RQ-0092-KP

CHARLES SCHWERTNER
STATE SENATOR • DISTRICT 5
COMMITTEES: HEALTH & HUMAN SERVICES, CHAIR • ADMINISTRATION
BUSINESS & COMMERCE • FINANCE • STATE AFFAIRS

January 26, 2016

CERTIFIED MAIL, RETURN RECEIPT REQUESTED
The Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General Opinion re: Enforceability of Texas Any Willing Pharmacy –Tex. Ins. Code Art. 21.52B

Dear General Paxton:

I am requesting an Attorney General's opinion on the following:

Whether the Texas Any Willing Pharmacy Statute, TEX. INS. CODE Art. 21.52B §2(2) ("Texas AWP") is currently enforceable.

The Texas Department of Insurance has indicated that the Texas Any Willing Pharmacy statute ("Texas AWP") is not currently enforceable because, in 1997 it was found by the United States Fifth Circuit Court of Appeals to be preempted by Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA preempts state laws which "relate to" an ERISA benefit plan. 29 U.S.C. §1144(a). However, state laws can be saved from preemption by ERISA's savings clause. 29 U.S.C. §1144(b)(2)(A). The ERISA savings clause exempts from preemption those state laws which regulate insurance. *Id.*

The United States Supreme Court held that a similar Kentucky any willing provider statute was not preempted by ERISA in 2003. The Texas Department of Insurance has indicated that the Texas AWP would need to be re-enacted in order for the law to, once again, become enforceable.

BRYAN OFFICE:
3000 BRIARCREST DRIVE, SUITE 202
BRYAN, TEXAS 77802
(979) 776-0222 • FAX: (979) 776-0220

CAPITOL OFFICE:
E1.806 • P.O. BOX 12068 • AUSTIN, TEXAS 78711
(512) 463-0105 • FAX: (512) 463-5713
charles.schwertner@senate.state.tx.us

GEORGETOWN OFFICE:
501 S. AUSTIN AVE., SUITE 1250
GEORGETOWN, TEXAS 78626
(512) 863-8456 • FAX: (512) 863-8436

BACKGROUND

A. The Texas Any Willing Pharmacy Act

The Texas AWP renders void contractual provisions which, *inter alia*, deny a pharmacy the right to participate as a contract provider under a health insurance policy or a managed care plan. TEX. INS. CODE Art. 21.52B §2(2). The Texas AWP law was originally enacted in 1991. Acts 1991, 72nd Leg., ch. 182, § 1, eff. Sept. 1, 1991.

B. 1997: *Texas Pharmacy Association* Finds Texas AWP Not Saved From Preemption

In 1997, the Fifth Circuit analyzed the Texas AWP law and held that the ERISA savings clause did not save the Texas AWP statute from ERISA preemption. *Texas Pharmacy Association v. Prudential Ins. Co. of America*, 105 F.3d 1035, 1036 (5th Cir. 1997).

In that case, the Texas Pharmacy Association sued Prudential Insurance Company alleging that it violated the Texas AWP law by prohibiting willing pharmacies from participating in certain of Prudential's pharmacy networks. The federal district court found that the Texas AWP was saved from preemption.

Prudential appealed the decision to the United States Fifth Circuit Court of Appeals. While the issue was pending before the Fifth Circuit, the 74th Texas Legislature amended the Texas AWP statute to expand coverage under the statute beyond a "health insurance policy" to include health maintenance organizations, preferred provider organizations and other health plans.

In *Texas Pharmacy Association*, the Fifth Circuit used the now-defunct *Metropolitan Life* test, a test crafted from the McCarran-Ferguson "business of insurance" test, to determine whether a state law was saved from ERISA preemption. *Metropolitan Life* employed a three-factor test to determine whether the state law was saved from preemption: (1) whether the statute has the effect of spreading the policyholder's risk; (2) whether the statute is an integral part of the policy relationship between the insurer and the insured; and (3) whether the statute is limited to entities within the insurance industry. *Texas Pharmacy Ass'n*, 105 F.3d at 1038 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)). The Fifth Circuit in *Texas Pharmacy Association* held that the amended version of the Texas AWP statute failed to satisfy the third prong of the *Metropolitan Life* test because while that version applied to insurance companies, it also applied to other companies that were not insurance companies such as health maintenance organizations, preferred provider organizations and other health plans. *Id.* at 1038-39. As a result, the Fifth Circuit held that since the statute was not limited to entities within the insurance industry, it was not saved from ERISA preemption. *Id.*

The *Texas Pharmacy Association* decision chilled enforcement of the Texas AWP statute. But the law has never been repealed and remains a part of the Texas Insurance Code.

C. 2003: *Miller* Established a New Savings Clause Analysis That Effectively Reversed *Texas Pharmacy Association*

The text of the ERISA savings clause has not changed since the *Texas Pharmacy Association* decision. However, the test used by courts to determine whether a state law is saved from preemption has changed since 1997. Six years later, the U.S. Supreme Court, effectively reversed the holding of *Texas Pharmacy Association.*

In *Kentucky Association of Health Plans, Inc. v. Miller*, the U.S. Supreme Court specifically rejected the use of McCarron-Ferguson factors such as those used in *Metropolitan Life* in a savings clause analysis. 538 U.S. 329, 340-41 (2003). Instead, the Court reformulated the test and held that in order to be saved from preemption by the savings clause:

(1) the state law must be specifically directed toward entities engaged in insurance; and
(2) the state law must substantially affect the risk pooling arrangement between the insurer and the insured.

Id. at 341-42. Contrary to the analysis in *Texas Pharmacy Association*, the U.S Supreme Court now holds that the state law does not need to be solely confined to application to insurance companies. So long as the state law applies to insurance companies, then its application to other entities including HMOs, PPOs and even ERISA plans would still save it from ERISA preemption. *Id.* at 336 n.1. As explained by the U.S. Supreme Court:

> *We do not think [the Kentucky AWP law's] application to self-insured non-ERISA plans forfeits its status as a "law ... which regulates insurance" under 29 U.S.C. § 1144(b)(2)(A).* ERISA's saving clause does not require that a state law regulate "insurance companies " or even "the business of insurance " to be saved from pre-emption; it need only be a "law ... which regulates insurance, " ibid. (emphasis added), and self insured plans engage in the same sort of risk pooling arrangements as separate entities that provide insurance to an employee benefit plan. Any contrary view would render superfluous ERISA's "deemer clause," § 1144(b)(2)(B), which provides that an employee benefit plan covered by ERISA may not "be deemed to be an insurance company or other insurer ... or to be engaged in the business of insurance ... for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts...." That clause has effect only on state laws saved from preemption by § 1144(b)(2)(A) that would, in the absence of § 1144(b)(2)(B), be allowed to regulate self-insured employee benefit plans. ...
>
> Both of Kentucky's AWP laws apply to all HMOs, including HMOs that do not act as insurers but instead provide only administrative services to self-insured plans. Petitioners maintain that the application to noninsuring HMOs forfeits the laws' status as "law[s] ... which regulat[e] insurance." § 1144(b)(2)(A). We disagree. To begin with, *these noninsuring HMOs would be administering self*

> *insured plans, which we think suffices to bring them within the activity of insurance for purposes of § 1144(b)(2)(A).*

Id. (emphasis added).[1] This conclusion directly overrules the Fifth Circuit's holding that a state law's application to both insurance and non-insurance companies would remove it from the protections of the savings clause.

Moreover, the U.S. Supreme Court also recognized how any willing provider laws necessarily affect the risk pooling arrangement between insurer and insured:

> By expanding the number of providers from whom an insured may receive health services, AWP laws alter the scope of permissible bargains between insurers and insureds ... No longer may Kentucky insureds seek insurance from a closed network of health-care providers in exchange for a lower premium. The AWP prohibition substantially affects the type of risk pooling arrangements that insurers may offer.

Id. at 338-39. The Fifth Circuit in *Texas Pharmacy Association* had already recognized this fact. The Fifth Circuit noted that the old version of the Texas AWP statute had the effect of spreading the policy holder's risk:

> By requiring policies to give the beneficiary the option of obtaining pharmaceutical services from any pharmacy, and requiring pharmacy networks to admit any willing provider, we believe that the prior statute influenced which costs were ultimately borne by the insurer and which were borne by the beneficiary, and whether insurers would be willing to offer pharmacy coverage at all.

Id. at 1041. Though the Fifth Circuit directed this analysis toward the prior version of the Texas AWP law, the current version is no different in this respect. Because the Texas AWP law is specifically directed towards entities that include those engaged in insurance and because the law substantially affects the risk pooling arrangement between the insurer and the insured, it is saved from ERISA preemption. Prior court rulings to the contrary have been effectively overruled.

D. 2004-2008: Those Who Have Analyzed *Miller* Have Concluded That *Miller* Overruled *Texas Pharmacy Association.*

In 2004, Lieutenant Governor David Dewhurst charged the Senate Committee on State Affairs to study the impact of the *Miller* decision and its impact on the Texas AWP law and make recommendations to state law to conform to the recent federal court decisions. The Senate State Affairs Committee thoroughly reviewed the issue and concluded that the *Miller* decision "effectively reversed" the Fifth Circuit's prior decision in *Texas Pharmacy Association. Senate*

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[1] The Texas AWP law specifically excludes self-funded ERISA plans from its application. TEX. INS. CODE Art. 21.52B, §5.

Committee on State Affairs, Interim Report to the 79th Legislature (Dec. 2004) at p. 40. The committee indicated that the AWP statute is not preempted by ERISA and is enforceable.[2]

In 2008, the Fifth Circuit in *Quality Infusion Care, Inc. v. Humana Health Plan of Texas Inc.* recognized the change that the U.S. Supreme Court's decision in *Miller* had created. 290 Fed. Appx. 671 (5th Cir. 2008). *Quality Infusion* concerned a pharmacy's attempt to bring a claim for benefits by assignment. The Fifth Circuit held that such a claim was preempted by ERISA. *Id.* at 677. However, in the process, the Fifth Circuit also recognized that "our analysis does not suggest that other claims – e.g., the declaratory judgment in *Miller* – are similarly preempted." *Id.* at n.8. The Fifth Circuit went so far as to say that "Under *Miller*, [Quality Infusion Care] is likely correct that the [Texas AWP law] would similarly be saved from preemption as presented there" and that their prior holding in *Texas Pharmacy Association* "is at least called into doubt by *Miller*." *Id.* at 681 and n.14.

E. *Miller*'s Overruling of *Texas Pharmacy Association* Rendered the Texas AWP Immediately Enforceable.

Under Texas law, when a court holding that had rendered invalid a statute is reversed, the statute becomes effective once again. *Storrie v. Cortes*, 90 Tex. 283, 291-92, 38 S.W. 154, 158 (Tex. 1896). In *Storrie*, the Texas Supreme Court held that

> The proposition ... that a decision of a court is not a law, but merely the evidence of what the law is, and that, when it is overruled, it is not a change of the law, but a declaration and judicial ascertainment that it never was the law, is supported by ample authority. We believe this to be the true rule, and that a decision of a court is not in fact a law, and, if erroneously made, cannot make a law. It is simply the declaration of a court as to what the law is in the opinion of the judges. ... If the erroneous decision is overruled, it is then as if it had never been made, and the law is to be considered as declared in the later opinion.

Id. (citations omitted). This statement of law was reiterated in an opinion of the Texas Attorney General. Tex. Op. Att'y Gen. No. JM-1116 (1989) (citing *Storrie* and stating "When a court overrules a prior judicial decision that held a statute unconstitutional, the statute will be held valid from its effective date.").

Therefore, since *Miller* effectively reversed *Texas Pharmacy Association*, the Texas AWP law is and has been enforceable. Health plans and pharmacy benefit managers cannot exclude pharmacies from their network contracts if the pharmacies are willing to provide services that meet all the terms and requirements that apply to providers under the plan. Enforcement of the existing Texas AWP law will:

1) open doors by ensuring the widest possible choice of pharmacies for patients;

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[2] The committee report also suggested that the Texas Legislature revisit the issue to determine if the public policy considerations underlying the adoption of the Texas AWP law still existed, and if they remain valid, should be reenacted. If not, it should be repealed. The Texas Legislature ultimately did not reenact or repeal the Texas AWP statute.

2) protect the rights of Texas patients to select the pharmacist of their choice, the one they know and trust;
3) preserve an important relationship in the health care system, that of the pharmacist and patient (be aware that pharmacists are consistently ranked as one of the most trusted and ethical professionals in annual Gallup polls, tying with doctors for second in the 2014 poll); and
4) in my humble opinion, ultimately save Texas and the health plans and/or pharmacy benefit managers significant money. Typically community pharmacists (small business owners) are the ones excluded from the network contracts, and they are generally known to be those most committed to helping patients maximize their drug regimens / adherence / outcome, which in turn dramatically reduces the likelihood of costly emergency room visits and hospitalizations.

It is clear to me that the long term benefits of enforcing the existing Texas AWP law will benefit Texas patients and taxpayers.

I appreciate your attention to this request. Please do not hesitate to contact me if you need additional information or clarification.

Sincerely,

Charles Schwertner
State Senator

TODD HUNTER
TEXAS HOUSE OF REPRESENTATIVES
DISTRICT 32
NUECES (PART)

January 26, 2016

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CAPITOL OFFICE: GW.5 • P.O. BOX 2910 • AUSTIN, TEXAS 78768-2910 • (512) 463-0672 • FAX (512) 463-2101 • TODD.HUNTER@HOUSE.STATE.TX.US
DISTRICT OFFICES: 15217 S.P.I.D., SUITE 205, CORPUS CHRISTI, TEXAS 78418
COMMITTEES: CALENDARS, CHAIR • URBAN AFFAIRS, VICE-CHAIR • CRIMINAL JURISPRUDENCE • GENERAL INVESTIGATING & ETHICS • REDISTRICTING

BACKGROUND

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> *insured plans, which we think suffices to bring them within the activity of insurance for purposes of § 1144(b)(2)(A).*

Id. (emphasis added).[1] This conclusion directly overrules the Fifth Circuit's holding that a state law's application to both insurance and non-insurance companies would remove it from the protections of the savings clause.

Moreover, the U.S. Supreme Court also recognized how any willing provider laws necessarily affect the risk pooling arrangement between insurer and insured:

> By expanding the number of providers from whom an insured may receive health services, AWP laws alter the scope of permissible bargains between insurers and insureds ... No longer may Kentucky insureds seek insurance from a closed network of health-care providers in exchange for a lower premium. The AWP prohibition substantially affects the type of risk pooling arrangements that insurers may offer.

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> The proposition ... that a decision of a court is not a law, but merely the evidence of what the law is, and that, when it is overruled, it is not a change of the law, but a declaration and judicial ascertainment that it never was the law, is supported by ample authority. We believe this to be the true rule, and that a decision of a court is not in fact a law, and, if erroneously made, cannot make a law. It is simply the declaration of a court as to what the law is in the opinion of the judges. ... If the erroneous decision is overruled, it is then as if it had never been made, and the law is to be considered as declared in the later opinion.

Id. (citations omitted). This statement of law was reiterated in an opinion of the Texas Attorney General. Tex. Op. Att'y Gen. No. JM-1116 (1989) (citing *Storrie* and stating "When a court overrules a prior judicial decision that held a statute unconstitutional, the statute will be held valid from its effective date.").

Therefore, since *Miller* effectively reversed *Texas Pharmacy Association*, the Texas AWP law is and has been enforceable. Health plans and pharmacy benefit managers cannot exclude pharmacies from their network contracts if the pharmacies are willing to provide services that meet all the terms and requirements that apply to providers under the plan. Enforcement of the existing Texas AWP law will:

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[2] The committee report also suggested that the Texas Legislature revisit the issue to determine if the public policy considerations underlying the adoption of the Texas AWP law still existed, and if they remain valid, should be reenacted. If not, it should be repealed. The Texas Legislature ultimately did not reenact or repeal the Texas AWP statute.

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It is clear to me that the long term benefits of enforcing the existing Texas AWP law will benefit Texas patients and taxpayers.

I appreciate your attention to this request. Please do not hesitate to contact me if you need additional information or clarification.

Very truly yours,

Todd Hunter
State Representative - District 32