A Closer Look At 'Preemptive' Federal Contract Terms

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Subrogation of insureds' third-party claims is not a subject that excites too many lawyers. But in Coventry Health Care of Missouri Inc. v. Nevils, No. 16-149, decided on April 18, the U.S. Supreme Court issued a subrogation-related opinion that will be of interest to anyone who tracks the court's federal preemption jurisprudence.

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Express Preemption

In Coventry the court had little difficulty holding that the Federal Employees Health Benefits Act (FEHBA) — which establishes the principal health insurance program for 8 million federal employees — expressly preempts state laws that prohibit FEHBA insurance carriers from carrying out contractual obligations, imposed by the Office of Personnel Management (OPM), to seek subrogation or reimbursement when an insured pursues a personal injury claim against a third party. FEHBA's preemption provision states that "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).

The court, in a unanimous (eight-justice) opinion authored by Justice Ruth Bader Ginsburg, held that § 8902(m)(1) bars a Missouri law

prohibiting insurance carriers from seeking subrogation and reimbursement in FEHBA cases: “Contractual provisions for subrogation and reimbursement ‘relate to ... payments with respect to benefits’ because subrogation and reimbursement rights yield just such payments.” Slip op. at 6-7. The court emphasized that “Congress’ use of the expansive phrase ‘relate to’ shores up that understanding,” id. at 7, since the court has “repeatedly recognized that the phrase ‘relate to’ in a preemption clause expresses a broad preemptive purpose,” ibid. (internal quotation marks omitted).

In addition, the court indicated that the “statutory context and purpose reinforce our conclusion.” Ibid. The court emphasized that “[s]trong and distinctly federal interests are involved,” such as the federal government’s “significant financial stake” in administration of the FEHBA program. Id. at 8 (internal quotation marks omitted). To protect those interests, the United States participated in the case as amicus curiae in support of petitioner Coventry. The solicitor general’s brief emphasized the government’s interest in being able to administer the FEHBA programs on a nationally uniform basis without variations based on state or local laws.

Constitutional Issue

The more interesting — and far-reaching — federal preemption question presented by Coventry, however, was whether “the statute itself would violate the supremacy clause by assigning preemptive effect to the terms of a contract, not to the laws of the United States.” Id. at 9. The court concluded “that the statute, not a contract, strips state law of its force.” Ibid. According to the court, “FEHBA contract terms have preemptive force only ... when the contract terms fall within the statute’s preemptive scope.” Ibid. In other words, without the statute’s preemption provision, “there would be no preemption of state insurance law.” Ibid. In upholding the constitutionality of § 8902(m)(1), the court rejected petitioner Nevils’ contention that under the supremacy clause, U.S. Const., Art. VI, cl. 2, only “laws” of the United

States, not “terms” of a contract, reign supreme over state law. See id. at 10. The court found that this “argument elevates semantics over substance.” Ibid.

How Far Does the Court’s Opinion Go?

In a footnote, the court indicated that “[t]his case involves only Congress’ preemption of state insurance laws to ensure that the terms in contracts negotiated by OPM, a federal agency, operate free from state interference.” Id. at 11 n.9. Citing the Federal Arbitration Act (FAA) and the Employee Retirement Income Security Act as examples, the court noted, however, that “[m]any other federal statutes preempt state law in this way, leaving the context-specific scope of preemption to contractual terms.” Id. at 9-10. Had the court held otherwise, i.e., held that a preemption provision is unconstitutional if it defines the scope of preemption by referring to the terms of a federal contract, many federal programs — including federal procurement programs — could have been left vulnerable to imposition of conflicting or inconsistent state legislative or regulatory requirements.

The United States argued in its amicus brief that even if the FEHBA preemption provision were ambiguous, “the terms of a federal contract can displace state law.” U.S. Br. at 30 (December 2016). In support of this contention, the government cited Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988). Although that military equipment product liability suit was between private parties, the court emphasized in Boyle that the government’s rights and obligations under its contracts are governed exclusively by federal law (including federal common law), and on that basis, held that significant federal interests relating to government procurement impliedly preempted the plaintiff’s conflicting state-law liability claims. Although the court did not find a need to address implied preemption in Coventry, nothing in the opinion appears to preclude the idea that the terms of a federal

contract can have a preemptive effect even in the absence of a statutory preemption provision.

Other Preemption Issues

Coventry implicated two additional federal preemption issues, but the court's opinion does not squarely address either of them.

First, the court skirted the frequently recurring question of whether, or to what extent, the so-called "presumption against preemption," rather than ordinary statutory construction principles, applies to interpretation of express preemption provisions. See id. at 8-9. At the March 1 hearing, Justice Elena Kagan noted that the court indicated that such a presumption only applies in implied preemption cases (i.e., where an express preemption provision is not involved). The court's opinion in Coventry declines to invoke a presumption against preemption, see id. at 9, and instead, adopts a plain-text construction of the preemption provision.

Second, "[b]ecause the statute alone resolves this dispute," the court indicated that it "need not consider whether Chevron deference attaches" to OPM's regulatory interpretation of the FEHBA preemption provision. Id. at 9 n.3. The opinion notes, however, that although respondent Nevil has offered a statutory interpretation that is "plausible ... the reading advanced by Coventry and the United States best comports with § 8902(m)(1)'s text, context and purpose." Id. at 6.

Conclusion

Coventry adds to Supreme Court federal preemption jurisprudence. Its holding, although limited to the FEHBA preemption provision, may support similar preemption arguments under other federal programs where a statutory preemption provision, through reference to federal contractual terms, supplants state or local interference.

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