Examining the Role of ERISA in the State Based System of Insurance Regulation: Can Meaningful State Reforms be Achieved in an ERISA-Dominated Marketplace?

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Overview

• What is ERISA?
• What is preemption?
• How did we get here?
• Where are we now?
What is ERISA?

- *The Employee Retirement Income Security Act of 1974* (ERISA) is the Federal law that regulates most pension and health plans in private industry
  - Codified at 29 U.S. Code §§1001 et seq.
What is ERISA?

• ERISA is mostly about pensions
  – Rules about plan participation, coverage, vesting, benefit accrual, contributions and benefits, nondiscrimination & funding

• But ERISA also has general rules about
  – Reporting & disclosure
  – Fiduciary duties & plan administration
  – Claims procedures & appeals
  – Enforcement & remedies
What is Preemption?

- Federal law supersedes State law
  - Federal law “takes the place of” State law
- *Supremacy clause* of the U.S. Constitution dictates that Federal law is the “supreme law of the land.” (art. VI, ¶ 2)
  - *Commerce clause*, too (art. 1, § 8, cl. 3)
- Moreover, *ERISA § 514 expressly* preempts most State laws that “relate to” pension and health plans (29 U.S. Code § 1144)
ERISA’s *Preemption Clause*

- ERISA § 514(a) provides that ERISA “shall supersede *any* and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . . (emphasis added)”

- Sweeping general preemption language — but there are several exceptions
ERISA’s *Savings Clause*

- ERISA’s *savings clause* saves from preemption any State law “which regulates insurance . . . .”
  
  “nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.” ERISA § 514(b)(2)(A)
ERISA’s *Deemer Clause*

- But ERISA’s savings clause is itself subject to an exception
  - The *deemer clause* provides that an employee benefit plan is not to be considered insurance (even if the plan bears and spreads risk)
  - An employee benefit plan shall *not* “be deemed to be an insurance company or other insurer”

ERISA § 514(b)(2)(B)
ERISA and Health Plans: Semi-Preemption

• States can regulate insurance companies and policies, but States cannot regulate *self-insured* health plans
  
  – By self-insuring, an employer can avoid having to pay for State-mandated benefits
    
    • In 2016, 40.7 percent of private-sector establishments reported that they self-insured*
    
    • Small employers can buy stop-loss insurance, which insures them against high costs (e.g., health care costs exceeding $20,000 per beneficiary)

• ERISA was a deal between big business & big unions—mostly to regulate pensions

• In one of his first official acts, new President Gerald Ford signed it on Labor Day, September 2, 1974:
  
  — “Today, with great pleasure, I am signing into law a landmark measure that may finally give the American worker solid protection in his pension plan.”

Legislative History*

- The preemption language was expanded late
  - The last expansion was made at the final meeting of the Conference Committee (July 21)
    - Deemer clause had already been finalized (June 24)
  - Nobody in the health industry really understood the implications of preemption
  - The chief lobbyist for the Health Insurance Association of America was recovering from coronary bypass surgery

The Motivation for Broad Preemption

• Big business & big unions did not want to comply with different laws in 50 States
  – Initially, business and labor did not want their employee benefit plans regulated at all
  – But Federal regulation and uniformity was far preferable to State regulation
  – Hence the preemption language
Then-Current Events Led to Broad Preemption

• A Missouri trial court held that Monsanto’s self-insured health and disability plan was an “insurance business” that needed approval from State insurance department
  • Companies also worried about State health insurance premium taxes

• Unions did not want their pre-paid legal services plans regulated by State insurance departments or State bar associations
Alessi v. Raybestos-Manhattan, Inc.

- New Jersey law prohibiting pension plans from offsetting benefits by the amount of workers’ compensation awards they receive after retirement—PREEMPTED
Shaw v. Delta Air Lines

• 463 U.S. 85 (1983)
• New York disability and pregnancy discrimination laws, as applied to benefits under a plan—PREEMPTED
Metropolitan Life Ins. Co. v. Massachusetts

• 471 U.S. 724 (1985)
• Massachusetts statute requiring insured plans to provide minimum mental healthcare benefits—NOT preempted
Pilot Life Ins. Co. v. Dedeaux

• 481 U.S. 41 (1987)

• Mississippi tort claim for bad faith denial of benefits—PREEMPTED
  – State insurance laws that provide an additional remedy beyond that found in ERISA—PREEMPTED
  – Exclusiveness of ERISA remedies
    • Recover benefits due
    • No punitive damages
    • No juries
FMC Corp. v. Holliday

- 498 U.S. 52 (1990)
- Pennsylvania law that prohibited health plans from collecting from people injured in automobile accidents who recovered from a third party tortfeasor—PREEMPTED
Rush Prudential HMO, Inc. v. Moran

- Illinois law, that required an independent medical review before certain health insurance benefits could be denied—NOT preempted
  - But that law did not provide for any additional claim or remedy outside of ERISA
Aetna Health, Inc. v. Davila

- Texas State law tort claims related to benefits decisions made under health care plans—PREEMPTED
  - But medical malpractice claims against doctors, etc.—NOT preempted
States’ Rights?—Not So Much

- Are the States “laboratories of democracy?”
  » U.S. Supreme Court Justice Louis Brandeis
    (dissenting in New State Ice Co. v. Liebmann, 285 U.S. 262 280, 311 (1932))
    - Massachusetts’ Romneycare survived

- What about repealing ERISA preemption?
  - Not likely
  - Just look at the Affordable Care Act
    • Even more Federal intervention & control
    • Waivers?
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