Weekly Checkup

Preemption Redemption

JACKSON HAMMOND | AUGUST 18, 2023

On Tuesday, the United States Court of Appeals for the 10th Circuit released its long-awaited decision on the PCMA v. Mulready case regarding the legality of an Oklahoma law regulating pharmacy benefit managers (PBMs). **The court ruled in favor of PBMs, declaring that the Oklahoma law violated federal law on private insurance regulation. Let's dive into the details about the case and why this is a win for the private insurance system.**

First, the basics of the Mulready case: Back in 2019, the Oklahoma state legislature passed the Patient's Right to Pharmacy Choice Act. Among other things, the act had four provisions that limited PBMs' ability to steer patients toward specific pharmacies. First, PBMs had to ensure 90 percent of covered individuals were within five miles of a participating retail pharmacy and that 70 percent were within 15 miles of a participating retail pharmacy in rural areas, and mail-order pharmacies couldn't be used to meet those standards. Second, PBMs and insurers could not provide discounts of any kind to incentivize patients to use certain in-network pharmacies over other in-network pharmacies. Third, PBMs could not deny preferred participation status to any pharmacy if the provider was willing to accept the same contract as other preferred-status pharmacies. Finally, PBMs could not deny, limit, or cancel a pharmacy's contract if a dispensing employee was on probation with the Oklahoma State Board of Pharmacy. **In short, PBMs had to have a broad network of pharmacies, couldn't incentivize beneficiaries to use cheaper in-network pharmacies, couldn't deny or negotiate individual contracts with pharmacies that wanted preferred status, and couldn't even reject or terminate contracts with pharmacies that have dispensing providers on probation by the state.**

The 10th Circuit sided with the PBMs, reversing a previous lower court decision, and ruled the Oklahoma legislation violated both the Employee Retirement Income Security Act (ERISA) preemption clause and Medicare Part D preemption. As the

Weekly Checkup has noted previously, ERISA preempts state laws that apply to "a central matter of plan administration or interfere with nationally uniform plan administration" of self-insured plans. Oklahoma's law clearly does that: The ability to choose the provider is crucial to plan design as provider choice dictates cost, and cost dictates the type and amount of benefits that can be provided. Provider choice is very much a central matter of plan administration. The 10th Circuit said as much, stating, "As we see it, all PBMs could offer Oklahoma ERISA plans is a single-tiered network with uniform copayments, unrestricted specialty-drug access, and complete patient freedom to choose a brick-and-mortar pharmacy. These network restrictions are quintessential state laws that mandate benefit structures. ERISA forbids this." Oklahoma has the option to appeal the case, so this saga may not be over.

Why does all this matter? Well, ERISA preemption is the backbone of our private-market health care system. Don't just take this author's word for it; the left is explicit that "ERISA's expansive preemption provision creates a narrow, risky path for state regulation to capture the employer health care expenditures crucial for financing a single-payer system." ERISA's preemption makes providing health care feasible for employers who otherwise could not afford the cost of complying with 50 different state regulations, making benefits worse or having them disappear altogether. As I've argued before, the worse the options in the employer market get, the more people will switch to – or be forced onto – the Affordable Care Act marketplace and Medicaid, and with that comes increased political pressure to continually enhance subsidies and benefits in those programs. **While the 10th Circuit decision is a welcome one, it cannot be relied upon. There is a growing push to challenge ERISA preemption by both states and critics.** Both the 10th Circuit in Mulready and the Supreme Court in its *Rutledge* decision have made clear how to avoid this: **Congress must clarify and strengthen ERISA preemption.**