

**Summary of SC93134, *Jodie Nevils v. Group Health Plan Inc. and ACS Recovery Services Inc.***

Appeal from the St. Louis County circuit court, Judge Thea A. Sherry  
Argued and submitted December 10, 2015; opinion issued May 3, 2016

**Attorneys:** Nevils was represented by Jon Campbell, Erich Vieth and Alicia Campbell of Campbell Law LLC in St. Louis, (314) 588-8101; Mitchell L. Burgess, Keith C. Lamb and Blake P. Green of Burgess & Lamb PC in Kansas City, (816) 471-1700; Ralph K. Phalen of Ralph K. Phalen Attorney at Law in Kansas City, (816) 589-0753; and Don P. Saxton of the Saxton Law Firm LLC in Kansas City, (816) 471-1700.

Group Health Plan (now Coventry) was represented by Thomas N. Sterchi and David M. Eisenberg of Baker Sterchi Cowden & Rice LLC in Kansas City, (816) 471-2121; Thomas M. Dee, Melissa Z. Baris, Mark G. Arnold and Elizabeth A. Mushill of Husch Blackwell LLP in St. Louis, (314) 480-1500; and Miguel A. Estrada and Jonathan C. Bond of Gibson, Dunn and Crutcher LLP in Washington, D.C., (202) 955-8500. ACS was represented by Winthrop B. Reed III, Steven D. Hall, Richard A. Ahrens, Neal F. Perryman and Ronald B. Ziegler of Lewis Rice LLC in St. Louis, (314) 444-7600.

Two organizations filed briefs as friends of the Court. The United States of America was represented by Nicholas P. Llewellyn of the United States attorney's office in St. Louis, (314) 539-7637, and Henry C. Whitaker of the United States Department of Justice in Washington, D.C., (202) 514-3180. The Association of Federal Health Organizations was represented by Christopher O. Bauman of Blitz, Bardgett & Deutsch LC in St. Louis, (314) 863-1500; and David Ermer of the Ermer Law Group PLLC in Washington, D.C., (202) 833-3400.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** In a case sent back from the United States Supreme Court, a former federal employee argues a new federal regulation does not mean that a federal act preempts Missouri law prohibiting subrogation of the proceeds of the employee's settlement of a personal injury lawsuit. In a decision written by Judge Richard B. Teitelman and joined by four other judges, the Supreme Court of Missouri reverses the circuit court's judgment in favor of the insurance company and remands (sends back) the case. A federal office's rule interpreting the federal act does not change either the text of the federal act's preemption clause or the fact that the federal act's preemption clause does not express Congress' clear and manifest intent to preempt Missouri's anti-subrogation law. There is no binding precedent requiring courts to afford dispositive deference to an agency rule defining the scope of an express preemption clause.

In an opinion joined by five other judges, Judge Paul C. Wilson concurs in result. As stated in his separate opinion in *Nevils I* (this Court's prior opinion in this case), he would hold the federal statute's attempt to give preemptive effect to the provisions of a contract between the federal

government and a private party is not a valid application of the supremacy clause of the federal constitution and, therefore, does not displace Missouri law.

**Facts:** This is the second time this case has come before this Court. Jodie Nevils was a federal employee with a health insurance plan covered by the federal employee health benefits act. Nevils sued Group Health Plan Inc. (now Coventry Health Care of Missouri Inc.) and ACS Recovery Services Inc. after they enforced a subrogation lien against the proceeds from Nevils' settlement of a personal injury claim. Nevils alleged the subrogation lien violated Missouri law prohibiting the subrogation of personal injury claims. The circuit court entered summary judgment (judgment on the court filings, without a trial) in favor of Coventry and ACS, holding that the federal act preempts state anti-subrogation law. On appeal (*Nevils I*), this Court reversed the judgment, holding that the federal act's preemption clause did not preempt Missouri anti-subrogation law. The federal office of professional management subsequently promulgated a formal rule providing, in part, that an insurer's rights and responsibilities pertaining to subrogation under any contract under the federal act are effective notwithstanding any state law relating to health insurance or plans. On further appeal, the United States Supreme Court vacated this Court's decision and remanded the case for this Court to determine whether the federal office's new rule establishes that the federal act preempts Missouri's anti-subrogation law.

#### **REVERSED AND REMANDED.**

**Court en banc holds:** The federal office's rule does not alter the fact that the federal act's preemption clause does not express Congress' clear and manifest intent to preempt Missouri's anti-subrogation law. The text of the federal act's preemption clause remains unchanged. To reverse course from its holding in *Nevils I*, this Court would have to hold that the federal office's rule is dispositive as to Congressional intent to preempt state law. Absent binding preference from the United States Supreme Court requiring such deference, this Court declines to afford dispositive deference to an executive agency's interpretation of a statutory preemption clause. The United States Supreme Court has held that, to determine whether federal law preempts a state statute, the sole task is to ascertain the intent of Congress. There is a strong presumption against preemption unless it is the clear intent of Congress to preempt state law. When two plausible readings or a statute are possible, courts must accept the reading that disfavors preemption. The United States Supreme Court has noted that the preemption clause of the federal act here is subject to plausible, alternate interpretations. Following distinctions noted by prior United States Supreme Court decisions, this Court concludes there is no binding precedent requiring courts to afford dispositive deference to an agency rule defining the scope of an express preemption clause. Accordingly, this Court declines to hold the federal office's rule conclusively resolves the ambiguity in the federal act's preemption clause.

**Opinion concurring in result by Judge Wilson:** As stated in his separate opinion in *Nevils I*, the author would hold the federal statute's attempt to give preemptive effect to the provisions of a contract between the federal government and a private party is not a valid application of the supremacy clause of the federal constitution and, therefore, does not displace Missouri law.