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Case Note: Golden Gate Restaurant Association v. City and County of San Francisco: Setting the Stage for Supreme Court Review of the Most Important Preemption Matter in the History of ERISA, 41 J. Marshall L. Rev. 995 (2008)

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CASE NOTE: *GOLDEN GATE RESTAURANT ASSOCIATION V. CITY AND COUNTY OF SAN FRANCISCO*: SETTING THE STAGE FOR SUPREME COURT REVIEW OF THE MOST IMPORTANT PREEMPTION MATTER IN THE HISTORY OF ERISA

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I. INTRODUCTION AND BACKGROUND

Within the last three years, a number of states and municipalities have enacted measures designed to ameliorate rising health care costs by shifting the financial burden of health care for uncovered workers to private employers. These laws, which are collectively referred to as "Play or Pay" or "Fair Share" laws (the nomenclature chosen tends to hinge upon the who the speaker is), do differ in their specific operation, but all share a single characteristic which defines them as a group: they all require that certain employers either pay a minimum amount toward some form of private health coverage for employees, or fork over funds to the respective government entity, at least purportedly to aid the government(s) in defraying the rising costs of health coverage for the otherwise uninsured.

As of the writing of this Case Note, there are at least two states which have such laws currently on the books, and which have not been successfully challenged in court as being preempted on the grounds of having an impermissible relationship to employee benefit plans under ERISA Section 514. In Massachusetts, the State's Health Care Reform Law[1] requires, among other things, that employers with more than eleven employees in the State offer a cafeteria benefit plan and satisfy

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1. The Massachusetts Health Care Reform Law comprises Chapter 58 of the state's statutory code.

one of two tests (one based on the amount of employer contributions, the other on the rate of participation by employees) to demonstrate that the employer's financial contributions to the Plan are "fair and reasonable." If neither of the tests is satisfied, a $295 per employee "contribution" must be remitted to the Commonwealth. In Vermont, employers must pay $365 per year to the State for each of their uncovered "full-time equivalent" workers to help fund the State's "Catamount Health" program, even for those who decline the employer's existing coverage, subject to certain exemptions.[2]

In addition, there are two such laws which have been struck down as preempted by ERISA. The first mandate, which was known as the (Maryland) "Fair Share Health Care Fund Act," and which was successfully challenged by a trade group led by Wal-Mart, would have required large employers (the statute was specifically targeted at Wal-Mart only) to contribute eight percent of their payroll toward private health coverage or pay the difference to the State.[3] In ruling that the law was preempted by ERISA, the Fourth Circuit in *Retail Industry Leaders Association v. Fielder*,[4] noted that the choice between paying an amount to the State for which no concrete benefit could be expected, or paying the same for health care for employees, which would certainly improve retention and morale among existing workers and help recruit new ones, was a "choice" upon which there could only be one rational conclusion.[5] As such, it was held, by leaving employers with no rational choice but to structure their (likely) ERISA-governed benefit plans to provide a required level of benefits, the statute was effectively a state mandate governing the structure of employers' ERISA plans, and was thus preempted and unenforceable.[6] Relying heavily on *Fielder*, The U.S. District Court for the Eastern District of New York struck down Suffolk County, New York's version of a "Fair Share" statute, only months later, and on essentially the same grounds.[7]

Thus, until recently, major "Play or Pay" or "Fair Share" laws have fallen into one of two categories: those of which there has been no favorable or unfavorable determination in court, and those

2. The law under which the Catamount Health Program was established is Vermont H. 861—The Health Care Affordability Act, and was signed into law on May 25, 2006. For more information on the program, see http://www.catamounthealth.org/.

3. The Act was codified at 2006 MD. CODE. ANN. [LAB. & EMPL.] §§ 8.5-101 to 107 (West 2008).

4. 475 F.3d 180 (4th Cir. 2007).

5. *Id.* at 193.

6. *Id.* at 193-94.

7. Retail Indus. Leaders Ass'n v. Suffolk County, 497 F. Supp. 2d 403 (E.D.N.Y. 2007)

which were struck down. However, it appears likely that there will soon be a third category with at least a single member: mandates which have been specifically upheld as not being preempted by ERISA, and thus, enforceable.

II. THE SAN FRANCISCO HEALTH CARE SECURITY ORDINANCE

In 2006, the San Francisco Board of Supervisors enacted, and the Mayor signed into law, the San Francisco Health Care Security Ordinance ("the Ordinance").[8] The Ordinance generally requires local employers with more than twenty employees[9] to make minimum aggregate health care expenditures either for private coverage, or as contributions to a City-run Plan, based on the number of hours worked by covered employees.[10] For 2008, employers with between twenty and ninety-nine employees are required to make such expenditures in the amount of $1.17 per work hour, and those with one-hundred or more employees are required to pay $1.76 per work hour.[11] Employers are required to pay (to the city plan) only to the extent that the amounts they expend for other employee health coverage do not meet the requisite thresholds, and thus many employers will not be directly affected. However, the Ordinance also requires employers to maintain records to demonstrate their compliance, regardless of the method it is achieved.[12]

III. LITIGATION

A trade association representing restaurants in the San Francisco area brought suit against the City and County of San Francisco, seeking a judicial declaration that the Ordinance, like the state statute in *Fielder*, was preempted by ERISA and could therefore not be enforced upon its membership.[13] Their wish was granted by the U.S. District Court for the Northern District of California, which, applying a similar analysis as did the Fourth Circuit in *Fielder*, found that the Ordinance was indeed preempted having both an impermissible connection with, and making

8. S. F. ADMIN. CODE §§ 14.1-14.8, *available at* http://www.municode.com /Resources/gateway.asp? pid=14131&sid=5.

9. § 14.1(11 & 12) define the "medium" and "large" businesses which are covered by the law as those with between twenty and ninety-nine employees on average, and those with 100 or more employees on average, respectively, and subject to certain exceptions.

10. *See generally* § 14.3 (providing a description of the required expenditures).

11. § 14.1(8)(a & b), as indexed.

12. *See generally* § 14.4.

13. Golden Gate Rest. Ass'n v. City and County of San Francisco (Golden Gate I), 535 F. Supp. 2d 968 (N.D. Cal. 2007).

unlawful reference to, employee benefit plans.[14]

The group's victory, however, was short-lived. The City and labor union intervenors brought a motion for stay, asking that the Ordinance be permitted to be enforced, pending appeal before the Ninth Circuit. Their motion was granted in January of 2008.[15] At present, the Ordinance is therefore in force and employers in the area whose health care expenditures do not otherwise meet the Law's requirements have already begun to make mandatory contributions to the City Plan.

However, for the Plaintiffs and other advocates of ERISA preemption over these types of local mandates, the fact that the Ordinance is currently in place pending appeal is hardly the most disconcerting facet of the matter. In granting the Defendants' motion for stay, the three judge panel of the Ninth Circuit made a number of indications that the Ordinance is likely to be upheld as not preempted on appeal, and the District Court's contrary finding reversed. First, in ruling on the Defendants' likelihood of success on the merits, (which is one of the elements weighed in determining the adequacy of such a petition, since such petitions focus on the prevention of irreparable harm) the Panel found that the Ordinance does not have any forbidden "connection with" ERISA plans[16] and is unlikely to have a likewise impermissible "reference to" such plans,[17] findings which directly contradict those of the District Court. The language used by the Court is exceptionally strong for this type of ruling, and seems to provide a window to the Court Members' intentions that is decidedly not subtle.

In addition, in granting the petition, the Ninth Circuit rejected the restaurant association's argument that a heightened standard of review should be applied because the granting of stay would change the status quo.[18] The Court, in fact, reached the opposite conclusion, observing that an enforceable Ordinance would have been the status quo but not for the District Court's finding, and stating its belief that preservation of the status quo in this matter demanded action, as non-action would result in irreparable injuries to the citizens of San Francisco.[19] This

14. *See generally id.* The standard for determining whether a state law "relates to" employee benefit plans for purposes of the preemption clause of ERISA § 514(a) is whether the law "has a connection with OR reference to such plans." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 97 (1983).

15. Golden Gate Rest. Ass'n v. City and County of San Francisco (Golden Gate II) 512 F.3d 1112 (2008).

16. *Id.* at 1120-24.

17. *Id.* at 1124-25.

18. *Id.* at 1116-17.

19. *Id.* at 1116 (citing Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 830 n. 21 (D.C. Cir. 1984) for the premise that the status

finding, although innocuous enough on a theoretical level, may likewise be an indicator (even if unconscious) of the Court Members' intentions to uphold the Ordinance upon full appeal before the Court. Why?

The possible irreparable injuries upon which the Court expressed concern[20] in granting the Defendants' motion for stay focused on the unavailability of preventative and other treatments which would result if stay were denied pending the Court's determination on appeal. Naturally, the argument that these concerns justified the Court's ruling becomes much more powerful if one contemplates that the Ordinance will be upheld and become the permanent law of the land, meaning that the granting of stay would act to prevent injuries which could have been prevented if not for the District Court's soon to be overturned ruling. If, on the other hand, one assumes that the Ordinance would be found to be preempted on appeal, then the granting of stay would serve no purpose but to provide for a temporary period of treatment availability for otherwise uninsured citizens, only delaying the inevitable consequences that would result from the Ordinance being struck down.

While, of course, the Ninth Circuit has not yet ruled on the merits of this case, one might wonder how two Circuits of the United States Court of Appeals could possibly reach opposite conclusions on a question which seems so fundamental to the issue of ERISA Section 514 preemption. A full compare/contrast of the Ninth Circuit's granting of stay in *Golden Gate* and the Fourth Circuit's determination in *Fielder* is beyond the scope or purpose of this Case Note, and would in fact be premature since the 9th Circuit has yet to render its final ruling. However, if there is a single factor which differentiates the two holdings, it must be this: In *Golden Gate*, the Court applies ERISA's preemption provision with a focus on the effects the Ordinance would have on ERISA-governed plans, ultimately concluding that the effects are slight.[21] In *Fielder*, the Fourth Circuit considered the issue of ERISA preemption in a broader light—framing its discussion in terms of the *relationship* between employers and the benefits provided to their employees (i.e., the subject matter of employee benefits) as

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quo may be a condition of action, not rest, and that rest may be "exactly what will inflict the irreparable injury upon complainant").

20. *See id.* at 1125, noting that:

> It is uncontested that individuals without health coverage are significantly less likely to seek timely medical care than those will health coverage. Lack of timely access to health care poses serious health risks . . . . It is clear that otherwise avoidable human suffering, illness, and possibly death will result if a stay is denied.

21. *See generally id.* at 1120-25.

constituting the issue of exclusive Federal control.

The United States Supreme Court has provided a framework for determining whether a state or local law sufficiently "relates to" employee benefits plans so as to cause it to be preempted under ERISA Section 514(a). To wit, a law will be found to be so preempted if it either (1) has a connection with, or (2) reference to, employee benefit plans.[22] In evaluating San Francisco's likelihood to prevail on the merits of the case, and with respect to the first item, the Ninth Circuit concluded that the Ordinance does not have an impermissible connection with employee benefit plans, contrasting the Ordinance from other state mandates which had been struck down for this reason. Once again, a full comparison between the Ninth Circuit's opinion in granting stay, and the holdings of the District Court and the Fourth Circuit in *Fielder* would be premature, but the respective Courts' different treatments of the issue of whether these types of laws have an impermissible connection with employee benefit plans is a useful example for illustrating how the two approaches differ.

With respect to this issue, the Ninth Circuit noted that the Ordinance "stands in stark contrast"[23] to three state mandates which have been found preempted by the Ninth Circuit and United States Supreme Court, and likened it instead to a fourth example which was found not to be preempted. Specifically, the Court analyzed the following cases:

- In *Egelhoff v. Egelhoff*,[24] the United States Supreme Court struck down a Washington statute which required certain beneficiary designations to be given effect even to the extent they contravened ERISA plan designations made in accordance with plan requirements. This mandate was struck down on the grounds that it required ERISA plan administrators to adhere to local rules which were in conflict with governing plan documents.[25]

- In *Shaw v. Delta Airlines, Inc.*[26] in a suit over two New York statutes governing benefits for pregnancy, one statute was found preempted and the other unenforceable with respect to ERISA plans, with the Court noting that laws which require the payment of specific benefits are preempted under Section 514(a).[27]

- In *Standard Oil v. Agsalud*, both the Ninth Circuit and United States Supreme Court struck down a state statute which would have required employers to provide employees with a

22. Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316, 324 (1997).

23. *Golden Gate II*, 512 F.3d at 1121.

24. 532 U.S. 141 (2001).

25. *Id.* at 147.

26. 463 U.S. 85 (1983).

27. *Id.* at 97-100.

prepaid health plan covering a wide range of required benefits,[28] on the grounds that the law would have regulated the type of benefits provided by employers.[29]

- On the other hand, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,[30] a state-mandated surcharge to be collected by hospitals from patients covered by commercial insurers but not from those insured by Blue Cross/Blue Shield was found not to be preempted, with the United States Supreme Court noting that the law amounted only to an indirect economic influence over the choices of insurers available to ERISA plans and other entities.

In short, the Ninth Circuit used the above four cases to illustrate its belief in the *sine qua non* of whether a state or local statute is preempted by ERISA on account of an impermissible connection with employee benefit plans: whether the law is simply an indirect economic influence over such plans, or whether it crosses the line and directly regulates matters central to plan administration.[31] With respect to the San Francisco Health Care Security Ordinance, the Court thus concluded:

> The Ordinance does not require any employer to adopt an ERISA plan or other health plan. Nor does it require any employer to provide specific benefits through an existing ERISA or other health plan. Any employer covered by the Ordinance may fully discharge its expenditure obligations by making the required level of employee health care expenditures, whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to the City. The Ordinance thus preserves ERISA's "uniform regulatory regime."[32]

Predictably, the approaches taken by the District Court in this matter and the Fourth Circuit in *Fielder* do not approach the problem of preserving ERISA's "uniform regulatory regime" in the same manner.

In *Fielder*, the Fourth Circuit specifically rejected the notion that the effect of the Supreme Court's decision in *Travelers* (relied on by the Ninth Circuit, as stated above) provided a basis upon which Maryland's Fair Share Law could be deemed a merely indirect economic influence, and thus, as not having an impermissible connection to employee benefits plans.[33] Specifically, the Fourth Circuit noted that the statute (pertaining

28. 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1982).
29. *Id.* at 766.
30. 514 U.S. 645 (1995).
31. *Golden Gate II*, 512 F.3d at 1122-23.
32. *See id.* at 1121 (citing Aetna Health v. Davila, 542 U.S. 200, 208 (2004)).
33. *Fielder*, 475 F.3d at 195-96.

to hospital surcharges) at issue in *Travelers* was "inapposite" to the Maryland law, pointing out that the hospital surcharges in *Travelers* constituted only an indirect influence, whereas Maryland's Fair Share Law directly affected the structuring of employee benefit plans.[34] Ultimately, the Fourth Circuit in *Fielder* concluded that, regardless of the fact that employers under the Maryland Fair Share Law were afforded the choice to comply with the statute through means other than establishment of an ERISA plan, (by paying the State) that "(t)he undeniable fact is that the vast majority of any employer's healthcare spending occurs through ERISA plans. Thus, the primary subjects of the Fair Share Act are ERISA plans, and any attempt to comply with the Act would have direct effects on the employer's ERISA plans."[35] The Court went on to point out that a proliferation of these types of laws throughout the country would require employers to adhere to varying requirements from jurisdiction to jurisdiction.[36]

Stripped to its essentials, the Fourth Circuit's holding in *Fielder* stands for the proposition that it is the relationship and subject matter of employee benefit plans which is a matter of exclusive Federal control, and that a statute which affects the structure of ERISA plans cannot escape the grasp of ERISA preemption simply by providing a "non-ERISA" avenue for employers to comply with minimum healthcare spending mandates. It is noteworthy that, having reached the conclusion that Maryland's Fair Share Law was preempted as having an impermissible connection with employee benefit plans, it did not address the question of whether the Law was preempted on account of having "a reference to" such plans,[37] which is the second branch of the preemption inquiry, as stated above.[38]

The District Court in *Golden Gate*, of course, had held that the San Francisco Ordinance had an impermissible connection with employee benefit plans, a holding it reached through the application of factors gleaned from a Ninth Circuit case.[39]

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34. *Id.*
35. *Id.* at 196.
36. *Id.* at 197.
37. *Id.* at 193 n.2.
38. *Golden Gate II*, 512 F.3d at 1121.
39. *Golden Gate I*, 535 F.Supp.2d at 975. The factors used by the District Court are taken from Operating Eng'rs Health & Welfare Trust Fund v. J.W.J. Contracting Co., 135 F.3d 671, 678 (9th Cir. 1998). The factors cited are:

> (1) whether the state law regulates the types of benefits of ERISA employee welfare plans; (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law; (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and (4) whether the state law

First, the Court noted that the Ordinance "regulates the types of benefits of ERISA employee welfare plans,"[40] again paying credence to the concept that it is the *relationship* created through the provision of benefits to employees from employers that is intended to be an exclusively federal matter under ERISA's preemption clause. Similarly, the Court emphasizes that the Ordinance imposes recordkeeping and administrative burdens on existing ERISA plans,[41] a second factor cited by the Ninth Circuit[42] in another matter with respect to the determination of ERISA preemption. Finally, on the specific issue of interference with the employee benefit plan relationship, and citing to *Fielder*, the District Court had held that the Ordinance "directly and indirectly affects the structure and administration of ERISA plans," regardless of the fact that employers could satisfy their obligations through contributions to the City-run plan, noting that this is "a relationship that has traditionally been governed by ERISA."[43] Once again, it bears note that the District Court's holding with respect to safeguarding the employee benefits relationship as an exclusively Federal matter was reached only after applying the holdings of several Ninth Circuit cases.[44] If the Ninth Circuit does indeed uphold the statute on appeal as not being preempted by ERISA, it will be interesting to see to what extent the Court is able to craft an opinion which is reconcilable with several of its own former pronouncements (which would seem to support the opposite outcome).

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regulated certain ERISA relationships, including relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and the employee.

Id.

40. *Id.* at 975-76; *see Fielder*, 475 F.3d at 195-96.

41. *Golden Gate I*, 535 F. Supp. 2d at 976.

42. *Fielder*, 475 F.3d at 195-96.

43. *Golden Gate I*, 535 F. Supp. 2d at 977.

44. *See id.* (citing Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212, 1219 (9th Cir. 2000) ("[A] core factor leading to the conclusion that a state law is preempted is that the claim bears on an ERISA-regulated relationship"); Blue Cross of Cal. v. Anesthesia Care Assocs., 187 F.3d 1045, 1053 (9th Cir. 1999); Emard v. Hughes Aircraft Co., 153 F.3d 949, 957 (9th Cir. 1998) (in determining whether state law would "frustrate the purpose" of the statute, a factor is the existence of state-law regulation of ERISA relationships); *Operating Eng'rs*, 135 F.3d at 678 (A preemption factor is "whether the state law regulates certain ERISA relationships . . . .")

IV. CONCLUSION

To note that upholding of the Ordinance by the 9th Circuit could change the landscape of employer-provided health care coverage is the very definition of an understatement to the employee benefits practitioner. Of course, if the Court does uphold the Ordinance, as many expect, the clear immediate effect will be the removal of any Federal barrier for any states or municipalities in the Circuit's jurisdiction of California, Hawaii, Alaska, Oregon, Washington, Arizona, Nevada, Idaho, and Montana from enacting similar measures. Equally manifest is that such a ruling would result in a decided split, at least between the 9th and 4th Circuits, on a Federal issue of the utmost importance, setting the stage for likely review by the U.S. Supreme Court. It is difficult to imagine any issue relating to ERISA preemption as going down in the annals of employee benefits law history as having more far-reaching implications than the question of whether state and local governments can enact and enforce such mandates.