

IN THE SUPREME COURT OF MISSOURI

No. SC93134

JODIE NEVILS,
Appellant,

v.

GROUP HEALTH PLAN, INC., ET AL
Respondents.

TRANSFER FROM THE MISSOURI COURT OF APPEALS EASTERN
DISTRICT

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

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Introduction

Pursuant to Rule 84.04, Appellant files this Reply brief in response to the Substitute Brief of Respondent Group Health Plan, Inc. (“GHP”) and Respondent ACS Recovery Service (“ACS”). Respondents miss the mark on four relevant and critical issues in their brief, and Appellant provides additional clarity on those issues herein.

First, this case unquestionably calls for application of the presumption against preemption of state law prescribed by the U.S. Supreme Court. The presumption applies when interpreting a federal statute pertaining to fields traditionally occupied by state law, and an insurer’s right to subrogate its insured’s tort claims is traditionally a domain of state law. Respondents attempt to sidestep the presumption’s application with a myriad of arguments touting the federal government’s “strong interest” in its employees’ benefit plans, or pointing to enforcement of those benefit plans’ provisions as the “real issue” in the case. Nevertheless, the fact remains that an insurer’s right to reimbursement or subrogation is and has traditionally been an issue of state law, and whether Missouri’s anti-subrogation law is displaced by federal statute is, to borrow Respondents’ words, the “real issue” before the Court.

Second, the Court should also follow the U.S. Supreme Court’s lead in giving FEHBA’s preemption provision, 5 U.S.C. § 8902(m)(1), a “modest reading,” or “cautious interpretation,” and limit FEHBA’s preemptive scope to state laws which truly “relate to” coverage or benefits. Respondents urge the Court to supplant the U.S. Supreme Court’s characterization of § 8902(m)(1) as “unusual” with their own, brazenly declaring the highest federal Court in the land’s analysis of a federal preemption statute as “empirically

wrong.” In seeking an expansive reading of the “relates to” language, Respondents rely on ERISA’s preemption provision and cases interpreting it; but those arguments are similarly off-base. ERISA’s wide-sweeping preemption provision contains no language explicitly limiting its preemptive power to the contractual terms relating to “coverage or benefits” – a distinction noted by the U.S. Supreme Court in *Empire Healthchoice Assurance Co. v. McVeigh*, 547 U.S. 677 (2006). The “coverage or benefits” limitation within the plain language of the statute indicates Congressional intent to restrict FEHBA’s preemptive scope, and should not be overlooked by the Court.

Moreover, Respondents’ string citation of post-*Empire* cases supposedly in support of their broad interpretation of § 8902(m)(1) contains misleading quotations taken out of context, a case which contained little to no analysis of FEHBA’s preemption provision, and a case concerning the second condition to finding FEHBA preemption, making it of no use here. Despite Respondents’ assertions to the contrary, while *Empire* and cases that followed in its wake did concern the question of complete preemption, those courts’ analyses of § 8902(m)(1) and the distinctions made between “coverage or benefits” and subrogation or reimbursement are directly relevant here, and should be considered by the Court.

Third, though Respondents contend that “legislative history confirms the breadth of § 8902(m)(1)’s preemption,” a review of FEHBA’s complete legislative history reveals no intention by Congress to create a broad or wide-sweeping preemption provision. Nor does the legislative history contain any reference whatsoever to subrogation or reimbursement. Not surprisingly, the legislative history indicates that

Congress added the preemption provision specifically to combat differing state requirements concerning the extent of health insurers' provision of coverage and benefits (such as whether chiropractic care is covered). Legislative history also reveals that § 8902(m)(1) was "purposely limited," and did not provide exemption from other state laws concerning the insurance business.

Finally, the Office of Personnel Management's ("OPM") interpretation of § 8902(m)(1) lacks both the force of law and the power of persuasion, and should thus be afforded no deference by the Court. In light of the presumption against preemption, FEHBA's legislative history, and plain scope-limiting language of the statute, OPM's interpretation is not reasonable.

I. The presumption against preemption clearly applies to this case.

Appellant first addresses Respondents' contention that no presumption against finding federal preemption of Missouri's anti-subrogation law applies in this case. The United States Supreme Court has stated that when a preemption clause is susceptible of more than one plausible reading, the courts should ordinarily accept the reading that disfavors preemption. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 78 (2008). Moreover, when the federal "law" in question pertains to areas traditionally controlled by state law, courts should apply a presumption "with particular force" against preemption. *Id.* An insurer's right to subrogate its insured's third-party tort claims (which are brought under state law) is without question a field traditionally occupied by state law. Insurance regulation in general is a field of law traditionally relegated to the states, and insurers'

rights to pursue subrogation or reimbursement of health benefits paid vary from state to state.

Respondents also know that insurers' rights to subrogation are traditionally controlled by state law. So rather than arguing against it, Respondents provide a smattering of unsound reasons why the presumption should not apply, seemingly hoping that one will stick.

First Respondents contend that rather than federal preemption of Missouri's anti-subrogation law, "the real issue in this case is the [sic] conditions for receipt of benefits by federal employees." Br. at 30. Respondents then state that conditions for receipt of benefits by federal employees is not a field traditionally occupied by the states – a fact that Appellant will readily admit. The entirety of Respondents' "real issue" argument is two or three sentences long, and for good reason: it does not pass muster when faced with common sense. Clearly the issue before the Court is whether Missouri's anti-subrogation law is preempted by § 8902(m)(1).

Next Respondents argue that the presumption against preemption is not triggered in this case because the relationship between Respondent GHP and OPM is "inherently federal," and therefore this case does not concern a field occupied by state law. In support, Respondents cite the case of *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001). In *Buckman*, plaintiffs alleged that a defendant medical device manufacturer made fraudulent representations to the FDA, violating FDA regulations and thereby damaging the plaintiffs. Respondents' argument ignores three glaring points of distinction between these cases that render them incomparable. First, unlike *Buckman*,

Appellant's claims are not based on any fraudulent or wrongful conduct in its dealings with a federal agency or administrative body – they are based on Respondents' subrogation practices in violation of Missouri law. Second, unlike *Buckman*, there is no federal statute in this case which “leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance.” *Buckman* at 349. The “noncompliance” Appellant sues for here is noncompliance with Missouri law, not federal law. Third, unlike the FDA and medical device manufacturers who made fraudulent misrepresentations to the FDA, OPM is not charged with investigating and enforcing regulations prohibiting GHP and other insurers from violating state anti-subrogation laws. *Buckman* is simply irrelevant to this case, and does nothing to displace the presumption against preemption.

Respondents then abruptly turn to a brief discussion of *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), seemingly suggesting that this Court should apply federal “common law”¹ in order to find preemption. Federal common law is invoked and applied in “few and restricted” circumstances. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). Those circumstances are not present in this case, because as Judge Sachs with the Western District of Missouri recognized in another FEHBA case, where “litigation is purely between private parties and does not touch the rights and duties of the United

¹ Appellant notes that there is no “federal general common law.” *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938).

States,' federal law does not govern." *Morris v. Humana Health Plan, Inc.*, 829 F. Supp. 2d at 858 (quoting *Boyle*, 487 U.S. 500, 506).

Respondents' final attempt to displace the presumption against preemption comes via argument that just because there are other recognized exceptions to Missouri's anti-subrogation law, the Court should find that one exists here. Respondents cite exceptions created by the Missouri legislature (hospital liens, workers compensation liens, and uninsured motorist payment liens) and in one case by federal statute (ERISA), and argue Missouri's anti-subrogation law is "hardly as strong or rigid as [Appellant] suggests," claiming that the "exception" they are claiming here is no different. Br. at 35. Once again, Respondents fail to recognize critical distinctions that render their proposed analogy inoperative.

Concerning the state law exceptions to Missouri's anti-subrogation rule, they are created by statute and written by Missouri's elected representatives; whereas the exception to Missouri law claimed by Respondents is a creature of private contract. Respondents correctly point out that Missouri's anti-subrogation law is preempted by ERISA; but as discussed in great detail below, FEHBA and ERISA's preemption provisions are easily distinguishable. ERISA, unlike FEHBA, has no language limiting the scope of its preemptive powers to contract terms concerning "coverage or benefits," and the Court is obligated to interpret FEHBA in a way that gives effect to that clause of limitation.

In sum, none of Respondents' various arguments alter the fact that the U.S. Supreme Court calls for a presumption against preemption of state law when the text of a

preemption clause is susceptible of more than one plausible reading, and Respondents concede that the U.S. Supreme Court has held that § 8902(m)(1) is susceptible to multiple readings. Br. at 27. The presumption therefore applies. Moreover, it applies “with particular force,” as it is within an area traditionally reserved for state law. It is with this lens that the Court should view all of Respondents’ arguments for preemption.

II. The Court should give § 8902(m)(1) a “modest reading.”

The primary issue before the Court is whether Respondents’ claimed rights to subrogation “relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits),” as provided by § 8902(m)(1). This Court should follow the U.S. Supreme Court’s lead in giving § 8902(m)(1), a “modest reading,” or “cautious interpretation,” and avoid expanding the scope of FEHBA preemption by reading “relate to” expansively.

However, before turning to Respondents’ arguments for a broad interpretation of § 8902(m)(1), Appellant must briefly address an inaccurate recitation of his position in Respondents’ brief. 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). In his brief, Appellant concedes that the second condition is satisfied in this case. But Respondents’ mischaracterize that concession, stating that Missouri’s anti-subrogation rule “*has a connection with the plan*

because it purports to prevent what the contract requires. That is exactly what § 8902(m)(1) was intended to prevent and Nevils expressly concedes the point.” Br. at 12. For the sake of clarity, Appellant does not concede that Missouri’s anti-subrogation law is related to health insurance “*because it purports to prevent what the contract requires,*” but rather because the law simply is related to health insurance. This is the difference between the FEHBA and ERISA preemption statutes discussed in greater detail below. Nor does Appellant concede that state anti-subrogation laws are “*exactly what § 8902(m)(1) was intended to prevent.*” This bold assertion by Respondents touches on legislative intent and is easily disproven, as more fully explained in Section III.

Differentiating Between “Coverage or Benefits” and Subrogation

Respondents urge the Court to adopt an expansive reading of § 8902(m)(1) and effectively read subrogation/reimbursement into the statute. Other than the presumption against preemption, there are ample reasons to reject Respondents’ arguments.

First, the plain language of § 8902(m)(1) gives only those contract terms which relate to “coverage or benefits (or payments with respect to benefits)” the power to supersede state laws. On the statute’s face, its preemptive power does not extend to reimbursement or subrogation – processes through which Respondents recover money long after “coverage and benefits” have been determined, and “payments with respect to benefits” have been made to the provider. Respondents’ attempt to cast “payments with respect to benefits” as encompassing subrogation or reimbursement because through subrogation, money is being paid back to the insurer for the benefits they were obligated

to provide. That proposed construction ignores the clause's earlier focus on coverage and benefits. When considered as a whole, the plain language is (intentionally – as discussed in Section III) limiting and restrictive of FEHBA's preemptive power. However, even if there is an ambiguity, it must be resolved in favor of state law pursuant to the presumption against preemption.

This is especially true given the U.S. Supreme Court's clear warning not to construe § 8902(m)(1)'s preemptive powers too broadly. *Empire*, 547 U.S. at 683. (“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.”)

Empire and Subsequent FEHBA Cases

Respondents urge the Court not to consider the cautionary instruction of the U.S. Supreme Court in *Empire* when interpreting § 8902(m)(1), and for good reason: they propose an expansive and imprudent construction of the statute where The Court called for modesty and caution. Respondents are correct that *Empire* and the cases that followed it – *Blue Cross & Blue Shield of Illinois v. Cruz*, 495 F.3d 512, 514 (7th Cir. 2005), and *Van Horn v. Ark. Blue Cross & Blue Shield*, 629 F. Supp. 2d 905 (W.D. Ark. 2007) – considered whether to exercise federal jurisdiction. But in so doing, the courts undertook detailed and thoughtful analyses of § 8902(m)(1), and whether FEHBA's preemption statute necessarily encompassed claimed rights to subrogation and reimbursement – a question they all answered in the negative. While the legal question

posed by these cases differs slightly from the one at bar, their analyses of § 8902(m)(1) are still of value to this Court.

While Respondents cast *Empire* and its successors off as irrelevant, the charge ironically suits all but one case Respondents cite in support of finding preemption. Preliminarily, Appellant maintains that all cases predating *Empire* are of no value in interpreting the preemptive force of § 8902(m)(1), as the U.S. Supreme Court changed analysis of the statute by cautioning future courts to interpret it narrowly. Therefore, Appellant addresses no pre-*Empire* cases in this brief.

In their brief, Respondents provided a string citation of post-*Empire* cases that supposedly support their broad interpretation of § 8902(m)(1). Among those cited cases is a case which contained little to no analysis of FEHBA's preemption provision, misleading quotations taken out of context, and a case concerning the second condition to finding FEHBA preemption, making it of no use here. Perhaps most tellingly, none of the cases cited by Respondents seem to have applied the presumption against preemption prescribed by the U.S. Supreme Court under these circumstances.

Respondents' first cited case is *Shields v. Gov't Employees Hosp. Ass'n., Inc.*, 450 F.3d 643, 648 (6th Cir. 2006). In *Shields*, the plaintiff was insured with a FEHBA carrier. She suffered an injury, recovered from the tortfeasor, and reimbursed the FEHBA carrier for the medical expenses paid. The plaintiff also had "no-fault insurance" as prescribed by Michigan law, and she sued her no fault insurer for reimbursement of the money she had turned over to the FEHBA carrier. The *Shields* court mentions FEHBA's preemption of state law only in passing. The opinion provides no substantive analysis of

FEHBA preemption whatsoever, and for good reason: the FEHBA carrier's right to subrogation was not being challenged by the insured, and it was not the issue before the court. *Id.* As a result, the Sixth Circuit's commentary about the preemptive effect of FEHBA with respect to subrogation is mere dictum, and should be afforded no weight in this Court's analysis.

Respondents next cite *Blue Cross Blue Shield Health Care Plan of Ga. Inc. v. Gunter*, 541 F.3d 1320, (11th Cir. 2008), and *Maple v. U.S. ex rel. O.P.M.*, 2010 WL 2640121 (W.D. Okla. June 30, 2010) in support. In *Gunter*, the Eleventh Circuit upheld the dismissal of a FEHBA carrier's suit for subrogation, finding a lack of subject matter jurisdiction. The *Gunter* court relied on *Empire* and a pre-*Empire* decision of the Georgia Supreme Court which had explicitly ruled that Georgia's "complete compensation rule" was displaced by FEHBA. As there was no conflict between federal and state law, no federal jurisdiction existed. *Gunter* at 1323. The critical distinction between this case and *Gunter* is that a federal court was applying state law that pre-existed *Empire*, and was in no position to overrule the Georgia Supreme Court's precedent. Unlike the *Gunter* court, this state Court has the opportunity to revisit Missouri's interpretation of FEHBA preemption with respect to asserted rights to subrogation; *Gunter* is therefore inapposite.

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 the OPM for 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. On the contrary, at issue in *Maple v. Office of Personnel Management*, the Western District of Oklahoma's analysis was limited to the second inquiry: whether the Oklahoma laws under which the plaintiffs sought relief "relate[d] to health insurance or plans." *Maple* at *8. Appellant has conceded that issue here. *Maple* provided no analysis or interpretation whatsoever of the "coverage or benefits" condition to finding preemption, and is of no value to the Court here.

That leaves only *Calingo v. Meridian Res. Co.*, 2013 WL 1250448 (S.D.N.Y. Feb. 20, 2013), which Appellant discussed at length in his opening Substitute Brief. *Calingo* is legally on point, but obviously not controlling, and Appellant ardently maintains that the judge was right the first time when he followed *Empire* and *Cruz* and found that there was no preemption of the state anti-subrogation law. Notably, there appears to have been no presumption against preemption applied in this case either.

In sum, despite Respondents' assertions to the contrary, they offer only one case on point that supports their argument – a federal district court case where the judge apparently had a change of heart after reading the OPM Carrier Letter (which is addressed below). Additionally, while *Empire* and cases that followed in its wake did concern the question of complete preemption, those courts' analyses of § 8902(m)(1) and

the distinctions made between “coverage or benefits” and subrogation or reimbursement are directly relevant, and should be considered by the Court in its analysis of FEHBA’s preemptive scope.

FEHBA v. ERISA – The Limiting Words Make All The Difference

As is well-established by now, the U.S. Supreme Court in *Empire* noted that § 8902(m)(1) was “unusual” in that it gave private contracts the power to supersede state laws, and thus warranted cautious interpretation. Nevertheless, Respondents urge the Court to supplant the U.S. Supreme Court’s characterization of § 8902(m)(1) as “unusual” with their own, brazenly declaring the highest federal Court in the land’s analysis of a federal preemption statute as “empirically wrong.”

In seeking an expansive reading of the “relates to” language in § 8902(m)(1), Respondents rely on ERISA’s preemption provision and cases interpreting it; but Respondents’ analogy is once again off-base. ERISA’s 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. Notably, in *Empire* the U.S Supreme Court noted with reference

to ERISA’s preemption provision, “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 (emphasis in original). Congress intentionally limited the preemptive scope of § 8902(m)(1) to those contract terms relating to coverage and benefits, and this Court should avoid rendering Congress’s scope-limiting language in § 8902(m)(1) superfluous.

Respondents also urge the Court to apply the interpretation of ERISA’s “relate to” as expressing a “broad” and “expansive” preemptive purpose, as expressed by Justice Scalia’s opinion in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992). First, adopting an expansive reading of § 8902(m)(1) would fly directly in the face of The Court’s cautionary instruction in *Empire*. Second, there can be no comparison between ERISA, which unquestionably dominates all areas of law relating to employee-benefit plans, FEHBA, which provides for only limited preemption. Just as Respondents did, Appellant urges the Court to compare ERISA and FEHBA’s preemption provisions, but to observe the weighty difference in the statutes’ preemptive scopes. The importance of the “relate[s] to” language should be evaluated with that difference in mind, and with the presumption against preemption in place.

The “Condition Precedent to Benefits” Argument

In an effort to read subrogation into § 8902(m)(1), Respondents cite the fact that acceptance of subrogation is a condition of receiving benefits, and therefore subrogation “relates to” benefits. However, as noted in Appellant’s opening brief, acceptance of all

terms of the contract was a “condition of receiving benefits.” Therefore by Respondents’ rationale, every single term within a FEHBA contract “relates to” coverage or benefits, and has the power to supersede state law. Once again, this construction would render the limiting language of § 8902(m)(1) utterly superfluous. Respondents’ argument calls to mind the words of Justice (then Judge) Sotomayor in her *Empire* opinion at the Second Circuit: “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.” *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 143 (2nd Cir. 2005) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). The argument that because GHP made acceptance of the terms a condition to receiving benefits, all terms therefore “relate to” benefits leads to a construction of § 8902(m)(1) that can hardly be called modest or cautious. On the contrary, it leads to relations that have no practical end.

The *Empire* decision and comparison to the sweeping preemptive powers of ERISA should lead this Court to construe § 8902(m)(1) modestly, a conclusion bolstered by an examination of the FEHBA’s legislative history.

III. FEHBA’s legislative history support’s Appellant’s construction.

Though Respondents contend that “legislative history confirms the breadth of § 8902(m)(1)’s preemption,” a review of FEHBA’s complete legislative history reveals no

intention by Congress to create a broad or wide-sweeping preemption provision. Throughout FEHBA's fifty-four year history, nowhere in the legislative history is there any reference whatsoever to subrogation or reimbursement. In fact, the legislative history indicates congressional intent to limit the scope of FEHBA's preemptive powers.

FEHBA's preemptive provision was added by Congress in 1978 "to establish uniformity in federal employee health benefits and coverage provided pursuant to contracts made under such chapter by preempting state or local laws pertaining to such benefits and coverage which are inconsistent with such contracts." S. Rep. No. 95-903 at 1 (1979), *reprinted in* 1978 U.S.C.C.A.N. 1413 (emphasis added). Specifically, it was enacted due to concern over increasing state insurance laws that were "requiring recognition of certain practitioners not covered by Federal Employee's Health Benefit Plans." *Id.* at 1414. Congress further explained, "[f]or example, the Indemnity Benefit Plan (AETNA) pays for chiropractic [sic] services in Nevada as required by state law, but does not pay for such services in any other state." *Id.* As a result of that conflict, Congress enacted the preemption provision so that "the provisions of health benefits contracts made under [FEHBA] concerning benefits or coverage, would preempt any state and/or local insurance laws and regulations which are inconsistent with such contracts. Such a preemption, however, is purposely limited and will not provide insurance carriers under the program with exemptions from state laws and regulations governing other aspects of the insurance business." *Id.* at 1415. Based on the foregoing, Respondents' contention that "legislative history confirms the breadth of § 8902(m)(1)" is patently false. In fact the opposite is true: Congress intentionally restricted its scope to

those terms explicitly concerning coverage and benefits, and intended its reach to go no further.

Respondents also cite legislative history from § 8902(m)(1)'s 1998 amendment, claiming that Congress intended to “[preempt] in toto all state laws that ‘relate to’ FEHBA health insurance.” Br. at 13. Obviously, given Congress’s decision to leave the restriction of § 8902(m)(1) to those terms relating to coverage or benefits (as opposed to giving preemptive power to any term in the plan, as they did with ERISA), Respondents have once again misconstrued Congressional intent.

Respondents cite the reference to “cost-cutting initiatives” in the 1998 H.R. Report as referring to subrogation, but do not provide the full quotation for the Court. Here is the full quotation of the “Background and Need for Legislation” section of the Report:

“In addition, this bill broadens the preemption provisions in current law to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live. This change will strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts. It will also prevent carriers’ cost-cutting initiatives from being frustrated by State laws. For example, a carrier’s effort to establish a preferred provider organization (PPO) across the country would not be jeopardized by State-mandated “any willing provider” statutes.” H.R. Rep. 105-374 at

9. Once again, there is no mention of or reference to Congressional intent to extend the breadth of § 8902(m)(1) to state laws concerning an insurer’s right to subrogation. Nor does Respondents’ depiction of this amendment as Congress’ intention to displace any and all state laws that could apply to FEHBA find any support in legislative history.

In sum, FEHBA's legislative history indicates that Congress has never mentioned subrogation in discussing the preemptive effect of § 8902(m)(1). That provision was added specifically to combat differing state requirements concerning the extent of health insurers' provision of coverage and benefits (such as whether chiropractic care is covered). Legislative history also reveals that § 8902(m)(1) was "purposely limited," and did not provide exemption from other state laws concerning the insurance business, and that by amending the statute in 1998, Congress did not intend to bring state laws concerning subrogation within its preemptive scope.

IV. The OPM Letter is not entitled to substantial deference by this Court.

Respondents lean heavily upon the interpretation of § 8902(m)(1) by Respondent GHP's contractual partner, OPM. In short, OPM's unilateral interpretation of § 8902(m)(1) lacks both the force of law and the power of persuasion, and should thus be afforded no deference by the Court.

Respondents seemingly concede by omission that the OPM Letter is not entitled to substantial deference, as it was not promulgated after a notice-and-comment period and does not have the force of law. Nevertheless, Respondents argue that the Court should afford the OPM Letter a lesser degree of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under *Skidmore*, the degree of deference afforded such an agency opinion depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.*

OPM's reasoning in coming to the conclusion that § 8902(m)(1) preempts state anti-subrogation laws is not valid, nor is there evidence of any thoroughness of consideration by OPM. On the contrary, it is readily apparent that OPM did not thoroughly consider whether subrogation was encompassed by the "coverage or benefits" language in § 8902(m)(1), but instead sought to justify its predetermined conclusion in the affirmative.

First and foremost, the OPM Letter is misleading and factually inaccurate, and therefore the very foundation of OPM's reasoning is unsound and invalid. In its letter, OPM claims that "Carriers are required to seek reimbursement and/or subrogation in accordance with the contract." That is untrue. In his opening brief, Appellant demonstrated that some OPM contracts state that FEHBA carriers "may" seek reimbursement or subrogation while others mandate that carriers "shall" – a variance that evidences individual negotiation on the issue between OPM and the carrier. *See Jacks v. Meridian*, Case No. 11-94 (W.D. Mo. Sept. 9, 2011) (Appendix, A10) ("[T]he 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. That fact is further evidenced by the amicus brief of the United States, which explicitly stated that only "[m]ost FEHB program contracts provide for a right of subrogation."² Br. at 3.

² As an aside, while Respondents' fervently argue that there exists a great federal interest in preserving uniformity of FEHBA carriers' subrogation rights from state to state, that

Where OPM's conclusion in part based on a falsehood, their reasoning cannot be considered "valid."

Moreover, OPM's failure to apply the presumption against preemption evidences their failure to thoroughly consider the issue. In his opening brief and in the preceding Sections of this Reply, Appellant has demonstrated that: (1) The U.S. Supreme Court has advised courts to apply a presumption against preemption with particular force in a field of law traditionally occupied by the states; (2) insurers' rights to subrogation is a field of law traditionally occupied by the states; (3) the U.S. Supreme Court has stated that if a preemption provision is susceptible to more than one reading, the interpreting court should adopt the construction disfavoring preemption; (4) the U.S. Supreme Court has stated that § 8902(m)(1) is susceptible to more than one reading; and (5) the U.S. Supreme Court has further advised that § 8902(m)(1) should be read modestly and interpreted cautiously. If OPM considered these legal realities and still arrived at the conclusion that § 8902(m)(1) preempts state subrogation laws, the agency's reasoning is anything but valid, and the thoroughness of their consideration leaves much to be desired. More likely, before issuing its pronouncement that its own contractual provisions were valid and enforceable, OPM looked only for justification of its desired position.

Due to its inherent bias, flawed reasoning, and factual inaccuracy, the OPM Letter should be afforded no deference by this Court.

argument carries little persuasive power in light of the fact that *by their own contracts*, OPM does not require subrogation from every carrier.

Conclusion

Based on the foregoing and his opening Substitute Brief, Appellant respectfully requests that the Court reverse the trial court's judgment in favor of Respondents and remand the case back to the Circuit Court for further adjudication consistent with the Court's Order.

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 5,254 words, exclusive of the table of contents and table of authorities.

/s/ Blake P. Green

Blake P. Green

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 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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