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ERISA Preemption Litigation

Preserving the Defense and Crafting Benefit Plans to Minimize State Lawsuits

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Todd D. Wozniak, Partner, **Greenberg Traurig**, Atlanta

Michael G. Monnolly, Partner, **Alston & Bird**, Atlanta

James P. McElligott, Partner, **McGuire Woods**, Richmond, Va.

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ERISA Preemption

By: Todd D. Wozniak

What Is ERISA Preemption?

- ERISA expressly supersedes “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...”. 29 U.S.C. § 1144(a).
- Absent a statutory exception, ERISA preempts not only state statutes, but also state common law theories of recovery which relate to ERISA plans. See 29 U.S.C. § 1144(c)(1) (defining the term “State law” contained in 29 U.S.C. § 1144(a) to include “all laws, decisions, rules, regulations, or other State action having the effect of law, of any State”); Aetna Health, Inc. v. Davila, 542 U.S. 200, 216 (2004) (any state law claim based on the terms of a plan is preempted)

What Is ERISA Preemption?

- In interpreting the phrase “relates to,” the Supreme Court has held that a state law claim is preempted if it has a connection with or reference to a benefit plan. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).
- A state law may ‘relate to’ a benefit plan, and thereby be preempted, even if the law is not specially designed to affect such plans, or the effect is only indirect. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).
- This phrase has been interpreted broadly.

What Exemptions Exist To ERISA Preemption?

- Cause of actions which arose before January 1, 1975 are not preempted by ERISA. 29 U.S.C. § 1144(b)(1).
- Other federal laws are not preempted if preemption would alter, amend, modify, invalidate, impair or supersede them. 29 U.S.C. § 1144(d).
- State laws which regulate insurance, banking or securities are also exempt from ERISA. 29 U.S.C. § 1144(b)(2)(A).
 - Notwithstanding this savings clause, these state laws will remain preempted to the extent they allow plan participants “to obtain remedies under state law that Congress rejected in ERISA.” *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 378-379 (2002) (state causes of action that provide a “form of ultimate relief in a judicial forum that add[] to the judicial remedies provided by ERISA” are preempted regardless of the savings clause).

What Exemptions Exist To ERISA Preemption?

- The current test for determining whether a law regulates insurance (and, thus, is saved from ERISA preemption) is set forth in Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003):
 - (1) The state law must be specifically directed toward entities engaged in insurance; and
 - (2) The state law must substantially affect the risk pooling arrangement between the insurer and the insured.
- Under this test, the Fifth Circuit upheld a Virginia law regulating insurers ability to recover from third-parties on behalf of insureds as it was (1) specifically directed at insurance companies; and (2) it alters the permissible bargains between insurers and insureds by telling them what bargains are acceptable. See Benefit Recovery, Inc. v. Donelon, 521 F.3d 326 (5th Cir. 2008)



“Pay or Play” Health Care Mandates

By: Todd D. Wozniak

What Are “Pay or Play” Laws?

- State, county or city health care initiatives which require employers to either pay an assessment to the state, county, or city or contribute to employee healthcare or premiums

- Example:

The City of Atlanta enacts an ordinance that requires employers with more than 50 full-time employees to contribute 10% of the premium cost of its health plan for all full-time employees or contribute \$1,000 per employee annually to the City’s health care fund for low income persons

What Are ERISA's Implications For "Pay Or Play" Laws?

- The Courts are split as to whether "pay or plays" laws are preempted by ERISA
 - The Fourth Circuit held Maryland's law was ERISA preempted in Retail Industry Leaders Assoc. v. Fiedler, et al., 475 F.3d 180 (4th Cir. 2007), i.e., the "Wal-mart" case
 - The Ninth Circuit held that San Francisco's ordinance was not preempted in Golden Gate Restaurant Assoc. v. City of San Francisco, et al., 546 F.3d 639 (9th Cir. 2008)

Retail Industry Leaders Assoc. v. Fiedler

- In 2006, Maryland enacted the “Fair Share Act” which required private employers with more than 10,000 workers to either spend at least 8 % of payroll on employee health services or pay the shortfall to the State to help fund its Medicaid program.
 - The law was widely referred to as the “Wal-mart law” as Wal-mart would have been the only employer subject to the law
- The Fourth Circuit Court of Appeals held that the law was preempted by ERISA because of its “connection with” an employee health benefits program
- The Act effectively mandated increased ERISA benefits as no reasonable employer would opt to pay a penalty to the State rather than contribute to its ERISA plan on behalf of its employees

Golden Gate Restaurant Assoc. v. City of San Francisco

- In 2006, San Francisco passed an ordinance that requires employers with 100 or more employees to pay \$1.76 per hour for health care expenditures or make payments to the City for the benefit of their covered employees (smaller businesses and non-profits had to pay a lower hourly amount)
- Additionally, the Ordinance imposes reporting requirements on covered employers, including a requirement that the employer maintain “accurate records of health care expenditures” and “proof of such expenditures”
 - Failure to maintain these records creates a presumption that the employer did not make the mandatory health care expenditures and subjects the employer to penalties

Golden Gate Restaurant Assoc. v. City of San Francisco

- The Ninth Circuit Court of Appeals held that San Francisco's ordinance was not ERISA preempted
- The Court rejected the Association's argument that the City-payment option created an ERISA plan
- The Court also rejected the Association's argument that the requirement that employers make payments at certain levels was sufficiently related to the ERISA plans of covered employers
 - To reach this result, the Court relied on the presumption against preemption because it held that the Ordinance operated in a field (the provision of services to low income persons) traditionally operated by the State

Reconciliation Of These Decisions

- The Ninth Circuit Court of Appeals addressed and distinguished the Fiedler decision in finding that San Francisco's Ordinance was not preempted by ERISA
- In contrast to the law in Fiedler which gave the employer no meaningful choice but to alter the existing structure of its ERISA plan, the Ordinance allows employers to make payments to the City's health care fund
 - If payments are made into the health care fund, an employer's employees are eligible for free or discounted enrollments in the City's health care plan (i.e., there are tangible benefits associated with the City payments)
 - Thus, employers subject to the Ordinance have a meaningful alternative to establishing or altering their ERISA plans

What Is The Likely Outcome Of An ERISA Preemption Challenge To A “Pay Or Play” Law?

- Unfortunately, until the Supreme Court resolves the conflict among the Circuit Courts, it is not possible to predict with great certainty whether ERISA will be found to preempt a specific “pay or play” law
- Fortunately, the Supreme Court is currently considering whether to grant certification on this very issue
 - On June 5, 2009, a petition for a writ of certiorari was filed by the Golden Gate Restaurant Association
 - On October 5, 2009, the U.S. Supreme Court invited the Obama administration to weigh in on the case

Supreme Court Review

- The Supreme Court may find that San Francisco's "pay or play" Ordinance is preempted by ERISA
 - Such a finding would be consistent with the Fourth Circuit's opinion in Fiedler and Supreme Court authority interpreting ERISA preemption broadly
 - It would also be consistent with an employer's right to amend or eliminate its welfare plans
 - The DOL's response to the Supreme Court's invitation for briefing will be telling as the DOL previously filed an amicus brief in support of the Restaurant Association (during the Bush administration)



State Law FMLA Mandates

By: Todd D. Wozniak

State FMLA Statutory Mandates

- The FMLA specifically provides that nothing in the Act “shall be construed to supersede any provision of State or local law that provides greater family or medical leave rights than the rights established under this Act.” 29 U.S.C. § 2651(b)
- A number of states, including California, Washington, Wisconsin, Connecticut, Hawaii, Maine and the District of Columbia have family and medical leave acts that provide for greater benefits than afforded under the Federal Family Medical Leave Act

State FMLA Statutory Mandates

- On May 31, 2005, the DOL issued an opinion letter regarding whether certain provisions of Washington's Family Care Act containing leave substitute provisions is ERISA preempted where a covered employer maintained an ERISA qualified sick leave plan
- The DOL determined that Washington's Act was not preempted by ERISA
- In doing so, the DOL engaged in "double-dipping"

State FMLA Statutory Mandates

- Specifically, the DOL relied on ERISA's savings clause which provides that nothing in ERISA shall be construed to alter, impair, or supersede any law of the United States
- The DOL then turned to the FMLA and highlighted that it provided that nothing in the Act shall be construed to supersede any provision of State or local law which provides greater rights than the FMLA
- Thus, the DOL reasoned that because the FMLA expressly allows more generous state leave laws (and Washington's law did just that), the law was not preempted by ERISA under ERISA's federal law savings clause

State FMLA Statutory Mandates

The DOL's opinion failed to discuss or even mention the Supreme Court's decision in Shaw v. Delta Air Lines, 463 U.S. 85 (1983), where the "double savings clause" argument was rejected:

"The Court of Appeals properly rejected the simplistic "double saving clause" argument - that because ERISA does not preempt Title VII, and Title VII does not preempt state fair employment laws, ERISA does not preempt such laws. Title VII does not transform state fair employment laws into federal laws that § 514(d) saves from ERISA preemption. Furthermore, since Title VII's saving clause applies to all state laws with which it is not in conflict, rather than just to nondiscrimination laws, and since many federal laws contain non-preemption provisions, the double saving clause argument, taken to its logical extreme, would save almost all state laws from preemption."

ERISA Preemption Litigation

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Michael G. Monnolly

Alston & Bird LLP

Complete Preemption verses Conflict Preemption

Complete Preemption – arises under ERISA Section 502(a) and is a jurisdictional concept.

- Well-pleaded Complaint Rule – a plaintiff is ordinarily entitled to remain in state court so long as her complaint does not, on its face, affirmatively allege a federal claim.
- Complete preemption doctrine is the exception to the well pleaded complaint rule. Provides a basis for federal question jurisdiction, and thus removal, where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim.
- To remove under complete preemption doctrine you must establish that the state-law claims are entirely encompassed by § 502(a).

Complete Preemption verses Conflict Preemption

- Complete Preemption Test – a claim is completely preempted where:
 - The party asserting the state law claim could have asserted the claim under ERISA Section 502(a); and
 - The defendant's actions do not implicate any other any other independent legal duty.
 - Example: claim by healthcare provider against TPA for underpayment of a medical claim in which the rates of reimbursement are set forth in a preferred provider contract. Healthcare provider does not have standing to sue in its own right under 502(a) and the claim is based on independent legal duty –the preferred provider contract.

Complete Preemption verses Conflict Preemption

- Conflict or Express Preemption - arises under ERISA Section 514. This is a defensive doctrine, meaning you raise it as an affirmative defense to a state law claim in either federal or state court.
 - Conflict preemption does not confer federal question jurisdiction for purposes of removal.
 - This is the “relates to” analysis. Any claim that relates to and ERISA plan is preempted under Section 514.
 - A claim may be conflict preempted, but still not completely preempted for purposes of removal.

Developments in Pension & 401(k) Cases

- Courts continue to limit the scope of ERISA Preemption consistent with recent Supreme Court decisions. One area where the courts have permitted greater latitude for state law claims are claims by plans or participants against third party providers, such as actuaries, accountants and financial service providers.
 - Paulsen v. CNF Inc., 559 F.3d 1061 (9th Cir. 2009) Former employees sued consulting firm providing actuarial services to plans for professional negligence under California law. Held state law claims were not expressly or conflict-preempted under ERISA.
 - Hausmann v. Union Bank of California, N.A., 2009 WL 1325810 (C.D. Cal., 2009) ERISA did not completely preempt state law claims of alleged post-plan misfeasance asserted by a pension plan and defined benefit pension plan trust against banks, a life insurer, and bank employees in connection with the sale of a retirement plan. The state law claims did not relate to the plan, its administration, or its benefits.
 - Heritage Equity Group 401(k) Savings Plan v. Crosslin Supply Co., Inc., --- F.Supp.2d ----, 2009 WL 1650484, (M.D. Tenn., 2009) Court held that the plan's state law unjust enrichment claim asserted against two other ERISA plans was completely preempted by ERISA because the claim sought to supplement existing remedies under ERISA, namely a constructive trust under 502(a)(3).
 - As You Sow v. AIG Financial Advisors, Inc., 584 F.Supp.2d 1034 (M.D. Tenn., 2008) claims by trustee and sponsor of 401(k) plan against AIG based on broker dealers embezzlement of plan funds was not preempted by ERISA. Court found that claims were exempt from preemption under savings clause applicable to state securities laws.

Developments in Pension & 401(k) Cases

- Another area where the courts have shown greater willingness to restrict the scope of ERISA preemption are claims by plan participants that seek to challenge corporate conduct that adversely impacts a benefit plan.
 - Curry v. CTB McGraw-Hill, LLC, 296 Fed. Appx. 563 (9th Cir. 2008) independent contractors' claims for coverage under employer's pension and welfare plans was not completely preempted by ERISA because plaintiffs did not have standing to assert claims under ERISA Section 502(a).
 - Dieffenbach v. CIGNA, Inc., 310 Fed.Appx. 504 (3rd Cir. 2009) State law claims brought by employee seeking declaratory and injunctive relief invalidating general liability waiver required by employer in exchange for benefits ERISA regulated severance plan were not completely preempted by ERISA.
 - Johnson v. Couturier, 572 F.3d 1067 (9th Cir., 2009) in case involving claims by ESOP participants court found that directors were subject to ERISA fiduciary duties for business decisions resulting in allegedly excessive compensation of president of closely held corporation that was owned by the ESOP. Court also found that state law that permitted advancement of defense costs to president and directors was preempted by ERISA.

Discretionary Clause Litigation & IRO

Statutes

- Numerous states including California, Michigan and Hawaii have passed state insurance laws / regulations that forbid insurance companies from issuing policies in their states that contain grants of discretion to the claim fiduciary / insurer to decide claims and interpret the terms of the plan.
 - Impact – all claims decided under that policy are subject to a de novo standard of review. Courts have generally held that such laws are saved from ERISA preemption as laws regulating insurance.
 - American Council of Life Insurers v. Ross, 558 F.3d 600 (6th Cir., 2009) upheld Michigan State Insurance Commissioner rule barring use of discretionary clauses in life, health and disability policies issued in state of Michigan. Court held that the insurance regulation was not inconsistent with ERISA's civil enforcement mechanism, such that it would fall outside of the savings clause, because the standard of review is not statutorily mandated and, in any event, under Firestone de novo review is the default standard of review.

Discretionary Clause Litigation & IRO Statutes

- Independent Review Organizations – a number of states, including Georgia, have implemented IRO statutes which permit plan participants to pursue an independent review of a final claim denial by a state approved body. The decision of this body is then binding on the plan administrator.
 - These statutes do not apply to self insured plans under the deemer clause in Section 514.
 - Corporate Health Ins., Inc. v. Texas Dept. of Ins., 314 F.3d 784 (5th Cir. 2002) State law requiring independent review of HMO medical necessity determinations not preempted by ERISA.

Prompt Payment Statutes & Other Healthcare Provider Claims

- Preemption of claims arising under prompt payment or any willing provider statutes turn on the nature of the claim at issue. In general, if the claim seeks to challenge the “rate of payment” as opposed to the “right to payment” it is not preempted.
 - Lone Star OB/GYN Associates v. Aetna Health Inc., 579 F.3d 525 (5th Cir. 2009) held that state law claims under prompt payment statute are not completely preempted by ERISA where the claim relates to rate and timing of payment under contract between TPA and medical provider. However, where the claim seeks to challenge a benefit determination (i.e., the right to payment) under the plan terms, it is completely preempted.
 - Schoedinger v. United Healthcare, 557 F.3d 872 (8th Cir. 2009) held that Missouri prompt payment statute was completely preempted by ERISA because it attempted to regulate the timing of payments between the carrier and claimants. Unlike the Lone Star case, the provider in Schoedinger was suing in its capacity as assignee.
 - Quality Infusion Care Inc., v. Humana, 290 Fed. Appx. 671 (9th Cir. 2008) claims by out-of-network healthcare provider under Texas any willing provider statute were completely preempted by ERISA because the healthcare provider was pursuing such claims in its capacity as assignee. The court distinguished similar claims on the basis that the dispute at issue here was over the “right to payment” under the plan and not the “level of payment” under a provider contract.

Prompt Payment Statutes & Other Healthcare Provider Claims

- Third Party Breach of Contract / Misrepresentation Claims. Typically these claims are asserted against a TPA based on an oral representation that a participant is covered for a certain procedure / treatment. The courts are generally finding that such claims are not completely preempted.
 - Catholic Healthcare West-Bay Area v. Seafarers Health & Benefit Plan, 321 Fed.Appx. 563 (9th Cir. 2008) claim by healthcare provider against benefit plan was not completely preempted by ERISA because the claim was based on alleged oral promise between plan and provider and therefore it did not implicate principle ERISA relationships.
 - Great-West Life & Annuity Ins., co., v. Information Systems & Networks Corp., 523 F.3d 266 (4th Cir. 2008) TPA's breach of contract and unjust enrichment claims against plan sponsor to recover payments made to healthcare provider under employer's self-funded health plan are not preempted by ERISA because the claims did not relate to the plan inasmuch as they were based on a service provider contract between the plan and the TPA.
 - Marin General Hosp. v. Modesto & Empire Traction Co., --- F.3d ---, 2009 WL 2882832 (9th Cir. 2009) Held that healthcare providers claim against plan administrator seeking payment of patient's medical expenses, and alleging state-law claims for breach of contract, negligent misrepresentation, quantum meruit, and estoppels were not completely preempted by ERISA because the claims were based on legal obligations independent of the plan.



Plan Drafting Tips for Preserving the ERISA Preemption

James P. McElligott, Jr.

McGuireWoodsLLP

One James Center, Richmond, Virginia

804-775-4329 jmcelligott@mcguirewoods.com

www.mcguirewoods.com

Know What Makes an ERISA Plan.

- Plan, fund or program established or maintained by employer and/or “employee organization.”
- An ERISA Benefit Plan is either
 - “pension plan” provides retirement income or defers income to the termination of employment; or
 - “welfare plan” provides directly or through insurance medical, dental, life, disability, unemployment, vacation, sickness, apprenticeship programs, prepaid legal services, day care centers, scholarship funds, or any benefit described in §302(c) of the Labor Management Relations Act (other than pensions on death or retirement or insurance to provide pensions).
- Severance benefits are addressed specifically in ERISA § 3(2)(B)(i). Generally treated as welfare plans under 29 CFR §2510.3-2(b).

What Makes a Plan a Plan?

- Ongoing Plan administration. *Fort Halifax*, 482 U.S. 1 (1987). No preemption of Maine statute requiring one time severance payment upon plant closure. Employer just had to write a check.
- *Fontenot*, 953 F.2d 960 (5th Cir. 1992) Change in control agreement providing for lump sum of three times earnings not a plan and no preemption
- *Simas*, 6 F3d 849 (1st Cir. 1993) State law requiring severance for certain employees preempted because employer had to determine whether employees were discharged for cause or eligible for unemployment compensation.

Excluded Plans

- Payroll practices for paying vacation, sick leave, jury duty, etc of general assets. 29 CFR §2510.3-12(b)(3). *Mass. v. Morash*, 490 U.S. 107 (1989).
- Plans “maintained solely for the purpose of complying with applicable workers’ compensation laws or unemployment compensation or disability insurance laws.” ERISA § 4(b)(3). *Shaw*, 463 U.S. 85 (1983); *DC v. Washington Bd of Trade*, 506 U.S. 125 (1992).
- Government plans. ERISA § 4(b)(1).
- Church Plans. ERISA § 4(b)(2) unless election made under Internal Revenue Code § 410(d) with respect to ERISA minimum vesting and funding standards for pension plans.
- “Excess Benefit Plans” retirement plans designed to provide benefits that exceed Internal Revenue Code §415 limits. See ERISA § § 3(36) and 4(b)(5).
- Plans maintained outside U.S. primarily for non-resident aliens. ERISA §4(b)(4).

Statutory Exceptions to Preemption

- Savings Clause of ERISA § 514(b)(2)(A): “nothing in [ERISA] shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, and securities.”
 - Insured health plans must comply with state insurance law.
 - “Self-insured” health plans need not comply with state insurance laws.
- “Deemer” clause: no ERISA plan or related trust “shall be deemed to be an insurance company, or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State.” ERISA § 514(b)(2)(A).
- ERISA § 514(b)(5): Exclusion for Hawaii Prepaid Healthcare Act.
- ERISA § 514(b)(7): Qualified Domestic Relations Orders (QDROs).

Drafting Considerations for ERISA Preemption

- Be sure your plan documents show you have an ERISA benefit and “ongoing plan administration.”
 - Summary Plan Description
 - Statement of Material Modifications
 - Annual Form 5500s
 - Other
- Your documents should show your plan is not excluded from ERISA: i.e., government, church, or excess benefit plans.
- If your plan is not insured, make sure that is clear in your Summary Plan Description and Form 5500.

Vacation Trusts

- Some employers have adopted “vacation trusts” funded through Voluntary Employee Benefit Associations (VEBAs) to avoid restrictive state laws governing payment of vacation benefits.
- Considerable litigation over whether these “vacation trusts” are still just payroll practices exempt from ERISA.

Top Hat Plans

- Governed by ERISA, but exempt from ERISA fiduciary, funding and reporting rules if appropriate filing made.
- Primarily for purpose of providing deferred compensation for select groups of management or highly compensated employees.
- Consider whether change in control agreements should be set up as ERISA top hat plans.

Administer Plans to Maintain Preemption.

- File annual 5500's.
- Plan documents should comply with ERISA rules.
- Respond to requests for plan documents.
- Know and follow plan's claims procedures and Department of Labor Regulations on claims.

Understand How “Complete Preemption” Gets Your Lawsuit Out of State Court.

- Must show an ERISA plan. Some federal courts have refused removal from state court where plan documents, including 5500s, were not in compliance with ERISA. Have those documents handy.
- Removal has strict time limits, so move quickly and have what you need in advance.
- All defendants generally need to join in removal. Plan for possible co-defendants.

James P. McElligott, Jr.

Mr. McElligott is a partner in the Richmond, Virginia office of **McGuireWoods LLP**. He handles employee benefits, executive compensation, and labor relations matters for employers and fiduciaries, and has an active litigation and arbitration practice. He is a Fellow of the College of Labor and Employment Attorneys, and is listed in *Chambers USA*, *Best Lawyers in America*, and *SuperLawyers* under both Employee Benefits and Labor and Employment. He is a member of the Employee Benefits Committees of the ABA Sections of Labor and Employment Law and Taxation, a member of the US Chamber of Commerce Employee Benefits Committee, former President of the Federal Bar Association, Richmond Chapter, and former president of the Central Virginia Employee Benefits Council. Mr. McElligott is a Phi Beta Kappa graduate of the University of Illinois and received his law degree, *cum laude*, from Harvard Law School, where he served as Note Editor on the *Harvard Journal on Legislation*.

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