

The Potential Impact of PPACA on ERISA Preemption

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The Purpose of This Presentation

The purpose of this presentation is to invite discussion about whether the provisions of PPACA and the interpretation of certain provisions of the statute by the Department of Labor (“DOL”) in its Interim Regulations (the “Regulations”) potentially pose a threat to the protections ERISA’s preemption provisions afford ERISA health and welfare benefit plans. (Pension plans are excluded from the discussion.)

The subject matter of the debate is presented by two questions.

The Questions Up for Discussion

- Do the provisions of PPACA that detail the mandatory benefit content, appeals procedures and penalties for non-compliance applicable to both insured and self-funded plans arguably moot the relevance of ERISA Section 514 (29 U.S.C. §1144) and Section 502 (29 U.S.C. §1132)?
- Might the semantic ambiguity of the Regulations open the door to arguments that state law damage remedies now are available to ERISA plan members?

The Economic Significance of ERISA's Preemption Provisions

It would be impossible to quantify the economic value of the liability risks that are eliminated by ERISA's preemption provisions. It cannot be denied, however, that it is substantial.

Imagine that every wrongful denial of benefit claim or asserted fiduciary breach potentially created exposure to liability for damage remedies, including consequential and punitive damages.

How would you value the magnitude of that exposure?

The Economic Significance of a Loss of ERISA's Preemption of Damage Remedies – Some Questions

- Would liability for damage remedies affect coverage decisions?
- If so, what would be the cost consequences for the funding of ERISA benefit plans?
- Would exposure to liability for damages incent employers not to sponsor plans and simply pay the penalty imposed by PPACA?

Are These The Questions?

If ERISA's preemption provisions fail to protect payers from, among other risks, exposure to state jury trials and damage remedies, might payers conclude that the financially responsible action is to avoid the risks and let a single payer with sovereign immunity deal with health care coverage?

Might carriers then opt to get paid to be administrators of a governmental plan as in the fiscal intermediary model for Medicare?

The Structure of the Presentation

The presentation has two parts:

- A brief review of ERISA's preemption provisions in order to identify the protections they afford to ERISA plans ("Plans"), their fiduciaries and benefit payers that may be at risk under PPACA; and
- A discussion of contentions based on PPACA and the Interim Regulations that might lend credence to an argument that state law remedies are available under PPACA.

ERISA's Preemption Provisions

ERISA's preemption provisions were intended by Congress to induce employers to sponsor employee benefit plans.

In order to provide some perspective on the scope of the protections ERISA preemption provisions create, a brief summary of the current effects of Sections 514 and 502 (29 U.S.C. §§1132 and 1144) follows.

ERISA Section 514 Preemption

- Section 514 bars direct state interference in the design and administration of plans, and only allows indirect regulation of insured plans through the states' authority to regulate insurance.
- The purpose of Section 514, as recognized in the case law, is to enable employers to offer uniform benefit plans across states without the burden of conforming benefits and administration to the demands of each state.

ERISA Section 514 Preemption

Section 514 also may be viewed as providing to plans, their fiduciaries and payers a form of immunity to liability pursuant to state laws that otherwise might be applicable to them.

Section 502 limits the remedies available to Plan members to a set of equitable remedies that: (i) do not include damages; and (ii) preempt all state law remedies.

Thus, it bars state law damage remedies for claims that are, or could be, brought as ERISA claims.

The Nature of Section 514 Preemption

The courts construe Section 514 as invoking ordinary conflict preemption principles – i.e.- unless a state law directly conflicts with an ERISA provision or purpose, the state law will not be preempted and may be enforced.

Section 514 provides that state laws that “**relate to**” ERISA plans are preempted.

The judicial interpretation of that term has been a frequently unpredictable evolutionary process, the mysteries of which are beyond the scope of this presentation.

Section 514's "Insurance Savings Clause"

This provision reflects the federal government's historical deference to the state's authority to regulate insurance. Its major effects are that insured ERISA plans are required:

- To cover state mandated benefits; and
- To varying degrees, depending upon the specific subject, adapt their plan administration to state regulation of insurance practices.

Section 502 Remedies

Section 502 is a complete preemption provision. Any state law that purports to provide a remedy for a claim that can be brought as an ERISA claim is preempted, even if it does not conflict with the remedies available under Section 502.

Courts, and the Justices, have disagreed, the latter with startling vehemence on occasion, about the scope and nature of Section 502 remedies. (See, for example, almost any of Justice Scalia's opinions concerning the proper definition of "equitable remedies" –i.e. remedies available in the equity courts before these courts were sullied by the adoption of remedies at law.)

Section 502 Remedies

There is a consensus, however, that:

- Section 502 equitable remedies are the **exclusive remedies** for ERISA claims;
- **Damage remedies** and other remedies at law **are barred**; and
- All **state law remedies** sought to be applied as a form of relief for any claim that is an ERISA claim, irrespective of how the claim is asserted, **are preempted**.

Inter-Action Between the Provisions

The application of both provisions in one case illustrates the value of the liability protections they afford.

- In *Rush Prudential HMO v Moran*, 536 U.S. 355 (2002), a state law required health maintenance organizations (“HMO”) to submit coverage denials to independent review and to be bound by the reviewer’s decision.

Inter-Action Between the Provisions

- The HMO did not comply with this provision;
- The HMO member paid for a denied treatment herself and filed an action under ERISA for reimbursement;
- The HMO argued that the state law was preempted under Section 514 because it interfered with the administration of the plan; and
- The plaintiff asserted that the Insurance Savings clause saved the law from preemption.

Inter-Action Between the Provisions

- The member argued that the state law was not preempted by virtue of the Insurance Savings clause; and
- That she was entitled to a remedy under ERISA.

Inter-Action Between the Provisions

The Court held that the state statute was saved from preemption and that:

- The terms of the statute were incorporated in the coverage policy issued by the HMO; and
- The HMO policy was a plan document that specified the plan's covered benefits and administration.

Inter-Action Between the Provisions

- It followed, the Court ruled, that the plan member's cause of action was for the wrongful denial of plan benefits pursuant to ERISA Section 502(a)(1)(B); and
- In connection with that ruling, the Court emphasized that Section 502 completely preempts the remedies available under ERISA.

Aetna Health, Inc. v. Davila, 542 U.S.200 (2004) provides a further illustration of the protection against economic damages afforded by the preemption provisions.

- There, a state court action seeking damages under the Texas Health Care Liability Act (“THCLA”) was filed against the Aetna HMO.
- The claim that the HMO did not exercise “ordinary care” when it denied coverage of a procedure, that the plaintiff suffered injuries and, was entitled to damages under Act.

The *Davila* Decision

- The case was removed to federal court where the Fifth Circuit ruled that the THLCLA claim was not preempted by ERISA because:
 - The HMO's decision was a mixed eligibility and treatment decision and was not a fiduciary act (citing *Pegram v. Herdrich*, 530 U.S. 211; and
 - The remedy did not replicate the remedy provided by Section 502(a)(1)(B) (citing *Rush Prudential*).

The *Davila* Decision

Davila garnered enormous attention because, if the plaintiff prevailed:

- Coverage decisions based on medical necessity would be subject to state law standard of care criteria;
- Payers would be exposed to liability for damages; and
- Costly shifts in behavior by treating physicians and payers could result.

The Court reversed the Fifth Circuit and held:

- The THLCLA provided alternative remedies for an ERISA claim and therefore was preempted; and
- Section 502(a)(1)(B) is the exclusive remedy for wrongful benefit denials.

In sum, ERISA's preemption provisions effectively protect Plans from the risk of liability for damages.

Does PPACA Moot the Relevance of Section 514?

As you will recall, the intended purpose of Section 514 is to shield Plans from the burden of complying with multiple state standards and mandates.

PPACA, however, radically alters the context in which Plans and the states will operate and interact.

Is Section 514 Relevant Under PPACA?

- Unlike ERISA, which by and large does not specify the health benefits Plans must cover, PPACA imposes a comprehensive regimen of mandated benefits applicable to all health benefit Plans, not just those subject to ERISA; and
- The Act sets out a mandatory claim review process that, unlike ERISA, imposes external review binding on Plans.

What About the Insurance Savings Clause?

Is the Insurance Savings clause an anachronism under PPACA?

- PPACA asserts federal control of the benefits insurers must offer, and imposes an IRO external review process on coverage decisions;
- PPACA sets the criteria state insurance exchanges must satisfy, and offers funding for the creation of state ombudsman offices to assist Plan members (*Do federal funds ever come without mandatory criteria and standards?*)

Section 514's Relevance is Questionable

As a result, under PPACA, the states have little, or no, capacity to interfere with either the benefit content or administration of Plans;

The federal government has usurped large chunks of the states' insurance turf; and

Therefore, a reasonable argument may be made that the preemption effectuated by Section 514 is superfluous under PPACA.

Is Section 502 Also Inconsequential?

- The compliance criteria applicable to health plan fiduciaries under PPACA differ from the ERISA criteria;
- The criteria which govern fiduciary benefit decisions are not in plan documents and are found in PPACA and federal agency regulations;
- Fiduciaries also have no interpretive discretion under PPACA, the agencies will own that authority; and
- Plan fiduciaries also no longer make final benefit decisions.

Is Section 502 Also Inconsequential?

PPACA, unlike ERISA, also imposes penalties for non-compliance with coverage requirements.

PPACA creates a complete regulatory framework for the administration of health benefit plans that did not exist when ERISA was enacted.

That framework is not limited to employer sponsored plans as in ERISA, it **encompasses all plans** including state governmental plans.

Is Section 502 Also Inconsequential?

In this new context, the relevance of the remedies provided under Section 502 for coverage decisions is open to serious question.

Rather than seek relief under ERISA, an action to enforce PPACA is available

The exercise of fiduciary authority, in one mode or another, lies at the heart of the causes of action available under Section 502. PPACA leaves little, if any, space for the exercise of discretionary authority by health plan fiduciaries.

The Implied Repeal Objection

An objection that may be made to the contention that Sections 514 and 502 are inapplicable to health plans in the context of PPACA is that courts do not favor implied repeal arguments.

The inapplicability argument suggested, however, does not assert implied repeal of the preemption provisions. They retain their full force and effect with respect to Pension Plans.

The Implied Repeal Objection

The suggested inapplicability argument flows from two propositions:

1. It is generally acknowledged that when Congress enacted ERISA, its primary focus was to safeguard pension benefits, health benefits were an incidental afterthought and were not subjected to detailed analysis. Almost all plans were insured and the states had that covered.
2. The detailed federal regime created by PPACA thoroughly eliminates the potential for interference by the states and, consequently, the preemption provisions are superfluous.

The Potential Implications of the Ambiguous Interim Regulations

We now turn to this question:

Has the Secretary of Labor's Technical Release 2010-01, *Interim Procedures for Federal External Review Relating to Internal Claims and Appeals and External Review Under the Patient Protection and Affordable Care Act* (the "Interim Regulations"), opened a door to the availability of state law remedies for improper benefit denials?

The Interim Regulations

The provision of the Interim Regulations that gives rise to this question is located in the Section that specifies the mandatory content of the IRO notice to claimants of the decision reached with respect to their claim. Section A.3.(g)(v).

The provision applies to insured and self-funded plans.

The notice must include a statement that the decision is binding except to the extent which other remedies may be available under **State** or Federal law to either the group health plan or the claimant.

The relevant text of the Notice states:

If we (the IRO) have upheld the denial, there is no further review available under the appeals process. However, you may have other remedies under State or Federal law, such as filing a lawsuit.
(emphasis added)

Neither the Regulation nor the Notice clearly state that the only remedies applicable to ERISA plan members are limited to those specified in Section 502.

The Interim Regulations

If Section 502 is intended to be applicable under PPACA, it would be reasonable and in accord with applicable law for the Secretary to clearly say that state law remedies are not available to ERISA plan participants.

The ambiguous language chosen by the Secretary may open the door to arguments that state law remedies can be sought by ERISA plan participants. (Note: The DOL has supported the imposition of damage remedies under Section 502. The Court, however, generally has not been receptive to its arguments.)

Opening The Door to State Damage Remedies?

The door to state law damage remedies would be wide-open if it were ruled that ERISA's preemption provisions are not applicable under PPACA.

A significant number of members of state and federal judiciaries have expressed serious discontent with what they view as highly inadequate remedies ERISA provides to plan members.

Justice Ginsburg, for example, asserts that the Court has got Congress' intent as to the scope of the remedies available under Section 502 all wrong by excluding the damage remedies available in equity and the common law of trusts. PPACA may be a tempting means to right that error.

Some Proposals For Counsel

Given the existence of judicial hostility to ERISA's limited remedies it would be prudent to anticipate that some judges may buy into the PPACA arguments presented and take some actions:

1. The Secretary should be asked to clarify the Interim Regulations to state that Section 502 provides the only remedies for ERISA plan members.
2. The ERISA defense bar should develop persuasive responses to assertions that ERISA's preemption provisions do not apply under PPACA; and
3. The plaintiffs' bar- Well, that's not the side on which my bread is buttered.

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