The ERISA Edit: One Court Holds ERISA Preempts Any Willing Provider Provision; Two Others Conflict on Standing in PRT Litigation

Employee Benefits Alert
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Tennessee Court Declares Provisions of State PBM Law Preempted by ERISA as Applied to Self-Funded Plans

On March 31, 2025, the U.S. District Court for the Eastern District of Tennessee granted summary judgment to McKee Foods Corporation (McKee), declaring certain pharmacy network adequacy provisions, specifically "any willing provider" provisions of the challenged Tennessee pharmacy benefit manager (PBM) law, are preempted by ERISA as applied to self-funded plans. *McKee Foods Corp. v. BFP Inc. d/b/a/ Thrifty Med Plus Pharmacy*, No. 1:21-cv-279 (E.D. Tenn. Mar. 31, 2025). The court permanently enjoined Tennessee's enforcement of these provisions against McKee's self-funded plan, including its PBM.

This case is somewhat atypical in its origin. McKee initially brought suit against a former member of its health plan's pharmacy network, BFP, Inc. d/b/a Thrifty Med Plus Pharmacy (Thrifty Med), on ERISA preemption grounds in response to Thrifty Med's filing administrative complaints against the health plan's PBM arising out of the latter's refusal to reinstate Thrifty Med to its pharmacy network. The Commissioner of the Tennessee Department of Commerce and Insurance intervened to defend the Tennessee PBM law. It was only after McKee amended its complaint to expand the scope of the case to include additional related state law provisions that it added the Commissioner as a defendant. Thrifty Med was originally dismissed from the case on mootness grounds, but that decision was reversed by the U.S. Court of Appeals for the Sixth Circuit.

The Tennessee PBM provisions at issue provide:

> A pharmacy benefits manager or a covered entity shall not: (1) Interfere with the right of a patient, participant, or beneficiary to choose a contracted pharmacy or contracted provider of choice in a manner that violates § 56-7-2359 [Tennessee's "any willing provider" law]; or (2) Offer financial or other incentives to a patient, participant, or beneficiary to persuade the patient, participant, or beneficiary to utilize a pharmacy owned by or financially beneficial to the pharmacy benefits manager or covered entity.

2022 Tenn. Pub. Ch. 1070 § 5, Tenn. Code Ann. § 56-7-3120(b).

McKee challenged a related provision requiring PBMs to admit any willing pharmacy to their networks without giving preference to a pharmacy or requiring different cost-sharing obligations or additional fees for using a certain participant-preferred pharmacy. 2022 Tenn. Pub. Ch. 1070 § 6, Tenn. Code Ann. § 56-7-3121. McKee also sought a declaration that Tennessee's "any willing provider" law codified at Tenn. Code. Ann § 56-7-2359 (as incorporated by § 56-7-3120(b)) was ERISA-preempted as applied to self-funded plans.

Of note, these provisions expressly include ERISA plans in the statutory definitions of a "covered entity" and a "pharmacy benefits manager." 2022 Tenn. Pub. Ch. 1070 §§ 3-4, Tenn. Code Ann. § 56-7-3102(1), (5).

After rejecting standing challenges by Tennessee, the court found that the challenged provisions were preempted by ERISA because they have an impermissible "connection with" ERISA plans, relying principally on *Kentucky Ass'n of Health Plans, Inc. v. Nichols*, 227 F.3d 352, 363 (6th Cir. 2000), *aff'd sub som. Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003). The court rejected Tennessee's argument that the Supreme Court's decision in *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80 (2020), is dispositive because it abrogates *Nichols*. The court distinguished *Rutledge* – concerning a provision of the Arkansas PBM law regulating the reimbursement of pharmacies by PBMs, which was found to regulate costs rather than ERISA plans – from the Tennessee any willing provider requirements at issue because "the scope of an ERISA plan's provider network (in this case a pharmacy network) is a key aspect of plan administration: how the plan structures and designs its benefits." The court cited *Pharm. Care Mgmt, Ass'n v. Mulready*, No. 23-1213 (May 10, 2024), which involves Oklahoma's "Any Willing Provider Provisions" and is currently pending before the Supreme Court, for this point.

In addressing the aspects of the challenged Tennessee laws prohibiting disincentives or incentives as related to pharmacy networks, the court found that these provisions "functionally mandate that ERISA plans charge plan participants the same copays and/or fees at all pharmacies in a given network," and therefore "prevent an ERISA plan from designing and providing benefits in a way that the plan determines best serves participants." The court did not reach McKee's other arguments as to why these laws were ERISA preempted, including "reference to" and conflict preemption. In addition, the court granted Thrifty Med's motion to dismiss on mootness grounds because, *inter alia*, Thrifty Med stated it was not seeking reinstatement to McKee's health plan's pharmacy benefit network.

The court enjoined Tennessee from enforcing the challenged state law provisions against McKee, but its holding also broadly preempts these provisions as to all "self-funded benefits plans governed by ERISA." The court was clear that its "injunction includes direct enforcement against the [McKee] Health Plan and indirect enforcement against the Health Plan's PBM for actions the PBM takes on the Health Plan's behalf."

This decision aligns with Pharmaceutical Care Management Association's defense of the Tenth Circuit's holding that similar Oklahoma PBM provisions were ERISA preempted that is now before the Supreme Court in *Mulready*. It remains to be seen whether the Tennessee Insurance Commissioner will appeal the district court's decision to the Sixth Circuit given the *Nichols* precedent, and any such appeal could be controlled by a decision in *Mulready* if the Supreme Court grants *certiorari* in that case. The Supreme Court's invitation to the Solicitor General to file a brief expressing the views of the United States in *Mulready* has prolonged a potential oral argument and decision in that case. An appeal in *McKee* will add to the existing circuit split on the issue of ERISA preemption of provider network participation standards.

Diverging Outcomes on Standing in Pension Risk Transfer Suits Hinge on Injury

On March 28, 2025, two federal district courts rendered opposing decisions on motions to dismiss in two pension risk transfer (PRT) cases. In *Konya v. Lockheed Martin Corp.*, No. 8:24-cv-00750, the District Court for the District of Maryland denied in full Lockheed Martin's motion to dismiss, finding that the plaintiff-retirees met their burden to establish standing, albeit narrowly, and sufficiently asserted ERISA claims for fiduciary breach and prohibited transactions. On the other hand, in *Camire v. Alcoa USA Corp.*, No. 1:24-cv-01062, the district court in DC dismissed the PRT plaintiffs' suit for lack of standing. The analysis in both decisions centered on whether the plaintiffs had alleged adequate injury-in-fact to establish constitutional standing. Though both cases involved similar fact patterns, the decisions differed narrowly in their weighing of the evidence on injury, resulting in wholly different outcomes at this stage in the litigation. What is apparent from the decisions is that the *Lockheed* court, like the *Alcoa* court, was not fully persuaded by the alleged injury in the form of an increase in the risk of a failure to pay benefits, but nonetheless allowed the plaintiffs to "eke out" standing through their conclusory pleadings.

The plaintiffs' claims in both *Lockheed* and *Alcoa*, previously covered here and here, rest on PRT transactions that transferred defined benefit pension plan liabilities from the defendant-employers to an external annuity provider, Athene Annuity and Life Co. (Athene). The complaints in both cases, brought by retired participants in the respective pension plans, alleged that the decision to select Athene for the PRT was a breach of the fiduciary duties of the employers. The complaints alleged the employers failed to

select the "safest annuity available" for the PRT, instead choosing a "risky" option that jeopardized the plaintiffs' pension benefits. The complaints also alleged that the PRT constituted a prohibited transaction, as the choice of Athene was a cheaper option, the benefits of which accrued to the employers.

The defendants in both cases filed motions to dismiss for lack of standing and failure to state a claim. Central to both defendants' arguments against standing was the application of *Thole v. U.S. Bank*, 590 U.S. 538 (2020). The defendants argued that *Thole* — which found that participants in a defined benefit plan could not show injury-in-fact where they continued to receive their defined benefits, despite financial losses to the plan — foreclosed standing here because the participants had not alleged missing or lower benefit payments.

The court in *Lockheed* found that the plaintiffs "eked out sufficient injury-in-fact to establish standing" at the motion to dismiss stage. The court agreed with the defendant that an injury articulated as a "decrease in *value* of their pension benefits due to the uncompensated risk" associated with the PRT was foreclosed by *Thole*, because participants in a defined benefit plan did not have a stake in the value of the plan as a whole (emphasis added). However, the court credited the plaintiffs' reliance on a particular passage in *Thole* suggesting that standing may exist where "mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits." The court found that the plaintiffs had alleged sufficient facts to suggest an "increased and significant risk that they will not receive the benefit payments to which they are entitled," a situation not at issue in *Thole*. The court noted that the PRT resulted in the plaintiffs' benefits no longer being protected by ERISA or guaranteed by the Pension Benefit Guaranty Corporation (PBGC), and that the court at this early stage in the litigation was required to accept as true the plaintiffs' plausible allegations about the risks associated with using Athene as an annuity provider. The court failed to explain how the absence of ERISA or PBGC protections factored into a "substantial" increased risk of failure of the Athene annuity products themselves.

The court in *Alcoa* likewise focused on the injury-in-fact requirement as articulated by *Thole*, but here it found that the plaintiffs had failed to plausibly allege "substantially increased" risk of "plan failure." The court's legal analysis tracks closely that in *Lockheed*. Like the court in *Lockheed*, the *Alcoa* decision finds that a decrease in the value of the plan is not a cognizable injury under *Thole*, but that *Thole* did not foreclose a theory of standing based on imminent harm to participants' defined benefits. It agreed that a showing of imminent harm may be simpler in this case as compared to *Thole*, as the PRT rendered the plan uncovered by the PBGC. Where the court in *Alcoa* differed from *Lockheed* was in its reading of the plaintiffs' factual allegations. The *Alcoa* court found that the plaintiffs had not demonstrated a "substantial probability" of plan failure, even if Athene is a riskier annuity provider than other comparable options, because the plaintiffs had not shown a high level of "absolute" risk. Where the *Lockheed* court focused on allegations of risk to plan participants from "high-risk insurance practices" and Athene's "private equity composition" and alleged lack of regulatory oversight, the *Alcoa* court focused on the "several events that would need to take place before Plaintiffs could ever experience the harm," including that both the plan and state guaranty associations fail to the extent that participants stop receiving benefits. Therefore, the court in *Alcoa* concluded that the plaintiffs failed to establish standing and the court dismissed the case in full.

The court in *Lockheed* went on to deny the defendant's motion to dismiss for failure to state a claim, finding that the plaintiffs plausibly alleged fiduciary breach stemming from the plan fiduciaries' selection of Athene as its annuity provider. It further found that the plaintiffs plausibly alleged a prohibited transaction based on self-dealing by acting in its own interest in selecting a cheaper annuity option, though it agreed with the defendant that Athene was not a party in interest such that the plaintiffs could not make out a prohibited-transaction claim on that basis. The *Alcoa* court's analysis, which focused on the probability of a failure to pay benefits and discounted assumed events that must occur for such failure to be realized, is the better approach for evaluating the allegations in support of standing in these cases.

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