

Key Regulatory Issues Facing APCD States Post *Gobeille v. Liberty Mutual*

The All Payer Claims Database (APCD) Council has collected and compiled responses to key questions posed to regulators in APCD states since the March 1 decision by the Supreme Court of the United States (SCOTUS) in *Gobeille v. Liberty Mutual*, related to key regulatory enforcement issues to be considered by states.

These responses are not meant to provide legal advice and should not be relied upon as such. Instead, this is a compilation of opinions and regulatory interpretations that may help guide states as they assess the impact of the SCOTUS decision on APCD efforts.

REGULATORY ENFORCEMENT ISSUES FOR APCD STATES

Issue 1: Are state APCD statutes still enforceable?

Yes. APCD statutes are and remain, for the most part, enforceable. Health insurance companies, providers, government health plans, and other APCD-regulated entities are still authorized to comply with APCD reporting statutes. Unless specifically directed by self-funded plan sponsors otherwise, Third-Party Administrators (TPA) should also continue to comply with state APCD reporting requirements.

In *Gobeille v. Liberty Mutual*, a self-funded plan sponsor (employer) challenged the state of Vermont's right to compel the employer's TPA to submit claims data to the state's APCD regulated by the Green Mountain Care Board. In its March 1, 2016 decision, SCOTUS confirmed that Vermont's statute, as applied to the self-funded employer's Employee Retirement Income Security Act of 1974 (ERISA) plan, was preempted by ERISA.

Health insurance companies and TPAs have questioned the breadth of the *Gobeille* decision. In light of the facts giving rise to the decision, legal scholars agree that states can continue to require the submission of claims data from regulated health insurance issuers, including fully insured plans; non-ERISA plans; and TPAs, as long as self-funded employer plans governed by ERISA have the opportunity to decide whether or not to submit their data.

Given the ruling, employers who offer self-funded ERISA plans may inform their TPA or the APCD that they decline to submit their data, and the state must comply with such a refusal.

Issue 2: Are governmental plans or other plans exempt from ERISA?

Generally, governmental plans are exempt from ERISA's provisions and are not impacted by the *Gobeille* decision with regard to claims submission. ERISA defines a governmental plan as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or

instrumentality of any of the foregoing.” This would include any health insurance plan or program established for its employees by the state, any city or town, and any governmental agency or subdivision.

In addition, statutes requiring individual market plans to submit data are not impacted by the *Gobeille* decision, because such plans are not covered by ERISA.

Issue 3: Who decides whether or not the claims data generated by a self-funded ERISA plan can be voluntarily submitted to the state?

States agree that TPAs are typically regulated as part of a state’s insurance regulatory authority and thus remain obligated to submit claims data, unless specifically informed otherwise by their self-funded plan sponsor clients. However, the submission decision may be governed by the specific contract between the TPA and the plan sponsor; ERISA does not address this situation. According to state regulators, most TPAs seem to be concluding that the plan sponsor (i.e., the employer) has the right to determine whether the TPA continues to voluntarily submit data.

Employers and ERISA plan sponsors may want or need information about the value of APCDs both by virtue of the broad impact claims data analysis can have on health policy, health costs and health reform, and the important analysis aggregated claims review can provide to employers in the overall management of their employee health plans. The value of APCDs to employers is more fully set forth at <https://www.apcdouncil.org/publication/value-all-payer-claims-databases-employers>.

Issue 4: Does the SCOTUS ruling raise privacy concerns to the extent that health plan sponsors agree to voluntarily submit claims data from ERISA plans?

Some data submitters have expressed concern that if state law cannot compel the submission of claims data from self-funded employer sponsored plans, submitting such data might raise privacy concerns, specifically under HIPAA privacy regulations. According to legal scholars, claims data voluntarily submitted by self-funded ERISA plans would continue to comply with HIPAA privacy requirements notwithstanding the *Gobeille* decision.

The HIPAA Privacy Rule permits health plans, including self-funded ERISA plans, to disclose identifiable claims data without individual authorization where required by law or authorized by law for health oversight or public health activities. Even if not mandated by law, self-funded ERISA plans and their TPAs are allowed to submit data voluntarily to APCDs under the HIPAA Privacy Rule.

Issue 5: Do state departments of insurance have to regulate the APCDs in order for states to argue APCD collection is ‘saved’ from ERISA preemption?

No. ERISA includes a “savings” clause (Section 514(b)(2)(A): “nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.”). The *Gobeille* decision did not address and does not alter a state’s authority to “regulate insurance.” To the extent state APCD laws are directed at insurance entities, they likely would be viewed as regulating insurance subject to the “savings” clause. Therefore, fully insured ERISA plans, like other types of insurance entities, would be saved from ERISA preemption and still subject to APCD reporting requirements. The APCD requirements do not have to come from or be administered by the state department of insurance for the savings clause to apply.

Issue 6: What documentation is required to be provided if a self-funded ERISA plan sponsor does not want to contribute data to the APCD?

States typically have the authority to request documentation or other verification of a plan sponsor’s decision to opt-out of (or opt-in to) APCD data submission. Again, plan administrators may have a contractual or fiduciary obligation to inform plan sponsors of the value APCD reporting adds to their plan and their employees.