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Retail Industry Leaders Ass'n v. Fielder: ERISA Preemption Trumps the "Play or Pay" Law

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RETAIL INDUSTRY LEADERS ASS'N v. FIELDER: ERISA PREEMPTION TRUMPS THE "PLAY OR PAY" LAW

In *Retail Industry Leaders Ass'n v. Fielder*,[1] the United States Court of Appeals for the Fourth Circuit held that Maryland's Fair Share Health Care Fund Act[2] (the Fair Share Act or the Act) was preempted by the Employee Retirement Income Security Act of 1974 (ERISA)[3] because the Act impermissibly regulated employee benefit plans.[4] By characterizing the Fair Share Act as an effective mandate that employers alter their employee benefit plans, the Fourth Circuit, although correct in its ultimate holding, avoided the tougher—but necessary—analysis to determine whether ERISA preempts a state or local law that gives employers the option to either increase employee benefit plan spending to meet a minimum threshold amount or pay a fee to the state.[5] Although the Fair Share Act provides alternative methods of compliance, ERISA still preempts it because one of those methods requires an employer to alter its benefit plans to meet a state-specific requirement, and thus contravenes ERISA's goal of promoting the uniform administration of employee benefit programs nationwide.[6]

The Fourth Circuit's opinion has impacted similar "play or pay" laws[7] in other jurisdictions, and will likely continue to do so, by causing other courts and commentators to similarly consider whether such laws effectively mandate that employers alter their employee benefit plans.[8] If a court adheres strictly to the Fourth Circuit's analysis, it may conclude that a particular "play or pay" law survives ERISA preemption, so long as the law does not effectively mandate that an employer alter its employee benefit plans.[9] This result would, however, contravene ERISA's preemption goal of promoting the uniform administration of nationwide benefits because it would allow different

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1. 475 F.3d 180 (4th Cir. 2007).
2. MD. CODE ANN., LAB. & EMPL. §§ 8.5-101 to -107 (West Supp. 2007).
3. 29 U.S.C. §§ 1001–1461 (2000 & Supp. IV 2004).
4. *Fielder*, 475 F.3d at 197.
5. *See infra* Part IV.A.1.
6. *See infra* Part IV.A.2.
7. A "play or pay" law is one that gives employers the choice of either playing, by providing health care that meets prescribed standards to their employees, or paying a specific amount to the state. Amy B. Monahan, *Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts*, 55 U. KAN. L. REV. 1203, 1203 (2007).
8. *See infra* Part IV.B.
9. *See infra* Part IV.B.

jurisdictions to create laws that would potentially subject employers to different healthcare benefit plan requirements.[10] As such, these "play or pay" laws should not survive ERISA preemption if the goal of the uniform administration of employee healthcare benefit plans is to remain intact.[11]

I. THE CASE

In January 2006, the Maryland General Assembly enacted the Fair Share Act.[12] The Act required employers with at least 10,000 employees in the State of Maryland to either spend eight percent of their total payroll on employee health insurance costs, or to pay the difference between their current spending and the eight percent requirement to a fund created by the Act.[13]

A. *The General Assembly Study*

The Maryland General Assembly carefully studied the costs of Maryland's Medical Assistance Program[14] prior to enacting the Fair Share Act, learning that annual program spending had increased from \$3.46 billion to \$4.7 billion in the previous three years.[15] The General Assembly singled out Wal-Mart Stores, Inc. (Wal-Mart) as a contributing factor to the increased spending, believing that Wal-Mart's practice of providing "substandard" benefits caused many of its employees to rely on the state's Medical Assistance Program.[16] In fact, the Maryland Department of Legislative Services (Legislative Services) provided a report to the General Assembly about Wal-Mart that noted that several states have accused Wal-Mart of providing employees with substandard healthcare benefits, forcing those employees to use public health programs such as Medicaid.[17] The report also discussed how other states have responded to this financial burden by requiring employers to either provide employees with health insurance or pay the state.[18] The Legislative Services report also compared Wal-Mart and Costco Wholesale (Costco), and pointed out that while Wal-Mart officials claim that the company provides forty-five percent of its employees

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10. *See infra* Part IV.B.
11. *See infra* Part IV.B.
12. Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 184 (4th Cir. 2007).
13. *Id.* at 183, 185.
14. *Id.* at 183. This program includes Medicaid and children's health programs. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 183–84. For example, Georgia spends nearly \$10 million per year on the children of Wal-Mart employees. *Id.* at 184.
18. *Id.* at 184.

with health coverage, Costco provides health insurance to ninety-six percent of its eligible employees.[19]

B. The Enactment

As a result of its findings, the General Assembly passed the Fair Share Act on January 12, 2006.[20] The Fair Share Act's core provision stated:

> An employer that is not organized as a nonprofit organization and does not spend up to 8% of the total wages paid to employees in the State on health insurance costs shall pay to the [Maryland] Secretary [of Labor, Licensing, and Regulation] an amount equal to the difference between what the employer spends for health insurance costs and an amount equal to 8% of the total wages paid to employees in the State.[21]

All payments collected in the name of the Fair Share Act were to be directed to the Fair Share Health Care Fund and used only in support of the Maryland Medical Assistance Program.[22] In addition, the Fair Share Act imposed a civil penalty of $250,000 in the event that an employer failed to increase spending or pay the state.[23] The Act further required the submission of an annual report to the state disclosing the number of employees, expenditures on healthcare, and the percentage of total compensation spent on health insurance for the previous calendar year.[24] The General Assembly anticipated that Wal-Mart, which spent between seven percent and eight percent of its Maryland wages on healthcare benefits,[25] would be the sole employer with more than 10,000 employees affected by the Fair Share Act's spending requirements.[26]

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19. *Id.*

20. *Id.* at 183–84. The effective date was January 1, 2007. *Id.*

21. MD. CODE ANN., LAB. & EMPL. § 8.5-104(b) (West Supp. 2007). Nonprofit organizations are only required to meet a threshold spending requirement of six percent. *Id.* § 8.5-104(a). Additionally, wages paid to an employee that exceed the median household income in Maryland do not figure into the calculation of total payroll. *Id.* § 8.5-103(b)(1).

22. *Id.* § 8.5-107(3).

23. *Id.* § 8.5-105(b).

24. *Id.* § 8.5-106.

25. *Fielder*, 475 F.3d at 185.

26. Retail Indus. Leaders Ass'n v. Fielder, 435 F. Supp. 2d 481, 485 (D. Md. 2006). Wal-Mart employs approximately 16,000 in Maryland. *Fielder*, 475 F.3d at 185. There are three other non-governmental employers in Maryland with 10,000 or more employees. *Fielder*, 435 F. Supp. 2d at 485. As a non-profit, Johns Hopkins University qualified for and met the lower six percent requirement. *Id.* Northrop Grumman Corp. met the eight percent requirement due to a provision that exempted from the calculation of total payroll those wages paid above the median household income in Maryland. *Id.* Giant Food, Inc., the

C. *The Litigation*

The Retail Industry Leaders Association (RILA)[27] responded to the Act's passage by commencing an action against the Maryland Secretary of Labor, Licensing and Regulation (the Secretary), arguing that the Act was preempted by ERISA and seeking to enjoin the Act's enforcement.[28] RILA also alleged that the Act violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[29] RILA moved for summary judgment on the ERISA preemption and Equal Protection Clause issues.[30] The Secretary responded with a motion to dismiss for lack of jurisdiction, alleging (1) that RILA lacked standing; (2) that RILA's claims were not ripe; and (3) that the Tax Injunction Act[31] barred RILA's claims.[32] The United States District Court for the District of Maryland found that RILA did have jurisdiction to brings its claims and that the Fair Share Act was preempted by ERISA because it improperly mandated minimum spending requirements for healthcare benefit plans.[33] The district court, however, concluded that the Act did not violate the Equal Protection Clause.[34] Both parties appealed, leaving the United States Court of Appeals for the Fourth Circuit to determine whether the district court ruled properly on the jurisdictional, preemption, and Equal Protection Clause issues.[35]

II. LEGAL BACKGROUND

A. *The ERISA Statute*

In 1973, Congress aimed to alleviate many of the problems employees faced regarding the pension system and to provide protections for retirees.[36] The end result was the ERISA statute, which

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third employer, already spent more than eight percent of its total Maryland wages on healthcare benefits when the Act took effect. *Id.*

27. RILA is composed of major retailers, including Wal-Mart, Best Buy Company, Target Corporation, Lowe's Companies, and IKEA. *Fielder*, 475 F.3d at 185. Many of these companies sit on RILA's board, which authorized RILA's initiation of this action. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 28 U.S.C. § 1341 (2000). The Tax Injunction Act protects, in most cases, a state's collection of taxes from a federal court's injunction, suspension, or restraint. *Fielder*, 475 F.3d at 185–86.

32. *Fielder*, 475 F.3d at 185–86.

33. *Id.* at 186.

34. *Id.*

35. *Id.*

36. 119 CONG. REC. 130 (1973), *reprinted in* SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIRE-

contains provisions that protect and regulate employee benefit plans.[37] Employee benefit plans include employee pension and welfare benefit plans.[38] Congress defined employee welfare benefit plans as including those plans that provide benefits for "medical, surgical, or hospital care," and such events as "sickness, accident, disability, [or] death . . . ."[39]

To effectively achieve its goal of overhauling the pension system, Congress recognized the need for federal law to preempt state and local laws in this same area. Both House and Senate committee reports commented on the interstate quality of employee benefit plans and the need to provide a uniform approach to regulation in lieu of multiple state and local standards.[40] Additionally, during floor debates, Congressman Dent and Senator Williams lauded the effects of a broad preemption power and its ability to "eliminat[e] the threat of conflicting [and] inconsistent State and local regulation."[41] The preemption provision as passed into law stated specifically that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[42] By including employee welfare benefit plans under the definition of employee benefit plans, Congress extended the preemption provision to state and local laws regulating employee healthcare plans.[43] Finally, Senate floor debate suggested that the federal courts would develop a body of substantive law to address issues arising in the area of preemption.[44]

MENT INCOME SECURITY ACT OF 1974, at 90 (1976) [hereinafter LEGISLATIVE HISTORY] (statement of Sen. Williams).

37. 29 U.S.C. § 1001(a) (2000).

38. *Id.* § 1002(3).

39. *Id.* § 1002(1)(A).

40. S. REP. NO. 93-127, at 35 (1973), *reprinted in* LEGISLATIVE HISTORY, *supra* note 36, at 621 ("Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law . . . and for creating a single reporting and disclosure system in lieu of burdensome multiple reports."); H.R. REP. NO. 93-533 (1973), *reprinted in* LEGISLATIVE HISTORY, *supra* note 36, at 2359 ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.").

41. 120 CONG. REC. 29197 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 36, at 4670 (statement of Rep. Dent); 120 CONG. REC. 29933 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 36, at 4745–46 (1976) (statement of Sen. Williams).

42. 29 U.S.C. § 1144(a) (2000).

43. *Id.* § 1002(1)(A), (3).

44. 120 CONG. REC. 29942 (1974), *reprinted in* LEGISLATIVE HISTORY, *supra* note 36, at 4771 (statement of Sen. Javits).

B. Federal Preemption Standards and ERISA

The federal preemption power over state and local laws is derived from the Supremacy Clause of the United States Constitution.[45] The jurisprudence of the Supreme Court of the United States on federal preemption recognizes two types of preemption: express and implied.[46] This Note focuses on express preemption, which is typified by the presence of an explicit preemption provision in the relevant federal statute, like that found in ERISA.[47] If a statute contains an express preemption provision, the inquiry into whether Congress intended the provision to preempt state law begins with the text of that provision.[48] Yet, to fully understand the scope of the provision, the inquiry must include a consideration of Congress's purpose for creating such a provision.[49] The Supreme Court has said on multiple occasions that "'the purpose of Congress is the ultimate touchstone' in every pre-emption case."[50] Additionally, a clear congressional purpose is required to overcome the presumption that Congress does not intend to preempt those state laws that legislate in fields of traditional state police powers.[51] The Supreme Court has applied these principles to determine the breath of ERISA's express preemption provision on a number of occasions.

1. Shaw v. Delta Air Lines, Inc. *and Progeny*

In an early ERISA preemption case, *Alessi v. Raybestos-Manhattan, Inc.*,[52] the Supreme Court considered whether a New Jersey statute

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45. U.S. CONST. art. VI, § 2; N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995) (discussing the Supremacy Clause as a source for federal preemption).

46. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983). The difference between express and implied preemption depends on "whether Congress' [sic] command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (citations and internal quotation marks omitted).

47. *Id.*; *see* 29 U.S.C. § 1144(a) ("[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .").

48. Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996).

49. *Id.* at 485–86; *Travelers*, 514 U.S. at 655; Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990).

50. *Medtronic*, 518 U.S. at 485 (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)); *see also Ingersoll-Rand*, 498 U.S. at 138 ("The question whether a certain state action is pre-empted by federal law is one of Congressional intent. 'The purpose of Congress is the ultimate touchstone.'" (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985))); Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 8 (1987) ("[A]s in any preemption analysis, the purpose of Congress is the ultimate touchstone." (internal quotation marks omitted)).

51. *Medtronic*, 518 U.S. at 485; *Travelers*, 514 U.S. at 654–55.

52. 451 U.S. 504 (1981).

eliminating a method of calculating pension benefits was preempted by ERISA.[53] The Court determined that the state statute was preempted, explaining that ERISA reaches both direct and indirect state action bearing on employee benefit plans.[54] The Court also emphasized that a state could not avoid "through form the substance of the pre-emption provision."[55]

Shortly thereafter, in *Shaw v. Delta Air Lines, Inc.*,[56] the Supreme Court interpreted the words "relates to" in the ERISA preemption provision.[57] The question before the Court was whether two New York state laws prohibiting discrimination in employee benefit plans on the basis of pregnancy, and requiring the payment of sick-leave benefits to pregnant employees, were preempted by ERISA.[58] The Court began its analysis by looking to the dictionary definition of "relates to," determining that "[a] law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan."[59] Next, the Court examined the congressional record and concluded that Congress intended that the words "relate to" be understood in this ordinary, broad sense and not more restrictively.[60] After finding the requisite "connection with" or "reference to" an employee benefit plan, the Court determined whether the laws fell under one of the narrow exceptions to the preemption provision specified in the statute.[61] The Court ultimately determined that one of the challenged New York laws was preempted by ERISA and one was not.[62]

Subsequent Supreme Court decisions affirmed *Shaw*'s understanding of the "relates to" phrase in the preemption provision, and continued to refine the Court's understanding of those state laws that would be subject to preemption under ERISA. In *Metropolitan Life Insurance Co. v. Massachusetts*,[63] the Supreme Court reiterated its pronouncement in *Shaw* that the "relates to" phrase in the preemption provision is to be understood in a broad sense and that any law with a "connection with" or "reference to" an employee benefit plan would

53. *Id.* at 507, 524–25.
54. *Id.* at 524–25.
55. *Id.* at 525.
56. 463 U.S. 85 (1983).
57. *Id.* at 96–97.
58. *Id.* at 88.
59. *Id.* at 96–97.
60. *Id.* at 98–99.
61. *Id.* at 100.
62. *Id.* at 108–09.
63. 471 U.S. 724 (1985). The state statute in question required minimum mental health benefits to be provided to residents who were insured under three types of insurance policies. *Id.* at 727.

be preempted by ERISA.[64] The Court also restated that even indirect state actions may fall within the category of preempted activity.[65] The *Metropolitan Life* Court, however, held that ERISA did not preempt state laws regulating insurance because of the language of the savings clause in the preemption provision.[66]

Similarly, the Court in *Fort Halifax Packing Co. v. Coyne*[67] considered a statute mandating severance payments and held that statutes neither establishing nor requiring employers to maintain employee welfare benefit plans are not preempted by ERISA.[68] Specifically, the Court noted that statutes requiring a "one-time, lump-sum payment triggered by a single event" do not qualify as employee benefit plans under ERISA because they require no "administrative scheme" to implement.[69]

The Supreme Court has also established that, in addition to certain state or local laws themselves, some state causes of action are preempted by the ERISA statute. In 1990, the Court in *Ingersoll-Rand Co. v. McClendon*[70] examined whether a state common law claim for wrongful discharge based on the employer's desire to avoid payment of employee benefits was preempted by ERISA.[71] The Court again began by looking to the intent of Congress through the language, structure, and purpose of the statute.[72] In keeping with earlier decisions, the Court adopted the *Shaw* understanding of the phrase "relates to," stating that laws may relate to benefit plans even if they are "not specifically designed to affect such plans, or the effect is only indirect."[73] The Court also reemphasized the preemption provision's purpose of avoiding the administrative burden that employers would face if they had to tailor their employee benefit plans for each jurisdiction in which they maintained employees.[74] The Court found the cause of action in question preempted because it related to an em-

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64. *Id.* at 739 (quoting *Shaw*, 463 U.S. at 97). According to *Metropolitan Life*, a state law could be preempted by ERISA even if it was "consistent with ERISA's substantive requirements." *Id.*

65. *Id.* (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981)).

66. *Id.* at 744. The savings clause relieves from preemption state laws regulating insurance, banking, or securities. 29 U.S.C. § 1144(b)(2)(A) (2000).

67. 482 U.S. 1 (1987).

68. *Id.* at 5–6.

69. *Id.* at 11–12.

70. 498 U.S. 133 (1990).

71. *Id.* at 135.

72. *Id.* at 138.

73. *Id.* at 139.

74. *Id.* at 142.

ployee benefit plan and was "fundamentally at odds" with the purpose of ERISA's preemption provision.[75]

2. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.: *Refinement of the ERISA Preemption Analysis*

The Supreme Court narrowed its "connection with" or "reference to" standard in 1995 in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*[76] The New York statute in *Travelers* required surcharges on hospital costs incurred by patients insured by some commercial insurance carriers, but not patients insured by Blue Cross/Blue Shield.[77] Several commercial insurance carriers brought suit alleging that the surcharge statute was preempted by ERISA.[78]

The *Travelers* Court began by describing the traditional federal preemption standards, and noting that the preemption inquiry centers on Congress's intent, as understood from the text of the provision and the structure and purpose of the statute.[79] The Court also reemphasized the presumption that Congress does not generally intend to supplant state law, particularly when dealing in areas traditionally reserved for state police powers.[80] Absent a clear purpose from Congress to regulate in an area traditionally belonging to the states, the Court concluded, it would not find a state law preempted by federal law.[81]

The *Travelers* Court next explained that the language of the ERISA preemption provision, and subsequent Supreme Court decisions attempting to explain it, did not set forth any meaningful limits to preemption.[82] In addressing the "connection with" standard pronounced by the *Shaw* Court, the *Travelers* Court found the standard unsatisfactorily vague.[83] As such, the Court referred to the purpose of the ERISA statute to help it determine which state laws Congress

75. *Id.* at 139–40, 142.

76. 514 U.S. 645, 655–56 (1995).

77. *Id.* at 649.

78. *Id.* at 651–52.

79. *Id.* at 654–55.

80. *Id.*

81. *Id.* at 655.

82. *Id.* ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course . . . .").

83. *See id.* at 656 ("[H]ere an uncritical literalism is no more help than in trying to construe 'relate to.' For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections.").

sought to preempt.[84] The Court found that Congress devised the preemption provision to promote the uniform administration of employee benefit plans, but nevertheless found that state or local laws that indirectly economically influence plan administration and choices do not interfere with the uniform administration of such plans.[85] Specifically, the Court asserted that it would stretch the preemption provision too far to read it to cover statutes that relate indirectly to employee benefit plans.[86] Such a conclusion, the Court stated, would "violate basic principles of statutory interpretation" and would be inconsistent with precedent,[87] such as *District of Columbia v. Greater Washington Board of Trade*'s[88] statement that state laws with only a "tenuous, remote, or peripheral connection with covered plans" are not preempted.[89] The *Travelers* Court, however, explained that its holding did not limit ERISA preemption to only those statutes directly regulating employee benefit plans, and noted that state laws may be preempted if they create indirect, economic effects, yet still control employee benefit plans.[90]

Two terms later in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*,[91] the Court revisited the preemption question when it determined whether ERISA preempted a California prevailing wage law that prohibited payment of apprentice wages in some circumstances.[92] The Court clarified its *Travelers* decision and stated that it had interpreted the *Shaw* understanding of "relate to" as requiring a two-part inquiry, asking if the law in question "(1) has a connection with or (2) reference to" employee benefit plans.[93] In analyzing whether a state law had an improper connection with an employee benefit plan, the Court explained that courts should look "both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans."[94] Likewise, the Court explained that a state law has a reference to an employee benefit plan if it "acts immediately and exclusively upon

84. *Id.*
85. *Id.* at 657, 659–60.
86. *Id.* at 661.
87. *Id.*
88. 506 U.S. 125 (1992).
89. *Travelers*, 514 U.S. at 661 (citing *Greater Wash.*, 506 U.S. at 130 n.1).
90. *Id.* at 668.
91. 519 U.S. 316 (1997).
92. *Id.* at 319.
93. *Id.* at 324–25 (citations omitted).
94. *Id.* at 325 (citations and internal quotation marks omitted) (quoting *Travelers*, 514 U.S. at 656, 658–59).

[employee benefit] plans . . . or where the existence of [employee benefit] plans is essential to the law's operation . . . ."[95]

The Court determined that the prevailing wage statute was not preempted because, while it "alter[ed] the incentives" for an employee benefit plan, it did not "dictate the choices."[96] The *Dillingham* Court added that the California law did not have a sufficient "connection with," and, therefore, relation to employee benefit plans to overcome the presumption that Congress did not intend to preempt laws operating in areas traditionally regulated by the states.[97]

More recently, the Court applied the *Dillingham* framework in *Egelhoff v. Egelhoff*,[98] where the Court examined a Washington state statute that prevented a decedent's nonprobate assets from passing to the surviving former spouse upon the death of the decedent.[99] Specifically, Mr. and Mrs. Egelhoff divorced just over two months before Mr. Egelhoff died.[100] At the time of Mr. Egelhoff's death, his former wife remained a listed beneficiary on his life insurance and pension plans and was, therefore, paid proceeds from the plans.[101] Mr. Egelhoff's children from a previous marriage sued Mrs. Egelhoff, claiming they were entitled to the proceeds of the insurance and pension plans under the Washington statute.[102] The Court focused on analyzing the statute under the "connection with" prong of the ERISA preemption analysis.[103] Looking to the objectives of ERISA to determine if the scope of the Washington statute made it one that Congress intended to survive preemption, the Court determined, in relevant part, that the statute ran afoul of ERISA's goal of providing for the uniform administration of benefit plans.[104] The Court reasoned that ERISA

95. *Id.*; *see also, e.g.*, Dist. of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130 (1992) (finding that the District of Columbia's Equity Amendment Act was preempted by ERISA because it made specific reference to ERISA welfare benefit plans and the plans were essential to the operation of the statute); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 140 (1990) (finding that a Texas common law cause of action for wrongful discharge was preempted by ERISA because its operation was contingent on the existence of an ERISA plan); Mackey v. Lainer Collection Agency & Serv., Inc., 486 U.S. 825, 830 (1988) (holding that a Georgia state statute was preempted by ERISA because it expressly mentioned ERISA plans and treated them differently under state procedures).

96. *Dillingham*, 519 U.S. at 334.

97. *Id.*

98. 532 U.S. 141 (2001).

99. *Id.* at 144.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 147.

104. *Id.* at 147–48.

addressed the designation of beneficiaries[105] and that the existence of state statutes with contrary methods of determining beneficiaries would create the exact burden on uniform plan administration that the preemption provision sought to prevent.[106] Although the Washington statute dealt with areas of traditional state regulation—family and probate law—the Court observed that Congress clearly designed the preemption provision to overcome the presumption that such state laws would remain valid if they interfered with the uniform administration of ERISA plans.[107] The Court further explained that providing more than one way to comply with a statute would not save it from preemption because such statutes would still require plan administrators to be familiar with and tailor plans to the laws of various jurisdictions, thus contradicting the preemption provision's goal of uniformity.[108]

C. *Increased Use of the "Play or Pay" Model in State and Local Legislation Regarding Employee Benefit Plans*

In response to the increasing costs of state Medicaid programs,[109] many states and local jurisdictions have searched for creative ways to structure statutes that address these escalating costs while attempting to avoid ERISA preemption.[110] For example, in 2006, over half of the state legislatures introduced "play or pay" bills; however, most did not survive the legislative process.[111] In 2007, two states, Michigan and Minnesota, again introduced similar bills in their legislatures.[112] Yet,

105. *Id.* at 147.

106. *Id.* at 149–50 ("We recognize that all state laws create some potential for a lack of uniformity. But differing state regulations affecting an ERISA plan's system for processing claims and paying benefits impose precisely the burden that ERISA pre-emption was intended to avoid." (internal quotation marks omitted)).

107. *Id.* at 151.

108. *Id.* at 150–51 ("This tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction is exactly the burden ERISA seeks to eliminate." (internal quotation marks omitted)).

109. Daniel C. Vock, *Medicaid: Biggest Insurer Is a Budget Buster*, STATELINE.ORG, Aug. 3, 2006, http://www.stateline.org/live/details/story?contentId=131622.

110. Monahan, *supra* note 7, at 1203; *see, e.g.*, MD. CODE ANN., LAB. & EMPL. § 8.5-104(a)–(b) (West Supp. 2007) (requiring payments to a state fund if an employer fails to reach certain healthcare spending targets); MASS. GEN. LAWS ANN., ch. 149, § 188(b) (West Supp. 2007) (same); NEW YORK CITY, N.Y. CODE § 22-506(c) (2006) (same); SUFFOLK COUNTY, N.Y. REG. LOCAL LAW § 325-3 (2006), *available at* http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=64742&infobase=suffolk.nfo&softpage=Browse_Frame_Pg42 (same).

111. *See* National Conference of State Legislatures, 2006–2007 Fair Share Health Care Fund or "Pay or Play" Bills, http://www.ncsl.org/programs/health/payorplay2006.htm (last visited May 5, 2008).

112. *Id.*; *see also* S.B. 87, 94th Leg. (Mich. 2007) (providing for collection of a fee from employers based on amount paid for health care relative to total wages paid); H.B. 39, 85th

Maryland has not been alone in passing such a bill into law. Massachusetts also adopted a fair share contribution law.[113] The law required employers with eleven or more full time employees and who did not qualify as contributing employers to pay the state a per-employee fee, not to exceed $295.[114] A contributing employer was defined as one that makes fair and reasonable contributions to employee health care.[115] Under the law, an employer makes a fair and reasonable contribution if it has twenty-five percent of its employees enrolled in a group health care plan or, if less than twenty-five percent of its employees are enrolled, it offers to pay at least thirty-three percent of full time employees' premiums to group health care plans.[116]

Additionally, two local jurisdictions in New York also enacted similar laws. Suffolk County, New York enacted a law entitled the Suffolk County Fair Share for Health Care Act.[117] As amended in 2006, this local law required covered employers (mostly local grocery stores) to make minimum expenditures on employee health care coverage, or to pay a penalty equivalent to the difference between the employer's actual spending and the law's minimum requirement.[118] Likewise, the New York City Council passed the New York City Health Care Security Act targeting large grocery employers, which required employers to make certain health care expenditures for their employees.[119] Failure to make the required expenditures also resulted in a monetary penalty to be paid to the City in the amount of the difference between the employers' current health care expenditures and the prescribed amount.[120]

Leg. (Minn. 2007) (establishing the fair share health care fund and requiring employer payments to the fund). Neither bill passed out of committee. *See* Michigan Legislature, http://www.legislature.mi.gov/ (last visited May 5, 2008); Minnesota State Legislature, http://www.revisor.leg.state.mn.us/ (last visited May 5, 2008).

113. MASS. GEN. LAWS ANN., ch. 149, § 188.

114. *Id.* § 188(b), (c)(10).

115. *Id.* § 188(a).

116. 114.5 MASS. CODE REGS. 16.03 (2006).

117. Retail Indus. Leaders Ass'n v. Suffolk Co., 497 F. Supp. 2d 403, 406 (E.D.N.Y. 2007).

118. SUFFOLK COUNTY, N.Y. REG. LOCAL LAW §§ 325-2, 325-3A, 325-4A (2006), *available at* http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=64742&infobase=suffolk.nfo&softpage=Browse_Frame_Pg42.

119. NEW YORK CITY, N.Y. CODE § 22-506 (2006).

120. *Id.* § 22-506(e)(1).

III. THE COURT'S REASONING

In *Retail Industry Leaders Ass'n v. Fielder*,[121] the United States Court of Appeals for the Fourth Circuit addressed whether RILA had standing to bring its ERISA preemption and equal protection claims, whether the claims were ripe, whether the claims were barred by the Tax Injunction Act, whether the Fair Share Act was preempted by ERISA, and whether the Fair Share Act violated the Equal Protection Clause of the Fourteenth Amendment.[122] The Fourth Circuit determined that it did have jurisdiction to hear the claims[123] and held that the Fair Share Act was preempted by ERISA because the Act "conflict[ed] with ERISA's goal of permitting uniform nationwide administration" of healthcare benefits by "effectively requir[ing] employers in Maryland covered by the Act to restructure their employee health insurance plans."[124]

The court first addressed the ERISA preemption issue by examining the scope of the preemption provision.[125] The court then analyzed the nature of the Fair Share Act to decide whether the Act fell under ERISA's preemption provision.[126]

A. *ERISA Preemption Provision Analysis*

The Fourth Circuit began its preemption provision analysis by describing the aim of the ERISA preemption provision as promoting the uniform administration of employee healthcare plans for employers with employees in multiple jurisdictions.[127] The Fourth Circuit

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121. 475 F.3d 180 (4th Cir. 2007).

122. *Id.* at 185–86.

123. *Id.* at 189. The court found that RILA met the "associational standing" test to bring claims on behalf of Wal-Mart, which authorizes standing for an association when (1) a member would have standing to sue in its own right; (2) the interests sought to be protected by the association were in line with the association's own purpose; and (3) the individual members of the association were not needed to participate in the action. *Id.* at 186–88 (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 345 (1977)). The court rejected the Secretary of Labor's ripeness argument, finding that Wal-Mart would likely incur liability under the statute unless it made immediate changes to its spending procedures and that the questions presented were purely legal. *Id.* at 188. Lastly, the court rejected a challenge that the Fair Share Act was barred by the Tax Injunction Act, 28 U.S.C. § 1341 (2000), for allegedly serving a revenue-raising purpose, finding that the primary purpose of the Fair Share Act was to regulate health care spending, not to raise revenue, and concluding that the Fair Share Act was not a tax provision that would trigger the Tax Injunction Act. *Fielder*, 475 F.3d. at 189.

124. *Fielder*, 475 F.3d at 183. The court did not address the Equal Protection claim because it had already concluded that the Fair Share Act was preempted by ERISA. *Id.* at 198.

125. *Id.* at 190.

126. *Id.*

127. *Id.* at 191 (citing Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)).

then examined the meaning of "relate to" in the preemption provision and adopted the *Shaw v. Delta Air Lines, Inc.* interpretation of the phrase as meaning to have a "connection with" or a "reference to" an employee benefit plan.[128] The court explained that it would analyze whether the Fair Share Act was the type of state law that Congress envisioned ERISA would preempt by looking to the goals and objectives of ERISA, and then analyze the nature of the Fair Share Act and its effect on employee benefit plans.[129] The court also recognized that ERISA was not intended to preempt state laws operating in traditional state fields, such as matters of health and safety.[130]

The Fourth Circuit interpreted the Supreme Court precedent as stating that state or local laws have improper connections with employee benefit plans if they "directly regulate[ ] or effectively mandate[ ] some element of the structure or administration of employers' [employee benefit] plans."[131] In comparison, the court cited *Travelers* for the proposition that a state or local law that only created indirect economic incentives encouraging, but not requiring, employer behavior or administrative choices could not be preempted by ERISA.[132] The Fourth Circuit stated that the effect of the state or local law on the administration of the employee benefit plan would determine which of these principle applied.[133]

B. The Nature of the Fair Share Act

1. The Act Effectively Mandated a Minimum Spending Threshold

The Fourth Circuit viewed the Fair Share Act as effectively mandating that employers provide a minimum level of healthcare benefits because no reasonable employer would choose to pay the state money it could instead spend on its employees.[134] In examining the Fair Share Act, the court found that the Act's core provision required Wal-

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128. *Id.* (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)).

129. *Id.*

130. *Id.*

131. *Id.* at 192–93.

132. *Id.* at 193 (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658 (1995)).

133. *Id.* The court noted that just because a state or local law provides an employer with alternatives to avoid making changes to an ERISA plan, such alternatives may still disrupt the employer's uniform administration of plans across jurisdictions. *Id.*

The Fourth Circuit did not engage in the "reference to" analysis because the preemption question was answered fully under the "connection with" analysis. *Id.* at 192 n.2.

134. *Id.* at 193. The court referenced an affidavit by Wal-Mart in support of the point. *Id.* The Fourth Circuit also described the payment to the state fund as a "fee or a penalty" creating an "irresistible incentive" for employers to increase their healthcare spending. *Id.* at 194.

Mart to provide healthcare benefits to employees, which (1) impacted the structure of its record-keeping and healthcare spending; (2) disrupted the uniform administration of its employee benefits nationwide; and (3) possibly encouraged similar laws in other jurisdictions,[135] further upsetting the uniform administration of benefits ERISA seeks to protect.[136] As such, the court found that the Act had a clear connection with employee benefit plans and was, therefore, preempted.[137] Additionally, the Fourth Circuit found support for its position in the Maryland General Assembly's view of the Fair Share Act, believing the General Assembly understood the Act as forcing Wal-Mart to increase its healthcare spending.[138]

2. *The Act Directly Regulated ERISA Plans*

The Fourth Circuit rejected the Secretary of Labor's argument that the Fair Share Act was similar to the statutes in question in *Travelers* and *Dillingham* because it created an incentive for employers to follow a particular course of action, but did not dictate their choices.[139] The court distinguished *Fielder* from *Travelers* and *Dillingham* by discussing how those statutes had an indirect effect on the employee benefit plans; whereas, the Maryland Fair Share Act directly regulated Wal-Mart's employee benefit plans.[140] Specifically, the Fourth Circuit discussed how the *Travelers* statute directly regulated fees that hospitals were to charge various insurance companies, ultimately influencing employers to choose the cheaper Blue Cross/Blue Shield insurance carrier for their employee benefit plans.[141] Such a law, according to the Fourth Circuit, only indirectly affected employee benefit plans because it merely influenced the price of insurance policies.[142] Similarly, the court discussed how the law in *Dillingham* that regulated apprentice wages for public construction projects only indirectly encouraged ERISA apprentice programs to apply for state certification.[143] In contrast with these statutes, the court found that the

135. The Fourth Circuit cited similar laws already enacted in two New York local jurisdictions and legislation considered in Minnesota as examples. *Id.* at 194.

136. *Id.*

137. *Id.* at 193–94.

138. *Id.* at 194. Additionally, the Fourth Circuit determined that the Act was not a revenue generating statute as it only applied to four employers in the State of Maryland, and noted that the General Assembly knew that in practice the Act only applied to Wal-Mart. *Id.*

139. *Id.* at 195.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

Fair Share Act directly affected employee benefit plans because it directly regulated their structure.[144] Thus, the court found that the Act was more analogous to statutes that had been previously preempted by ERISA in cases such as *Shaw* and *Egelhoff*.[145]

3. The Act Was Not Saved from Preemption by Alternative Expenditure Options

Next, the Fourth Circuit rejected the Secretary of Labor's contention that the Act was not mandatory because employers had two options under the Act to avoid changing their employee benefit plans: (1) increase healthcare spending in non-employee benefit plan areas; or (2) pay the state the difference between its healthcare spending and the eight percent spending target.[146] As to increased spending in non-employee benefit plan areas, the court rejected the Secretary of Labor's two proposed alternative health spending options of maintaining on-site clinics or contributing more to employee Health Savings Accounts as failing to create meaningful alternatives.[147] First, the court found that an option to spend money to create clinics would create little more than first-aid stations and would not involve the kind of expenditure needed to achieve compliance with the Fair Share Act.[148] Second, the court rejected the option to increase contributions to pretax Health Savings Accounts, reasoning that unless Wal-Mart changed its employee benefit plan structure, such accounts would only be available to a small number of employees (1) with high deductible health care plans; (2) no other more comprehensive plan; and (3) who voluntarily set up the account.[149] The court pointed out that even if these alternative expenditure methods were to increase spending to reach compliance with the Act, there would still be an improper connection with employee benefit plans because the Act focused primarily on employee benefit plans, and the Act would still encourage other states to develop their own minimum health care spending requirements, thereby forcing Wal-Mart to monitor all jurisdictions for special laws and thus destroying ERISA's aim of uniform administration of benefits.[150]

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144. *Id.*
145. *Id.* at 195–96.
146. *Id.* at 195.
147. *Id.* at 196.
148. *Id.*
149. *Id.* at 196–97.
150. *Id.*

Finally, the court rejected the option of making payments directly to the state fund as creating a valid option for employers.[151] The court disagreed with the Secretary's argument that some employers who already spend nearly eight percent of their total wages on health care benefits may find it more cost effective to pay directly to the state fund instead of increasing their health care benefit spending, responding that this example was the only narrow exception to the general mandate that employers increase spending on healthcare.[152]

C. Dissenting Opinion

Judge Michael, writing in dissent, agreed with the majority that RILA had standing to sue and that the Tax Injunction Act did not bar RILA's claims (albeit for different reasons),[153] but would have held that the Act was not preempted by ERISA.[154] Judge Michael rejected the idea that the Act had an impermissible connection with employee benefit plans for three reasons. First, Judge Michael stated, the Act did not require that an employer create or maintain employee benefit plans because it provided compliance options such as paying into the state fund or increasing healthcare spending in non-employee benefit plan areas.[155] Second, the judge pointed out that the Act did not disrupt the uniform administration of plans because the Act did not mandate how the employer processed claims, paid benefits, or designated beneficiaries.[156] Third, Judge Michael argued that the Fair Share Act did not require that an employer maintain a certain level of employee benefits, but rather offered employers a real choice between paying more for healthcare benefits or paying into the fund.[157] Thus, Judge Michael concluded, whichever choice Wal-Mart made, its decision would be based on its business judgment, not because it was compelled to so choose by the Act.[158]

The dissent also rejected the majority's contention that the Fair Share Act directly regulated employee benefit plans.[159] Adhering to a

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151. *Id.* at 197.

152. *Id.*

153. *Id.* at 200 (Michael, J., dissenting).

154. *Id.* at 198.

155. *Id.* at 201–02.

156. *Id.* at 202. Judge Michael conceded that the reporting requirement might impact plan administration, but characterized the impact as so slight as to not trigger the ERISA preemption provision. *Id.*

157. *Id.* ("A statute that 'alters the incentives, but does not dictate the choices, facing [employee benefit] plans' is not preempted." (quoting Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 334 (1997))).

158. *Id.* at 202–03.

159. *Id.* at 203.

1994 interpretation of *Shaw* from the United States Court of Appeals for the Third Circuit, the dissent asserted that a statute does not relate to an employee benefit plan if the employer has alternative ways to comply with the statute that do not affect such plans.[160] Focusing on the nature of the Fair Share Act itself, Judge Michael stated that the Act was not one that Congress sought to preempt because it dealt with a traditional area of state regulation and was in keeping with Congress's directive that the states should find ways to combat Medicaid funding problems.[161] Lastly, Judge Michael maintained that the Act did not have a reference to employee benefit plans because it did not explicitly mention or rely on the existence of such plans.[162] For these reasons, Judge Michael would have held that the Act was not preempted by ERISA.[163]

IV. ANALYSIS

In *Retail Industry Leaders Ass'n v. Fielder*, the Fourth Circuit held that the Fair Share Act adopted by the Maryland General Assembly in January 2006 was preempted by ERISA.[164] Despite flaws in its analysis, the Fourth Circuit's ultimate decision was correct in light of ERISA's goal of uniformity in the administration of nationwide employee benefit plans.[165] The Fourth Circuit found ERISA preemption based on its classification of the Fair Share Act as effectively mandating that employers alter their employee benefit plans.[166] The court, however, should have recognized that the Fair Share Act provided employers two alternative compliance methods.[167] Under its preemption analysis, the court should have found that ERISA preempted the entire Fair Share Act because one of the Act's compliance methods severely disrupted an employer's uniform administration of nationwide benefits.[168] The effective mandate interpretation in this opinion has

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160. *Id.* at 201. The dissent quoted *Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945, 960 (3d Cir. 1994), saying, "[w]here a legal requirement may be easily satisfied through means unconnected to [employee benefit] plans, and only relates to [employee benefit] plans at the election of an employer, it 'affect[s] employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan.'" *Fielder*, 475 F.3d at 203 (Michael, J., dissenting).

161. *Fielder*, 475 F.3d at 203 (Michael, J., dissenting) (citing 42 U.S.C. § 1396a(a)(25)(A)–(B) (2000)).

162. *Id.* at 204.

163. *Id.*

164. *Id.* at 197 (majority opinion).

165. *See infra* Part IV.A.

166. *Fielder*, 475 F.3d at 193–94.

167. *See infra* Part IV.A.1.

168. *See infra* Part IV.A.2.

already influenced decisions in other jurisdictions regarding similar "play or pay" laws, and will likely influence future decisions.[169] If the goal of uniform administration of employee benefit plans is to remain intact, "play or pay" laws should not survive ERISA preemption, even if courts find that they do not create, or effectively create, a mandate.[170]

A. *The Fourth Circuit Did Not Have to Characterize the Fair Share Act as a Mandate in Order to Find the Act Preempted*

In holding the Fair Share Act preempted by ERISA, the Fourth Circuit engaged in an in-depth analysis of the nature of the Act that ultimately ended in its mischaracterization.[171] Specifically, the court focused on characterizing the entire Fair Share Act as effectively mandating that employers increase their healthcare spending.[172] The court should have recognized that the Act provides a choice for employers seeking to comply with the statute.[173] In particular, an employer can comply with the Act by either altering its employee benefit plans to increase spending or paying a fee to the state.[174] While understanding the nature of the Act is a crucial element of the "connection with" test, classifying the Act as a mandate was not necessary to find it preempted.[175] Indeed, the court should have applied the "connection with" test to the alternative compliance method view of the Act, placing the most weight on Congress's purpose for creating the preemption provision and using that insight to determine whether the Fair Share Act should be preempted.[176]

1. *The Court Improperly Characterized the Entire Fair Share Act as a Mandate to Increase Healthcare Spending*

The court's conclusion that the Act effectively mandated increased healthcare spending is undercut by the plain language of the Act, which mandated payment to the state only for those employers who failed to meet a specific healthcare spending target.[177] The first step in a statutory interpretation analysis is to "determine whether the

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169. *See infra* Part IV.B.
170. *See infra* Part IV.B.
171. *See infra* Part IV.A.1.
172. *See* Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 193–94 (4th Cir. 2007).
173. *See infra* Part IV.A.1.
174. *See infra* Part IV.A.1.
175. *See infra* Part IV.A.2. Like the *Fielder* majority, this Note will only focus on the "connection with" inquiry. *Fielder*, 475 F.3d at 192 n.2.
176. *See infra* Part IV.A.2.
177. *See* MD. CODE ANN., LAB. & EMPL. § 8.5-104 (West Supp. 2007) (containing no mandate for increased healthcare spending).

language at issue has a plain and unambiguous meaning."[178] The Fair Share Act explicitly required for-profit employers with 10,000 or more employees that failed to spend eight percent of their total wages on healthcare to pay the difference between the eight percent spending threshold and their current spending to the state, but the Act did not unambiguously mandate that employers increase their healthcare spending.[179]

Even if the court felt that it was ambiguous as to whether the language effectively mandated increased healthcare spending, the legislative history of the Act does not support its characterization as an effective mandate to increase such spending.[180] The Act's legislative history suggests that the General Assembly intended the Act to encourage, perhaps even coerce, employers (Wal-Mart specifically) to increase healthcare spending to avoid payment to the state.[181] This possibility, however, does not constitute a mandate, effective or otherwise, that employers increase their healthcare spending. While the state may have desired that employers increase their healthcare spending so as to prevent employees from turning to state Medicaid programs, the statute established multiple methods of compliance, one of which—payment into the state fund—would require no change to employers' spending on employee benefit plans.[182] Therefore, although the *Fielder* majority believed that an employer's only rational response to the Act would have been to avoid the mandated payment by increasing its healthcare spending, it ignored the fact that an employer could still have opted to avoid such a change and simply pay the state.[183]

It is true, as the majority points out, that if an employer chooses to increase its healthcare spending to avoid the required payment to

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178. Chesapeake Ranch Water Co. v. Bd. of Comm'rs, 401 F.3d 274, 279 (4th Cir. 2005) (internal quotation marks omitted) (citing Holland v. Big River Minerals Corp., 181 F.3d 597, 603 (4th Cir. 1999)).

179. LAB. & EMPL. § 8.5-104(b).

180. A court relies on legislative history only when a statute's plain language is ambiguous. *Holland*, 181 F.3d at 603.

181. *See* Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 185, 194 (4th Cir. 2007) (discussing how the Maryland General Assembly assumed the Act would, and intended it to, persuade employers to increase their healthcare spending); *see also* Edward A. Zelinsky, *Maryland's "Wal-Mart" Act: Policy and Preemption*, 28 CARDOZO L. REV. 847, 869–70 (2006) (describing the Act as pressuring employers to increase their healthcare spending).

182. *See Fielder*, 475 F.3d at 203 (Michael, J., dissenting) (characterizing the Act as creating a choice for employers that would ultimately turn on a business judgment).

183. *See id.* at 202 ("This choice is real. The assessment does not amount to an exorbitant fee that leaves a large employer with no choice but to alter its [employee benefit] plan offerings.").

the state, it must alter its employee benefit plans.[184] Such a requirement at this level, however, does not make the entire Fair Share Act an effective mandate, because an employer has a threshold choice before the employer is required to increase healthcare spending by altering its employee benefit plans. As the majority correctly pointed out,[185] ERISA regulations carefully describe which activities fall under the ERISA statute and which do not.[186] Although the regulations state that maintenance of first-aid clinics on the employer's premises is not covered by ERISA, they also state that such clinics are for the treatment of minor injuries only.[187] Thus, as both the Fourth Circuit and the district court concluded, an employer could not count on spending enough on first-aid clinics to make up for its shortfall in healthcare spending.[188]

Likewise, ERISA regulations provide that payments into payroll savings plans, such as a Health Savings Plan, are not covered by ERISA.[189] The catch is that, as the majority identified, a Health Care Savings plan is only available to employees with limited types of healthcare plans,[190] and an employer would have to alter its employee benefit plans to meet such requirements before this option would provide a valid alternative to increasing spending on employee benefit plans themselves.[191] Therefore, as the majority noted, the Act failed to provide any real healthcare spending alternatives that did not require alterations to employee benefit plans.[192] In sum, the Fourth Circuit mischaracterized the Act as an effective mandate in its entirety because it does indeed provide multiple methods of compliance. Only when an employer chooses to comply with the Act by increasing its healthcare spending is the employer required to alter its employee benefit plans.

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184. *Id.* at 196–97 (majority opinion).

185. *Id.* at 196 (addressing the maintenance of on-site medical clinics option proposed by the Maryland Secretary of Labor).

186. *See* 29 C.F.R. § 2510.3-1 (2007) (detailing those activities that do not constitute employee benefit plans under the Act).

187. *Id.* § 2510.3-1(c)(2).

188. *Fielder*, 475 F.3d at 196; Retail Indus. Leaders Ass'n v. Fielder, 435 F. Supp. 2d 481, 497 (D. Md. 2006) (referring to an argument suggesting such expenditures could satisfy the eight percent requirement as "out of line with reality" and "demean[ing] the seriousness" of the Maryland General Assembly).

189. 29 C.F.R. § 2510.3-1(a)(2).

190. *See* 26 U.S.C.A. § 233(c)(1) (West Supp. 2007) (identifying the limited health plans to which such Health Savings Plans can apply).

191. *Fielder*, 475 F.3d at 197.

192. *Id.* at 196.

2. *The Court Should Have Subjected the Alternative Compliance Method View of the Fair Share Act to the Preemption Analysis*

The Fourth Circuit's mischaracterization of the entire Fair Share Act as an effective mandate did not affect the result in *Fielder* because it was unnecessary to the finding of ERISA preemption. Indeed, subjecting the alternative compliance method view of the Act to the "connection with" analysis would have produced the same outcome given Congress's purpose in enacting ERISA.[193] This purpose was to create a uniform program for the administration of employee benefits, thus preventing conflicting state and local laws, particularly in the areas of reporting, disclosure, and predicting the legality of proposed actions.[194] These objectives should have colored the Fair Share Act nature and effect analysis, and ultimately played the decisive role in the final "connection with" determination.[195]

In addressing the Fair Share Act's nature and effect on employee benefit plans, the court should have followed those cases dealing with laws designed to directly apply to employee benefit plans even though the Act was not a mandate.[196] A state or local law is designed specifi-

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193. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) (identifying Congress's purpose as the most important part of any preemption analysis); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137–38 (1990) (same); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 8 (1987) (same).

194. *See, e.g.*, H.R. REP. NO. 93-533 (1973), *reprinted in* LEGISLATIVE HISTORY, *supra* note 36, at 2359 ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.").

195. *See* Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 330–32 (1997) (using its understanding of the ERISA preemption goals to color its analysis of the law in question); *supra* note 193.

196. Three categories of laws have been found to impermissibly relate to employee benefit plans, each with their own controlling case law: (1) those "designed specifically to apply to [employee benefit] plans" or with an express reference to employee benefit plans; (2) common law actions providing an alternative to the specific ERISA civil enforcement provisions; and (3) those causing an indirect "effect on employer or administrator decisions concerning benefit structure or administration of the plan." Karen A. Jordan, Travelers Insurance*: New Support for the Argument to Restrain ERISA Pre-emption*, 13 YALE J. ON REG. 255, 291 (1996).

Although *Travelers* and *Dillingham* adjudicated the current language of the ERISA preemption analysis, they only control when the state law in question has an indirect effect on an employee benefit plan by aiming at activities outside the employee benefit plan itself, such as regulating hospital rates and apprentice wages. *See id.* (discussing when the *Travelers* standard applies). Additionally, *Travelers* and *Dillingham* did not overrule the older case law that generally finds that state or local laws designed specifically to apply to employee benefit plans are preempted. *See id.*; *see also* Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (describing how ERISA preemption specifically sought to avoid state laws that would require employers to tailor their conduct to the differing laws of each jurisdiction); *Ingersoll-Rand*, 498 U.S. at 140 ("We have virtually taken it for granted that state laws which cally to apply to an employee benefit plan if it implicates a core concern of the plan, such as payment of benefits, benefit amounts and types, or plan structure, and is generally found preempted on that basis.[197] Based on the legislative intent behind the Act and because one compliance option requires an alteration to an employer's employee benefit plans and mandates a minimum amount of coverage, the Act is designed to apply to employee benefit plans.[198] Thus, although the court misconstrued the Fair Share Act as an effective mandate, the court was correct when it pointed out that the Act was most analogous to those laws designed to apply to employee benefit plans and thus subject to preemption on this basis.[199]

Although the Fair Share Act provides alternative methods of compliance, this characteristic should not allow it to escape preemption under the "connection with" analysis. The Supreme Court has cautioned that a state cannot avoid "through form the substance of the pre-emption provision."[200] Likewise, the Court has, on several occasions, emphasized that alternative methods of compliance do not circumvent the preemption provision, particularly when considered in light of one method's disruptive effects on the goals of the preemption provision.[201] Considered in isolation, the "play" compliance option requiring the employer to provide a minimum level of employee benefit plan coverage violates ERISA's preemption goal of uniform

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are specifically designed to affect employee benefit plans are pre-empted under [ERISA]." (citations and internal quotation marks omitted)).

197. *See, e.g.*, *Egelhoff*, 532 U.S. at 147–48 (finding that a law implicated a core area of the employee benefit plan by governing the payment of benefits and was, therefore, preempted by ERISA); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (stating that a state law broadly mandating benefits would be preempted by ERISA); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) (finding a law that mandated specific benefits clearly "relate[d] to" benefit plans and, thus, preempted by ERISA); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524–25 (1981) (finding a law that eliminated a method of calculation of employee benefits preempted by ERISA).

198. Despite allowing an option to pay the state, the Maryland General Assembly specifically designed the Act to encourage employers to increase spending in their employee healthcare benefit plans. *See* Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 194 (4th Cir. 2007) (discussing the Maryland General Assembly's understanding and intent that the Act would persuade employers to increase their healthcare spending). Additionally, to the extent that an employer chooses to follow the Fair Share Act by increasing its healthcare spending, it must do so by increasing its employee benefit plan coverage amounts. *See supra* notes 184–192 and accompanying text.

199. *See Fielder*, 475 F.3d at 195–96.

200. *Alessi*, 451 U.S. at 525.

201. *See Egelhoff*, 532 U.S. at 150 ("The statute is not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it."); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987) ("We have not hesitated to enforce ERISA's pre-emption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements.").

administration of benefits. Under this option, an employer is required to provide a minimum amount of healthcare plan coverage to its employees in Maryland,[202] disrupting its ability to provide a uniform level of coverage to its employees nationwide.[203] This is particularly true if additional jurisdictions follow the Fair Share Act's lead and develop laws setting minimum healthcare plan coverage amounts at a different level than Maryland.[204] The prospect of an employer having to maintain familiarity with the differing laws of each jurisdiction that chooses to employ its own minimum level of coverage, and tailoring its plans and/or conduct to those laws is "exactly the burden ERISA seeks to eliminate."[205] As such, the "play" compliance option runs afoul of the goals of ERISA preemption and, on its own, would not survive a "connection with" preemption challenge.

The Fair Share Act's use of such a disruptive compliance alternative should bring it within the scope of ERISA's preemption provision, which includes even those laws that may only create the prospect of conflicting requirements.[206] It would contradict ERISA's uniformity goal if a state or local jurisdiction was allowed to circumvent the ERISA preemption provision through creative drafting.[207] Therefore, because the Fair Share Act creates the possibility of disrupting the uniform administration of benefits by creating a "play" compliance method that sets differing benefit plan requirements in Maryland, it has an impermissible "connection with" employee benefit plans and should not survive ERISA preemption.

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202. *See supra* notes 184–192 and accompanying text.

203. *See* Zelinsky, *supra* note 181, at 869–70 (noting that the Act infringes on an employer's ability to determine its own healthcare spending amounts by requiring a minimum amount for the State of Maryland).

204. *See Egelhoff*, 532 U.S. at 151 (noting the potential for employers to be subject to the laws of 50 different jurisdictions if such laws are not preempted by ERISA).

205. *Id.* Additionally, ERISA never intended to set minimum levels of healthcare benefit coverage for employees, choosing to instead leave a "zone of employer autonomy" for employers to set their own amounts. Zelinsky, *supra* note 181, at 869–70.

206. *See Fort Halifax*, 482 U.S. at 10 (stating that if state or local laws even create the possibility of establishing conflicting regulations they should be preempted by ERISA in order to preserve the goal of uniformity).

207. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981) ("ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.").

B. *The Impact of* Retail Industry Leaders Ass'n v. Fielder *on Similar Laws in Other Jurisdictions*

Because the Fair Share Act is preempted for contravening the goal of uniform administration of benefits,[208] other similarly designed state laws should also be preempted by ERISA. Yet, because the Fourth Circuit inappropriately determined that the entire Fair Share Act created an effective mandate, other courts have viewed and will likely continue to view the mandate issue as the most important part of the ERISA preemption analysis.[209] Such a view creates the possibility that a court will permit a law like the Fair Share Act to stand as long as it does not create a mandate or effective mandate.[210] However, allowing this type of state law would undermine ERISA's goal of uniform administration of benefits.[211] As such, the same "connection with" analysis that found the Fair Share Act preempted by ERISA in the previous section[212] should be employed to determine whether other similarly designed "play or pay" laws are preempted.

Validating the *Fielder* majority's concern for non-uniform healthcare spending laws,[213] several other jurisdictions have already created their own unique and distinct "play or pay" laws to address employer healthcare spending.[214] Although the law in Suffolk County, New York[215] was recently found preempted by ERISA in the United States District Court for the Eastern District of New York,[216] the New York City ordinance[217] and a similar law in Massachusetts[218] remain in effect. Both are similar to the Maryland Fair Share Act in that they provide alternative methods of compliance, with one alternative method requiring a minimum (albeit different) amount of expenditures on

208. *See supra* Part IV.A.2.

209. *See* Retail Indus. Leaders Ass'n v. Suffolk County, 497 F. Supp. 2d 403, 416–18 (E.D.N.Y. 2007) (utilizing the Fourth Circuit's mandate analysis to find that a county "play or pay" enactment also created an effective mandate on employers and was, therefore, preempted by ERISA).

210. *See* Monahan, *supra* note 7, at 1213, 1215–16 (arguing that because the Massachusetts fair share contribution provision does not mandate that employers alter their employee benefit plans it should not be preempted by ERISA).

211. *See supra* notes 200–207 and accompanying text.

212. *See supra* Part IV.A.2.

213. Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 194 (4th Cir. 2007).

214. *See supra* Part II.C.

215. SUFFOLK COUNTY, N.Y. REG. LOCAL LAW §§ 325-1 to -6 (2006), *available at* http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=64742&infobase=suffolk.nfo&softpage=Browse_Frame_Pg42.

216. Retail Indus. Leaders Ass'n v. Suffolk County, 497 F. Supp. 2d. 403, 418 (E.D.N.Y. 2007).

217. NEW YORK CITY, N.Y. CODE § 22-506 (2006).

218. MASS. GEN. LAWS ANN., ch. 149, § 188 (West Supp. 2007).

employee healthcare benefit plans.[219] These varying "play" alternatives, just like the one in the Fair Share Act, run afoul of the ERISA preemption goal of promoting the uniform administration of nationwide benefits by (1) not allowing employers to set their own employee benefit plan amounts,[220] and (2) requiring employers to monitor the legal requirements of multiple jurisdictions and to tailor their conduct and benefits in those jurisdictions accordingly.[221] Additionally, both "play" alternatives, like the Fair Share Act, attempt to use the form of the law to avoid the substance of ERISA's preemption provision, something Congress never intended to allow.[222] Courts should find that these disruptive alternative compliance methods in "play or pay" laws trigger ERISA preemption.[223]

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219. *See* MASS. GEN. LAWS ANN., ch. 149, § 188(b) (requiring non-contributing employers (employers that do not contribute a certain amount to health care premiums) to pay an amount to the state); NEW YORK CITY, N.Y. CODE § 22-506(c), (e)(1) (requiring minimum healthcare expenditures and imposing a monetary penalty, paid to the City, in the amount of the difference between the employers' current health care expenditures and the prescribed amount for failure to make the minimum expenditure).

220. *See* William G. Schiffbauer, *Hiding in Plain View: ERISA Preempts Provisions of Massachusetts "Play or Pay" Health Care Reform Law*, 14 HEALTH CARE POLICY REPORT 1, 2 (2006) (describing how the Massachusetts fair share contribution provision sets a minimum standard for healthcare benefit contributions and, therefore, interferes with ERISA's goal of uniform administration of benefits); Zelinsky, *supra* note 181, at 869–70 (explaining that ERISA never intended to set minimum levels of healthcare benefit plan coverage, choosing to instead leave a "zone of employer autonomy" for employers to set their own amounts).

221. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (emphasizing that "this 'tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction' is exactly the burden ERISA seeks to eliminate").

222. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981) ("ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.").

223. *See supra* notes 206–207 and accompanying text. This analysis does not take into account any potential finding that either "play" option truly provides a meaningful spending alternative to increasing benefit plan coverage. *See* Maureen McOwen, *Through the Eye of the Needle: How the New York City Health Care Security Act Will Escape ERISA Preemption*, 40 COLUM. J.L. & SOC. PROBS. 37, 68–69 (2006) (arguing that the existence of meaningful spending alternatives will allow the New York City ordinance to survive ERISA preemption). Such an in-depth analysis of the nuances of other laws' "play" alternatives is beyond the scope of this Note; however, even if such meaningful alternatives did exist, it is likely that such laws would still be preempted due to the monitoring and tailoring problems their existence creates for employers, which also contravene ERISA's goal of uniform administration of benefits and preventing conflicting federal, state, and local laws. *See Egelhoff*, 532 U.S. at 151 (explaining that requiring employers to monitor and tailor conduct to the differing laws of each jurisdiction is precisely what ERISA's preemption provision sought to prevent).

V. CONCLUSION

In *Retail Industry Leaders Ass'n v. Fielder*,[224] the Fourth Circuit's focus on characterizing Maryland's Fair Share Act[225] as an effective mandate that employers alter their employee healthcare benefit plans misconstrued the Act.[226] The Act more accurately created a system of alternative compliance methods, one of which did indeed require employers to alter their employee benefit plans.[227] By focusing on characterizing the entire Fair Share Act as an effective mandate, the Fourth Circuit missed the opportunity to set a broad precedent holding that the entire genre of "play or pay" laws contravenes Congress's goal of ERISA preemption.[228] The Fourth Circuit should have concluded that Maryland's Fair Share Act was preempted by ERISA regardless of its alternative methods of compliance because one such alternative was highly disruptive of ERISA's preemption goals, thus bringing the entire Act within ERISA's preemption provision.[229] Such a finding would likely have led different courts to invalidate other "play or pay" laws currently in existence, ultimately preserving Congress's intent of providing a system free from conflicting federal, state, and local laws to promote the uniform administration of nationwide benefits.[230]

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224. 475 F.3d 180 (4th Cir. 2007).
225. MD. CODE ANN., LAB. & EMPL. §§ 8.5-101 to -107 (West Supp. 2007).
226. *See supra* Part IV.A.1.
227. *See supra* Part IV.A.1.
228. *See supra* Part IV.B.
229. *See supra* Part IV.A.2.
230. *See supra* Part IV.B.