Trial and Error: Examining ERISA § 514(a) Preemption of Employer "Fair Share" Laws in the Aftermath of Golden Gate Restaurant Association v. City and County of San Francisco

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TRIAL AND ERROR: EXAMINING ERISA § 514(a)
PREEMPTION OF EMPLOYER “FAIR SHARE”
LAWS IN THE AFTERMATH OF GOLDEN GATE
RESTAURANT ASSOCIATION v. CITY AND COUNTY
OF SAN FRANCISCO

DANIEL RANELLONE†

I. INTRODUCTION

Healthcare is one of the most valued benefits available to the American employee, and remains one of the United States’ most pressing domestic issues. Notwithstanding the elderly, eighteen percent – 46 million – of this country’s citizens are uninsured, and four-fifths of that total consists of individuals coming from working families.1 Based on the surveys taken for the past several years, 700,000 more children were uninsured when studied in 2007 than in previous studies.2

The federal government and the states have differed in their approaches to solving this enormous problem, which has led to a variety of different proposals offered. To varying degrees, the federal government, most recently led by former Congressional leaders Dennis Hastert and Bill Frist, has embraced the individual or privatization method, in conjunction with considerable public coverage for seniors and low-income individuals. The most recent

† J.D., 2008, University at Buffalo Law School. I would like to thank Professor James Wooten for contributing his comments and suggestions throughout the research process, and for creating and maintaining the ERISA curriculum which sparked my interest in this case and in this most “complex and reticulated” of subjects. I would like to thank my family for their unwavering support; my life would look quite different without their love and encouragement. Last, but certainly not least, I would like to thank the Buffalo Public Interest Law Journal staff. Their edits and dedication made this a more focused, and Bluebook-friendly, document. Errors and omissions rest solely with the author.


effort promoting private coverage came in the Medicare Prescription Drug, Modernization, and Improvement Act, when Health Savings Accounts ("HSAs") were created as a means of providing tax breaks to encourage citizens to obtain and pay for their own high-deductible health plans.\(^3\) States have gone a different route, seeking to provide their own plans to cover a broader range of low-income and uninsured citizens than conventional Medicaid programs.\(^4\) Many state proposals require contributions by local employers, either through providing a set of health coverage plans or by contributing a specified sum on behalf of the number of individuals employed. These contributions generally serve to assist in covering both uninsured employees and the state’s poorest and unemployed citizens.

The provision of health care is generally considered an area where state governments have substantial influence, one of the areas in which Justice Brandeis encouraged states to act as "laboratories" of experiment.\(^5\) Answering this call, states and municipalities like Maryland, Massachusetts, Hawaii, California, Suffolk County, NY, and San Francisco have stepped forward with proposals to ensure that their citizens are guaranteed health care.

However, these states and localities have often encountered difficulty in implementing these proposals due to the Employee Retirement Income Security Act of 1974 ("ERISA").\(^6\) ERISA has been interpreted to prohibit states from regulating plans that "relate to" employee "welfare" plans, which includes nearly any employer-offered benefit outside of the scope of defined pension plans. One of the first benefits contained in the definition of "welfare plan" is, of course, health benefits. As a result, states have

\(^4\) For example, there have been a number of recent state efforts to expand coverage for children under SCHIP. See, e.g., Doug Trapp, States Sue Federal Government Over Tighter SCHIP Limits, AMEDNEWS, Oct. 22/29, 2007, http://www.ama-assn.org/amednews/2007/10/22/gvsc1022.htm.
\(^6\) 29 U.S.C. § 1001 et seq.
been taken to court for their proposals to require employers to assist them in providing coverage to their citizens, and have usually lost.

This paper seeks to examine the reasons that state legislative efforts have failed, will delve into who “won” and will offer an explanation as to why they won, and will offer some predictions as to what may happen if the Supreme Court decides to get involved. Finally, this paper will explore the merits of the state plans, exploring the desirability of these proposals.

II. ERISA § 514(a) LITIGATION: QUASHING STATE EFFORTS TO REQUIRE EMPLOYERS TO SUPPORT OR PROVIDE HEALTH COVERAGE

A. Legislative Developments Leading to ERISA’s Preemption Clauses

ERISA represents a legislative compromise between the House and Senate, social reformers and labor organizations and employers, and a variety of other competing interests. A prominent symbol of this compromise is reflected in ERISA’s preemption provisions, which were broadly written so as to appease corporate and labor groups who were concerned about states passing subsequent, more restrictive laws with which they would have to comply. Senator Jacob Javits, an early and “impassioned” supporter of national health insurance, was aware that broad preemption provisions requested in conference committee discussions could jeopardize many state efforts that related to provision of health care, but decided to concede the broad preemption in exchange for more regulatory influence by the U.S.

Department of Labor ("DOL") (and thus, his Senate Labor Committee). Senator Javits seemed to believe (or hope) that the federal courts’ development of “a body of Federal substantive law . . . to deal with issues involving rights and obligations under private welfare and pension plans” would somehow modify the broad preemption Congress had laid out for welfare plans – the thought seemed to be that the courts would refuse to interpret preemption as broadly as it had been written. With the exception of a few cases in the mid-1990s, however, ERISA preemption has been read to provide quite broad preemption.

B. “A body of Federal substantive law” – ERISA § 514(a) Litigation

Senator Javits’s hope was fulfilled, to the extent that a voluminous body of federal substantive law was created from ERISA litigation. However, neither American politics nor ERISA preemption policy provided the opening for implementation of the universal healthcare that he was hoping for. The main obstacle to state approaches to providing universal healthcare has proven to be ERISA § 514(a), whose history should be explained before the actual healthcare cases are addressed.

See WOOTEN, supra note 7, at 217.


Professor Edward Zelinsky has written extensively on § 514(a) preemption, which includes published law review articles on both the Maryland and the Massachusetts health care plans. See, e.g., The New Massachusetts Health Law: Preemption and Experimentation, 49 WM. & MARY L. REV. 229 (2007) [hereinafter Massachusetts Law]; Maryland’s “Wal-Mart” Act: Policy and Preemption, 28 CARDOZO L. REV. 847 (2006) [hereinafter Wal-Mart]. I have relied on his articles, and on the knowledge gained from a Pensions and Employee Benefits course, to guide me in this discussion of pertinent litigation.
1. Brief Discussion on ERISA Litigation

a. ERISA § 514(a) Preemption

ERISA § 514(a) provides that ERISA “shall supersede any and all State laws insofar as they now or hereafter relate to any employee benefits plan.”\(^\text{12}\) Further, § 102 defines an “employee welfare benefit plan” as “any plan, fund or program which ... was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, ... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, [or] disability ... .”\(^\text{13}\) Thus, laws that regulate healthcare and other employee welfare benefits are preempted by ERISA, if they “relate to” an employee benefits plan.

b. “Relate to” Clause

One of the earliest cases to interpret § 514(a) was Shaw v. Delta Air Lines, Inc.,\(^\text{14}\) which involved a case where New York State had passed a human rights law that mandated employers to provide pregnancy disability benefits to their employees.\(^\text{15}\) The Supreme Court, interpreting “relate to” to include any state laws which had “a connection with or reference to” ERISA pension and welfare plans, struck down the New York law as “related to” employer ERISA welfare plans.\(^\text{16}\) By requiring employers to act in a nondiscriminatory way toward pregnant individuals in providing benefits, New York State was imposing additional burdens upon employers’ ERISA plans that ERISA had not done. Such an additional burden on administration and funding of employer welfare plans is connected with or related to the employer’s

\(^{13}\) 29 U.S.C. § 1002(1).
\(^{15}\) Id. at 92, 97.
\(^{16}\) See id. at 100.
ERISA plan, and imposing additional requirements violates ERISA § 514(a). The standard set, that any law having a “connection with” or “reference to” an ERISA plan is preempted, would be refined with time.

Another key case in the Shaw line was District of Columbia v. Greater Washington Board of Trade,17 which concerned a D.C. law that required employers maintaining healthcare coverage for their employees to provide equivalent coverage for injured employees who were eligible for workers’ compensation payments.18 The Court found that such a plan was prohibited by § 514(a) regardless of whether it was specifically designed to affect ERISA plans or if its effects were only indirect, and further found that a state law is preempted even if it is “consistent with ERISA’s substantive requirements.”19 Washing Board of Trade is key in that it is a case where a common “rate” or “standard” was set (as with the “fair share” acts to be discussed), but was still preempted.20

The Court acknowledged the difficulty of its “relate to” interpretation in N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,21 conceding that “for all practical purposes preemption would never run its course,” if “relate to” was “taken to extend to the furthest stretch of its indeterminacy.”22 In Travelers, the Court determined that it would now look to the purpose of ERISA preemption to ensure that the “historic police powers of the States” were not superseded unless clear Congressional intent was shown,23 and nothing in ERISA

18 Id. at 126-27; see Wal-Mart, supra note 11, at 851-52.
20 Professor Zelinsky sees the Washington D.C. plan as one that “refers to” employee welfare plans, whereas the employer healthcare laws actually refer to and regulate welfare plans by requiring reporting, contributions, et cetera. Wal-Mart, supra note 11, at 853.
22 Id. at 655.
23 Id.
indicates that Congress “chose to displace general health care regulation, which historically has been a matter of local concern.” But, *Travelers* was based on a state surcharge to the insurance payor, not to the employer. The Court viewed the surcharge as an “indirect economic influence” on a choice of coverage, not on the ERISA plan or administrator.

The Court continued this line of logic the next year in *California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.*, concluding that California’s wage law did not relate to an ERISA plan. In this instance, the Division of Labor Standards Enforcement required that apprentices be paid certain statutory wages; Dillingham sued, saying this interfered with its administration of an ERISA plan. The blanket requirement on employers, though, did not refer to or connect with ERISA plans so as to disrupt the uniform administration of the plans.

In 2001, the Court revisited preemption in *Egelhoff v. Egelhoff*, overturning a Washington law that revoked probate designations of former spouses as beneficiaries, finding that it governed “the payment of benefits, a central matter of plan administration.” This is a crucial post-*Travelers* ruling, as it reiterated that plans cannot be forced into providing benefits to specific individuals, this effectively governs plan administration (an area that ERISA certainly relates to).

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24 *Id.* at 661 (citing Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 719 (1985)).
25 *Wal-Mart*, supra note 11, at 859.
26 *Id.*
28 *Id.* at 319.
29 *Id.* at 321-22.
30 *See id.* at 332-34.
32 *Id.* at 143, 148.
2. Universal Healthcare Litigation

a. The Maryland Plan – “Fair Share Health Care” Part I

i. Background

On January 12, 2005, the Maryland General Assembly enacted the Fair Share Health Care Fund Act (“Maryland Act”). The Maryland Act was directed at non-governmental employers of 10,000 or more state citizens, requiring that companies included in the definition devote at least 8% of their payroll expenditures toward health insurance, or that they pay the difference to the Labor Secretary. For non-profit employers, the number to meet is 6%. The Maryland Act also required employers to provide annual reports of its total number of employees, the amount spent on health insurance costs, and the percentage of the payroll that the figure represented. The Maryland Act further defined “health insurance costs” as health care expenditures “to the extent the costs may be deductible by an employer under federal tax law.” Crucially, only four employers met the definition provided in the Maryland Act, and three of them were exempted from having to modify their current procedures. Only Wal-Mart remained; they sued for summary judgment, through the Retail Industry Leaders Association (“RILA”), shortly after passage of the Maryland Act.

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34 MD. CODE ANN., LAB. & EMPL. § 8.5-102, -103(a)(1), -104(b).
35 Id. at § 8.5-104(a).
36 Id. at § 8.5-103.
37 Id. at § 8.5-101(d)(1) (apparently meaning HSA or some other includible employee expense).
38 Fielder, 435 F. Supp. 2d at 485.
39 Id. at 484.
Regulation, cross-moved for summary judgment through the Maryland Attorney General’s Office.\textsuperscript{40}

\section*{ii. District Court Decision}

\subsection*{(a) Jurisdictional Arguments}

The first matter for District Judge Motz\textsuperscript{41} to rule on was Maryland’s motion to dismiss based on a challenge of RILA’s standing to bring the case.\textsuperscript{42} Judge Motz dispatched the standing argument, finding that RILA has “associational standing” as an advocate for the rights of members of its group.\textsuperscript{43} Also important to the case was the finding that Wal-Mart and RILA were subjected to an “actual or threatened injury” by the Maryland legislation.\textsuperscript{44} In order to find this, the judge found that the reporting requirements, even though “trivial,” were an additional

\textsuperscript{40} Id.
\textsuperscript{41} Judge J. Frederick Motz was appointed to the district court by President Reagan in 1985, having served as United States Attorney for the District of Maryland during President Reagan’s first term; he also served as an Assistant United States Attorney for President Nixon from 1969-71. Maryland District Court, Judge Fredrick Motz, \url{http://www.mdd.uscourts.gov/publications/JudgesBio/motz.htm} (last visited Mar. 11, 2009).
\textsuperscript{42} \textit{Fielder}, 435 F. Supp. 2d at 485. To this reader, the standing ruling was a crucial one. Since RILA is a business group, rather than an actual business being directly affected, the standing argument could have permitted the judge to avoid ruling on this case on the merits. Further, a favorable ruling for the State here would have shown one possible technique for avoiding statutory challenges; it would have forced Wal-Mart to bring the case as a named party, rather than by using the resources and name of RILA from which to go after these laws. Also, this would have permitted deeper discovery of Wal-Mart’s expenses and practices.
\textsuperscript{43} Id. at 485-86. The Supreme Court’s ruling in \textit{Hunt v. Wash. State Apple Adver. Comm’n}, 432 U.S. 333 (1977), requires 1) that one of the association’s individual members have standing; 2) that the interests the association is trying to protect are “germane to the organization’s purpose;” and 3) the claim asserted and relief requested do not require the participation of individual members in the lawsuit. \textit{Hunt}, 432 U.S. at 343.
\textsuperscript{44} \textit{Fielder}, 435 F. Supp. 2d at 486.
burden; additionally, the court found that Wal-Mart would be administratively and economically burdened by the 8% requirement.\textsuperscript{45} Without this finding, there would be no foundation from which to argue the ERISA case thereafter.

(b) The “Payroll Tax” Argument

The next argument that the attorney general made was that the Maryland Act was imposing a “payroll tax,” which would bring it under the Tax Injunction Act, removing the district court’s jurisdiction and placing it under state court supervision.\textsuperscript{46} However, the district court judge determined that his jurisdiction was appropriate here, as he found the Maryland Act’s fee to be “regulatory,” which would fall outside of the Tax Injunction Act.\textsuperscript{47} Factors to consider here in determining whether a fee is “regulatory” rather than a “tax” includes “1) what entity imposes the charge; 2) what population is subject to the charge; and 3) what purposes are served by the use of the monies from the charge.”\textsuperscript{48} Looking at the narrow focus of the Maryland Act on one business rather than all citizens, that it is operated by the Maryland Labor Department, an agency, and that its purpose is largely based on encouraging employers to provide health care to employees (rather than actually to collect the fees to raise revenue), the court found that the Maryland Act imposed a regulatory fee rather than a tax.\textsuperscript{49}

(c) Section 514(a)

The court then turned to the ERISA preemption issue. The court first explained how § 514(a) preempts any and all states that relate to a benefit plan, emphasizing that courts must look to the

\textsuperscript{45} Id.
\textsuperscript{46} Id. at 490.
\textsuperscript{47} Id. at 490-93.
\textsuperscript{48} Id. at 491 (quoting Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000)).
\textsuperscript{49} See id. at 490-93.
“objectives” of ERISA and to “the nature of the effect of the state law on ERISA plans.” The “main objective” of ERISA preemption is to prevent a “multiplicity of regulation,” which justifies the prohibition of related state laws. The court then actually uses New York City’s and Suffolk County’s employer contribution laws against Maryland’s, contending that these different laws already show that there are differing statutes with which employers will have to deal. The other factor illustrating “connection with” an ERISA plan is that Wal-Mart’s health plan is defined as an ERISA plan, and the Maryland Act’s effect is to “force” Wal-Mart to increase health care contributions, which would be “coerce[ing]” Wal-Mart into altering its plan.

The court disagreed with Maryland’s interpretation of Travelers and Dillingham, who read the cases as narrowing ERISA preemption and adopting a “pragmatic approach;” instead, the court held that these cases lie at the “periphery” of ERISA analysis, while mandates on “employee benefit structures or their administration” lie at the core of ERISA preemption. Unlike Travelers and Dillingham, which involved a surcharge for hospitals and economic incentives for apprentices (considered “tangentially related”), Judge Motz found that the Maryland Act “focused upon” ERISA plans.

As to the alternatives to the 8% contribution, the court noted that the HSAs would only fall outside the definition of ERISA plans if voluntarily entered into; that spending 8% or more on providing on-site first aid facilities “demeans the seriousness”

50 Id. at 494.
51 Id.
52 Id. There were also laws pending in Oklahoma and Minnesota. See id. at 494-95. However, the Court distinguishes these laws simply by the different employer contribution percentages required, belying the soundness of the argument. If the only difference is that some states require 10% contributions (Minnesota) while others like Maryland want 8%, how burdensome on an ERISA plan is that really going to be?
53 Id. at 495. This satisfies the “connection with” factor of § 514(a).
54 Id.
55 Id. at 496.
of the Maryland General Assembly; lastly, the court again found that the choice between paying 8% of payroll or providing its own coverage was not really a choice at all.\footnote{Id. at 497.}

\textbf{(d) Equal Protection}

Interestingly, the court moved on to RILA’s argument that the Maryland Act violated the Equal Protection Clause after its ruling on preemption.\footnote{Id. at 498.} While the court pointed out the Maryland Act’s lack of clear distinctions and classifications, it nonetheless upheld the validity of the law, granting the legislature “leeway to approach a perceived problem incrementally.”\footnote{Id. at 500 (quoting F.C.C. v. Beach Commc’ns, Inc., 508 U.S. 307, 308 (1993)).} Wal-Mart also made the argument that there was an equal protection violation because it was the only legal person affected by the Act, but the court found that Wal-Mart would have to show itself to be a “politically vulnerable” group in order to receive protection from a law that specifically targeted it.\footnote{Id. (citing Romer v. Evans, 517 U.S. 620 (1996)).}

\textbf{iii. The Fourth Circuit’s Decision}

Secretary Fielder and the State appealed the decision to the Fourth Circuit, who affirmed the district court’s opinion entirely.\footnote{With the exception of RILA’s equal protection claim, which it did not reach after finding that the Fair Share Act was preempted. Retail Indus. Leaders Ass’n v. Fielder, 475 F.3d 180, 183, 197-98 (4th Cir. 2007).} Writing for a 2-1 majority, Judge Niemeyer\footnote{Judge Paul V. Niemeyer was appointed in 1990 by President Bush.; Judge William Byrd Traxler, Jr., the second judge in the majority, was appointed by President Clinton in 1998, after being appointed to the South Carolina District Court by President Bush in 1991. See generally United States Court of Appeals for the Fourth Circuit, Judges, http://www.ca4.uscourts.gov (last visited Mar. 11, 2009).} affirmed the district
court’s finding that RILA had “associational standing” to challenge the Act, affirmed that the case was ripe for review, that it was not a “tax” and thus barred from federal court review by the Tax Injunction Act, and that the Maryland Act was preempted by ERISA. 62

(a) Some Interesting Points

For the most part, Secretary Fielder and RILA made essentially the same arguments, to which the Fourth Circuit responded similarly. However, the Fourth Circuit did have a few new approaches to address some of the arguments made. As to the argument that the jurisdiction triggered by the Tax Injunction Act should be used, Maryland pointed to the stated purpose of the Act, which was to “support the operations of the [Maryland Medicaid] Program.”63 This stated purpose illustrated that the plan for the Act was to generate revenue, as a tax would, for Medicaid.64 However, the Fourth Circuit found this to be a “superficial characterization,” deducing that the Maryland Act’s “content” and “context” show its “actual” purpose.65

Maryland also characterized the Act as “part of [its] comprehensive scheme for planning, providing, and financing health care for its citizens,” rather than as an employer mandate.66 This was simply a payroll tax that offered employers a credit against any taxation for healthcare spending.67 But the Fourth Circuit refused to interpret the Maryland Act this way, looking to the expansive scope of 29 U.S.C. § 1002(1)’s definition of an “employee welfare benefit plan,” which includes any “plan, fund

62 Fielder, 475 F.3d at 189, 197.
63 Id. at 189. This will be contrasted with the San Francisco plan infra p. 81.
64 This argument, about the creation of a “fund” to illustrate that a tax is being imposed rather than a regulatory fee, is one that will continue to arise in these cases.
65 Fielder, 475 F.3d at 189. Both courts saw this as a legislative attempt to regulate Wal-Mart’s provision of health coverage to its employees.
66 Id. at 190.
67 Id.
or program” consisting of “medical, surgical, or hospital care or benefits,” of which any state laws that “relate to” those plans are preempted by § 514(a).  

Looking to the intent of ERISA and the Act, the court conceded that Dillingham recognizes that ERISA is not presumed to “supplant state law, especially in cases involving ‘fields of traditional state regulation’ . . . [such as] the regulation of matters of health and safety,” but distinguished this case from the Dillingham line of cases by pointing out that those were about healthcare “providers,” not about employers. Nor is a state law that regulates the administration or structuring of an ERISA plan saved by an “opt out” provision, because it still requires employers to modify their plans or tailor them to the state’s intended goal. The court then reiterated the importance of ensuring administrative uniformity of ERISA plans.

When looking at the alternatives to direct payment to the State’s fund, the court made another interesting finding. It said it “would still conclude” that the Maryland Act had an impermissible relation to ERISA plans, even if the on-site medical clinics and contributions to HSAs were meaningful alternatives. The “vast majority of any employer’s healthcare spending occurs through ERISA plans,” so attempts to comply with the Act would always affect ERISA plans. This is a crucial discussion as it seems to preclude the possibility of presenting any sort of employer healthcare contributions legislation as a potential alternative.

68 Id. at 190-91.
69 Id. at 191 (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658 (1995)).
70 Id. at 191 (emphasis added).
71 Id. at 192 (citing Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001)).
72 Id. at 193.
73 Id. at 196.
74 Id.
(b) Judge Michael’s Dissent

Judge Michael\textsuperscript{75} cited the “explosive growth in the cost of Medicaid,” and explored the scope of the problem for most of his dissenting opinion.\textsuperscript{76} After agreeing that the case was justiciable and that it was outside of the jurisdiction of the Tax Injunction Act, he then went on to dissent from the ERISA preemption holding.\textsuperscript{77} Judge Michael emphasized the importance of state experimentation in that the Maryland Act was “a legitimate response to congressional expectations that states develop creative ways to deal with the Medicaid funding problem.”\textsuperscript{78} He then discussed the “incidental impact” of simple record-keeping requirements,\textsuperscript{79} and further considered the payments a legal requirement that were “easily satisfied through means unconnected to ERISA plans . . .”\textsuperscript{80}

b. The Suffolk County Plan – “Public Health Cost Rates”

i. Background

In October 2005, Suffolk County, NY passed the Fair Share for Health Care Act (“Suffolk County Act”), requiring large retail stores selling groceries to make “health care expenditures” of at least $3 per hour worked for their Suffolk County employees.\textsuperscript{81} If employers did not provide the appropriate expenditures, they would be subjected to civil penalties by Suffolk County and have

\textsuperscript{75} Judge M. Blane Michael was appointed by President Clinton in 1993. See generally United States Court of Appeals for the Fourth Circuit, supra note 61.
\textsuperscript{76} Fielder, 475 F.3d at 198 (Michael, J., dissenting).
\textsuperscript{77} Id. at 201.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 202.
\textsuperscript{80} Id. at 203.
\textsuperscript{81} Retail Indus, Leaders Ass’n v. Suffolk County, 497 F. Supp. 2d 403, 406 (E.D.N.Y. 2007).
to make up the shortfall in county health care spending.\textsuperscript{82} Employers were also required to file health care expenditure reports, payroll records that included names, addresses, and job titles, and the dates and hours worked of each employee during the reporting period.\textsuperscript{83} The Suffolk County Act also exempted covered employers who had entered into a collective bargaining agreement ("CBA") with a labor union.\textsuperscript{84} Again, RILA stepped in through Wal-Mart (this time in Suffolk County) and filed a complaint seeking to enjoin enforcement of the Suffolk County Act on preemption grounds, saying that it only imposed requirements on employers who declined to enter collective bargaining agreements.\textsuperscript{85}

Suffolk County amended the Act, replacing the $3 per employee requirement with a more general "public health cost rate,"\textsuperscript{86} removing the exemption for employers who had entered into a CBA, and removed the requirement that made employers make up the spending shortfall if they failed to provide health care expenditures.\textsuperscript{87} To provide some expenditure options for employers, the Suffolk County Act allows employers to provide 1) health savings account contributions on behalf of employees; 2) reimbursement of employee health care expenses; 3) an employer operated workplace "health clinic;" or 4) employer contributions to a federally qualified health center.\textsuperscript{88} Like Maryland, Suffolk County appeared to be targeting Wal-Mart, defining the Act’s "covered employer" as a large grocery retailer in which 25,000 plus square feet are used in selling groceries, or a store of 100,000 square feet or more and uses at least 3% of its floor space on grocery sales, or it generates $1 billion or more of

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. The rate would be set by the Suffolk Department of Labor. Id.
\textsuperscript{87} Id. The amended version preserved the civil penalties provision. Id.
\textsuperscript{88} Id. at 407.
revenues with groceries constituting 20% of that revenue.89 Further, the Suffolk County legislators expressly mentioned the deleterious effect of “Wal-Mart type” stores on communities,90 and the drastic increases in Medicaid costs after the introduction of Wal-Mart stores into communities.91

ii. The Eastern District’s Decision

Both RILA and Suffolk County filed cross-motions for summary judgment, with the main dispute resting on whether or not the Act is preempted by ERISA.92 This became a high-profile case, with RILA being represented by prominent ERISA firm Gibson, Dunn and Crutcher LLP, and Suffolk County being assisted by intervenors like the City of New York and a variety of social welfare groups, who were represented by Cleary Gottlieb Steen & Hamilton LLP and Meyer, Suozzi, English and Klein, P.C., respectively.93 The arguments were similar to the Maryland decision, with the business plaintiffs prevailing again. The eastern district relied mainly upon the “reference to” language and case law of ERISA § 514(a), and upon the goal of a “uniform administrative scheme” in finding that states and municipalities are

89 Id.
90 Id. at 408.
91 Id.
92 Id. at 409.
93 Gibson Dunn has been involved in a number of pivotal ERISA cases, including its representation of RILA in the Maryland case (by Justice Scalia’s son, nonetheless). Retail Indus. Leaders Ass’n v. Fielder, 475 F.3d 180, 182 (4th Cir. 2007). Cleary Gottlieb is a 900 plus person internationally renowned firm. Cleary Gottlieb, http://www.cgsh.com/about/overview/ (last visited Mar. 13, 2009). Meyer Suozzi is one of New York State’s most powerful lobbying and labor law firms. Tom Suozzi – the Nassau County Executive and a former gubernatorial candidate – is represented at the firm by his father, who is a named partner, as is current governor David Paterson, whose father, Basil, is also a prominent partner with the firm. Governor Paterson’s father was also Deputy Mayor of New York City and was Secretary of State for New York. Meyer Suozzi is especially influential on Long Island. Meyer Suozzi, http://www.msek.com (last visited Mar. 11, 2009).
prohibited from regulating ERISA plans.\textsuperscript{94} Further, the court relied heavily on the Maryland District Court and Fourth Circuit decisions.\textsuperscript{95} Like the Maryland Court, the eastern district found that the alternatives provided were not sincere options, but rather that the choice was between paying the municipality more money or simply paying more for their employees directly.\textsuperscript{96} The court did not see this as a choice, but rather as a mandate that employers restructure their ERISA plans, a preempted activity under § 514.

Looking at each “option,” the court found as to each alternative offered: 1) HSAs would relate to plans because they were not voluntarily provided; 2) on-site health services are “unrealistic” and “impractical” for employers;\textsuperscript{97} 3) direct contributions to a health center would be less favorable than simply paying that money toward providing a different welfare plan themselves; and 4) setting up an employee reimbursement plan would require employers to establish a new ERISA plan to ensure proper administration of expenditures.\textsuperscript{98} Crucially, the court found that the Suffolk County Act requires companies to change “how they structure their employee benefit plans.”\textsuperscript{99} In other words, the Suffolk County Act puts employers in an ERISA-violative bind.

\textsuperscript{94} \textit{Retail Indus. Leaders Ass’n v. Suffolk County}, 497 F. Supp. 2d at 412 (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987)).

\textsuperscript{95} See \textit{id.} at 413-16.

\textsuperscript{96} See \textit{id.} at 416-17.

\textsuperscript{97} Interestingly, the notion of “fast food” or “in-and-out” healthcare was not so burdensome as to prevent Wal-Mart from implementing it for paying customers. \textit{See infra} p.95 and note 182.

\textsuperscript{98} \textit{See Retail Indus. Leaders Ass’n v. Suffolk County}, 497 F. Supp. 2d at 417-18.

\textsuperscript{99} \textit{Id.} at 418 (quoting Retail Indus. Leaders Ass’n v. Fielder, 475 F.3d 180, 197 (4th Cir. 2007)).
c. The San Francisco Plan

i. Background

In 2006, the San Francisco Board of Supervisors unanimously passed the San Francisco Health Care Security Ordinance ("San Francisco Act"), which was signed by Mayor Gavin Newsom.\textsuperscript{100} The San Francisco Act, both similar to and different from past efforts to promote universal healthcare, deserves exploration.

The San Francisco Act requires medium and large businesses to make required quarterly health care expenditures on behalf of covered employees, based on the total number of hours the employee has worked for the San Francisco employer.\textsuperscript{101} The Act also requires employers to maintain accurate records of healthcare expenditures, allow the City of San Francisco "reasonable access" to those records (though the records do not have to be in a particular form); if the employers do not provide those records, though, the city is merely allowed to examine them through the San Francisco Tax Collector and Treasurer’s Office.\textsuperscript{102} This implies that the records are not expected to be something outside of the ordinary course of business, which is important. They are, however, subject to administrative penalties for failure to comply with the San Francisco Act.\textsuperscript{103} The Act also provides a "non-exclusive” list of healthcare expenditures that qualify, including: 1) employer-funded HSAs; 2) employer reimbursement to employees; 3) payments to third parties for employee coverage (insurance); 4) direct delivery of healthcare to employees; and 5) payments to the city on behalf of covered employees.\textsuperscript{104}

\textsuperscript{100} Golden Gate Rest. Ass’n v. City and County of San Francisco, 535 F. Supp. 2d 968, 970 (N.D. Cal. 2007).
\textsuperscript{101} S.F. ADMIN CODE § 14.3(a).
\textsuperscript{102} Id. at § 14.3(b).
\textsuperscript{103} Id. at § 14.4(e).
\textsuperscript{104} Id. at § 14.1(b)(7).
exclusive” description, and the more extensive list of options, shows that the Act is not as binding as its predecessors.

Further, San Francisco set up the Health Access Program (also known as “Healthy San Francisco”) to provide healthcare to its uninsured citizens, whether employed or unemployed.105 Healthy San Francisco is significant in that it not only provides coverage for the uninsured, tying the San Francisco Act to universal coverage, but it also provides a program for collecting and administering funds. Having a city-operated program to manage things ensures a minimal burden to employers, should they choose to make expenditures to San Francisco, since they are essentially limited to writing a check that they would already track in the regular course of business. Healthy San Francisco was designed to be funded by both employer contributions through the San Francisco Act and through other city resources.106

Other important prongs of the legislation include its “preemption” section, which declares that it should not be interpreted to conflict with state or federal law,107 its “severability” section that separates each section in case one is deemed unconstitutional,108 and its “general welfare” section that declares the San Francisco Act to be designed for satisfying its “obligations to provide health care” to its citizens.109

On November 8, 2006, the Golden Gate Restaurant Association (“Golden Gate”) brought a suit seeking declaratory and injunctive relief against San Francisco, contending that the San Francisco Act was preempted by ERISA.110

105 Id. at §§ 14.1(b)(6), 14.2(c)-(f). Unlike Maryland and Suffolk County, NY, which express their desire to restore Medicaid expenditures (and possibly exact some retribution on companies it perceives to be cheating), San Francisco is striving to show that it wants the funding for healthcare, not repayment.
106 Golden Gate Rest. Ass’n v. City and County of San Francisco, 535 F. Supp. 2d 968, 970-71 (N.D. Cal. 2007).
108 Id. at § 14.5.
109 Id. at § 14.7. See also supra note 105 and accompanying text.
110 Golden Gate Rest., 535 F. Supp. 2d at 971. San Francisco cross-motioned for summary judgment. Id.
ii. District Court Decision

Judge Jeffrey S. White\textsuperscript{111} published his opinion on December 26, 2007, after the case had been brought before his court in the northern district of California.\textsuperscript{112} Judge White began by outlining the requirements of the law, discussing the medium and large employers covered under the program, the listed forms of accepted expenditures, the design of the Healthy San Francisco program, and the recordkeeping requirements and penalties.\textsuperscript{113}

Judge White then discussed the case’s fitness for summary judgment, and proceeded to go into the intent of § 514(a) preemption.\textsuperscript{114} The discussion resembled the analyses from previous cases going through Shaw and the uniform administration of ERISA plans rationale for exclusive federal control, the broad definition of employee welfare plans, and the “relate to” language.\textsuperscript{115}

Judge White then found that the San Francisco Act was preempted because it was impermissibly connected with employee welfare plans by “mandating employee health benefit structures and administration,” which interferes with employer autonomy and uniform administration of plans.\textsuperscript{116} Further, the San Francisco Act’s provisions refer to plans, are designed to act immediately upon plans, and cannot operate successfully without the existence of welfare plans.\textsuperscript{117} Among the factors that the court cited in finding the impermissible connection, it looked at whether the state law regulates the types of benefits of the plans; whether the law requires the establishment of separate plans; whether the law

\begin{itemize}
\item \textsuperscript{112} \textit{Golden Gate Rest.}, 535 F. Supp. 2d at 971.
\item \textsuperscript{113} \textit{Id.} at 970-71.
\item \textsuperscript{114} See \textit{id.} at 972-75.
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 975.
\item \textsuperscript{117} \textit{Id.}
\end{itemize}
imposes reporting requirements; and whether the law regulated ERISA relationships (like the one between the plan and the employer). The court found that the San Francisco Act fulfilled all of these factors aside from actually requiring the creation of a plan – the Act directly regulates the level of benefits the plans should provide; the Act’s recordkeeping requirements are ongoing and directly affect the administrative scheme; and the Act alters the relationship between ERISA plan providers and their beneficiaries. The court also found that the San Francisco Act makes specific reference to ERISA plans in §14.1(b)(7) by providing specific types of employer-provided plans (which fall under the “welfare benefit plan” definition of ERISA). Further, the court distinguished the San Francisco Act from a California regulation of wages statute, which required employer contributions, by pointing out that it did not require the provision of any types of benefits to employees, but merely required employers to provide a minimum level of compensation. A minimum wage statute does not refer to ERISA plans because it does not dictate that an employer provide benefits, nor does it require benefits plans to be altered – any changes in plans would be the employer’s choice.

In its conclusion, the district court describes the legislative goal as “laudable,” but said that it “is not convinced” that “other alternatives for creating a program for providing public health care are not viable.” The court then expresses its desire to avoid “wading into the legislative dominion,” but says it can “envision” a tax program that “takes existing health care expenditures by private employers into account in the form of tax credits,” or just

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118 Id. (citing Operating Eng’rs Health and Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 678 (9th Cir. 1998)).
119 Id. at 975-78.
120 Id. at 978.
121 Id. at 979 (citing WSB Elec., Inc. v. Curry, 88 F.3d 788, 791, 796 (9th Cir. 1996)).
122 Id.
123 Id. at 980.
requiring an “hourly rate” paid to the city. The district court then grants Golden Gate’s summary judgment motion.

iii. Ninth Circuit Reversal

On December 27, 2007, San Francisco then appealed to the Ninth Circuit, making a motion to stay the district court’s judgment so that it could implement the San Francisco Act, which had been set to go into effect on January 1, 2008. Judges Goodwin and Reinhardt concurred in Judge Fletcher’s opinion, which granted the motion to stay.

In order for a court to grant a stay of judgment, it must evaluate the applicant’s motion on the following factors: 1) whether the applicant has made a showing that s/he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured if the stay is not granted; 3) whether the other parties will be substantially injured by granting the stay; and 4) where the public interest lies.

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124 Id.
125 Id.
126 Golden Gate Rest. Ass’n v. City and County of San Francisco, 512 F.3d 1112, 1114 (9th Cir. 2008). The City actually made the motion to both the district court and the Ninth Circuit. Id. at 1115. The motion was denied by the district court on December 28. Id.
128 Golden Gate Rest. Ass’n v. City and County of San Francisco, 512 F.3d at 1114. Oral argument for the case on the merits was heard on April 17, 2008. See infra p. 92 and note 170.
129 See Golden Gate Rest. Ass’n v. City and County of San Francisco, 512 F.3d at 1115.
de novo. Concluding that San Francisco has a “strong likelihood” of success that it would be injured more gravely than Golden Gate, and that the public interest is promoted by the Act, the Ninth Circuit panel granted San Francisco’s stay motion.

After discussing the standard required to grant the stay, it explains why it deserves to be granted, beginning with a discussion of the San Francisco Act. The court explains the rates for different sized employers, goes into the variety of non-exclusive options, and differentiates between the types of employers under the Act. There are those with no ERISA plans, those that have plans that spend at least as much as is required by the Act for employees, those that spend enough for some employees but not others, those that have plans but do not spend enough, and those that have plans for some but do not spend the Act-approved amount. This discussion is important because all of these employers are guided by the San Francisco Act, yet none are required to make the plans or change their plans. Further, the Act requires that the employer make “payments” to a plan or the city, not that they provide “benefits.”

(a) No “Connection with”

The court then delves into ERISA preemption, discussing its purpose of providing a uniform regulatory scheme for employers with ERISA plans. The court concludes that the San Francisco Act does not require adoption or alteration of ERISA plans because of the option to make health care expenditures, and

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130 Id. at 1116.
131 Id. at 1127.
132 Id. at 1117.
133 Id. at 1118.
134 Id. at 1118-19.
135 Id. at 1119. Again, though, this is simply a matter of interpretation by the judges. The Maryland and Eastern District courts likely would have affirmed the lower court’s ruling.
136 Id.
137 Id. at 1119-20.
further does not affect the “administrative practices” of the benefit plan because the employer would “voluntarily elect to change [its] practices.”\textsuperscript{138} The court sees the use of a surcharge as analogous to \textit{Travelers}, whose use of a surcharge to “influence” insurance purchasers (including employers) was “entirely permissible.”\textsuperscript{139} This was deemed an “indirect economic influence,” and the Ninth Circuit found that the Act was “even more indirect” than \textit{Travelers}.\textsuperscript{140} Whereas in \textit{Travelers} the fee would presumably lead to insurance providers having to alter their coverage to cope with the new surcharge, the effect of the San Francisco would be an employer deciding to spend money \textit{on} a plan rather than sending it directly to the city fund.\textsuperscript{141} The Act does not require that employers provide certain benefits or that it provide any benefits whatsoever.\textsuperscript{142}

\textbf{(b) No “Reference to”}

In determining whether a law has an illegal “reference to” ERISA plans, the court asks whether the law acts “immediately and exclusively upon ERISA plans” and whether “the existence of ERISA plans is essential to the law’s operation.”\textsuperscript{143} The San Francisco Act does not “single out” or “specifically mention” ERISA plans – the court holds that the Act does not act on ERISA

\textsuperscript{138} \textit{Id.} at 1121. This is a very different interpretation than the Fourth Circuit took. See \textit{supra} notes 50-56 and accompanying text. It is also interesting that the Ninth Circuit does not address the other RILA cases; while it is not required to address another circuit’s rulings, perhaps it will offer a rebuttal to those decisions when the case is decided on the merits.

\textsuperscript{139} \textit{Golden Gate Rest. Ass’n v. City and County of San Francisco}, 512 F.3d at 1122.

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} \textit{See id.}

\textsuperscript{142} \textit{Id.} (citing Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley, 37 F.3d 945, 960 (3d Cir. 1994)).

\textsuperscript{143} \textit{Id.} at 1123 (citing Cal. Div. of Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316, 325 (1997)).
plans at all. Though the district court had found the Act to be similar to Greater Washington in “mandating employee health benefit structures,” the Ninth Circuit distinguishes the two by observing that Greater Washington involved a plan that required a specific level of benefits to be matched in accordance with an ERISA plan for other employees – the present San Francisco Act makes no such reference to levels of payments or benefits provided by an ERISA plan. Instead, this case is similar to the city requiring a standard payment for employees, as in WSB Electric., Inc. v. Curry, the minimum wage law. For these reasons, the court finds the city to be likely to prevail on the argument that its law is not preempted.

The court then discusses the hardships likely to be experienced by the parties, and finds that the approximately 20,000 uninsured San Franciscans will be more severely injured by not receiving health coverage than will the businesses, which may have to make one quarterly payment and may have to face preliminary administrative burdens. Further, the public interest prong again rests with provision of healthcare over businesses saving money. For these above reasons, the court grants San Francisco’s motion to stay judgment.

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144 Id.
145 Id. at 1124.
146 WSB Elec., Inc. v. Curry, 88 F.3d 788 (9th Cir. 1996).
147 Golden Gate Rest. Ass’n v. City and County of San Francisco, 512 F.3d at 1124-25.
148 See id. at 1125.
149 Id. at 1125-26. Interestingly, the Court finds that the intervenors, who include workers unions and insurance rights groups, are the ones whose injuries will include human suffering – as opposed to San Francisco and Golden Gate, whose injuries are economic. Id. at 1126.
150 Id. at 1126-27.
151 Id. at 1127.
III. THE PLANS AND THEIR DIFFERENCES

Though the Ninth Circuit seems to view the employer requirements’ impact on ERISA plans differently than the other courts who have ruled so far, there are some differences in the plans that deserve discussion.

A. Maryland’s Wal-Mart Plan

As Professor Zelinsky observes, the Maryland Act is “ill-conceived.”152 Targeted at Wal-Mart in a less than subtle manner, the Maryland Act would generate revenue from only one company even if it had been upheld, and likely would have caused Maryland Wal-Marts to simply reduce their number of employees or raise prices to account for the new expenses of the Maryland Act.153 Rather than addressing their Medicaid concerns by trying to ensure that all mid- or large-sized firms provided healthcare or adequate expenditures for their employees, instead Maryland simply attacked one very large firm by limiting its legislation to employers of 10,000 or more. The San Francisco Act adopts the opposite approach.

Another aspect that caused preemption was the administrative burden imposed. Whereas San Francisco asked for “reasonable” access to records and only asked for information that it could obtain on its own through the company’s tax returns,154 Maryland required the “principal executive officer” to provide a signed annual report informing the Maryland Labor Secretary of the number of employees and percentage of payroll spent on healthcare for the preceding year.155 Further, the executive officer had to include an affidavit, which would subject him to penalty of perjury, with the report.156 The next section differentiates payments

152 Wal-Mart, supra note 11, at 847.
153 Id.
154 S.F. ADMIN. CODE § 14.3(b).
155 MD. CODE ANN., LAB. & EMPL., § 8.5-103(a).
156 Id.
for non-profits from payments required by for-profit companies, further illustrating the special treatment reserved for Wal-Mart. As Professor Zelinsky points out, the Wal-Mart law is a “poorly-designed exercise in political symbolism.”

B. Suffolk County Plan

The Suffolk County Fair Share for Health Care Act is similar to Maryland’s Fair Share Health Care Fund Act with a few variations. First, the Suffolk County Act has a page-long discussion of its legislative intent, discussing the lack of healthcare coverage for low-wage employees, the low wages offered by the retail industry, and the rapidly rising Medicaid costs. The Suffolk County Act then goes on to define the covered employers, which includes large grocers and food retailers. Among the amendments made to the Suffolk County Act after the first RILA lawsuit was changing the standard $3 per hour payment to a requirement that a “public health cost” rate be paid instead. This amendment unmasks any claim that the Suffolk County Act was designed as a revenue generating fee, rather than an effort to require employers to fund their employees’ healthcare, as the rate is to be set at what the Suffolk Labor Secretary desires for “public health.” Further, it represents an administrative burden, as companies will have to follow these different rates every year when they are released by the DOL. Additionally, the reporting requirements imposed require the employer to inform Suffolk of

157 Id. at § 8.5-104.
158 Wal-Mart, supra note 11, at 893.
159 SUFFOLK COUNTY, N.Y., REG. LOCAL LAW § 325-1 (2005).
160 Id. at § 325-2. Again, the size required for the stores – including grocery stores of 25,000 or more square feet, stores that derive at least 3% of revenue from a 100,000 square foot selling space, or a company with $1 billion or more in revenue that derives at least 20% from food sales – is geared toward a huge establishment like Wal-Mart. See id.
161 See Retail Indus. Leaders Ass’n v. Suffolk County, 497 F. Supp. 2d 403, 406 (E.D.N.Y. 2007). This public health cost rate is set by the Suffolk Department of Labor. Id.
their previous year’s healthcare expenditures, payroll records with each employee’s personal information, and the amount of time each employee has worked.\textsuperscript{162} The district court found this to be enough of a burden to interfere with ERISA’s goal of ensuring a uniform administrative scheme.\textsuperscript{163} The reporting requirements are similar to San Francisco’s, though the San Francisco Act provides a secondary option for getting the information through records already provided to the Office of Labor Standards Enforcement by companies, if the employer does not provide it.\textsuperscript{164} But, the similarities in these plans illustrate the courts’ different interpretations of these respective laws.

\section*{C. Massachusetts Plan}

One recent healthcare law that has not yet been discussed in this paper, because there has been no litigation pursued against it, is the Massachusetts Health Law.\textsuperscript{165} The Massachusetts law, a reflection of political compromise, combines a number of different features, including an individual mandate for all citizens to procure healthcare, an employer pay-or-play mandate, heavy regulation of insurance providers to ensure non-discrimination, the creation of a fund for management of employer contributions, subsidies for individuals unable to afford healthcare, and a “connector” designed to bring individuals together so as to pool their risks and save money on insurance.\textsuperscript{166} This law would seem to infringe upon ERISA plans both by mandating the plans of individuals and by

\textsuperscript{162} \textsc{Suffolk County, N.Y., Reg. Local Law} § 325-3.
\textsuperscript{163} \textit{Retail Indus. Leaders Ass'n v. Suffolk County,} 497 F. Supp. 2d at 416-18.
\textsuperscript{164} \textsc{S.F. Admin. Code} § 14.3(b).
\textsuperscript{165} Several theories have been posited for the absence of litigation in this case. Professor Zelinsky brings up what may be the most likely reason, which is that the Massachusetts health law is a genuine example of a compromise, a product of bipartisan cooperation and labor and employer involvement. See \textit{Massachusetts Law, supra} note 11, at 282.
\textsuperscript{166} Encompasses a number of sections, including \textsc{Mass. Gen. Laws} ch. 149 § 188(a) (2006); \textsc{Mass. Gen. Laws} ch. 176Q (2006).
mandating employers’ plans. However, it may be saved as a result of the compromises made in putting the law together; perhaps the most important aspect of this is the $295 “bargain” surcharge imposed upon employers who do not provide coverage for their employees. Further, Massachusetts’s definition of “affordability” for healthcare plans will determine how much of the population will be covered by the State itself, relieving the burden from individuals and other parties. This law is very different from the other plans, mandating coverage for all people, not just requiring expenditures by employers, but the law is too early in the implementation process to know what chances of success it will have.

IV. CONCLUSION: PREDICTIONS AND POLICIES

A. The Current Status of Golden Gate Restaurant

San Francisco’s case was argued on the merits before the same panel that granted the stay on April 17, 2008. When the case was originally heard, this author speculated that the Ninth Circuit would likely affirm its logic from the stay motion. Interestingly (but inconclusively), Justice Anthony Kennedy denied Golden Gate’s motion to vacate the Ninth Circuit’s granting of the motion to stay. As the Groom Law Group speculated in a comprehensive public memorandum to clients, the likely resolution occurred with Golden Gate losing the appeal to the same

167 Massachusetts Law, supra note 11, at 233-34.
168 See infra p. 98 and note 190.
judges who heard the stay motion. Golden Gate then filed for an en banc hearing by a larger portion of the Ninth Circuit. However, despite the circuit conflict issues lurking, the Ninth Circuit refused to hear the case en banc. In refusing to hear before a full court, Judge Fletcher stated:

In brief, the Ordinance requires San Francisco employers to pay to the City of San Francisco what amounts to a tax. The tax is either $1.17 or $1.76 per hour per employee, depending on the profit or non-profit status of the employer and the number of employees. No employer is required by the Ordinance either to establish a new ERISA health care plan or to modify an existing ERISA health care plan. An employer may fully satisfy its obligation under the Ordinance by paying the tax to the City.

Given the increasing passage of similar bills and subsequent litigation, and the potential circuit split that could arise between two powerful circuits, the Supreme Court may decide the time has arrived to set a uniform precedent.

**B. The Likely Result**

*Golden Gate Restaurant* drew in a number of powerful parties as intervenors and as amici, including the Service Employees International Union ("SEIU") (intervenors), the United States Chamber of Commerce, the DOL, the ERISA Industry Committee, the American Association of Retired People ("AARP"), and the California Attorney General’s Office

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172 See Golden Gate Rest. Ass’n v. City and County of San Francisco, 546 F.3d 639 (9th Cir. 2008).
173 See Golden Gate Rest. Ass’n v. City and County of San Francisco, No. 07-17370, 2009 WL 605320 (9th Cir. 2009) (en banc).
174 Id. at *1.
175 Id. This interpretation of these proposals states, simply, the approach articulated in the stay motion and in the appeal ruling.
(“California OAG”). With the exception of the SEIU, AARP, and the California OAG, the overwhelming number of amici and intervenors support Golden Gate’s position in favor of preemption. Further, a variety of influential blogs by law professors support Golden Gate’s arguments. It seems that the only way the Supreme Court would uphold the San Francisco Act would be through a substantial expansion of the Travelers surcharge theory to include employers, and a narrowing of what legislative activity is connected with ERISA plans. Neither of these seem likely, given the Court’s rulings in cases like Egelhoff that have come after Travelers.

C. Policy Suggestions/Critiques

1. Professor Zelinsky

Professor Zelinsky yet again provides a wealth of ideas, in addition to criticizing some of the current approaches to handling the healthcare problem. Professor Zelinsky is especially critical of the notion of “taxing” big businesses, especially when they cater to poorer consumers like Wal-Mart. To him, the increased costs for Wal-Mart’s healthcare expenditures will simply cause them to raise prices and/or lay off their low-income workers. As an alternative, Professor Zelinsky proposes that states increase their

177 See generally id.
179 See, e.g., Wal-Mart, supra note 11 at 888-89.
180 Id.
Earned Income Tax Credits ("EITC") to low-income taxpayers as a means of providing them with additional resources to invest in healthcare. In addition, states can provide tax credits for taxpayer investments in 401(k) plans and individual retirement accounts that can incentivize planning for these expenses.

These ideas expose a fundamental disagreement about paying for healthcare. Whereas Professor Zelinsky seems to believe that individuals should be encouraged to save on their own by adding yet more incentives to the tax code, this author finds it reasonable for a state to respond to its drastically increasing Medicaid burden by taxing the employers who are coming into the state and encouraging its employees to use those state resources. States and municipalities are providing huge tax breaks to companies for coming into their jurisdictions; perhaps those (often wealthy) companies can share the burden that they are creating when they employ low-wage workers and then fail to cover those workers’ healthcare expenses, rather than leaving low-income laborers to fend for themselves or rely on Medicaid. Further, are these really the jobs that we want people to cling to, in fear of layoffs because the company does not want to pay for the healthcare that its employees are being provided by the state? As was discussed earlier, most of the nation’s uninsured are employed, but simply cannot pay the high costs of healthcare; what quantity of tax credits would be required to enable them to pay for healthcare for themselves and their families? Would it make sense to provide these tax credits, or just use the money on administering a broader, uniform system that will ensure coverage instead?

181 Id. at 889-90.
182 There is a long history of employer-provided healthcare, particularly when unions are involved. See, e.g., MARTIN HALPERN, UNIONS, RADICALS, AND DEMOCRATIC PRESIDENTS: SEEKING SOCIAL CHANGE IN THE TWENTIETH CENTURY 1-15 (2003) (discussing various social reforms, including healthcare, fought for on behalf of workers); ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985 150, 152-53, 185-86 (discussing the post-World War II success of labor groups and collective bargaining agreements in ensuring health coverage for workers).
Professor Zelinsky also proposes that states be exempted from preemption for experimentation purposes. Section 514(a)(5)’s exemption of the Hawaii Prepaid Health Care Act provides precedent for taking such a maneuver, and Professor Zelinsky encourages that Congress either amend ERISA to exempt the bipartisan Massachusetts Health Law, or that it consider exempting all state efforts at healthcare reform. Depending on the intentions of the new Obama Administration and the new Congress, ERISA legislation and public health coverage may be in store for dramatic changes, rendering this entire line of argument moot, but until then ERISA exemption for state experimentation remains an intriguing idea.

An argument that would almost certainly be raised in opposition to legislative exemption would be a familiar one, and one that will come up if a “fair share” case reaches the Supreme Court – ERISA’s purpose of ensuring a uniform administrative scheme. Perhaps the argument that best illustrates the lack of administrative burden by a “fair share” statute – which requires a percentage of healthcare expenditures and reporting requirements that only ask for records which would be kept in the regular course of business – is the employer’s own conduct. Many of the employers affected have already taken on the burden associated with operating businesses under different laws in different states and countries; employers are able to comply with different general insurance rates and taxation rates and different regulatory environments in different countries. Employers choose to enter

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183 See Massachusetts Law, supra note 11, at 280-84.
184 See id. at 281-83.
185 Looking at President Obama’s first nominee for HHS, former Senator Tom Daschle, likely provides some insight as to the President’s thoughts on the issue. See, e.g., TOM DASCHLE, SCOTT S. GREENBERGER, AND JEANNE M. LAMBREW, CRITICAL: WHAT WE CAN DO ABOUT THE HEALTH-CARE CRISIS (2008) (particularly Part IV, articulating his views on creating a Federal Health Board which would be comparable to the Federal Reserve Board, serving as a means of universalizing and publicizing sound health care practices).
new jurisdictions for the purpose of making more money,\textsuperscript{186} and choose to comply with their respective laws; what difference does the requirement of another percentage of their payroll make?

2. Other Policies/Critiques

Among the other options (aside from the government providing healthcare without the assistance of employers), are new taxes or regulations on insurance or multiple employer welfare arrangements,\textsuperscript{187} and what may be called the nuclear option allowing cities to ban “discount superstores” from their jurisdiction, as occurred in \textit{Wal-Mart Stores, Inc. v. City of Turlock}.\textsuperscript{188} One other option would be to expand programs like Medicaid and State Children’s Health Insurance Program to include greater income ranges, so as to expand coverage.\textsuperscript{189}

Imposing new taxes or regulations through § 514 exceptions would be likely to injure those already covered by insurance, as healthcare providers and insurers would probably just raise prices and detract from plan coverage as a means of recouping lost expenditures. As to the nuclear option, all parties (other than local employers) seem to be injured. Big employers

\textsuperscript{186} While on the subject of employers taking on administrative burdens, it seems worth pointing out that on-site health facilities, an alternative which Judge Motz derided as “demean[ing] the seriousness of the Maryland General Assembly,” have been adopted (as “walk-in clinics”) by a number of large discount stores for marketing to consumers. See Christopher Rowland, \textit{I’ll Have a Loaf of Bread, Milk, and a Flu Shot}, BOSTON GLOBE, Dec. 11, 2005, at A1, available at http://www.boston.com/business/articles/2005/12/11/ill_have_a_loaf_of_bread_milk_and_a_flu_shot/ (citing Retail Industry Leaders Ass’n v. Fielder, 435 F. Supp. 2d 481, 497 (2006)).

\textsuperscript{187} These options are permitted under §§ 514(b)(2)(b) and (b)(6).

\textsuperscript{188} \textit{Wal-Mart Stores, Inc. v. City of Turlock}, 41 Cal. Rptr. 3d 420 (Ct. App. 2006). This option is particularly ironic, as it probably would not have been considered, if not for ERISA’s preemption. The effect of these laws injures both parties – preventing companies from expanding into new consumer bases, and denying municipalities the option to draw tax revenues and bring in new employment opportunities for citizens.

\textsuperscript{189} This would require federal government approval.
cannot expand their businesses, and municipalities cannot derive the benefits of those businesses being there. Instead of not getting adequate revenues or expenditures, they do not receive any.

Among some other options, the National Academy for State Health Policy mainly echoes Professor Zelinsky and the strategies already attempted: it encourages fair share statutes; tax credits to employers and/or employees for investing or saving for healthcare; increasing the prevalence of “public works” contracts through which employer-provided healthcare can be mandated (the Dillingham rule); state creation of purchasing pools to bring together individuals so rates can be lowered; and Travelers-style taxes on providers/insurers. All of these remaining options again place the burden on the states; they will presumably be forced to increase taxes in order to fund future tax credits, education projects, public works projects, and so on.

3. Do we really want fair share laws?

The remaining policy question is whether fair share laws will actually do any good. Will employers start providing healthcare? Will they simply shift their new costs onto consumers and employees? How easy will implementation of these plans be?

If Massachusetts is a harbinger for the remainder of the plans, the University of Kansas does not paint an encouraging portrait. First, the Massachusetts plan “promises,” but “does not guarantee or directly provide” universal coverage to Massachusetts residents. Further, the Massachusetts plan only requires that employers pay $295 for each employee that they refuse to give coverage to, a “bargain rather than a penalty.” In other words,


the employer makes money by paying the expenditures. These incentives point toward individuals being penalized for failure to obtain coverage when they may not be able to afford it, and toward encouraging businesses to abandon their healthcare plans to increase their profits.

Plans are still in the implementation and challenge phases, so one cannot be sure as to how things will play out. But if state experimentation produces perverse incentives to drop coverage plans while ERISA induces towns and cities to bar entry to certain employers, it certainly would not be what Senator Javits envisioned in 1974.

\[193\] This bargain gives the employer very little reason to challenge the statute under ERISA. *Id.* at 1287-88.