

IN THE SUPREME COURT OF MISSOURI

No. SC93134

JODIE NEVILS,
Appellant,

v.

GROUP HEALTH PLAN, INC., ET AL
Respondent.

TRANSFER FROM THE MISSOURI COURT OF APPEALS EASTERN
DISTRICT

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
THE HONORABLE THEA A. SHERRY
DIVISION 5

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JURISDICTIONAL STATEMENT

This matter arises from an action brought by Appellant Jodie Nevils, on behalf of himself and others similarly situated, in the Circuit Court of the County of St. Louis, Missouri. Appellant suffered injuries in a motor vehicle accident in 2006 and received medical treatment from numerous health care providers. Legal File¹ at 292. Appellant was entitled to medical coverage through a federal employee health benefit plan governed by the Federal Employee Health Benefits Act (“FEHBA”). LF at 293. Appellant’s health insurance plan was carried by Respondent Group Health Plan, Inc. (“GHP”) pursuant to a contract between GHP and the federal government, and Appellant’s medical bills resulting from the accident were paid pursuant to the plan. LF at 293.

Appellant subsequently made a negligence claim against the tortfeasor who caused the accident, and GHP and Respondent ACS Recovery Services, Inc. (“ACS”) asserted a lien on Appellant’s claim for payments made pursuant to the insurance plan. LF at 293. The lien was paid in full. LF at 293. Missouri’s “anti-subrogation law” prohibits health insurers from subrogating their insureds’ personal injury claims. LF at 293. In light of Respondents’ policies to pursue subrogation and reimbursement in violation of Missouri law, Appellant brought suit against GHP (and later, intervener ACS) on behalf of himself and others similarly situated, alleging (1) violation of the Missouri Merchandising

¹ Hereafter, references to pages of the Legal File will be abbreviated as “LF at (page number).”

Practices Act (“MMPA”); (2) unjust enrichment; (3) conversion; and (4) seeking injunctive relief. LF at 289-302.

GHP filed a motion for summary judgment, as did ACS after intervening in the case. LF at 8-229 and 345-800. The trial court granted GHP and ACS’s motions, relying solely on *Buatte v. Gen. Healthcare Sys. Inc.*, 939 S.W.2d 440 (Mo. App. E.D. 1996), and noting that reconsideration of *Buatte* would be appropriate in the Court of Appeals. LF at 855.

Appellant appealed the trial court’s final judgment to the Missouri Court of Appeals for the Eastern District. The Court of Appeals affirmed, relying on *Buatte* and citing principles of *stare decisis*. Appellant sought timely transfer to this Court for final adjudication of an issue that pits the terms of a private contract against the sovereignty of Missouri law. The Court accepted transfer.

STATEMENT OF FACTS

On or about November 2, 2006, Appellant suffered injuries in a motor vehicle accident; he subsequently received treatment from numerous health care providers. LF at 292. As a federal employee, Appellant was entitled to medical coverage through a federal employee health benefit plan. LF at 293. The plan was governed by the Federal Employee Health Benefits Act, 5 U.S.C. §§ 8901-8914 (“FEHBA”). LF at 293. Under FEHBA, the federal government’s Office of Personnel Management (“OPM”) contracted with Respondent Group Health Plan (“GHP”) for GHP to act as an insurance carrier for federal government employees’ health benefits, and GHP was the carrier for Appellant’s benefit plan. LF at 293. Pursuant to the terms of the insurance plan with GHP, Appellant’s medical bills related to the accident were paid by GHP. LF at 293.

Appellant subsequently made a claim for negligence against the tortfeasor who caused the motor vehicle accident. LF at 293. Through its agent, Respondent ACS Recovery Services, Inc. (“ACS”), GHP asserted a lien against Appellant’s negligence claim for \$6,592.24, seeking reimbursement/subrogation for payment of medical bills related to the accident. LF at 293. Respondents based the assertion of this lien on a provision of the contract between GHP and OPM (“GHP-OPM contract”) which directed GHP to seek reimbursement/subrogation. LF at 31. That provision notwithstanding, Missouri law has long prohibited insurers from acquiring the legal rights of an insured through subrogation of personal injury claims. LF at 293. In order to unencumber his personal injury claim and obtain a settlement, Appellant was instructed that he must remit \$6,592.24 to GHP to satisfy the lien, which he did. LF at 263.

Appellant subsequently brought suit on behalf of himself and others similarly situated against GHP for asserting a right to reimbursement/subrogation in violation of Missouri law. LF at 289-302. Appellant alleged counts for violation of the Missouri Merchandising Practices Act (“MMPA”)²; unjust enrichment; conversion; and seeking injunctive relief. LF at 289-302. GHP removed the case to federal court citing federal question jurisdiction; Appellant sought remand. LF at 221.

GHP argued in the remand briefing that because the GHP-OPM contract directed GHP to seek subrogation, there was a conflict between the GHP-OPM contract and Missouri law that created federal jurisdiction. LF at 228. In granting Appellant’s motion for remand, Judge Noce of the Eastern District noted that no conflict appeared to currently exist between Missouri law due to the 1996 decision of *Buatte v. Gen. Healthcare Sys. Inc.*, 939 S.W.2d 440 (Mo. App. E.D. 1996), which stated “Missouri state law prohibiting subrogation is preempted by the FEHBA.” LF at 228. However, Judge Noce also noted in his remand order that “Missouri courts may want to revisit this holding in light of subsequent developments of the law.” LF at 228.

On remand, ACS filed an unopposed motion to intervene, which was granted. LF at 4. GHP and ACS each filed motions for summary judgment making various legal and policy-based arguments, but principally arguing that *Buatte* mandated federal preemption of the Missouri anti-subrogation law and, therefore, judgment on their behalf. LF at 8-229 and 345-800. The Court entered summary judgment on behalf of Respondents on all claims, basing its decision solely on the holding in *Buatte*. However, in doing so the

² R.S.Mo. § 407.020 *et seq.*

court stated, “The court has thoroughly considered Plaintiff’s claims that *Buatte* is no longer good law in light of more recent court decisions. However, no case has overruled *Buatte*, and it is still the law in Missouri. . . Any reconsideration of the *Buatte* holding in light of recent decisions would be appropriate in the Court of Appeals.” LF at 855.

Appellant appealed to the Eastern District and the Court of Appeals considered the issue, but relied on *Buatte* and principles of *stare decisis* in holding that Missouri’s anti-subrogation law was preempted by the terms of the GHP-OPM contract. Appellant sought and obtained transfer to this Court for final resolution.

POINTS ON APPEAL

- I. **The trial court erred in granting Respondents summary judgment because FEHBA does not expressly preempt Missouri’s anti-subrogation rule in that asserted rights to subrogation and reimbursement do not relate to the “nature, provision or extent of coverage or benefits.”**

Empire Healthchoice Assurance Co. v. McVeigh, 547 U.S. 677 (2006)

Altria Group, Inc. v. Good, 555 U.S. 70 (2008)

Blue Cross & Blue Shield of Ill. V. Cruz, 495 F.3d 510 (7th Cir. 2007)

Van Horn v. Arkansas Blue Cross & Blue Shield, 629 F.Supp.2d 905 (E.D. Ark. 2007)

ARGUMENT

- I. The trial court erred in granting Respondents summary judgment because FEHBA does not expressly preempt Missouri’s anti-subrogation law in that asserted rights to subrogation and reimbursement do not relate to the “nature, provision or extent of coverage or benefits.”**

Standard of Review

The Court’s review of a grant of summary judgment is essentially de novo. *ITT Commerical Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court examines the whole record in the light most favorable to the non-moving party, and the non-moving party receives the benefit of all inferences. *Id.* Therefore, summary judgment is only appropriate when the moving party has demonstrated that there is no issue of material fact and judgment is proper as a matter of law. *Wallingsford v. City of Maplewood*, 287 S.W.3d 682, 685 (Mo. banc 2009).

The Presumption Against Preemption

Aside from the standard of review for summary judgment under state law, the Court must analyze FEHBA’s preemption provision through the appropriate lens of federal jurisprudence. The central question before the Court is whether Missouri’s law prohibiting an insurer from acquiring rights of the insured against a tortfeasor through subrogation (“Missouri’s anti-subrogation law”) is preempted by federal law. The Supremecy Clause of the United States Constitution states that federal law “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. Under this clause, state laws that conflict with federal laws are preempted, and are therefore without effect. *Connelly v. Iolab Corp.*, 927 S.W.2d 848, 851 (Mo. banc 1996). With Congressional intent being the “ultimate touchstone of preemption analysis,” the issue then turns on whether it was the clear and manifest purpose of the United States Congress to preempt a particular state law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

Preemptive intent may be indicated “through a statute’s express language or through its structure and purpose.” *Id.* A state law is expressly preempted when a federal statute states Congressional intent to preempt state law by defining the scope of preemption. *Pet Quarters, Inc. v. Depository Trust & Cleaning Corp.*, 559 F.3d 772, 780 (8th Cir. 2009). As FEHBA’s preemption provision expressly defines the scope of preemption, the question before this Court is one of express preemption.

The United States Supreme Court has repeatedly cautioned that “in the interest of encroachment on the state’s authority, a court interpreting a federal statute pertaining to areas traditionally controlled by state law should be reluctant to find preemption.” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Thus, when considering preemption of a state law, analysis must begin “with an assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 78 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). That assumption applies “with particular force” where Congress has legislated in a field

traditionally occupied by the states. *Id.* An insurer's right to subrogate its insured's third-party tort claims brought under state law is without question a field traditionally occupied by state law.

The U.S. Supreme Court has stated that the presumption against preemption of state law is especially applicable "when the text of a preemption clause is susceptible of more than one plausible reading," and advised that "courts ordinarily 'accept the reading that disfavors preemption.'" *Altria Group*, 555 U.S. at 78 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). As explained in greater detail below, the United States Supreme Court has explicitly stated that the text of FEHBA's preemption clause is susceptible of more than one plausible reading. Therefore, the Court should apply a presumption against preemption of Missouri law in this case.

A. FEHBA's preemption provision does not apply to subrogation.

The trial court granted summary judgment to Respondents based on its finding that Missouri's anti-subrogation law was expressly preempted by FEHBA. FEHBA's preemption provision, codified in 5 U.S.C. § 8902(m)(1). The provision reads as follows:

The terms of any contract under this chapter 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.

Id. In order to trigger preemption under FEHBA, two independent conditions must be satisfied: (1) the FEHBA contract terms at issue must relate to the nature, provision, or extent of coverage or benefits; (2) preemption of state or local laws occurs only if those

laws relate to health insurance or plans. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2nd Cir. 2005).

There is no dispute between the parties that Missouri law, as a matter of public policy, prohibits an insurer from acquiring rights of the insured against a tortfeasor through the payment of a medical expense through subrogation. *Waye v. Bankers Multiple Line Ins. Co.*, 796 S.W.2d 660 (Mo. App. 1990). Appellant concedes that Missouri's anti-subrogation law relates to "health insurance or plans," satisfying the second condition of FEHBA's preemption provision. Therefore, the only issue before the Court is whether an insurance carrier's asserted right to subrogation of an insured's third party tort claim relates to the "coverage or benefits" of the insurance plan. As stated below, based on the U.S. Supreme Court's seminal opinion in *Empire Healthchoice Assurance Co. v. McVeigh*, 547 U.S. 677 (2006), as well as the cases which have followed in *Empire's* wake, a carrier's claim for reimbursement/subrogation is not encompassed within the "coverage or benefits" language of FEHBA's preemption provision.

1. The holding of *Buatte v. Gencare Health Sys., Inc.*, 939 S.W.2d 440 (Mo. App. E.D. 1996).

Respondents' arguments for express preemption of Missouri's anti-subrogation law rely on *Buatte*, which is the only prior Missouri case to address the issue presented in this matter. In *Buatte* (decided in 1996 and without the benefit of the U.S. Supreme Court's decision in *Empire*), the, the Court of Appeals for the Eastern District held:

“The FEHBA requires preemption of state law if it would differ the “nature or extent of coverage or benefits” offered under the FEHBA authorized plan. In the present case, prohibiting Gencare from seeking reimbursement from its insured would clearly differ the extent of coverage or benefits.”

Buatte at 442. As alluded to by the federal district court in its remand order and the trial court in its order granting summary judgment, *Buatte* is ripe for review in light of recent decisions holding that reimbursement/subrogation are not encompassed by the “coverage or benefits” language in the FEHBA preemption provision.

2. In light of *Empire* and other recent decisions, *Buatte* should be overturned.

Before further addressing the U.S. Supreme Court’s decision in *Empire* and the subsequent cases supporting overruling of *Buatte*, Appellant will address Respondents’ assertions that these cases are of no relevance to the Court’s current inquiry. Respondents claim that because *Empire* and subsequent cases relying on *Empire* addressed the question of federal jurisdiction under FEHBA (complete preemption), the decisions are of no value to this Court’s analysis in determining whether Respondents may claim express preemption as a total defense to Appellant’s claims. While it is clever legal strategy to downplay the distinction between benefits and reimbursement made by the U.S. Supreme Court in *Empire* (and in its jurisprudential progeny), Respondents’ argument that these cases are irrelevant is a red herring. The simple question before the Court is this: Does the “coverage or benefits” language in FEHBA’s preemption provision expressly and unambiguously encompass an insurance carrier’s claimed right to

reimbursement/subrogation? For the reasons stated below, the U.S. Supreme Court's decision in *Empire* resolves that question.

Empire Healthcare Assurance v. McVeigh

In *Empire*, 547 U.S. 677, the U.S. Supreme Court was faced with the question of whether an insurance carrier's claim for reimbursement was within federal jurisdiction because, as in this case, the reimbursement was sought pursuant to a FEHBA contract with OPM. In a sweeping analysis of the preemption provision, the Court held that there was no complete preemption that conferred federal jurisdiction, and that therefore the carrier's claim raised only issues of state law. *Id.* at 698. In its opinion, the Court stated, "FEHBA contains a preemption clause, § 8902(m)(1), displacing state law on issues related to 'coverage or benefits' afforded by health-care plans. The Act contains no provision addressing the subrogation or reimbursement rights of carriers." *Id.* at 683. (emphasis added). The Court also cautioned against a broad interpretation of the FEHBA preemption provision, stating, "That choice-of-law prescription is unusual in that it renders preemptive contract terms in health insurance plans, not provisions enacted by Congress. A prescription of that unusual order warrants cautious interpretation." *Id.* (internal citation omitted) (emphasis added). Continuing with its narrow interpretation of the preemption statute, the Court noted, "given that § 8902(m)(1) declares no federal law preemptive, but instead, terms of an OPM-[carrier] negotiated contract, a modest reading of the provision is in order. Furthermore, a reimbursement right of the kind Empire here asserts stems from a personal-injury recovery, and the claim underlying that recovery is plainly governed by state law." *Id.* at 698 (emphasis added).

Similarly, before *Empire* ever reached the U.S. Supreme Court, a future Supreme Court justice recognized the “peculiar” and “quite unusual” provision of § 8902(m)(1), which provides that “certain types of *contract* terms will ‘supersede and preempt’ state laws in a particular field.” *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 143 (2nd Cir. 2005) (emphasis in original). Writing for the Second Circuit, Justice (then-Judge) Sotomayor stated that “[t]hough § 8902(m)(1)’s plain language differs from typical preemption provisions by unambiguously providing for preemption by contract, such a literal reading of the provision is highly problematic, and probably unconstitutional, because only federal *law* may preempt state and local law.” *Id.* (emphasis in original).

Justice Sotomayor’s well-reasoned opinion also considered the argument made by Respondents here, that reimbursement/subrogation “relates to” coverage or benefits. In rejecting that reading of § 8902(m)(1), Justice Sotomayor stated, “The Supreme Court has specifically warned against overly-broad interpretation of the term, noting that ‘if “relate[s] to” were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere.” *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

Notably, in *Empire v. McVeigh*, both Justice Sotomayor (for the Second Circuit) and the U.S. Supreme Court advised a narrow, “modest,” or “cautious” reading of § 8902(m)(1), as the provision gives private contracts the power to supersede state laws. In the wake of the *Empire* decision, a near uniform consensus has emerged that insurers’

claimed rights to reimbursement/subrogation are not encompassed by the “coverage or benefits” language within § 8902(m)(1).

Post-Empire Analysis of FEHBA Preemption and Reimbursement/Subrogation

With the guidance imparted by the U.S. Supreme Court in *Empire*, other courts across the country soon followed suit in reading FEHBA’s preemption provision in § 8902(m)(1) to exclude FEHBA insurers’ claimed contractual rights to reimbursement/subrogation. The U.S. Supreme Court remanded the case of *Blue Cross Blue Shield of Ill. v. Cruz* to the Seventh Circuit for further consideration in light of *Empire*. *Cruz v. Blue Cross & Blue Shield*, 548 U.S. 901. In the Seventh Circuit’s previous treatment of *Cruz*, the court had reversed a Northern District of Illinois decision dismissing a suit for want of federal jurisdiction; the case involved a FEHBA insurer seeking reimbursement pursuant to a FEHBA contract. *Blue Cross & Blue Shield of Illinois v. Cruz*, 396 F.3d 793 (7th Cir. 2005) (vacated at 548 U.S. 901). While the Seventh Circuit’s initial, vacated opinion in the *Cruz* case was based on “a belief that Congress in the Federal Employees Health Benefit Act had wanted federal employees to have the same benefits under their health plan no matter what state they were in,” Judge Posner recognized that in *Empire*, “[t]he Supreme Court distinguished . . . between benefits and reimbursement. The amount of benefits is determined by the plan and is indeed uniform across states and is unaffected by [state law regarding reimbursement]. That [state law] just affects how much of a tort judgment or other judgment against (or settlement with) a third party the plaintiff gets to keep and how much he must give the insurer.” *Cruz*, 495 F.3d at 512. Judge Posner continued, “the benefits are uniform,

though the net financial position of an insured who has a potential tort claim is not but instead depends on the state liability rules applicable to his tort claim When ‘benefits’ are understood to include every financial incident of an illness or injury, national uniformity is unattainable without a federal takeover of the entire tort system.” *Cruz* at 514.

Judge Posner’s point is well-made: interpreting “coverage or benefits” to include anything affecting an insurer or insured’s net financial position could lead to absurd and disturbing eventualities. For instance, what if FEHBA contracts provided a right of reimbursement to the insurer if the insurer determined – in its sole discretion – that the insured was injured due to his or her own negligence? If that “right” to reimbursement created by private contract superseded state law, FEHBA insurers such as GHP could then place liens on the real and personal property of insureds while the insureds would be left without the protections afforded by state law. Under Respondents’ rationale in this case, a FEHBA contract could potentially shorten or lengthen a state’s statutes of limitation, comparative/contributory fault rules, damage caps or similar state laws governing tort claims, all because such contract terms would affect the insurer’s ability to procure reimbursement and therefore “relate to” coverage and benefits. Indeed, allowing such an expansion of FEHBA’s preemption statute would effectively allow OPM and its insurance carriers to takeover the entire tort system by way of private contract.

With *Empire* and then *Cruz* highlighting the difference between benefits and reimbursement, other courts soon followed suit in recognizing the critical distinction. In *Van Horn v. Ark. Blue Cross & Blue Shield*, 629 F. Supp. 2d 905 (W.D. Ark. 2007), an

insured filed a declaratory judgment action in state court seeking an order declaring that the defendant insurer was not entitled to reimbursement/subrogation from proceeds of a personal injury action. The defendant insurer removed the case to federal court and the insured moved for remand. *Id.* In remanding the case, the *Van Horn* court cited *Cruz* and differentiated between benefits and reimbursement, stating that “the disuniformity that results is not a disuniformity in benefits, but a possible disuniformity in the net financial position of insureds from state to state.” *Id.* at 912.

Additionally, at least one Missouri trial court has ruled that *Buatte* is no longer good law. In an Order denying a defendant insurer’s Motion to Dismiss, Judge Ann Mesle of the Jackson County Circuit Court concluded “because the U.S. Supreme Court has suggested that preemption of a state law requires express action by Congress, it is unlikely that *Buatte* holds any authority on this issue today. Pursuant to federal court decision that are more recent than *Buatte* (*Empire, Van Horn, and Cruz*), the Court finds that Missouri laws on subrogation and reimbursement are not preempted.” L.F. at 840-843.³

In ACS’ summary judgment brief before the trial court, it cited a single post-*Empire* case that addresses FEHBA preemption, supposedly in support of Respondents’ position. In *Maple v. Office of Personnel Management*, 2010 U.S. Dist. LEXIS 65306 (W.D. Okla. 2010), plaintiff insureds filed a complaint against their insurers and OPM for

³ On March 13, 2013, after the Court of Appeals handed down their decision in this case upholding *Buatte*, Judge Mesle granted summary judgment to the defendant insurer.

retroactively terminating their health insurance, which left them responsible for medical bills that had originally been paid by the insurer. As stated in section I.A. above, in order to find preemption of a state law under FEHBA, two independent conditions must be satisfied: (1) the FEHBA contract terms at issue must relate to the nature, provision, or extent of coverage or benefits; (2) preemption of state or local laws occurs only if those laws relate to health insurance or plans. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2nd Cir. 2005). At issue in this case is question of whether the first condition is satisfied by a contract provision relating to reimbursement/subrogation. On the contrary, at issue in *Maple v. Office of Personnel Management*, the Western District of Oklahoma’s analysis was limited to the second factor for finding preemption under FEHBA: whether the state law under which the plaintiffs sought relief “relate[d] to health insurance or plans.” *Maple* at *8. Appellant has conceded that Missouri’s anti-subrogation law relates to health insurance or plans. *Maple* provided no analysis or interpretation whatsoever of the “coverage or benefits” condition to finding preemption, and is therefore of no value to the Court here.

In sum, after *Empire* and multiple subsequent cases have clarified the distinction between “coverage and benefits” and reimbursement/subrogation, *Buatte v. Gen. Healthcare Sys. Inc.* is no longer good law. The U.S. Supreme Court and other courts have encouraged a “modest” or “cautious” interpretation of the FEHBA preemption statute because it allows private contract terms to supersede state law. *Buatte* provides a liberal reading of the statute’s preemptive power, and therefore eviscerates the sovereignty of Missouri law. Moreover, as referenced above and discussed in greater

detail below, when a preemption provision is open to more than one plausible reading, the Court should accept the reading which disfavors preemption.

3. If FEHBA’s preemption provision is open to more than one plausible reading, the reading disfavoring preemption must be accepted.

As stated *supra*, the U.S. Supreme Court has said that “when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Altria Group, Inc. v. Good*, 555 U.S. 70, 78 (U.S. 2008) (emphasis added), *quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). That presumption is bolstered in this case by the U.S. Supreme Court advising a “modest reading” and “cautious interpretation” of § 8902(m)(1) in *Empire*.

The U.S. Supreme Court unequivocally stated in *Empire* that § 8902(m)(1) does not address reimbursement or subrogation. However, it also briefly addressed whether the language of the statute could be read broadly enough to include subrogation even if not expressly stated. The Court declared that § 8902(m)(1) is “open to more than one construction” as to whether or not reimbursement/subrogation is encompassed within the purview of “coverage or benefits.” *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 697-98 (2006).

In short, the U.S. Supreme Court has provided clear guidance in this case with the following two holdings: (1) If a preemption provision is susceptible to more than one plausible reading, there should be a presumption against preemption⁴; and (2) FEHBA’s preemption statute is susceptible to more than one plausible reading as to whether its

⁴ See *Altria Group Inc. v. Good*, 555 U.S. at 78, and *Bates*, 544 U.S. at 449.

“coverage or benefits” language encompasses state laws regarding insurers’ rights to subrogation/reimbursement⁵. This Court should follow the lead of the U.S. Supreme Court in holding that “[e]ven if [the party seeking preemption] had offered us a plausible alternative reading of [the preemption provision], indeed, even if its alternative were just as plausible as our reading of that text – we would nevertheless have a duty to accept the reading that disfavors pre-emption. ‘[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.’” *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 449 (2005), quoting *Medtronic*, 518 U.S. at 485.

Though Appellant ardently maintains that § 8902(m)(1) does not encompass contract terms related to reimbursement/subrogation, at a bare minimum there is more than one possible interpretation. Therefore, based on federal law concerning ambiguities within federal statutory preemption provisions, the Court must observe a presumption against preemption of Missouri’s anti-subrogation law.

4. OPM’s opinion letter should be afforded no deference by this Court.

In addition to the aforementioned cases finding no complete preemption in the wake of *Empire*, one court initially followed *Empire* in arriving at the conclusion that § 8902(m)(1) did not expressly preempt a state law barring an insurer’s claimed right to reimbursement/subrogation before ultimately reversing its decision based on a letter of opinion from OPM.

⁵ See *Empire*, 547 U.S. at 697-98.

Calingo v. Meridian Resources

In *Calingo v. Meridian Resources*, 2011 U.S. Dist. LEXIS 83496 (S.D.N.Y. 2011), Judge Vincent L. Briccetti considered the precise issue here before the Court: whether a state anti-subrogation law was expressly preempted by FEHBA. Just as in this case, plaintiff insureds brought a putative class action against a FEHBA insurer seeking money collected through reimbursement/subrogation of medical bills in violation of a New York anti-subrogation law. The defendant insurer sought dismissal of the plaintiffs' claims, citing express preemption of the state law by § 8902(m)(1). Judge Briccetti provided a detailed and thorough analysis of jurisprudence interpreting the FEHBA preemption provision, both pre- and post-*Empire*, and concluded that "[t]he decisions by the Supreme Court and the Second Circuit Court of Appeals in [*Empire*] changed the legal framework for how courts treat the interaction between state subrogation laws and FEHBA's preemption provision," and that "[a]fter [*Empire*], courts withdrew from their earlier findings that FEHBA preempted state subrogation laws." *Id.* at *22, *26. As such, Judge Briccetti ruled that "subrogation and reimbursement pursuant to a health insurance policy does not relate to the coverage and benefits under such a policy," and the defendant insurer's motion to dismiss was denied. *Id.* at *28.

Subsequent to Judge Briccetti's initial ruling, OPM issued a "FEHB Program Carrier Letter" (hereinafter "OPM Letter") expressing its official position that FEHBA (and by extension, OPM's own negotiated contracts) preempt state laws on issues of subrogation and reimbursement. The letter described the carrier's right to subrogation

and/or reimbursement as “both a condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits,” and positing that the terms therefore “relate to” coverage or benefits.

Based on the OPM Letter, Judge Briccetti entered judgment on the pleadings for the insurance carrier. The court’s judgment briefly touched on the fact that “[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law” generally are not entitled to substantial deference, before changing course and granting judgment to the insurance carrier. *Calingo v. Meridian Resources*, 2013 U.S. Dist. LEXIS 42759 (Feb. 20, 2013) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

Judge Briccetti explained that he was persuaded by OPM’s argument that allowing carriers to seek subrogation/reimbursement serves to reduce the amount of money insureds pay for their health insurance, “and presumably affect[s] the benefits they receive.” *Id.* at *6. Judge Briccetti’s about-face is curious to say the least, especially after his heavy reliance on Judge Posner’s well-crafted opinion in *Blue Cross & Blue Shield of Ill. v. Cruz*, 495 F.3d 510, 512-13 (7th Cir. 2007), within his earlier ruling denying dismissal in *Calingo*. In *Cruz*, Judge Posner focused on the importance of reading FEHBA’s preemption statute narrowly and highlighted the danger of reading “coverage and benefits” to include all things affecting an insurer’s bottom line, warning that “[w]hen ‘benefits’ are understood to include every financial incident of an illness or injury, national uniformity is unattainable without a federal takeover of the entire tort

system.” *Id.* at 514. Ironically, Judge Briccetti relied on precisely that portion of Judge Posner’s opinion only months before reversing course and finding persuasive OPM’s argument that subrogation of an injured insured’s tort claims related to “benefits” because it affected how much the insurers charge for health insurance. Judge Briccetti had it right the first time.

No deference is due to the OPM Letter

The U.S. Supreme Court has stated that in certain circumstances, an agency’s interpretation of a statute it administers is entitled to substantial deference. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This “substantial deference” is commonly referred to with reference to the case fostering the doctrine as “*Chevron* deference.” *Chevron* deference is appropriate “where an agency rule sets forth important rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007). Specifically, the U.S. Supreme Court has identified the issuance of the rule after a notice-and-comment procedure as a “significant” factor in finding *Chevron* deference. *U.S. v. Mead Corp.*, 533 U.S. 218, 231 (2001).

Conversely, the U.S. Supreme Court has stated that “[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law,” are generally not entitled

to *Chevron* deference. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). The OPM Letter at issue in this case was not promulgated after a notice-and-comment period, nor does it have the force of law. Rather, it came on the heels of ongoing litigation in this state and others, with OPM (to no one's surprise) interpreting FEHBA's preemption clause as giving OPM's contracts with insurance carriers the power to supersede state laws prohibiting subrogation of insureds' third-party tort claims. OPM is not entitled to *Chevron* deference in this case.

Nor should the OPM Letter be afforded any other degree of deference based upon its purported "persuasiveness." Obviously, OPM's letter is entirely self-serving; If OPM were to admit that the reimbursement/subrogation terms within its contracts exceeded the scope of FEHBA's preemption clause, it would be admitting that the contract terms it drafted were illegal under various state laws. However, the OPM letter is also factually inaccurate and misleading to the Court. OPM claims that "Carriers are required to seek reimbursement and/or subrogation in accordance with the contract." *Calingo*, 2013 U.S. Dist. LEXIS 42759 (Feb. 20, 2013). We know this not to be true. In fact, some OPM contracts state that FEHBA carriers "may" seek reimbursement or subrogation while others mandate that carriers "shall" seek reimbursement or subrogation. This variance evidences the fact that these private contracts which OPM claims supersede state law on matters of reimbursement and subrogation rights are individually negotiated between OPM and the carrier. The discretion given to a carrier in a "may" FEHBA contract was noted by Judge Howard F. Sachs of the United States District Court for the Western District of Missouri in a companion FEHBA case, *Jacks v. Meridian*, Case No. 11-94

(W.D. Mo. Sept. 9, 2011) (Appendix, A10). In finding an absence of jurisdiction and remanding the case to state court, Judge Sachs recognized “the contractual language agreed to by the parties at bar does not mandate, but rather permits discretion to [the carrier] to pursue reimbursement claims by filing suit.” *Id.* at Appendix A19. If some carriers “may” seek subrogation while others “shall,” OPM’s claim that carriers are required to seek subrogation or reimbursement is woefully misleading at best.

With heavy implications for federalism and the sovereignty of Missouri law hanging in the balance, a misleading opinion letter with no force of law whatsoever should be given the same amount of deference by this Court. This is especially true when considering that OPM’s interpretation would render a portion of FEHBA’s preemption provision “mere surplusage.”

5. The language of FEHBA’s preemption provision makes Congress’s intent to limit its scope clear.

A basic and longstanding principle of statutory interpretation is that courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). The modern variant of this canon of construction is that statutes should be construed “so as to avoid rendering superfluous” any statutory language. *Astoria Fed. Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

Respondents argue in their motions for summary judgment (and OPM in its letter) that acceptance of the carrier’s right to reimbursement/subrogation is a condition to the

membership with insurance plan and receipt of its benefits, and that therefore the carrier's right to reimbursement/subrogation relates to "coverage or benefits." Without accepting that term – they argue – there can be no receipt of benefits whatsoever by the insured. But the contract requires that the insured accept more than just the carrier's right to reimbursement/subrogation to enroll in the plan and receive benefits: it requires that the insured accept every term of the contract. Therefore, by Respondents' (and OPM's) rationale – every single term within the contract is a condition of receiving coverage or benefits, and therefore relates to coverage or benefits.

Once again, the statutory text of FEHBA's preemption provision reads as follows:

The terms of any contract under this chapter 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). If this Court were to adopt the interpretation put forth by Respondents and OPM, it would effectively render the words "which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)" utterly superfluous. This Court has recently undertaken analysis of a federal express preemption clause to determine its preemptive effect on state law. Just as it did in *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, this Court should "construe the plain language of the statute to determine the extent to which Congress intended for [federal law] to preempt state law." *Id.* at 148. Surely Congress did not include an entire

eighteen word phrase limiting the scope of preemption if it intended it to be of no importance.

In fact, we have a concrete example of how Congress broadly constructs preemption provisions that it intends to supersede all relevant state laws. The Employee Retirement Income Security Act (“ERISA”) preemption provision clearly displays Congressional intent to categorically preempt all state laws concerning employee benefit plans, subject to a few enumerated exceptions. ERISA’s preemption provision provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee health benefit plan described in section 4(a) and not exempt under section 4(b).” 29 U.S.C. § 1144(a). Had Congress intended all terms of FEHBA plan contracts to supersede any state law relating to health insurance plans, they would have simply omitted the scope-limiting language as they chose to in ERISA’s preemption provision. As the U.S Supreme Court noted with reference to ERISA’s preemption provision in *Empire*, “Section 8902(m)(1)’s text does not purport to render inoperative *any and all* state laws that in some way bear on federal employee-benefit plans.” *Empire*, 547 U.S. at 698. They chose not do so for good reason, and this Court should avoid rendering Congress’s scope-limiting language in § 8902(m)(1) superfluous.

Moreover, if Congress had so intended, they could have since taken action to broaden FEHBA’s preemption provision and clarify their preemptive intent. “[I]t can be strongly presumed that Congress will specifically address language on the statute books it wishes to change.” *United States v. Fausto*, 484 U.S. 439, 453 (1988) (superseded on other grounds). FEHBA was originally enacted in 1959 and its preemption provision, §

8902(m)(1), was added in 1978. Congress amended the preemption provision in 1998, but elected to leave the scope-limiting language within the statute. Since *Empire* was handed down from the U.S. Supreme Court in 2006, there has been considerable litigation concerning the preemptive scope of FEHBA, yet Congress has not amended the preemption provision to broaden its scope. Congress' choice of statutory language in § 8902(m)(1) and their choice to let it remain untouched are demonstrative of the intent to provide preemption in cases concerning the "coverage or benefits" administered under FEHBA plans, but not extending to cases concerning subrogation and reimbursement.

CONCLUSION

A single question is before the Court: Does Missouri's anti-subrogation law relate to the nature, provision, or extent of coverage or benefits, making it preempted by federal law?

The United States Supreme Court has advised that courts considering federal preemption of state law should be reluctant to find preemption unless a clear and manifest Congressional intent to preempt the law can be found. They have further advised that the assumption against preemption should be applied with particular force in a field of law traditionally occupied by the states. Insurers' rights to subrogation of an insured's tort claim is unquestionably a field of law traditionally occupied by the states. Finally, the U.S. Supreme Court has advised that if the preemption provision in question is susceptible of more than one reading, the court should accept the reading disfavoring preemption.

In *Empire*, the U.S. Supreme Court stated that FEHBA's preemption provision did not address subrogation or reimbursement. They bolstered the presumption against preemption that should be applied in this case by suggesting "cautious interpretation" and "modest reading" of FEHBA's preemption provision due to the fact that it gives private contracts the power to supersede state laws. Finally, they explicitly stated that FEHBA's preemption provision was susceptible to multiple interpretations. Following the directives of the U.S. Supreme Court concerning preemption of state law, this Court must apply a presumption against preemption in this case, and find that "coverage or benefits" means just that – coverage or benefits – and is not inclusive of the insurer's right to reimbursement or subrogation, which occurs long after coverage has been determined and benefits have been paid.

In reaching that conclusion, this Court should afford no deference to the letter of opinion provided by OPM. OPM obviously must opine that its own contracts are valid and enforceable by law. Its letter of opinion is inaccurate and misleading, it was not born of any formal rule-making process, and it is entirely devoid of any force of law. Moreover, OPM and Respondents' position that reimbursement/subrogation "relates to" coverage or benefits because acceptance thereof is a condition of the insured receiving coverage and benefits is a circular argument that would render all limiting language of FEHBA's preemption provision superfluous. As Congress has not chosen to remove that scope-limiting language itself, we must assume it is there for good reason.

With the presumption against preemption clearly applying and no clear reference subrogation or reimbursement within FEHBA's preemption provision, this Court should

find in favor of Appellant and in favor of Missouri law. Unless and until this Court overrules *Buatte*, Missouri law will continue to be unjustly and unnecessarily usurped by the terms of private contracts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellant states that this Brief is in compliance with the limitations of Rule 84.06(b), is in Microsoft Word format using Times new Roman 13 point font and contains 6,981 words, exclusive of the table of contents, table of authorities, and appendix.

/s/ Blake P. Green

Blake P. Green

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2013, I electronically filed the foregoing with the Clerk of the Missouri Supreme Court by using the Missouri eFiling system. I certify that all participants in the case are registered eFiling users and that service will be accomplished by the Missouri eFiling system.

/s/ Blake P. Green _____

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