

## Memorandum

To: Rhode Island All Payer Claims Database Interagency Work Group  
From: Jennifer Wood, Deputy Secretary – General Counsel  
Re: Applicability of the *Gobeille v. Liberty Mutual* decision to Rhode Island’s APCD  
Date: March 29, 2016

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### **Background:**

Since the U.S. Supreme Court rendered its decision in *Gobeille v. Liberty Mutual*, 577 U.S. (2016), a number of Rhode Island data submitters have contacted the R.I. APCD to discuss the implications of the U.S. Supreme Court’s action for the R.I. All Payer Claims Database (APCD). Some data submitters have expressed an unwillingness to submit data collected on behalf of their self-insured clients based on the Supreme Court’s decision. However the *Gobeille* decision does not apply to the R.I. APCD because the Rhode Island statute enacting APCD is fundamentally different from the Vermont statute that was reviewed by the Supreme Court.

### **Discussion:**

**1. The R.I. APCD does not impose reporting requirements on ERISA governed self-insureds. Reporting requirements are imposed only on insurers in the R.I. APCD.**

The R.I. APCD statute differs in three critical regards from the Vermont APCD statute:

- Unlike the Vermont statute, the R.I. APCD does not impose any reporting requirements on self-insured employers subject to ERISA.
- Unlike the Vermont APCD, the R.I. APCD does not contain any personally identifiable information. The R.I. APCD has a unique feature that requires that all personal information be removed from data submitted to the database. This materially alters the concerns raised by Liberty Mutual in the Vermont case.
- Unique in the nation, the R.I. APCD provides an opportunity for any Rhode Islander to opt out of having his/her de-identified health care information submitted to the R.I. APCD. This further differentiates the R.I. and Vermont situations for data submitters.

Rhode Island’s APCD is specifically structured to avoid imposing any reporting obligations on ERISA-governed, self-insured employers. Vermont’s statute imposes a direct requirement on self-insured employers that are otherwise regulated by the Federal requirements of ERISA.<sup>1</sup>

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<sup>1</sup> Vermont Statutes Annotated Title 18, Chapter 221, Section 9410 requires health insurers to submit data to the Vermont APCD. For purposes of the Vermont APCD, the definition of “insurer” explicitly includes self-insured employers regardless of whether their plan is administered by a third party. (VSA Title 18, Chapter 221 Section 9402(8)).

In stark contrast, the R.I. APCD statute was structured to impose reporting requirements only on Rhode Island insurers and only as to information that the insurers already routinely collect regarding health care claims. Nowhere in the R.I. APCD statute is there any reference to self-insureds, nor does the R.I. APCD statute impose any reporting requirements on self-insureds. The entire requirement to report is limited to R.I. insurers, expressly avoiding any requirements placed on any entity governed by ERISA. R.I.G.L §23-17.17-10 defines the reporting requirements for the R.I. APCD. It states: “insurers, health care providers, health care facilities and governmental agencies shall file reports, data, schedules, statistics or other information determined by the director to be necessary to carry out the purposes of this chapter.” Because the R.I. statute imposes no reporting requirements on self-insured employers subject to ERISA, the federal ERISA statute does not preempt the R.I. APCD statute.

**2. The Rhode Island APCD is different from the Vermont APCD in that the R.I. APCD statute prohibits the inclusion of any personally identifiable information in the database. This removes the primary basis for the challenge in *Gobeille v. Liberty Mutual*.**

In *Gobeille v. Liberty Mutual* the self-insured employer challenged the Vermont APCD statute because the employer’s data, including personally identifiable information, would be submitted to the Vermont APCD thus potentially exposing the employer to breach of confidentiality claims.<sup>2</sup> The R.I. APCD has a unique structure, quite different from that in Vermont. Under R.I. law no personally identifiable information may be submitted to the APCD. Vermont’s statute was deemed by the Supreme Court in the *Gobeille* case to be preempted in part because of the burden of potential breach of fiduciary responsibility by Liberty Mutual should their employees’ information be impermissibly disclosed as a consequence of the reporting requirements that Vermont’s statute imposes on self-insureds. This is not a valid concern in R.I. The R.I. APCD has significantly more requirements for protecting the confidentiality of insured individuals than that of any other state, including Vermont. Because no individually identifiable information can be collected by the R.I. APCD, under the terms of the R.I. statute, no potential liability for breach of confidential personal information can be claimed by any entity (self-insured or fully insured) whose information is submitted by a R.I. insurer pursuant to the R.I. APCD statute. The R.I. APCD statute *expressly prohibits* the submission of any personally identifiable information. R.I. has gone to great lengths to build an identity lock box and ensure that no personally identifiable information is submitted to the database. Only de-identified information is submitted to the database after all personal identifiers have been stripped and replaced by a unique identifier assigned by a lock box vendor with no relationship to the database vendor. Not only does the R.I. APCD not impose any

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<sup>2</sup> As the majority in *Gobeille* noted: “Respondent [Liberty Mutual], concerned in part that the disclosure of confidential information regarding its members might violate its fiduciary duties under the Plan, instructed Blue Cross not to comply.” *Gobeille v. Liberty Mutual*, p. 4. (emphasis added)

reporting requirements on self-insured employers subject to ERISA, the structure of the R.I. APCD ensures that no burdens or potential liabilities such as those that were at issue for the self-insured employer in the *Gobeille* case are possible - further underscoring that no preemption by ERISA can apply to the R.I. APCD.

**3. The R.I. APCD is not pre-empted by ERISA because not only does it impose no reporting requirements on self-insureds governed by ERISA, it further gives every individual insured the right to opt out of the database.**

The R.I. statute is unique in the nation in that it requires that any enrollee in health insurance, whether through a self-insured entity or directly through an insurer, must be given the opportunity to opt out of the APCD and have no data, even though de-identified, submitted to the APCD. Once again, the R.I. statute requires insurers (not self-insured entities subject to ERISA) to notify enrollees that they have a right to opt out. Approximately 1-2% of Rhode Islanders have chosen to opt out. This participation in the opt out mechanism by Rhode Islanders demonstrates that this is a meaningful additional layer of protection for confidentiality, and this protection is placed by the R.I. statute directly in the hands of the individual insured, not the ERISA employer. This unique R.I. structure further demonstrates that there is no basis for federal preemption of the R.I. statute. ERISA-governed employers have no right to assert confidentiality rights on behalf of their employees, nor stand in the shoes of their employees in R.I. where the right to opt out of the APCD is guaranteed for the individual employee in Rhode Island's APCD structure.

**Conclusion:**

Rhode Island's APCD statute is fundamentally different than that of Vermont. Because R.I.'s APCD statute does not impose any requirements on employer health plans subject to ERISA; because R.I.'s APCD statute does not expose employer health plans subject to ERISA to any of the confidentiality concerns enumerated by Liberty Mutual in the *Gobeille* case; and because individual employees have an absolute right to opt out in R.I.; R.I.'s APCD statute is not subject to federal preemption by ERISA.