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ERISA Litigation Alert

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Todd G. Smith, a shareholder in Godfrey & Kahn's Madison office, practices in the area of complex civil litigation, including ERISA and insurance coverage disputes. Todd represents clients in disputes involving benefits provided pursuant to self-funded arrangements, including welfare and retirement benefit plans subject to regulation under the Employee Retirement Income Security Act of 1974. Todd has successfully defended ERISA plans against suits seeking benefits as well as claims alleging breach of fiduciary duties. Todd also represents insurance companies in cases seeking life and health insurance benefits under insurance policies.

Representative Cases:
McCarter v. Retirement Plan for the District Managers of the American Family Ins. Group, 2008 US App LEXIS 18808 (lead counsel for retirement benefit plans in ERISA class action lawsuit challenging lump sum provision of plans; won summary judgment dismissing suit and recovering attorney fees from plaintiffs and their counsel)

Haupt, et al. v. McFarlane Incentive Savings and Profit Sharing Plan, et al., Western District of Wisconsin Case No. 03-C-100 (J. Shabaz) (successfully defended ERISA plan in benefits and breach of fiduciary duty litigation)

Summerlin v. Georgia-Pacific Life, Health & Accident Plan, 366 F. Supp. 2d 1203 (M.D. Ga. 2005) (represented both a plan and a TPA in a case establishing that ERISA pre-empted Georgia's anti-subrogation statute)

Ninth Circuit Approves Municipal Ordinance Mandating Employer Health Care Expenditures

By Todd G. Smith

In a much anticipated decision, the U.S. Court of Appeals for the Ninth Circuit has held that a municipal ordinance requiring employers to make certain expenditures for their employees' health care is not pre-empted by the Employee Retirement Income Security Act of 1974. The City of San Francisco ordinance requires employers to make payments toward employees' health care, but does not require any particular payment or coverage.

With its decision, the court steps into this important public policy debate, essentially changing ERISA preemption analysis to allow state and local governments to enact legislation designed to address the issue of health care coverage. The decision also provides support for other state and local governments who might enact similar legislation. Given the important public policies at issue, it is likely that the preemption principles addressed in the decision will ultimately be reviewed by the U.S. Supreme Court.

The City of San Francisco Ordinance

The San Francisco ordinance has two primary components. First, it requires employers to make health care expenditures, in certain defined amounts, on behalf of their employees. The amount of the required expenditure depends upon the size of the employer's workforce. The employer may make the expenditures directly toward employee health care, such as in the form of insurance premiums or contributions toward a self-funded health care plan. In the alternative, the employer may elect to make payments to the City in the form of health care assessments.

The ordinance also creates a Health Access Plan ("HAP") to fund health care services for low and moderate income persons. The program utilizes a network of public and private providers to provide health care to workers, to be funded though general taxes as well as the health care assessments paid by employers. Employees who do not receive benefits in the mandated amounts are eligible to participate in the HAP.

The Golden Gate Restaurant Association filed suit, contending that the ordinance was pre-empted by ERISA. The trial court agreed, reasoning that the ordinance was an attempt by a local government to require employers to provide health care benefits at a particular level, which ERISA forbids. The City appealed, asserting that its ordinance was outside ERISA's preemptive reach.

The Court of Appeals' Decision

The Ninth Circuit Court of Appeals reversed the judgment of the district court, finding that ERISA did not preempt the statute. The court began its analysis by recognizing that there is a presumption against finding state and local laws preempted when those laws regulate areas of traditional state concern. The court noted that providing affordable health care services to low and moderate income households is an area of traditional state regulation.

The court first found that, by creating the HAP, the ordinance did not "create" a health care plan. The court focused on the fact that the ordinance does not require employers to create an administrative scheme to comply with the ordinance's funding obligations. It also found significant the fact that health care payments and assessments would be funded through employers' general assets, rather than the separate fund that employers typically designate for health care expenditures.

The court focused on one of ERISA's main purposes, which is to prevent mismanagement or

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misuse of funds otherwise allocated for employee benefits. Because the ordinance did not require employers to create a scheme or fund, and did not impart employers with any discretion with regard to funding obligations, the court found that the ordinance's obligations did not raise the risk of mismanagement that was a primary concern of Congress when it enacted ERISA.

The court also held that that the ordinance does not "relate to" a welfare benefit plan, as that phrase in section 514(a) of ERISA has been interpreted by courts. The court distinguished several lines of ERISA preemption cases, stating:

> 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 plan 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." The Ordinance also has no effect on the administrative practices of a benefit plan, unless an employer voluntarily elects to change those practices.

The court concluded its preemption analysis by holding that the ordinance is not a regulation placed upon health care plans, but instead creates obligations on employers, regardless of whether the employer even has a health care plan.

Larger Implications of the Decision

The court's decision creates the first significant "victory" for state and local governments that desire to address the issue of health care coverage through legislation. Accordingly, other jurisdictions may follow suit and enact similar or identical legislation.

The decision reflects a larger dynamic that occurs when courts and judges step in to address what they perceive to be a failure of the legislative process to address an important issue of public concern. To date, no important state or local legislative initiative of this type has survived ERISA preemption analysis. This has lead to dissatisfaction with current ERISA preemption analysis, possibly leading the Ninth Circuit to craft its unique decision.

Given the importance of health care reform in today's policy debate, it is likely that the plaintiffs challenging San Francisco's ordinance will pursue an appeal to the United States Supreme Court.

A copy of the court's opinion can be found here: http://www.ca9.uscourts.gov/ca9/newopinions.nsf/7247887E88BB6AE7882574D3007D1157/$file/0717370.pdf?openelement

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