

LEGISLATIVE REFORM

FEHBA'S PREEMPTION CLAUSE: IS IT A MODEL FOR PRIVATE EMPLOYERS' SUBSIDIZED HEALTH CARE?

I. INTRODUCTION

In the 1992 presidential election, then Governor Clinton made universal health care a central issue of his platform. The idea was warmly received by the American people and they elected him president. After the election, however, many of the same people who supported the abstract idea of universal health care balked at the reality of paying higher taxes for less care. During the next two years, both Democrats and Republicans suggested many health care plans, but all failed to win more than marginal support. Then, as a result of the Republican sweep of the 1994 elections, debate on the issue came to an abrupt stop. Yet the problems with our current system were never fixed. Between 50 and 70 million Americans remain uninsured and the costs of health care continues to outstrip inflation.¹

While is it apparent from the 1994 elections that the American people are unwilling to accept greater government involvement in order to ensure universal health care, something must be done to help those people who remain uninsured. One idea often suggested is for the government to require private corporations to adopt insurance policies similar to those already used to insure federal employees. Since 1959, the Federal Employee Health Benefit Plan (FEHBA) has provided federal employees comprehensive health care benefits.² Under 5 U.S.C. §§ 8901-8913, the United States government does not act as an insurer, but through the Office of Personal Management (OPM), contracts annually with private carriers for health insurance coverage.³ It then subsidizes these policies by "contributing 60% of the average premium."⁴ Perhaps the most important part of FEHBA is 5 U.S.C. § 8902(m)(1) which grants the federal government preemption over state insurance law. It states:

The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans

1. Ellen M. Yacknin, *Helping the Voices of Poverty to be Heard in the Health Care Reform Debate*, 60 Brooklyn L. Rev. 143, 144 (1994).

2. 5 U.S.C. §§ 8901-13 (1994). *See also* Blue Cross and Blue Shield of Fla. v. Dep't of Banking and Finance, 613 F. Supp. 188, 190 (D.C. Fla. 1985), *aff'd*, 791 F.2d 1501 (11th Cir. 1986).

3. Hayes v. Prudential Insurance Company of America, 819 F.2d 921, 922 (9th Cir. 1987).

4. The Health Maintenance Organization of New Jersey, Inc. v. Whitman, 72 F.3d 1123, 1130 (3rd Cir. 1995) citing 5 U.S.C. § 8906 (1994).

to the extent that such law or regulation is inconsistent with such contractual provisions.⁵

This important exception allows the government to keep the cost of the program lower⁶ and avoid a "patchwork quilt of benefits that var[ies] from state to state."⁷

Section 8902(m)(2) was added to FEHBA in 1977 after the Comptroller of the United States complained to the Senate about "various attempts by states to require the inclusion of special health benefit plans"⁸ which resulted in FEHBA carriers being "exposed to varying requirements from state to state and caught by conflicts between states and the program's requirements."⁹ To alleviate these problems, Congress enacted § 8902(m)(1).¹⁰ Its purpose is to "supersede and preempt any State or local law, or any regulation issued under such law relating to health insurance or plans, to the extent that such law or regulation is inconsistent with the provisions of the Federal employees' health benefits contract."¹¹

By providing uniform nationwide application, § 8902(m)(1) allows insurers to offer greater coverage at a lower rate. This is because the amendment offers nationwide certainty as to what the insurer risks are which allows them to more accurately calculate their risks. Previously, companies were often unaware of the exact extent of their liability and therefore often overcharged to insure they had adequate capital to cover any claims. At first glance, it appears everyone is a winner except for the state insurance commissioners whose powers have been usurped. The insured receives more for less and the insurer is able to accurately assess its risk so as to ensure a profit.

However, problems often arise when state laws provide protection which is not available under FEHBA. When such a problem arises, most jurisdictions have held that Congress intended FEHBA to be "the exclusive source of [a federal] employee's compensation rights,"¹² and have therefore limited the insurer liability. A prime example is *Burkey v. Government Employees Hospital Association*.¹³ In *Burkey*, the Fifth Circuit held that state law was preempted by federal law, nullifying any state law claims. Yet, some federal and state courts have narrowed FEHBA's preemption clause upholding various state law claims, such as fraudulent misrepresentation.¹⁴ These courts based their decisions on the assumption that Congress did not intend "such rigid uniformity as to insulate a FEHBA insurer from any and all aspects of state law."¹⁵ The

5. 5 U.S.C. § 8902(m)(1) (1994).

6. *Blue Cross and Blue Shield of Florida*, 613 F. Supp. at 192 n.13.

7. *Wormack v. Southeastern Mutual Insurance Company*, 907 S.W.2d 163, 166 (Ky. Ct. App. 1995) (quoting *Caudill v. Blue Cross and Blue Shield of North Carolina*, 99 F.2d 74, 78-79 (4th Cir. 1993)).

8. *Blue Cross and Blue Shield of Fla.*, 613 F. Supp. at 192. "For example, some statements mandated recognition of the services of chiropractors while others required benefits for treatment of drug abuse." *Id.* at 192 n.10, citing *Report of the Comptroller General of the United States, Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefit Carriers*.

9. *Id.* at 192 n.13.

10. 5 U.S.C. § 8902(m)(1) (1994).

11. H.R. Rep. No. 282, 95th Cong., 1st Sess., at 4 (1977).

12. *Kizas v. Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

13. *Burkey v. Gov't Employees Hospital Ass'n*, 983 F.2d 656 (5th Cir. 1993). *See supra* note 18.

14. *Macon-Bibb County Hospital v. National Treasury Employees Union*, 458 S.E.2d 95 (Ga. 1995).

15. *Wormack*, 907 S.W.2d at 166.

Georgia Supreme Court did this in *Macon-Bibb County Hosp. Auth. v. Nat'l Treasury Employees Union*.¹⁶ As a result of these latter decisions, the nationwide conformity clearly sought by Congress when it amended FEHBA to include § 8902(m)(1) remains unascertained.

The Supreme Court has not addressed this conflict within FEHBA. Traditionally, Congress has left the insurance industry alone as evidenced by the McCarran-Ferguson Act.¹⁷ With this Act, Congress stated that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."¹⁸ Congress, however, does have the power to regulate it.¹⁹ This article proposes that Congress use this power to amend FEHBA, thereby clarifying the law and making insurance available to more people.

II. MAJORITY VIEW

The Fifth Circuit's decision in *Burkey v. Government Employees Hospital Association*²⁰ represents a majority of jurisdictions. In *Burkey*, Carey Burkey was insured by his mother's FEHBA insurer, Government Employees Hospital Association (GEHA), for 31 days after his twenty-second birthday. During this 31 day extension period, Carey was involved in an automobile accident and was rendered quadriplegic. Since he was in the hospital at the end of the 31 day extension, he was entitled to an additional 60 days of hospital care. During this time, his mother attempted to get approval from GEHA to move him from a Charity Hospital to a private hospital specializing in the treatment of spinal cord injuries.²¹ When she was unable to obtain approval, she filed suit for the costs of her son's care during the 60 day extension period. The Louisiana Department of Health and Human Resources then intervened to state its claim for medical expenses incurred by Charity Hospital during the 60 days. At trial, the judge found in favor of Burkey and entered judgment for twice the medical expense (\$44,693) and attorney fees (\$40,000).²² GEHA appealed the decision asserting "the District Court incorrectly interpreted the scope of FEHBA preemption."²³ It argued that at most Burkey could only recover his actual medical expenses; any additional damages including attorney fees were preempted by 5 U.S.C. § 8902(m)(1).

The Fifth Circuit Court of Appeals agreed: "the weight of authority and most persuasive analysis supports the position that state law claims are preempted."²⁴ The court stated that "whether a certain state action is preempted by federal laws is one of congressional intent."²⁵ Upon close examination of Congress' intent when it enacted § 8902(m)(1), the court concluded, "Congress expressed itself with unusual clarity The policy underlying 5 U.S.C. § 8902(m)(1) is to ensure nationwide uniformity of the

16. *Macon-Bibb*, 458 S.E.2d 95 (Ga. 1995). See *Supra* note 40.

17. 15 U.S.C. §§ 1011-1015 (1995).

18. 15 U.S.C. § 1012(a) (1995).

19. The U.S. Supreme Court stated that Congress can regulate insurance under the Commerce Clause. *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944).

20. 983 F.2d 656 (5th Cir. 1993).

21. *Id.* at 658.

22. *Id.* at 659.

23. *Id.*

24. *Id.*

25. *Id.* at 658.

administration of FEHBA benefits;²⁶ and therefore, state law claims must be preempted. In addition, the Court rejected Burkey's claim that his damages were not preempted since they related "to remedies and not to the 'nature or extent of coverage or benefits.'"²⁷ The Court held that "no such distinction can sensibly be made. Tort claims arising out of the manner in which a benefit claim is handled are not separable from the terms of the contract that governs benefits."²⁸ Such claims "relate to" the plan under 5 U.S.C. § 8902(m)(1) as long as they are connected with or refer to the plan.²⁹ In determining the scope of FEHBA's preemption clause, most Circuits have reached decisions consistent with the Fifth Circuit's holding in *Burkey*.³⁰

The Supreme Court has yet to hear a case concerning FEHBA's preemption clause but the Supreme Court has agreed with the Fifth Circuit's rationale in relation to a similar statute. In *Pilot Life Insurance Co. v. Dedeaux*³¹, the U.S. Supreme Court addressed the scope of the preemption clause in the Employee Retirement Income Security Act of 1974 (ERISA). The latter is relevant since "ERISA's preemption clause is similar to § 8902(m)(1) . . ."³² ERISA states that "the provisions of this title . . . shall supersede any and all State laws in so far as they may now or hereafter relate to any employee benefit plan . . ."³³

In *Pilot Life*, Everate Dedeaux sued Pilot Life for failure to provide benefits promised by his insurance policy.³⁴ The District Court granted Pilot Life summary judgment based on ERISA's preemption clause, but the Court of Appeals for the Fifth Circuit reversed.³⁵ The Supreme Court then granted certiorari to determine whether ERISA "preempts state common law tort."³⁶ The Court concluded, "[t]here is no dispute that the common law causes of action asserted in Dedeaux's complaint 'relate to' an employee benefit plan and therefore fall under ERISA's express preemption clause . . ."³⁷ It based its holding on *Metropolitan Life Ins. Co. v. Massachusetts*,³⁸

26. *Id.* at 658, 660.

27. *Id.*

28. *Id.*

29. *Id.*

30. The Fifth Circuit is joined by the Fourth Circuit in *Myers v. United States*, 767 F.2d 1072, 1074 (4th Cir. 1985) ("state law which purports to allow recovery of additional benefits not contemplated by a federal insurance contract must be deemed inconsistent [with and] preempted by FEHBA"), and by the Eighth Circuit in *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994) ("FEHBA preempted the state-law rule"); and by the Ninth Circuit in *Hayes*, 819 F.2d 921, 926-27 (9th Cir. 1987) ("state law claims are preempted under 5 U.S.C. § 8902(m)(1)"); and by the Eleventh Circuit in *Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572, 1574 (11th Cir. 1985) ("the interpretation of health insurance contracts is controlled by federal, not state law"). Some District Courts also agree evidenced by *Liebermann v. Nat'l Postal Mail Handlers Union*, 819 F. Supp. 344, 349 (S.D.N.Y. 1993) ("State law which affords a remedy beyond that provided by the procurement contract is inconsistent with the procurement contract, and is therefore preempted under 5 U.S.C. § 8902(m)(1)"); and *NALC Health Benefit Plan v. Lunsford*, 879 F. Supp. 760, 763 (E.D. Mich. 1995) (5 U.S.C. § 8902(m)(1) "is 'the exclusive source of [a federal] employee's compensation rights'").

31. *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987). Dedeaux was a federal employee injured on the job. He applied for permanent disability under Pilot who had sole discretion in determining who qualified for permanent disability. After 2 years, Pilot terminated Mr. Dedeaux's policy. During the next three years his benefits were reinstated and terminated several times by Pilot. Dedeaux then filed suit claiming "Tortious Breach of Contract"; "Breach of Fiduciary Duties" and "Fraud in the Inducement."

32. *Hayes*, 819 F.2d at 926.

33. 29 U.S.C. § 1144(a) (1995).

34. *Pilot Life*, 481 U.S. at 43.

35. *Id.*

36. *Id.*

37. *Id.* at 47.

in which "[t]he phrase 'relate to' was given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan."³⁹ It concluded that when Congress enacted ERISA's preemption clause, it intended "that ERISA's civil enforcement scheme be exclusive."⁴⁰ When two years later Congress enacted FEHBA's preemption clause, it again wanted to ensure that all federal employees had equal rights and avoid the contradictions and inconsistencies that result from each state having its own insurance laws. It therefore adopted language similar to ERISA's preemption clause. Therefore, based on the court's decision in *Pilot Life*, the majority of jurisdictions are correct in interpreting FEHBA's preemption clause broadly.

III. THE MINORITY VIEW

Some jurisdictions, however, have interpreted FEHBA's preemption clause more narrowly.⁴¹ The state of Georgia is one such jurisdiction. In *Macon-Bibb County Hosp. Auth. v. Nat'l Treasury Employees Union*,⁴² Georgia's Supreme Court upheld a lower court's ruling that 5 U.S.C. § 8902(m)(1) did not exclude negligent misrepresentation. In *Macon-Bibb*, the Macon-Bibb County Hospital provided post-natal care to an infant of a mother covered by National Treasury Employees Union (NTEU). Macon-Bibb alleged it received precertification that the care would be covered and when NTEU refused to pay, Macon-Bibb sued claiming negligent misrepresentation.⁴³ NTEU, noting FEHBA's preemption clause, moved for summary judgment.⁴⁴ The trial court rejected the motion, but on interlocutory appeal, the Georgia Court of Appeals, based on *Pilot Life*, granted it.⁴⁵ The Georgia Supreme Court then granted *certiorari*. In reaching its decision, the Georgia Supreme Court ignored *Pilot Life* and instead focused on the U.S. Supreme Court's holding in *Mackey v. Lanier Collection Agency & Services, Inc.*⁴⁶ In *Mackey*, the Court held that "a state law may have a connection with or reference to an ERISA plan in 'too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan.'"⁴⁷ To determine if Georgia's negligent misrepresentation state law was "too tenuous" to relate to FEHBA, the Court examined the 11th Circuit's decision in *Lordmann Enterprises v. Equicor*.⁴⁸ In *Lordmann*, an ERISA plan was sued for negligent misrepresentation under Georgia's law. In part, the court relied on the fact that "[t]he 11th Circuit concluded that state law claims brought by health care providers against plan insurers 'too tenuously affect

38. *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724 (1985).

39. *Pilot Life Ins. Co.*, 481 U.S. at 47 (quoting *Metropolitan Life Ins. Co.*, 471 U.S. at 739, and *Shaw v. Delta Airlines*, 463 U.S. 85, 97 (1983)).

40. *Id.* at 57.

41. *Howard v. Group Hosp. Service*, 739 F.2d 1508, 1510-12 (10th Cir. 1984) (approving state law interpretation of FEHBA provisions); *Wormack*, 907 S.W.2d at 166 (Congress has [not] intended such rigid uniformity as to insulate FEHBA insurer from any and all aspects of state law); *Furey v. U.S. Healthcare HMO Pennsylvania* 1991 U.S. Dist. LEXIS 14373 (E. Pa. Oct. 2, 1991); *Lambert v. Mail Handlers Ben. Plan*, 886 F. Supp. 830 (M.D. Al. 1995).

42. *Macon-Bibb*, 458 S.E.2d 95 (Ga. 1995).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825 (1988).

47. *Macon-Bibb*, 458 S.E.2d at 97.

48. *Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529 (11th Cir. 1994).

[federal] plans to be preempted"⁴⁹ Since "ERISA plan[s] could be sued 'for run-of-the-mill state law claims,'"⁵⁰ the Georgia Supreme Court held that FEHBA plans could also be sued. Therefore, it reversed the Court of Appeals and remanded the case for trial. Macon-Bibb County Hospital was entitled to damages.

The reasoning used by the Georgia Supreme Court, however, is flawed. It misinterprets the scope of the Supreme Court's decision in *Mackey*. The Supreme Court based its conclusion that ERISA could be sued for "run-of-the mill state law claims"⁵¹ on § 502 of ERISA which "clearly contemplates the enforcement of money judgments against benefit plans."⁵² However, FEHBA does not contain a similar section. In fact, the court explained that "in a comprehensive regulatory scheme [like FEHBA] . . . omission[s] are significant."⁵³ Congress first enacted FEHBA in 1959, and amended it numerous times since. Its failure to enact a section similar to § 502 of ERISA indicates that Congress did not intend FEHBA to be sued for "run-of-the-mill torts."⁵⁴

In addition, *Macon-Bibb* is inconsistent with the Supreme Court's decision in *Pilot Life*.⁵⁵ In *Pilot Life*, the Court held ERISA's phrase "relates to" should be "given its broad common-sense meaning, such that a state law claim 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'"⁵⁶ If, as in *Macon-Bibb*, a party brings a state claim for negligent misrepresentation of an insurance policy, the defendant's negligent misrepresentation must be in relation to something, i.e., the insurance policy. Using "common-sense," a negligent misrepresentation claim must "relate to" the FEHBA policy and therefore be preempted by § 8902(m)(1).

IV. LEGISLATIVE CHANGES

While courts have reached different conclusions, all based their respective opinions on the policy that "[f]ederal preemption of state law is fundamentally 'a question of Congressional intent'"⁵⁷ Unfortunately, the courts cannot agree on what Congress' intent was. In particular they disagree over the interpretation of the House of Representatives Report Number 282, which states:

The effect of this amendment is to preempt the application of State laws or regulations which specify types of medical care, providers of care, extent of benefits, coverage of family members, age limits for family members, or other matters relating to health benefits or coverage when such laws or regulations conflict with the provisions of contracts under the Federal employees' health benefits program.⁵⁸

49. *Macon-Bibb*, 458 S.E.2d at 97.

50. *Id.*

51. *Id.*

52. *Mackey*, 486 U.S. at 832.

53. *Id.* at 837.

54. *Macon-Bibb* at 97.

55. *Pilot Life Ins. Co.*, 481 U.S. 41 (1987). See *supra* note 29.

56. *Id.* at 47.

57. *Burkey v. Gov't Employee's Ass'n*, 983 F.2d at 659. (quoting *English v. General Electric Co.*, 496 U.S. 72, 78 (1990)).

58. H.R. Rep. No. 282, 95th Cong., 1st Sess., at 4-5 (1977).

In *Burkey*, the Fifth Circuit Court of Appeals interpreted the above as an expression of Congress' intent to "ensure nationwide uniformity."⁵⁹ But, the court in *Eidler v. Blue Cross Blue Shield of Wisconsin*,⁶⁰ concluded the same words "show[ed] the concern of Congress was state laws that conflict with contractual provisions, not other state laws,"⁶¹ such as tort claims.

Since the courts have been unable to agree upon what Congress' true intent was, Congress should amend § 8902(m)(1). The new amended section should express in no uncertain terms Congress' clear intent that FEHBA preempts all state laws relating to insurance regulation. Toward this end, Congress should consider the following amendments:

Section § 8902 Contracting Authorities

(m)(1)(A) The purpose of this section shall be construed to secure the uniform application of this chapter nationwide. Toward this end, this chapter will be the exclusive source of federal employee's compensation rights.

(B) Subject to § 8902(m)(1)(B), the provisions of any health plan contract under this chapter shall supersede and preempt all State laws which regulate insurance.

(C) This chapter shall not supersede and preempt State or local laws relating to the taxation of health insurance carriers or to the maintenance of special reserves.

(D) For purposes of this subsection, "state law" includes all laws, decisions, rules, regulations, or other State actions having the effect of law, of any State.

By clarifying any ambiguities, an amended § 8902(m)(1) eliminates the three main sources of judicial controversy. First, it eliminates any ambiguity as to Congress' intent. Section 8902(m)(1)(A) states in clear and concise terms Congress' intent in enacting this preemption clause. Next, § 8902(m)(1)(B) eliminates any uncertainty about whether a state action "relates to" the FEHBA policy. Instead of referencing the preemption clause to that "which relate[s] to the nature or extent of coverage or benefits," the amended subsection preempts all state actions which regulate insurance law, except for those listed in § 8902(m)(1)(C). Finally by deleting the closing phrase, "to the extent that such law or regulation is inconsistent with such contractual provision," the issue of whether tort claims must contradict a specific provision to be preempted is eliminated. This phrase was unnecessary because if the contract and State law had been consistent with each other, then the parties would not have been in court. These amendments would accomplish what the present § 8902(m)(1) has been unable to do: establish a uniform rule of law for all FEHBA plans.

By establishing national conformity and limiting the liability of third party insurers, Congress will help to insure that health care remains affordable. At a time when one is accustomed to horror stories of government waste, FEHBA has proven to be a

59. *Burkey*, 983 F.2d at 660.

60. *Eidler v. Blue Cross and Blue Shield of Wisconsin*, 671 F. Supp. 1213 (E.D. Wis. 1987). In *Eidler*, Ms. Eidler sued claiming bad faith. The Federal District Court concluded that since the claim of bad faith does not conflict with any contractual provisions, it is not preempted by § 8902(m)(1).

61. *Id.* at 1217.

model of how employer supported health insurance can work. Given the current environment in Washington and the unlikeliness that any major health care reform will be passed in the near future, it is necessary to look for ways to make it easier for private enterprise to insure the 50-70 million uninsured Americans. At the moment, many employers are unwilling to do so because of the exorbitant costs of health insurance. By offering corporation preemption from state law, the cost of health care insurance will be lower, and as a result, more employers would be able to afford to offer it to their employees. While FEHBA, with the necessary amendments, is not a perfect or even complete answer to the current health care crisis in America, it can make it possible for some to at least have access to health care insurance.

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