

# The Dangers of State Oversight in Health Care Reform: Where is ERISA Preemption

Tess J. Ferrera,  
Miller & Chevalier  
202.626.1470  
tferrera@milchev.com

# ERISA Preemption

- The world as we knew it.
- ERISA § 514(a) – ERISA “supersede[s] any and all State laws insofar as they . . . Relate to any employee benefit plan ...”
  - State law is broadly defined to include all “laws, decision, rules, regulations, or other . . . Action having the effect of law” of any “State, any politician subdivisions thereof, or any agency or instrumentality of either. . . .” ERISA § 514(c)
- ERISA § 514(b)(2)(A) – the “Savings clause” – limits § 514(a). It provides that nothing in ERISA “shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.”
  - ❖ Insurance has been most important to date.

# ERISA Preemption

- ERISA § 514(b)(2)(B) – the “Deemer clause” – qualifies the “Savings clause.”
  - It provides that no employee benefit plan or trust
    - ❖ 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 purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.
    - ❖ As a result of the “Deemer clause,” states cannot regulate an employee benefit plan as an entity engaged in the business of insurance, banking, or securities despite the “Savings clause.”

# ERISA Preemption

- ERISA preemption provision was thought to be the “crowning achievement” of the statute.
- Purpose
  - Eliminate threat of inconsistent State and local regulation of employee benefit plans, and in particular, multi-state plans.
  - Ensure establishment of uniform standards to govern conduct of plan fiduciaries and administrators.
  - Free administration of employee benefit plans from potential state interference.

# ERISA Preemption

- Distinction between self-funded and full-insured plan.
  - *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).
- Starting in 1995, Supreme Court began to take a narrower view of preemption. *New York state Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).
  - ❖ “[i]f ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for [r]eally, universally, relations stop nowhere.” *Id.* at 655
- Erosion has occurred in the health insurance context because of the serious problem of remedies.

# New World Order: Pension Protection and Affordable Care Act -- PPACA

- PPACA contains numerous provisions addressing preemption in one way or another.
- They are scattered throughout Title I of PPACA, and some contain comparable -- but subtly different -- language.
- The result is potentially an interpretational quagmire and, at a minimum, confusion.

# Pension Protection and Affordable Care Act -- PPACA

- PPACA includes the following preemption sections:
  - Prior to PPACA, preemption provisions in the PHSA stated that a standard in PHSA parts A - C supersedes state law “to the extent that such [state law] standard or requirement *prevents* the application of a requirement of [Parts A - C of the PHSA].”
  - Those preemption provisions are now PHSA § § 2724 and 2762 (as redesignated and amended by PPACA section 1563(c)(14) and (c)(15), which were redesignated from section 1562 by section 10107(b)(1)).
  - PPACA amended these earlier PHSA preemption sections only to clarify that state laws not just with respect to group health insurance coverage, but also with respect to “individual” health insurance coverage, are not preempted unless they ***prevent*** application of a PHSA requirement.

# Pension Protection and Affordable Care Act -- PPACA

- PPACA § 1321(d) establishes a preemption provision covering all of Title I of PPACA. This provision states: “Nothing in this title shall be construed to preempt any State law that does not **prevent** the application of the provisions of this title.”



# Pension Protection and Affordable Care Act -- PPACA

- PPACA establishes (at least) three preemption provisions relating to exchanges.
  - PPACA section 1311(k) states: “An exchange may not establish rules that ***conflict*** with or ***prevent*** the application of regulations promulgated by the Secretary under this subtitle.”
  - PPACA section 1312(d)(2) states: “Nothing in this title shall be construed to ***terminate, abridge, or limit*** the operation of any requirement under State law with respect to any policy or plan that is offered outside of an Exchange to offer benefits.”

# Pension Protection and Affordable Care Act -- PPACA

- PHSA section 2715 (added by PPACA section 1001(5)), which requires uniform explanations of coverage, states in subsection (e): “The standards developed under [this section] **preempt** any related State standards that require a summary of benefits and coverage that provides less information to consumers than that required to be provided under this section, as determined by the Secretary.”
- PPACA section 1101(g)(5), relating to the temporary high-risk health insurance pool program, states: “The standards established under this section shall **supersede** any State Law or regulation (other than States licensing laws relating to plan solvency) with respect to qualified high risk pools which are established in accordance with this section.”

# Pension Protection and Affordable Care Act -- PPACA

- PHSA section 2709 (added by PPACA section 10103(c), as added by PPACA section 1201)), which concerning coverage for clinical trials, states in subsection (h): “[N]othing in this section shall **preempt** State laws that require a clinical trials policy for State regulated health insurance plans that is in addition to the policy required under this section.”
- PPACA section 1303 (as amended by PPACA section 10104(c)), which concerns state abortion laws, states in subsection (c)(1): “Nothing in this Act shall be construed to **preempt** or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.”

# Pension Protection and Affordable Care Act -- PPACA

- PPACA section 1511, which adds section 18A to the Fair Labor Standards Act (“FLSA”) and concerns automatic enrollment in employer-sponsored coverage, states: “Nothing in this section shall be construed to **supersede** any State law which establishes, implements, or continues in effect any standard or requirement relating to employers in connection with payroll except to the extent that such standard or requirement prevents an employer from instituting the automatic enrollment program under this section.”
- PPACA section 1557, which adds section 18C to the FLSA and concerns nondiscrimination against employees, states in subsection (b): “Nothing in this title (or an amendment made by this title) shall be construed to . . . **supersede** State laws that provide additional protections against discrimination on any basis described in subsection (a).”

# Pension Protection and Affordable Care Act -- PPACA

(Not really preemption)

- PPACA section 1324 (as amended by PPACA section 10104(n)) sets forth an immunity from certain state, and federal, laws for “any health insurance coverage offered by a private health insurance issuer” if a CO-OP plan or one of the multi-state plans established by the U.S. Office of Personnel Management (for the exchanges) is exempted from these state, or federal, laws.
- Among the state laws to which the immunity would extend are state laws relating to guaranteed renewal, rating, preexisting conditions, on discrimination, quality improvement and reporting, fraud and abuse, solvency and financial requirements, market conduct, prompt payment, appeals and grievances, privacy and confidentiality, licensure, and benefit plan material or information.

# Pension Protection and Affordable Care Act -- PPACA

---

- Many other provisions of PPACA carve out a role for the states, or otherwise make individual coverage or group health plans subject to state requirements. But these provisions technically are not “preemption” provisions, since they do not set forth a rule for when state law will be superseded by federal law.

# Issues to Consider

- **Most of the PPACA preemption provisions envision a federal “floor” below which state law cannot go, but they otherwise allow for the application of state law.**
- State cannot establish a standard that conflicts with, or prevents application of, a federal standard, but they otherwise permit state law to operate.
  - The result is that state law supplementing, duplicating, or strengthening a federal standard appears allowable.
  - Only state laws that would set standards **lower** than those established in PPACA are superseded.
  - Notable exception – State high risk pools.

# Issues to Consider

- **Various preemption sections in PPACA appear to adopt customary “conflict” preemption rules.**
  - **Under the Constitution’s Supremacy Clause, state law that conflicts with federal law is preempted, and no additional statutory preemption provision is necessary to make conflicting state law invalid. See U.S. Const., art. VI, cl. 2**
  - **As a result of the Supremacy Clause, statutory preemption provisions incorporating a conflict standard are largely superfluous. That may be the case with many of PPACA’s preemption sections (*i.e.*, the ones that prohibit state law that “prevents” application of a federal standard or that otherwise leave “additional” state law intact).**
  - **Despite subtly different wording, similar preemption provisions in PPACA are likely to be interpreted simply as adopting normal conflict preemption standards.**



# Issues to Consider

---

- **In PPACA section 1324, Congress stated that any coverage offered by a health insurance issuer is immunized from all state and federal laws on a variety of topics if a state CO-OP plan or one of OPM's multi-state plans is not subject to those laws.**
  - **Establish a level playing field.**

# Issues to Consider

---

- **PPACA amended the PHSA's preemption provisions so that the latter now clearly cover individual health insurance offerings.**
  - **Little encroachment into state governance over insurance law.**

# Issues to Consider

- **PPACA potentially incorporates state law as a federal rule.**
  - There are provisions in PPACA that carve out a role for the states, where they otherwise would have none with respect to ERISA (self-funded) plans.
  - For instance, health insurers and group health plans must, under PHSA § 2715A, report to HHS *and state insurance commissioners* enrollment and disenrollment data, claims denial data, cost-sharing, and out-of network practices.
  - State insurance commissioners traditionally have had no jurisdiction over self-funded ERISA plans, but PPACA now makes it part of federal law that they report information to state insurance commissioners.