# May Vermont Apply Its Health Care Database Law to the Third-Party Administrator for a Self-Insured ERISA Plan?

## CASE AT A GLANCE

Vermont requires all public and private entities that pay for health care services provided to its residents to supply data to its "all-payer database." The requirements apply to insurers and third-party administrators, among others. The Liberty Mutual Insurance Company filed suit to block Vermont from obtaining claims data for its employee health plan claiming that the Employee Retirement Income Security Act of 1974 (ERISA) preempts any requirement that Liberty Mutual's third-party administrator provide information to Vermont's health care database. This case calls for the Court to decide whether Vermont's effort to track the health care services that are provided to its residents and the cost of those services runs afoul of ERISA's superseding authority over the regulation of employee benefit plans. The case has national significance because many states currently have similar databases in place or in development in an effort to better control health care costs and outcomes.

***Gobeille v. Liberty Mutual Insurance Company***
**Docket No. 14-181**

**Argument Date: December 2, 2015**
**From: The Second Circuit**

by Michael Kurs
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## ISSUE

Is the Vermont health care database law preempted by ERISA as applied to self-insured employee benefit plans?

## FACTS

Alfred Gobeille chairs Vermont's Green Mountain Care Board, which has responsibility for Vermont's health care all-payer database, and has since June 2013. Vermont considers the database a "tool for improving public health." The database receives data from a full array of payers in an effort to overcome a perceived dearth of reliable data necessary to plan and monitor the state's health care programs and health care in Vermont. Vermont, like many other states, collects this data in an attempt to control the cost of health care. States faced with fiscal challenges attributable in significant part to state health care funding obligations have endeavored to better employ data to analyze how they might best direct their health care efforts. Initially, Vermont relied on voluntary participation by major insurers in its data collection efforts. In order to capture more comprehensive statewide data, Vermont's current database statute incorporates mandatory reporting requirements that reach "health insurers" who include, among others, "any third party administrator, any pharmacy benefit manager, any entity conducting administrative services for business and any other similar entity with claims data." Vt. Stat. Ann. tit. 18, § 9410(j)(1)(B). Only health insurers with 200 or more covered members living in Vermont or receiving covered services in Vermont must provide information.

In 2011, Liberty Mutual instructed the third-party administrator for its employee health plan, Blue Cross and Blue Shield of Massachusetts (Blue Cross), not to report data to Vermont's database. The Vermont government agency then responsible for data collection proceeded to subpoena eligibility, medical, and pharmacy claims files from Blue Cross. Liberty Mutual filed suit to block Vermont from obtaining its employee health plan data.

Liberty Mutual asserted that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts any requirement that its third-party administrator, Blue Cross, provide information to Vermont's health care database. Liberty Mutual, itself an insurance company, provides health care coverage for over 80,000 employees, retirees, and their families throughout the United States through a self-funded health benefit plan subject to the requirements of ERISA. Liberty Mutual's Plan specifies that it "has been established for the exclusive benefit of Participants … ." Liberty Mutual is considered a "named fiduciary" and "plan administrator" under ERISA. The company has employees and offices in Vermont and conducts business within the state.

The federal district court for Vermont rejected Liberty Mutual's preemption claim. The court reasoned that Vermont's statutes and regulations do not run afoul of ERISA preemption principles. Vermont's statute and regulations do not have a "reference" to ERISA plans. They do not "act immediately and exclusively upon ERISA plans, nor is the existence of ERISA plans essential to their operation." Vermont's law does not attempt to control, supersede, or

interfere with the operation of Liberty Mutual's ERISA plan and has no effect whatsoever on the core relations that ERISA was designed to protect or upon ERISA's core functions.

United States District Court Judge William K. Sessions III's decision describes the development of ERISA preemption law, noting that the Supreme Court originally gave the preemption provision "sweeping scope." In the mid-1990's the Court "placed ERISA preemption on the same footing as its other preemption cases, beginning with the presumption that Congress does not intend to supplant state law, particularly in areas of traditional state regulation." (quoting from *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995)).

Judge Sessions also recognized that case law supports the proposition that the regulation of health and safety matters is primarily and historically a matter of local concern. For that reason, a "statute that operates in the health care field" receives the benefit of "the presumption against preemption." The presumption is one that may be overcome where Congress has made clear its desire for preemption. For instance, state laws that are specifically designed to affect employee benefit plans are preempted (but not merely because they use the word ERISA or its equivalent). A state law that acts immediately and exclusively upon ERISA plans will result in preemption.

Judge Sessions found that Vermont's law and regulation does not require any particular health plan, benefit structure, specific benefits, or enforcement mechanism. They do not alter how Liberty Mutual processes claims or disburses benefits. According to Judge Sessions, there is no evidence that they affect relationships among "core ERISA entities" or create "an economic effect so acute as to dictate certain administrative choices."

The Second Circuit Court of Appeals did not agree with Judge Sessions's preemption analysis. Its decision focuses upon what Judge Dennis Jacobs's Circuit Court opinion describes as "two constants" in ERISA preemption doctrine: (1) recognition that ERISA's preemption clause is intended to avoid a multiplicity of burdensome state requirements for ERISA plan administration; and (2) acknowledgement that "reporting" is a core ERISA function. As Judge Sessions's decision notes, 16 other states collect health care data for their own databases, with the majority following Vermont in requiring plans to report claims data.

The Second Circuit also recounts the history of the Supreme Court's application of ERISA's preemption provision and remarks upon "something of a pivot in ERISA preemption" with *Travelers,* one of the cases that Judge Sessions used to support his decision. The decision explains that, applying *Travelers,* cases conclude that state laws having only "indirect economic effects on ERISA plans lack sufficient 'connection with' or 'reference to' an ERISA plan to trigger exemption." (internal quotation marks omitted). Still, the "use of preemption to avoid proliferation of state administrative regimens remains a vital feature of the law." The court reversed the district court, remarking that "the trend toward narrowing ERISA preemption does not allow one of ERISA's core functions—reporting—to be laden with burdens, subjected to incompatible, multiple, and variable demands, and freighted with risk of fines, breaches of duty and legal expense." One judge of the three-judge panel disagreed and dissented from the appeals court's ERISA preemption analysis.

Vermont sought review by the Supreme Court. The United States, 18 states, the District of Columbia, and multiple other entities have filed or joined in friend of the court briefs in support of Vermont's effort to enable its database law to survive the application of ERISA preemption analysis to its data collection efforts.

## CASE ANALYSIS

This case allows the Court another opportunity to define the boundaries of ERISA's preemptive reach. The Supremacy Clause of the U.S. Constitution provides that the Constitution and laws of the United States and treaties made under the authority of the United States shall be the supreme law of the land. ERISA establishes and imposes an extensive matrix of federal requirements on employee benefit plans as well as upon pension benefit plans. ERISA includes a preemption provision, 29 U.S.C. § 1144(a), that provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. ERISA's preemption clause is intended to prevent state laws from upsetting the scheme of laws and regulations that Congress has adopted to uniformly regulate employee benefit plans under its supreme authority to establish laws applicable in all of the states.

Vermont describes its health care database efforts as grounded in a long history of the collection by states of data to promote the health of their citizens. "For well over a century," Vermont says, "States have required doctors to report instances of infectious disease." Vermont describes other efforts that "predate ERISA and go back at least 50 years." It points out that the federal government has supported, funded, and sometimes even mandated data collection before and after ERISA became law. For instance, Vermont notes, Congress enacted the federal cooperative health statistics program, which has supported aspects of Vermont's data collection, the same year that Congress enacted ERISA. It also highlights the importance of collecting data from self-insured health plans. Vermont indicates that 20 percent of Vermont's population's health care data would be excluded from its database if the self-insured population's was not collected.

Vermont seeks to convince the Court that its data collection laws and regulation does not interfere with ERISA plan administration or benefit decisions. Because the data collection does not intrude upon a core function and "has nothing to do" with ERISA reporting requirements, ERISA preemption should not undermine the data reporting requirements. Federal enactments and support of data collection and the presumption against preemption also weigh in the law's favor, according to Vermont. Furthermore, Liberty Mutual never established that the database law improperly burdens its plan.

Liberty Mutual, in addition to asserting that the Court should not exercise jurisdiction over the case because the databoard's chair is not a proper party before the Court, argues that a central objective of ERISA was to allow employers to maintain self-funded health benefit plans on a national basis free from state regulation. This serves to insure that "plans can dedicate resources to providing benefits rather than meeting administrative costs." Congress, recognizing that a patchwork of regulation would introduce considerable

inefficiencies in plan operation, included the preemption provision as part of ERISA to ensure that plans "are not subject to potentially conflicting regulations in 50 states."

To give the Court an appreciation of the burdens associated with Vermont's reporting requirements, Liberty Mutual points out that "the data submission requirements regulate, among other things, the content, coding, encryption, and file format of the data . . . . The Regulation also includes detailed files specifications that dictate such minutiae as the placement of decimal points and the justification of text fields." Liberty Mutual argues Congress intended ERISA to relieve plans of such state-imposed reporting obligations.

ERISA, the company maintains, "contains perhaps the broadest preemption provision in the United States Code." Plan resources are meant to be available for the payment of benefits rather than administrative costs. "Absent preemption, Congress understood employers might be so deterred by the administrative burden and cost of complying with multiple state regulations that they might not set up an employee benefit plan at all." Liberty Mutual describes preemption as a necessary part of the bargain between labor and business interests to accept strong federal reporting and fiduciary standards "in exchange for federal standards being exclusive."

Even a state law "with a noble purpose" is preempted if its effects conflict with Congress's objectives in ERISA, Liberty Mutual explains. It argues preemption turns on whether a law operates on the same object—in this case health plan reporting obligations. The Supreme Court, it asserts, applies the preemption clause to ensure that health plans "will be governed by only a single set of regulations."

Liberty Mutual maintains it was not required to quantify the cost of complying with Vermont's reporting mandate in order to have preemption operate in its favor. It otherwise parries the various positions taken by the many parties supporting Vermont, including the United States.

The U.S. Solicitor General, as amicus in support of Vermont, describes the Vermont law as essentially requiring Liberty Mutual's third-party administrator to do nothing more than take information generated in the ordinary course of its business of claims-payment operations and report it in a prescribed format to Vermont. The position of the United States is that the Vermont database statute and ERISA serve different purposes and that the database statute does not concern ERISA claims functions. Since the Vermont reporting requirements "do not exert impermissible effects on the design or administration of ERISA plans" the Court should not deem them preempted. The United States asserts that especially in the field of health care, there is no ERISA preemption absent a clear manifestation of congressional purpose. Also, the presumption against preemption should operate in Vermont's favor. Vermont's law, it maintains, is a valid law of general applicability that operates in areas "to which ERISA does not speak."

The Affordable Care Act and the Health Insurance Portability and Accountability Act confidentiality also receive attention from the parties although they are somewhat minor players in the fight over what ERISA truly preempts.

## SIGNIFICANCE

The United States notes that "[i]n separate opinions four Justices have called for this Court to clarify that its framework for analyzing ERISA preemption questions essentially applies ordinary principles" of ERISA preemption. The United States identifies Justices Antonin Scalia, Ruth Bader Ginsburg, Stephen Breyer, and John Paul Stevens as those justices. What reasons might the Court resist applying ordinary principles of preemption to the case at hand? The United States points to a study that estimates 58.5 percent of workers were covered by self-insured plans in 2011. Liberty Mutual maintains that Congress has made employee benefit plans subject to exclusively federal regulation to ensure that employee benefit plans can dedicate resources to providing benefits, free of the administrative costs that may prove increasingly burdensome as more and more states adopt their own health care data collection laws.

A decision that favors Liberty Mutual and the Second Circuit's decision below, may indicate an overriding commitment to maintaining the health of our nation's system of self-insured health plans by shielding them from state-imposed administrative reporting costs.

Of course, the Court may also decide that this case does not require it to set any new ERISA preemption guideposts. It might choose instead to classify Vermont's database law as among the myriad of state laws that do not interfere with ERISA's purposes as they neither mandate particular employee benefits nor interfere in plan administration. Or, the Court may just accept the notion that data collection laws like Vermont's allow states to carry out their traditional roles as the primary regulators of public health. The Court could then find it suitable to rely upon the presumption that ERISA did not intend to supplant Vermont's law by concluding that Liberty Mutual has not met the considerable burden of overcoming the presumption.

If Vermont's law is not upheld, more comprehensive health care data collection may have to depend upon the federal government's willingness to itself impose mandated data reporting requirements. In the meantime, state databases would be left to work around the holes in their data collection abilities due to ERISA preemption. If the law is upheld, hopefully like laws and the administrative costs associated with them will not erode employers' support of ERISA benefit plans.

However the Court decides, it is a good bet that health care plans, states, and the federal government will all continue to commit resources to attempting to control health care costs in the shared interest of using the limited financial resources that we have committed to pay for health care more efficiently.

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*PREVIEW of United States Supreme Court Cases,* pages 95–98.
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