In What Circumstances Can a Defendant Waive the Defense of ERISA Preemption?


The Employee Retirement Income Security Act of 1974 (ERISA) contains a preemption clause that is widely recognized for its far-reaching effect of barring state law causes of action. Section 514(a), with limited exceptions, provides that ERISA “shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. §1144(a).

Accordingly, “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.” Aetna Health Inc. v. Davila, 124 S.Ct. 2488, 2495 (2004).

In light of the “conspicuous breadth” of ERISA preemption, many practitioners may be surprised that, under certain circumstances, ERISA preemption has been held to be an affirmative defense that can be waived.

Supreme Court’s Choice-of-Forum Versus Choice-of-Law Analysis

The Supreme Court, in Int’l Longshoreman’s Ass’n v. Davis, 476 U.S. 380 (1986), held that there are two categories of preemption arguments: (1) a challenge to the court’s power to adjudicate, and (2) an affirmative defense.

Where it is raised to challenge the choice of forum, the preemption argument invokes a jurisdictional issue that questions the power of the court to adjudicate the matter. Such a challenge, as with any jurisdictional issue, can be raised at any time and cannot be waived. Id. at 381–82 (NLRA preemption provision was designed to give the NLRB exclusive subject matter jurisdiction over the field).

On the other hand, where a court has jurisdiction to adjudicate the matter, it is an affirmative defense, and the preemption argument can be waived. Id. at 391 n.9; Sweeney v. Westvaco Co., 926 F.2d 29, 39 (1st Cir. 1991) (preemption under the LMRA dealt with which law should apply, rather than which forum should apply it, and could therefore be waived).

Application of Supreme Court’s Analysis to ERISA Preemption

Courts have applied the choice-of-forum versus choice-of-law distinction in the context of ERISA preemption to conclude that, depending on the circumstances, it can indeed be waived.
Concurrent Jurisdiction Over Claims for Benefits Under Section 502(a)(1)(B)

Take, for example, claims brought to recover plan benefits pursuant to section 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). For such actions, there is concurrent jurisdiction between state and federal courts under section 502(e), 29 U.S.C. §1132(e). Section 502(e) states that: “State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraph (1)(B) ... of subsection (a) of this section.”

Under these circumstances, regardless of whether the action is initiated in state or federal court, because both courts have jurisdictional authority to decide such an action, ERISA preemption raises a choice-of-law issue that is an affirmative defense that must be timely asserted or be waived. See, e.g., Saks v. Franklin Covey Co., 316 F.3d 337 (2d Cir. 2003).

In Saks, the plaintiff sued her employer in federal court, alleging that she was denied infertility procedures under her employee health benefits plan and that this constituted a breach of contract, as well as a violation of the Civil Rights Act, Pregnancy Discrimination Act, Americans with Disabilities Act, and New York Human Rights Law.

The defendant did not assert the defense of ERISA preemption as to the state contract claims until its motion for summary judgment, and the plaintiff claimed that the defense was, therefore, waived. The Second Circuit agreed, holding: “ERISA’s jurisdictional provision governing benefits-due actions provides concurrent jurisdiction in state and federal district courts, and thus ERISA prescribes the choice of law, not jurisdiction. As a result, we find that ERISA preemption in a benefits-due action is a waivable defense.” Id. at 349 (internal citations omitted).

The First Circuit arrived at the same conclusion in Wolf v. Reliance Standard Life Ins. Co., 71 F.3d 444 (1st Cir. 1995). The court discussed its earlier decision in Sweeney, and held that, like LMRA preemption, “ERISA preemption in a benefits-due action does not affect the choice of forum, because ERISA’s jurisdictional provision provides [for concurrent jurisdiction].” Id. at 448.

Accordingly, the court held “that ERISA preemption in a benefits-due action is waivable, not jurisdictional, because it concerns the choice of substantive law but does not implicate the power of the forum to adjudicate the dispute.” Id. at 449. See also Allen v. Westpoint-Pepperell, Inc., 11 F.Supp.2d 277, 283 (S.D.N.Y. 1997) (ERISA’s preemption clause “cannot be interpreted to be jurisdictional and non-waivable and defendants may effectively waive their right to raise ERISA’s preemption clause in opposition to plaintiffs’ state law claims”); Dueringer v. Gen’l American Life Ins. Co., 842 F.2d 127, 130 (5th Cir. 1988) (“[P]reemption in this case clearly involves a choice-of-law question and therefore must be asserted as an affirmative defense.”).

Claims Involving Exclusive ERISA Jurisdiction Asserted in State Court

Conversely, for ERISA causes of action other than to recover benefits due, federal courts have exclusive jurisdiction. Section 502(e) of ERISA states: “Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter.”

Consequently, federal courts have exclusive jurisdiction over these claims, such as actions by a participant or beneficiary seeking equitable relief under section 502(a)(3), and state courts have no power to adjudicate these claims.

Accordingly, when a non-benefits-due ERISA matter is brought in state court, ERISA preemption cannot be waived. As ERISA preemption deprives the state court of subject matter jurisdiction, this argument can be raised at any time as a challenge to the state court’s authority to hear the matter. See Saks, 316 F.3d at 349–350 (court noted that other types of ERISA actions are subject to the exclusive jurisdiction of federal courts and that waivability of ERISA preemption is limited to ERISA preemption of benefits-due actions).

Impact of Alternative Bases for Jurisdiction in Federal Court

Application of this analysis when a case is brought in federal court is often more complicated. Several cases have discussed the impact of alternative bases for federal jurisdiction on whether the ERISA preemption defense can be waived.

In Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986), for example, an employee asserted in federal court claims of age discrimination and breach of the implied
covenant of good faith and fair dealing based on his being terminated and then offered a position only upon condition that he waive any claim for back pay or lost medical benefits. The defendant attempted to argue on appeal that plaintiff’s claims were preempted by ERISA, though he did not raise this argument in the district court.

The Ninth Circuit court discussed Davis, and held that “a preemption argument that affects the choice of forum rather than the choice of law is not waivable.” Id. at 1497. The court then concluded that, since the state law claim and the federal discrimination claims arose out of a “common nucleus of operative facts,” the district court would have had jurisdiction, even if the state law claim could be recharacterized as a federal ERISA claim.

The defendant’s “preemption argument therefore implicates only a choice-of-law question that is waived unless it is timely raised,” and consequently, it may not be raised for the first time on appeal. Id. Implicit in this holding is that preemption may not have been waivable had the federal court not had supplemental jurisdiction over the claim for benefits.

In Penn Central Nat’l Bank v. Connecticut Gen’l Life Ins. Co., 1990 WL 83326 (W.D. Pa. Jan. 10, 1990), Penn Central National Bank, guardian of an estate, sought damages allegedly owed under an insurance policy. The defendant moved for summary judgment, arguing in part that plaintiff’s state common law breach of contract claim was preempted by ERISA, while plaintiff argued that this defense was waived. The plaintiff based its argument on the fact that the defendant had failed to raise ERISA preemption as an affirmative defense in its answer to plaintiff’s complaint and that defendant’s motion to amend the answer to include such a defense had been denied.

The court granted plaintiff’s motion for summary judgment, in part, holding:

[If ] the case were to be recharacterized as one arising under ERISA, rather than under state law, the forum would not be altered because this court has diversity jurisdiction of the state law claims under 28 U.S.C. §1332. Accordingly, preemption of the state law claims by ERISA would affect only the choice of applicable law, rather than the forum; therefore, the right of defendant to choose ERISA is an affirmative defense that is waivable if not timely raised.

Id. at *2.

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