Shopping for Better Health Care at Big Employers—

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Over the past decade, while the number of Americans with health insurance increased, the number without insurance grew at an even larger rate.¹ Beyond those numbers, the percentage of Americans receiving employer-supported insurance from ERISA² programs has continued to fall, from 62.6% in 2001³ to 59.5% in 2005.⁴ As a result, government agencies are forced to pick up the slack.⁵ With governments

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⁴ DeNavas-Walt, et al., supra note 1, at 20-21. Calendar year 2005 represents the most recently available data. Id.

⁵ See Id. The percentage of Americans receiving health coverage from some sort of government agency has in fact risen at slow, but steady increments since 2000. One explanation for the percentage increase in government-supported plans could be the military involvement in the Middle East. The percentage of Americans receiving Department of Defense supported health insurance increased from 3.7 to 3.8% while the other governmental sources remained statistically unchanged. Id. Conversely, others will demonstrate that the burden has been placed upon health care providers, as the number of uninsured has increased. David Blumenthal, Controlling Health Expenditures, 344 NEW ENG. J. MED. 766, 766 (2001); cf. Rick Mayers, Medicare and America’s Healthcare System in Transition: From the Death of Managed Care to the Medical Modernization Act of 2003.
shouldering a higher percentage of health insurance protections, state governments have
moved to encourage private employers to cover more of their employees. In Retail
Industry Leaders Association v. Fielder, currently on appeal, the Federal District Court of
Maryland determined that ERISA pre-emption rules prevent states from using a tax
scheme as an incentive to encourage employers to provide insurance.

At issue is the “Fair Share Health Care Fund Act,” (Fair Share Act) passed by
an override by the Maryland legislature on January 12, 2006. “Fair Share” laws are part
of a “pay or play” movement requiring employers to either offer insurance or pay a tax
for government insurance. The current political movement, spurred in part by labor
unions and unionized employers, encourages employers to improve their employee
health care options by applying a tax to those who do not provide coverage deemed
“adequate.” Although proposed in many states, only three fair share laws have been

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6 See John Hechinger and David Armstrong, Massachusetts Seeks to Mandate Health Insurance—Bill
Would Penalize Citizens Who Don’t Buy Insurance: Businesses Fear Higher Costs, WALL ST. J., Apr. 5,
2006 at A1. Approximately four percent of employees at large corporations nationally receive
their health care from government funded programs, such as Medicaid. Reed Abelson and
Michael Barbaro, Law Aimed at Wal-Mart May be Hard to Replicate, N.Y. TIMES, Jan. 16, 2006, at
C1. The Fair Share Health Care Act was established by the Maryland legislature express to
“support the operations of the [Medicaid] program. MD. CODE ANN., HEALTH-GEN. §15-142
(LexisNexis 2006).


8 Retail Industry Leaders Association v. Fielder, No. 06-1840 (4th Cir. filed Jul. 25, 2006).

9 Id. at 496.


(legislative history) available at http://mlis.state.md.us/2005rs/billfile/sb0790.htm. (December 4,
2006). The bill was first introduced to the Maryland Senate on February 4, 2005 before being
vetoed by the Governor on May 19, 2005.

12 See Alexandra Marks, Businesses Warm to ‘Pay or Play’ Healthcare, CHRISTIAN SCI. MONITOR, Sept.
29, 2004, at 2. Most recent “Pay or Play” healthcare initiatives stem from the early 1990s when
the Democratic Party and President Clinton proposed a national overhaul of healthcare
programs. See Hilary Stout, Senate Democrats Ready Legislation to Overhaul the Health-Care System,
Plan Face Sticky Questions --- How to Finance the Program And What It Will Include Are Among the Top

13 See Amy Joyce and Matthew Mosk, Unions Hope Wal-Mart Bill Has Momentum: Other States
Consider Similar Measures, WASH. POST, Jan. 14, 2005 at D1. Labor unions and employers with
unionized workforces have aggressively pursued these laws as they seek to remain competitive
with non-union employers, such as Wal-Mart. See Id; Editorial, The Wal-Mart Tax’ Goes Down,
enacted to date. Maryland's statute requires employers with more than 10,000 employees in that state to pay a tax of eight percent of their payroll or to demonstrate that they already pay an equal or larger amount toward health care costs. Citing the heavy burden health care imposes on the state when employers do not provide adequate coverage, the legislature created the regulation to force larger employers to fund more of their employees' health care costs. With a 10,000 employee threshold, the law only


14 Fair Share laws have been enacted in Maryland, supra notes 10 and 11, New York City, N.Y. CITY ADMIN. CODE § 22-506 (2006), and Suffolk County, on New York's Long Island, IR-1903-2005, available at 2005 WL 3782145. Unlike the Maryland statute, which applies to all employers with over 10,000 employees, the two New York regulations apply to retailers only. See Id. Litigation questioning the legality of the Long Island law under ERISA, brought by the Retail Industry Leaders Association, is pending in the Federal District Court for the Eastern District of New York. Docket No. 206CV00531. New York City's “Health Care Security Act,” passed by an override of the city council, requires that large retailers pay at least $2.50 into an employee's healthcare program per hour worked. N.Y. CITY ADMIN. CODE § 22-506. Massachusetts has enacted legislation taking a radically different approach to a similar problem, requiring that each individual over 18 to have his or her own medical coverage. MASS. GEN. LAWS ch. 111M, §§ 2-6 (2006) (eff. July 1, 2007). Generally, a Massachusetts resident who does not have health insurance will be covered by a so-called “Commonwealth Care Trust Fund,” paid for by a tax on that individual. MASS. GEN. LAWS c. 111M, § 2(c); MASS. GEN. LAWS ch. 111M, § 3 (granting an exception on religious grounds—such as Christian Scientists). The Massachusetts scheme differs from Maryland's in that it does not dictate the contribution amount of the employer, nor does it assess a tax onto the employer for failing to provide coverage. Compare MD. CODE ANN. §§ 8.5-101-8.5-107, supra note 10, with MASS. GEN. LAWS ch. 111M, § 2-3; see also 2006 Mass. Acts, c. 58, §§ 1, 12-13. Further “fair share” legislation has been proposed in the following jurisdictions: California (S.B. 1414, 2005-06 Leg., vetoed by Gov. in Sept. 2006); Chicago/Cook County, Ill. (Living Wage Ordinance, vetoed by Mayor Daily in Sept. 2006); Colorado (H.B.1316, 2006 Leg., 65th Sess., pending); Connecticut (H.B. 1147, 2005 Leg., posted to committee); Florida (S.B.1618, 2006 Leg., referred to committee); Georgia (H.B.1339 and S.B. 6356, both in committee); Kansas (H.B.2579, 2006 Leg., posted to committee); Kentucky (H.B. 94, 2006 Leg., approved by Banking & Insurance Cmte. on 2/15/2006, pending House vote); Michigan (S.B. 734, 2005-06 Leg., posted to committee); Minnesota (H.B. 74, approved by Jobs, Energy, & Community Dev. Cmte. on 3/14/2006, floor vote pending); Mississippi (S.B. 2684, 2006 Leg., assigned to committee); New Hampshire (House Bill voted down in Jan. 2006); New Jersey (S.B. 447, referred to committee); New York (H.B. 10583 and S.B. 7090, 2006 Leg., both referred to committee); Rhode Island (H.B. 6917, 2006 Leg., referred to committee); Virginia (H.B. 258, 2006 Leg., referred to committee); Washington (H.B. 2517 and S.B. 6356, 2006 Leg., both in committee); West Virginia (H.B. 4024 and S.B. 147, 2006 Leg., in committee).

15 Md. CODE ANN., LAB. & EMP. §§ 8.5-102, 8.5-104 (LexisNexis 2006). The tax applies to individual income, as reported in annual tax returns, up to the state medium family income.

16 See Andrew Green, Wal-Mart veto fails; Lawmakers override Ehrlich, order more spending on worker health, BALTIMORE SUN, Jan. 13, 2006, at A1; see also Andrea Walker and David Natkin, Wal-Mart
affects four employers in the state: Johns Hopkins University, Northrop Grumman Corporation, Giant Food Stores, and Wal-Mart. Of those four, only Wal-Marts did not contribute at least eight percent of the cost of its payroll to employee healthcare.

Following the passage and enactment of the Fair Share Act, the Retail Industry Leaders Association (RILA), Wal-Mart’s trade representative, initiated a suit against Maryland’s Secretary of Labor. The suit alleged that the Fair Share Act violates ERISA’s preemption of state law and that Maryland had singled out Wal-Mart, in violation of the Equal Protection Clause. Responding to the claim, the Secretary challenged RILA’s standing and the cases’ ripeness. Further, the Secretary contended that the act did not fall under the ERISA pre-emption and even if it did, the case was outside the court’s jurisdiction because the Tax Injunction Act granted jurisdiction to the state courts. After a trial and the court’s determination that it could rule on the merits of the case, District Court Judge Motz held that the Fair Share Act, although not singling out Wal-Mart, was preempted by ERISA.

The District Court concluded that a single code of laws for employee benefits was established to ensure compliance by employers and provide consistent benefits for employees, particularly when the employer had far-flung enterprises with employees who may transfer frequently.

To facilitate this policy objective, Congress included a
particularly strong preemption clause dealing with conflicting state laws. Congress' policy rationale was considered so impregnable that few courts were willing to challenge the preemption language. Although described as being "deliberately expansive," ERISA does not preempt all state laws. The Supreme Court, having addressed ERISA repeatedly over the years, determined that ERISA preemption occurs only when a state law "relates to" ERISA by either making "reference to" or having a "connection to" an ERISA plan. Generally, this occurs either when "a State's law acts immediately and exclusively upon ERISA plans," or the plan's existence "is essential to the law's operation."

Although the preemption is admittedly well-established, it is not rigid,
evidenced by a series of Supreme Court decisions have acted to narrow its scope. The Supreme Court has slowly moved some state regulations away from ERISA preemption by finding their connections “too tenuous.” The Court determined that “Congress did not intend to forbid the use of state-law mechanisms [by passing ERISA] . . . , even when those mechanisms prevent plan participants from getting benefits.”

32 See generally Stephen F. Befort & Christopher J. Kopka, The Sounds of Silence: The Libertarian Ethos of ERISA Preemption, 52 FLA. L. REV. 1 (2000) (concluding that a narrower scope of ERISA preemption is inconsistent with Congressional intent and that the Court should implement a framework that will retain this broad preemptive scope); Karen A. Jordan, Travelers Insurance: New Support for the Argument to Retrain ERISA Pre-emption, 13 YALE J. ON REG. 255 (1996) (arguing that the Court’s analytical framework can effectively restrain findings of preemption and should lead to more rational preemption decisions); Edward A. Zelinsky, Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption, 21 CARDOZO L. REV. 807 (1999) (concluding, as a matter of policy, Congress should permit ERISA preemption to be governed by Court’s normal standards of implied preemption).


34 Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. at 831-32. The Mackey court allowed a creditor to enforce a Georgia garnishment statute against a plan. Id. at 831-88. Even though the plan's administrator argued that the statute would create an undue administrative
of Blue Cross and Blue Shield Plans v. Travelers, the Supreme Court abandoned a literal approach, stating that ERISA need not preempt a state law merely because it creates “indirect, economic effects, by intent or otherwise to force an ERISA plan to adopt certain scheme of substantive coverage or effectively restrict its choice of insurers.” Subsequently, the Court reiterated that a “myriad of state laws” can “impose burdens” but still do not relate to ERISA laws.

Even if state law interferes with an ERISA plan, further preemption may be avoided by the “savings clause” which allows states to exercise their regulatory power over insurance carriers. In fact, the savings clause increasingly gives states considerable authority to regulate health benefits, particularly insurance. In Kentucky Association of Health Plans, Inc. v. Miller, the Supreme Court articulated that the savings clause will uphold a state law which regulates an insurance practice. Likewise, the Fourth Circuit has not looked favorably upon expansive ERISA scope arguments, burden and costs, the Court determined that the state must have a manner for enforcing judgments against a plan. Id. at 834. See also Fort Halifax, 482 U.S. at 18 (determining that Maine’s one-time severance statute was not a “plan” and therefore not preempted). It is worth noting that statutes mandating health care coverage have existed for years, such as statutes which require university students to carry health insurance. See e.g. Mass. Gen. Laws c. 15A, § 18 (2006) (mandating that full-time college students enroll in a qualified program). 39 N.Y. State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). Id. at 668. The court addressed N.Y.’s Pub. Health Law § 2897-c, requiring hospitals to assess a surcharge on commercial insurance carriers and HMOs but not onto government policies or Blue Cross/Blue Shield policies. Id. at 649. See also Bogan, supra note 25, at 1012 (arguing that Justice Souter’s decision “finally recognized that ‘uncritical liberalism’ is no help in trying to construe ERISA’s ‘relates to’ phrase). 37 DeBuono v. NYSA ILA Med. & Clinical Servs. Fund, 520 U.S. at 815 (deeming that N.Y.’s Health Facility Assessment tax was not preempted by ERISA). The Court addressed ERISA several times in 1997. See Dillingham, 519 U.S. at 316 (finding that a Cal. training program did not conflict with ERISA’s preemption language); Bogg, 520 U.S. at 833 (a third post-Travelers ERISA decision that year not addressing preemption rules). 38 See Matthew G. Vansuch, Not Just Old Wine in New Bottles: Ky. Ass’n of Health Plans, Inc. v. Miller Bottles A New Test For State Regulation of Insurance, 38 AKRON L. REV. 253, 264, 291 (2005) (examining how Miller changed the analytical framework for the savings clause). The “savings clause” has often been described as an exception to ERISA preemption. See Donald T. Bogan, ERISA: State Regulation of Insured Plans After Davila, 38 J. MARSHALL L. REV. 693, 737 (2004) (hereinafter “State Regulation”). 39 See Ky. Ass’n. of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003); see also Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999). 40 Ky. Ass’n of Health Plans, Inc. v. Miller, 538 U.S. at 329 (2003). 41 Id. at 338.
stating its “reluctan[ce] to displace state law.”42 In fact, the Fourth Circuit reversed Judge Motz in a case reviewing the ERISA preemption case law by noting that Congress’ intent in ERISA was not infinite.43 Furthermore, the Fourth Circuit has been increasingly critical of Congress’ preemption scope in areas where states traditionally legislate.44 While cognizant of Congress’ ability to regulate insurance and of federal supremacy, the Circuit Court has been vocal in noting that, despite Travelers potential ambiguity, courts should not assume that Congress intends to supplant state law, particularly when there is no direct conflict.45 Therefore, Fourth Circuit analysis requires a showing of actual conflict and a multiplicity of regulation.46 Determining that Maryland does not have the authority to mandate that employers offer a certain type of policy or coverage at a proscribed monetary level, the District Court in Retail Industry Leaders Association v. Fielder ruled that the Fair Share Act was pre-empted by ERISA.47 The Court relied on the literal definition of preemption dating back to 1981.48 Judge Motz determined that “state laws which impose employee health or welfare mandates on employers are invalid under ERISA” by using a test which “looks to (1) ‘the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood

43 Gresham v. Lumberman’s Mut. Cas. Co., 404 F.3d 253, 258 (4th Cir. 2005) (“While the scope of preemption is thus quite broad, it is not unlimited”); see Metropolitan Life Ins. Co. v. Pettit, 164 F.3d at 861 (distinction from previous case, Stiltner v. Beretta, upholding ERISA preemption); see also Stiltner v. Beretta. U.S. Corp., 74 F.3d 1473, 1480 (4th Cir. 1996) en banc (noting party had sought “to recover benefits of a sort which are already provided by an ERISA plan, even though it [sought] to recover them not from the plan itself, but from the employer directly”) (emphasis added).
44 See Cox v. Shalala, 112 F.3d 151, 154 (1997) (“State law is per se preempted to the extent that it actually conflicts with federal law”) (emphasis in original) (citations omitted).
45 Metropolitan Life Ins. Co. v. Pettit, 164 F.3d at 861; see Coyne & Delany Co. v. Selman, 98 F.3d at 1468 (courts should presume that Congress does not intend to supplant state law); see also Craddock v. Apogee Coal Co., 166 Fed. Appx. 679, 684, 2006 WL 305545 (4th. Cir. 2006) (ERISA preemption claims without merit when they do not create multiplicity of regulation).
46 Although the Fourth Circuit has shown deference to ERISA’s preemption language, the court has shown an unwillingness to accept a preemption claim absent a definitive showing of a conflict between the state regulation and ERISA. See Cox, 112 F.3d at 154; Craddock, 166 Fed. Appx. at 684; Pettit, 164 F.3d at 861.
47 Fielder, 435 F. Supp. 2d at 495.
48 Id. at 495-6. The court addresses the Supreme Court’s most recent decisions, including Travelers, DeBuono, Engelhoff and Dillingham. However, these cases are not used to show the Court’s changing jurisprudence. Id. Rather, the Motz decision uses the newer decisions as proof that the original 1981 view of preemption, as articulated in Shank, is still valid without explaining how the law has changed. Id.
would survive'; and (2) 'the nature of the effect of the state law on ERISA plans.'

Accordingly, the court found that the Fair Share Act was preempted because the Act offered a "Hobson's choice" that added layers of complex record-keeping and required the employer to fund an ERISA insurance policy. Finally, in addressing the newer ERISA case law, the court dismissed Travelers and its prodigy as "[lying] at the periphery of ERISA analysis."

The District Court's decision to structure the argument upon older case law rather than on the more recent line of cases casts doubt on the decision. Although ERISA preemption doctrine has been in a flux over the past decade, it is clear that a literal interpretation is no longer in vogue. Having established that Congress' intent was not to eliminate all laws that ventured into the realm of employee benefits, the District Court failed to determine the boundaries of ERISA's reach. Rather, the court tracked all the way back to the starting gate and incorrectly determined that the Fair Share Act imposed a particular insurance plan. Even if the court's analysis is as assumed, arguendo, the Travelers decision indicates that state regulations are allowed even when their result reduces available insurance options. Ultimately, the court sidestepped the result of Travelers, namely that states had the right to use regulations and their tax scheme to encourage a health policy.

49 Fielder, 435 F. Supp. 2d at 494 (citing Egelhoff, 532 U.S. at 147). The court relied on Travelers and other new cases to establish that Congress intended a uniform body of laws. Id. See supra note 49. Once, the Motz decision established that Congress intended a uniform body of laws, the decision avoids using the newer case law and relies on older decisions. Id. 50 435 F. Supp. 2d at 494-96. Judge Motz determined that Maryland's Fair Share Act created a burden because it required an employer to break-out compensation and benefit costs for employees in Maryland, even though the employer may had to break out that same information for other tax purposes. Id. The District Court accepted the Plaintiff's argument that Fair Share was preempted because ERISA law did not mandate a health program, whereas Maryland's does. Id. (Maryland's law is deemed a hobson's choice, because the alternative is a tax).

51 435 F. Supp. 2d at 495. 52 Compare Fielder, 435 F. Supp. 2d at 495 with Travelers, 514 U.S. at 657. The Travelers court made a clear case that the scope of preemption is narrower than originally defined. See Id. 53 See Bogan, supra note 25 at 1014-15. While the Travelers decision did not reverse the prior holdings, it clearly changed the analysis of state statues in a preemption context. See DeBuono, 520 U.S. at 812-13. 54 435 F. Supp. 2d at 495. 55 See 435 F. Supp. 2d at 494-96. 56 See N.Y. State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. at 668. 57 Id.; see also DeBuono v. NYSA ILA Med. & Clinical Servs. Fund, 520 U.S. at 814. The right of the state to regulate insurance and minimum wage rules has long been established as outside of the ERISA regulation. See Unum Life Ins. Co. v. Ward, 526 U.S. at 358 (upholding a California prevailing wage and job-training program).
Unfortunately, the court missed an opportunity to place the issue into proper context with Congress' intent. Congress designed ERISA to resolve broken pension promises, and not as a barrier to state benefit programs. Nevertheless, the District Court ignored ERISA's fundamental purpose by finding a preemption through a questionable analysis and a dubious record-keeping burden.

As the goal of preserving affordable health care becomes more significant, the need to have a predictable bright-line test on ERISA preemption also becomes more important. This is particularly true as states attempt to solve health-care costs through their own legislatures. The Fourth Circuit, therefore, should look to develop a realistic and practical rule for the rights of states to regulate insurance coverage.

58 See N.Y. State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. at 657; Bogan, supra note 24 at 1019.
60 See 435 F. Supp. 2d at 495. For further information see supra note 49 and accompanying text.
61 See 2006 Mass. Acts c. 56. Although the Massachusetts legislation is different from Maryland's or Suffolk County, Long Island, the effect is similar and raises similar ERISA questions. Under the Travelers analysis, the Massachusetts statute is unlikely to face ERISA preemption because it does not impose requirements on plans or plan providers, but rather merely requires you pay a tax for a state plan if you don't have one. See Id., see also, Travelers, 514 U.S. at 657.