FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY RUDEL, *Plaintiff-Appellee/* *Cross-Appellant,* v. HAWAIʻI MANAGEMENT ALLIANCE ASSOCIATION, *Defendant Appellant/* *Cross-Appellee.*	Nos. 17-17395 17-17460 D.C. No. 1:15-cv-00539-JMS-RLP OPINION

Appeal from the United States District Court
for the District of Hawaiʻi J. Michael Seabright,
Chief District Judge, Presiding

Argued and Submitted June 12, 2019
Honolulu, Hawaiʻi

Filed September 11, 2019

Before: Sidney R. Thomas, Chief Judge, and Consuelo M. Callahan and Morgan Christen, Circuit Judges.

Opinion by Chief Judge Thomas

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OPINION

THOMAS, Chief Judge:

In this case, we consider whether two Hawai'i statutes restricting health insurers' subrogation recovery rights are saved from preemption under the Employee Retirement Income Security Act of 1974 ("ERISA") and, if so, whether the statutes provide a relevant rule of decision in a federal ERISA action to determine the validity of the insurer's lien on tort settlement proceeds.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's decisions regarding preemption. *Winterrowd v. Am. Gen. Annuity Ins.*

Co., 321 F.3d 933, 937 (9th Cir. 2003). We affirm the judgment of the district court, which held that the statutes were saved from preemption and provided the relevant rule of decision.

I

While riding his motorcycle home from work, Randy Rudel was hit by a vehicle making an allegedly illegal left turn. As a result of the accident, Rudel sustained numerous severe injuries, including partial amputations of his left leg and left forearm. Rudel had health insurance benefits for his medical care from the Hawai'i Medical Alliance Association ("HMAA") pursuant to an employee benefit plan governed by ERISA ("the Plan"). In total, HMAA paid $400,779.70 for medical expenses.[1]

In addition to the money paid by HMAA, Rudel also received a payment totaling $1.5 million in a tort settlement with the driver of the vehicle that struck him. The tort settlement agreement stipulated that the payment was for "general damages" including medical expenses and emotional distress, and did not include special damages such as those that would "duplicate

[1] HMAA paid these benefits as the result of a lawsuit brought by Rudel, in which he asserted that HMAA refused to pay his expenses because he declined to sign a "Reimbursement Agreement" that would have required him to agree to repay HMAA from any recovery gained from a third party. HMAA eventually waived this requirement and paid the benefits, leading to the dismissal of the case.

medical payments, no-fault payments, wage loss, [or] temporary disability benefits."

HMAA asserted a right to a portion of the tort settlement proceeds under the Plan, which provided to HMAA the "right to be reimbursed for any benefits [it] provide[s], from any recovery received from . . . any third party or other source of recovery" including "general damages" from third-party settlements. As Rudel's settlements was for such general damages, HMAA placed a lien for $400,779.70 on Rudel's tort settlement.

Two Hawai'i state statutes (collectively, "the Hawai'i Statutes") posed obstacles to HMAA's ability to recover: Hawai'i Revised Statutes ("HRS") §§ 431:13-103 (a)(10) and 663-10. Read together, these statutes prohibit insurance providers from seeking reimbursement for general damages from third-party settlements. They do, however, permit special damages to be reimbursed if a state court determines the lien to be valid, pursuant to the statutory terms.[2] Thus, the Hawai'i Statutes directly contradict the terms of the Plan, which provided that the insurer could be reimbursed for general damages.

Specifically, Haw. Rev. Stat. § 431:13-103 is a provision of the Hawai'i insurance code that defines unfair

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[2] Under Hawai'i law, "[s]pecial damages are often considered to be synonymous with pecuniary loss and include such items as medical and hospital expenses, loss of earnings, and diminished capacity to work." *Dunbar v. Thompson*, 901 P.2d 1285, 1294 (Haw. App. 1995).

methods of competition and unfair or deceptive acts or practices. Haw. Rev. Stat. § 431:13-103(a). Section 431:13-103(a)(10) defines one such unfair practice in the business of insurance as:

> Refusing to provide or limiting coverage available to an individual because the individual may have a third-party claim for recovery of damages; provided that:
>
> (A) Where damages are recovered by judgment or settlement of a third-party claim, reimbursement of past benefits paid shall be allowed pursuant to section 663-10.

Id.

Section 663-10(a), which is referenced in § 431:13-103(a)(10), establishes the procedure for determining if and when reimbursement can be permitted. Importantly, § 663-10 does not permit reimbursement for general damages—it only permits reimbursement for special damages. It reads:

> In any civil action in tort, *the court*, before any judgment or stipulation to dismiss the action is approved, *shall determine the validity of any claim of a lien against the amount of the judgment or settlement by any person who files timely notice of the claim to the court or to the parties in the action.* The judgment entered, or the order subsequent to settlement, shall include a statement of the amounts, if any, due and owing to any person determined by the court to be a holder of a valid lien and to be paid to the lienholder out of the amount of the

> corresponding *special damages* recovered by the judgment or settlement. . . . As used in this section, lien means a lien arising out of a claim for payments made or indemnified from collateral sources, including health insurance or benefits, for costs and expenses arising out of the injury which is the subject of the civil action in tort. If there is a settlement before suit is filed or there is no civil action pending, then any party may petition a court of competent jurisdiction for a determination of the validity and amount of any claim of a lien.

Haw. Rev. Stat. § 663-10(a) (emphasis added).

In state court, Rudel filed an action asserting that the Hawai'i Statutes nullified the inapposite terms of the Plan so as to prevent HMAA from seeking reimbursement. Pursuant to the Hawai'i Statutes, he filed a petition for determination of validity of HMAA's lien in Hawai'i Circuit Court of the Third Circuit. There, he argued that, because his third-party settlement paid only general damages and because the Hawai'i Statutes only permit reimbursement for special damages, HMAA was not entitled to reimbursement. HMAA contended that the state statutes were irrelevant to any claims for reimbursement because the Plan was governed by ERISA, which preempts the Hawai'i Statutes and leaves the Plan terms to determine its subrogation rights.

HMAA then removed the case to the District of Hawai'i. Rudel moved for remand, arguing that his action implicated only state law because he sought only

"to *keep* benefits already provided by HMAA" rather than to "recover benefits under the terms of the Plan."

The district court denied Rudel's remand motion, holding that Rudel's claim belonged in federal court because, in substance, he did not possess the benefits free and clear of HMAA's lien. Thus, for purposes of federal jurisdiction, the action remained one "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits" under ERISA § 502(a)(1)(B).

Rudel then filed a motion for determination of validity of HMAA's lien pursuant to the Hawai'i Statutes. In response, HMAA filed a motion for summary judgment, arguing that Rudel's action was preempted by ERISA so that the Plan provisions governed, and its lien was thus valid.

In a detailed order, the district court denied HMAA's motion for summary judgment and granted, in part, Rudel's motion. The district court held that the Hawai'i Statutes were saved from preemption under ERISA § 514, and that § 514 also provided the relevant rule of decision. The court ordered that further proceedings were required to determine the validity and amount of the lien under the Hawai'i Statutes. However, the parties stipulated that if the Hawai'i Statutes provided the relevant rule of decision, HMAA had no valid lien claim.

HMAA timely appealed the district court order.[3] Rudel timely cross-appealed on the issue of whether the district court erred in denying his initial motion for remand.

II

This appeal turns on the application and interplay of two ERISA statutes implicating preemption of claims: § 502 (codified at 29 U.S.C. § 1132) and § 514 (codified at 29 U.S.C. § 1144). These "two strands to ERISA's powerful preemptive force," *Cleghorn v. Blue Shield of Cal.*, 408 F.3d 1222, 1225 (9th Cir. 2005) differ in their purpose and function.

Section 502 sets forth "a comprehensive scheme of civil remedies to enforce ERISA's provisions." *Id.* Section 502's purpose is to ensure that federal courts remain the sole forum and the sole vehicle for adjudicating claims for benefits under ERISA. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 945 (9th Cir. 2009). Asserted remedies and causes of action that conflict with with ERISA's civil enforcement scheme are deemed preempted. If, through the application of § 502(a), a state law claim asserted in state court is completely preempted, then the state

[3] The Hawai'i Medical Service Association ("HMSA"), a health care insurer in the State of Hawai'i, filed an amicus curiae brief in support of HMAA's position. The Secretary of Labor filed an amicus curiae brief in support of neither party and requesting affirmance of the district court's denial of Rudel's motion for remand and of the district court's denial of HMAA's motion for summary judgment.

action may be removed to federal court. Federal jurisdiction exists under § 502(a) if: (1) the individual could have brought his claim under this ERISA provision; and (2) no other independent legal duties are implicated by the defendant's actions. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004). When a claim is removed to federal court, the state law claim is reconfigured as a federal ERISA cause of action under § 502(a). Then, an analysis is undertaken to examine whether the transformed cause of action conflicts with ERISA. If so, it is preempted. If not, it remains viable as a federal ERISA cause of action.

Section 514 contains ERISA's express preemption provision. It expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan[.]" 29 U.S.C. § 1144(a). However, § 514 saves from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The saving clause functions to preserve a state's traditional regulatory power over insurance, banking, and securities. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016). Section 514, however, does not confer federal jurisdiction. *Marin Gen. Hosp.*, 581 F.3d at 945.

If a case is properly before a federal court under § 502, a state statute that is saved from preemption under § 514, and that does not conflict with § 502, can "suppl[y] the relevant rule of decision." *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 377 (1999). Put another way, a statute saved from express preemption under § 514 can—in some circumstances—provide the

rule of law used by a federal court to decide a claim for the recovery, enforcement, or clarification of benefits in an action removed pursuant to § 502(a).

In sum, our task is to ascertain whether: (1) § 502(a) completely preempted the Hawai'i Statutes, allowing the case to be removed to federal court, (2) the Hawai'i Statutes are saved from preemption pursuant to § 514, and (3) the Hawai'i Statutes provide the rule of decision for the newly reconfigured federal ERISA action.

With those general principles in mind, we turn to a more detailed analysis of the issues.

III

We first examine whether the district court properly exercised federal jurisdiction over Rudel's state law claims under § 502(a). "Ordinarily, federal question jurisdiction does not lie where a defendant contends that a state-law claim is preempted under federal law." *Fossen v. Blue Cross & Blue Shield of Mont., Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011). However, if a federal cause of action completely preempts a state law claim, then the action "necessarily arises under federal law." *Beneficial Nat'l. Bank v. Anderson*, 539 U.S. 1, 10 (2003). The complete preemption doctrine applies "where the preemptive force of federal law is so 'extraordinary' that it converts state common law claims into claims arising under federal law for the purposes of jurisdiction." *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1029 (9th Cir. 2011) (quoting

Holman v. Laulo-Rowe Agency, 994 F.2d 666, 668 (9th Cir. 1993)).

The complete preemption doctrine "prevent[s] a plaintiff from avoiding a federal forum when Congress has created a federal cause of action with the intent that it provide the exclusive remedy for the particular grievance alleged by the plaintiff." *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1057–58 (9th Cir. 2018) (quoting Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1785 (1998)). Therefore, when complete preemption exists, the state law action may be removed to federal court. *Fossen*, 660 F.3d at 1107.

When complete preemption applies, "a state-law claim ceases to exist[,]" *Hansen*, 902 F.3d at 1058, because, upon removal to federal court, "the state-law claim is simply 'recharacterized' as the federal claim that Congress made exclusive." *Id.* (quoting *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009)).[4]

As we have noted, § 502 "'set[s] forth a comprehensive civil enforcement scheme' that completely preempts state-law 'causes of action within the scope of th[es]e civil enforcement provisions.'" *Fossen*, 660 F.3d at 1107 (alterations in original) (quoting *Davila*, 542 U.S. at 208–09). Thus, § 502 dictates whether a federal court can exercise jurisdiction over a particular

[4] Specifically, upon removal, the district court has the option to "treat the artfully pleaded claim for all purposes as the correct federal claim, or else dismiss it with leave to formally replead the claim under federal law." *Hansen*, 902 F.3d at 1058.

claim for benefits. *Marin Gen. Hosp.*, 581 F.3d at 945. According to its terms, an action "to recover benefits due . . . under the terms of [a] plan, to enforce . . . rights under the terms of the plan, or to clarify . . . rights to future benefits," 29 U.S.C. § 1132(a)(1)(B), will be heard in a federal court.

Federal jurisdiction exists under § 502(a) if: (1) the individual could have brought his claim under this ERISA provision; and (2) no other independent legal duties are implicated by the defendant's actions. *Davila*, 542 U.S. at 210. In determining whether a petitioner could have brought his claim under ERISA § 502(a)(1)(B), we examine the substance of the claim, rather than its form. *Id.* at 214.

A

Davila's first requirement asks whether Rudel could have brought his claims under ERISA § 502(a). We agree with the Secretary of Labor's position that the district court correctly held that he could because, in substance, Rudel's claim was one to recover benefits or to clarify his rights to benefits pursuant to the Plan. *See* 29 U.S.C. § 1132(a)(1)(B). HMAA's lien on Rudel's tort settlement jeopardized his ability to retain the benefits HMAA had previously paid; indeed, had HMAA been successful in its claim for reimbursement, Rudel would have had to pay back the $400,779.70 he originally received from HMAA. In this way, the substance of Rudel's claim could be restated as "Rudel has not fully 'recovered [the benefits] because [he] has not

obtained the benefits free and clear of [HMAA's] claims.'" *Noetzel v. Hawai'i Med. Serv. Ass'n*, 183 F. Supp. 3d 1094, 1103 (D. Haw. 2016). Thus, his action properly could be characterized as a § 502(a) action that "seeks to determine his entitlement to retain the benefits based on the terms of the plan." *Arana v. Ochsner Health Plan*, 338 F.3d 433, 438 (5th Cir. 2003) (en banc).

In reaching the conclusion that challenges to a plan's right to reimbursement are properly characterized as § 502(a) claims, we join the Third, Fourth, and Fifth Circuits. *Id.*; *see also Levine v. United Healthcare Corp.*, 402 F.3d 156, 163 (3d Cir. 2005) (holding that a claim premised on unlawful reimbursement requirements was preempted by § 502 because it was a "claim for 'benefits due' " under the terms of a plan); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 291 (4th Cir. 2003) (characterizing reimbursement as a § 502 claim to ensure that benefits are not "diminished by [a] payment" to insurers).[5]

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[5] The Second Circuit has held to the contrary. *Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 242 (2d Cir. 2014). It reasoned that because the claims at issue were saved from preemption under § 514, they could not be completely preempted under § 502, and federal jurisdiction did not exist. However, that theory is inconsistent with our precedent holding that "[p]reemption under ERISA section 502(a) is not affected by [§ 514.]" *Cleghorn*, 408 F.3d at 1226 n.6. And we find the reasoning of the other Circuits persuasive.

B

Satisfying *Davila*'s second requirement requires there be no legal duty implicated by the defendant's actions independent from a duty to provide benefits pursuant to § 502. *Davila*, 542 U.S. at 210. The district court determined that no independent legal duties were implicated by HMAA' s actions, and we agree.

Here, any legal duty HMAA had to provide Rudel with benefits is dependent on the amount owed and paid pursuant to the Plan. Without the Plan obligating HMAA to pay medical expenses, Rudel would be unable to claim that HMAA was not entitled to reimbursement because Rudel would not have received any money in the first place. Thus, Rudel's assertions that the Hawai'i Statutes provide an independent legal duty prove unavailing.

In addition, § 663-10 permits "any person who files timely notice of the claim to the court" to have the validity of an insurer's lien determined by a court. Haw. Rev. Stat. § 663-10. By its own permissive terms, the statute *permits*, but does not obligate, a claimant to ask a court to determine the validity of a lien. The Hawai'i Statutes do not impose any legal duty upon a plan administrator like HMAA.

Thus, both *Davila*'s requirements are satisfied. Therefore, Rudel's state law claims were completely preempted for purposes of jurisdiction by § 502, and the district court properly denied Rudel's remand motion.

IV

Given that the district court properly exercised federal jurisdiction, we must determine whether the Hawai'i Statutes are preempted by ERISA, or whether they are saved from preemption and provide the relevant rule of decision. There are two types of ERISA preemption: (1) express preemption under § 514 and (2) preemption due to conflict with ERISA's civil remedial scheme under § 502. *Fossen*, 660 F.3d at 1107.

A

We first address preemption under § 514, which also contains ERISA's "saving clause." Section 514 expressly preempts any and all state laws insofar as they may "now or hereafter relate to any employee benefit plan[.]" 29 U.S.C. § 1144(a). However, § 514 saves from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A).

There is no doubt that the Hawai'i Statutes relate to an employee benefit plan, so the only question is whether they are saved from preemption under § 514 because they regulate insurance. To determine that, we ask whether the law: (1) is "specifically directed toward entities engaged in insurance;" and (2) "substantially affect[s] the risk pooling arrangement between the insurer and the insured." *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625*, 856 F.3d 686, 693 (9th Cir. 2017) (quoting *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003)).

1

The district court properly held that the Hawai'i Statutes are "specifically directed toward entities engaged in insurance." *See id.* Under ERISA, "[a] law is specifically directed toward entities engaged in insurance if it is 'grounded in policy concerns specific to the insurance industry.'" *Id.* (quoting *UNUM Life Ins. Co.*, 526 U.S. at 372). "It is well-established that a law which regulates what terms insurance companies can place in their policies regulates insurance companies." *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 842 (9th Cir. 2009).

There is no doubt that § 431:13-103 regulates insurance, given that it is embedded in the insurance code and regulates the extent to which insurers may limit insurance coverage.

Section 663-10, however, is a general statute for determination of civil remedies. Haw. Rev. Stat. § 663-10. Thus, the question is whether § 663-10 and § 431:13-103 should be read together as laws that regulate insurance, or whether they are completely independent statutory provisions.

Employing the familiar tools of statutory interpretation, we begin with the plain language of the statute, reading the words in the context of the overall statutory scheme. *Rainero v. Archon Corp.*, 844 F.3d 832, 837 (9th Cir. 2016). Here, § 431:13-103 expressly cross-references § 663-10, providing in relevant part that "[w]here damages 'are recovered by judgment or settlement of a third-party claim, reimbursement of past

benefits paid shall be allowed pursuant to section 663-10.'" Haw. Rev. Stat. § 431:13-103. Thus, the plain statutory text demonstrates that § 663-10, insofar as it affects insurance subrogation rights, must be read in conjunction with § 431:13-103.

The legislative history buttresses the conclusion that the two statutes were intended to work in tandem as to insurance claims. The Hawai'i legislature enacted § 663-10 in 1986 to allow health insurers to seek reimbursement for special damages recovered in a judgment or settlement that duplicated the amounts already paid, thereby prohibiting double recovery. *See Yukumoto v. Tawarahara*, 400 P.3d 486, 497 (Haw. 2017). But in 2000, the Hawai'i legislature decided to limit this right to reimbursement and subrogation. To do so, it passed S.B. No. 2563, "the purpose of which was to 'make it an unfair or deceptive act to limit or withhold coverage under insurance policies because a consumer may have a third-party claim for damages.'" *Id.* (quoting H. Stand. Comm. Rep. No. 1330-00, in Haw. H. J., at 1515 (Haw. 2000)). In order to create a "fair, uniform and comprehensive procedure" that would govern reimbursements related to third-party recoveries, the legislature amended § 663-10 to expressly include "health insurance or benefits." *Id.*

This amendment, however, brought about the unforeseen consequence of exempting health insurance providers from the prohibition of unfair practices outlined in the new statute, thus permitting them to refuse to provide or to limit coverage to insured individuals with a third-party claim. *See id.* at 498; *see*

also S. Stand. Comm. Rep. No. 107, in Haw. S. J., at 987 (Haw. 2001). To correct this "oversight," the legislature enacted S.B. 940, which clarified that:

> Refusing to provide or limiting health coverage to persons who have third-party claims for damages is not permitted, except for reimbursement under section 663-10 [HRS]. This measure makes such acts unfair insurance practices under [§ 431:13-103] to eliminate any doubt that health insurers have always been subject to these limitations under section 663-10, HRS.

Id. at 499 (quoting Conf. Comm. Rep. No. 67-02, in Haw. H. J., at 1783 (Haw. 2002)).

This language, as well as the fact that § 431:13-103 explicitly incorporates § 663-10, leaves no doubt that the Hawai'i Statutes must be read together. Indeed, under Hawai'i law, "HRS §§ 663-10 and 431-13:103(a)(10) *comprehensively* address [] and limit[] a health insurers' rights to reimbursement and subrogation." *Id.* (emphasis added).

Because the statutes must be read together, HMAA's argument that § 663-10 cannot regulate insurance is not persuasive. HMAA relies on the Third Circuit's opinion in *Levine*, where the court held that even though a statute's "legislative history . . . indicate[d] an intent to lighten the burden on the liability insurance industry," the "plain language of the statute"—which stated that the statute applied to "any civil action"—controlled. 402 F.3d at 165 (emphasis omitted).

The Hawai‘i Statutes, however, are easily distinguished from the statute at issue in *Levine* because, in *Levine*, there was only one statute at issue—one that did not regulate insurance. *Id.* at 164 & n.9. Here, § 431:13-103 unquestionably regulates insurance, and expressly incorporates § 663-10's methodology for determining when health insurance reimbursements will be permitted. Read together, the terms of the Hawai‘i Statutes regulate the insurance industry.

HMAA still urges us to read § 663-10 in isolation, however, because there is no private right of action to bring a claim under § 431:13-103. *See also* Haw. Rev. Stat. § 431:13-107 (noting that all remedies and proceedings in the insurance code "are to be invoked solely and exclusively by the commissioner"). It argues that Rudel's action for a lien determination was, by default, a private claim under § 663-10, rendering § 431:13-103 irrelevant to the determination whether the statutes are specifically directed toward insurance.

This argument is unpersuasive for two reasons. First, it is premised on a belief that Rudel brought his action under § 663-10. To the contrary, once the case was removed to district court pursuant to § 502(a), the court considered Rudel's claim as a § 502(a) action for benefits; in effect, Rudel's claim was brought under § 502(a), not § 663-10. Second, HMAA again assumes that the Hawai‘i Statutes can be read separately. As discussed, this bifurcated view ignores the comprehensive scheme demanded by Hawai‘i law.

Thus, the district court properly held that §§ 431-13:103(a) and 663-10 are "specifically directed toward entities engaged in insurance."

2

The next question is whether the Hawai'i Statutes substantially affect the risk pooling arrangement between the insurer and the insured. A state statute substantially affects the risk pooling arrangement between the insurer and the insured when it impacts the terms by which insurance providers must pay plan members. *See Morrison*, 584 F.3d at 844–45. This requirement "ensures that [statutes] are targeted at insurance practices, not merely at insurance companies." *Id.* at 844 (noting that a statute that mandates the salary of an insurance company employee would not affect risk pooling because it is not directed at insurance practices).

The district court properly concluded that the Hawai'i Statutes substantially affect risk pooling. Read together, §§ 431-13:103(a) and 663-10 prohibit an insurer from seeking certain types of reimbursement, thus impacting the eventual net value of any payment made to a plan member—in other words, due to the Hawai'i Statutes, the insurers face more risk than they would otherwise. *See Singh*, 335 F.3d at 286 (analyzing a similar antisubrogation scheme and noting that "it is difficult to imagine an antisubrogation law of this type as anything other than an insurance regulation, as it

addresses who pays in a given set of circumstances and is therefore directed at spreading policyholder risk").

3

In sum, the district court correctly concluded that the Hawai'i Statutes are saved from express preemption under § 514 because they are directed at insurance practices and impact risk pooling.

B

Having concluded that the statutes are saved from preemption under § 514, we must determine whether the Hawai'i Statutes supply the rule of decision for Rudel's reconfigured federal ERISA claim. A state statute may provide a relevant rule of decision in an ERISA action if: (1) it is saved from preemption under § 514; and (2) it does not impermissibly expand the scope of liability outlined in § 502(a). *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365–81 (2002); *Singh*, 335 F.3d at 282–83.

1

Given that the Hawai'i Statutes are saved from preemption, the only remaining question is whether the statutes impermissibly expand the scope of liability under § 502(a). This requirement is founded squarely in the statute and in ERISA's comprehensive civil enforcement scheme. Under that rubric, Rudel is prohibited from recovering remedies with his

reconfigured federal ERISA claim that could not be awarded under § 502(a). As the Supreme Court has observed, "even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Davila*, 542 U.S at 217–28.

More specifically, to determine whether a state statute is preempted on the merits under § 502(a) as conflicting with ERISA's remedial scheme, we ask whether the statute would "significantly expand[ ] the potential scope of ultimate liability imposed upon [insurance providers]." *Id.* at 378–79. This "preemptive effect depends on the nature of the state remedy, including the availability of non-ERISA compensatory and punitive damages." *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1146 (9th Cir. 2003).

Although we must ensure that state remedies do not expand the scope of relief available under ERISA, we begin with a "'starting presumption that Congress d[id] not intend to supplant . . . state laws regulating a subject of traditional state power' unless that power amounts to 'a direct regulation of a fundamental ERISA function.'" *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 666 (9th Cir. 2019) (alterations in original) (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)), *petition for cert. filed*, No. 19-77 (Jul. 16, 2019); *see also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (noting that the existence of § 514 evidences "the congressional decision to 'save' local insurance regulation").

In this case, the district court properly concluded that the Hawai'i Statutes do not impermissibly expand ERISA's remedial scope. On removal, Rudel's claim was effectively converted into a § 502(a) claim for benefits. The only question is the scope of the benefits to be awarded. The Hawai'i Statutes do not create a method for Rudel to collect additional benefits, nor do they subject the insurer to any additional liability. In short, the statutes do not create additional remedies not permitted by § 502(a). The Hawai'i Statutes only impact the insurer's subrogation rights against a third party tort settlement fund. There are no statutory provisions of ERISA that address reimbursement limitations. Thus, no conflict exists between the Hawai'i Statutes and ERISA.

The Supreme Court's decision in *Rush* is instructive. In *Rush*, the Illinois state statute at issue permitted patients to seek an independent physician's opinion regarding the medical necessity of a procedure. 536 U.S. at 361. If the independent physician determined that the procedure was medically necessary, the insurance provider was required to cover the service. *Id.* at 383. The insurance provider argued that the statute expanded the remedies permitted under § 502, in part because the statute created an alternative dispute resolution process that would impermissibly expand ERISA' s remedial scheme. *Id.* at 383–84.

However, the *Rush* majority rejected this argument. It held the state statute did not provide a scheme that would "give the independent reviewer a free-ranging power to construe contract terms" and exceed

ERISA' s boundaries. *Id.* at 382–83. Instead, the second-opinion procedure merely permitted an alternative opinion regarding whether benefits were due—at all times, the action remained one for the recovery of benefits pursuant to an ERISA plan. *Id.* at 382–83. Thus, the second-opinion procedure for dispute resolution did not enlarge the scope of liability under ERISA. *Id.* at 383–85.

Similarly, in *Singh*, the Fourth Circuit held that a state antisubrogation statute that prohibited insurance providers from seeking reimbursement from a third-party settlement was saved from preemption. 335 F.3d at 281. The Fourth Circuit reasoned that the statute "simply mandat[ed] or prohibit[ed] certain terms of policy coverage" and did not "force a choice between State regulation of insurance and the prescribed remedies of § 502(a)." *Id.* at 287–88. The court pointed out:

> While ERISA' s civil enforcement scheme contained in § 502(a) creates an exclusive set of remedies that even a state regulation of insurance may not supplement or supplant, ERISA 'contains almost no federal regulation of the terms of benefit plans' that would conflict with a substantive provision such as the subrogation prohibition.

Id. at 288 (quoting *Metro. Life Ins.*, 471 U.S. at 732).

Thus, the state antisubrogation statute merely "operate[d] . . . to define the scope of a benefit" provided by an ERISA-governed plan. *Id.* at 288. It did not

create a new remedy. *Id.* at 289; *see also UNUM Life Ins. Co.*, 526 U.S. at 376 n.7 (holding that a California statute providing employers be designated an insurer's agent for purposes of filing ERISA claims was not preempted because the petitioner sought only benefits due pursuant to ERISA, and not separate remedies).

The situation is identical here. The Hawai'i Statutes operate to define the scope of a benefit provided by the Plan; they do not create additional remedies not permitted by ERISA. Thus, because the statutes do not impermissibly expand the scope of liability outlined in § 502(a), they are not conflict preempted and can apply the rule of decision.

2

Elliot does not compel a contrary result, as HMAA contends. There, we held as preempted on the merits Montana's Unfair Trade Practices Act ("UTPA")—a statute that, in relevant part, permitted awards of punitive damages. 337 F.3d at 1141, 1147. We held that a petitioner's claim "relie[d] in the first instance on Montana's UTPA's civil enforcement provision" because it "provide[d] damages above and beyond those provided in ERISA, including punitive damages." *Id.* at 1147. Thus, the statute was completely preempted under § 502. *Id.*; *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 136 (1990) (holding preempted a Texas cause of action that converted an equitable claim under ERISA to a claim for damages under state law); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50–56 (1987)

(holding preempted Mississippi state common law causes of action for claims-processing errors that permitted punitive damages because ERISA's civil enforcement scheme "would make little sense if the remedies available to ERISA participants . . . could be supplemented or supplanted by varying state laws"); *Barber v. UNUM Life Ins. Co.*, 383 F.3d 134, 141 (3d Cir. 2004) (holding preempted a state remedy that permitted ERISA-plan participants to recover punitive damages for bad faith conduct).

Thus, because the Hawai'i Statutes merely provide the analytical framework by which the court is to decide the § 502(a) action and do not create causes of action that permit recovery beyond that permitted under ERISA, the Hawai'i Statutes are distinguishable from the state statutes in *Elliot, Ingersoll-Rand, Pilot Life*, and the other cases cited by HMAA and amicus curiae HMSA. All of those cases involved state statutes that provided additional damages or remedies outside the scope of ERISA's remedial scheme. We agree with the Secretary of Labor that here is no such provision here.

And, as was true in *Singh*, the Hawai'i Statutes do not conflict with an ERISA provision because there are no statutory provisions of ERISA that address reimbursement limitations. *See also Depot, Inc.*, 915 F.3d at 667 (holding that state law claims that did not have corresponding, conflicting provisions in ERISA did not provide an impermissible alternative enforcement mechanism). The Hawai'i Statutes merely regulate the terms that an ERISA plan provider may employ—they

do not offer any benefits that conflict with those provided by ERISA.

3

HMAA argues that permitting a court to decide a petition for a determination of lien pursuant to §§ 431:13-103 and 663-10 creates a new judicial vehicle for deciding claims outside the bounds of ERISA's comprehensive civil enforcement scheme. Similarly, amicus curiae HMSA argues, "[T]he Hawai'i statutes at issue provide for an entire judicial process alternative to § 502, creating precisely the type of adjudication that falls within *Pilot Life*'s categorical bar." HMAA points out that the state statute in *Singh* did not provide a separate procedure to determine the amount and validity of the lien, but instead prohibited reimbursement outright. HMAA relies in part on the suggestion in *Rush* that a "conventional evidentiary hearing" held during an arbitration might be preempted. 536 U.S. at 383.

These arguments are not persuasive. In *Rush*, the Court's primary concern in discussing an alternate form of arbitration was that such a scheme would undermine "the manifest congressional purpose to confine adjudication of disputes to the courts." *Id.* at 381–82. Here, because the case was removed under § 502(a) and effectively became a § 502(a) action for benefits, there is no question that the federal courts remain the forum—and ERISA the vehicle—for determining Rudel's entitlement to any benefits. *See id.* at 379–80

(noting that though the independent review process in that case could be dispositive of the validity of a claim for benefits, it did not impermissibly enlarge the scope of liability under § 502(a)).

4

Finally, HMAA suggests that because the state statutes were completely preempted under § 502(a), they necessarily must be in conflict with § 502(a) and therefore cannot form the basis for decision. This argument confuses complete preemption for jurisdictional purposes with conflict preemption. As we have discussed, by operation of § 502(a), Rudel's state law claims are completely preempted, allowing the insurer to remove the case to federal court. But, although his state law claims are extinguished, his federal ERISA rights under § 502 are not. The Hawai'i Statutes do not conflict with § 502, so conflict preemption does not apply, and because the Hawai'i Statutes are saved from express preemption under § 514, they may supply the rule of decision for Rudel's federal ERISA action.

C

Thus, the district court correctly concluded that Rudel's claims were not ERISA-preempted. Because the Hawai'i Statutes regulate insurance and are directed at insurance practices and impact risk pooling, they are saved from express preemption under § 514. And because they do not impermissibly expand the

scope of available ERISA remedies, the Hawai'i Statutes are not preempted by the merits under § 502(a).

V

In sum, the district court properly exercised federal jurisdiction and correctly denied Rudel's remand motion because his state law claims could have been brought as ERISA claims. The court also correctly held that the Hawai'i Statutes were saved from preemption pursuant to § 514, were not subject to conflict preemption under § 502, and provided the relevant rule of decision in the removed action. Because the parties stipulated that HMAA had no valid lien if the Hawai'i Statutes provided the relevant rule of decision, the district court also properly entered a final judgment in Rudel's favor. We need not—and do not—reach any other issue urged by the parties. All pending motions are denied as moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RANDY RUDEL, Petitioner, vs. HAWAII MANAGEMENT ALLIANCE ASSOCIATION, Respondent.	Civ. No. 15-00539 JMS-RLP ORDER (1) GRANTING IN PART PETITIONER'S MOTION FOR DETERMINATION OF VALIDITY OF LIEN, ECF NO. 38; AND (2) DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, ECF NO. 40

ORDER (1) GRANTING IN PART PETITIONER'S MOTION FOR DETERMINATION OF VALIDITY OF LIEN, ECF NO. 38; AND (2) DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, ECF NO. 40

(Filed Oct. 31, 2017)

I. INTRODUCTION

On December 29, 2014, Petitioner Randy Rudel ("Rudel") crashed his motorcycle into a vehicle allegedly making an illegal left turn in front of him. ECF No. 1-2 at 7. He suffered catastrophic injuries, resulting in multiple surgeries and partial amputations of his left leg and forearm. *Id.* Because of the accident, Respondent Hawaii Management Alliance Association ("HMAA") paid $400,779.70 in health-insurance benefits under Rudel's HMAA benefit plan ("the Plan"). ECF No. 49-6 at 1-5. Rudel also received a $1.5 million

third-party tort settlement from the vehicle-driver's liability insurance carrier. ECF No. 1-2 at 14. HMAA then claimed a lien against Rudel, seeking reimbursement of the $400,779.70 from his $1.5 million settlement, based on a reimbursement provision in the Plan. ECF No. 49-6 at 1. Rudel filed this action to determine the validity of HMAA's claim of lien.

The court faces two Motions. Rudel filed a "Motion for Determination of Validity of Claim of Lien of [HMAA]," ECF No. 38, ultimately arguing that HMAA is not entitled to *any* reimbursement. HMAA responded with a Motion for Partial Summary Judgment, ECF No. 40, contending that Rudel's action is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and that its lien is valid under the Plan. The Motions raise complex and important questions involving two distinct ERISA-preemption doctrines as applied to two interrelated Hawaii statutory provisions, Hawaii Revised Statutes ("HRS") §§ 431:13-103(a)(10) and 663-10.

Based on the following, Rudel's Motion is GRANTED in part, and HMAA's Motion is DENIED.

II. BACKGROUND

A. Factual Background

The circumstances of the December 29, 2014 accident, as well as the severe nature of Rudel's injuries, are not at issue in these Motions. For present purposes,

it is undisputed that Rudel was a member of an ERISA plan—an HMAA employee-sponsored health benefits plan that provided him certain insurance benefits, including medical care, treatment, and services for injuries resulting from the accident. ECF No. 49-3 at 2.[1] Nor is it disputed that HMAA eventually paid $400,779.70 in accident-related expenses (at least as of November 16, 2015) out of total charges of $634,839.03.[2]

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[1] "[HMAA] dba Hawaii Medical Assurance Association" is "a Hawaii Mutual Benefit Society." ECF No. 41-2 at 1; *see also* ECF No. 38-3 at 1 ("[HMAA] is registered with the State of Hawaii Department of Commerce and Consumer Affairs, Insurance Division, as a Mutual Benefit Society[.]").

[2] HMAA paid Rudel's medical expenses after Rudel filed a related suit on June 19, 2015 against HMAA under ERISA § 502(a), 29 U.S.C. § 1132(a). *See Rudel v. Haw. Mgmt. All. Ass'n*, Civ. No. 15-00236 HG-BMK (D. Haw.). According to that suit, HMAA was refusing to pay Rudel's expenses because he declined to sign (claiming parts were contrary to Hawaii law as an illegal insurance practice) a "Reimbursement Agreement" with a clause stating:

> I agree to repay HMAA from any recovery received by me or on my behalf from any other person or party, even if the recovery does not specifically include medical expenses, is described as general damages only, or is less than the total actual or alleged loss suffered due to my injury or illness. HMAA shall be paid first from such recovery and shall have a first lien against any such recovery to the extent of its total payment of benefits. This lien will attach to and follow any recovery proceeds even if the proceeds are distributed to another person or entity.

ECF No. 1-2 at 149. For its part, HMAA had apparently refused to pay based on certain terms in the Plan, and on a provision in HRS § 431:13-103(a)(10)(C)(ii) ("For entities licensed under chapter 432 or 432D: . . . Payment of claims to an individual who may have a third-party claim for recovery of damages may be

ECF No. 49-6. The Petition also establishes that, on August 17, 2015, Allstate Insurance Company (which covered the driver of the other vehicle) paid Rudel $1.5 million under a settlement that Allstate represented was "the total applicable available policy limits." ECF No. 1-2 at 54. The settlement agreement includes a clause stating:

> The consideration paid herein constitutes general damages incurred on the account of personal injury or sickness and/or emotional distress resulting therefrom, as defined by IRS Code Section 104(a)(2) and does not duplicate medical payments, no-fault payments, wage loss, temporary disability benefits or other special damages previously received by Randy Rudel.

Id. at 52. The Petition contends that the value of Rudel's claim against the driver/tortfeasor exceeded $5.9 million, including $4 million in general damages. *Id.* at 11. Finally, the record establishes that on November 16, 2015, HMAA claimed (and still claims) a lien of $400,779.70 against Rudel's $1.5 million settlement. ECF No. 49-6.

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conditioned upon the individual first signing and submitting to the entity documents to secure the lien and reimbursement rights of the entity and providing information reasonably related to the entity's investigation of its liability for coverage."). ECF No. 1-2 at 118-19. Rudel dismissed that suit after HMAA agreed to waive its requirement that he sign the Reimbursement Agreement before he could receive medical benefits. *See* ECF No. 1-2 at 157.

B. Legal Background

1. HRS §§ 431:13-103(a)(10) and 663-10

The Hawaii Insurance Code, subject to certain exceptions, defines "unfair methods of competition and unfair or deceptive acts or practices in the business of insurance" as including the following:

> (10) Refusing to provide or limiting coverage available to an individual because the individual may have a third-party claim for recovery of damages; provided that:
>
> (A) *Where damages are recovered by judgment or settlement of a third-party claim, reimbursement of past benefits paid shall be allowed pursuant to section 663-10*;

HRS § 431:13-103(a) (emphasis added).[3]

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[3] Section 431:13-103(a)(10) continues in part:

> (B) This paragraph shall not apply to entities licensed under chapter 386 [regarding workers compensation] or 431:10C [regarding motor vehicle insurance]; and
>
> (C) For entities licensed under chapter 432 [mutual benefit societies] or 432D [health maintenance organizations]:
>
> (i) It shall not be a violation of this section to refuse to provide or limit coverage available to an individual because the entity determines that the individual reasonably appears to have coverage available under chapter 386 or 431:10C; and
>
> (ii) Payment of claims to an individual who may have a third-party claim for recovery of damages may be conditioned upon the individual first signing and submitting to the entity documents to secure the lien and reimbursement rights of the entity and providing information

In turn, HRS § 663-10, entitled "Collateral sources; protection for liens and rights of subrogation," provides:

> (a) In any civil action in tort, the court, before any judgment or stipulation to dismiss the action is approved, shall determine the validity of any claim of a lien against the amount of the judgment or settlement by any person who files timely notice of the claim to the court or to the parties in the action. *The judgment entered, or the order subsequent to settlement, shall include a statement of the amounts, if any, due and owing to any person determined by the court to be a holder of a valid lien and to be paid to the lienholder out of the amount of the corresponding special damages recovered by the judgment or settlement.* In determining the payment due the lienholder, the court shall deduct from the payment a reasonable sum for the costs and fees incurred by the party who brought the civil action in tort. As used in this section, lien means a lien arising out of a claim for payments made or indemnified from collateral sources, *including health insurance or benefits*, for costs and expenses arising out of the injury which is the subject of the civil action in tort. *If there is a settlement before suit is filed or there is no civil action pending, then any party may petition a court of*

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reasonably related to the entity's investigation of its liability for coverage.

competent jurisdiction for a determination of the validity and amount of any claim of a lien.

HRS § 663-10 (emphases added).[4]

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[4] Section 663-10(b) (as enacted in 2002) continues:

(b) Where an entity licensed under chapter 432 [mutual benefit societies] or 432D [health maintenance organizations] possesses a lien or potential lien under this section:

(1) The person whose settlement or judgment is subject to the lien or potential lien shall submit timely notice of a third-party claim, third-party recovery of damages, and related information to allow the lienholder or potential lienholder to determine the extent of reimbursement required. A refusal to submit timely notice shall constitute a waiver by that person of section 431:13-103(a)(10). An entity shall be entitled to reimbursement of any benefits erroneously paid due to untimely notice of a third-party claim;

(2) A reimbursement dispute shall be subject to binding arbitration in lieu of court proceedings if the party receiving recovery and the lienholder agree to submit the dispute to binding arbitration, and the process used shall be as agreed to by the parties in their binding arbitration agreement; and

(3) In any proceeding under this section to determine the validity and amount of reimbursement, the court or arbitrator shall allow a lienholder or person claiming a lien sufficient time and opportunity for discovery and investigation.

For purposes of this subsection:

"Timely notice of a third-party claim" means a reasonable time after any written claim or demand for damages, settlement recovery, or insurance proceeds is made by or on behalf of the person.

"Third-party claim" means any tort claim for monetary recovery or damages that the individual has against

With §§ 431:13-103(a)(10) and 663-10, "the [Hawaii] legislature intended to limit a health insurer's right of subrogation[.]" *Yukumoto v. Tawarahara*, 140 Haw. 285, 291, 400 P.3d 486, 492 (2017).[5] The legislative history and intent behind both provisions becomes critically important in resolving the Motions. As explained to follow, resolution ultimately turns on whether this Hawaii law is "specifically directed toward entities engaged in insurance," *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329, 342 (2003), such that it is—or parts of it are—"saved" from preemption for purposes of ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). The court thus explains relevant aspects of this history in detail, and as set forth in *Yukumoto*.

In invalidating a contractual subrogation clause in a non-ERISA health insurance plan, *Yukumoto* recognized that:

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any person, entity, or insurer, other than the entity licensed under chapter 432 or 432D.

Section 663-10(b), which applies to "entities licensed under chapter 432 or 432D," was added in 2002 by Act 228, Hawaii Session Laws. As detailed later, Act 228 also amended § 431:13-103(a)(10).

[5] In this context, "[s]ubrogation exists to provide insurers with a mechanism to recover the costs of reimbursing injured insured parties." *Yukumoto*, 140 Haw. at 292, 400 P.3d at 493 (internal quotation marks and citations omitted). It is "premised on the notion that an insured should not be able to unduly benefit from a loss and thereby enjoy a double recovery from both the insurer and the tortfeasor." *Id.* at 291, 400 P.3d at 492 (internal quotation marks and citations omitted). Thus, for present purposes, the court uses the terms "reimbursement" and "subrogation" synonymously.

> [s]ituations involving tort recovery in personal insurance contexts, like the instant case [of health insurance], often include payment by the tortfeasor for intangible losses such as life, death, health, pain and suffering, and physical well being, where it is difficult to ascertain exact measurements of loss. In this way, recovery for medical insurance benefits and tort damages . . . does not necessarily produce a windfall or duplicative recovery to the insured.

140 Haw. at 294, 400 P.3d at 495. And after analyzing the statutory language of both provisions and the legislative history, *Yukumoto* concluded that "the [Hawaii] legislature limited the type of damages from which a lienholder may be reimbursed. The legislature did not provide that the lienholder may be reimbursed from an insured's recovery of general damages which, as mentioned previously, are difficult to determine exactly." *Id.* at 295, 400 P.3d at 496. Rather, § 663-10 provides that "the amount due and owing to any holder of a valid lien, [is] to be paid to the lienholder from '*special damages* recovered by the judgment or settlement.'" *Id.* The idea is that an injured person should not receive a "windfall"—if someone recovers damages from a tortfeasor for medical costs that were already (or will be) paid by a health insurer, the insured should not be entitled to double-recovery. A health insurer should be entitled to (and limited to) reimbursement from "special damages" obtained from a tort judgment or settlement.

"[T]he legislative history of HRS §§ 663-10 and 431:13-103(a)(10) demonstrates that a health insurer's *sole* rights to reimbursement and subrogation are provided for in those statutes, and that a health insurer's right to subrogation is therefore limited." *Id.* at 295-96, 400 P.3d at 496-97 (emphasis added). The statutory regime "allow[s] for collateral sources to be reimbursed when special damages recovered in a judgment or settlement duplicate[ ] the amounts they had paid." *Id.* at 296, 400 P.3d at 497.

In particular, the Hawaii legislature passed Act 29 in 2000, "to 'make it an unfair or deceptive act to limit or withhold coverage under insurance policies because a consumer may have a third-party claim for damages.' " *Id.* (quoting H. Stand. Comm. Rep. No. 1330-00, in 2000 House J. at 1515).[6] "Act 29 made clear that collateral sources were required to pay benefits, and were limited to reimbursement under [§ 663-10] in third-party personal injury situations." *Id.* (citing H. Stand. Comm. Rep. No. 1330-00).

And in 2001, "the legislature considered and subsequently passed [Senate Bill ("S.B.")] 940, which amended . . . HRS [§] 431:13-103(a)(10) to expressly make it an unfair insurance practice for a *health*

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[6] Article 13 of Hawaii's Insurance Code, HRS §§ 431:13-101 *et seq.* (entitled Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance) was originally enacted in 1987 as part of a comprehensive restructuring of Hawaii's insurance code. *See* 1987 Haw. Sess. Laws Act 347, § 2. Section 663-10 was originally enacted in 1986. *See* 1986 Haw. Sess. Laws Act 2 (reprinted at ECF No. 58-4).

insurer to limit or exclude insurance coverage to an insured who has a third-party claim for damages." *Id.* at 297, 400 P.3d at 498 (emphasis added) (citing S. Stand. Comm. Rep. No. 107, in 2001 Senate J. at 987). "The purpose of S.B. 940 was to 'make mutual benefit societies (societies) and health maintenance organizations (HMOs) subject to the unfair methods of competition and unfair and deceptive acts and practices of the business of insurance, for refusing to provide or limiting coverage to an individual having a third-party claim for damages." *Id.* (quoting S. Stand. Comm. Rep. No. 107).

That is, S.B. 940 (which was enacted in 2002 by Act 228 of the Session Laws of Hawaii ("SLH")) specifically amended § 431:13-103(a)(10) to clarify that "Act 29, SLH 2000, established lien rights for health insurance benefits paid[.]" *Id.* (quoting testimony of the State Insurance Commissioner). The legislature's intent in amending § 431:13-103 was "that societies and HMOs promptly pay the benefits owing under their policies, and recoup their payments from a third-party claim by lien as provided under section 663-10, HRS." *Id.* (quoting S. Stand. Comm. Rep. No. 107). Similarly, in passing Act 228, the legislature explained:

> Refusing to provide or limiting health coverage to persons who have third-party claims for damages is not permitted, except for reimbursement under section 663-10, Hawaii Revised Statutes (HRS). This measure makes such acts unfair insurance practices under article 13 of the insurance code to eliminate

> any doubt that health insurers have always been subject to these limitations under section 663-10, HRS. Health insurers continue to be entitled to reimbursement of their subrogation liens under section 663-10, HRS.

Id. at 298, 400 P.3d at 499 (quoting Conf. Comm. Rep. No. 67-02, in 2002 House J. at 1783). Act 228 removed statutory language appearing to exempt health insurers, and added § 431:13-103(a)(10)(C), applicable to "entities licensed under chapter 432 or 432D." 2002 Haw. Sess. Laws Act 228, § 1. Act 228 also, as noted earlier, added several paragraphs to § 663-10, specific to those entities. *Id.* § 2.

2. HMAA's Plan

In contrast to this Hawaii law, HMAA's Plan defines a right of reimbursement that is not limited to special damages. Specifically, the Plan's Summary Plan Description ("SPD") provides, in part, as follows:

> If you have complied with the rules above [regarding cooperation], we will pay benefits in connection with the injury or illness to the extent that the medical treatment would otherwise be a covered benefit payable under this SPD. However, we shall have a right to be reimbursed for any benefits we provide, *from any recovery received from or on behalf of any third party or other source of recovery in connection with the injury or illness*, including, but not limited to, proceeds from any:

- Settlement, judgment, or award;
- Motor vehicle insurance including liability insurance or your underinsured or uninsured motorist coverage;
- Workplace liability insurance;
- Property and casualty insurance;
- Medical malpractice coverage; or
- Other insurance.

We shall have a first lien on such recovery proceeds, up to the amount of total benefits we pay or have paid related to the injury or illness. *You must reimburse us for any benefits paid, even if the recovery proceeds obtained (by settlement, judgment, award, insurance proceeds, or other payment):*

- *Do not specifically include medical expenses;*
- *Are stated to be for general damages only;*
- *Are for less than the actual loss or alleged loss suffered by you due to the injury or illness;*
- Are obtained on your behalf by any person or entity, including your estate, legal representative, parent, or attorney;
- Are without any admission of liability, fault, or causation by the third party or payer.

. . . .

> If we are entitled to reimbursement of payments made on your behalf under these rules, and we do not promptly receive full reimbursement pursuant to our request, we shall have a right of set-off from any future payments payable on your behalf under this SPD.
>
> . . . .
>
> The amount of recovery to be reimbursed or otherwise paid to HMAA is not reduced by any expenses, such as attorneys' fees incurred in connection with the recovery. Accordingly, the common fund doctrine is not to be applied. In addition, the "make-whole" rule of insurance law, which holds that an insurance company may not enforce a right of subrogation or third-party responsibility until the insured party has been fully compensated for any injuries, also does not apply.

ECF No. 49-5 at 4-5 (emphases added).

In short—in conflict with Hawaii law—HMAA's Plan provides that HMAA's reimbursement rights apply even if the recovery proceeds are not for special damages, i.e., the proceeds do not include medical expenses or are stated to be for general damages only. *Id.* The present action arises from this conflict: Rudel contends that the Plan's language is invalid under Hawaii law; HMAA contends that ERISA preempts that Hawaii law, and seeks to enforce the Plan's reimbursement provisions.

C. Procedural History

1. HMAA Removes the Action From State Court, and Rudel Moves to Remand

On December 9, 2015, Rudel filed this Petition against HMAA "pursuant to HRS §§ 431:13-103(a)(10) and 663-10" in the Third Circuit Court, State of Hawaii. ECF No. 1-2. HMAA then removed the action to this court on December 29, 2015, asserting federal jurisdiction under ERISA §§ 502(a) & (e), 29 U.S.C. §§ 1132(a) & (e). ECF No. 1 at 2. HMAA's Notice of Removal alleged that "a petition for determination of validity and amount of lien filed in state court that falls within the scope of the civil enforcement provisions of ERISA is completely preempted and hence removable to federal court." *Id.* at 3-4 (citing *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (other citation omitted)).

Rudel filed a Motion to Remand on January 27, 2016, arguing that HMAA improperly removed the action. ECF No. 10. Extensive proceedings ensued to adjudicate the Motion to Remand. And because those proceedings are particularly relevant to understanding the current Motions, the court describes that background in detail.

On March 31, 2016, a magistrate judge issued Findings and a Recommendation ("F&R"), recommending that the Court remand the action to state court for lack of subject-matter jurisdiction. ECF No. 15. On April 14, 2016, HMAA objected to the F&R pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil

Procedure 72(b), ECF No. 18, and Rudel responded to HMAA's Objection on April 28, 2016, ECF No. 20.

At that time, the same issue regarding "complete preemption" of §§ 431:13-103(a)(10) and/or 663-10 by ERISA § 502(a) was pending in the District of Hawaii before Judge Susan Oki Mollway in *Noetzel v. Hawaii Medical Service Association*, Civ. No. 15-00310 SOM-KJM. One day before Rudel's Response was filed, on April 27, 2016, Judge Mollway issued an order in *Noetzel* rejecting a similar F&R that had recommended remanding that action. *See Noetzel v. Haw. Med. Serv. Ass'n* ("*Noetzel I*"), 183 F. Supp. 3d 1094, 1111 (D. Haw. 2016) (concluding that the court had jurisdiction under ERISA § 502). Accordingly, in May 2016, the parties in this case filed supplemental briefing to address *Noetzel I*. ECF Nos. 23, 24. On June 14, 2016, this court stayed consideration of the Motion to Remand, pending a decision by Judge Mollway on a subsequent motion for reconsideration of *Noetzel I*. ECF No. 25. And on July 27, 2016, Judge Mollway issued a detailed order denying reconsideration of *Noetzel I*. *See Noetzel v. Haw. Med. Serv. Ass'n* ("*Noetzel II*"), 2016 WL 4033099 (D. Haw. July 27, 2016).

2. The Action Was Properly Removed Under § 502(a)

On August 1, 2016—having considered the original and supplemental briefing, as well as *Noetzel I* and *Noetzel II*—this court issued an order also rejecting the F&R and denying the Motion to Remand. ECF No. 26;

Rudel v. Haw. Mgmt. All. Ass'n, 2016 WL 4083320 (D. Haw. Aug. 1, 2016). Applying a two-part test articulated by the Supreme Court in *Davila*, the court concluded that HMAA properly invoked ERISA § 502(a)'s complete preemption exception to the well-pleaded complaint rule.[7] That is, although Rudel's "well-pleaded" Petition invokes only state law (§§ 431:13-103(a)(10) and/or 663-10), "'[w]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption,' the state claim can be removed." *Davila*, 542 U.S. at 207 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)). "This is so because 'when the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.'" *Id.* at 207-08 (quoting *Anderson*, 539 U.S. at 8).

Specifically, ERISA § 502(a), "sets forth a comprehensive civil enforcement scheme that completely preempts state-law causes of action within the scope of these civil enforcement provisions." *Fossen v. Blue Cross & Blue Shield of Mont., Inc.*, 660 F.3d 1102, 1107

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[7] Under *Davila*, a state law claim is completely preempted if (1) the plaintiff "could have brought his claim under ERISA § 502(a)(1)(B) . . . [and (2)] "there is no other independent legal duty that is implicated by a defendant's actions." *Davila*, 542 U.S. at 210. "The complete preemption doctrine applies to the other subparts of § 502(a) as well." *Fossen v. Blue Cross & Blue Shield of Mont., Inc.*, 660 F.3d 1102, 1108 (9th Cir. 2011) (citation omitted).

(9th Cir. 2011) (citations, quotation marks, and brackets omitted). ERISA § 502(a) provides:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

29 U.S.C. § 1132(a). ERISA § 502(a)(3) further authorizes a "participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3). "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy [in § 502(a)] conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore [completely] pre-empted." *Davila*, 542 U.S. at 209.

This court determined that Rudel is seeking "to recover benefits due to him under the terms of his plan," or "to enforce his rights under the terms of the plan." *Rudel*, 2016 WL 4083320, at *2 (quoting § 502(a)(1)(B)). He also could have filed a § 502(a) action to "clarify his

rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). As stated in *Noetzel I,*

> Under ERISA § 502(a)(3), [petitioner] could have brought a claim to enjoin [the insurer] from enforcing those parts of the Plan that required that [the insurer] be reimbursed. [Petitioner] could have even asked the court to declare that the Plan's reimbursement terms were overbroad or illegal and to enforce the remaining terms of the Plan.

183 F. Supp. 3d at 1106 (citations omitted); *see also Noetzel II*, 2016 WL 4033099, at *3 ("[Petitioner] could have brought a claim asserting that [the insurer's] lien did not entitle [the insurer] be reimbursed for benefits paid to [petitioner] under the plan because the plan's terms permitting reimbursement of settlement amounts equivalent to general damages are allegedly void under Haw. Rev. Stat. § 663-10."). Further, the Plan's benefits and terms (and interpretation and validity of those terms) are squarely at issue, as *Davila* also requires. Thus, the court concluded that Rudel's Petition is completely preempted under § 502(a). *Rudel*, 2016 WL 4083320, at *4.

3. This is Now a § 502(a) Action

Because the case was properly removed to federal court, the action now continues as if it had been filed as a § 502(a) action. *See, e.g.*, *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 945 (9th Cir. 2009) ("If a complaint alleges only state-law claims, and if these claims are entirely encompassed by § 502(a),

that complaint is converted from 'an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.") (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987)); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 292 (4th Cir. 2003) ("Because we have found that at least some of Singh's claims are completely preempted, leading to their conversion into federal claims and their removal to federal court, those completely preempted claims must now be decided by the district court"); *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 195 (4th Cir. 2002) ("[W]hen a claim under state law is completely preempted and is removed to federal court because it falls within the scope of § 502, the federal court should not dismiss the claim as preempted, but should treat it as a federal claim under § 502.").

Proceeding as a § 502(a) action, Rudel filed his "Motion for Determination of Validity of Claim of Lien of [HMAA]" on April 25, 2017. ECF No. 38. HMAA responded with its Motion for Partial Summary Judgment on May 8, 2017. ECF No. 40. The parties filed corresponding Oppositions and Replies, ECF Nos. 49, 50, 52, 53, and the court heard both Motions on July 24, 2017. ECF No. 54. At the court's request, ECF No. 55, the parties filed supplemental briefs, ECF Nos. 60, 61. The Motions are now ready to be decided.

III. ANALYSIS

The parties agree that HMAA's reimbursement provisions conflict with Hawaii law. Rather, the dispositive question is whether Hawaii law is preempted, at least where an ERISA plan is at issue.[8]

A. ERISA Preemption

This is a complicated area of the law. And it's important to understand that two distinct ERISA preemption doctrines are involved. That is,

> There are two strands to ERISA's powerful preemptive force. First, ERISA section 514(a) expressly preempts all state laws "insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a), but state "laws . . . which regulate insurance, banking, or securities" are saved from this preemption. 29 U.S.C. § 1144(b)(2)(A).
>
> Second, ERISA section 502(a) contains a comprehensive scheme of civil remedies to enforce ERISA's provisions. *See* 29 U.S.C. § 1132(a). A state cause of action that would fall within the scope of this scheme of remedies is preempted as conflicting with the intended exclusivity of the ERISA remedial scheme, even if those causes of action would

[8] For a non-ERISA plan, *Yukumoto* held that the statutes take precedence over contrary contractual subrogation rights. 140 Haw. at 299, 400 P.3d at 500.

> not necessarily be preempted by section 514(a).

Cleghorn v. Blue Shield of Cal., 408 F.3d 1222, 1225 (9th Cir. 2005) (citation and internal brackets omitted).

Litigants and courts sometimes confuse the two doctrines, and occasionally use their terminology interchangeably. *See, e.g.*, *Marin Gen. Hosp.*, 581 F.3d at 944-46 ("The parties in this case have not clearly understood the difference between complete preemption under ERISA § 502(a) . . . and conflict preemption under ERISA § 514(a). . . . We may have been partially responsible for the parties' confusion [because] . . . [s]ome of our prior opinions dealing with complete preemption under § 502(a) have used the terminology 'relate to' even though that terminology is relevant to conflict preemption under § 514(a) rather than complete preemption under § 502(a).") (citations omitted). Further, applying § 514 is sometimes difficult because "congressional language seems simultaneously to preempt everything and hardly anything[.]" *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002). "While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time." *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 740 (1985).

"Complete preemption under § 502(a) is 'really a jurisdictional rather than a preemption doctrine, as it confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law

claim.'" *Marin Gen. Hosp.*, 581 F.3d at 945 (quoting *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Tr. Fund*, 538 F.3d 594, 596 (7th Cir. 2008) (brackets omitted)). "But . . . § 502(a) *conflict* [or "complete"] preemption is distinct from *express* preemption [under § 514]." *Fossen*, 660 F.3d at 1111 (citation omitted). "Whether or not the state [law] is exempt from § 514 . . . express preemption, it may still be conflict preempted under § 502(a)[.]" *Id.* at 1112. That is, "[p]reemption under ERISA § 502(a) is not affected by [§ 514]." *Cleghorn*, 408 F.3d at 1226 n.6. "[T]he question whether a law or claim 'relates to' an ERISA plan is not the test for complete preemption under § 502(a)(1)(B). Rather, it is the test for conflict preemption under § 514(a)." *Marin Gen. Hosp.*, 581 F.3d at 949.

With this background, HMAA raises two interrelated arguments in favor of preemption: First, it argues that the Plan's terms control—regardless of § 514—because the court has already determined that Hawaii law is completely preempted under § 502(a). Second, it maintains that Hawaii law is expressly preempted under ERISA § 514(a), and is not saved from such express preemption under ERISA § 514(b)(2)(A). The court addresses each argument in turn.

B. Hawaii Law Can Provide The "Relevant Rule of Decision" For This § 502(a) Action

As detailed previously, the court concluded when denying Rudel's Motion to Remand that Rudel was

seeking a remedy under Hawaii law that could have been brought under § 502(a), and there was no other independent legal duty implicated by HMAA's actions. *Rudel*, 2016 WL 4083320, at *2-3. Because the court concluded that ERISA completely preempts Rudel's state-law cause of action under § 502(a), HMAA argues that the court can summarily conclude that the subrogation/reimbursement provisions in its ERISA Plan are valid regardless of whether state law might otherwise be "saved" from express preemption under § 514(b)(2)(A). HMAA points to *Davila*, which reasoned that "[u]nder ordinary principles of conflict pre-emption . . . even a state law that can arguably be characterized as 'regulating insurance' will be preempted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Davila*, 542 U.S. at 217-18.

And, at first glance, HMAA's argument appears to make sense. Usually, a "preempted" law is not enforceable, and here "[p]reemption under ERISA § 502(a) is not affected by [§ 514(b)(2)(A)]." *Cleghorn*, 408 F.3d at 1226 n.6. Indeed, HMAA relies on a subsequent order in *Noetzel* that appears to have adopted such reasoning in cursorily granting summary judgment on the merits to the health insurer:

> The present motion seeks a substantive ruling that Noetzel's claims are preempted by ERISA. That is precisely what the court determined in declining to remand Noetzel's claims. That is, although Noetzel pled her claims as if they were based purely on state

> law, this court found federal questions raised because Noetzel's claims were completely preempted by ERISA. Consistent with the reasoning in both the denial of remand and the denial of reconsideration of that remand order, this court grants partial summary judgment to HMSA, determining that Noetzel's claims are preempted by ERISA for the very reasons set forth in this court's earlier orders on the subject.

Noetzel v. Haw. Med. Serv. Ass'n, 2016 WL 7444939, at *3 (D. Haw. Dec. 27, 2016).

Upon closer examination, however, the issue is not so simple. Such reasoning does not fully recognize the distinction between § 502(a) and § 514. Moreover, even if a state-law claim "duplicates, supplements, or supplants" a § 502(a) remedy, it does not necessarily follow that parts of that state law cannot be enforced. Rather, sometimes saved state law provides a "relevant rule of decision" for a § 502(a) action. *See, e.g.*, *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 377 (1999) (reasoning that because a state law "notice-prejudice rule complements rather than contradicts" ERISA's rules regarding handling of claims, it "supplied the relevant rule of decision for this § 502(a) suit"); *id.* at 376 n.7 ("Ward has sued under § 502(a)(1)(B) for benefits due, and seeks only the application of saved state insurance law as a relevant rule of decision in his § 502(a) action."); *Roche v. Aetna, Inc.*, 167 F. Supp. 3d 700, 709 (D.N.J. 2016) ("[P]reemption of a claim does not mean preemption of an entire theory of suit. A state law claim may be preempted, but if the claim is under a law or

regulation that is saved under ERISA § 514(b)(2)(A), then that law or regulation can 'suppl[y] the relevant rule of decision for [an ERISA] § 502(a) suit' so long as it is not providing relief above and beyond what ERISA § 502 would provide.") (quoting *Ward*, 526 U.S. at 377). In short, the terms of the state law must be examined.

Stated succinctly, "ERISA's saving clause still ha[s] meaning[.]" *Haw. Mgmt. All. Ass'n v. Ins. Comm'r*, 106 Haw. 21, 33, 100 P.3d 952, 964 (2004). "[T]he Hawaii legislature may continue to 'regulate insurance' so long as the legislature does not create a 'cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy.'" *Id.* (quoting *Davila*, 542 U.S. at 209) (brackets omitted)). "[A] state law that 'regulates insurance' is not preempted so long as it does not create a new claim for relief and does not enlarge a claim for benefits beyond that available in § [502(a)]." *Id.* at 34, 100 P.3d at 965.

Singh exemplifies the analysis (in nearly the same context that this court now faces). In *Singh*, the Fourth Circuit examined a Maryland anti-subrogation law, ultimately concluding that it was saved from express preemption under § 514(b)(2)(A) as a law that "regulates insurance" under the test enunciated in *Miller*, 538 U.S. at 342. *See Singh*, 335 F.3d at 286. In so doing, it reasoned:

> [W]hile a State law purporting to supply additional *remedies* to claimants under ERISA plans would impermissibly compete with § 502(a) remedies, and therefore not be saved from preemption as a result of the limited

> exception from the saving clause, a State law simply mandating or prohibiting certain terms of policy coverage does not force a choice between State regulation of insurance and the prescribed remedies of § 502(a) and therefore may be saved under § 514(b)(2)(A).

Id. at 287-88. The Maryland anti-subrogation provision "does not depend on any particular remedy but operates simply to define the scope of a benefit provided to members of HMOs in Maryland—i.e., entitlement to retain their full benefit and not have it reduced by recoveries from third parties." *Id.* at 288-89. "In this sense, it does not differ from any other State law mandating or regulating a contractual benefit." *Id.* at 289. Because the law "does not supplement or supplant ERISA's exclusive remedies . . . it remains 'saved' and therefore 'supplies the relevant rule of decision' in a § 502(a) claim to enforce the provision of State law[.]" *Id.* (quoting *Ward*, 526 U.S. at 377). "A State law preserved as a regulation of insurance under § 514(b)(2)(A) may supply a substantive term or mandate a benefit in an employee benefit plan, but once that term or benefit becomes part of the plan, a suit to enforce it may only be brought under § 502(a)." *Id.*

Singh went on to examine whether the action had been properly removed from state court under § 502(a). It faced a complaint that "relying on state-law causes of action . . . seeks some remedies that undoubtedly fall within the scope of § 502(a), even if others might fall outside of its scope." *Id.* at 290. For that reason, the action was completely preempted, and the petitioner was

limited to "those remedies set forth in § 502(a)." *Id.* at 292. But *Singh* recognized that the relief sought—application of the Maryland anti-subrogation law—could continue in district court in a § 502(a) action:

> Singh's State common-law claims are claims for benefits due under the terms of an ERISA plan and are therefore "completely preempted," such that federal removal jurisdiction exists. In reaching the conclusion that Singh's claims seek to enforce a term of the Prudential plan, we conclude that, although the Maryland HMO Act 'relates' to an employee benefit plan, it is saved as a State regulation of insurance that does not conflict with § 502(a) of ERISA, such that it defines a term of the ERISA plan. Because Singh's claims seek to enforce a term of the Prudential plan, as so modified by State law, they are within in the scope of § 502(a) and must be adjudicated as federal claims under that section.

Id. at 292-93. Rather than upholding the dismissal, *Singh* remanded "for consideration of plaintiff's claims to the extent they fall within the scope of § 502(a) of ERISA," while "express[ing] no opinion on whether all of the relief requested in the current complaint is consistent with the remedies supplied under § 502(a)." *Id.* at 293.

This analysis applies here. Parts of § 663-10 *do* create a cause of action that "duplicates, supplements, or supplants" a § 502(a) remedy. It requires "the court . . . [to] determine the validity of any claim of a lien against the amount of the judgment or settlement" in

"any civil action in tort." HRS § 663-10(a). And where there is no civil action pending, it authorizes "any party [to] petition a court of competent jurisdiction for a determination of the validity and amount of any claim of lien." *Id.* At least to that extent, § 663-10 clearly supplements ERISA's remedial scheme under § 502(a), and so the action is completely preempted for purposes of removal jurisdiction.

But the Petition must now be decided as a § 502(a) action. As such, § 431:13-103(a)(10) can still apply (if it is saved from express preemption as a law "which regulates insurance" under § 514(b)(2)(A)). By itself, § 431:13-103(a)(10) does not provide a remedy.[9] It provides "no new cause of action under state law and authorizes no new form of ultimate relief." *Rush Prudential*, 536 U.S. at 379. Rather, as in *Singh*, it can "operate[ ] simply to define the scope of a benefit provided" to members of HMAA's Plan, "i.e., entitlement to retain their full benefit and not have it reduced by recoveries from third parties." *Singh*, 335 F.3d at 288-89. That is, § 431:13-103(a)(10)—which specifically incorporates § 663-10's limitations on the scope of reimbursement allowable under Hawaii law—can supply the relevant

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[9] If there were a private remedy to enforce § 431:13-103(a)(10), it might well be completely preempted by § 502(a). But, as HMAA itself argues, there is no private cause of action to enforce § 431:13-103. ECF No. 53 at 8-9; *see, e.g.*, HRS § 431:13-107 ("All remedies, penalties and proceedings set forth in this article are to be invoked solely and exclusively by the [Insurance] commissioner."); *Wittig v. Allianz, A.G.*, 112 Haw. 195, 206 n.5, 145 P.3d 738, 749 n.5 (Haw. Ct. App. 2006) ("There is no private cause of action for violations of HRS § 431:13-103[.]").

rule of decision in the § 502(a) action. *See also Roche*, 167 F. Supp. 3d at 710 ("The [saved] subrogation prohibition contained [in a New Jersey administrative code] therefore 'supplies the relevant rule of decision' for any ERISA § 502(a) claim.") (quoting *Ward*, 526 U.S. at 377).

HMAA argues that because its Plan is an ERISA plan, its terms must apply precisely *because* they conflict with § 431:13-103(a). ECF No. 40-1 at 16; ECF No. 49 at 9 ("[I]n an action brought under § 502(a)(3) based on an equitable lien by agreement, the terms of the ERISA plan govern.") (quoting *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 106 (2013)). But HMAA takes this conclusory phrase too far—the Supreme Court has long rejected an insurer's "'contra plan term' argument [which] overlooks controlling precedent and makes scant sense." *Ward*, 526 U.S. at 375. The Supreme Court "ha[s] repeatedly held that state laws mandating insurance contract terms are saved from preemption under [§ 514(b)(2)(A)]." *Id.* (citations omitted). Under HMAA's interpretation, "States would be powerless to alter the terms of the insurance relationship in ERISA plans; insurers could displace any state regulation simply by inserting a contrary term in plan documents. This interpretation would virtually 'rea[d] the saving clause out of ERISA.'" *Id.* at 376 (quoting *Metro. Life*, 471 U.S. at 741); *see also*, *e.g.*, *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan*, 856 F.3d 686, 694 (9th Cir. 2017) (reiterating *Ward's* reasoning that "[t]his interpretation would virtually 'read the savings clause out of ERISA'").

The remaining question, then, is whether § 431:13-103(a)(10) (and perhaps other aspects of Hawaii law) is actually saved from preemption under § 514(b)(2)(A). The court now turns to that question.

C. Section 431:13-103(a) is Saved Under ERISA § 514(b)(2)(A)

To reiterate, ERISA § 514(a) expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). But ERISA § 514(b)(2)(A) saves from preemption "any law of any State which regulates insurance, banking, or securities." *Id.* § 1144(b)(2)(A).

The parties do not dispute that the Hawaii law at issue "relates to" HMAA's Plan. *See, e.g.*, *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 842 (9th Cir. 2009) ("It is well-established that a law which regulates what terms insurance companies can place in their policies regulates insurance companies.") (citations omitted); *Singh*, 335 F.3d at 284 ("State antisubrogation laws 'relate to' an employee benefit plan.") (citation omitted). The question, however, is whether § 431:13-103(a)(10) or § 663-10 "regulates insurance" for purposes of § 514(b)(2)(A).

A two-part test applies to make that determination: "First, the law must be 'specifically directed toward entities engaged in insurance,' and second, it 'must substantially affect the risk pooling arrangement between the insurer and the insured.'" *Orzechowski*,

856 F.3d at 693 (quoting *Miller*, 538 U.S. at 342). "ERISA's saving clause 'saves laws that regulate *insurance*, not insurers.'" *Id.* (quoting *Miller*, 538 U.S. at 334).

"A law is specifically directed toward entities engaged in insurance if it is 'grounded in policy concerns specific to the insurance industry.'" *Id.* (quoting *Ward*, 526 U.S. at 372). "[L]aws of general application that have some bearing on insurers do not qualify." *Miller*, 538 U.S. at 334. Under *Miller*, a state law that "impos[es] conditions on the right to engage in the business of insurance" falls under the savings clause. *Id.* at 338.

A law "substantially affects the risk-pooling arrangement between the insurer and insured" if it alters "the scope of permissible bargains between insurers and insureds." *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 845 (9th Cir. 2009) (citing *Rush Prudential*, 536 U.S. at 355). A law that "dictates to the insurance company the conditions under which it must pay for the risk that it has assumed . . . qualifies as a substantial effect on the risk pooling arrangement[.]" *Miller*, 538 U.S. at 339 n.3. This requirement is aimed at ensuring that the laws in question are "targeted at insurance practices, not merely at insurance companies." *Morrison*, 584 F.3d at 844.

Applying these principles, § 431:13-103(a)(10)—falling within Hawaii's insurance code—easily meets both prongs of *Miller*. As its legislative history set forth earlier amply demonstrates, the law was specifically

directed at insurance (indeed, at *health* insurance). The legislature expressly prohibited health insurers (subject to certain exceptions) from denying or limiting coverage because an insured also has a third-party claim for damages. *Yukumoto*, 140 Haw. at 297, 400 P.3d at 498. In return for that prohibition, § 431:13-103(a)(10) allows insurers to seek reimbursement for duplicative benefits received by an insured from a collateral source. But it limits that reimbursement right to special damages as set forth in § 663-10. *Id.* at 295-96, 400 P.3d at 496-97. This was the Hawaii legislature's intent, and the statutory language is not ambiguous. An antisubrogation law that "directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain . . . does not merely have an impact of [sic] the insurance industry; it is aimed at it." *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

Moreover, as the legislative history demonstrates, Act 29 (2000) and Act 228 (2002) in particular of the Hawaii Session Laws are both laws "specifically directed" at health insurance, and both affect the "risk pooling" arrangement between an insured and insurer. *See Yukumoto*, 140 Haw. at 296-97, 400 P.3d at 497-98. Those Acts amended *both* § 431:13-103(a) and § 663-10. Indeed, on that basis, some *non-remedial* provisions of § 663-10 might also be saved,[10] and would be applicable as a "relevant rule of decision." *Ward*, 526

[10] HMAA admits that a court may find that ERISA preempts conflicting portions of state law while leaving other portions intact. ECF No. 61 at 12.

U.S. at 377. It is enough, however, that § 431:13-103(a)(10) itself falls within ERISA § 502(b)(2)(A)'s savings clause.

HMAA emphasizes that § 663-10 is not specifically directed at insurance because it refers to "any person" (not just insureds) and defines reimbursement rights of any "persons or entities" (not just insurers). ECF No. 53 at 11. That is, it "regulates non-insurance parties as well as insurance entities" and "applies in all civil actions, not merely those in which liability insurers will pay the judgment." *Levine v. United Healthcare Corp.*, 402 F.3d 156, 165-66 (3d Cir. 2005). Under this logic, those parts of § 663-10 are "laws of general application that have some bearing on insurers," *Miller*, 538 U.S. at 334, which is insufficient for the law to be "specifically directed" at insurance. *See Levine*, 402 F.3d at 166. Even so, however, this only means that § 663-10 (or parts of it) is not a law "regulating insurance." It does not mean that *all* subrogation laws do not "regulate insurance." *See, e.g.*, *FMC Corp.*, 498 U.S. at 61; *Roche*, 167 F. Supp. 3d at 710. And it certainly does not change the conclusion that § 431:13-103(a)(10) is specifically directed at insurance, and saved from express preemption.

Accordingly, HMAA's arguments fail; Rudel's Petition survives HMAA's ERISA-preemption challenge. It is premature, however, to conclude that Rudel fully prevails on his Motion, i.e., that HMAA is not entitled to any reimbursement. Hawaii law still allows HMAA to be reimbursed for any duplicative recovery that Rudel may have obtained. This is a matter of proof.

Although the settlement agreement between Rudel and Allstate stated that it was a "general damages only" settlement, it may be that HMAA could seek to contest that proposition. Or it may be that HMAA must concede that it has no evidence to contradict that settlement agreement, especially here, given the catastrophic nature of Rudel's injuries. Additional proceedings may be necessary to address the amount of reimbursement (which could be zero).

IV. CONCLUSION

This case aptly demonstrates that applying "the morass of ERISA preemption law," *Morstein v. Nat'l Ins. Servs., Inc.*, 93 F.3d 715, 718 (11th Cir. 1996), can be confusing and difficult. And although at first blush appearing to be inconsistent, the court's conclusion that relevant aspects of Hawaii law are saved from express preemption under ERISA § 514(b)(2) is indeed *consistent* with the court's prior Order concluding that Rudel's Petition is subject to "complete preemption" under ERISA § 502(a) for purposes of removal jurisdiction. Although Rudel invoked remedial aspects of Hawaii law (HRS § 663-10(a)) that § 502(a) completely preempts, saved Hawaii law (at minimum, HRS § 431:13-103(a)(10)) still provides the rule of decision in this particular § 502(a) action.

Consequently, Rudel's Motion for Determination of Validity of Claim of Lien of HMAA, ECF No. 38, is GRANTED in part. HMAA's corresponding Motion for Partial Summary Judgment, ECF No. 40, is DENIED.

HMAA's claim of lien is limited to reimbursement of any duplicative recovery that Rudel may have obtained. The court therefore directs the parties to meet and confer, and then contact Magistrate Judge Richard Puglisi by November 7, 2017 to schedule a status conference to address whether any further proceedings are necessary to determine the amount, if any, of HMAA's lien (and if so, what type of proceeding, e.g., evidentiary submissions or a trial).

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 31, 2017.

[SEAL]

/s/ J. Michael Seabright
J. Michael Seabright
Chief United States
District Judge

Rudel v. Haw. Mgmt. All. Ass'n, Civ. No. 15-00539 JMS-RLP, Order (1) Granting in Part Petitioner's Motion for Determination of Validity of Lien, ECF No. 38; and (2) Denying Respondent's Motion for Partial Summary Judgment, ECF No. 40