

ERISA

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Commentary

Preemption Is Preemption. Or Is It? A Recent Fifth Circuit Decision Sheds Light On The Differences Between Conflict And Complete ERISA Preemption

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A recent decision out of the United States Court of Appeals for the Fifth Circuit highlights the distinction between conflict preemption and complete preemption under the Employee Retirement Income Security Act of 1974 ("ERISA"), and should help to eliminate at least some of the historical confusion existing between these two doctrines. (By way of background, conflict preemption is a litigation defense and it arises under the ERISA statute, itself, and it exists when a state law relates to an ERISA-governed plan and is not otherwise saved from preemption. Complete preemption provides a basis to remove a state-law cause of action to federal court and it exists when a state law cause of action duplicates or interferes with a remedy provided by ERISA or provides an additional remedy unavailable under ERISA.)

The Fifth Circuit's decision also demonstrates how blurred the line can be between the two doctrines.

State law yields to federal law under each doctrine, though when one applies the other one does not necessarily apply. And there often is considerable overlap between the two. Understanding how these doctrines relate to each other and how they each impact various state laws will ensure clarity in the law, as it continues to develop.

The Statute

When it enacted ERISA in 1974, Congress sought:

to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b). To ensure the satisfaction of these goals, Congress vested broad preemptive power in this "massive undertaking."¹

Specifically, 29 U.S.C. § 1144(a) states:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .

ERISA's preemption provision was "deliberately expansive."² And the courts have applied a "common-sense meaning" to the provision and have interpreted § 1144(a) to mean ERISA preempts state laws that "relate to" ERISA-governed plans, if the law "has connection with or reference to such a plan."³

But ERISA's preemptive scope is not without limits. In 29 U.S.C. § 1144(b)(2), Congress enacted the so-called savings clause: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." The test courts employ today to determine whether a state law is saved from preemption under this provision is: first, whether the law is specifically directed at the insurance industry, and second, whether it significantly affects the risk-pooling arrangement.⁴ Prior to *Ky. Association of Health Plans v. Miller*,⁵ however, courts looked at a number of factors, referred to as the *McCarran-Ferguson* factors, not relevant here, to determine whether ERISA's savings clause applied. And thus, even if a state law relates to an ERISA plan, if the savings clause applies, ERISA will not preempt the state law.

Before the courts began analyzing the complete and conflict preemption doctrines separately, as they should, however, they analyzed ERISA preemption solely in the context of 29 U.S.C. § 1144. Indeed, the Supreme Court in *Pilot Life Ins. Co. v. Dedeaux*,⁶ applied these principles. And even though the court claimed to analyze the case solely under the umbrella of 29 U.S.C. § 1144, it added a new dimension to the analysis, sounding awfully similar to a complete preemption analysis.

Pilot Life

At issue in *Pilot Life* was whether ERISA preempted a Mississippi cause of action for bad faith. The court held ERISA preempted the state law cause of action, because it determined it related to the ERISA plan at issue and the savings clause did not rescue it.

But the court took an additional step, however, probably because the savings clause analysis did not neatly wrap up the issue. The court considered the "role of the savings clause in ERISA as a whole." Because plaintiff's bad faith cause of action "seeks remedies for the improper processing of a claim for benefits under an ERISA-regulated plan, our understanding of the saving clause

must be informed by the legislative intent concerning [ERISA's] civil enforcement provisions," specifically 29 U.S.C. § 1132(a).

The *Pilot Life* court agreed that:

Congress clearly expressed an intent that the civil enforcement provisions of ERISA . . . be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of [29 U.S.C. § 1132(a)] would pose an obstacle to the purposes and objectives of Congress.

And the court recognized that the language and structure of the civil enforcement provision as well as its legislative history support its exclusivity. Under 29 U.S.C. § 1132(a)(1)(B), for instance, a plan participant or beneficiary may sue for benefits, to enforce plan terms, or to clarify rights to future benefits, either as a request for benefits due or declaratory or injunctive relief. A participant or beneficiary may also sue for breaches of fiduciary duties under 29 U.S.C. §§ 1132(a)(2) or (a)(3).

Accordingly, the court stated:

The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in [29 U.S.C. § 1132(a)] of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." [*Mass-Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)].

What the Court in *Pilot Life* did not say, however, is that this exclusivity principle holds true irrespective of whether ERISA's savings clause analysis would technically find the law saved from conflict preemption. In

other words, while not an acknowledgement of a separate preemption doctrine from the court in this early decision on preemption, one can see the first signs that the Supreme Court would in later decisions hold that ERISA completely preempts state law if the latter interferes or supplants ERISA's civil enforcement provision, regardless of whether or not the savings clause applies. In the end, however, the court in *Pilot Life* applied an analysis couched in terms of conflict preemption and held the plaintiff's "state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved" from preemption.

Metropolitan Life v. Taylor

A brighter line distinction between conflict and complete preemption arose, albeit not explicitly at first, when courts considered whether and when state-court actions asserting state-law causes of action for ERISA plan benefits were removable to federal court. The Supreme Court in *Metropolitan Life Ins. Co. v. Taylor*⁷ for instance, considered whether a state-law cause of action is "not only" preempted by ERISA, 29 U.S.C. § 1144(a), "but also displaced by ERISA's civil enforcement provision," so as to be removable to federal court.

State court actions typically are not removable to federal court unless the cause of action asserted therein arises under federal law, *i.e.*, the complaint raises an issue of federal law. In the ERISA context, however, even when a plaintiff does not expressly assert a cause of action under the Act, the case may be removable nonetheless when a plan participant or beneficiary essentially complains about a denial of ERISA-plan benefits through a state law cause of action. The Court in *Metropolitan Life* explained:

Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. . . . One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.

And that is precisely what the court held in *Metropolitan Life*: ERISA's civil enforcement provision at 29 U.S.C.

§ 1132(a) displaces a state-law cause of action seeking ERISA plan benefits. Indeed, the court recognized that because ERISA's enforcement provision has "extraordinary pre-emptive power," it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Thus, a state court action seeking ERISA benefits – whether or not it expressly asserts a cause of action under ERISA – arises under federal law and is removable.

Ingersoll-Rand

*Ingersoll-Rand Co. v. McClendon*⁸ is another important decision in the evolution of ERISA preemption jurisprudence. In *Ingersoll-Rand*, the Supreme Court again considered the scope of ERISA preemption and held ERISA preempts Texas's wrongful termination law. The court recognized the existence of separate preemption doctrines, referring to them as "express" and "implied" preemption, among other things. And to thoroughly confuse matters, the court even referred to what eventually became known as "complete" preemption as "conflict" preemption.

The plaintiff in the case sought compensatory and punitive damages asserting a cause of action under Texas's wrongful termination law. The plaintiff alleged he was entitled to these damages because his employer was principally motivated in terminating his employment by a desire to avoid contributing to or paying his pension benefits. He did not assert a cause of action under ERISA.

The *Ingersoll-Rand* court analyzed whether ERISA preempted plaintiff's cause of action under ERISA's preemption provision, 29 U.S.C. § 1144(a), under ERISA's prohibition against benefits discrimination, 29 U.S.C. § 1140, and under ERISA's enforcement mechanism, 29 U.S.C. § 1132(a), "singly or in combination." But ultimately, the court held, "[r]egardless of the avenue we follow – whether explicit or implied preemption – this state-law cause of action cannot be sustained."

In first concluding ERISA expressly preempted the Texas law under 29 U.S.C. § 1144(a), the Court stated that plaintiff's cause of action related to the employer's pension plan, because:

the existence of a pension plan is a critical factor in establishing liability under the

State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself. . . . Thus, in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment.

The court stated, even if ERISA did not expressly preempt plaintiff's state-law cause of action, it would be preempted nonetheless because it "conflicts" – poor word choice – "directly with an ERISA cause of action."

The court stated that the plaintiff's cause of action "falls squarely within the gambit of [29 U.S.C. § 1140]," which states:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

This "crucial" provision shields plan participants from employers who would terminate their employment to prevent pension benefits from vesting, just as the Texas wrongful discharge law purported to do. Absent certain "special features," however, the "mere existence" of an enforcement scheme does not "imply" preemption of state-law remedies. The court stated that the exclusivity of 29 U.S.C. § 1132(a) is "precisely the kind of 'special feature'" warranting preemption. The court concluded:

Unquestionably, the Texas cause of action purports to provide a remedy for the violation of a right expressly guaranteed by [29 U.S.C. § 1140] and exclusively enforced by [29 U.S.C. § 1132(a)]. Accordingly we hold that when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [29 U.S.C. § 1140], due regard for the federal enactment requires that state jurisdiction must yield.

(internal citations and quotations omitted).

Aetna Health

By the time the Supreme Court decided *Aetna Health Inc. v. Davila*,⁹ however, courts were regularly distinguishing between conflict and complete preemption, and referring to the separate doctrines, as such. Indeed, the *Aetna Health* court considered whether ERISA's civil enforcement provision, something the court referred to as ERISA's "remedial scheme," "completely" preempted the Texas Health Care Liability Act ("THCLA"). The court held it did; thus, plaintiffs' actions were properly removable to federal court.

Two plaintiffs in consolidated cases – captioned, *Aetna Health v. Davila* – submitted claims for medical benefits under their respective ERISA-governed health plans. They each "suffered injuries allegedly arising from Aetna's [and Cigna's] . . . decisions not to provide coverage for certain treatment and services recommended by respondents' treating physicians," but nevertheless asserted claims under THCLA and filed suit in state court.

The defendants removed the cases to federal court on the grounds that 29 U.S.C. § 1132(a) completely preempted plaintiffs' THCLA claims. The plaintiffs would not amend their complaints to add ERISA claims; thus, the U.S. district courts dismissed the complaints. The Fifth Circuit found significance in the tort-like nature of a THCLA claim. Although the court "recognized that state causes of action that 'duplicate or fall within the scope of an ERISA . . . remedy' are completely preempted and hence removable to federal court," the Fifth Circuit held that plaintiffs' claims did not "duplicate" an ERISA cause of action in that "THCLA did not provide an action for collecting benefits"; thus, plaintiffs' claims fell outside the scope of ERISA's remedial scheme and reversed the district court.

In its decision reversing the Fifth Circuit, the Supreme Court first explained that ERISA's remedial scheme is a "distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans." And in its strongest language to date, the court explained when ERISA's enforcement mechanism completely preempts a state-law cause of action. The court stated:

any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.

In short, the court held the Fifth Circuit erred in limiting 29 U.S.C. § 1132(a)'s preemptive reach to state law causes of action that duplicate ERISA's remedial scheme.

If a plan participant or beneficiary sues and through the suit is complaining about a denial of coverage, where such coverage would only exist because of the terms of an ERISA-governed plan, and "where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls 'within the scope of [29 U.S.C. § 1132(a)(1)(B)]." And thus, as a general matter, if a state law cause of action falls within the scope of ERISA's remedial scheme, then the cause of action is completely preempted.

The court next considered whether plaintiffs' claims fell "within the scope" of 29 U.S.C. § 1132(a)(1)(B). The court explained that it needed to examine plaintiffs' pleadings, the state law plaintiffs' relied on, *e.g.*, THCLA, and the applicable plan documents. After conducting this analysis, the court concluded that plaintiffs were only really complaining about the denial of benefits under the terms of their employers' ERISA-governed plan. Accordingly, the court held that plaintiffs' THCLA causes of action fell within the scope of 29 U.S.C. § 1132(a)(1)(B), even though the THCLA claims did not strictly "duplicate" an ERISA denial-of-benefits claim, and were completely preempted; thus, they were removable to federal district court.

The court then rejected plaintiffs' argument that the savings clause applied to exempt their THCLA claims from preemption. Relying heavily on its earlier decision in *Pilot Life*, the *Aetna Health* court explained that applying the savings clause to a state law cause of action would make little sense because doing so would obstruct Congress's intent of creating an exclusive federal remedy. The court stated:

Under ordinary principles of conflict preemption, then, even a state law that can arguably be characterized as "regulating

insurance" will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme.

The court correctly stated that ERISA preempts a state law if the law supplements, supplants, or duplicates ERISA's enforcement provision, regardless of whether the state law is specifically directed at the insurance industry and might otherwise be saved from preemption under a conflict preemption analysis. But the court's language is unclear. The court appears to be saying that even if the savings clause technically applied, principles of conflict preemption would nevertheless apply to preempt a state law that supplements, duplicates, or supplants ERISA's remedial scheme. What principles? Under conflict preemption analysis, if the state law relates to an ERISA plan and is specifically directed at the insurance industry then the savings clause applies and ERISA does not preempt the state law. Right? But the court held in *Pilot Life* and other earlier decisions that allowing the savings clause to avoid preemption in such circumstances would frustrate the purposes of ERISA and thus, courts must interpret 29 U.S.C. § 1144(b)(2)(A) in light of Congress's intent to create an exclusive federal remedy in 29 U.S.C. § 1132(a).

In the end, the court's decision in *Aetna Health* turned on a complete preemption analysis and did not depend on formally extending the conflict preemption doctrine to include an exception to preempt state laws that frustrate Congressional intent and the purposes of ERISA as the court did previously in *Pilot Life*.

Swenson

So that brings us to *Swenson v. United of Omaha Life Ins. Co.*¹⁰ In *Swenson*, the court considered whether ERISA's enforcement mechanism completely preempted plaintiff's state law cause of action invoking a Louisiana law regarding the conversion of group life insurance to an individual life insurance policy after group coverage ended. The court held ERISA completely preempted the state law cause of action.

The plaintiff sought to recover life insurance benefits under an ERISA-governed benefit plan. Her deceased husband had been a participant in the plan and had life insurance coverage thereunder. The defendant denied coverage under the plan on the grounds that

the plaintiff's husband was not a covered employee at the time of his death.

The plaintiff filed suit in Louisiana state court, relying on the state conversion law. The defendant removed the case to federal court and argued that ERISA completely preempted the plaintiff's state law causes of action. The district court dismissed the action, and the plaintiff appealed.

In its decision affirming the district court, the Fifth Circuit explained that ERISA's enforcement mechanism provides the sole avenue for seeking to recover benefits under an ERISA plan. Thus, ERISA completely preempted the plaintiff's state law claims seeking to recover plan benefits.

The plaintiff attempted to avoid complete preemption by arguing that the savings clause precluded a finding that ERISA preempted her state law claims. The court disagreed and stated, "[the savings clause] only saves certain state laws from conflict preemption, which is a federal defense that can be asserted when a federal law conflicts with a state law." The court explained that the savings clause quite simply did "not allow state law claims seeking recovery of ERISA benefits to escape preemption."

The court acknowledged that the savings clause preserved a role for certain state laws that regulate insurance, but explained that even a state law otherwise "saved from preemption by the savings clause is itself preempted if" the "state claims . . . provide a separate vehicle for seeking benefits from an ERISA plan." Such state law claims, the court stated, "remain preempted as such claims must be brought under ERISA's civil enforcement provision."

Explaining how the savings clause fits into the analysis, the court stated:

That is not to say that, when challenging the lawfulness of the denial of ERISA benefits, a beneficiary cannot argue that the administrator failed to comply with applicable laws including any state laws that retain force because of the savings clause. But that must be done in the context of ERISA's civil enforcement provision.

It is this explanation – stated succinctly by the court – that captures the distinction between state insurance laws an ERISA plan administrator must comply with in adjudicating claims under an ERISA plan, subject to conflict preemption analysis, and state laws that provide plan participants or beneficiaries with remedies for the allegedly wrongful claim determination, subject to complete preemption analysis. The Fifth Circuit held plaintiff's state law cause of action fell into the latter category and concluded that ERISA completely preempts plaintiff's state law claims.

Conclusion

The *Swenson* court did what many courts have not done. (And given the long history of somewhat confused jurisprudence in this area it is not surprising.) In response to plaintiff's misplaced argument that the savings clause somehow applies to preclude complete preemption of a state law cause of action, the court explained that the savings clause is only relevant in conflict preemption analysis. A court analyzing complete preemption should consider whether the state law cause of action duplicates, supplements, or supplants ERISA's remedial scheme, not whether the state law relates to an ERISA plan or whether the savings clause applies.

Courts should follow *Swenson's* lead and do more to adequately differentiate between the two discrete preemption doctrines.

Endnotes

1. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987).
2. *Id.* at 46.
3. *Id.*
4. *Ky. Association of Health Plans v. Miller*, 538 U.S. 329 (2003).
5. *Id.*
6. *Supra*, n. 1.
7. 481 U.S. 58, 60 (1987).
8. 498 U.S. 133 (1990).
9. 542 U.S. 200 (2004).
10. 876 F.3d 809 (5th Cir. 2017). ■

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