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CLIENT ALERT

Supreme Court Sides with State Regulation of PBMs in Boost to Independent Pharmacies

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On Tuesday, December 8, the Supreme Court upheld Arkansas Act 900 (Act 900), which regulates the rates at which pharmacy benefits managers (PBMs) reimburse pharmacies for prescription drugs. The 8-0 decision (Justice Amy Coney Barrett abstained), marks a boundary on the broad scope of the Employee Retirement Income Security Act (ERISA), which preempts state laws that "relate to" employee benefit plans covered by the federal statute. 29 U.S.C. §1144(a).

Arkansas enacted Act 900 after many independent pharmacies claimed that they were forced to close at least partially because PBMs set reimbursement rates for prescription drugs at amounts lower than the cost at which the pharmacies acquired the drug. PBMs typically administer prescription drug benefits on behalf of employers and health plans, many if not most of which are ERISA plans. These local, often rural, pharmacies complained that, in addition to reimbursing them less than they paid for the drugs, PBM-affiliated pharmacies received reimbursement at significantly higher rates. Act 900 requires that PBMs reimburse prescription drugs at a rate equal to or higher than the pharmacy's acquisition cost.

Maximum allowable cost (MAC) lists are a tool that PBMs use when reimbursing pharmacies. MAC prices are typically the maximum price at which a PBM will reimburse a pharmacy for a generic drug or brand drug with a generic equivalent. Act 900 permits Arkansas pharmacies to refuse to dispense a drug to a patient if the reimbursement rate set by the PBM is lower than the price paid by the pharmacy to acquire the drug. Ark. Code Ann. §17–92–507(e). The Act also requires PBMs to timely update their MAC lists when wholesale prices increase, §17–92–507(c)(2), and provide pharmacies an administrative appeal procedure to challenge MAC reimbursement rates, §17–92–507(c)(4)(A)(i)(b).

The Pharmaceutical Care Management Association (PCMA), objected to Act 900 and brought suit in the U.S. District Court for the Eastern District of Arkansas, asserting that the Arkansas law "related to" or had an "impermissible connection to" ERISA plans and was thus preempted by ERISA's expansive preemption clause (29 U.S.C. § 1144(a)). PCMA argued that because employee health-insurance plans make routine use of PBMs to administer the prescription drug benefits that the plans provide, Act 900 constitutes an impermissible connection to ERISA plans by interfering with central matters of plan administration.

The PCMA was successful in its arguments before the District Court and the Eighth Circuit Court of Appeals, which leaned on its prior decision in *Pharm. Care Mgmt. Ass'n. v. Gerhart*, 852 F. 3d 722 (8th Cir. 2017), in siding with PCMA. In *Gerhart*, the Eighth Circuit struck down an Iowa statute similar to Act 900, holding that the Iowa law was preempted because it made "implicit reference" to ERISA by regulating PBMs that administer ERISA plan benefits, *Id*. at 729, and maintained an impermissible connection to ERISA plans because the appeal process, which allowed pharmacies to challenge PBM reimbursement rates, limited plan administrators' control over drug benefit calculations. *Id*. at 726, 731.

Overturning the Eighth Circuit's decision, the Supreme Court held that "State rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not preempted by ERISA." *Rutledge v. Pharm. Care Mgmt. Ass'n*, No. 18-540, 2020 WL 7250098, at *6 (U.S. Dec. 10, 2020) (citing *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.,* 514 U. S. 645, 668 (1995).

The Court also held that Act 900 "does not act immediately and exclusively upon ERISA plans" because the Act governs PBMs irrespective of whether they manage ERISA plans. *Rutledge* at *6-7. Nor are ERISA plans essential to the operation of Act 900. *Id*. at *7. For these reasons, Act 900 lacks the specific focus on and interference with ERISA plans that the federal statute seeks to curtail.

The Court's opinion marks an important development in ERISA preemption jurisprudence and provides guidance to states as they increasingly seek to regulate PBMs. To date, thirty-six states have passed laws similar to Act 900. Thirty-two states and the District of Columbia filed an *amicus* brief in support of Arkansas, warning that invalidating Act 900 would sow confusion and conflict regarding states' powers to regulate the cost of prescription drugs and other healthcare services at a time when health-care costs are rising. The case is an interesting contrast to a recent ERISA preemption decision where the Court found that ERISA preempted a Vermont law requiring health plans to disclose certain plan cost information to the state. The Court determined that gathering and reporting such information were matters central to plan administration such as recordkeeping, disclosure and reporting – areas preempted by ERISA. Had Act 900 mandated a similar duty on PBMs to track and report certain cost information the result may have been different. (*Gobeille v. Liberty Mut. Ins. Co*., 136 S. Ct. 936 (2016)).

Despite PBM's loss at the Court and significant public pressure on the drug supply chain to reign in drug prices, it bears watching over time whether Act 900, and similar laws, will negatively impact drug prices. The PCMA released a statement after the release of the *Rutledge* opinion saying, "As states across the country consider this outcome, we would encourage they proceed with caution and avoid any regulations around prescription drug benefits that will result in higher health care costs for consumers and employers."

If the Act results in higher drug reimbursement, it could lead to higher costs to health plans, employers or even employees or health plan members. On the other hand, complexity in the pricing of drugs at various stages of the distribution cycle makes it hard to predict the specific impact of Act 900, although such impact is likely to include consequences for plans, employers and employees that were not considered by the legislature when it passed the Act. Whatever else its impact may be, Act 900 and similar legislation in other states is almost certain to complicate the negotiation and administration of prescription drug plans and plan benefits that are offered in multiple states or nationwide.

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