

STATE HEALTH INSURANCE RISK POOL ASSESSMENTS ON EXCESS OR STOP-LOSS POLICIES ISSUED TO SELF-INSURED ERISA PLANS: CAN ERISA PREEMPTION BE AVOIDED?

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Introduction

A number of state Comprehensive Health Insurance Pools (“CHIP”) function as the “alternative mechanism” under the Health Insurance Portability and Accountability Act of 1996¹ by providing health insurance coverage to citizens who are uninsurable individuals. Because of the high-risk nature of the populations that these CHIP plans serve, adequate funding is crucial. Some CHIP plans are based on the National Association of Insurance Commissioners Health Plan for Uninsurable Individuals Model Act, which authorizes two dedicated sources of funding. The first are premiums charged to the CHIP enrollees, which are generally designed to cover two-thirds of the costs of the CHIP plan obligations. The second source of funding is assessments imposed on insurers that write insurance in that state’s health insurance market. If a state CHIP plan attempts to assess excess or stop-loss policies purchased by self-insured employee welfare benefit plans,² then a legal question arises as to whether such assessments of excess or stop-loss insurance policies are preempted by the Employee Retirement Security Act of 1974³ (“ERISA”). This Article will specifically address the issue of ERISA preemption of these assessments.

Congress enacted ERISA in response to its findings that employee benefit plans substantially affect interstate commerce, federal tax revenues, and the continued well-being and security of millions of American workers and their families.⁴ Approximately eighty-eight percent of working Americans have private medical insurance through their employee welfare benefit plans, and ERISA governs these plans whether they are privately insured through commercial health insurers; subscribed to a health maintenance organization; covered through non-profit health service corporations, such as Blue Cross/Blue Shield plans; or self-insured by the employer.⁵ ERISA preempts all state laws “relating to” employee welfare benefit plans, but does not preempt state laws regulating insurance or other laws of general applicability.⁶ States, however, in the exercise of their power to regulate insurance or to establish risk sharing plans to provide health coverage to their citizens, encounter problems regarding ERISA preemption of those laws.

Discussion

Over seventy percent of employers that self-fund their employee welfare benefit plans are covered by some form of stop-loss insurance.⁷ This form of policy insures a self-funded plan against the risk of excessive payouts to plan beneficiaries.⁸ Because stop-loss insurance policies to self-insured benefit plans do not clearly fall within ERISA’s regulatory framework, the Circuit Courts of Appeal have split in their treatment of stop-loss plans for preemption purposes.⁹ The majority view holds that ERISA preempts state regulation of stop-loss providers, while the minority view maintains that ERISA should not prevent states from enforcing their insurance laws against a stop-loss insurer.¹⁰

To achieve federal uniformity in benefit plan regulation, ERISA specifically preempts all state laws that “relate to,” or have a connection with or reference to, employee welfare benefit plans.¹¹ However, the “savings clause” limits ERISA’s preemptive scope by preserving state insurance regulation from federal preemption, even if the law relates to an employee welfare benefit plan.¹² The savings clause has its own exception: employee welfare benefit plans, whether they are self-insured or otherwise, are exempted from the definition of “insurance company or other insurer,” and are therefore preempted from direct state regulation under ERISA’s “deemer clause.”¹³ However, states may indirectly regulate insured plans by regulating their insurance companies.¹⁴ This distinction between employee welfare benefit plan regulation, which lies exclusively with the federal government, and insurance regulation, which is primarily a state concern, creates problems when dealing with stop-loss insurance policies of self-insured employee welfare benefit plans, which have features of both.¹⁵

Courts differ as to whether an otherwise self-funded employee welfare benefit plan that purchases a stop-loss insurance policy is “insured,” thus subjecting the stop-loss insurer to state regulation.¹⁶ The majority rule – followed by the Fourth, Fifth, and Ninth Circuits – exempts stop-loss insurers from direct state regulation of insurance, holding that a self-insured

employee welfare benefit plan that is covered by a stop-loss policy is considered fully self-insured for ERISA's preemptive purposes.¹⁷ Courts subscribing to this view reason that if the stop-loss policy's "trigger point" has not been reached, then the stop-loss insurer has never acted in its capacity as insurer to the plan because it has never been called upon to satisfy participants' claims.¹⁸ "Because the insurer does not engage in the business of insurance in relation to the plan, state law regulating the insurer falls outside the scope of the savings clause, and the plan is uninsured."¹⁹ However, this view fails to explain why a stop-loss insurer's assumption of risk under such a policy is itself insufficient to create an insurance relationship under the savings clause.²⁰ In fact, the majority of insurance policies never result in claims by the policyholders, yet those policies are still undoubtedly considered "insurance."²¹ Another rationale supporting the majority viewpoint is that unless an employee welfare benefit plan purchases health or accident insurance on behalf of its participants, the plan remains self-insured, though the plan has insured itself against catastrophic claims with the stop-loss insurance policy.²² Because no insurance benefits are provided directly to plan participants, the plan remains self-insured and within ERISA's deemer clause.²³

The minority of jurisdictions, including the Sixth and Seventh Circuits and various district courts, have repeatedly held that an employee welfare benefit plan that purchases stop-loss coverage is considered to be "insured" for the purposes of ERISA preemption, and thus the plan's stop-loss insurer is within the scope of state insurance regulation.²⁴ For example, in *Safeco Life Ins. Co. v. Musser*,²⁵ the Seventh Circuit addressed a challenge to the Wisconsin Health Insurance Risk Sharing Plan ("HIRSP"), which assessed fees upon all health insurers doing business in the state, insofar as the assessments applied to insurance sales to self-funded ERISA plans.²⁶ Safeco Life Insurance Company ("Safeco") was a stop-loss insurer to several self-insured employee welfare benefit plans and refused to pay the annual assessments which were based on the company's total health care coverage revenue from Wisconsin residents.²⁷

The district court first addressed whether the HIRSP assessments "relate to" an ERISA plan to place them within the preemption clause, and concluded that the assessments did not make reference to, nor did they have any connection with, an employee benefit plan.²⁸ The assessments applied only to Safeco's total health revenue, were not based on a figure that was connected with the benefits paid from the plan to employees, and did not affect the substantive provisions of the coverage employees received under their ERISA plans; thus, the HIRSP assessments were not preempted by ERISA.²⁹ The court rejected Safeco's argument to the contrary and held that any possible economic effect the assessments may have on the plans was "too 'remote or tenuous' to 'relate to' an employee benefit plan."³⁰ Because the Seventh Circuit agreed that the HIRSP assessments imposed on Safeco for its stop-loss insurance policies did not "relate to" the plans in order to trigger ERISA's preemption clause, the Seventh Circuit did not even consider the savings and deemer clauses.³¹ The court concluded, "Any indirect effect that the HIRSP assessments may have upon employee benefit plans by increasing the cost of insurance purchased for these plans is beyond the purview of ERISA."³²

The United States Supreme Court has yet to grant certiorari to address the stop-loss controversy and to determine whether stop-loss plans are governed by state insurance regulation under the savings clause.³³ Nevertheless, the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*,³⁴ which formed the basis for the Seventh Circuit's holding in *Safeco*, provides an alternative argument to avoid ERISA preemption under the preemption clause: CHIP assessments simply do not "relate to" ERISA plans, so the preemption clause is not triggered. In *Travelers*, the Court examined a New York statute that regulated hospital rates for inpatient care by imposing various surcharges on commercial insurers, some HMOs, and ERISA plans.³⁵ Self-funded plans paid a 13% surcharge for hospital services, while commercial insurers paid 24% more than the basic rate.³⁶ The Court held that the surcharges did not "relate to" ERISA plans in any manner because they were imposed regardless of whether the health coverage was ultimately secured by an ERISA plan, through private insurance purchase, or otherwise.³⁷ In considering whether the surcharges had a "connection with" ERISA plans, the Court acknowledged the indirect economic effects the surcharges might have on the plans, but held that preemption cannot occur "if the state law has only a tenuous, remote, or peripheral connection with covered plans, as in the case with many laws of general applicability."³⁸ Indirect economic effects do not alter the uniform administration of ERISA plans, thereby regulating the plan itself; the intended purpose of federal preemption was to shield ERISA plans from "conflicting directives" from state to state and is not implicated by state laws with only indirect economic effects on ERISA plans.³⁹

Conclusion

Thus, after *Travelers*, state insurance regulations should be upheld if they do not specifically relate to ERISA plans and only affect the plans, including self-insured plans,⁴⁰ in an indirect way. ERISA does not preempt statutes of general

applicability that make no reference to, or that function irrespective of, ERISA plans.⁴¹ Therefore, careful drafting of a state's insurance statute within the aforementioned limits should permit such assessments to apply not only to commercial insurers, but also to stop-loss insurers of self-funded ERISA plans. In addition, assessments, taxes, or surcharges may be imposed upon all insurers, including stop-loss carriers, so long as the law does not specifically relate to ERISA plans or directly affect plan administration or structure.

Endnotes

1. 42 U.S.C.S. § 300gg-44 (Lexis 2000).
2. Hereinafter referred to as “stop-loss insurance policies” or “stop-loss policies.”
3. 29 U.S.C.S. § 1001-1461 (Lexis 1998 & Supp. 2000).
4. *See* 29 U.S.C.S. § 1001(a) (Lexis 1998).
5. *See Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 711 (2d Cir. 1993).
6. *See* 29 U.S.C.S. § 1144(a) - (b)(2)(B) (Lexis 1998); *see also, e.g., Safeco Life Ins. Co. v. Musser*, 65 F.3d 647 (7th Cir. 1995); *Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995).
7. *See* Troy Paredes, Note, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 234 (1997). Over 65% of employers self-insure their employee welfare benefit plans. *Id.*
8. *Id.* at 233.
9. *Id.*
10. *Id.*
11. *See* 29 U.S.C.S. § 1144(a) (Lexis 1998); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).
12. *See* 29 U.S.C.S. § 1144(b)(2)(A) (Lexis 1998). The savings clause is consistent with the McCarran-Ferguson Act, which delegated insurance regulatory functions primarily to the states. *See Paredes, supra* note 7, at 241. In fact, courts utilize the McCarran-Ferguson criteria to determine what constitutes the “business of insurance” under the savings clause. *Id.*
13. *See* 29 U.S.C.S. § 1144(b)(2)(B) (Lexis 1998).
14. *See Paredes, supra* note 7, at 247.
15. *Id.* at 248.
16. *Id.*
17. *Id.* at 251; *see also, e.g., Tri-State Mach., Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309, 315 (4th Cir. 1994); *Brown v. Granatelli*, 897 F.2d 1351, 1353-55 (5th Cir. 1990); *Moore v. Provident Life & Accident Ins. Co.*, 786 F.2d 922, 926-27 (9th Cir. 1986); *Auto Club Ins. Ass'n v. Safeco Life Ins. Co.*, 833 F. Supp. 637, 642-43 (W.D. Mich. 1993); *Birdsong v. Olson*, 708 F. Supp. 792, 800 (W.D. Tex. 1989); *Rasmussen v. Metropolitan Life Ins. Co.*, 675 F. Supp. 1497, 1501-02 (W.D. La. 1987). *But see Safeco Life Ins. Co. v. Oregon Med. Ins. Pool*, Civ. No. 92-331-MA, 1992 U.S. Dist. LEXIS 17745, at *11-*16 (D. Or. Sept. 1, 1992) (upholding assessment of stop-loss insurance policies which covered self-funded ERISA plans or employers).
18. *See Moore*, 786 F.2d at 926-27; *see also Paredes, supra* note 7, at 251-52.

19. Paredes, *supra* note 7, at 252.
20. *See Moore*, 786 F.2d at 926-27; Paredes, *supra* note 7, at 253.
21. *See Paredes*, *supra* note 7, at 253.
22. *Id.*; *Thompson v. Talquin Bldg. Prods. Co.*, 928 F.2d 649 (4th Cir. 1991) (holding that the stop-loss plan was self-funded for preemption purposes, although Thompson's claims exceeded the plan's stop-loss trigger point); *United Food & Commercial Workers v. Pacyga*, 801 F.2d 1157 (9th Cir. 1986).
23. *See Pacyga*, 801 F.2d at 1161-62.
24. *See Paredes*, *supra* note 7, at 251; *see also, e.g., Northen Group Servs., Inc. v. Auto Owners Ins. Co.*, 833 F.2d 85, 91-91 (6th Cir. 1987); *Michigan United Food & Commercial Workers Unions v. Baerwaldt*, 767 F.2d 308, 311-13 (6th Cir. 1985); *Auto Club Ins. Ass'n v. Mutual Sav. & Loan Ass'n*, 672 F. Supp. 997, 1000-02 (E.D. Mich. 1987); *Simmons v. Prudential Ins. Co. of Am.*, 641 F. Supp. 675, 679-80 (D. Colo. 1986).
25. 65 F.3d 647 (7th Cir. 1995).
26. *Id.* at 648. The assessments were used to provide health insurance to individuals whose physical and mental conditions prevented them from obtaining health coverage in the private market. *See Id.*
27. *Id.* at 649. From 1998 through 1993, Safeco was assessed \$262,467.08 plus interest based on the stop-loss policies it sold to Wisconsin employers. *See Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See Safeco*, 65 F.3d at 651.
32. *Id.* at 653-54.
33. *See Paredes*, *supra* note 7, at 258.
34. 514 U.S. 645 (1995).
35. *Id.* at 649. New York justified the price differentials, which were not imposed on the non-profit Blue Cross/Blue Shield plans, because the Blues paid promptly and efficiently, and because they provided coverage for many subscribers who were unacceptable risks to the commercial insurers. *See Id.* at 658.
36. *Id.*
37. *Id.* at 656.
38. *Id.* at 659-60.
39. *See Travelers*, 514 U.S. at 662.
40. *See Travelers Ins. Co. v. Pataki*, 63 F.3d 89 (2d Cir. 1995) (holding that self-insured plans are subject to NY hospital rate surcharges because they do not "relate to" the plans to trigger preemption). *But see Bricklayers Local No. 1 Welfare Fund v. Louisiana Health Ins. Ass'n*, 771 F. Supp. 771 (E.D. La. 1991) (finding ERISA preemption where the state law required self-insured welfare plans to pay hospital service charges as a "mandated benefit,"

thereby directly regulating the ERISA plans).

41. *See Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995) (upholding Minnesota statute that imposed a hospital provider tax to finance state health care programs, although it specifically permitted the transfer of the expense to insurance companies, HMOs, and self-insured employee health plans).