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From the Editors

Old Whines, New Battles

Robert N. Eccles
O'Melveny & Myers LLP, Washington, D.C.

David E. Gordon
Clark Consulting/Pearl Meyer & Partners, Los Angeles, CA

Sometimes, it just happens. As you plunge more deeply into some of the articles in this issue, you'll find us complaining about the absence of marquee decisions over the last few months. It's not the first time, and it won't be the last. And it's not the same thing as saying there's nothing of interest in the recent case law. Once we got used to the fact that we were not going to find appellate decisions sure to be cited by dozens of future courts, there was still a good variety of lesser decisions worthy of at least some attention.

But that won't stop us from whining a little over what might have been. Exhibit A in support of our whine is the 5th Circuit's eagerly awaited en banc decision in *Milofsky v. American Airlines, Inc.*, 442 F.3d 311 (5th Cir. March 2, 2006). We've had occasion to preview the importance of this decision before in our articles on employer stock litigation—see 13 *ELR* 4. Although not a classic stock drop case, *Milofsky* presented a question of great significance to those cases and, indeed, to most fiduciary breach litigation involving defined contribution or individual account plans.

Stated generically, that question is whether suit can be brought under Section 502(a)(2) of ERISA — the classic claim for recovery on behalf of a plan — when not all of the participants in the plan would benefit from the recovery, as, for example, when not all participants' accounts were invested in the employer stock that is the subject of the suit. If the answer to that question is no, participants still have their remedies under Section 502(a)(3), but those remedies are, if not wholly worthless, not very valuable given the Supreme Court's narrow construction of the equitable relief available under that section.

Milofsky burst on the ELR radar when the district court in the Northern District of Texas held that there was no claim under Section 502(a)(2). Its path to stardom grew even brighter when a divided panel of the 5th Circuit affirmed the district court's dismissal of the claim. See 404 F.3d 338 (5th Cir. 2005). Even when that decision was automatically vacated by grant of rehearing en banc, hope remained that we would see a badly split decision that would inexorably reach the Supreme Court.

On March 2, 2006, that dream died. We have struggled journalistically with ways to breathe drama into the 5th Circuit's per curiam en banc decision and have met only failure. In two deliberately bland paragraphs, the en banc court vacated the district court decision. One paragraph holds, without further explanation, that the district court erred in dismissing the (a)(2) claim "[m]easured by the principles of notice pleading and the standards controlling dismissal . . ." The other paragraph quotes from an earlier 5th Circuit decision to hold that the court also erred in concluding that the claims were disguised benefits claims that were required to be exhausted prior to suit being filed.

What compromises went on within the en banc court to produce such an opaque opinion? We have no idea. What we do know is that it seems unlikely that *Milofsky* is going to be a case we'll hear much about in the future. The (a)(2) issue that briefly made *Milofsky* a household name in at least our households, however, is going to resurface, if only because a large number of defendants in stock drop cases are continuing to raise the issue. Sooner or later, there will be a circuit court decision that actually discusses the issue, and, when it does, we'll be waiting.

We feel slightly less whiny about the decision in *Chao v. Day*, 436 F.3d 234 (D.C. Cir. Jan 24, 2006) which also presents a recurring question that we've had occasion to discuss more than once recently. While the D.C. Circuit didn't discuss the question as much as it could have done, it's pretty obvious why. The court clearly saw the defendant as someone whose conduct did not require much discussion.

Brittain Day told his ERISA plan clients that he would find them insurance coverage. Twenty-nine plans sent him their checks totaling hundreds of thousands of dollars and received insurance policies. The only problem was that the policies were fake, and Day essentially kept the money.

The Secretary of Labor, unsurprisingly, sued and was granted summary judgment of over $1 million. Day's only defense on appeal was that the district court had erred in holding that he was an ERISA fiduciary.

Day's argument, in essence, was that he was only a thief. Actually, he said he was a salesman who was merely acting on instructions to buy policies, but we think our wording is both more accurate and sharpens the issue. We've had occasion before to wonder about the line between someone who clearly has fiduciary authority to dispose of plan assets and someone who has been granted no such authority but just takes the money. The first person is a fiduciary, but we find it unnatural to think of a thief in fiduciary terms. Day looks to us quite a bit like someone in that latter category.

The D.C. Circuit, however, had no trouble affirming the judgment and holding that Day was a fiduciary. The court emphasized that one became a fiduciary by having "any authority or control" over disposition of plan assets, not merely discretionary authority or control. It noted that the plans had sent Day checks payable to him and that, although obligated to buy policies, he disposed of the funds by keeping them for himself. The court noted that its conclusion was consistent with the "results" — and we thought that might be a telling word — in other cases and was supported by the common law of agency that imposes fiduciary duties on an insurance broker as an agent for customers such as the plans.

Having announced its conclusion and rationale, the court "hasten[ed] to emphasize the limited scope of its holding" by making clear that it was not intending to impose fiduciary duties on anyone who had "mere possession or custody" over plan assets. Referring to Day as "far more than a mere custodian," it labeled him "a broker who solicited, accepted, and then pilfered the plans' assets," facts the court viewed as sufficient to hold him to fiduciary status.

We're not entirely convinced. In a perfect world, we'd want a little more explanation as to how a broker differs from a mere custodian. But that's way too much to hope for in the case of someone as unsympathetic as Day. Unlike the question ducked by the 5th Circuit in *Milofsky*, which we expect to be fully discussed and explored in later decisions, we think most courts will continue to do what the D.C. Circuit did to Day and be quick to find fiduciary status where plan assets have been stolen.

So far, we've talked about two decisions in which courts had, but slightly ducked, the chance to address old issues in new ways. Filling that gap nicely in this issue is an article from Tom Gies of Crowell & Moring LLP in Washington, D.C. No question is older or more chronicled in the ELR than ERISA preemption. No question has been more frequently addressed by the U.S. Supreme Court in decisions that seemed likely to be the last on the subject, but somehow never are.

We know from our own experience that preemption questions continue to recur as the past decisions are applied to new contexts. One of the hottest such contexts is presented by the so-called Wal-Mart legislation now being litigated in Maryland and elsewhere. When Tom — who had read the ELR long enough to know what might interest us — suggested that we might want to run an article addressing that litigation, we were initially dubious in light of our reasonably firm policy of discussing only appellate decisions. The more we thought about it, however, the more we thought it might be fun to get the discussion going early, aided by Tom's perspective as an experienced labor and employment lawyer on the management side. We found his article interesting, and we're thinking seriously about commissioning a counterpoint for our next issue. Old as the preemption questions appear to be, we have a strong feeling that, in the not too distant future, they'll produce us a new appellate decision that will be well worth our writing about.

ERISA Preemption Meets the Union Corporate Campaign: The Challenge to the Maryland "Wal-Mart Bill"

Thomas P. Gies, Crowell & Moring LLP, Washington D.C.

In the more than 30 years since passage of ERISA, lawyers have gotten used to seeing preemption issues in a variety of situations. But it may be a surprise to see ERISA preemption emerge as a central issue in organized labor's war on Wal-Mart. A lawsuit pending in federal court in Baltimore, challenging the recently enacted Maryland Fair Share Health Care Fund Act, promises yet another round of argument as to the meaning of ERISA Section 514(a). The debate will focus on whether some of the Supreme Court's more recent pronouncements on the subject have, in fact, changed the way courts view this corner of ERISA preemption. In other words, this case may give us a chance to find out what the Supremes really meant to say in *Travelers* and *Dillingham*.

The Act

Widely-known as the "Wal-Mart bill," the Act essentially requires private employers with more than 10,000 employees working in the State of Maryland to spend up to 8% of the total wages paid to employees working in the State on "health insurance costs." The Act is silent as to the manner in which a covered employer can comply. If the employer does not meet this obligation, it is required to pay the shortfall to a fund controlled by the State government and intended to defray Medicaid expenditures. The Act, which is effective January 1, 2007, applies only to Wal-Mart as a practical matter. The Act was strongly supported by organized labor, and a unionized competitor of Wal-Mart in Maryland, Giant Food, lobbied for passage of the Act. Similar so-called "fair share" legislation is pending in more than 30 other states. Labor unions and other supporters of such legislation claim that certain large employers are failing to provide adequate health care coverage for many of their workers and their families. As a result, they say, these companies are shifting the responsibility onto state and local taxpayers because health care coverage has to be provided under programs like Medicaid. Proponents of fair share legislation suggest, with remarkable candor, that they have drafted these bills in a way that will insulate them from legal challenge based on ERISA preemption.

The Act is viewed as one of the cornerstones of the labor movement's nation-wide campaign against Wal-Mart. Unions have been singularly unsuccessful in organizing Wal-Mart's employees through the procedures established by the National Labor Relations Act. The failure to organize large employers like Wal-Mart is one of several reasons for last year's defection from the AFL-CIO. Six unions, including the Food & Commercial Workers and the Service Employees International Union, left the AFL-CIO in a philosophical dispute over the future of the labor movement. The defectors formed a new organization, the Change to Win Coalition. These unions have been among the leaders in the labor movement in pursuing new strategies designed to force employers to acquiesce to union demands.

The new approach, known as the union "corporate campaign," emphasizes non-traditional ways of putting economic pressure on recalcitrant employers by attacking the corporation itself. Corporate campaigns include increasingly sophisticated attacks on a company's business and reputation through a variety of initiatives that has been aptly described as "death by a thousand cuts." Thus, wherever possible, a corporate campaign will include a blizzard of complaints filed with various regulatory agencies; making mischief at the EPA, or at other agencies regulating health and safety, is a particularly popular tactic. Corporate campaigns feature media strategies intended to generate unfavorable press coverage of the company. Unions often orchestrate unflattering presentations to the investor community, combined with the not so subtle message that the campaign will include efforts to cause a reduction in the stock price. Corporate campaigns also involve a variety of economic pressure directed towards the company's customers in the hope that the prospect of lost sales will have the desired impact. Labor unions often affiliate with community activists of various sorts to put increased public relations pressure on the company. Employers, for their part, generally view corporate campaigns as a pernicious form of extortion. In any case, organized labor has made it clear that it hopes "fair share" legislation like the Act will cause a substantial increase in Wal-Mart's benefits costs.

The Complaint

On February 7, 2006, a retail industry trade association group of which Wal-Mart is a member filed a complaint in federal district court in Maryland seeking to invalidate the Act, in a case called *Retail Indus. Leaders Ass'n v. Fielder*. The complaint alleges that the Act is preempted by ERISA Section 514(a). The complaint asserts that the purpose of ERISA is to "establish a uniform national framework for sponsoring, administering, protecting, and regulating employee benefit plans, including pension plans and health and welfare plans." RILA alleges that the Act "conflicts with" the ERISA framework by, *inter alia*, requiring covered employers either to sponsor health insurance programs or to change the administration of existing programs. The complaint further alleges that the Act disrupts ERISA's goal of supporting uniform national administration of employee benefits plans, "since it imposes on covered employers different health care obligations toward employees in Maryland than owed to employees elsewhere in the country." RILA also claims that the Act violates the Equal Protection Clause of the United States Constitution because it treats a certain class of employers in a different and arbitrary manner. The complaint also alleges a violation of a Maryland constitutional provision against "special laws" enforced only against one entity. The complaint asks for a permanent injunction against enforcement of the Act. Plaintiff moved for summary judgment on March 10, 2006.

The "Relate to" Clause

The papers filed to date suggest that RILA hopes to frame the legal arguments in the case by characterizing the Act as a thinly disguised mandated benefits law. This is a sensible approach to addressing the chaotic issue of ERISA preemption. After all, two of the Supreme Court's leading pro-preemption decisions struck down state laws that were described as mandated benefit laws. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983) held a New York state disability benefits law preempted to the extent it required employers to provide pregnancy disability benefits in excess of the requirements of Title VII at the time. And *Shaw* is fondly remembered by ERISA litigators as the first decision to define the "relate to" clause as meaning a "connection with or a reference to" an ERISA plan. In *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), the Court held preempted a District of Columbia law requiring employers who provide health insurance coverage to continue "equivalent" coverage once employees became eligible for workers' compensation. Justice Thomas' brief opinion concluded that the preemption question was easily answered because the statute explicitly referred to ERISA welfare plans. These two decisions are bookends for *Metropolitan Life Insurance v. Massachusetts,* 471 U.S. 724 (1985) where the Court was definitive in ruling that state mandated benefits laws "relate to" ERISA plans within the meaning of Section 514(a). As a result, following *Greater Washington Board of Trade,* a lot of us assumed that this was one strand of ERISA preemption jurisprudence that had been put to bed.

But that was then and this is now. And now the question of ERISA preemption of state statutes purportedly enacted for purposes other than regulating ERISA plans law can be resolved only in the wake of the Supreme Court's decisions in *New York State Conference of Blue Cross & Blue Shield Plans et al. v. Travelers Insurance Co.*, 514 U.S. 645 (1995) and *California Division of Labor Standards Enforcement et al. v. Dillingham Construction*, 519 U.S. 316 (1997). RILA understands this and doesn't pin its hopes solely on the mandated benefits law decisions; RILA's papers also stress ERISA's goal of promoting uniform national administration of ERISA plans maintained by large employers operating in several states.

The Supreme Court's efforts to interpret Section 514(a) have been characterized in many terms. A personal favorite is the First Circuit's observation in *Carpenters Local 26 v. USF&G*, 215 F.3d 136, 139-40 (1st Cir. 2000) that courts have been "at least mildly schizophrenic in mapping" the contours of the "relate to" clause. Still, one must begin somewhere and *Travelers* is as good a place as any. *Travelers* involved New York state laws that required hospitals to impose a series of surcharges on patients with commercial insurance. The laws also imposed a surcharge on HMOs. These surcharges were not applicable to patients belonging to one of the Blue Cross/Blue Shield plans operating in New York. In a unanimous opinion, the Supreme Court rejected the commercial insurers' effort to overturn the

New York laws on ERISA preemption grounds. Justice Souter's opinion held that the statutes did not "relate to" ERISA plans. The Court recognized that the statutes had an "indirect economic effect" on choices made by insurance buyers, including ERISA plans, but concluded that this sort of economic influence was insufficient to warrant preemption. The Court observed that any number of state laws could have an economic impact on an ERISA plan but that since such impacts do not inevitably "dictate the choices made by" ERISA plan administrators, such impacts are insufficient to constitute an impermissible "connection with" an ERISA plan in the same sense as *Shaw v. Delta Air Lines*.

Dillingham was a challenge to a California prevailing wage statute that provided an exception for individuals employed under certain state approved apprenticeship programs. A construction company with a different type of apprenticeship program challenged the law as preempted by ERISA. The Supreme Court rejected this challenge as well, holding that the law did not "relate to" an ERISA plan within the meaning of Section 514(a). Following *Travelers,* the majority found the California law covered an area that has long been regulated by the States, and concluded that the principal subject of the statute – the wage rates to be paid on prevailing wage rate construction jobs – to be "quite remote from the areas with which ERISA is expressly concerned." The Court thus concluded it was appropriate to apply a presumption against preemption. Not surprisingly, the rest of the majority opinion found the presumption not rebutted. The Court observed that the statute did "not bind ERISA plans to do anything," and concluded that the effect of the statute was "merely to provide some measure of economic incentive" for contractors to comply with the State's apprentice programs.

ERISA litigators know that *Travelers* has spawned many a claim that Congress did not intend ERISA to overturn state laws of general applicability. For many of us who tend to favor a broad view of ERISA preemption, *Dillingham* is probably most troubling for building on the notion articulated in *Travelers* that a state law imposing an additional economic cost on an ERISA plan administrator is often not enough to warrant preemption.

In addition to their holdings, *Travelers* and *Dillingham* are significant for what amounts to a remarkable confession that the Court's prior attempts to interpret the "relate to" clause has been a failure. In *Travelers*, Justice Souter acknowledged that "our prior attempt to continue the phrase 'relate to' does not give us much help drawing the line here." The Court warned against the application of an "uncritical literalism" in construing Section 514(a). In *Dillingham*, while Justice Thomas did his level best to summarize and harmonize the Court's prior attempts at interpreting "relate to," Justice Scalia threw in the towel. Justice Scalia's concurrence concluded that a literal interpretation of "relate to" was "a project doomed to failure" since, at some point, "everything is related to everything else." Justice Scalia then suggested it would be better to wave the white flag on textual analysis and consider the "relate to" clause as identifying the field of laws regulating ERISA plans for purposes of applying what he called "ordinary field preemption."

Since *Dillingham*, the big question has been how far the courts will run with these concepts. Those who hoped for additional clarity (and who should have known better) have been disappointed. The Court's most recent offering on the topic, *Egelhoff v. Eglehoff*, 532 U.S. 141 (2001), is a good example. There the majority held preempted a Washington statute providing for the automatic revocation, upon divorce, of a beneficiary designation contained in any non-probate asset, including a life insurance policy. Although Justice Thomas' opinion purported to examine whether the statute had an improper "connection with" an ERISA plan, the opinion itself, citing *Dillingham,* is focused on the "objectives of the ERISA statute" in relation to the state law in question. While the majority opinion uses different phraseology, it's by no means clear that the outcome signals a substantial retreat from the Court's prior broad reading of Section 514(a). That was certainly Justice Breyer's view, whose dissenting opinion stressed that the Washington state inheritance statute involved an obvious matter of local concern and traditional state regulation that Congress, in his view, had no intention of displacing. Indeed, if one looked only at whether the state law involved a matter of traditional state regulation, one might think that a case like *Egelhoff*, as well as the Supreme Court's earlier foray into the effect of ERISA on family law in *Boggs v. Boggs*, 520 U.S. 833 (1997), would be a particularly good candidate for a no-preemption finding. But that would have been asking for far too much consistency in this area of the law.

In any case, apart from its impact on the intersection of ERISA and family law, the most interesting part of *Egelhoff* is the tantalizing prospect that the Court may be poised formally to abandon a textual approach to Section 514(a) in favor of the view first asserted by Justice Scalia in his concurring opinion in *Dillingham.* With Justice Breyer's dissenting opinion in *Eglehoff,* there now appear to be four votes (Scalia, Ginsburg, Breyer and Stevens) in favor of junking text in favor of "traditional field preemption." Justice Alito's writings on the 3rd Circuit provide no hint as to his view of the subject.

It is by no means clear how field preemption would operate in the real world. In *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997), the Court expressed its concern about an additional avalanche of litigation over ERISA preemption. It's a reasonable bet that a formal adoption of field preemption (or traditional conflict preemption, for that matter) jurisprudence in place of a literal reading of Section 514(a) would do nothing more than substitute one source of litigation for another. Traditional field preemption, after all, can be its own can of worms. To cite just one example, labor lawyers know it can be extremely difficult to predict the outcome of litigation over whether a particular state statute or common law cause of action is preempted by the National Labor Relations Act under the Supreme Court's *Garmon* doctrine. And the Supreme Court decided five separate cases in six years on the question of whether federal labor law preempts claims implicating the interpretation of a collective bargaining agreement, another labor law issue that involves field preemption principles. Litigation on this issue continues to proliferate in the lower courts, largely due to the unending creativity of plaintiffs' lawyers.

But we're getting a little ahead of ourselves in speculating how the Supreme Court might decide the case before the district court has ruled on the motion for summary judgment. Which leads back to the terms of the Act and its avowed objective. There are a couple of things one can say about the Act with some certainty. It does not refer explicitly to an ERISA plan. Neither is it a mandated benefits law, at least not an explicit one. The Act essentially requires a covered employer to spend 8% of its Maryland payroll on "health care costs." It does not dictate how an employer can satisfy this standard.

The Act's supporters believe ERISA preemption arguments will fail. Supporters claim that the Act, after all, regulates employers and not ERISA plans. They stress that a covered employer can comply with the statute in a variety of ways that would require neither establishment of an ERISA plan, nor substantive changes to the plan design of existing ERISA plans. As an example, advocates have suggested that an employer could comply with the Act by making direct payments to covered employees through a cash bonus dedicated to health care costs. Others suggest that an employer could comply by subsidizing health insurance benefits in ways not involving ERISA plans, through the introduction of health savings accounts, or by funding an on-site clinic. It is an open question whether any of these notions will withstand close scrutiny in this litigation.

In making the argument that the Act is a law of general applicability addressing a matter of traditional local concern, with only an "indirect economic influence" on ERISA plans, defenders of the Act will likely rely heavily on the Court's decision in *De Buono v. NYSA-ILA Medical and Clinical Services Fund*. Read broadly, *De Buono* and its progeny seem to authorize a state government to enact legislation imposing additional taxes directly on ERISA plans. *A fortiori,* the supporters of the Act surely will argue, an increased cost imposed on an employer, even if characterized as a tax or a penalty, cannot possibly be preempted under the logic and rationale of *Travelers* and *Dillingham.*

Supporters of the Act will also rely heavily on the Supreme Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Most ERISA lawyers think of *Fort Halifax* for its holding that a Maine statute requiring a severance payment in the event of a plant closing did not constitute an ERISA welfare benefit plan. The distinction between a "benefit" and a "plan" is at the heart of the Court's analysis in that case, as is the Court's conclusion that the severance benefit required by the Maine law could be provided outside an ERISA plan.

Overcoming these arguments will be no walk in the park. That said, there appear to be several convincing responses to the defenders' arguments. To begin, the likely effect of the Act would be to cause a covered employer to spend the extra money at issue to "top off" its existing ERISA plans. No sensible employer would decide to go the alternate route of paying what amounts to a penalty to the State of Maryland; employers would almost certainly prefer to see those same dollars spent for the direct benefit of their employees. And, since most employees spend money on "health care costs" through ERISA plans, it would seem that the shortest road to compliance would be through modifications to those plans. From there, it should be a short stroll to a conclusion that the Act impermissibly interferes with a covered employer's administration of ERISA plans.

RILA's papers make the compelling point that the inevitable effect of the Act is to disrupt ERISA's goal of encouraging uniform administration of ERISA plans across the county. The Court's decision in *Egelhoff* reinforces the importance of uniformity, citing language to that same effect from *Travelers*. Supporters of ERISA preemption should be able to tell a persuasive story that the Act could easily lead to a scenario in which large employers with self-insured ERISA plans would be required to deal with a patchwork quilt of state regulation of their health insurance programs. If you think that's a fanciful notion, a review of the other "fair share" bills pending in State Capitals across the country may change your mind on this point.

RILA will also argue that the Act's reporting obligations conflict with those imposed by ERISA. Plaintiff will focus on the annual payroll report required by Section 103 of the Act which, among other things, requires information as to the percent of compensation spent on employee health insurance costs in the previous year. RILA asserts that this requirement forces ERISA plan administrators to compile and maintain information in a manner that is "completely foreign to ERISA."

Although not mentioned explicitly in the papers filed to date, another reporting obligation, imposed by Section 106 of the Act, lurks as a significant issue in the preemption debate. The Act requires an annual report to the Governor by the Maryland Secretary of Labor, Licensing and Regulation. This report must include information as to each covered employer's "definition of full-time employee and part-time employee," the number of employees in both categories who are eligible and who receive health insurance benefits from the employer, and "the source of health insurance benefits" for employees in both categories who do not receive such benefits from their employer. The Act is not clear as to how the Secretary will obtain such information. Neither does it explain why such information is necessary to the avowed purpose of the Act; the employer report required by Section 103 of the Act should be adequate for enforcement purposes. The interesting thing about this second reporting obligation is that it sheds light on what many believe is the real motivation for the Act – further embarrassment of Wal-Mart. The information required by Section 106 (not publicly available) would be extremely valuable to labor unions trying either to organize Wal-Mart's employees or to continue the corporate campaign against the retailer.

Proponents of preemption will also try to milk as much as they can from *Travelers*. In this context, they should home in on the alternative posed by the Act – making a payment into the Maryland "Fair Share fund" in an amount necessary to equal 8% of the company's Maryland payroll. Eight percent of payroll for an employer with more than 10,000 Maryland employees sounds like a considerable sum of money. The *Travelers* Court observed that an exorbitant tax might present a Hobson's choice that "would be treated as imposing a substantive mandate." As suggested above, economic realities dictate the manner of a covered employer's response to the Act. The inducement contained in the Act can be argued as "tantamount to a compulsion" to provide a certain level of benefits under the employer's existing ERISA plans.

The various arguments on both sides of the preemption question surely will become more developed as the case proceeds through the courts. One would expect that the plaintiff and its allies will try to bolster their chances by casting some of their arguments in terms of traditional field preemption, and by paying less deference to a literal reading of the "relate to" clause.

In making their arguments, one hopes RILA and its supporters won't concede that the Act is a law of general applicability and thus give its supporters even more reason to hide behind *Travelers* and *Dillingham*. Both the formal legislative history and the other public statements associated with the Act leave no doubt that the real purpose of the Act is to "get" Wal-Mart. The Act, after all, is all about the labor movement trying to inflict more pain on the country's largest private sector employer. Once should be skeptical of the assertion that the Act is really intended to save money for Maryland taxpayers. It is also questionable whether a "fair share" statute can truly be said to address an area that has traditionally been an area of state regulation. In any event, the Act is clearly distinguishable from state laws involving inheritance and community property, which cases like *Egelhoff* and *Boggs* have held preempted under the analysis suggested in *Travelers*.

Much has been already written about the extent to which *Travelers* and *Dillingham* have altered the landscape of ERISA preemption. And while that is undeniably the case, it's also true that neither opinion provides any inkling of an intent to back away from the Court's prior decisions, in cases like *Metropolitan Life* and *Greater Washington Board of Trade,* holding that mandated benefits laws are preempted. And, of course, neither decision suggests a more general retreat from the fundamental rationale grounding this branch of ERISA preemption that recognizes the Congressional intent to preclude a multiplicity of regulation of nationwide employer health care plans.

All of which leads back to where we started, with the attempt to characterize the Act as closely analogous to the D.C. statute held preempted in *Greater Washington Board of Trade*. RILA should have the better of this argument. Like the Act, the D.C. statute did not specify how an employer must go about the task of providing "equivalent" health care coverage to its employees once they become eligible for workers' compensation. Presumably one could have achieved equivalence there through expenditures not made to an ERISA plan. Although the Act, unlike the D.C. statute, does not contain the same kind of explicit reference to ERISA plans (the Act cleverly does this indirectly), the substance of the two statutory obligations seems identical. In this respect, the 2nd Circuit's 1989 decision in *General Electric Co. v. New York State Dept of Labor*, 891 F.2d 25 (2d Cir. 1989), may give comfort to the challengers. There, the 2nd Circuit held that certain provisions of a New York state prevailing wage statute were preempted because they obligated covered employers to provide a certain equivalent level and type of fringe benefits on covered projects.

Any prediction of the outcome of this challenge to the Act is premature. The challengers could win on their constitutional Equal Protection argument, or they could be bounced out of court for lack of standing. It is interesting that RILA chose to seek summary judgment without developing a more complete record through discovery. A full record might make it easier for the challengers to argue that the Act should not be seen as a statute regulating an area of traditional state law concern. After all, one's chances of prevailing on a preemption argument would seem to be greatly improved if the *Travelers* presumption against preemption is not applicable.

Moreover, a more complete record might provide challengers with another weapon – the theory labor lawyers know as *Machinists* preemption. In several cases the Supreme Court has overturned legislative actions taken by state and local governments that have had the effect of tipping the balance in a labor dispute by regulating in an area Congress intended to be left to the free play of economic force by labor and management. *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986) (preempting a city ordinance that imposed a penalty on a taxicab company that refused to accede to collective bargaining demands made by a Teamsters local) and *Gould v. Wisconsin*, 475 U.S. 282 (1986) (preempting a Wisconsin state law imposing additional penalties on employers found to have violated the National Labor Relations Act) are two leading examples. ELR readers with good memories will recall that labor law preemption was argued unsuccessfully in *Metropolitan Life v. Massachusetts*. But there are several aspects to these "fair share" laws that were not present in that case, starting with the most obvious that the Act is part of a strategy by the labor movement to organize Wal-Mart. While the scope of *Machinists* preemption is a subject for another article (probably for a different journal), suffice it to say that there are substantial labor law arguments, both textual and policy-based, suggesting that a State government has no business intervening in what boils down to a union organizing campaign.

If nothing else, the Act reconfirms the notion that there is simply no end to the cleverness of some people. Since nothing in the Court's more recent preemption decisions suggests any intent to retreat from the rationale and holding of *Greater Washington Board of Trade*, one would think (and fervently hope, if you believe the Act is too cute by half) that the courts will reach the same conclusion about the Act.