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Employee Benefits & Executive Compensation ADVISORY ▪

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Supreme Court Strikes Down Vermont Health Data Reporting Law as Applied to Self-Funded ERISA Plans: Ruling Could Have Broader Implications

On March 1, 2016, the Supreme Court held that a Vermont law requiring detailed reporting of health data could not be applied to self-funded plans subject to ERISA. In *Gobeille v. Liberty Mutual Insurance Company*, the Court, in a 6-2 decision, held that the Vermont law is preempted by ERISA. The Court said: "The state statute imposes duties that are inconsistent with the central design of ERISA, which is to provide a single uniform national scheme for the administration of ERISA plans without interference from laws of the several States, even when those laws, to a large extent, impose parallel requirements."

The *Gobeille* decision has implications beyond the Vermont law. At least 18 states have similar health data reporting laws, and many other states have been considering such laws. The broad nature of the *Gobeille* decision indicates that other health data reporting laws would also likely be preempted. The decision also may indicate a shift in preemption analysis, potentially opening up a larger window as to what state laws are preempted. Indeed, the Court has already sent one pending preemption case back to the Court of Appeals for revaluation in light of *Gobeille*.

Preemption applies only to plans that are subject to ERISA. Thus, ERISA would not preempt state law as applied to self-funded state and local governmental plans or church plans. Each state law would need to be reviewed to determine the extent to which the law applies to such plans. Further, state laws as applied to insurers generally are not preempted by ERISA. *Gobeille* did not involve a challenge to the law as applied to insurers with respect to fully-insured plans.

The Vermont Law as Applied to Liberty Mutual

As described by the Court, the statute in question requires certain entities that provide and pay for health services to report detailed health-related information, including medical and pharmacy claims data and eligibility information, to a state agency. The reported information is to be compiled into a database reflecting utilization, costs, and resources in Vermont and health care utilization and costs for services provided to Vermont residents in other states. The reporting requirements apply to health insurers, self-funded plans, third-party administrators (TPAs), health care providers, heath care facilities, and government agencies. The specifics of the reporting requirements are determined by a state agency.

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Liberty Mutual's self-funded health plan was not itself subject to the reporting requirement because the number of Vermont residents covered by the plan was fewer than the threshold that triggers mandatory reporting. The plan's TPA, Blue Cross Blue Shield of Massachusetts, Inc., was subject to the reporting requirement. Vermont issued a subpoena ordering Blue Cross to transmit data on Vermont members. Liberty Mutual instructed Blue Cross not to reply and filed suit to seek a declaratory judgment that ERISA preempts application of the Vermont law with respect to data regarding the plan or its members.

ERISA Preemption and Pre-*Gobeille* Case Law

ERISA's preemption provision is broadly stated and provides that, subject to limited exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to ERISA. State laws that regulate insurance, banking or securities are among the exceptions to preemption. However, a state law may not avoid the general preemption provision by deeming a plan subject to ERISA to be an insurance company.

Practice Pointer: Because ERISA does not preempt state law as applied to insurers, many state laws that apply to health insurers will indirectly apply to fully-insured ERISA plans through application of the state law to the insurer. For example, state law health benefit mandates typically apply to fully-insured group health plans, but are preempted with respect to self-funded group health plans. Plans that are not subject to ERISA, such as state and local government plans and church plans, do not receive the benefit of ERISA preemption.

The potential breadth of the statutory provision has led to considerable litigation, including multiple Supreme Court cases. In the words of the Court, if the phrase relate to "were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course." Courts have struggled with trying to provide workable standards relating to preemption given the lack of specificity in the statute.

The Supreme Court cases have produced essentially a two-prong analysis for ERISA preemption cases. First, a state law is preempted if it has a "reference to" ERISA plans. This tends to be a fairly narrow examination. As explained by the Court in *Gobeille*, where "a State's law acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation, that 'reference' will result in pre-emption." Under the second prong, ERISA preempts state laws that have an impermissible "connection with" ERISA plans, meaning that the state law governs a central matter of plan administration or interferes with nationally uniform plan administration. A state law also might have an impermissible connection with ERISA plans if "acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers."

The result of these standards has been a somewhat case-by-case analysis, which typically requires looking at the details of the particular state law and how it fits within the construct and scope of ERISA. This approach has produced a number of themes. For example, health coverage benefit mandates are typically preempted as applied to self-funded plans. Laws that relate specifically to claims administration or that attempt to allow remedies in addition to those provided in ERISA are typically preempted. Other types of laws, however, may not be preempted, particularly if they are broadly applied. As just one example, certain state law taxes have survived ERISA preemption challenges. In *Travelers*[1], the Supreme Court unanimously ruled that a New York law

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[1] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 US 645 (1995).

that imposes a surcharge on hospitalization charges on commercial insurers is not preempted merely because it made the cost of certain insurance more expensive for ERISA plans than other insurance.

Despite the Court's attempt to provide workable standards on preemption, the volume of litigation has continued to grow as new state laws are enacted.

The Court's Analysis in *Gobeille*

The Court's decision was based on an examination of the objectives of ERISA as a guide to the scope of the state law that Congress understood would survive preemption and the nature of the effect of the state law on ERISA plans. The Court noted the extensive reporting, disclosure, and recordkeeping requirements imposed by ERISA, with particular emphasis on the requirements of the annual report as relevant to this case. The Court also noted that the Secretary of Labor has authority to establish additional reporting and disclosure requirements and suggested that the Secretary might be authorized to require reporting of the type of information Vermont was seeking. The Court found that the requirements in ERISA "make plain" that reporting, disclosure, and recordkeeping are central to and an essential part of the uniform system of plan administration contemplated by ERISA and that Vermont's reporting regime would interfere with that uniform system. The Court did not find persuasive the state's argument that the state statute had a different purpose than ERISA. The Court found that the state law "is a direct regulation of a fundamental ERISA function."

Practice Pointer: Self-funded plan sponsors in Vermont should review their practices and TPA agreements to consider what action, if any, needs to be taken to reduce the burden of reporting. Self-funded plan sponsors in other states with similar rules should also review their reporting obligations and determine whether any changes in practices are appropriate.

The concurring and dissenting opinions provide some additional insight into preemption issues. Justice Breyer and Justice Thomas concurred in the majority opinion but wrote separately to make particular points. Justice Breyer wanted "to emphasize that a failure to find pre-emption here would subject self-insured health plans under [ERISA] to 50 or more potentially conflicting information reporting requirements. Doing so is likely to create serious administrative problems." Justice Thomas made a very different point. While concurring in the Court's opinion "because it faithfully applies our precedents" interpreting the statute, Justice Thomas wrote separately because he "has come to doubt whether [ERISA's preemption provision] is a valid exercise of congressional power and whether our approach to ERISA pre-emption is consistent with our broader pre-emption jurisprudence." He noted that, given the breadth of the statute, the Court has abandoned efforts to give the statute its ordinary meaning and has, instead, adopted "atextual but what we thought to be 'workable' standards to construe [the statute]." Justice Thomas urges that, rather than engage in such atextual analysis, the Court should review the constitutionality of the underlying statute.

Justice Ginsburg, joined in her dissent by Justice Sotomayor, would hold the statute not preempted for the same reasons the dissent in the Court of Appeals decision would have held the statute not to be preempted: (1) the reporting requirement imposed by Vermont differs in kind from the reporting required by ERISA, so it is not the kind of state law Congress intended to preempt; and (2) no actual burden had been shown, much less a burden that triggers ERISA preemption. The dissent concluded that "[d]eclaring 'reporting,' unmodified, a central or core ERISA function … passes the line this Court drew in [earlier decisions] when it reined in [ERISA preemption] so that it would no longer operate as a 'super-preemption' provision." Justice Ginsburg also noted that the Court's

opinion could potentially interfere with the ability of states to require reporting for other purposes, such as reporting of plan assets that might be needed in order to assess property taxes.

Implications of the Court's Decision

The Court's decision has implications beyond the Vermont law in question, particularly given the number of other states with similar health care reporting requirements. While each law should be reviewed for details, the *Gobeille* holding indicates there may be a sound basis for challenges to such laws. The Supreme Court has already followed up on the promise that *Gobeille* indicates a shift in preemption analysis. Just a few days after the decision, on March 7, 2016, the Court addressed a case challenging a Michigan law that imposes a tax on health claims paid, including those under self-insured plans. In *Self-Insurance Institute of America v. Snyder*, the Sixth Circuit had held that the tax was not preempted. The Supreme Court has now sent the case back to the Sixth Circuit for consideration in light of *Gobeille*. The principles of *Gobeille* may reach other areas as well. For example, Courts of Appeals have reached conflicting decisions regarding laws relating to pharmacy benefit managers, with conflicting holdings on ERISA preemption by the DC Circuit and the First Circuit on two different state laws described by one court as "nearly identical."

Gobeille may also have reach beyond the health arena. Just how far the decision will ultimately reach is unclear, but it seems clear that the Court intended to set new standards. The decision may also have an impact on states as they continue to consider changes in their laws and the extent to which they will attempt to impose laws on plans that are within the ERISA preemption umbrella.

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