

ERISA Advisory

ERISA Preemption is Alive and Well

April 5, 2016

The Employee Retirement Income Security Act of 1974 (ERISA) broadly preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA, with limited exceptions. ERISA, §514(a), 29 U.S.C., §1144(a). On its face, this language federalizes the law of employee benefits and leaves the states without authority to regulate employee benefit plans. Although a number of judicial decisions have attempted over the years to limit ERISA’s preemptive scope, the US Supreme Court’s recent decision in *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016) makes clear that ERISA will preempt state efforts to regulate central areas of plan administration, regardless of the state’s objectives and regardless of the economic costs that the state regulation would impose on employee benefit plans.

For the first 20 years after ERISA was enacted, courts, both federal and state, tended to take an expansive view of preemption. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645 (1995), however, the Supreme Court rejected “uncritical literalism” in favor of a more nuanced approach to interpreting ERISA’s express preemption provision. The conclusion that the Court drew was that ERISA preempts a state law only if it explicitly refers to ERISA-covered plans or is inconsistent with what the Court took to be Congress’ objective in enacting section 514(a), namely, to “eliminate the threat of conflicting and inconsistent State and local regulation.” *Id.* at 657. On that basis, the Court concluded that a hospital price regulation scheme that gave health plans an incentive to insure with Blue Cross/Blue Shield in preference to commercial insurers or HMOs posed no threat of inter-state inconsistency and therefore was not preempted. In a later case, the Court concluded that, in the absence of a specific reference to employee benefit plans, a state law would be preempted if it “govern[ed] . . . a central matter of plan administration” or “interfere[d] with nationally uniform plan administration.” *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001).

In *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997), the Court upheld a gross receipts tax on a hospital operated by an ERISA-covered plan, stating that a strong presumption exists against federal preemption of state laws in the healthcare field, which “has been traditionally occupied by the States.” *Id.* at 814. The Court then held that the plan could not overcome that presumption, because:

This is not a case in which New York has forbidden a method of calculating pension benefits that federal law permits, or required employers to provide certain benefits. Nor is it a case in which the existence of a pension plan is a critical element of a state law cause of action, or one in which the state statute contains provisions that expressly refer to ERISA or ERISA plans.

A consideration of the actual operation of the state statute leads us to the conclusion that the HFA is one of “myriad state laws” of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not “relate to” them within the meaning of the governing statute. . . . Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is preempted by the federal statute.

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Id. at 814-16 (footnotes omitted). *Travelers* and *De Buono* certainly did not give states *carte blanche* to regulate employee benefits, but the conventional wisdom was that they had “*greatly narrowed*” preemption.” *Hattem v. Schwarzenegger*, 449 F.3d 423, 430 (2d Cir. 2006) (emphasis in original).

Gobeille shows that the conventional wisdom was mistaken. Vermont is one of a number of states that have enacted laws requiring health plans to report extensive data concerning medical claims, with no exclusion for plans covered by ERISA. The rationale, as summarized by the dissent in *Gobeille*, is “to serve compelling interests, including identification of reforms effective to drive down health care costs, evaluation of relative utility of different treatment options, and detection of instances of discrimination in the provision of care.”

Liberty Mutual Insurance Co. maintains a self-funded health plan with over 80,000 participants in 50 states, of whom only a trivial number live in Vermont. The state ordered the plan’s third party administrator “to transmit to a state-appointed contractor all the files it possessed on member eligibility, medical claims, and pharmacy claims for Vermont members. . . . [Liberty Mutual], concerned in part that the disclosure of confidential information regarding its members might violate its fiduciary duties under the Plan, instructed Blue Cross not to comply.” The company then filed suit to prevent Vermont from enforcing its order, arguing that ERISA preempted the data collection law.

Liberty Mutual’s argument was that, if Vermont’s law were not preempted, its plan would be exposed to “the threat of conflicting and inconsistent State and local regulation.” Six of the eight US Supreme Court Justices agreed, albeit with an interesting concurrence by Justice Clarence Thomas. The majority held that state reporting mandates impinged on “reporting, disclosure, and recordkeeping [requirements that] are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA.” That was more than enough of a defect. According to *Egelhoff*, either the connection with “a central matter of plan administration” or interference with “nationally uniform plan administration” would be sufficient for preemption, and the Court here concluded the law was defective on both grounds:

The fact that reporting is a principal and essential feature of ERISA demonstrates that Congress intended to pre-empt state reporting laws like Vermont’s, including those that operate with the purpose of furthering public health. The analysis may be different when applied to a state law, such as a tax on hospitals . . . the enforcement of which necessitates incidental reporting by ERISA plans; but that is not the law before the Court. Any presumption against pre-emption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does.

The Court did not demand that the employer quantify the burden imposed by the state law. It was enough to show “the possibility of a body of disuniform state reporting laws and, even if uniform, the necessity to accommodate multiple governmental agencies. A plan need not wait to bring a pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs.”

The majority thus rejected the central counterargument of Vermont, the US Solicitor General as *amicus curiae*, and the dissent: that ERISA and Vermont’s data collection law “serve different purposes” and that the difference in purpose necessarily meant that the state law did not affect “a central matter of plan administration.” Hence, in the dissent’s view, a burden imposed by state law would justify preemption only if it duplicates federal requirements or “effectively dictate[s] how a plan is designed or administered.” As to concern with having to comply with potentially 50 different sets of state reporting rules, the dissent remarked that “diversity is a hallmark of our political system and has been lauded in this Court’s opinions.”

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Justice Stephen Breyer and Justice Thomas, in addition to joining the majority opinion, filed concurrences. Justice Breyer's concurrence emphasized the practical difficulty of complying with divergent state laws and suggested that medical claims data, if as essential as Vermont and the dissent asserted, would best be obtained through joint state and federal efforts.

Justice Thomas struck out in an unexpected direction. While he agreed that the majority opinion followed from Court precedent, he expressed, "doubt whether §[514] is a valid exercise of congressional power and whether our approach to ERISA pre-emption is consistent with our broader pre-emption jurisprudence." Justice Thomas stated that section 514 "may be the most expansive express pre-emption provision in any federal statute" and that it "raises constitutional concerns." According to Justice Thomas, the fact that "Congress can regulate some aspects of ERISA plans pursuant to the Commerce Clause does not mean that Congress can exempt ERISA plans from state regulations that have nothing to do with interstate commerce." However, Justice Thomas' concurrence does not reach any definite conclusion. Left to his own devices, Justice Thomas presumably would examine each challenged state law to ascertain whether it deals with an area in which the Commerce Clause grants Congress legislative authority. How far the Commerce Clause reaches is, of course, a matter of controversy among the members of the Court.

Although prior Supreme Court decisions had suggested as much, *Gobeille* makes clear that reporting, disclosure, and recordkeeping are fundamental ERISA plan administration activities, and that ERISA will preempt state laws that purport to directly regulate employee benefit plans in these areas regardless of whether they "conflict" with any requirements imposed by ERISA. At the conclusion of the Court's opinion, the majority in *Gobeille* observed that, although the Affordable Care Act's (ACA) "anti-pre-emption" provision (see 42 U.S.C. § 18041(d)) "might prevent any new ACA-created reporting obligations from pre-empting state reporting regimes like Vermont's," the reporting, disclosure, and recordkeeping requirements of ERISA have their own preemptive force under section 514(a) of ERISA. What impact this may have on state laws that are expressly contemplated under the ACA remains to be seen.

One last point deserves mention. Although the plan at issue in *Gobeille* was self-funded, the Supreme Court's holding that the Vermont reporting law "related to" plans would apply equally to insured plans. To escape preemption with respect to insured plans, the state would have to establish that the law "regulates insurance" within the meaning of the savings clause in ERISA § 514(b)(2)(B). A state law must satisfy two requirements to be deemed a regulation of insurance: (1) a state law must be "specifically directed toward entities engaged in insurance," and (2) a state law must "substantially affect the risk pooling arrangement between the insurer and the insured." *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329, 342 (2003). We question whether a state reporting law like Vermont's could satisfy the second requirement.