

Locke Lord QuickStudy: Supreme Court Rules ERISA Does Not Preempt Arkansas' PBM Regulation ?

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Recently, the Supreme Court released its decision in *Rutledge v. Pharmaceutical Care Management Association*.

The case considers whether the Employee Retirement Income Security Act of 1974 (“ERISA”) preempts an Arkansas state law regulating pharmacy benefit managers’ (“PBMs”) generic prescription drug reimbursement rates. The Supreme Court reversed and held that Arkansas’ state law regulating PBMs is not preempted by ERISA, clearing the way for stricter regulation of PBM pricing which may differ from state-to-state.

What Are PBMs and What Does This Ruling Have to Do with ERISA?

Insurance companies that issue fully insured ERISA group health plans and employer plan sponsors of self-funded ERISA group health plans frequently contract with PBMs to manage and administer the prescription drug component of the plan benefits.¹ To administer prescription drug benefits, PBMs maintain pharmacy networks for ERISA group health plans and negotiate drug reimbursement rates with their network pharmacies which may not be tied to the pharmacies’ drug acquisition costs from wholesalers. In some instances, when a participant in an ERISA group health plan fills a generic prescription drug at a participating pharmacy, the PBM reimburses the participating pharmacy for the prescription at the PBM’s maximum allowable cost (“MAC”), less the amount the participant is required to pay out of pocket. The PBM then bills the ERISA group health plan at the ERISA plan’s negotiated rate, which may be a fixed rate that might be higher than the amount the PBM reimbursed the pharmacy or at a pass-through rate where the PBM bills the actual amount the PBM reimbursed the pharmacy plus administrative fees.

Arkansas’ Act 900

In response to concerns that some Arkansas pharmacies are having trouble covering their costs due to wholesale prices being in excess of the MAC rate for certain generic prescription drugs, Arkansas passed Act 900 to regulate PBMs’ MAC lists. See [Act 900](#). Act 900 requires PBMs to reimburse Arkansas pharmacies at a rate at least equal to the price the pharmacy paid for the generic prescription drug and to update their MAC lists whenever generic prescription drug wholesale prices increase. Act 900 also dictates that PBMs which operate in Arkansas must provide appeal procedures for pharmacies to challenge reimbursement rates. If a PBM does not reimburse the pharmacy at a rate at least equal to the pharmacy’s acquisition cost for the generic prescription drug, Act 900 allows the pharmacy to decline selling the generic prescription drug to an individual (such as a participant in an

ERISA group health plan).

History of *Rutledge*

As a result of the enactment of Act 900, the Pharmaceutical Care Management Association (“PCMA”), which represents some of the largest PBMs in the country, filed suit against the state of Arkansas arguing that Act 900 is preempted by ERISA. ERISA preemption depends on whether or not a state law has an “impermissible connection” with ERISA plans or “acts immediately and exclusively upon ERISA plans.” More simply, in the words of Justice Thomas’ concurring opinion, the “plain text of ERISA suggests a two-part preemption test: (1) do any ERISA provisions govern the same matter as the state law at issue, and (2) does that state law have a meaningful relationship to ERISA plans?”

The PCMA argued that Act 900 has an impermissible connection with ERISA plans since enforcement of the Act would directly affect the administration and structure of the prescription drug component of ERISA health plans, because the act mandates a particular pricing methodology for prescription drug benefits and creates an administrative appeal procedure for pharmacies. The PCMA reasoned that this pricing methodology would affect ERISA plan design, creating an “impermissible connection” with an ERISA plan. The PCMA also argued that allowing pharmacies to decline filling a prescription when a PBM’s reimbursement of that drug will be less than the pharmacy’s cost of acquisition effectively denies benefits to ERISA plan beneficiaries. This reasoning prevailed in the district court and the Eighth Circuit Court of Appeals.

Upon review, however, the Supreme Court held that Act 900 does not have an “impermissible connection” with ERISA plans because it is a rate regulation that does not force group health plans to adopt any particular plan design. The Court noted that when a statutory scheme only increases costs or alters incentives for ERISA plans, but does not force the plan to adopt any particular plan design, such scheme is normally protected from ERISA preemption. The Court also held that Act 900 does not “act immediately and exclusively upon ERISA plans” since PBMs also contract with other health plans that are not covered by ERISA and Act 900 does not reference the word ERISA. Therefore, Act 900 would apply to PBMs whether or not the plans they service fall under ERISA and as a result Act 900 does not act immediately and exclusively upon ERISA plans.

Implications of *Rutledge* Decision

For ERISA group health plans with a prescription drug component that utilizes a PBM, plan sponsors should be aware that the Court’s opinion in *Rutledge* may lead to patchwork state-level regulation of PBM pricing, which must be taken into consideration by the plan sponsors when reviewing the design of their ERISA health plans, renewing or entering into a PBM contract, and importantly when supervising the PBM. Ultimately, this type of increased pricing regulation could impact ERISA plan sponsors as a result of the increase in drug costs and plan administration costs, updates to summary plan descriptions to describe potential state law processes that may impact benefits, updates to plan year cost budgets, and determinations of whether increased cost-sharing by participants is needed in states in which these types of regulations apply.

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1. PBMs also administer prescription drug benefits for insurance products offered in the individual market, Medicare Advantage plans, and managed Medicaid plans, as well as for non-electing church or governmental group health plans. However, this Quick Study is focused only on the impact of ERISA preemption on Act 900 with respect to ERISA-covered group health plans, which was at issue in *Rutledge*.

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