N.D.A.G. Letter to Maxson (Dec. 18, 1992)

December 18, 1992

Honorable Jim Maxson
State Senator
6 Ninth Street SE
Minot, ND 58701

Dear Senator Maxson:

Thank you for your September 25, 1992, letter concerning the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. (1988 & Supp II 1990). Specifically, you ask whether a proposed state law requiring employer-provided health insurance plans and other insurance plans to pay medical expenses arising out of workers compensation claims would be preempted by ERISA. Additionally, you ask whether the proposed legislation would be enforceable against self-insured employers.

Presently, most insurance plans do not provide payment to a participating member who sustains a work-related injury covered under workers compensation. The proposed legislation would prohibit an insurance company, nonprofit health service corporation, or health maintenance organization from issuing or renewing any health insurance policy or health service contract that excludes or limits coverage of work-related injuries. Payment for medical expenses associated with a compensable injury would be paid consistent with the terms of the insurance policy or contract although the workers compensation bureau would pay any deductible or coinsurance costs.

ERISA's primary purpose was 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) (1988). ERISA defines an "employee benefit plan" as either an employee welfare benefit plan - which generally provides for some combination of medical, health, sickness, accident, disability, death, or unemployment benefits - or an employee pension benefit plan - which generally provides for retirement income. 29 U.S.C. § 1002(1)-(3) (1988).

The scope of ERISA's coverage, and the exceptions to that coverage, are outlined in 29 U.S.C. § 1003 (1988):

> (a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained--
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> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
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> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.
>
> (b) The provisions of this subchapter shall not apply to any employee benefit plan if--
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> (1) such plan is a governmental plan (as defined in section 1002(32)) of this title;
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> (2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of title 26;
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> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;
>
> (4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or
>
> (5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

29 U.S.C. § 1144(a) (1988) expressly provides for the preemption of state law:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

29 U.S.C. § 1144(b)(2)(A) (1988), provides a saving clause specifically excluding state laws that "regulate[] insurance, banking, or securities" from the preemptive effect of 29 U.S.C. § 1144(a). Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1985). 29 U.S.C. § 1144(b)(2)(A) provides:

> 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.

Under 29 U.S.C. § 1144(b)(2)(B) (1988), the so-called "deemer clause", "an employee benefit plan governed by ERISA shall not be 'deemed' an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws 'purporting to regulate' insurance companies or insurance contracts." FMC Corp. v. Holliday, 111 S.Ct. 403, 407 (1990). 29 U.S.C. § 1144(b)(2)(B) provides:

> Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Courts have recognized that 29 U.S.C. § 1144(a) was "designed to have a sweeping preemptive effect in the employee benefit plan field." R.R. Donnelley & Sons Co. v. Prevost, 915 F.2d 787, 791 (2d Cir. 1990) (quoting American Progressive Life and Health Ins. Co. v. Corcoran, 715 F.2d 784, 786 (2d Cir. 1983)). 29 U.S.C. § 1144(a) was "intended to preempt all state laws that relate to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA." Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978) (emphasis in original). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983). Under this approach, "a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 453, 478 (1990).

However, the United States Supreme Court has recognized "that Congress, in seeking to preempt all state laws that 'relate to' employee benefit plans, could not possibly have meant to preempt all laws having any impact on such plans, no matter how small or how tangential." Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 145 (2d Cir.), cert. denied, 493 U.S. 811 (1989). "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n. 21.

Applying these principles to the proposed legislation requiring employer provided health insurance plans and other insurance plans to pay medical expenses arising out of workers compensation claims, leaves one little difficulty in concluding that the proposed legislation "relates to" employee benefit plans within the meaning of 29 U.S.C. § 1144(a). The proposed legislation has a direct impact upon an employee benefit plan in requiring the payment of medical expenses arising out of workers compensation claims, an expense which is not currently borne by most plans. See generally Alessi v. Raybestos-Manhatten,

Inc., 451 U.S. 504 (1981).

Having determined that the proposed legislation relates to employee benefit plans, the question remains as to whether the proposed legislation is saved from preemption by one of the exceptions under 29 U.S.C. § 1003(b)(3) or the saving clause under 29 U.S.C. § 1144(b)(2)(A).

For example, plans "maintained solely for the purpose of complying with applicable workmen's compensation laws" are excepted from ERISA coverage. 29 U.S.C. § 1003(b)(3). In Stone & Webster Engineering Corporation v. Ilsley, 690 F.2d 323, 329-330 (2d Cir. 1982), the court concluded that a state statute requiring an employer to provide health and life insurance coverage for a former employee who was receiving workers compensation was not directed specifically to plans maintained solely for the purpose of complying with that state's workers compensation laws. Consistent with Stone, it cannot be said that the proposed legislation falls within the exception as a law relating to plans maintained solely for the purpose of complying with our state workers compensation law. The proposed legislation additionally does not appear to relate to the other types of plans which are excepted from ERISA coverage under 29 U.S.C. § 1003(b).

Having determined that the proposed legislation relates to an employer benefit plan and is not excepted from ERISA's coverage under 29 U.S.C. § 1003(b)(3), it remains necessary to determine whether the saving clause under 29 U.S.C. § 1144(b)(2)(A) spares the legislation from preemption.

In Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977) cert. denied, 435 U.S. 980 (1978), the court considered whether a state law regulating the content of group insurance policies to provide coverage for the treatment of mental illnesses and emotional disorders was in conflict with ERISA. The court "conclude[d] that ERISA does not preempt application of state law to group insurance policies when such policies are purchased by employee benefit plans." Woodsworth, 562 F.2d at 78. The court reasoned that "Congress was fully aware of the functions and scope of employee benefit plans and, nonetheless, exempted state laws regulating insurance from preemption." Id. (Footnote omitted.) Succinctly stated by the United States Supreme Court, "[i]f a state law 'regulates insurance,' . . . it is not preempted." Metropolitan Life Ins. Co., 471 U.S. at 746.

Because the proposed legislation purports to regulate insurance with regard to the content of insurance policies, it is my opinion that it is not preempted under 29 U.S.C. § 1144(a).

Turning next to your second question, it is my opinion that the proposed legislation would not be enforceable against self-insured employers. 29 U.S.C. § 1144(b)(2)(B) specifically exempts self-funded plans from state laws that regulate insurance. See Smith v. Blue Cross & Blue Shield, 959 F.2d 655, 657 (7th Cir. 1992). Conversely, "[p]lans that purchase insurance - so-called 'insured plans' - are directly affected by state laws that regulate the insurance industry." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985). See also FMC Corp. v. Holliday, 111 S.Ct. 403, 410 (1990) (State laws that directly regulate insurance are "saved" but do not reach self-funded plans because the plans may

not be deemed to be insurance companies or engaged in the business of insurance.); Gonzales v. Prudential Ins. Co. of America, 901 F.2d 446, 453 (5th Cir. 1990) (Self-funded ERISA plans are not subject to state insurance regulation, either directly or indirectly.).

Sincerely,

Nicholas J. Spaeth

dec/jfl