WINSTON & STRAWN LLP

CLIENT ALERT

ERISA Does Not Preempt Arkansas State Law That Regulates PBMs

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On December 10, 2020, the U.S. Supreme Court (the Court) unanimously ruled that the Employee Retirement Income Security Act of 1974 (ERISA), does not preempt an Arkansas state law requiring pharmacy benefit managers (PBMs) to reimburse Arkansas pharmacies at a price equal to or higher than the price the pharmacy paid to buy the drug from a wholesaler. This decisive 8-0 ruling clarifies the limits of ERISA preemption, and follows existing Court precedent addressing how state laws, with an "indirect economic influence" on ERISA plans, are not subject to preemption by ERISA. Justice Amy Coney Barrett did not participate in consideration of the case.

Overview of Arkansas Law

Arkansas Act 900 (Act 900) imposes certain requirements on the reimbursement policies of PBMs. Generally, PBMs administer prescription-drug plans as an intermediary between pharmacies and health plans. PBMs reimburse pharmacies for the cost of drugs provided to prescription-drug plan participants according to reimbursement rates set by the PBM. The PBM then seeks reimbursement from the plan at a different contractual reimbursement rate. The PBM reimbursement rates are not necessarily connected to the pharmacy's cost to acquire the drug, so a pharmacy may end up paying more for a drug than it would receive in total from the plan participant copayment and PBM reimbursement. Arkansas sought to remedy this concern for pharmacies by adopting Act 900, which prohibits PBMs from reimbursing pharmacies for prescription drugs at rates below the drugs' wholesale acquisition costs, gives pharmacies the discretion not to sell prescription drugs that are not reimbursed at an amount at least equal to their acquisition cost, and establishes appeal procedures for pharmacies to challenge reimbursement rates.

Supreme Court Decision

In *Rutledge v. Pharmaceutical Care Management Association*, Pharmaceutical Care Management Association (PCMA), a trade association for PBMs, argued that Act 900 has an impermissible connection to ERISA plans and, therefore, should be preempted. In particular, PCMA argued that Act 900: (1) affects plan design by mandating a particular pricing methodology and appeal procedure; (2) interferes with central matters of plan administration by allowing pharmacies to decline to dispense a prescription if the PBM reimbursement will be less than the cost of acquisition; and (3) impacts nationally uniform administration by creating operational inefficiencies.

Relying on precedent, the Court overturned a 2018 decision by the Eighth Circuit, holding that Act 900 was not preempted by ERISA because it has neither an impermissible connection with nor reference to ERISA. The Court

found that Act 900's requirements established price floors and permissible state-law dispute resolution mechanisms without requiring plans to provide any particular benefit to any particular beneficiary in any particular way. In the majority opinion, Justice Sotomayor wrote that "ERISA does not preempt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." The Court also noted that "indirect economic influence," such as the creation of inefficiencies or increase in costs, is not enough to trigger ERISA preemption, citing the Court's prior decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, which upheld a New York surcharge on hospital billing rates on certain health plans. Finally, the Court also concluded that Act 900 does not "refer to" ERISA because it applies to PBMs whether or not they manage an ERISA plan.

Winston Takeaway

The case is a win for state legislatures and state insurance regulators that seek to protect the competitive advantage of independent and rural pharmacies and implement laws regulating PBMs. The case is also a win for independent pharmacies that argued the reimbursement practices of PBMs favored their affiliated pharmacies. While one of the arguments of the state was that the law would help control escalating drug costs, the decision may, in fact, lead to an increase in drug costs for employer-sponsored plans if PBMs are required to reimburse local pharmacies at rates billed to the plan, and PBMs then pass those increased costs on to plans. There is also a risk that "decline to dispense" provisions like those in Act 900 could leave plan participants, especially those in areas with limited pharmacy choices, with the burden of either paying out of pocket for prescriptions or traveling further to find a pharmacy willing to fill the prescription. Many states have already enacted or are considering laws regulating the way PBMs and private prescription drug payers, such as benefit plans, set and use MAC prices. Plan sponsors should closely monitor developments in this area and carefully review PBM agreements for changes related to drug pricing, pharmacy networks, and exclusivity provisions.

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