

CLIENT ALERT

Ninth Circuit Addresses Medicare Preemption in New *Uhm v. Humana* Opinion

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On August 30, the U.S. Court of Appeals for the Ninth Circuit issued its long-awaited decision in *Uhm v. Humana, Inc.*, No. 06-35672. This decision could have important ramifications for litigation involving Medicare Advantage and Part D plans, particularly because it is one of the few Circuit Court decisions addressing Medicare preemption since Congress revised the preemption statute in 2003.

The case involved a lawsuit brought by Medicare beneficiaries against a Medicare Part D provider. The plaintiffs alleged that the provider made oral and written misrepresentations in marketing the plan. When the plaintiffs did not receive their desired prescription drug coverage by the expected date, the plaintiffs filed a lawsuit in the U.S. District Court for the Western District of Washington claiming breach of contract, violation of state consumer protection statutes, unjust enrichment, fraud, and fraud in the inducement. The district court dismissed all the claims, concluding that CMS regulations and the administrative process governed the plaintiffs' grievances and that the plaintiffs' state claims were preempted under the Medicare Act. The Ninth Circuit has now affirmed that decision, basing its decision on the plaintiffs' failure to exhaust their administrative remedies and the Medicare Act's express preemption provision.

Exhaustion of Administrative Remedies

The Ninth Circuit first addressed the jurisdictional issue of whether the plaintiffs were required to exhaust their administrative remedies under the Medicare Act before filing their lawsuit. Per the Court, under the Medicare Act and U.S. Supreme Court precedent, a plaintiff may only seek judicial review for cases "arising under" the Medicare Act after he/she exhausts the Medicare Act's administrative review process. And by their own admission, the plaintiffs in *Uhm* did not pursue any of their claims through the Medicare Act's administrative processes. Instead, they argued that the exhaustion requirement was inapplicable because their claims did not arise under the Act.

The Ninth Circuit, however, found that the plaintiffs' breach of contract and unjust enrichment claims did arise under the Medicare Act. The Court noted that a claim for Medicare benefits arises under the Act, even if "cleverly concealed" or "creatively disguised" as something else. The Court also concluded that a state law claim could arise under the Act. Thus, because at bottom the plaintiffs' breach of contract and unjust enrichment claims were about the denial of Medicare benefits, they arose under the Medicare Act and the plaintiffs were required to exhaust their administrative remedies before filing a lawsuit. (By contrast, the Court concluded that the plaintiffs' consumer protection act and fraud claims did not arise under the Medicare Act because they were collateral to any claim for benefits and could be proven without regard to any benefits provisions in the Medicare Act.)

Medicare Preemption

The Ninth Circuit then addressed the scope of Medicare preemption as applied to the plaintiffs' consumer protection act and fraud claims. At the outset, the Court acknowledged that CMS standards supersede any State law or regulation "with respect to" a prescription drug plan offered by a PDP sponsor under the Medicare Act's express preemption provision. 42 U.S.C. § 1395w-

112(g) (the Part D preemption provision); *see also* 42 U.S.C. §1395w-26(b)(3) (the Part C preemption provision). The Court also affirmed that Congress intended to broaden the scope of Medicare preemption in 2003 when it enacted the Medicare Prescription Drug, Improvement, & Modernization Act.

With respect to the plaintiffs' consumer protection act claims, the Court determined that they were preempted by the extensive CMS regulations governing plan marketing materials, because those claims were based on alleged misrepresentations made in written enrollment forms and in oral statements by employees who were marketing the plan. The Court further concluded that the state consumer protection acts upon which the plaintiffs based their claims were "inconsistent" with CMS's standards because they were much less specific and did not provide for CMS review. The Court explained that allowing a plaintiff to bring a claim based on a state consumer protection statute for "deceptive" practices could result in a court finding certain materials deceptive or misleading, even if CMS had approved those same materials, which could undermine the Medicare Act's standards. The Court specifically applied this reasoning to New York's and Washington's consumer protection statutes, but noted that the "same result is possible under the other state consumer statutes on which the Uhms rely" (the complaint had also referenced consumer protection statutes in California, Delaware, Florida, Illinois, Louisiana, Minnesota, New Jersey, Pennsylvania, and Texas).

The Court similarly determined that the plaintiffs' fraud and fraud in the inducement claims were expressly preempted by the Medicare Act, noting that the type of tort action raised by the plaintiffs could be inconsistent with (and therefore undermine) the standards established under the Medicare Act. In so holding, the Court also concluded that common law causes of action, not just positive state enactments, could be expressly preempted by the Medicare Act's preemption provision.

[Click here for a copy of the Court's opinion.](#)

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