VOL. 34, NO. 1 SPRING 2021

BENEFITS LAW JOURNAL

From the Editor

U.S. Supreme Court: ERISA Preemption Leaves Room for State Innovation

The Supreme Court is allowing states to develop innovative solutions to improve the health and retirement wellbeing of its citizens. The Court's most recent ERISA preemption case, *Rutledge v. Pharmaceutical Care Management Association*, maintains the sensible approach of enabling states to regulate benefits, even in areas that may touch ERISA plans. Given the difficulties in crafting a national response to the numerous unresolved challenges – including high medical costs, retirement insecurity and lack of emergency savings – states can lead the way.

Rutledge involved an Arkansas law designed to protect pharmacies, especially in rural and poorer regions, from losing money filling prescription for health care plan participants. The particular problem was that pharmacy benefit managers ("PBMs") had fixed reimbursement rates for each drug – set in negotiations between the PBM and various health plans, that were sometimes lower than what the pharmacy paid for the drug. While lower pricing helped plan participants, money-losing deals threatened some pharmacies ability to survive. So, Arkansas enacted Act 900 setting minimum prices based on what the drug store paid for the drugs. Act 900 mandated frequent updates to PBM reimbursement rates, established an administrative appeals process and gave pharmacy the right to decline to fill a script, to keep the pharmacies afloat. An association of PBMs sued claiming the law was preempted by ERISA.

The district court and the U.S. Court of Appeals for the Eighth Circuit (having previously ruled against a similar law) agreed that Act 900 was preempted by ERISA. A unanimous Supreme Court reversed 8-0. (Justice Barrett did not take part in the decision.)

As readers of *Benefits Law Journal* know, ERISA preempts "any and all state laws which . . . relate to an employee benefit plan" covered by ERISA. Writing for the Court, Justice Sotomayor began by examining the goals of ERISA, that participants receive their promised benefits and, secondarily, that plan sponsors and employers have a uniform body of regulations governing plan operations. Crucially, *Rutledge* emphasized that it takes more than a state law simply affecting benefits to trigger preemption. Instead, the law must "force [ERISA] plans to adopt [a] particular benefit scheme of substantive coverage" or "act immediately and exclusively upon ERISA."

Act 900, of course, affected ERISA health plans. If PBM reimbursements to pharmacy were increased, it likely would increase plan expenses. Complying with the Act's appeals process also could increase administrative costs and subject PBMs to various and inconsistent state regulations. But, Act 900 applied to all health plans, including non-ERISA Medicare, Medicaid, and other government programs. And, the Court stated that simply increasing ERISA plan costs does not trigger preemption. It takes much more, such as mandating a particular benefit or an operating procedure that directly affects a "central aspect of plan operation."

I have no opinion on whether the Arkansas law is wise; prescription drug pricing is a mystery to me. That U.S. drug prices and, indeed, overall health costs are the highest in the world and a number of people still lack coverage, suggests that we have a serious unsolved problem.

That's where the states come in. As Justice Louis Brandeis famously noted over one hundred years ago, states are the "laboratories of democracy." With benefit issues like health care, savings and retirement security, states should be allowed to experiment with different solutions to improve outcomes. Some experiments will undoubtedly fail. But, some, like the successful auto-IRA savings programs in Oregon, Illinois, and California, will succeed and can be copied by other states and even serve as the basis of a nation-wide solution. Kudos to the Supreme Court for allowing states to try.

The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.

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