

# 10th Circ.'s Okla. PBM Ruling Could Curtail State Regulation

By **Kellie Mejdrich**

Law360 (August 18, 2023, 2:28 PM EDT) -- The Tenth Circuit handed employers a decisive win in its recent decision finding that federal benefits law preempts parts of an Oklahoma state statute regulating pharmacy benefit managers, attorneys say, and similar laws in other states are now potentially on the chopping block.

A three-judge panel for the Tenth Circuit **issued the decision Tuesday** in a case brought by the Pharmaceutical Care Management Association — a trade group representing PBMs — challenging provisions of Oklahoma's law. PBMs act as intermediaries between pharmacies, health insurance companies and drugmakers. A major holding from the panel's decision was that the U.S. Supreme Court's 2020 decision in *PCMA v. Rutledge* didn't change the appellate court's Employee Retirement Income Security Act preemption analysis in Oklahoma.

In *Rutledge*, the justices found that an Arkansas PBM law, which was also challenged by the PCMA, was not preempted by ERISA.

Noting Tuesday that "ERISA's promise of uniformity is vitally important for employers," the Tenth Circuit panel said Oklahoma's 2019 Patient's Right to Pharmacy Choice Act imposed network restrictions in a way that was forbidden by ERISA, including by mandating changes in network design. The panel held that four provisions the PCMA had challenged were preempted by ERISA as applied to ERISA plans.

The Tenth Circuit's decision comes after the panel seemed skeptical of Oklahoma's argument that the law wasn't preempted during **oral arguments in May**.

Employer-side attorney Joanne Roskey, a member of Miller & Chevalier Chtd., said in an interview with Law360 that the decision was "a big victory for PBMs, obviously, but also for employers that are seeking uniform administration of their plans across multiple states and multiple circuits."

"This will certainly help them achieve that uniformity goal," Roskey said, adding that the decision "stands out as a counterbalance to the *Rutledge* decision."

Here, benefits attorneys offer key takeaways from the Tenth Circuit's ruling.

## Return to ERISA Preemption

The Tenth Circuit's finding that parts of Oklahoma's law were preempted by ERISA based on their connections to ERISA plans was an important aspect of the decision for attorneys, particularly because the Supreme Court didn't find such a connection in its *Rutledge* decision upholding restrictions on PBM pricing in Arkansas.

The appellate court's post-*Rutledge* interpretation also draws contrasts with the **Eighth Circuit's 2021 decision** in *PCMA v. Wehbi*, in which a panel found portions of a North Dakota PBM law, including provisions setting quality standards on pharmacy providers, were not preempted. Some of the North Dakota restrictions are similar to what the Tenth Circuit has now deemed preempted in Oklahoma.

"I think it was important that the [Tenth Circuit] analyzed the facts in detail, and then really re-

grounding the preemption analysis into the 'connection with' prong of preemption, and focusing on the fact that you can indirectly regulate a plan by regulating a plan service provider," said Ryan Temme, principal at Groom Law Group.

Temme said he thought it was important for the court to draw out "some of the unique fact patterns that arise in the pharmacy benefits side as opposed to the medical benefits side."

"Because some of the relationships, it's not just the regulation of the PBM — there is a direct impact on the plan, the underlying ERISA plan," Temme said.

### **Similar State Laws In Question**

Benefits attorneys said they're keeping an eye out for new legal challenges against state PBM laws now that the Tenth Circuit ruled that provisions in Oklahoma's law can't apply to ERISA plans. One of those provisions, which forces PBMs in the state to let providers participate in a pharmacy network if they meet certain standards, known as the "any willing provider" provision, also won't apply to Medicare Part D plans in Oklahoma.

That's significant given the **explosion of state PBM laws** nationwide, many of which contemplate similar restrictions on ERISA and Medicare Part D plans. Many states that have passed similar restrictions also joined as amici in support of Oklahoma during the pendency of the Tenth Circuit appeal.

Temme, with Groom Law, said there were a "good number" of state laws that contemplate restrictions similar to Oklahoma's, pointing to Florida's PBM laws as a particularly broad example. Florida was an amicus in the Tenth Circuit appeal in support of Oklahoma.

"There are components in the Florida law that look like the Oklahoma law, but then there are also significant additional state law provisions that would do things like prohibit spread pricing and that sort of thing," Temme said.

Julie K. Lappas, shareholder at Hall Render Killian Heath & Lyman PC, said she thinks it's likely that new challenges to state law could arise in the wake of the Tenth Circuit's decision.

"I do see it likely that PCMA is going to use this decision and the momentum to challenge similar state laws that are out there that are regulating PBMs," Lappas said.

A PCMA spokesperson declined to comment on whether the PCMA plans to sue in Florida or other states.

More broadly, Lappas characterized the decision as "a big win for PCMA and for PBMs. And it comes at a time when PBMs are facing intense scrutiny at both the state and federal levels."

Industry groups were also quick to call out how other state laws on the books are now in question following the appellate court's decision.

For example, James Gelfand, president of the ERISA Industry Committee, or ERIC, a lobbying group representing large employers administering ERISA-regulated benefits, said in a statement on the ruling Wednesday that the Oklahoma law the Tenth Circuit found preempted by ERISA was "one of several state PBM laws of its kind."

"This decision at the circuit court level marks a key victory in preserving ERISA preemption from further erosion and safeguards the ability of self-insured employer plans to continue to provide access to high quality care in a nationwide market," Gelfand said.

### **What's Next**

Many attorneys think it's likely that the Oklahoma attorney general will petition the state's Tenth Circuit loss to the Supreme Court or move for en banc rehearing at the appellate level.

A spokesperson for the state's attorney general said in a statement to Law360 on Wednesday, "The

office is reviewing the decision and will consider the best options for the State of Oklahoma."

Those critical of the decision — including industry groups like the National Community Pharmacists Association, which represents community and specialty pharmacists who have seen PBMs cut into their business — quickly labeled the Tenth Circuit decision as splitting from the Eighth Circuit and called for it to be overturned.

"The Tenth Circuit decision is inconsistent with what other federal courts have decided, and it departs from the Supreme Court's unanimous Rutledge decision, which clearly held that PBMs can't hide behind ERISA. It must be overturned," B. Douglas Hoey, CEO of the National Community Pharmacists Association, said in a statement Thursday.

But attorneys are skeptical of whether the high court will actually take up a petition if it's filed.

Andrew Oringer, partner at Wagner Law Group, said "it's hard to really handicap what the court would do."

But even if there's an issue where something might arguably be a split, Oringer said "there's a real consideration here as to whether the Supreme Court would view the principles as having been developed enough so that it's ripe for their consideration," he added.

"And it is possible, at least in my mind, that the Supreme Court might want to wait for a more fully developed record," Oringer said.

--Editing by Abbie Sarfo.