IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RETAIL INDUSTRY LEADERS ASSOCIATION, Plaintiff, v. **JAMES D. FIELDER, JR., in his official capacity as Maryland Secretary of Labor, Licensing, and Regulation,** Defendant.	Case No. 1:06-cv-00316-JFM

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF RETAIL INDUSTRY LEADERS ASSOCIATION

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") submits this *amicus curiae* brief for the Court's consideration in connection with the Motion for Summary Judgment ("Motion") filed by Plaintiff Retail Industry Leaders Association ("RILA"). Through its submission, the Chamber seeks to assist the Court with its consideration of the Employee Retirement Income Security Act of 1974 ("ERISA") preemption issues presented by this matter.

Representing an underlying membership of more than 3,000,000 businesses, the Chamber serves as the principal voice of the American business community in the courts by regularly filing *amicus curiae* briefs and litigating as party-plaintiff. It has filed *amicus curiae* briefs in leading ERISA cases. *See e.g., Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); *Pegram v. Herdrich*, 530 U.S. 211 (2000); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Barber v. Unum Life Ins. Co. of America,* 383 F.3d 134 (3d Cir. 2004) and *AARP v. Equal Employment Opportunity Commission*, 390 F.Supp.2d 437 (E.D. PA. 2005).

This case is of great legal and practical importance to the Chamber because many of its members provide uniform health care plan coverage to their employees who work in different states. The "Fair Share Health Care Fund Act" Md. Code Ann., Lab & Empl. tit. 8.5 §§101-107 (2006) ("Maryland Act" or "Act"), if allowed to stand, would establish a template for state-by-state regulation of employer-sponsored health care plans. As a result, multi-state employers could be subjected to substantive and procedural obligations that vary widely and wildly from state to state. The complex administrative burdens that would result could well

cause some employers simply to stop doing business in states with onerous health care benefit requirements – a result that would benefit no one. Thus, although described by its proponents as health care reform, the Maryland Act violates ERISA's most basic purpose -- to create and ensure a uniform federal body of law governing the provision of employee benefits.

The mandate under the Maryland Act works as a "pay or play" system. Either the employer plays by providing a minimum level of health care plan benefits to its employees or it pays into the state's Medicaid system the amount the state thinks the employer should have paid for such benefits. More specifically, an employer with more than 10,000 employees in Maryland will be assessed a contribution amount for Maryland's Fair Share Fund calculated on the difference between 8% of the employer's payroll costs (6% of payroll for non-profit entities) and the amount the employer spends on health care insurance costs. (Complaint, ¶¶ 11-12),

A large employer in Maryland is thus faced with a Hobson's choice - either fund an employer-sponsored health care plan at 8% of payroll, irrespective of whether that amount makes any practical or economic sense, or pay 8% of payroll to the Maryland Fair Share Fund to provide benefits that may or may not go to its own employees. If the Maryland Act withstands challenge, nothing would prevent Maryland (or the sixteen other states considering similar legislation)[1] from applying the same type of benefit mandates to all employers. At bottom, state-by-state mandated heath care benefit payments is completely irreconcilable with both the letter and spirit of ERISA. It could not be clearer that the plain language of ERISA and established case law compel the conclusion that the Maryland Act is preempted by ERISA.

[1] www.uschamber.com/issues/index/labor/ mandate_scorecard.

I. INTRODUCTION

Prior to the passage of ERISA, states were free to regulate the terms of employer-provided health care plans. *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760, 764 (9th Cir. 1980).[2]

Through ERISA, Congress divided employee benefit plans into two worlds: (1) pension benefit plans; and (2) welfare benefit plans. Pension plans were defined to include retirement plans or other plans that defer the receipt of income until the termination of employment or beyond. *See* 29 U.S.C. § 1002(1). Welfare plans were broadly defined to include everything else, such as medical, dental, vision, life, disability and virtually any other employee benefit that is not related to retirement. 29 U.S.C. § 1002(2)(a).

ERISA was designed to regulate both the conduct and content of employee benefit plans. All employee benefit plans are subject to a uniform set of rules regulating "conduct", including reporting, disclosure and fiduciary responsibility provisions. *See* 29 U.S.C. §§ 1104-

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[2] By the time ERISA was enacted in 1974, most states had not attempted to do so because skyrocketing health care costs were not yet a significant concern. Rather, ERISA was Congress' response to the public outcry that arose during the 1960s and 1970s when many pension plan sponsors had failed to properly fund promised retirement benefits. 1974 U.S. Code Cong. & Admin. News 4670, 4680 (citing the Studebaker shutdown).

> ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans [citations omitted). It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. §§ 101-111, 401-414 29 U.S.C. §§ 1021-1031, 1101-1114 (1976 ed. and Supp. V). . . . ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.

Shaw v. Delta Air Lines, 463 U.S. 85, 90-91, 103 S. Ct. 2890 (1983).

05 and 1082. The regulations governing the content of pension as opposed to welfare plans differ greatly. While pension benefits are subject to substantial content regulation - vesting requirements, funding mandates, non-discrimination tests and special rules governing benefit accruals - the content of welfare benefit plans is left largely unregulated. *See, e.g.*, 29 U.S.C. §§ 1052-54 and 1082. While, as a result, most insured medical, dental, disability or vision plans are subject to almost no content requirements, this does not mean that welfare plan content can be regulated by the states. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 91.

Indeed, a fundamental purpose of ERISA is to provide a unitary federal scheme so as to avoid a multiplicity of regulation and to prevent conflicts between federal and state regulatory systems. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57, 115 S. Ct. 1671 (1995). ERISA thus displaced a patchwork scheme of state regulation of employee benefit plans with a uniform set of federal regulations. *FMC Corp. v. Holliday*, 498 U.S. 52, 56-60, 111 S. Ct. 403 (1990).

ERISA's provisions were meant to supersede state laws so as:

> [T]o ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government ... [and to prevent] the potential for conflict in substantive law. . . .requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142, 111 S. Ct. 478 (1990).

To ensure the accomplishment of ERISA's primary goals of providing minimum standards and uniform federal regulation of employee benefit plans, Congress enacted a broad preemption clause. 29 U.S.C. § 1144(a). ERISA expressly preempted "any and all State laws

insofar as they may now or hereafter relate to any employee benefit plan . . ." and broadly defined "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law . . ." ERISA §§ 514(a) and (c), 29 U.S.C. §§ 1144(a) and (c). ERISA defines "state" as "a State, any political subdivision thereof, or any agency or instrumentality of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by ERISA." ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2). The primary advantage of the preemption clause found in ERISA is that it has allowed plan sponsors to create uniform employee benefit plans covering employees in different states. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 105.

The need for a single, federal scheme regulating health care plans is obvious. For example, without uniform federal interpretation, health care plans could be required to keep certain records in some states but not in others; to provide different benefits or different benefit levels in different states; to decide benefit claims in different ways; and to comply with differing standards of conduct in administering employee benefit programs. As Congress recognized, the inefficiency caused by a "patchwork" of state-by-state regulation could lead large, national employers with employee benefit plans to provide the lowest common denominator of benefits, or even discourage those employers from offering any employee benefit program at all. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-11, 107 S. Ct. 2211 (1987).

Although the concept of ERISA preemption is simple and the Congressional intent is clear, the statute's preemption provision is not "a model of legislative drafting." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99, 114 S. Ct. 517 (1993).

Nevertheless, the Supreme Court has consistently described ERISA's preemption provision as "conspicuous for its breadth". *FMC Corp. v. Holliday*, 498 U.S. at 58. The boundaries of ERISA's preemptive reach have been the subject of a series of differing Supreme Court interpretations. Given the difficulty in applying the expansive preemption language found in ERISA to real world problems, the Supreme Court has issued no fewer than 24 ERISA preemption decisions over the course of the last 25 years.[3]

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[3] *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S. Ct. 1895 (1981) (New Jersey law prohibiting the offset of workers compensation benefits by ERISA plans-preempted); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983) (New York discrimination in law requiring health care plans to provide pregnancy coverage-preempted); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985) (Massachusetts insurance law mandating minimum health care benefits-not preempted); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542 (1987) (Mississippi bad faith insurance law claim concerning improper processing of a benefits claim provides federal jurisdiction under the complete preemption doctrine); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987) (Mississippi state law causes of action for disability plan benefits-preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987) (Maine statute requiring one-time payment to employees upon closure of facility-not preempted); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 108 S. Ct. 2182 (1988) (Georgia garnishment statute preempted as it purported to exempt from garnishment the assets from ERISA welfare plans); *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668 (1989) (Massachusetts statute regulating unfunded vacation pay plans-not preempted); *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403 (1990) (Pennsylvania law precluding subrogation or reimbursement of benefits in any action arising out of the use of motor vehicle preempted through application of the "deemer clause"); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478 (1990) (Texas wrongful discharge tort and contract claims concerning pension benefits-preempted); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 113 S. Ct. 580 (1992) (District of Columbia law requiring employers to provide health care coverage to employees on worker compensation leaves-preempted); *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 114 S. Ct. 517 (1993) (New York state law regulating general account funds of insurance company-preempted); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671 (1995) (New York law requiring hospitals to collect surcharges from patients from all health care plans except for Blue Cross/Blue Shield-not preempted); *Boggs v. Boggs*, 520 U.S. 833 (1997) (Louisiana community property law that would change pension plan beneficiaries-preempted); *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 117 S. Ct. 832 (1997) (California law governing prevailing wages for public

Most of the Supreme Court's ERISA preemption cases have turned on what the "relate to" standard means, "[b]ut applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335, 117 S. Ct. 832 (1997) (Scalia, J. concurring). But notwithstanding the Court's general frustration with the "relate to" standard, the Court has set aside each and every attempt by a state to regulate the content of employee benefit plans. *See, e.g., Boggs v. Boggs*, 520 U.S. 833, 841 (1997) ("We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relates to' provides further and additional support for the pre-emption claim.")

(continued...)

works projects involving apprenticeship programs-not preempted); *De Buono v. NYSA ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997) (New York gross receipts tax on medical centers operated by ERISA plans-not preempted); *Unum Life Ins. Co. v. Ward*, 526 U.S. 358 (1999) (California rule that would make the employer an agent of insurance company-preempted); *Pegram v. Herdrich*, 530 U.S. 211, 120 S. Ct. 2143 (2000) (Mixed eligibility decisions by HMOs are not fiduciary decisions under ERISA and thus not subject to ERISA preemption.) *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322 (2001) (Washington statute overriding pension plan beneficiary designations-preempted); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 122 S. Ct. 2151 (2002) (Illinois HMO act requiring independent review of disputed claims was found to be a law regulating insurance-not preempted); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003) (California "treating physician rule" applied to LTD claims-preempted); *Delta Family-Care Disability and Survivorship Plan v. Regula*, 539 U.S. 901, 123 S. Ct. 2267 (2003) (California following *Nord,* treating physician rule applied to LTD claims- preempted); *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S. Ct. 1471 (2003) (Kentucky "any willing provider" statute precluding HMOs from limiting network providers was found to be a law regulating insurance-not preempted); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004) (Texas law mandating standard of care for HMO benefit coverage decisions-preempted).

II. THE MARYLAND ACT IS PREEMPTED BY ERISA

A. State Laws Requiring Mandated Employee Benefit Schemes Are Preempted Under ERISA

An employer's decision to offer a welfare benefit plan to employees is a voluntary one. "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996) (citing *Shaw v. Delta Airlines*, 463 U.S. at 91. (Citations omitted). The Maryland Act directly displaces this fundamental tenet of ERISA by mandating that employers pay at least 8% of their payroll to provide health care plan benefits for their employees.

Whether a state can mandate health plan coverage was long ago presented to the Supreme Court. In *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980) the question presented was whether Hawaii's Comprehensive Prepaid Health Care Act enacted in 1974 ("Hawaii Act") requiring employers to provide their employees with comprehensive prepaid health care plan coverage was preempted by ERISA. *Id.* at 763. In 1976, the Hawaii Act was amended to require employer-provided plans to cover the diagnosis and treatment of alcohol and drug abuse. *Standard Oil Co. of California v. Agsalud*, 442 F.Supp. 695, 696 (N.D. CA 1977). The Hawaii Act, like the Maryland Act, included certain reporting requirements that differ from those in ERISA. *Id.*, *see* also, Md. Code Ann., Lab & Empl. tit. § 8.5-102 to 8.5-105 (Health Care Payroll Assessment).[4] In finding the Hawaii statute preempted, the Ninth Circuit explained:

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[4] § 8.5-102. This title applies to an employer with 10,000 or more employees in the state.

> At the time ERISA was enacted, all private plans were voluntary as opposed to mandated by state law and ERISA itself does not require employers to provide plans. We cannot agree, however, with Hawaii's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage. Congress did distinguish between plans established or maintained by private employers for private employees and plans established or maintained by government entities for government employees. Such government plans are exempt. [Citations omitted]. Private plans are not. The plans which Hawaii would require of private employers are not government plans. There is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees. The legislative history convincingly demonstrates a broad congressional preemptive intent. [Citations omitted.]

Id. at 764.

The Supreme Court, in a Memorandum Opinion, affirmed. *Agsalud v. Standard Oil Co.*, 454 U.S. 801, 102 S. Ct. 79 (1981).

B. The Maryland Act "Relates To" ERISA-Governed Employee Benefit Plans

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(continued...)

§ 8.5-103. (A) (1) On January 1, 2007, and annually thereafter, an employer shall submit on a form and in a manner approved by the Secretary:

(I) The number of employees of the employer in the state as of 1 day in the year immediately preceding the previous calendar year as determined by the employer on an annual basis;

(II) The amount spent by the employer in the year immediately preceding the previous calendar year on health insurance costs in the state; and

(III) The percentage of payroll that was spent by the employer in the year immediately preceding the previous calendar year on health insurance costs in the state. ...

§ 8.5-105.

(A) Failure to report in accordance with § 8.5-104 of this Title shall result in the imposition by the Secretary of a civil penalty of $250,000.

The Maryland Act mandates the existence of an ERISA plan to accomplish its purpose as it requires employers who employ more than 10,000 employees to spend a minimum amount of payroll on "health insurance costs." The Act, in pertinent part, states:

> 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 Secretary 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.

(Complaint, Exh. 1, p. 6)

Does a state law mandating a minimum level of contributions by an employer for "health insurance costs" intrude on ERISA's regulation of health care plans? To have ERISA regulation, there must be an "employee benefit plan." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 12. A welfare plan under ERISA is broadly defined to include:

> [A]ny **plan, fund, or program** which was heretofore or is hereafter **established or maintained by an employer** or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained **for the purpose of providing** for its participants or their beneficiaries, **through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness**, accident, disability, death. . . .

29 U.S.C § 1002(1) (Emphasis added)

In *Shaw v. Delta Air Lines, Inc.*, the Supreme Court explained that a state law relates to an employee benefit plan if it: (1) has a connection with a plan; or (2) refers to a plan. 463 U.S. at 96-97. As the Court further explained in *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, a law "has a . . . reference to" a plan where the law "acts immediately and exclusively upon ERISA plans, ... or where the existence of ERISA

plans is essential to the law's operation . . . " 519 U.S. at 325. On the other hand, if the law "functions irrespective of ... the existence of an ERISA plan," it does not make reference to an ERISA plan so as to be preempted. 519 U.S. at 328. A number of factors have been used by the courts in determining whether a state law of general application "relates to" an ERISA-regulated plan. In *Shaw,* a New York State disability law requiring pregnancy benefits was preempted because it regulated the type of benefits and the terms of an ERISA-regulated plan. 463 U.S. at 96-97. State laws that require an employer to establish a separate employee benefit plan, impact the ongoing administration of an ERISA plan, or are not otherwise consistent with ERISA have also been found to be preempted. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988).

Since, each of the employers currently affected by the Maryland Act does, in fact, sponsor ERISA-governed medical plans,[5] the required "connection with" an ERISA-governed plan has been met.[6]

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[5] The Legislative History to the Maryland Act shows there are four employers in Maryland with more than 10,000 employees: Giant Food, Northrop Grumman Corp., Wal-Mart and Johns Hopkins University. Only Wal-Mart has health insurance costs low enough to be subject to the payroll assessment. See Plaintiff RILA's Statement of Uncontroverted Material Facts No. 5.

[6] The law is settled that even in the absence of a written plan document or compliance with ERISA's other requirements, an ERISA-regulated plan may be found to exist. In *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (*en banc*) the Court held that the test was whether a reasonable person could ascertain from the surrounding circumstances: (1) intended benefits; (2) intended beneficiaries; (3) a source of financing for the benefits; and (4) a procedure for obtaining benefits. The *Dillingham* test has been widely followed. *Wickman v. Northwestern National Life Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013, 111 S. Ct. 581 (1990); *Grimo v. Blue Cross/Blue Shield of Vermont*, 34 F.3d 148, 151, 18 EBC 2140 (2d Cir. 1994); *Diebler v. United Food and Commercial Workers' Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992); *Elmore v. Cone Mills Corp.*, 23 F.3d 855 (4th Cir. 1994) (*en banc*); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d

C. ERISA Preempts The Maryland Act Because It Is Inextricably Tied To An Employer's ERISA-Regulated Health Care Plan

The Maryland Act violates at least two of the three categories of state laws that can be said to have a connection with an ERISA plan:

> First, Congress intended ERISA to preempt state laws that 'mandate employee benefit structures or their administration.' ... Second, Congress intended to preempt state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself ... Third, in keeping with the purpose of ERISA's preemption clause, Congress intended to preempt 'state laws providing alternate enforcement mechanisms' for employees to obtain ERISA plan benefits.

Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1468 (4th Cir. 1996) (quoting *Travelers*, 514 U.S. at 658).

The Maryland Act functions solely by reference to an employer's expenditures for employer-provided health care. Employer-sponsored health insurance programs are, by definition, subject to ERISA regulation. *See* ERISA § 4(a), 29 U.S.C. § 1003(a); *Madonia v. Blue Cross & Blue Shield of Virginia,* 11 F.3d 444, 447 (4th Cir. 1993).

First, requiring an employer to provide health insurance coverage to employees equal to 8% of its payroll costs mandates a particular employee benefit plan structure. Second, the

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236, 240-241 (n.4) (5th Cir. 1990); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551 (6th Cir. 1989); *Ed Miniat, Inc v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 7 EBC 2414 (7th Cir. 1986), *cert. denied*, 482 U.S. 915, 107 S. Ct. 3188 (1987); *Harris v. Arkansas Book Co.*, 794 F.2d 358 (8th Cir. 1986); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 5 EBC 2744 (9th Cir. 1984), *cert. denied,* 474 U.S. 865, 106 S. Ct. 183 (1985); *Scott v. Gulf Oil Corporation*, 754 F.2d 1499 (9th Cir. 1985); *Peckham v. Gem State Mutual of Utah*, 964 F.2d 1043, 1047 (10th Cir. 1992); *Kenney v. Roland Parson Contracting Corp.,* 28 F.3d 1254, 18 EBC 1892 (D.C. Cir. 1994). The Supreme Court has noted that the existence of an ERISA plan also requires "some minimal ongoing 'administrative' scheme or practice" *District of Columbia v. The Greater Wash. Bd. of Trade*, 506 U.S. 125, 134, n.2, 113 S. Ct. 580 (1992).

administration of the covered employer's plan is affected in at least three different ways: (1) it requires the plan to pay a certain level of benefits; (2) it requires a payment to the Fair Share Fund in the event those minimum benefit levels are not met; and (3) it requires ongoing reports to the State of Maryland as to the efforts made in connection with the 8% of payroll mandate. A failure to make timely reports to the State of Maryland results in a $250 per day penalty. A failure to make timely payments to the Fair Share Fund results in the imposition of a civil penalty of $250,000. Contrary to the fundamental purpose of ERISA, the Act literally commands employers to establish "Maryland specific" benefit levels and to abide by "Maryland specific" administrative rules precluding their ability to uniformly administer health care plans with multi-state applicability.

The mandates of the Maryland Act are analytically indistinguishable from those that were addressed by the Supreme Court in *Greater Wash. Bd. of Trade*, 506 U.S. at 129-31. There the Court expressly stated that laws requiring employers to provide benefits based upon state-mandated levels are preempted by ERISA. *Greater Wash. Bd. of Trade*, 506 U.S. at 126-27. In *Greater Wash. Bd. of Trade*, the Court was asked whether the District of Columbia could require employers who provide health insurance for their employees to provide the same health insurance coverage for injured employees eligible for workers' compensation benefits. *Id.* Finding the D.C. law to be preempted, the Court observed:

> We have repeatedly stated that a law 'relates to' a covered employee benefit plan for purposes of § 514(a) 'if it has a connection with or reference to such a plan.' [Citations omitted.] This reading is true to the ordinary meaning of 'relate to,' see Black's Law Dictionary 1288 (6th ed. 1990), and thus gives effect to the 'deliberately expansive' language chosen by Congress. [Citations omitted.] Under § 514(a), ERISA pre-empts any state law that refers to or has a connection with

> covered benefit plans (and that does not fall within a § 514(b) exception) 'even if the law is not specifically designed to affect such plans, or the effect is only indirect,' *Ingersoll-Rand, supra*, [498 U.S.] at 139, and even if the law is 'consistent with ERISA's substantive requirements,' *Metropolitan Life, supra*, [471 U.S.] at 739. n1.
>
> Section 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted. The health insurance coverage that § 2(c)(2) requires employers to provide for eligible employees is measured by reference to 'the existing health insurance coverage' provided by the employer and 'shall be at the same benefit level.' ...

Id. at 129-30.

While the Supreme Court took a more cautious approach to ERISA preemption starting with *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), it in no way abandoned its earlier preemption analysis. In *Travelers*, the Court held that a New York law requiring hospitals to collect surcharges from patients covered by a commercial insurance company, but not from patients insured by a Blue Cross/Blue Shield plan, was not preempted. The Court explained that where federal law bars state action in fields of traditional state regulation, it has operated on "the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 655. The *Travelers* court emphasized:

> The basic thrust of the [ERISA] preemption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.
>
> Accordingly in *Shaw*, for example, we had no trouble finding that New York's "Human Rights Law, which prohibited employers from structuring their employee benefit plans in a manner that discriminated on the basis of pregnancy and New York's Disability Benefits Law, which required employers to

> pay employees specific benefits, clearly 'related to' benefit plans. 463 U.S. at 97.
>
> . . . [M]andates affecting coverage could have been honored only by varying the subjects of a plan's benefits whenever New York law might have applied, or by requiring every plan to provide all beneficiaries with a benefit demanded by New York law if New York law could have been said to require it for any one beneficiary . . . . In each of these cases, ERISA pre-empted state laws that mandated employee benefit structures or their administration. Elsewhere, we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption. See *Ingersoll-Rand, supra.*

Id. at 657-58.[7]

Furthermore, courts have looked to the effect the law has on the "principal ERISA entities," such as the employer, plan participants, plan fiduciaries, and beneficiaries in analyzing the reach of ERISA's preemption provision. *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1469 (4th Cir. 1996), *see also Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.* 793 F.2d 1456, 1467-68 (5th Cir. 1986). While Congress did

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[7] The New York Court of Appeals recently relied on the analysis of *Shaw* in holding that New York City's "Equal Benefits Law" (prohibiting city agencies from entering into contracts with firms that do not provide domestic partner benefits) is preempted by ERISA. (*Matter of Council of the City of New York v. Bloomberg,* 2006 N.Y LEXIS 149 (N.Y. Feb. 14, 2006)). The Court of Appeals rejected the City Council's contention that the City was merely acting as a "market participant" and the law "did not compel any firm to offer benefits", stating:

> *Shaw* holds that states (and, of course, municipalities) cannot regulate the content of ERISA plans. That holding has been left untouched by more recent cases, which hold, in effect, that ERISA does not preempt every state law that has an indirect impact on an ERISA plan. [citations omitted]. The Equal Benefits Law seemingly seeks to do exactly what ERISA, as interpreted in *Shaw*, prohibits - to prescribe the terms of benefit plans.

Id. at Slip Op. 18.

not intend ERISA to preempt state-based laws of general applicability that do not implicate relations among the traditional ERISA plan entities, the Maryland Act is a law directly aimed at regulating the content of health care plans. *Custer v. Sweeney*, 89 F.3d 1156, 1167 (4th Cir. 1996). While there is no preemption if a state law has only a "tenuous, remote or peripheral" connection with a covered plan, *Shaw v. Delta Air Lines, Inc.,* 463 U.S. at 100, n.21, the Maryland Fair Share Act is preempted because it is aimed directly at regulating the provision of health care plan benefits by employers. *See Mackey,* 486 U.S. at 830-838; *Greater Washington,* 506 U.S. at 130, n.1. More particularly, it requires covered employers to provide employees with a specified minimum level of health care benefits. By operation, this statutory mandate changes the relationship between two entities that only ERISA is permitted to regulate - plan sponsors and participants. The Act dictates the level of health care plan benefits and thus fundamentally changes the plan sponsor's role in connection with the plan and the plan's participants. *See e.g., Sommers Drug Stores Co. Employee Profit Sharing Trust,* 793 F.2d at 1467-68.

D. Congress Intended ERISA To Provide Exclusive Federal Regulation Of Employee Benefit Plans

The Maryland Act is precisely the type of state law Congress intended to preempt. Since the passage of ERISA in 1974, its preemption provision has been amended six times. The first was to allow Hawaii to maintain its Prepaid Health Care Act. 29 U.S.C. § 1144(b)(5). In enacting this amendment Congress considered and rejected an earlier version of this bill which would have eliminated ERISA preemption as to any state health care mandates. 95th Congress First Session (1977), SF 1383. In 1999, Congress passed another change to ERISA preemption, permitting the state regulation of multiemployer welfare plans. 29 U.S.C. § 1144(b)(6). State laws governing domestic relations orders were exempted from ERISA preemption in 1984 providing such orders were "qualified domestic relations orders". 29 U.S.C. § 1144(b)(7). Certain child support orders were exempted from ERISA preemption in 1993. *Id.* And in an attempt to help states deal with growing Medicaid costs, in 1986 Congress gave states the power to mandate that employer-sponsored health plans not include a provision requiring employees to exhaust Medicaid benefits prior to claiming benefits under an employer-sponsored plan. 29 U.S.C. § 1144(b)(8).

These amendments to ERISA's preemption provision are noteworthy for two reasons. First, the consistent message from these few amendments is that Congress intends the regulation of employee benefit plans to be uniform and, with only a few limited exceptions, to be exclusively a federal concern. By establishing employee benefit regulation as reserved to the federal government, Congress sought "to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan

beneficiaries." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 142. The negative effect of varying state laws mandating employee benefits was described as antithetical to ERISA's purposes in *Shaw v. Delta Air Lines, Inc.*:

> An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of [federal law], would make administration of a uniform nationwide plan more difficult. The employer might choose to offer a number of plans, each tailored to the laws of particular States, the inefficiency of such a system presumably would be paid for by lowering benefit levels.... To offset the additional expenses, the employer presumably would reduce wages or eliminate those benefits not required by any State. Another means by which the employer could retain its uniform nationwide plan would be by eliminating classes of benefits that are subject to state requirements with which the employer is unwilling to comply. ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans.

Shaw v. Delta Air Lines, Inc., 463 U.S. at 105, n.25

Second, should Congress choose to exempt Maryland from ERISA's uniform regulation of health care plans, it surely knows how to do so.

III. CONCLUSION

In enacting the Fair Share Act, the State of Maryland has overstepped its authority by regulating an area of the law that Congress identified as an exclusively federal concern. ERISA was enacted to ensure that employers who choose to offer pension or welfare benefits to their employees are subject to uniform regulation. Maryland's Fair Share Act attempts to circumvent this federal mandate by requiring employers to provide a minimum level of health insurance benefits. The Act also serves as precedent for other states considering similar

measures. The inevitable result of this legislation will be to open the door to precisely the hodgepodge of state health plan regulation that ERISA was designed to avoid. Accordingly, the Act runs afoul of more than three decades of Supreme Court jurisprudence. For all of the foregoing reasons, the Chamber respectfully requests this Court rule that Maryland's Fair Share Act is preempted by ERISA.

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Respectfully submitted,

/s/

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