

## **Ninth Circuit Holds Medicare Act's Exhaustion Requirements And Preemption Provision Bar Plaintiffs' Common Law Claims**

### ***Healthcare Law Alert***

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By: [Douglas Collodel](#)

At long last, the Ninth Circuit Court of Appeals issued its second opinion in the *Uhm v. Humana, Inc.*, -- F.3d -- (9th Cir. 2010), matter, which found the Medicare Act's exhaustion requirements and preemption provision barred all of the plaintiffs' common law claims. Last summer, the court vacated the original opinion (which issued on August 25, 2008), requested amicus assistance from the Centers for Medicare and Medicaid Services, and took the matter under submission.

The Uhms alleged causes of action for breach of contract, unjust enrichment, fraud and violation of state consumer protection laws. The appellate court's first opinion affirmed the district court's judgment, finding the Medicare Act preempted the plaintiffs' claims against Humana for recovery of Medicare prescription drug benefits based on implied conflict preemption principles. The original panel found the Medicare Act's coverage determination process [42 U.S.C. sections 1395w-104(f) and (g)] preempted causes of action for breach of contract and unjust enrichment claims because they were "classic" coverage disputes or subject to the Act's grievance procedure. The Court of Appeals similarly found the extensive CMS regulations governing marketing materials and practices preempted the plaintiffs' consumer protection law and fraud claims.

Although the Ninth Circuit again affirmed the district court's judgment, its new opinion reflects a completely different analysis, which likely was formulated after receiving not only CMS' amicus brief but several others, too. This time, the Court of Appeals found that federal courts lack jurisdiction to address the plaintiffs' breach of contract and unjust enrichment claims because the plaintiffs failed to exhaust their remedies under the Medicare Act [42 U.S.C. sections 405(g) and (h)], and further held that the Medicare Act expressly preempted the plaintiffs' fraud and consumer protection law claims under its preemption clause [42 U.S.C. section 1395w-26(b)(3), incorporated into Part D via 42 U.S.C. section 1395w-112(g)].

The new panel – which included a new Ninth Circuit judge who replaced the district judge from the original panel – concluded the plaintiffs' breach of contract and unjust enrichment claims "arose under" the Medicare Act because they were "inextricably intertwined" with the plaintiffs' claims for Medicare benefits. Significantly, however, the Court of Appeals distinguished claims that "at bottom" do not seek the recovery of benefits and raise, instead,

complaints that could not be redressed by the Medicare Act's administrative review process. The court cited *Ardary v. Aetna Health Plans of Cal., Inc.*, 98 F.3d 496, 500 (9th Cir. 1996), which held a wrongful death claim is not subject to the Act's exhaustion requirements. Thus, under this court's analysis, complaints about the denial of Medicare benefits – but not necessarily those involving state law claims for damages – require exhaustion under the Act because retroactive compensation could make the enrollees whole.

The court then held that the Uhms' fraud and consumer protection act claims were barred as a matter of law under the Act's "express" preemption provision. The claims did not "arise under" the Medicare Act, as the basis of the latter claims was an injury "collateral to any claim for benefits." (Slip.Op. at 12932.) Importantly, the panel recognized congressional intent to broaden the scope of Medicare Act preemption and specifically *rejected* the suggestion that consumer protection laws are "generally applicable" and not subject to preemption. The *Uhm* court's holding is limited, however, to its conclusion that "at the very least, any state law or regulation falling within the specified categories and 'inconsistent' with a standard established under the Act remains preempted." (Slip.Op. at 12941.) It left for another day "the precise degree to which the 2003 amendment expanded the preemption provision beyond state laws and regulations 'inconsistent' with the enumerated standards." (*Id.*)

Next, the appellate court found the Uhms' fraud and consumer protection act claims, which were rooted in Humana's purported misrepresentations about when drug benefits would begin, were preempted by the "extensive CMS regulations governing PDP marketing materials." (Slip.Op. at 12942.) Because CMS screened and approved the plan's marketing materials, Medicare Act preemption stopped a court from applying consumer protection laws that might reach a different conclusion about the marketing materials than CMS did. In its discussion about the plaintiffs' fraud claims, the Court of Appeals distinguished a U.S. Supreme Court case [*Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002)] upon which CMS relied to assert Congress only intended to preempt positive state enactments and not common law actions. (Many plaintiffs' counsel make the same argument.) Then, to determine whether the Medicare Act preempts common law claims, the *Uhm* court turned to the legislative history and congressional intent. Ultimately, the appeals court determined the 2003 version of the Act (the MMA) preempts "at least some common law claims." (Slip.Op. at 12951.) From this premise, the panel analyzed whether, and found that, the Uhms' fraud claims were preempted because tort actions pose the problem of establishing standards that are potentially inconsistent with standards established under the Act.

In sum, the new *Uhm* decision is strong support for Medicare Act preemption arguments. Even though the Ninth Circuit's actual holding is somewhat confined to claims associated with marketing materials (which have been preempted since Congress included a

preemption provision in 1997), the new opinion undermines many contentions that plaintiff attorneys raise. And although it rejected CMS' interpretation on several issues – most notably CMS' suggestion that the Act expressly preempts state statutorily based claims, but may only impliedly preempt common law claims – the Ninth Circuit's decision incorporates CMS' underlying thesis that state law claims interfering with Medicare standards and regulations must be preempted.

The Ninth Circuit's MMA preemption analysis is different than that reached by two California appellate courts – *Yarick v. PacifiCare of California*, 179 Cal.App.4th 1158 (2009) and *Cotton v. PacifiCare of California*, 183 Cal.App.4th 437 (2010) – which themselves present different preemption analyses. *Uhm* does not mention either California decision and, ultimately, the scope of Medicare Act preemption probably will head to the U.S. Supreme Court for ultimate resolution.

For additional insight into *Uhm* and/or Medicare Act preemption issues, please contact Douglas J. Collodel.

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