In *Rutledge v. Pharmaceutical Care Management Association* the Supreme Court will decide whether states’ attempts to regulate pharmacy benefit managers’ (PBMs) drug-reimbursement rates are preempted by the Employee Retirement Income Security Act (ERISA).

PBMs are an intermediary between health plans and pharmacies. Among other things, they set reimbursement rates to pharmacies dispensing generic drugs. Contracts between PBMs and pharmacies create pharmacy networks. According to the Eighth Circuit, “[b]ased upon these contracts and in order to participate in a preferred network, some pharmacies choose to accept lower reimbursements for dispensed prescriptions.” So, in some instance pharmacies lose money.

Arkansas passed a law requiring that pharmacies “be reimbursed for generic drugs at a price equal to or higher than the pharmacies’ cost for the drug based on the invoice from the wholesaler.”

The Eighth Circuit concluded that Arkansas’s law “ma[de] implicit reference to ERISA” because it regulates “PBMs who administer benefits for . . . entities, which, by definition, include health benefit plans and employers, labor unions, or other groups . . . subject to ERISA regulation.”

According to Arkansas, the Eighth Circuit got the implicit-reference preemption test wrong. The proper test, according to Arkansas, is a state law implicitly 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[.]” Arkansas points out its pharmacy reimbursement law covers “far more than those PBMs that administer benefits for ERISA plans,” so it can’t be subject to implicit-reference ERISA preemption.

Arkansas claims that 36 states have enacted similar legislation “intended to curb abusive prescription drug reimbursement practices.” Arkansas’s *amicus* brief likewise cites to findings indicating that in the last fifteen years, 16 percent of independently owned, rural pharmacies have closed.
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