Preemption – It's Not Just for ERISA Anymore

A Primer on MMA Preemption

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HOOPS2008

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Medicare Preemption – Roadmap

- Pre-2003 Medicare preemption rule
- MMA statute & regulations
- Legislative & regulatory guidance
- Judicial interpretations
- The future…

Pre-MMA Preemption

- 42 U.S.C. § 1395w-26(b)(3), pre-2003
  - General Preemption – state law preempted if inconsistent with federal standard
  - Specific Preemption – 4 specific areas preempted

Pre-MMA Preemption

- General Preemption:
  - "The standards established under this subsection shall supersede any State law or regulation . . . with respect to M+C plans which are offered by M+C organizations under this part to the extent such law or regulation is inconsistent with such standards."

Pre-MMA Preemption

- Specific Preemption:
  - State standards relating to the following are superseded:
    - Benefit requirements
    - Requirements relating to inclusion or treatment of providers
    - Coverage determinations
    - Requirements relating to marketing materials and summaries and schedules of benefits

MMA Preemption Provision

- Current statute:
  - "The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part."

MMA Preemption Provision

- The **standards** established under this part shall supersede any State law or regulation (other than State **licensing laws** or State laws relating to **plan solvency**) with respect to MA plans which are offered by MA organizations under this part.

MMA Preemption Provision

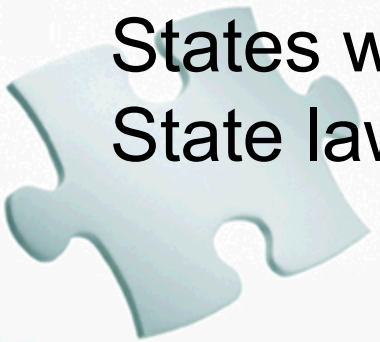
- MA Plans:
  - 42 U.S.C. § 1395w-26(b)(3)
  - 42 C.F.R. § 422.402
- PDPs (applies "in the same manner"):
  - 42 U.S.C. § 1395w-112(g)
  - 42 C.F.R. § 423.440

Legislative/Regulatory Guidance

- Generally:
  - Reverses the presumption (state laws are now presumed to be preempted)
  - Congress intended for the MA program to operate solely under Federal rules, except for licensure/solvency
  - State laws preempted in areas where Congress intended CMS to regulate

Legislative/Regulatory Guidance

- "In areas where we have neither the expertise nor the authority to regulate, we do not believe that State laws would be superseded or preempted. For example, State environmental laws, laws governing private contracting relationships, tort law, labor law, civil rights laws, and similar areas of law would, we believe, continue in effect and PDP sponsors in such States would continue to be subject to such State laws." (69 Fed. Reg. 46696)



Legislative/Regulatory Guidance

- Narrow Exceptions:
  - "States may not use licensure or solvency requirements as an indirect means to impose health plan regulations on MA plans."

(70 Fed. Reg. 4664)

Legislative/Regulatory Guidance

- Licensing Exception:
  - Limited to requirements for becoming state licensed (ex: filing articles of incorporation)
  - Meant to cover requirements re: whether the organization is fit to serve as a health insurer, ***not how the entity operates*** its insurance upon receipt of a license

Legislative/Regulatory Guidance

- Solvency Exception:
  - "Federal law does not preempt State solvency requirements. States may decline to license an MA plan to operate in a State if the State determines that the organization offering the MA plan does not meet State solvency requirements. The State may also elect to limit the service area for which the plan is licensed based on the financial resources (i.e., solvency) of the MA organization proposing to offer the MA plan." (CMS Manual, Ch. 10)

Judicial Interpretations

- Substantive Areas
  - Solvency
  - Tort Actions
  - Benefits
  - Marketing

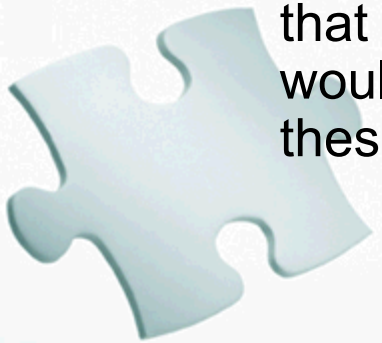
- Jurisdiction
  - Federal jurisdiction & removal

Litigation – Solvency

- *State of Florida v. Universal Health Care Ins. Co.,* No. 4:07cv176-SPM/WCS (N.D. Fla. Dec. 5, 2007)
  - Proposed liquidation of Universal Health Care for failure to meet Florida's surplus requirements
  - Equates insolvency with impairment of surplus
  - "In Florida's regulatory scheme, the requirement that an insurer maintain a level of surplus is a regulation relating to plan solvency."
  - **No preemption** (Also no federal jurisdiction)

Litigation – Tort Actions

- *Rumage v. Bergman*, No. 07-CA-135-WWJ (W.D. Tex. Jan. 16, 2008)
  - Plaintiffs alleged various tort claims, including wrongful death & negligence
  - **No preemption** – court held that Congress did not intend to preempt state tort claims
    - "Congress did not intend for our regulations to supersede each and every State requirement applying to plans—particularly those for which the Secretary lacks expertise and authority to regulate. Thus, we did not believe, for example, that wrongful death or similar lawsuits based upon tort law would be superseded by the appeals process established in these regulations." (citing 70 Fed. Reg. 4362)



Litigation – Benefits

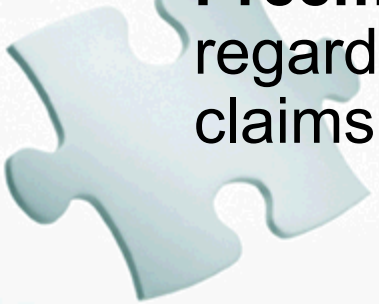
- *Masey v. Humana, Inc.*, 2007 WL 236077 (M.D. Fla. Aug. 16, 2007)
  - Plaintiff brought state law claims for breach of contract & violations of state consumer protection law, alleging that chemo drugs were covered under Part B
  - Motion to dismiss filed, asserting plaintiff's claims preempted by federal law governing Medicare benefits
  - **No preemption** – court held that plaintiff's claims did not relate to any state law or regulation relating to MA plans

Litigation – Marketing

- *Clay v. Permanente Medical Group, Inc.*, 2007 WL 4374273 (N.D. Cal. Dec. 14, 2007)
- *Drissi v. Kaiser Foundation Hospitals, Inc.*, 2008 WL 54382 (Jan. 3, 2008)
  - Motions to compel arbitration
  - Allegations re: inadequate patient care, wrongful death suit
  - MA plan election forms and Evidences of Coverage (EOCs) contained arbitration clauses
  - Plaintiffs argued arbitration clauses unenforceable (Cal. state law imposed certain standards re: arbitration clauses)
  - **Preemption** – election forms and EOCs constituted marketing materials falling within the Medicare law's purview

Litigation – Marketing

- *Uhm v. Humana, Inc.*, 540 F.3d 980 (9th Cir. 2008)
  - Plaintiffs enrolled in prescription drug plan, relying on defendants' advertising materials
  - Plaintiffs brought action in federal court, claiming they were unable to access their drug benefit (raised claims for breach of contract, state consumer protection statutes, unjust enrichment, fraud, etc.)
  - Motion to dismiss based on preemption argument
  - **Preemption** – court held that the Part D standards regarding marketing materials covered plaintiffs' claims



Litigation – *Uhm* Implications

- What is a "standard" as that term is used in the MMA preemption provision?
  - *Uhm*, footnote 9 implies narrow interpretation
    - "Although the term 'standard' is not defined in the Act, at the narrowest cut, a 'standard' within the meaning of the preemption provision is a statutory provision or a regulation promulgated under the Act and published in the C.F.R."

Litigation – Jurisdiction

- **Alabama Federal Cases**
  - Southern District of Alabama:
    - *Dial v. Healthspring of Alabama, Inc.*, 2007
    - *Bolden v. Healthspring of Alabama, Inc.*, 2007
    - *Spencer v. Coventry Health & Life Ins. Co.*, 2008
  - Middle District of Alabama:
    - *Harris v. Pacificare Life & Health Ins. Co.*, 2007
    - *Lassiter v. Pacificare Life & Health Ins. Co.*, 2007
    - *Williams v. VIVA Health Inc.*, 2008

Litigation – Jurisdiction

- *Dial,* 541 F.3d 1044 (11th Cir. 2008)
  - Claims for breach of fiduciary duty, fraud, negligence, etc. arising from alleged MA marketing abuses
  - Complaint explicitly stated it was not raising any claims pursuant to Federal law or that would give rise to Federal jurisdiction
  - Case removed, then motion to remand
  - Does complete preemption doctrine apply? – ultimately not addressed

Litigation – Jurisdiction

- *Dial (continued)*
  - Removal under 28 U.S.C. § 1441(b) for "a claim or right arising under the Constitution, treaties or laws of the United States"
  - The Medicare Act "strips federal courts of primary federal-question subject matter jurisdiction over claims that arise under that Act"
    - Because it only provides for an administrative hearing before the HHS Secretary and for judicial review of the Secretary's final decision in certain instances
  - Therefore, **no federal jurisdiction**

The Future of Medicare Preemption

- Future court cases
- MIPAA regulation:
  - Must only use state-licensed agents & brokers
  - Must comply with any state appointment laws
  - Must report agent/broker terminations to the state
  - Must comply with state requests for information regarding the performance of an agent/broker

The Future of Medicare Preemption

- Continued Congressional inquiries (marketing)
- NAIC White Paper:
  - "State insurance regulators and consumer groups strongly recommend that the state regulatory preemption contained in MMA be amended so that states have the ability and thereby the regulatory authority to enforce appropriate state laws on all marketing practices of insurance companies that are MA and Part D plan sponsors."

Questions?

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