

CLIENT ALERT

U.S. Supreme Court Upholds Kentucky "Any Willing Provider" Laws that Restrict HMOs' Ability to Select Providers

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In a unanimous decision that limits the ability of HMOs to be selective about the providers in their networks, the United States Supreme Court upheld two Kentucky laws that required health insurers to admit any provider willing to meet the terms and conditions set by the insurer. *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. ____ (2003), No. 00-147 (April 2, 2003). <http://supct.law.cornell.edu/supct/html/00-1471.ZS.html>. The Kentucky Association of Health Plans, on behalf of seven health plans in Kentucky, had argued that the laws were preempted by the Employee Retirement Income Security Act ("ERISA"). Justice Scalia, writing for the Court, disagreed.

The Court's decision flatly recognizes, "No longer may Kentucky insured seek insurance from a closed network of health-care providers in exchange for a lower premium." The Court's unanimous decision resolves legal uncertainty about the basic applicability of AWP laws to HMO and insurance plans offering coverage to employee benefit plan participants, but will put the policy issue squarely in the lap of legislative bodies as these laws are proposed and come under review. The decision continues a trend of Supreme Court rulings narrowing, or declining to expand, the scope of ERISA preemption of state laws.

Kentucky's so called "Any Willing Provider ("AWP") laws, passed in 1994 and amended in 1997, forbid health insurers from discriminating against any provider located within the plan's geographical coverage area "who is willing to meet the terms and conditions for participation established by the health insurer." Proponents of AWP laws argue that they provide patients with more options when choosing a physician or other provider. Opponents argue that by impairing the ability of a health insurance plan to limit the number of physicians in their networks in return for discounted rates, AWP laws actually increase the cost of health care to consumers.

In 1997, a group of plans challenged the Kentucky laws in federal court, arguing that the laws were preempted by ERISA. ERISA preempts all state laws "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). ERISA does have a "savings clause", however, by which state "law[s]...which regulat[e] insurance, banking or securities," are saved from preemption. 29 U.S.C. § 1144(b)(2)(A). The District Court ruled that the Kentucky laws, although relating to health plans, actually regulated insurance and were saved from ERISA preemption. A divided Sixth Circuit Court of Appeals upheld the District Court in 2000. The Supreme Court held the case until after it had ruled on whether an Illinois law was preempted by ERISA in *Rush Prudential HMO, Inc. v. Moran* in 2002. The Court heard arguments on the Kentucky laws in January 2003, and issued its unanimous ruling on April 2, 2003.

The health plans first argued that Kentucky's AWP laws fell outside the scope of the ERISA savings clause because the laws were not "specifically directed" towards the insurance industry. The plans claimed the laws also regulated physicians who seek to form and maintain provider networks with HMOs. Previous Supreme Court decisions, including *Rush* in 2002, had held that a state law must be "specifically directed" towards the insurance industry to fall within the ERISA savings clause. Here, the Court disagreed, finding that the Kentucky laws, on their face, do nothing to prevent physicians in Kentucky from forming provider

networks. The Court acknowledged that the laws would have the consequence of preventing entities outside the insurance industry such as providers from being able to enter into agreements with Kentucky insurers. But the Court found that the laws were not directed at these outside entities. "Regulations 'directed toward' certain entities will almost always disable other entities from doing, with the regulated entities, what the regulations forbid," wrote Justice Scalia. "This does not suffice to place such regulation outside the scope of ERISA's savings clause."

The health plans also argued that Kentucky's AWP laws fell outside the savings clause because the laws do not regulate an insurance practice, as they do not control the actual terms of insurance policies. Instead, they argued that the Kentucky laws focused on the relationship between an insurer and third-party providers. In the *Rush* decision in 2002, the Court held that insurers must be regulated "with respect to their insurance practices" in order for the insurance savings clause to apply. In support of their argument, the health plans relied on *Group Life & Health Ins. Co. v. Royal Drug Co.*, a 1979 Supreme Court case that held that third-party provider arrangements between insurers and pharmacies were not "the business of insurance" under the McCarran-Ferguson Act.

The Court, however, found that unlike the McCarran-Ferguson Act, which is concerned "with how to characterize conduct undertaken by private actors," the ERISA savings clause is concerned with "how to characterize state laws in regard to what they 'regulate.'" The Kentucky laws impose conditions on the right to engage in the business of insurance. "Whether or not an HMO's contracts with providers constitute 'the business of insurance' under *Royal Drug* is beside the point," wrote Justice Scalia.

The Court also emphasized that in order to be covered by the savings clause, a state's conditions on the right to engage in the business of insurance "must also substantially affect the risk pooling arrangement between the insurer and the insured." Otherwise, any state law aimed at insurance companies could be considered to fall within the savings clause. The health plans had argued that the Kentucky laws were just such laws -- that by not regulating the terms of the insurance policies, the laws did not concern the business of insurance. The Court disagreed. "We have never held that state laws must alter or control the actual terms of insurance policies to be deemed 'laws...which regulat[e] insurance' under [the savings clause]," the Court noted. "It suffices that they substantially affect the risk pooling arrangements between insurer and insured."

Finally, the Court sought to clarify some of the confusion it acknowledged creating in the lower federal courts by referring to three factors for determining whether a certain practices were the "business of insurance" under the McCarran-Ferguson Act in its *Rush* decision. "Today we make a clean break from the McCarran-Ferguson factors," Justice Scalia wrote. The Court adopted a new standard for determining whether a state law meets the ERISA savings clause. "First, the state law must be specifically directed toward entities engaged in insurance. Second...the state law must substantially affect the risk pooling arrangement between the insurer and the insured."

Dictum in a footnote of the Court's opinion could be read as implying that the AWP laws could be applied to HMOs even where they are not issuing coverage, but are only offering provider network access to self-insured plans. That issue was not before the Court, but any attempt to apply the AWP laws in those settings could directly impact the operation of self-insured health plans operating outside the reach of state insurance regulation.

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