A Bitter Pill to Swallow

Supreme Court Denies ERISA Pre-Emption for Arkansas Law Affecting Pharmacy Benefit Managers

In a unanimous decision issued on December 10, 2020, the U.S. Supreme Court ruled that Arkansas Act 900 ("Act 900"), a state law regulating Pharmacy Benefit Managers (PBMs), is not pre-empted by ERISA. The *Rutledge v Pharmaceutical Care Management Association* decision may not appear to be relevant outside of the state of Arkansas, but it could have broader effects if other states enact their own controls over the amounts insurance carriers and third party administrators (TPAs, including PBMs) pay for prescription drugs and/or other medical care.

Background

In 2015, Arkansas adopted Act 900, which amended Arkansas Code §17-92-507 to require the following:

1. PBMs must reimburse Arkansas pharmacies at a price at least equal to the pharmacies' cost to buy drugs from a wholesaler.

2. PBMs must provide Arkansas pharmacies with an administrative appeal procedure to challenge reimbursement prices that are below drug acquisition costs. If a pharmacy could not have acquired the drug at a lower price from its typical wholesaler, a PBM must increase its reimbursement rate to cover the pharmacy's acquisition cost.

3. Pharmacies may decline to sell a drug to a customer if the PBM's reimbursement will be less than the acquisition cost.

The law primarily protects out-of-network pharmacies who do not have negotiated reimbursement rates with one or more PBMs. States are generally free to regulate this for fully insured medical/Rx plans and self-insured, non-ERISA coverage. The dispute in *Rutledge* was whether Arkansas' law is enforceable when a PBM acts as an administrator for a self-insured ERISA plan. The Pharmaceutical Care Management Association (PCMA), which represents several large PBMs, sued, alleging that Act 900 is pre-empted by (ERISA) and should therefore not apply to self-insured ERISA plans.

ERISA Pre-emption

With certain exceptions, ERISA is intended to "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [underlining added]." In *Egelhof*, the Supreme Court previous ruled, "[A] state law relates to an ERISA plan if it has a connection with or reference to such a

plan."[1] Since this and similar laws indirectly affect the amount self-insured ERISA plans pay for prescription drugs, they have historically be viewed as subject to ERISA pre-emption by directly or indirectly regulating plan administration. Here, the Supreme Court held the Arkansas law is not pre-empted by ERISA because:

1. The Arkansas law is merely a form of cost regulation with an incidental effect on plan administration if the PBMs' pass increased costs to ERISA plans. There is no mandate for substantive coverage and no effect on plan design. The law's appeals process is between the pharmacy and PBM and does not include any ERISA plan.

2. Act 900 does not refer to ERISA or exclusively apply to ERISA plans and applies to PBMs whether or not they act as administrator for prescription drug benefits under an ERISA plan.

What Does This Mean?

In addition to Arkansas, a number of other states have similar laws affecting PBMs, which should now generally be safe from ERISA pre-emption. These laws may translate into somewhat higher costs for plans and ultimately, plan participants. The *Rutledge* decision may lead to states enacting additional cost regulation laws for prescription drugs or other medical plan services and/or other laws with narrow, indirect effects on plan administration. *Rutledge's* real legacy will be felt if these other laws are successful relying on it as a precedent.

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[1] *Egelhoff v. Egelhoff*, 532 U. S. 141, 147.