Can Federal Contract Requirements Preempt State Law?

Law360, New York (March 2, 2017, 12:13 PM EST) --


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The only thing predictable about the U.S. Supreme Court's decisions on federal preemption — a subject that strikes at the heart of federalism — is the odd way that the justices spell "pre-emption." While the court's implied preemption (field preemption and conflict preemption) case law is particularly difficult to reconcile, the court in recent years has tried to achieve some degree of uniformity in the way that it goes about interpreting federal statutes' express preemption provisions.

The continual challenge for the court, however, is that there is little consistency, and often imprecision, in the way that Congress drafts express preemption provisions. As Coventry Health Care of Missouri Inc. v. Nevils, No. 16-149 (argued March 1, 2017) illustrates, the Supreme Court still needs to address — or further address — some basic questions relating to express preemption:

- Whether a federal statute's express preemption provision is constitutional under the Supremacy Clause, U.S. Const. Art. VI, cl.2, even though it defines the scope of preemption by referring to the terms of federal contracts rather than to federal statutory or regulatory provisions.

- Whether a "presumption against preemption," rather than ordinary statutory construction principles, applies to interpretation of express preemption provisions, and if so, under what circumstances and to what effect.

- Whether Chevron deference should be afforded to a federal agency's reasonable interpretation of an arguably ambiguous express preemption provision in a statute that it administers.

Case Background

The Federal Employees Health Benefits Act (FEHBA) governs the primary health insurance program for millions of federal employees. FEHBA, which is administered by the Office of Personnel Management (OPM), contains an express preemption provision, which states as follows: "The *terms of any contract* under this [act] which relate to the nature, provision 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." 5 U.S.C. § 8902(m)(1) (emphasis added). To help reduce FEHB program insurance premiums for both the federal government and federal employees, contracts awarded by OPM under the FEHBA contain terms requiring health insurance carriers to seek subrogation of an injured beneficiary's liability claims against third parties, and if a beneficiary already has received payments from a third party, to seek reimbursement from the beneficiary. In contrast, to protect the financial interests of insureds and their families, Missouri (like other states) bars insurance carriers from seeking subrogation or reimbursement. The issue in Coventry Health Care is whether FEHBA's express preemption provision, § 8902(m)(1), supplants Missouri's common-law prohibition against subrogation and reimbursement.

Petitioner Coventry Health Care paid for the medical care of respondent Nevils, a Missouri resident, federal employee and FEHB program participant who was injured in an automobile accident. Nevils also received a monetary settlement from the driver responsible for the accident. As required by its FEHBA contract, Coventry sought and obtained reimbursement of the settlement amount. Nevils then filed in Missouri state court a putative class action contending that despite Coventry's contractual obligation, it was barred by Missouri's common-law anti-subrogation doctrine from seeking reimbursement of the third-party settlement amount. The lower state courts agreed with Coventry that the FEHBA preemption provision bars Nevil's claims. The Missouri Supreme Court granted review.

Based in part on the so-called presumption against preemption, the Missouri Supreme Court, in a 2014 opinion, held, contrary to the views of amicus curiae United States, that § 8902(m)(1) does not preempt state anti-subrogation and anti-reimbursement laws. Coventry sought U.S. Supreme Court review. But at the recommendation of the United States, the court remanded the case to the Missouri Supreme Court for further consideration after OPM promulgated a regulation, 5 C.F.R. § 890.106(h), codifying its interpretation that § 8902(m)(1) preempts state laws that would interfere with the subrogation and reimbursement requirements contained in FEHBA contracts. On remand the Missouri Supreme Court not only declined to afford deference to OPM's duly promulgated regulatory interpretation, but also held that FEHBA's preemption provision is unconstitutional on the theory that it gives preemptive effect to contractual provisions rather than to federal statutes or regulations. This time, the U.S. Supreme Court agreed to hear the case.

March 1 Hearing

At the Supreme Court's March 1 hearing, where Coventry shared its argument time with the Office of the Solicitor General, the justices asked probing questions that implicated each of the three express preemption issues identified above.

First, indicating that the FEHBA preemption provision, § 8902(m)(1), "says that the contract is what preempts state laws," Tr. at 21, Chief Justice John Roberts identified the question as whether it is "permissible for Congress to delegate the authority to decide what laws are preempted to a private entity." Id. at 11.

Although OPM (i.e, a federal agency) is one of the parties to FEHBA contracts, the chief justice seemed concerned that Congress has "authorized someone not subject to the political constraints that Congress is subject to undertake the pretty significant step of telling ... state legislators that they can't legislate." Id. at 15-16. Respondent Nevil's counsel contended that the FEHBA preemption provision "is unconstitutional under the Supremacy Clause [and] as written ... should have no effect," including because FEHBA contracts "are not laws under the Supremacy Clause." Id. at 24, 38. Coventry's attorney asserted, however, that "the proper way to conceptualize what Congress has done in this statute, as it has in many other statutes, is that is has displaced state law to create room for the operation unimpeded of certain contract terms that it believed should be encouraged for the public interest." Id. at 16. Along the same lines, the government's attorney argued that when the FEHBA preemption provision is read to mean "that the terms of the contract shall apply notwithstanding state or local law ... the statute is what is doing all the preempting here." Id. at 22.

Second, Justice Elena Kagan observed that "just a couple of years ago, we said with respect to an express-preemption clause ... that the presumption against preemption just didn't apply in a case like this ... that it was only applicable in a case of implied preemption." Id. at 36.

The government's attorney argued that "[t]he application of the presumption against preemption here [by the Missouri Supreme Court] is really just fundamentally misguided" because "[n]ot only do we have an express-preemption provision, we're talking about federal benefits for federal employees under federal contracts entered into under a federal statute." Id. at 20. The respondent's counsel theorized, however, that a presumption against preemption should apply where an express preemption provision's "text is ambiguous," but not "where the language ... is clear." Id. at 37.

Finally, regarding OPM's regulation, 5 C.F.R. § 890.106(h), interpreting the FEHBA preemption provision as displacing state anti-subrogation laws, Justice Sonia Sotomayor asked the government's attorney, who argued that OPM's interpretation is both reasonable and controlling, "[w]hether we get to Chevron deference at all." Id. at 18.

Chief Justice Roberts added "it's bad enough that they're preempting state law, but now they get deference." Id. at 19. In response, the government contended that it "would win this case even without Chevron deference," id. at 20, but that "it really doesn't make a difference" because the government has chosen a reasonable interpretation of the preemption provision. Id. at 18. The respondent's attorney argued that OPM's "effort to seek Chevron deference over what is explicitly a conclusion on the scope of an express-preemption clause just doesn't work" because "Congress itself does not control the terms of these [FEHBA] contracts, and it has not expressly delegated any authority to the agency to pronounce on preemption." Id. at 46. In rebuttal, however, Coventry's counsel noted that the court has recognized a federal agency's ability to use its general rulemaking authority to preempt state law, even in the absence of a specific statutory authorization. Id. at 47.

Observations

The court's questions and the parties' arguments at the Coventry Health Care hearing demonstrate that there are still significant jurisprudential gaps relating to interpretation of express preemption provisions. Perhaps the court will find some circuitous way to avoid addressing the thorny preemption issues in this case. But more likely, the court will have to decide whether the FEHBA preemption provision falls within the Supremacy Clause, and assuming that it does, whether based on the provision's language and/or OPM's regulatory interpretation, the statute's preemptive scope encompasses the type of insurance-related state laws at issue in this case.

Hopefully, the court's opinion will provide useful guidance not only for attorneys who are called upon in future cases to analyze and argue questions of express preemption, but also to members of Congress who formulate, draft, debate and enact preemption language.

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