

Analysis: SCOTUS Could Open the Door for States to Regulate PBMs

Last week, the Solicitor General of the United States filed a brief with the Supreme Court urging it to decide whether ERISA preempts (supersedes) State laws that regulate PBMs. The brief was filed in *Rutledge v. PCMA*, No. 18-540 (U.S.), a case in which the U.S. Court of Appeals for the Eighth Circuit had ruled in favor of the Pharmaceutical Care Management Association by holding that ERISA preempted an Arkansas law that effectively prohibited PBMs from reimbursing pharmacies below the pharmacies' cost of acquisition. In his brief to the Supreme Court, the Solicitor General disagreed with the Eighth Circuit decision, arguing that the ruling was contrary to Supreme Court precedent and should be reviewed and corrected.

ERISA is a federal statute that regulates most forms of private employer- and union-sponsored healthcare plans. It includes a preemption clause, which provides that ERISA displaces certain State laws that apply to ERISA-covered plans. The question presented in *Rutledge* is whether ERISA preempts State laws that regulate PBM-pharmacy reimbursements and the relationship of these entities more generally.

The Solicitor General's brief is significant for a number of reasons. First, the brief is a clear rebuke of a long-running argument of PBMs—that ERISA preempts any State law that regulates PBMs and their relationships with pharmacies. PCMA, the trade association that represents all major PBMs, has filed a number of lawsuits around the country seeking to invalidate State laws that imposed sensible limits on abusive PBM practices. And PCMA has used these lawsuits and arguments about ERISA to pressure State legislators not to enact new laws that address emerging PBM misconduct. Although the Solicitor General's views are not binding on any court, they represent the official legal opinion of the United States government that States have significant latitude to regulate PBM-pharmacy relationships without triggering preemption under ERISA.

Second, the Supreme Court often looks to the Solicitor General for advice on whether to review an appeal and specifically sought out that advice here. The Solicitor General's brief therefore increases the likelihood that the Supreme Court will agree to review *Rutledge* and address the scope of the States' authority to regulate PBMs even when those PBMs are working for ERISA plans.

Finally, the Solicitor General's brief is significant because it vindicates a number of arguments that NCPA has made in legal briefs and position papers. Like NCPA, the Solicitor General rejects the notion that ERISA preempts a State law if it simply includes ERISA plans within its reach. And like NCPA, the Solicitor General argues that there is a distinction between regulating *PBM administration*, which is not preempted by ERISA, and regulating *plan administration*, which could lead to preemption under ERISA.

The Supreme Court will now need to decide whether to grant Arkansas's request to review *Rutledge*. There is now timeline for that decision, but in all likelihood, the Court will do so in the next month. If the Court grants Arkansas's request, it will set the case for briefing and oral argument, the latter of which would likely occur in March or April 2020. And if the case is calendared for March or April, then the Court should issue an opinion by the end of June 2020. In contrast, if the Court denies Arkansas's request, then the Eighth Circuit's decision would remain controlling within that circuit, which covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. But other courts would remain free to reject the Eighth Circuit's rationale, and the Solicitor General's position would feature prominently in deciding any future cases.

NCPA will continue to monitor this and other cases throughout the country testing the authority of States to regulate PBM-pharmacy relationships. We will also continue supporting our members' and State efforts—through legislation, regulation, and litigation—to reign in PBM misconduct and other abusive practices.