Weekly Checkup

The Next Threat to Private Insurance

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Recently, I wrote an insight discussing ways to increase employer-sponsored insurance (ESI) offerings among small businesses as a bulwark against the creeping federal takeover of health coverage. In recent years, however, **a new issue threatens coverage options at firms: the weakening of the Employee Retirement Income Security Act (ERISA) of 1974 preemptions for employer health plans, namely through a couple of federal court cases**. Let's dive into the details of those cases and what they may mean for the future of ESI.

First, a quick background on ERISA and ERISA preemption. ERISA is the federal law regulating private-sector employee benefit plans. ERISA preemption allows plans subject to ERISA regulations to be exempt from state regulations related to the employee benefit plan. If you're a large, multi-state employer, this preemption is crucial: One regulatory scheme is far easier to comply with than 50. **Over the years, states have routinely tried various ways to challenge this preemption, and *in general*, the Supreme Court has struck down these laws if they have "a connection or reference to" an ERISA plan, meaning these laws applied to "a central matter of plan administration" or "interfer[ed] with nationally uniform plan administration."**

That "in general" qualifier is the key issue. **In recent years, the courts have cracked the window open on state regulation of ERISA plans.** The first major case to this extent was *Rutledge v. Pharmaceutical Care Management Association* (PCMA) in 2020. To put it simply, Arkansas passed a law requiring pharmacy benefit managers (PBMs) to reimburse pharmacies at or above the wholesale acquisition cost (WAC) to the pharmacy for a given drug. The Supreme Court ruled 8-0 that Arkansas' law lacked "a connection or reference to" an ERISA plan in that it did not require plans to be structured in a specific way, but only "increase[d] costs or alter[ed] incentives for ERISA plans." In other words, because the law did not require ERISA plans to pay for a specific benefit, preemption did not apply. The second major case, *PCMA v. Mulready*, which is currently pending before the 10th Circuit

Court of Appeals, concerns an Oklahoma law barring PBMs from restricting beneficiaries to specific in-network pharmacies. A lower court ruled that, as with *Rutledge*, this law does not interfere with "plan design or administration."

One would be hard pressed to understand how mandating which providers are allowed in a network is not interfering with "plan design or administration." It almost appears as though the courts believe PBMs and the pharmacy benefit are somehow separate from ERISA plans generally. To be clear, a PBM acts on behalf of a plan to help design and administer its pharmacy benefit. That includes designing a provider network, which includes pharmacists. Choosing providers is a crucial aspect of cost-control, and those savings are used to provide additional benefits to employees. Decreased cost control inherently limits plans' ability to design their benefits package.

Beyond the immediate challenges for plans' pharmacy benefit, these two cases create a small crack in ERISA preemption that, due to state efforts, will grow over time. Employers who have to comply with 50 different regulatory schemes – and the added expense that comes along with those regulations – are going to make cuts to benefits or increase employee contributions and deductibles to make up the difference. This is bad for the employees but could also be bad for ESI in general. If benefits are cut enough – or employee contributions and deductibles rise enough – employees may decide to leave for the individual market. As noted in a previous Weekly Checkup, the more individuals covered by federal programs, the more political pressure on the government to increase subsidization and benefits for these programs. While not as intentional as the Affordable Care Act's design, **the weakening of ERISA preemption is, ironically, another way in which the country is being pushed toward federally managed (some might say socialized) health care. To stop this, Congress needs to clarify ERISA preemptions and take the decision out of the courts' hands.**