



***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)

* Paul Fronstin, *Self-Insured Health Plans: Recent Trends by Firm Size, 1996–2016* (Employee Benefit Research Institute, Issue Brief No. 442, Feb. 27, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160036.



Legislative History

- 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.”*

* Pension Benefit Guaranty Corporation, *President Ford Signing ERISA of 1974*, <https://www.pbgc.gov/about/who-we-are/pg/president-ford-signing-erisa-of-1974> (last visited Dec. 3, 2018).



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

* James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 4: The “Deemer” Clause*, 22(1) JOURNAL OF PENSION BENEFITS 3 (Autumn 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576419.



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.

- 451 U.S. 504 (1981)
- 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

- 536 U.S. 355 (2002)
- 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

- 542 U.S. 200 (2004)
- 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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 - *Removing the Legal Impediments to Offering Lifetime Annuities in Pension Plans*, 23(1) CONNECTICUT INSURANCE LAW JOURNAL 31 (Fall 2016), <http://insurancejournal.org/wp-content/uploads/2017/03/2-Forman-1.pdf>;
 - *Tontine Pensions*, 163(3) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 755 (Feb. 2015) (with Michael J. Sabin), <http://www.pennlawreview.com/print/index.php?id=468>; and
 - MAKING AMERICA WORK (Washington, DC: Urban Institute Press, 2006).