NATIONAL ASSOCIATION OF SPECIALTY PHARMACY

Please find below a summary of the Supreme Court's decision prepared by Duane Morris, LLP in *Rutledge v. PCMA*, 529 U.S. (Case No. 18-540, 2020).

On December 10, 2020 The United States Supreme Court issued its opinion in *Rutledge v. Pharmaceutical Care Management Association*, announcing for the first time that ERISA does not preclude a State's ability to regulate the relationships between independent pharmacies and PBMs. More specifically, the decision held that a state could require that PBMs can be required to reimburse pharmacies at a rate that is fair and reasonable and that is no less than the large retail pharmacy chains affiliated with the PBMs.

The Court overturned a decision by the Eighth Circuit Court of Appeals that a 2015 law, known as Arkansas Act 900 ("Act 900"), which prohibited PBMs from providing below-cost reimbursement to pharmacies was preempted by the Employee Retirement Income Security Act ("ERISA").

A Brief History

Act 900 required PBMs to reimburse local, independent pharmacies at the same reimbursement rates as larger, chain pharmacies and barred PBMs from reimbursing pharmacies at lower rates for dispensing a drug than what the pharmacy paid for the drug.

The law arose out of complaints to the State that PBMs were providing preferential reimbursement rates to chain pharmacies, large mail-order pharmacy and big-box stores, which were driving independent pharmacies out of business.

Shortly after the enactment of Act 900, the national trade association for PBMs, Pharmaceutical Care Management Association ("PCMA") filed suit against Arkansas alleging that Act 900 was preempted by the federal ERISA law as it purportedly regulated matters central to administering ERISA benefits plan, such as benefit design and uniform pricing.

PCMA's lawsuit was successful in 2017, with an Arkansas judge striking down the law. The U.S. Court of Appeals for the Eight Circuit upheld the decision in 2018, and in 2019, Arkansas appealed to the Supreme Court.

In March 2020, Duane Morris LLP filed an amicus brief on behalf of NASP arguing that the need for state regulation of PBMs is paramount as specialty pharmacies, which provide acute life-sustaining pharmacy services to individuals suffering from rare conditions and chronic disease, nationwide are being squeezed by PBMs who reimburse below pharmacies' costs to acquire drugs, which has a detrimental impact on the available care to the most fragile and ill patients in the United States.

The Supreme Court's Decision

In a unanimous decision (Justice Barrett did not take part in the decision and Justice Thomas consented in the decision but issued a concurring opinion), the Supreme Court overturned the decision of the Eighth Circuit, holding that Act 900 is not preempted by ERISA as the law does not impermissibly interfere with nor is related to ERISA plan benefit administration.

(1) Impermissibility

First, the Court held that in order to determine whether a state law impermissibly interferes with ERISA, the Court must consider the objectives of ERISA. The main objective of ERISA is to ensure uniformity in plan administration. So, ERISA is concerned with preempting laws that force plans to adopt any particular scheme of substantive coverage.

The Court went on to state, however, that not every state law that affects ERISA or causes some disuniformity is plan administration is preempted by ERISA, especially if the law merely affects costs. The Court found that the logic of the case of *Blue Cross v. Travelers Ins.*, 514 U. S. 645 (1995), as relied upon by Arkansas, decided this case. Similar to the New York law that was at issue in travelers (a law regulating the rate of hospital admissions in New York State), the Court held that Act 900 is merely a cost regulation.

As noted by the Court, Act 900 requires "PBMs to reimburse pharmacies for prescription drugs at a rate equal to or higher than the pharmacy's acquisition cost. PBMs may well pass those increased costs on to plans, meaning that ERISA plans may pay more for prescription-drug benefits in Arkansas than in, say, Arizona." But, because "cost uniformity was almost certainly not an object of preemption," Act 900 will not effectively dictate plan choices, and does not therefore impermissibly interfere with ERISA benefit design.

(2) Referring to ERISA

The Court also held that Act 900 does not refer to ERISA. A law refers to ERISA if it "acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation." Act 900 applies to PBMs whether or not they manage an ERISA plan. Indeed, the Court held that Act 900 does not directly regulate health benefit plans at all, ERISA or otherwise; rather, it affects plans only insofar as PBMs may pass along higher pharmacy rates to plans with which they contract. Act 900 regulates PBMs whether or not the plans they service fall within ERISA's coverage.

The Court, therefore, held that Act 900 did not refer to ERISA.

(3) Rejection of PCMA's arguments

The opinion rejects a number of PCMA's arguments.

First, the Court rejected PCMA's arguments that Act 900 affects ERISA plans by mandating a particular pricing methodology which affects the uniformity of plan administration. In rejecting the argument, the Court held that requiring "PBMs to reimburse pharmacies at or above their acquisition costs does not require plans to provide any particular benefit to any particular beneficiary in any particular way. It simply establishes a floor for the cost of the benefits that plans choose to provide" In other words, because the law does not require plans to provide any particular benefit in any particular way, the law does not affect uniformity of plan administration.

Second, PCMA argued that Act 900 interferes with central matters of plan administration by allowing pharmacies to decline to dispense a prescription if the PBM's reimbursement will be less than the pharmacy's cost of acquisition. PCMA contended that such a refusal effectively denies plan beneficiaries their benefits. The Court, however, held that argument

misunderstands the statutory scheme of Act 900. It held that "Act 900 requires PBMs to compensate pharmacies at or above their acquisition costs. When a pharmacy declines to dispense a prescription, the responsibility lies first with the PBM for offering the pharmacy a below-acquisition reimbursement." In other words, the responsibility of ensuring patients can obtain their prescription drug benefit, lies with the PBMs and not the pharmacies.

Conclusion

The Supreme Court's decision was unanimous in overturning the Eight Circuit, and holds that Act 900 is not preempted by ERISA, as the law does not relate to or interfere with plan benefit administration. This is an important decision for the independent pharmacy industry that will almost certainly impact other states either in the process of drafting legislation similar to Act 900 or those that face objections to similar laws. Most significantly for the pharmacy industry, the decision will allow independent pharmacies to continue to seek fair and reasonable reimbursement for the medications needed by the vulnerable populations they serve.