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HARVARD LAW SCHOOL

ERISA as a roadblock for states implementing health policy

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Overview

- Introduction
- Major SCOTUS Cases
- Impact on State Health Reform
- Potential Solution

INTRODUCTION

WHAT IS ERISA

ERISA Background

- **Employment Retirement Income Security Act of 1974 (ERISA)**
  - Federal statute setting minimum standards for most voluntarily established pensions and other employee benefit plans
  - Regulation of ERISA plans "exclusively a federal concern."
  - Standardized financial disclosure and reporting requirements, standards of conduct, responsibility and obligation
  - Preemption clause – "'all state laws insofar as they . . . relate to any employee benefit plan"
- **The ERISA preemption clause**
  - Preemption clause – "'all state laws insofar as they . . . relate to any employee benefit plan"
  - The purpose was to allow multistate employers to offer a single, consistent plan to all of their workers, reducing administrative and regulatory burdens while keeping administrative costs low

ERISA AND HEALTH CARE

- **ERISA was never intended to be a health care statute but is one**
  - ERISA does govern employer-sponsored health care plans, or insurance plans in which an employer covers the full financial risk of its employees' claims for health care benefits, because they are a type of employee benefit plan
  - Employer-sponsored insurance covers almost 159 million nonelderly people
  - In 2022, 65 percent of workers who got their health insurance through their employer were enrolled in plans that were at least partially self-funded
  - Larger companies are more likely to offer employer-sponsored health care plans (20% of covered workers at small firms and 82% in large firms are enrolled in plans that are self-funded)

ERISA JURISPRUDENCE THROUGH THE 1990'S

SETTING THE PREEMPTION TEST

ERISA Background

- **Three cases in 1990's articulated the preemption test for many years**
  - New York State Conference of Blue Cross & Blue Shield v. Travelers Insurance Co.
  - California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.
  - De Buono v. NYSA-ILA Med. & Clinical Servs. Fund
- **Supreme Court's interpretation of ERISA preemption clause**
  - State law is preempted if "it has a connection with or reference to such a[n employee benefit] plan."
  - Preemption limited to "state statutes that mandate[] employee benefit structures or their administration."
  - If the state law does not force a plan administrator to adopt certain structures or administrative choices, then ERISA does not apply

GOBEILLE V. LIBERTY MUTUAL (2016)

AN EXPANSIVE PREEMPTIVE DECISION

GOBEILLE

- **Majority Opinion (Kennedy, J.)**
  - ERISA preempts Vermont's APCD
  - Vermont law has a "connection with" ERISA plan
    - ✓ "governs . . . a central matter of plan administration" (reporting, disclosure, and recordkeeping)
    - ✓ "interferes with nationally uniform plan administration"

- **Gobeille was a major expansion of ERISA's reach into health policy**
  - The first time the Court considered future problems with uniformity in ERISA preemption jurisprudence, rather than focusing on whether the state law as currently applied resulted in uniformity issues

GOBEILLE

- **Dissent (Ginsburg, J.)**
  - ERISA does **NOT** preempt Vermont's APCD
  - Vermont law did not "impermissibly intrude on ERISA's dominion over employee benefit plans"
    - ✓Law does not impose a "substantial burden" on ERISA
    - ✓Vermont law and ERISA's reporting requirements "elicit different information and serve distinct purposes"

RUTLEDGE V. PHARMACEUTICAL CARE MANAGEMENT (2020)

RESTORING ERISA PREEMPTION JURISPRUDENCE

- **Majority Opinion (Sotomayor, J.)**
  - ERISA do NOT preempt Arkansas's regulation of pharmaceutical benefit managers and drug pricing
  - Arkansas Act 900 did not "refer to" ERISA because it applied to PBMs "whether or not they manage an ERISA plan."

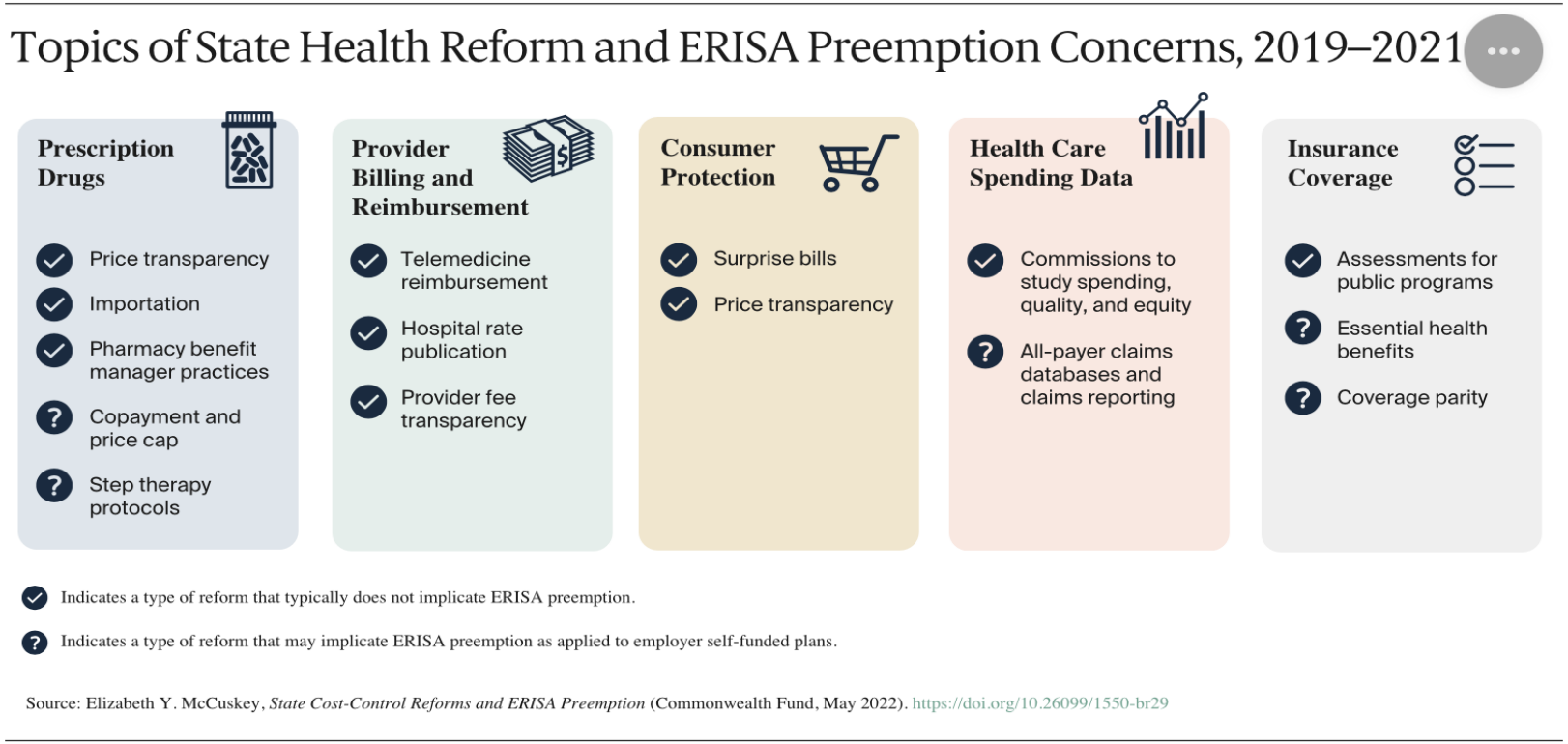
- **Sotomayor walks ERISA jurisprudence back from Gobeille to Travelers**
  - Sotomayor argued that, "[l]ike the New York surcharge law in Travelers, . . . [Arkansas Act 900] is merely a form of cost regulation" and not "primarily concerned with pre-empting laws that require providers to structure benefit plans in particular ways."
  - Only mentions Gobeille three times, in passing

IMPACT ON HEALTH CARE REFORM

WHAT CAN STATES DO?

ERISA IS A BARRIER TO INNOVATIVE POLICIES

ERISA preemption continues to deprive states from regulating a significant portion of their health insurance market: employer self-funded plans



IMPACT OF ERISA PREEMPTION

- **Gobeille as a test case**
  - Gobeille has significantly reduced the volume of claims data available to APCDs
  - As a response to Gobeille, some states have asked employers to voluntarily submit data to APCDs by entering into data-sharing agreements
  - However, many employers and insurance companies acting as third-party administrators are not willing to share their claims data because they are concerned about liability for violating non-disclosure agreements with employers, as well as state and federal privacy laws
- **Gobeille shows ERISA fixes are unlikely**
  - Congress could carve health plans out of ERISA
  - DOL and HHS could work together to create carve outs

Impact on Universal Care

- **Retail Industry Leaders Association v. Fielder (2007)**
  - Law required employers with more than 10,000 employees to spend a minimum of eight percent of their payroll on health care, or else pay the difference between the employer's actual health care expenditures and the eight percent threshold into a state Medicaid fund
  - Fourth Circuit struck down Maryland's "fair share law"
    - Only rational choice was to spend the required amount on health care because employer got no benefit if it just gave the money to the state

- **Golden Gate Restaurant Ass'n v. City and County of San Francisco (2009)**
  - Ninth Circuit reversed the District Court's finding that this program violated ERISA, relying on
    - The presumption against federal preemption of matters that generally fall within a state's police powers
    - That since the ordinance applied regardless of whether the employer had an ERISA plan, it did not "relate to" ERISA governed health plans
    - Distinguished from Fourth Circuit because employers had total discretion about how to spend their mandated contributions

AVENUES OF REFORM

What can We do?

Waivers as Saviors

- **Proposal to allow DOL Secretary to grant waivers of ERISA preemption**
  - States would have to proactively pursue a waiver of ERISA preemption
  - Could only use for regulation touching health plans, no other benefit plans
- **Avenue to allow flexibility**
  - Could work very similarly to 1115 Medicaid waivers
  - Does not get rid of ERISA but recognizes its "mission creep"
  - Would not add significant costs
- **Some Considerations**
  - May be dependent on the political winds
  - *Loper Bright*: courts may not be out of the ERISA game