Question Addressed

Whether the New Hampshire legislature can broaden the language of RSA 126-Q to equitably distribute an immunization assessment on all health benefits payers, including self-funded payers, in proportion to each payer's respective number of child covered lives without triggering preemption under Section 514 the Employee Retirement Income Security Act (ERISA).

Discussion

It is unlikely that broadening the assessment base in RSA 126-Q to include self-insured health benefits payers would trigger preemption under the Employee Retirement Income Security Act (hereafter "ERISA"). ERISA was enacted to "provide a uniform regulatory regime over employee benefit plans."[1] In pursuance of this policy goal of uniformity, ERISA § 514 expressly preempts certain state laws.[2] Historically, courts have shifted away from applying a broad interpretation of ERISA's preemption clauses to a more narrow interpretation. All case decisions considered in this discussion have been resolved in federal courts since ERISA is a federal statute under the jurisdiction of federal courts.

ERISA has three core preemption clauses: the (1) "Relates to Clause," (2) "Savings Clause," and (3) "Deemer Clause." The "Relates to Clause" broadly preempts state laws that relate to any employee benefit plan.[3]

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under 1003(b) of this title. This section shall take effect on January 1, 1975. ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

The "Savings Clause" saves from preemption "any law of any State which regulates insurance."

> Except as provided in subparagraph (B), nothing in this subchapter 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), 29 U.S.C. § 1144(b)(2)(A) (1988).

---

[1] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).
[2] ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).
[3] ERISA § 514.

Finally, the "Deemer Clause" qualifies the second prong by stating that no welfare benefit plan "shall be deemed an insurance company" for regulation by state law.

> Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, 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 purposed of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1988).

ERISA preemption does not apply to "any generally applicable criminal law of a State."[4]

According to ERISA's preemption tenets, if a state statute does not "relate to" a welfare benefit plan, the analysis stops and the law is not preempted. Laws that do "relate to" welfare benefit plans are then analyzed under the "savings clause." Under the "savings clause," a state statute is saved from preemption if it regulates the business of insurance. However, under the "deemer clause," self-insured entities are exempt from being deemed in the business of insurance. This third prong of the analysis removes some statutes that are saved by the second prong. ERISA's three prong preemption analysis has a litigious history as courts have attempted to clarify its linguistic ambiguity and delineate its implications more clearly on a case-by-case basis.

Shaw v. Delta, a seminal case interpreting the "relation to" clause, interpreted "relates to" broadly as "having a connection with or referring to" an employee benefit plan, ushering in an era of broad ERISA preemption.[5] Over a decade later, *Travelers* applied this test narrowly and ushered in a judicial era of more narrow ERISA preemption interpretation. The court in *Travelers* held that New York hospital surcharges on welfare benefits plans were not preempted under ERISA because the connection was too attenuated to pass the "connection or reference to" test established by *Shaw*.[6]

---

[4] ERISA § 514(b)(4).
[5] *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983).
[6] *New York State Conf.of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995).

> "'[P]reemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.' . . . [N]othing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." (emphasis added).[7]

The court reasoned that the "relates to" clause could not be read to "extend to the furthest stretch of its indeterminacy, [or] for all practical purposes preemption would never run its course, for 'really, universally, relations stop nowhere.'"[8] *Travelers* gives state legislatures more flexibility to pass "generally applicable" laws that may indirectly impact self-insured or insured health plans without triggering the first prong of ERISA preemption.[9] Although the Supreme Court did not specifically answer the question of whether the New York surcharges were preempted *as applied* to self-insured plans, this was in fact decided on remand. On remand, the Second Circuit of Appeals specifically held that ERISA did not preempt the surcharges as applied to self-insured plans.[10] Self-insured plans could be surcharged in the same manner as fully-underwritten plans.

Debuono, building upon *Travelers*, further delineated the limitations of the broadly worded "relation to" clause. In *Debuono*, the court upheld a state mandated Health Facility Assessment on the grounds that it was "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute."[11] The Court distinguished between direct and indirect impact on ERISA plans, holding that though the financial impact of the assessment would be direct, the assessment was only indirectly levied upon ERISA plans. The court concluded: "Any state tax, or other law that increases the cost of providing benefits to covered employees will have some effect on the

---

[7] *Id.* (citing to *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992).
[8] *Travelers*, 514 U.S. 661
[9] *See* Liston, Peter, and Martha Priddy Patterson. "Analysis of the Number of Workers Covered by Self-Insured Health Plans Under the Employee Retirement Income Security Act of 1974 and 1995." KPMG Peat Marwick, Report to the Henry J. Kaiser Foundation, 1996.
[10] *Travelers II*, 63 F.3d 89, 93 (2d Cir. 1995).
[11] *DeBuono v. Nysa-Ila Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997).

administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute."[12]

Similarly in *United Wire*, the court upheld a New Jersey statute requiring that self-insured plans pay hospital use surcharges to be used by the state for payment of bad debts, Medicare subsidies, and for reimbursement to hospitals for certain discounts.[13] The trial court held that ERISA preempted the state statute because the state statute would subject ERISA plans to administrative costs, and force them to pay hospital costs for non-plan-participants. However, the appellate court reversed this ruling and held that ERISA preemption was not triggered "[b]ecause we are here dealing with a statute of generally applicability that is designed to establish the prices to be paid for hospital services, which does not single out ERISA plans for special treatment, and which function without regard to the existence of such plans" (emphasis added). The court further reasoned that the state law functioned regardless of the existence of ERISA plans and had only an indirect economic influence on the plans, and that therefore the state statute could regulate self-insured ERISA plans without triggering ERISA preemption.

Another case continuing in this trend of narrowing the "relation to" clause is *Safeco v. Musser*. In *Safeco*, where a Wisconsin statute purported to levy an assessment on insurers for contribution into the Health Insurance Risk Sharing Plan (hereafter "HIRSP"), the plaintiff insurance companies argued that the state statute, as applied to self-insured entities, was preempted by ERISA.[14] The Seventh Circuit Court of Appeals held that the HIRSP assessments did not relate to ERISA plans to the degree required to trigger ERISA preemption.[15] The court reasoned that any effect on self-insured plans was indirect, and not preempted, because the state statute did not bind plan administrators to any particular choice.

---

[12] *DeBuono*, 520 U.S. 816.
[13] *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179, (1992).
[14] *Safeco Life Ins. Co. v. Musser*, 65 F.3d 647, 650 (1995).
[15] *Id.* at 653.

> Because the HISRP assessments imposed by Wisconsin on health insurance carriers do not interfere with the provisions or administration of ERISA plans, the assessments do not relate to such plans in a manner significant enough to implicate the preemption clause of [ERISA].[16]

Safeco, relying on *Travelers*, portrays yet another scenario where state statutes may assess self-insured entities without triggering ERISA's § 514(a) "relation to" clause.

As a matter of policy, if interpreted too broadly, ERISA's preemption clauses could give self-insured plans a market advantage over fully-underwritten plans. One law review article observes that this clear competitive advantage explains the "rapidly growing popularity of self-funded plans among employers."[17] The same article goes on to note a past hesitancy of states to pursue fair and competitive policies in the health benefits market, while also noting that "states have long been frustrated by the ability of self-funded plans to escape legitimate state regulation because of federal ERISA preemption."[18] In the light of cases like *Travelers*, *United Wire*, and *Safeco*, the law review article author concludes by observing that "[s]ome states have already begun to indicate a willingness to examine the new possibilities offered by [case law trends]" and encouraged state legislatures to reconsider implementing certain funding mechanisms like the state assessments considered in more recent case law, that would serve the legitimate state interests of competition, fairness and public safety.[19]

RSA 126-Q, establishing the New Hampshire Vaccine Association, provides an assessment as a mechanism to fund a universal purchase program for childhood vaccines, ensuring access to all recommended vaccines for resident children under the age of nineteen (19). The historic success of this funding mechanism is currently threatened by the significant market shift to self-funded health benefits programs not purchasing stop-loss insurance to cover the risk of catastrophic loss. Self-

---

[16] *Id.*
[17] 1997 Wis. L. Rev. 351, 370 (1997).
[18] *Id.*
[19] *Id.*

insured entities, comprising approximately forty-six percent (46%) of the health benefits market according to the New Hampshire Department of Insurance, are not included in RSA 126-Q even though their beneficiaries have been provided with vaccines paid for by the New Hampshire Vaccine Association. Broadening the language of the assessment base to include *all* pertinent health benefit payers inclusive of self-insured payers, will not likely trigger ERISA preemption because the overall statutory schema does not "relate to" (as interpreted by current law) ERISA plans in a manner significant enough to implicate the preemption clause of ERISA.

The assessment levied by RSA 126-Q is one of generally applicability. Even if RSA 126-Q effectually includes self-funded employee health benefit plans in the assessment base, such plans are included in due proportion to each plan's number of child covered lives, and not according to the plan category, regardless of whether or not it happens to be an ERISA plan. In other words, payers are equally included in the assessment regardless of the type of plan under which they are categorized. Of sole import to the assessment determination is the number of resident child covered lives included under the plan. Furthermore, distributing the assessment costs to self-insured entities in proportion to each plan's number of child covered lives provides the self-insured entities the same financial benefits enjoyed by fully-underwritten plans due to the cost efficiency that the New Hampshire Vaccine Association is able to procure for childhood vaccine serums. The health benefits payers derive the financial benefit of both the bulk purchase and the administrative efficiency that ensures universal access for children.

In summary the above discussion of ERISA's analytical framework and the trend of recent court decisions leads to the implication that ERISA preemption will not likely preclude the New Hampshire state legislature from broadening the New Hampshire Vaccine Association assessment base to include self-funded health benefit plans because RSA 126-Q does not relate to ERISA plans in a substantial enough manner to trigger ERISA § 514(a). Despite the plain meaning of "relates to"

as found in the dictionary and older case law, "relates to" (as used in ERISA § 514(b)) has developed a technical legal meaning that is much more narrow, precise, and strict than the average layperson's understanding of "relates to". Under the technical legal meaning of "relates to" as delineated in more recent ERISA preemption case law, RSA 126-Q would not likely be found to "relate to" an employee benefit plan because it is generally applicable to all health benefit payers, with only an incidental and indirect impact on the administration of ERISA plans. For the reasons stated in this discussion and on the basis of current case law, RSA 126-Q can likely include self-insured entities in a childhood immunization assessment without triggering ERISA preemption.

****

KidsVax.org™ encourages best practices in the funding of childhood vaccines but is not itself a policy maker. THIS DRAFT IS NOT OFFERED AS LEGAL ADVICE. This draft is the work product KidsVax.org™ and an independent researcher retained by KidsVax.org™. The draft is offered as an uncompensated service to local policy officials or industry organizations with the understanding that it would be reviewed by appropriate legislative services staff in the respective state prior to being made part of any bill. KidsVax.org™ offers consultation services from time to time on an "expenses only" basis with its work being made available to all comers without charge. KidsVax.org™ is pleased to assist states, state agencies, and state-chartered not-for-profit organizations with turnkey administrative and executive director service services to administer funding mechanisms for childhood vaccines, but does not accept compensation for advisory services prior to state policy being set by the respective state legislature. Ideally, this occurs after consultation and consensus building involving appropriate health and health insurance agencies along with key private stakeholders, including, at a minimum key organizations concerned with pediatric medical care and health insurance operations in the state. For follow up, kindly contact Fred L. Potter, managing member of KidsVax.org™ or the independent researcher listed below:

Ryan C. McKenna • *Independent Researcher*
KidsVax.org
PO Box 1885 • Concord, NH 03302-1885
cell 603.660.8107
email rmckenna@KidsVax.org

Fred L. Potter • *Managing Member*
KidsVax.org
PO Box 1885 • Concord, NH 03302-1885
ph 1.855.KidsVax (543.7829)
cell 603.491.2389
fax 1.855.KidsFax (543.7329)
email fpotter@KidsVax.org

****