
PREEMPTION — ERISA PREEMPTION — SIXTH CIRCUIT HOLDS THAT ERISA DOES NOT PREEMPT MICHIGAN MEDICAID TAX LAW. — *Self-Insurance Institute of America, Inc. v. Snyder*, 827 F.3d 549 (6th Cir. 2016), *cert. denied*, No. 16-593, 2017 WL 69264 (U.S. Jan. 9, 2017).

Under the Supremacy Clause,¹ federal law issued as a valid exercise of congressional power preempts conflicting state laws.² Whether federal and state legislation can peacefully coexist is a nuanced question — even where language in a federal law expressly provides for the preemption of state laws, courts have been able to define preemption both broadly and narrowly.³ One notable example of this tension arises in the context of the Employee Retirement Income Security Act of 1974⁴ (ERISA), a federal law that sets standards and reporting requirements for a wide array of employer-provided retirement and welfare benefits, including employer-funded health plans for employees.⁵ Despite its inclusion of an explicit (and broad) preemption provision,⁶ ERISA has engendered a complex and inconsistent preemption doctrine.⁷ While ERISA preemption doctrine had made room for some state laws to peacefully coexist with ERISA, a 2016 Supreme Court decision, *Gobeille v. Liberty Mutual Insurance Co.*,⁸ brought a more stringent approach to the doctrine and seemed to spell an end to a number of innovative state initiatives.⁹ Recently, in *Self-Insurance Institute of America, Inc. v. Snyder*,¹⁰ the Sixth Circuit held that ERISA did not preempt a Michigan state law levying a Medicaid tax on insurers. Cleverly spinning language from *Gobeille* after a remand from the

¹ U.S. CONST. art. VI, cl. 2.

² *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983).

³ *See, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655–56 (1995) (narrowing the possible breadth of a statutory preemption provision).

⁴ Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

⁵ *See* Sean E. Bland et al., *Strategies for Health System Innovation After Gobeille v. Liberty Mutual Insurance Company*, 316 JAMA 581, 581–82 (2016).

⁶ *See* 29 U.S.C. § 1144 (2012).

⁷ *See generally* Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996) (contextualizing ERISA in larger theories of statutory interpretation); Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807 (1999) (asserting that preemption can be developed from the statute).

⁸ 136 S. Ct. 936 (2016).

⁹ *See* Bland et al., *supra* note 5, at 581–82; Erin Fuse Brown & Jaime King, *The Consequences of Gobeille v. Liberty Mutual for Health Care Cost Control*, HEALTH AFF. BLOG (Mar. 10, 2016), <http://healthaffairs.org/blog/2016/03/10/the-consequences-of-gobeille-v-liberty-mutual-for-health-care-cost-control> [<https://perma.cc/NN73-H2R2>].

¹⁰ 827 F.3d 549 (6th Cir. 2016), *cert. denied*, No. 16-593, 2017 WL 69264 (U.S. Jan. 9, 2017).

Supreme Court, the Sixth Circuit created a route out of *Gobeille* with the potential to save a wide range of state laws from preemption.

In order to meet its financial obligations under Medicaid, in 2011 Michigan passed the Health Insurance Claims Assessment Act.¹¹ The Act levies a one percent tax on paid claims by health insurance companies or third-party administrators, which includes insurers covered by ERISA, for services provided to Michigan residents within the state of Michigan.¹² The Act also requires carriers and third-party administrators to devise and execute methodologies for collecting the tax,¹³ to “keep accurate and complete records and pertinent documents” related to the tax,¹⁴ and to submit quarterly returns to the Michigan Department of Treasury.¹⁵ In 2011, the Self-Insurance Institute of America¹⁶ (SIIA) filed suit against the Governor of Michigan and other state administrators of the Act in the United States District Court for the Eastern District of Michigan, seeking a declaratory judgment that ERISA preempts the Act.¹⁷ SIIA also sought an injunction precluding enforcement of the Act.¹⁸

The district court granted defendants’ motion to dismiss after determining that the Act does not “relate to any employment benefit plan” governed by ERISA, as required by ERISA’s preemption provision.¹⁹ Under the “relate to” standard interpreted by the Supreme Court, courts engage in two inquiries, either of which is sufficient to establish preemption: (1) whether the law makes “reference to” ERISA and (2) whether the law has a “connection with” ERISA.²⁰ First, the district court concluded that although the Act refers to ERISA plans in the “uncritical[ly] literal[ly]” sense,²¹ it falls short under the “reference to *plus* effect on” standard applied in ERISA preemption analysis.²² Sec-

¹¹ 2011 Mich. Pub. Acts 142 (codified at MICH. COMP. LAWS §§ 550.1731–1741 (2014)).

¹² MICH. COMP. LAWS §§ 550.1732(s), 550.1733(1).

¹³ *Id.* § 550.1733a(2).

¹⁴ *Id.* § 550.1735(1).

¹⁵ *Id.* § 550.1734(1).

¹⁶ SIIA is a member-based association that “protect[s] and promot[es] the business interests of companies involved in the self-insurance/alternative risk transfer (ART) industry.” *About SIIA*, SIIA, <http://www.siaa.org/14a/pages/index.cfm?pageid=1> [<https://perma.cc/4HML-5USR>].

¹⁷ Complaint for Declaratory Judgment & Injunctive Relief at 1, *Self-Ins. Inst. of Am., Inc. v. Snyder*, No. 11-15602, 2012 WL 3888212 (E.D. Mich. Sept. 7, 2012).

¹⁸ *Id.*

¹⁹ *Snyder*, 2012 WL 3888212, at *4 (quoting 29 U.S.C. § 1144(a) (2012)). ERISA’s preemption clause states that its provisions “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. 29 U.S.C. § 1144(a).

²⁰ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

²¹ *Snyder*, 2012 WL 3888212, at *8 (alterations in original) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995)).

²² *Id.* (emphasis added). For example, the Act defines “carrier” to include “commercial insurers and health maintenance organizations, nonprofit health care corporations, specialty prepaid health plans, and ERISA plans.” *Id.* at *7 (citing MICH. COMP. LAWS § 550.1732(a) (2014)). As

ond, the court found that under the two prongs of the “connection with” inquiry — whether the law “mandate[s] (or effectively mandate[s]) something” and whether that mandate “fall[s] within the area that Congress intended ERISA to control exclusively”²³ — the Act does not include any such mandates concerning benefit structures or benefit choices and thus does not have an impermissible “connection with” ERISA administration.²⁴ On appeal in 2014, the United States Court of Appeals for the Sixth Circuit affirmed.²⁵ Addressing SIIA’s three new arguments that the specific provisions of the Act has an impermissible “connection with” ERISA plans,²⁶ Judge Moore, writing for a unanimous panel, found all three lacked merit.²⁷

In March 2016, however, the Supreme Court decided *Gobeille*, an ERISA preemption case that concerned a Vermont statute requiring all health insurers to file reports containing claims data and other “information relating to health care” in order to establish an all-payer claims database.²⁸ The *Gobeille* Court found that although the statute did concern the state’s “traditional power to regulate in the area of public health,”²⁹ it was nonetheless preempted because its reporting requirements intruded upon “a central matter of plan administration” and “interfere[d] with nationally uniform plan administration.”³⁰ Shortly after

the court emphasized, although the Act refers explicitly to ERISA plans, it does “not depend on the existence of [ERISA] plans for its operation,” but is instead aimed at a “broad array of entities.” *Id.*

²³ *Id.* at *8 (quoting *Associated Builders & Contractors v. Mich. Dep’t of Labor & Econ. Growth*, 543 F.3d 275, 281 (6th Cir. 2008)).

²⁴ *Id.*

²⁵ *Self-Ins. Inst. of Am., Inc. v. Snyder*, 761 F.3d 631, 633 (6th Cir. 2014).

²⁶ SIIA argued that the Act “interferes with the administration of the plans,” imposes additional administrative burdens on the plans, and “interferes with the relationships between ERISA-covered entities.” *Id.* at 634–35. Judge Moore noted that SIIA had waived any claims under the “refers to” test. *Id.* at 641.

²⁷ *Id.* at 633. First, Judge Moore found that the Act does not interfere with the administration of ERISA plans, as its reporting and record-keeping requirements, and its different definition of a term utilized by ERISA, come into play only when carriers compute the tax, and therefore do not impact plan administration. *Id.* at 636–37. Second, Judge Moore found that the Act does not create inappropriate administrative burdens, as its burdens are “unrelated to the plans’ core functions” and thus fall outside of field preemption limitations on state laws governing financial reporting on ERISA plans. *Id.* at 638. Finally, Judge Moore addressed SIIA’s arguments that the Act interferes with the relationships between ERISA-covered entities, finding that the Act’s residency requirement does not require the collection of additional information and that Michigan’s interpretation of a provision on collection of the tax itself “does not force carriers and third-party administrators to change their plan documents.” *Id.* at 641.

²⁸ *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 940 (2016). An all-payer claims database is a collection of health care data used for purposes such as “identification of reforms effective to drive down health care costs, evaluation of relative utility of different treatment options, and detection of instances of discrimination in the provision of care.” *Id.* at 951 (Ginsburg, J., dissenting).

²⁹ *Id.* at 946 (majority opinion).

³⁰ *Id.* at 945 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)).

Gobeille was decided, the Supreme Court granted certiorari in *Snyder*, vacating the judgment and remanding the case to the Sixth Circuit “for further consideration in light of *Gobeille*.”³¹

On remand, Judge Moore again affirmed the district court opinion.³² Much of the earlier opinion’s language remained intact; it was primarily in the evaluation of whether the Act had an impermissible connection with ERISA plans that *Gobeille* factored into the decision.³³ In setting the standard for a “connection with” inquiry, Judge Moore now quoted *Gobeille*, stating that a law “has an impermissible ‘connection with’ ERISA plans” when it “‘governs . . . a central matter of plan administration’ or ‘interferes with nationally uniform plan administration.’”³⁴ Next, the judge characterized *Gobeille* as holding that “state laws that directly regulate [reporting, disclosure, and record-keeping] aspects of ERISA — whether by imposing additional administrative burdens or by interfering with uniform administration — are preempted.”³⁵ State law would be preempted where this “direct regulation of a fundamental ERISA function” occurred, regardless of whether the law exercised a traditional state power.³⁶

However, Judge Moore pointed out that *Gobeille* had distinguished the statute at issue from an earlier ERISA preemption decision about a state tax, *De Buono v. NYSA–ILA Medical & Clinical Services Fund*,³⁷ by stating that “[t]he analysis may be different when applied to a state law, such as a tax on hospitals, the enforcement of which necessitates incidental reporting by ERISA plans.”³⁸ This distinction, according to Judge Moore, indicates first that *Gobeille*’s preemption will occur *only* in the case of direct regulation of fundamental functions, and second that where regulation is incidental to those functions, the inquiry will be evaluated under principles established in earlier Supreme Court ERISA preemption decisions like *De Buono* and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*³⁹ that consider the extent of the burden upon an ERISA

³¹ Self-Ins. Inst. of Am., Inc. v. Snyder, 136 S. Ct. 1355, 1355 (2016).

³² *Snyder*, 827 F.3d at 553. Judge Moore was joined in her opinion by Judge Boggs and District Judge Barrett, sitting by designation from the Southern District of Ohio.

³³ See *id.* at 555–56. For Judge Moore’s previous analysis of SIIA’s claims, see *supra* note 27.

³⁴ *Snyder*, 827 F.3d at 555 (omission in original) (quoting *Gobeille*, 136 S. Ct. at 943). Judge Moore also noted that, according to *Gobeille*, an impermissible connection with ERISA plans might exist where “acute, albeit indirect, economic effects” of the state law “force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.” *Id.* at 556 (quoting *Gobeille*, 136 S. Ct. at 943).

³⁵ *Id.* at 556 (citing *Gobeille*, 136 S. Ct. at 945–46).

³⁶ *Id.* at 557 (quoting *Gobeille*, 136 S. Ct. at 946).

³⁷ 520 U.S. 806 (1997).

³⁸ *Snyder*, 827 F.3d at 557 (alteration in original) (citation omitted) (quoting *Gobeille*, 136 S. Ct. at 946).

³⁹ 514 U.S. 645 (1995).

plan.⁴⁰ As “the thrust of the Act” is to generate taxes and its reporting requirements are merely “peripheral,” Judge Moore concluded that it “falls in the *De Buono* and *Travelers* category of state laws that necessitate incidental reporting and record-keeping and thus are not preempted.”⁴¹

With its clever spin on language from the *Gobeille* majority opinion, the Sixth Circuit has provided courts with a means to work around *Gobeille*'s limitation on state regulation of ERISA entities. Despite ERISA's express intention to preempt state law, the statute has proved a challenge to courts, engendering the development of a doctrine far removed from its vague and far-reaching language.⁴² Since the mid-1990s, courts have generally avoided finding ERISA preemption in “areas of traditional state concern,” preventing ERISA-covered entities from skirting crucial state laws.⁴³ Breaking from this approach, *Gobeille* makes it extremely difficult for courts to uphold state regulation of ERISA-covered entities that requires reporting or record keeping. Judge Moore's reading of the language referring to hospital taxes, although somewhat forced, locates and expands a loophole in *Gobeille*'s holding that will enable courts to return to earlier ERISA preemption doctrine that is more amenable to avoiding preemption.

Judge Moore was correct to refer to preemption doctrine as a “quagmire.”⁴⁴ In theory, the concept of express preemption is simple — where Congress expressly states that a federal law preempts state law, the Supremacy Clause dictates that the conflicting state law shall be invalid.⁴⁵ Yet the express preemption inquiry, which requires judges to decide first what the statutory clause in question means and then whether Congress is constitutionally permitted to prevent states from “exercising the powers in question,”⁴⁶ has led to complicated and contradictory doctrines across a variety of areas, each distinctly tied to the relevant federal statutes.⁴⁷ The ERISA preemption provision is

⁴⁰ *Snyder*, 827 F.3d at 557.

⁴¹ *Id.* at 558.

⁴² See *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (providing an overview of the doctrine).

⁴³ See *Snyder*, 827 F.3d at 555; see also *Travelers*, 514 U.S. at 655; *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275, 280 (6th Cir. 2008) (citing *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 330 (1997)).

⁴⁴ *Snyder*, 827 F.3d at 553.

⁴⁵ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) (“It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.”); see also *Gen. Elec. Co.*, 496 U.S. at 78–79 (“[W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one.” *Id.* at 79.).

⁴⁶ Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000).

⁴⁷ Compare *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (Federal Aviation Administration Authorization Act of 1994), and *Geier v. Am. Honda Motor Co.*, 529 U.S. 861,

particularly striking due to its stipulation that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”⁴⁸ — an expansive mandate that could potentially preempt broad swaths of state law.⁴⁹

Indeed, for many years the ERISA provision was applied fairly broadly to strike down state laws such as wage laws and workers’ compensation programs,⁵⁰ tort law damages and medical malpractice statutes,⁵¹ and hospital taxes,⁵² leading many to lament that those seeking reform in the health care arena were shackled by the specter of ERISA preemption.⁵³ But this trend was reversed to some extent by *Travelers*.⁵⁴ In *Travelers*, the Court emphasized its “assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress,”⁵⁵ a familiar preemption concept that had in fact received little attention in the Court’s ERISA preemption cases.⁵⁶ Applying this presumption against preemption, the *Travelers* Court concluded that ERISA did not preempt a New York statute requiring certain hospital surcharges affecting employees covered by employer-sponsored health insurance.⁵⁷ Since *Travelers*, the Court has found that numerous statutes were not preempted by ERISA — for example, in *De Buono*, the

867–68 (2000) (National Traffic and Motor Vehicle Safety Act of 1966), *with* Medtronic, Inc. v. Lohr, 518 U.S. 470, 486–91 (1996) (plurality opinion) (Medical Device Amendments of 1976), and Jones v. Rath Packing Co., 430 U.S. 519, 525–26, 528–32 (1977) (Federal Meat Inspection Act).

⁴⁸ 29 U.S.C. § 1144(a) (2012).

⁴⁹ As the Supreme Court has noted, “[i]f ‘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, for [r]eally, universally, relations stop nowhere.” N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (second alteration in original) (quoting HENRY JAMES, RODERICK HUDSON, at xli (Oxford Univ. Press 1980) (1875)).

⁵⁰ Fisk, *supra* note 7, at 37 & nn.7–8 (collecting cases).

⁵¹ *Id.* at 37 & nn.11–12 & 15 (collecting cases).

⁵² *Id.* at 37 & n.13 (collecting cases).

⁵³ See *id.* at 36 (“ERISA preemption has thwarted reform efforts in a large number of states.”); John Kithaber & Mark Gibson, *The Crisis in Health Care: The Oregon Health Plan as a Strategy for Change*, 3 STAN. L. & POL’Y REV. 64, 70 (1991).

⁵⁴ See Liberty Mut. Ins. Co. v. Donegan, 746 F.3d 497, 506 (2d Cir. 2014) (noting that *Travelers* “marked something of a pivot in ERISA preemption”), *aff’d sub nom.* Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016).

⁵⁵ N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

⁵⁶ See, e.g., District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1992); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990); Massachusetts v. Morash, 490 U.S. 107 (1989). *But see* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740, 756 (1985).

⁵⁷ 514 U.S. at 649, 655.

Court concluded that the presumption against preemption militated against preemption of a state tax on hospitals.⁵⁸

Gobeille, as the Supreme Court's most recent elaboration on ERISA preemption, pushed back against this trend.⁵⁹ Although the *Gobeille* Court dutifully stated its "starting presumption that Congress does not intend to supplant state law,"⁶⁰ the Court went on to emphasize that *even if* a state law regulates a "subject of traditional state power," it will not be saved from preemption as long as it also regulates "a principal and essential feature of ERISA."⁶¹ Beyond its divergence from *Travelers*, this standard is further complicated by the fact that the "reporting" mandated by the state law at issue in *Gobeille* appeared to be quite distinct from the ERISA reporting requirements (a point raised by the *Gobeille* dissent),⁶² meaning that *Gobeille*'s lower standard could potentially be applied fairly broadly.⁶³ *Gobeille*, then, markedly shifted the tide toward more findings of ERISA preemption. It did so through its strong enunciation of principles protecting core ERISA functions and, perhaps even more so, through its stretched application of those principles to the facts of the case.⁶⁴ In doing so, *Gobeille* jeopardized state regulations intended to reign in health care spending and improve the quality of health care.⁶⁵

Through her reading of *Gobeille*, Judge Moore recognized and expanded an escape hatch that could save other legislation that involves incidental reporting from being overturned by *Gobeille*'s broad language. Judge Moore derived the principles that would guide her re-

⁵⁸ See *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814–16 (1997); see also *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002); *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).

⁵⁹ Certainly, *Gobeille* is not the only case to push back against *Travelers*. See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200, 216–18 (2004); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (noting that the presumption against preemption was overcome by clear congressional desire for preemption).

⁶⁰ 136 S. Ct. 936, 946 (2016) (quoting *Travelers*, 514 U.S. at 654).

⁶¹ *Id.*

⁶² *Id.* at 954 (Ginsburg, J., dissenting).

⁶³ *Id.* at 958 ("Vermont's data-collection law, eliciting information on medical claims, services provided to beneficiaries, charges and payment for those services, and demographic makeup of those receiving benefits, does not [implicate ERISA reporting requirements] any more than reporting relating to a plan's taxes or wage payments does."). As the dissent also noted, ERISA preemption of laws like Vermont's would stymie state efforts to "maintain and improve the quality, and hold down the cost, of health care services" through gathering valuable health care data. *Id.* at 952; see also *id.* at 951 (citing Brief of *Amici Curiae* Harvard Law School Center for Health Law & Policy Innovation, et al. in Support of Petitioner at 11–18, *Gobeille*, 136 S. Ct. 936 (No. 14-181)).

⁶⁴ For more discussion of the broad reach of *Gobeille*, see Ronald Mann, *Opinion Analysis: Justices Strike a Blow Against State Health-Care Data Collection*, SCOTUSBLOG (Mar. 2, 2016, 11:02 AM), <http://www.scotusblog.com/2016/03/opinion-analysis-justices-strike-a-blow-against-state-health-care-data-collection> [<https://perma.cc/S292-V CBD>], and Brown & King, *supra* note 9.

⁶⁵ See Bland et al., *supra* note 5, at 581–82 (arguing that *Gobeille* will make it more difficult for states to collect data necessary for providing efficient health care).

consideration of *Snyder* from a single sentence in *Gobeille*. In his opinion for the Court, Justice Kennedy had written, citing *De Buono*: “The analysis may be different when applied to a state law, such as a tax on hospitals, the enforcement of which necessitates incidental reporting by ERISA plans; but that is not the law before the Court”⁶⁶ — a sentence that could even be characterized as dictum insofar as it suggests what type of treatment hospital taxes might receive under a preemption challenge. Were one satisfied with *Gobeille*’s shift toward an outcome that *promotes* preemption of core ERISA functions, then, this statement could have been seen merely as a means to avoid overruling earlier precedent and thus could have been interpreted in the limited scope of state taxing of hospitals. However, Judge Moore instead utilized this language to provide a more expansive interpretation of the *Gobeille* majority opinion, first drawing out the principle that “incidental” reporting is distinct from the “direct” regulation of fundamental ERISA functions discussed in *Gobeille*, and then clarifying that incidental reporting would be governed by the earlier principles established under *De Buono* and *Travelers*.⁶⁷

To be sure, Judge Moore’s reading of an incidental/direct dichotomy might be dubbed “clever” insofar as it may not intuitively flow from *Gobeille*. Under some interpretations of *Gobeille*, an inquiry concerning this dichotomy might appear quite similar to a purpose-based inquiry as to whether reporting requirements were essential to the purpose of the state law.⁶⁸ The *Gobeille* Court seemed to explicitly reject such an inquiry, stating that a “perceived difference . . . in the objectives” of a state law and ERISA would not protect the state law from preemption where it regulated core ERISA functions.⁶⁹ Judge Moore’s determination that the Michigan Act did not “directly regulate any integral aspects of ERISA” was based on an assessment that its purpose was “to generate the revenue necessary to fund Michigan’s ob-

⁶⁶ *Gobeille*, 136 S. Ct. at 946 (citation omitted) (citing *De Buono v. NYS–ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997)), *quoted in Snyder*, 827 F.3d at 557.

⁶⁷ *Snyder*, 827 F.3d at 557; *see also* Albert Feuer, *State Tax Laws Withstand Most ERISA Preemption Challenges After ‘Gobeille’ and ‘Self-Insurance Institute of America,’* BLOOMBERG BNA: WKLY. ST. TAX REP. (Sept. 30, 2016), <http://www.bna.com/state-tax-laws-157982077817> [<https://perma.cc/BL8M-BF53>]; Steven D. Spencer, *Sixth Circuit Reaffirms that ERISA Preemption Doctrine Is Inapplicable to Michigan Tax*, MORGAN LEWIS: ML BENEBITS (July 11, 2016), <https://www.morganlewis.com/blogs/mlbenebits/2016/07/sixth-circuit-reaffirms-that-erisa-preemption-doctrine-is-inapplicable-to-michigan-tax> [<https://perma.cc/4MY4-F68S>].

⁶⁸ In this regard, Judge Moore’s interpretation seems to align more closely with Justice Ginsburg’s *Gobeille* dissent. Justice Ginsburg indicated that purpose should serve as the lodestone in the inquiry concerning core ERISA functions, *see Gobeille*, 136 S. Ct. at 955 (Ginsburg, J., dissenting), an approach that would seem to gel with the incidental/direct dichotomy proposed by Judge Moore. Justice Ginsburg would have held that the Vermont law was not preempted, in part because the two laws “elicit different information and serve distinct purposes.” *Id.* at 954.

⁶⁹ *Id.* at 946 (majority opinion).

ligations under Medicaid.”⁷⁰ Taking the facts of *Gobeille* itself as an example, then, a court adopting Judge Moore’s approach could find that the Vermont law’s reporting requirements were incidental to its functions in establishing a research-oriented claims database, relying on what looks a lot like an analysis of the law’s purpose to uphold the Act.⁷¹ Thus, although the *Gobeille* Court did not reject the notion of an incidental/direct distinction, it is not necessarily clear that the Court intended the inquiry that could result from drawing this distinction.

Despite this tension, however, Judge Moore’s take on *Gobeille*’s application to *Snyder* stands up to scrutiny. The *Gobeille* Court mentioned an exception to its holding and then left the precise nature of that inquiry open; it was reasonable that in addressing the type of law drawn out as an exception, Judge Moore would pick up on the Court’s use of the term “incidental” and derive from that term a doctrine concerning the exception. And indeed, although Judge Moore appeared to believe otherwise, the laws at issue in *Gobeille* (requiring “claims data, eligibility data, provider files, and other information relating to health care provided to [a] Vermont resident”⁷²) and *Snyder* (requiring only reporting relevant to the tax⁷³) may well fall on opposite sides of the incidental/direct dichotomy. Limiting *Gobeille*’s interpretation of ERISA’s core reporting function to the facts of that case, then, Judge Moore’s interpretation of the *Gobeille* language could still prevent preemption of a variety of health care–regulating state laws (although it does seem unfortunate to abandon such a valuable type of initiative as the all-payer claims database⁷⁴).

Not only was Judge Moore’s interpretation reasonable, but it also draws *Gobeille* back from a potentially drastic shift in ERISA preemption doctrine. By enabling courts to sidestep *Gobeille* where they can identify state laws only *incidentally* regulating core ERISA functions, Judge Moore’s interpretation softens *Gobeille*, providing the decision with a nuance that allows it to fit comfortably within the larger canon of ERISA preemption doctrine. Despite its affirmation of the presumption against preemption, *Gobeille* functionally removes this presumption unless the distinction drawn in *Snyder* applies. If a law containing truly insignificant reporting or record-keeping require-

⁷⁰ *Snyder*, 827 F.3d at 558.

⁷¹ Indeed, in the first iteration of her opinion, Judge Moore disagreed with the Second Circuit’s reasoning in *Liberty Mutual Insurance Co. v. Donegan*, 746 F.3d 497 (2d Cir. 2014), *aff’d sub nom. Gobeille*, 136 S. Ct. 936, citing the *Donegan* dissent’s critique that the majority opinion “misse[d] the nuance of what ‘reporting’ means in the context of ERISA.” *Self-Ins. Inst. of Am., Inc. v. Snyder*, 761 F.3d 631, 639 (6th Cir. 2014) (quoting 746 F.3d at 512 (Straub, J., dissenting in part and concurring in part)).

⁷² VT. STAT. ANN. tit. 18, § 9410(j)(1)(B) (West 2014).

⁷³ See MICH. COMP. LAWS § 550.1735(1) (2014).

⁷⁴ See *Gobeille*, 136 S. Ct. at 958 (Ginsburg, J., dissenting); see also Brown & King, *supra* note 9.

ments, operating in an area of traditional state regulation, were to be so easily preempted, *Gobeille* would indeed be a harsh reversal from earlier ERISA preemption doctrine. *Snyder* reasonably tempers that reversal, and does so in a manner that may help set a realistic line for ERISA preemption moving forward.

One helpful lens for conceptualizing *Snyder*'s impact on *Gobeille* doctrine is provided by the notion of "narrowing Supreme Court precedent from below."⁷⁵ As described by Professor Richard Re, narrowing occurs where lower courts adopt a narrow, yet reasonable, reading of ambiguous Supreme Court precedent, often as a means of engaging in "dialogue" with the Court.⁷⁶ Judge Moore's interpretation of *Gobeille* could be characterized as "narrowing" that decision in that *Snyder* used *Gobeille*'s ambiguous language to limit the holding to direct regulations of core ERISA functions. The result of this process is that "the narrowed precedent recedes from view, and the court is left with open ground that it . . . might occupy with a new legal rule."⁷⁷ Having limited *Gobeille* to direct regulation, Judge Moore neatly developed an incidental/direct dichotomy, determining that incidental regulation would belong to the realm of earlier, more flexible ERISA preemption doctrine.

Although the textual source from which Judge Moore's interpretation arose seems unlikely fodder for such a robust inquiry, her reading is certainly plausible. And indeed, Judge Moore will be appreciated for wrangling such an interpretation out of *Gobeille* — she may have provided a means by which state laws with incidental reporting and record-keeping requirements (or state laws that can be framed as such) can continue to operate unimpeded by ERISA. While a more limited reading of *Gobeille* probably could have saved the tax law at issue in *Snyder*, Judge Moore's elaboration of the language into a more explicit principle (or "narrowing" of *Gobeille*) could be a saving grace for numerous other state regulations that could otherwise suffer preemption under *Gobeille*.

⁷⁵ Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 921 (2016).

⁷⁶ *Id.* at 927; see also *id.* at 925–27.

⁷⁷ *Id.* at 932.