CARLTON FIELDS

Solicitors Argue to U.S. Supreme Court That Vermont Health Care Reporting Law Is Not Preempted By ERISA

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The Supreme Court will soon consider whether, as applied to self-insured health benefit plans or their third-party administrators, ERISA preempts a Vermont law requiring health care payers to report claims and other data to a state agency charged with developing a database of information on health care provided to Vermont citizens. The Second Circuit held the Vermont law to be preempted, finding that it had an impermissible "connection with" ERISA plans, particularly, because it addressed the "core" ERISA issue of reporting. At the invitation of the Supreme Court, the Solicitor General and Solicitor of Labor submitted an *amicus* brief in support of Vermont at the petition stage in *Gobeille v. Liberty Mutual Insurance Co.* and recently filed a further brief after *certiorari* was granted. Their brief argues that the Vermont law is not preempted because it does not make "reference to" or have an impermissible "connection with" an ERISA plan, but applies to many types of health care payers. They further argue that, while ERISA governs the design and administration of employee benefit plans, the Vermont law is aimed at improving the quality and cost of health care for citizens of Vermont. In support of the contention that the law is not concerned with ERISA plan administration, the brief also notes that the Vermont statute's implementing regulation does not require submission of data regarding denied claims. The solicitors cite *De Buono v. NYSA-ILA Medical & Clinical Services*, in which the court determined that a gross-receipts tax on patient services provided by a hospital operated by an ERISA plan was not preempted, notwithstanding that the hospital was required to submit quarterly reports under the law. The brief also cites *California Division of Labor Standards Enforcement v. Dillingham Construction*, in which the court held that California's prevailing-wage law was not preempted as applied to an apprenticeship program established as an ERISA plan, even though state law recordkeeping and disclosure obligations are typically associated with such laws. The Solicitor General and Solicitor of Labor also contend that the Vermont law is concerned with an area traditionally regulated by the states, the health and welfare of state citizens,

and is thus entitled to a presumption of non-preemption and, furthermore, that the Vermont law would survive under traditional field and conflict preemption tests. They point out that, without the Vermont law and those like it in other states, federal programs (such as those being implemented under the Affordable Care Act) that would use the data will be frustrated.

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