. *See* Robert L. Aldisert, Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After* Pilot Life Insurance Co., v. Dedeaux, 21 LOY. L.A. L. REV. 1343, 1356 (1988) (suggesting that ERISA's preemption language is intentionally broad to allow courts to refine mechanics of preemption).

[97] *See supra* notes 34-37 (describing consequences of complete preemption on federal jurisdiction); *see also* Cohen, *supra* note 13, at 587 (calling complete preemption drastic exception to nearly universal well-pleaded complaint rule); Levy, *supra* note 26, at 651 (describing effects of complete preemption as dramatic); Schwarzer, *supra* note 22, at 699-700 (comparing effects of complete versus defensive preemption).

[98] *See* Lane v. Goren, 743 F.2d 1337, 1340 (9th Cir. 1984) (holding that ERISA is not intended to preempt state laws prohibiting employers from discriminating on basis of age, race, sex, or religion). Such laws are traditionally the domain of the states. *See, e.g.*, Michael F. Nauyokas, *Two Growing Procedural Defenses in Common Law Wrongful Discharge Cases — Preemption and Res Judicata*, 11 U. HAW. L. REV. 143, 153-55 (1989) (discussing Ninth Circuit decisions regarding wrongful discharge). Courts and commentators have raised concerns about the danger of ERISA preempting laws traditionally within the domain of the states. *See, e.g.*, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (invoking federalism for conclusion that limits must be placed on preemption); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (holding that ERISA was not intended to preempt garden variety state law claims); Ragazzo, *supra* note 56, at 318 (noting federalism concerns raised by overbroad preemption).

[99] *See* 29 U.S.C. § 1001 (1994) (enumerating goals of ERISA and making no reference to wrongful discharge law); 120 CONG. REC. 29,940-30,120 (1974) (containing congressional debates over ERISA and not mentioning preemption of wrongful discharge or employment discrimination suits); *see also* Shapiro, *supra* note 40, at 918 (describing expansion of ERISA preemption as swallowing all state law that comes near ERISA's borders).

claims, and judicial action to bring ERISA preemption within its intended scope was appropriate.[100]

If courts limit ERISA preemption too far, however, ERISA may fail to achieve its goal of national uniformity in benefit law. Plaintiffs generally dislike ERISA and prefer to litigate under state law.[101] Consequently, plaintiffs have an incentive to avoid ERISA preemption.[102] If ERISA preemption is too narrow, plaintiffs will be able to plead around preemption.[103] For example, a plaintiff might be able to avoid ERISA preemption of a benefit-related theory merely by phrasing her complaint solely in terms of state law.[104] Thus, overly narrow ERISA preemption could undermine ERISA's goal of national uniformity.[105]

2. *Sorosky* and the Motivation Test

The *Sorosky* court's motivation test effectively balanced the competing policies of ERISA preemption and state regulation of wrongful termination. Under *Sorosky*, ERISA only preempts an employee's allegations of a benefit-related motive behind an employer's actions.[106] ERISA prohibits an employer from interfering with an employee's attempt to exercise rights under the benefit

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[100] *See, e.g.*, California Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316, 335-36 (Scalia, J. concurring) (arguing that if ERISA statutory language is construed literally, preemption would exceed all reasonable bounds); *New York State Conference*, 514 U.S. at 656 (stating that literal application of ERISA's preemption language would raise constitutional concerns).

[101] *See supra* notes 47-53 and accompanying text (describing relatively limited remedies available under ERISA and unfamiliarity of many plaintiffs' attorneys with federal court and ERISA).

[102] *See* Corby & Smith, *supra* note 50, at 437 (urging plaintiffs' lawyers to be prepared to counter defendants' preemption efforts).

[103] *Cf.* Stone v. Continental Airlines, Inc., 905 F. Supp. 823, 826 (D. Haw. 1995) (holding that narrow interpretation of preemption provision of Americans with Disabilities Act would encourage artful pleading to avoid preemption).

[104] *Cf.* Gateway 2000, Inc. v. Cyrix Corp., 942 F. Supp. 985, 994 (D.N.J. 1996) (refusing to find plaintiff's claim preempted by Copyright Act because act is not mentioned in complaint); Monsour v. Delco Remy, Plant 25, 851 F. Supp. 245, 249 (S.D. Miss. 1994) (failing to find preemption under Labor Management Relations Act because plaintiff did not allege violation of act).

[105] *See* McManus v. Travelers Health Network of Tex., 742 F. Supp. 377, 381-82 (W.D. Tex. 1990) (holding that allowing plaintiff to pursue state claim analogous to ERISA claim would undermine uniformity in pension regulation); General Motors Corp. v. California State Bd. of Equalization, 626 F. Supp. 439, 443 (C.D. Cal. 1985) (relying on Congress's rejection of narrower ERISA preemption provision in holding that ERISA preempted state tax and stating that allowing tax would threaten uniformity in pension law).

[106] *See supra* notes 62-67 and accompanying text (explaining application of *Sorosky*'s test).

plan.[107] An employee clearly has the right to collect benefits under her benefit plan.[108] Therefore, a plaintiff alleging a benefit-related motive has necessarily alleged an ERISA violation.[109] Accordingly, under *Sorosky*, ERISA properly preempts such claims.[110] Moreover, *Sorosky* avoids preempting meritorious state law claims. According to *Sorosky*, allegations of motive unrelated to the benefit plan constitute a separate claim for relief.[111] Such a claim survives preemption under the motivation test.[112]

Furthermore, courts can easily apply the *Sorosky* test. Federal preemption is an affirmative defense,[113] and the defendant must raise this defense at the pleading stage.[114] At this stage, the trial court is in a poor position to judge the plausibility of the plaintiff's complaint because the court has yet to hear any evidence.[115] Under the *Sorosky* test, courts need only scan the face of the complaint for allegations of a benefit-related motive.[116] ERISA preempts only those theories containing allegations of such motives.[117] Any remaining allegations escape preemption.[118] Thus, courts need not speculate as to the likelihood of success on the merits.

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[107] *See* 29 U.S.C. § 1140 (1994); *supra* note 17 (describing ERISA causes of action).

[108] *See* 29 U.S.C. § 1132(a) (1994) (authorizing suits by beneficiaries to collect benefits, enforce rights under plan, and clarify rights to future benefits).

[109] *See* 29 U.S.C. § 1140 (creating cause of action for discrimination for attempting to exercise rights under plan); Middleton v. Hewlett Packard Co., 715 F. Supp. 988, 989 (D. Colo. 1989) (finding plaintiff's state claim alleging benefit-related motive preempted because it overlapped with ERISA claim).

[110] *See* Sorosky v. Burroughs Corp., 826 F.2d 794, 801-02 (9th Cir. 1987).

[111] *See id.* (finding that Sorosky's wrongful discharge claim was actually several claims because several motives were alleged); *see also supra* notes 72-75 and accompanying text (discussing Sorosky's treatment of claims with multiple theories).

[112] *See Sorosky*, 826 F.2d at 800 (applying motivation test to each theory alleged).

[113] *See* International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 388 (1986) (discussing federal preemption as affirmative defense that defendant must allege in answer).

[114] *See* FED. R. CIV. PROC. 8(c) (requiring that defendant plead affirmative defenses in answer to complaint); Haudrich v. Howmedica, Inc., 662 N.E.2d 1248, 1253 (Ill. 1996) (stating that failure to allege federal preemption constitutes waiver of preemption defense).

[115] *See* Bennett v. Spear, 520 U.S. 154, 166-68 (1997) (holding that at pleading stage, plaintiff need only allege general factual basis for claim). At the removal stage, the parties have usually not conducted any discovery. *See* Philip Borowsky, *Discovery*, 342 PLI/Lit 247, 249 (1987) (outlining usual chronology of discovery). Thus, the court has no evidence with which to judge the plausibility of the plaintiff's complaint. *See* Riley v. Camp, 130 F.3d 958, 981-82 (11th Cir. 1997) (denial of rehearing en banc) (Kravitch, J., dissenting) (noting that at pleading stage, no record exists on which to base decision).

[116] *See supra* notes 69-75 and accompanying text (describing *Sorosky*'s application of test to each allegation of motive in complaint).

[117] *See Sorosky*, 826 F.2d at 800 (finding preemption of all benefit-related theories); *supra* notes 69-71 and accompanying text (describing *Sorosky*'s preemption analysis).

[118] *See Sorosky*, 826 F.2d at 802 (holding that ERISA does not preempt allegations independent of benefit plan and adjudicating all independent allegations under state law); *supra*

Critics might argue, however, that *Sorosky* allows a plaintiff to plead around ERISA preemption by simply not alleging a benefit-defeating motive.[119] A plaintiff could simply omit the sentence in the complaint referring to the employer's motivation for terminating the employee. Without this allegation, the plaintiff has not alleged acts of the employer that constitute an ERISA violation.[120] Consequently, no basis exists for preemption.[121]

In practice, however, a plaintiff cannot easily avoid preemption under *Sorosky* because the plaintiff may not omit all allegations of motive. In virtually all wrongful discharge claims, an essential element is that the employer's motives violated clearly established public policy.[122] Thus, to have a valid state law claim, a plaintiff must assert some plausible motivation behind the employer's acts. To eventually prevail on this claim, the plaintiff must also meet the burden of proof on this element.[123] Therefore, to both avoid preemption and prevail on her state law claim, a plaintiff must prove an illegal motive unrelated to the benefit plan.[124] Thus, under *Sorosky*, a plaintiff whose only meritorious theory relates to the benefit plan must seek relief under ERISA.

To contrast the *Sorosky* and *Campbell* approaches, consider how the *Sorosky* test would apply to the facts of *Campbell*. Under *Sorosky*,

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notes 69-71 and accompanying text (describing *Sorosky*'s preemption analysis).

[119] *See* Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947, 956 (D. Del. 1997) (holding that complete preemption removal must be based solely on facts alleged in complaint); Baldwin v. Pirelli Armstrong Tire Corp., 927 F. Supp. 1046, 1056 (M.D. Tenn. 1996) (stating that removal on complete preemption grounds cannot be based on facts extraneous to complaint).

[120] *See* 29 U.S.C. § 1140 (1994) (prohibiting discriminatory acts for the purpose of interfering with benefit rights); *Sorosky*, 826 F.2d at 800 (finding claims not alleging benefit-related theories were not preempted by ERISA).

[121] *See* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987) (limiting ERISA preemption to claims within scope of ERISA's civil enforcement scheme).

[122] *See, e.g.*, Foley v. Interactive Data Corp., 47 Cal. 3d 654, 670-71, 765 P.2d 373, 380 (1988) (holding that wrongful discharge claims must be based upon firmly established public policy); Miller v. Fairfield Communities, Inc., 382 S.E.2d 16, 19 (S.C. Ct. App. 1989) (reiterating rule that employee must allege reasons for termination in violation of public policy). For a survey of wrongful discharge laws of various jurisdictions, see generally Jill L. Rosenberg, *Trends in Wrongful Termination Law and Common Law Tort Claims*, 508 PLI/Lit 695, 706-730 (1994).

[123] *See* Thompto v. Coborn's Inc., 871 F. Supp. 1097, 1121 (N.D. Iowa 1994) (stating that Iowa law places burden of proof on plaintiff to prove violation of public policy in wrongful discharge claim); Dadonna v. Liberty Mobile Home Sales, Inc., 550 A.2d 1061, 1066-67 (Conn. 1988) (holding that plaintiff bears burden of proving violation of public policy).

[124] *See Sorosky*, 826 F.2d at 800 (holding that ERISA preempts claims related to benefit plan); *Thompto*, 871 F. Supp. at 1126 (citing motive as element of malice in qualified privilege defense).

Campbell's allegations that Aerospace willfully deprived him of benefits would constitute one distinct claim.[125] The court would then apply the motivation test to this claim.[126] Because this claim alleges a benefit-related motive, ERISA would preempt this claim.[127] However, Campbell's allegations of retaliation for whistleblowing would survive preemption under the motivation test.[128] Thus, Campbell could still pursue his state law claim based on a theory unrelated to the benefit plan.[129] Nevertheless, if he wishes to pursue a benefit-related theory, Campbell would have to resort to an ERISA claim.[130] As discovery proceeds, both the court and the parties will be better able to evaluate the merits of each claim.[131]

Critics who are unpersuaded might raise a further objection: the *Sorosky* test is inefficient. These critics might point out that, as in the preceding example, the test would often result in multiple claims.[132] What is worse, some of these claims would be under state law while some would be federal.[133] This could, conceivably, result in simultaneous trials at the state and federal level.

In reality, however, this fear is illusory. Federal courts have supplemental jurisdiction over state law claims that are part of the same "case or controversy" as a federal claim.[134] While federal

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[125] *See Sorosky*, 826 F.2d at 800 (treating each theory of motivation as distinct claim).

[126] *See id.* (applying motivation test to each theory alleged).

[127] *See id.* (finding ERISA preemption insofar as complaint alleged benefit-related motives).

[128] *See id.* (rejecting preemption arguments as applied to theories independent of benefit plan).

[129] *See id.*

[130] *See id.*

[131] *See* Riley v. Camp, 130 F.3d 958, 981 (11th Cir. 1997) (*reh'g denied en banc*) (Kravich, J., concurring in part, and dissenting in part) (commenting that decisions made later in proceedings based on record of evidence were more likely to be correct); *see also supra* note 115 and accompanying text (arguing that courts cannot properly evaluate merits of plaintiff's claims at pleading stage and before discovery).

[132] *See supra* notes 125-31 and accompanying text (describing application of *Sorosky* test to facts of *Campbell*).

[133] *See id.*

[134] *See* 28 U.S.C. § 1367(a) (1994) (granting federal courts supplemental jurisdiction over state law claims closely related to a federal claim). Section 1367 states:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Id. Claims are part of a single case or controversy if they arise "from a common nucleus of operative fact." *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

courts possess some discretion to decline to exercise their supplemental jurisdiction, this discretion is limited.[135] In a case such as the one described above, where the state and federal claims are based on a common set of facts, declining to exercise supplemental jurisdiction would rarely be appropriate.[136] Moreover, because the two claims are based on a common set of facts, multiple trials to determine those facts would not be necessary.[137] Finally, even if the defendant prevailed on the ERISA claim before trial, the federal court would not be required to remand the remaining claim to state court. The federal court in such a situation would have discretion to adjudicate the remaining state law claim if remanding the claim would result in too much duplication of the court's efforts.[138] Consequently, inefficiency-based criticisms of *Sorosky* are unpersuasive.

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[135] *See* 28 U.S.C. § 1367(c) (enumerating grounds for declining to exercise supplemental jurisdiction). Section 1367(c) lists four reasons for which a court may decline to exercise supplemental jurisdiction:

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances there are other compelling reasons for declining jurisdiction.

Id.; *see also* Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545, 1558-59 (9th Cir. 1994) (holding that discretion of district courts to decline supplemental jurisdiction was tied to circumstances enumerated in section 1367(c)).

[136] *See Executive Software*, 24 F.3d at 1560 (construing section 1367(c) as narrowing discretion to decline supplemental jurisdiction and stating that federal court must determine that judicial economy favors declining supplemental jurisdiction); Kelly v. Tomlinson, No. 2:97CV213-B-B, 1998 WL 378311, at *2 (N.D. Miss. Apr. 17, 1998) (holding that court had no discretion to decline to exercise supplemental jurisdiction over state claims based on same factual allegations as federal claim).

[137] *See* Massachusetts School of Law at Andover v. American Bar Ass'n, 142 F.3d 26, 38 (5th Cir. 1998) (stating that multiple causes of action based on common factual underpinnings form "convenient trial unit" and are normally tried together). In fact, if the plaintiff did not pursue both claims in one trial, that plaintiff may be precluded from ever bringing the state law claim under the preclusion doctrines of collateral estoppel and res judicata. *See id.* (applying doctrine of claim preclusion to bar claims based on same facts as earlier adjudicated claims).

[138] *See* 28 U.S.C. § 1367(c)(3) (listing, as discretionary factor for declining to exercise supplemental jurisdiction, that all claims within the original jurisdiction have been dismissed); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995) (stating that even once federal anchor claim has been disposed of prior to trial, remand of state claims is still matter of court discretion); *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 738 (3d Cir. 1994) (explaining that circumstances may dictate retaining state law claims after district court dismisses all federal law claims).

Sorosky's motivation test thus preserves preemption of claims that fall within the intended scope of ERISA regulation.[139] In addition, *Sorosky* avoids preempting meritorious state law wrongful termination claims.[140] Unfortunately, *Campbell*'s preemption test upsets this effective balance of federal and state interests.

3. *Campbell* and the Principal Theory Test

Campbell, unlike *Sorosky*, directs trial courts to evaluate the relative importance of multiple theories and to determine which theory is most important based solely on the pleadings.[141] In *Campbell*, the plaintiff's benefit-related theory appeared only in his prayer for punitive damages and not in the body of his complaint.[142] Therefore, the *Campbell* court's conclusion that this was a secondary theory seems reasonable. However, *Campbell*'s analysis raises serious problems.

As a practical matter, courts will find *Campbell*'s reasoning difficult to apply. Often, discovery is essential in wrongful termination suits to determine whether an employer's defenses are pretenses for an illegal motive.[143] As a result, the plaintiff herself might be unsure whether her loss of benefits was a motivating factor or a mere consequence of her termination. Accordingly, a plaintiff often advances several theories, any and all of which she may pursue at trial.[144] Thus, *Campbell* directs trial courts to make nebulous determinations at the pleading stage; not only must courts decide whether a plaintiff has alleged a benefit-related motive, they must decide if that motive predominates over any other alleged

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[139] *See supra* notes 106-11 and accompanying text (arguing that *Sorosky* test preempts claims within scope of ERISA's civil enforcement scheme).

[140] *See supra* notes 122-24 and accompanying text (discussing requirements for state claims to avoid ERISA preemption under *Sorosky*).

[141] *See* Campbell v. Aerospace Corp., 123 F.3d 1308, 1314 (9th Cir. 1997) (defining preemption test); *supra* notes 86-94 and accompanying text (discussing *Campbell*'s preemption test).

[142] *See Campbell*, 123 F.3d at 1310, 1315 (quoting language of plaintiff's complaint).

[143] *See* Mooney v. Aramco Services Co., 54 F.3d 1207, 1217 (5th Cir. 1995) (noting that discovery is often necessary before plaintiff can know whether employer is motivated by illegitimate factors); Borowsky, *supra* note 115, at 249 (explaining necessity of discovery to determine motive in wrongful termination claims).

[144] *See Mooney*, 54 F.3d at 1217 (approving of plaintiffs' practice of alleging several motives pending discovery); *see also Campbell*, 123 F.3d at 1310 (stating that plaintiff alleged six causes of action based on various state and federal laws); Sorosky v. Burroughs Corp., 826 F.2d 794, 799-800 (9th Cir. 1987) (enumerating plaintiff's multiple claims invoking several theories).

motive.[145] Without the benefit of any evidence to support the pleadings, a court's determination will be highly speculative.[146]

Furthermore, because ERISA completely preempts state law claims within its scope, this determination has a drastic effect on the litigation.[147] Under *Campbell*, if the benefit-related theory predominates, then ERISA preemption transforms the plaintiff's entire complaint into a single ERISA claim.[148] If the defendant ultimately prevails on the merits, the plaintiff has no other relief.[149] Conversely, if the court finds that the plaintiff's principal theory is unrelated to the benefit plan, the plaintiff's entire case survives preemption.[150] At this early stage in the proceedings, the court is probably obligated to remand the case to state court for lack of jurisdiction.[151] Generally, orders to remand for lack of subject matter jurisdiction are final and unappealable.[152] Therefore, the plaintiff is now free to pursue any theory, even a benefit related theory, without fear of ERISA preemption.[153] This all-or-nothing approach to preemption places the format of the complaint over the substance of the allegations.

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[145] *See Campbell*, 123 F.3d at 1313-14 (directing trial courts to determine from complaint whether plaintiff's principal theory is benefit related); *supra* notes 86-94 and accompanying text (explaining *Campbell*'s preemption test).

[146] *See supra* note 115 and accompanying text (discussing difficulty of evaluating merit of claims based solely on allegations in complaint).

[147] *See supra* notes 32-37 and accompanying text (describing consequences of complete preemption).

[148] *See Campbell*, 123 F.3d at 1313-14 (holding that plaintiff's entire case was not be preempted because principal theory not benefit related); *supra* note 32 and accompanying text (explaining how complete preemption transforms state claim into federal claim); *see also* Cohen, *supra* note 13, at 586 (giving hypothetical illustrating consequences of complete preemption of plaintiff's claims).

[149] *See* Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1375-76 (9th Cir. 1987) (holding that federal court's judgment on completely preempted claim has res judicata effect on future state law claims); Cohen, *supra* note 13, at 586 (stating that complete preemption extinguishes all other relief).

[150] *See Campbell*, 123 F.3d at 1314 (holding that no subject matter jurisdiction exists over plaintiff's case because principal claim was not benefit related).

[151] *See id.* at 1315 (remanding case for lack of subject matter jurisdiction); Cohen, *supra* note 13, at 586 (explaining consequences of finding that claim was not completely preempted).

[152] *See* 28 U.S.C. § 1447(d) (1994) (making unreviewable on appeal most remand orders); *In re* Shell Oil Co., 932 F.2d 1518, 1520 (5th Cir. 1991) (stating that review of remand orders were generally limited to procedural errors of trial court); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 1004 (1998) (explaining types of remand orders barred by section 1447(d)).

[153] *See* S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 492 (5th Cir. 1996) (noting that once case is remanded to state court, case cannot be removed again on same grounds as first removal).

The defects of the *Campbell* approach become evident when applied to the hypothetical in the introduction to this Comment. Under *Campbell*, the court would need to determine Walter's principal theory of why the employer fired him.[154] If the court decides that Walter's principal theory is benefit-related, then ERISA would preempt Walter's entire complaint.[155] Therefore, Walter could not later assert a state law claim based on the same facts.[156]

Conversely, if the court decides that Walter's principal theory relates to his religious beliefs, then his complaint would survive preemption entirely.[157] Thus, the court would remand Walter's entire case to state court.[158] Because the employer cannot appeal this remand order, Walter could even pursue benefit-related theories of liability under state law without fear of preemption.[159] As a result, the defendant employer could not invoke ERISA to preempt precisely the type of claim ERISA is intended to preempt.[160]

Campbell requires courts to make highly speculative determinations regarding the relative importance of the plaintiff's allegations.[161] These determinations dictate whether ERISA completely preempts the plaintiff's state law claims.[162] Because of the drastic effect of complete preemption, courts should not make these all-or-nothing determinations at the pleading stage.

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[154] *See Campbell*, 123 F.3d at 1312 (determining plaintiff's principal theory).

[155] *See id.* (stating that ERISA completely preempts claims based on benefit-related theory); *supra* notes 148-49 and accompanying text (analyzing application of *Campbell* test to claims in which benefit-related theory predominates).

[156] *See supra* note 37 and accompanying text (explaining that complete preemption has res judicata effect on later state law claims based on same facts).

[157] *See supra* notes 150-51 and accompanying text (analyzing application of *Campbell* test to claims in which principal theory is not benefit related).

[158] *See Campbell*, 123 F.3d at 1315 (remanding all claims to state court because principal theory was not benefit related); *supra* notes 150-53 and accompanying text (analyzing results of *Campbell* test when court finds that principal theory is not benefit related).

[159] *See* S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 492 (5th Cir. 1996) (stating that defendant may not remove based on same theory more than once); *supra* notes 152-53 and accompanying text (arguing that remand of entire case for lack of preemption under *Campbell* bars defendant from later arguing in favor of preemption).

[160] *See supra* notes 107-10 and accompanying text (arguing that ERISA intended to preempt allegations of benefit-related motives).

[161] *See supra* notes 143-45 and accompanying text (criticizing *Campbell* test as unworkable).

[162] *See supra* notes 87-89 and accompanying text (describing impact of court's finding that principal theory is benefit related in *Campbell* test).

III. PROPOSAL

ERISA mandates preemption of claims alleging denial of benefits due under an employee benefit plan.[163] This preemption is necessary to achieve the national uniformity in benefit regulation vital to ERISA's purpose.[164] As a result, state law wrongful termination claims must at times give way to ERISA's civil enforcement provisions. However, courts should apply ERISA preemption in a way that is both workable and consistent with traditional preemption principles. *Sorosky*'s motivation test achieves these goals effectively.

To illustrate the virtues of *Sorosky*, consider the hypothetical in the introduction to this Comment. Under *Sorosky*, Walter's allegation that his employer willfully caused him to lose his pension would constitute one claim.[165] Under the motivation test, ERISA would preempt this claim.[166] Walter's allegations that his employer fired him because of his religious beliefs would constitute a separate claim.[167] Under the motivation test, this claim would survive preemption.[168] Thus, Walter would have both an ERISA claim and a state law claim, each premised on a different theory of liability.[169] If either claim later proves to be unmeritorious, the court may grant the defendant employer summary judgment at that time.[170]

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[163] *See supra* notes 107-10 and accompanying text (arguing that ERISA intended to preempt allegations of benefit-related motives).

[164] *See supra* notes 23-28 and accompanying text (describing scope and purpose of ERISA preemption).

[165] *See* Sorosky v. Burroughs Corp., 826 F.2d 794, 800 (9th Cir. 1987) (treating each theory of motivation as separate claim for relief); *supra* notes 72-75 (describing how *Sorosky* court applied motivation test to each allegation of motive).

[166] *See Sorosky*, 826 F.2d at 799-800 (holding that ERISA preempts allegations of benefit-related motive).

[167] *See id.* at 800 (treating each theory of motivation as separate claim for relief).

[168] *See id.* (holding that allegations based on theories independent of benefit plan escape preemption).

[169] *See id.* at 800-01 (finding benefit-related allegations completely preempted and transformed into ERISA claims while allegations relying on other theories survive preemption). If the state law claim and ERISA claim are based on the same nucleus of operative facts, then the federal court may exercise supplemental jurisdiction over Walter's state law claim. *See* 28 U.S.C. § 1367 (1994) (granting district courts supplemental jurisdiction over claims based on common nucleus of operative facts); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (formulating common nucleus of operative facts test).

[170] *See* FED. R. CIV. PROC. 56 (giving courts authority to grant summary judgment if no dispute exists regarding material facts). Courts are generally more willing to grant summary judgment at a later stage than to dismiss claims at the pleading stage. *See* Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53, 60 (1988). At the summary judgment stage, courts have more evidence with which to judge the plausibility of the complaint than at the pleading stage. *See supra* note 115 and accompany-

By treating each theory of motivation as a separate claim, *Sorosky* avoids the judicial speculation necessitated by the *Campbell* rule.[171] Furthermore, *Sorosky* avoids the jurisdiction-related problems raised by *Campbell*'s mandate that the trial court evaluate the plaintiff's theory prematurely.[172] Because of these reasons, the Ninth Circuit should discard the *Campbell* test and return to the motivation test of *Sorosky*.

CONCLUSION

The *Sorosky* test comports with both traditional preemption principles and the intended reach of ERISA preemption. By treating each theory of liability as a separate claim for relief, *Sorosky* preempts claims alleging a benefit-related motive.[173] Thus, *Sorosky* effectively preempts claims within the intended scope of ERISA.[174] Moreover, the *Sorosky* approach avoids preemption of claims alleging a motive independent of the benefit plan.[175] As a result, plaintiffs may pursue meritorious state law claims free of ERISA preemption.[176] Thus, *Sorosky* effectively balances federal regulation of pension and benefit plans with state regulation of wrongful discharge and employment discrimination.[177]

In addition, the *Sorosky* test for preemption is easier to apply than the *Campbell* test. ERISA preemption has a profound effect on a plaintiff's rights and remedies.[178] *Sorosky* avoids difficult determina-

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ing text (discussing difficulty of evaluating merits of plaintiff's complaint prior to discovery).

[171] *See supra* notes 143-44 and accompanying text (criticizing *Campbell* test as requiring improper speculation as to merits of plaintiff's complaint).

[172] *See supra* notes 147-51 and accompanying text (highlighting substantive effects of *Campbell* rule on future litigation).

[173] *See Sorosky*, 826 F.2d at 799-800 (finding ERISA preemption of all allegations of benefit-related motives).

[174] *See* 29 U.S.C. § 1140 (1994) (creating cause of action for discharge for purpose of interfering with benefit plan rights); *supra* notes 107-10 (arguing that ERISA properly preempts allegations of benefit-related motives).

[175] *See Sorosky*, 826 F.2d at 800 (holding that ERISA does not preempt allegations relying on theories independent of benefit plan).

[176] *See id.* at 801-03 (adjudicating merits of plaintiff's unpreempted claims under state law).

[177] *See* 29 U.S.C. § 1001 (1994) (declaring purpose of ERISA was to create federal regulation of benefit and pension plan administration); *supra* notes 98-100 and accompanying text (relying on ERISA's text and legislative history to argue that ERISA was not intended to supplant state regulation of wrongful termination).

[178] *See* Sokol v. Bernstein, 803 F.2d 532, 537 (9th Cir. 1986) (holding that extracontractual and punitive damages were unavailable in ERISA retaliatory discharge action); *supra* notes 48-49 and accompanying text (contrasting remedies available under ERISA and state law).

tions that could mistakenly infringe these remedies.[179] Because of these advantages, the Ninth Circuit should return to the *Sorosky* test to determine when ERISA preempts state law wrongful discharge claims.

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[179] *See supra* notes 113-18 and accompanying text (arguing that *Sorosky* test avoids speculation about merits of plaintiff's claims that were necessitated by *Campbell* test).