



# PENSION & BENEFITS



## REPORTER

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### Federal Plans

#### **Seventh Circuit Finds That FEHBA Preempts Plan's Subrogation Claim Against Enrollee**

**T**he Federal Employees Health Benefits Act (FEHBA) preempts a plan administrator's state law claim for reimbursement from an enrollee under the plan's subrogation provision, the U.S. Court of Appeals for the Seventh Circuit ruled Jan. 24 (*Blue Cross and Blue Shield of Illinois v. Cruz*, 7th Cir., No. 03-4170, 1/24/05).

Judge Michael S. Kanne, wrote for the court, "because Congress's clear intent was to make benefits uniform for FEHBA plan enrollees of different states, state law regarding subrogation is preempted by the reimbursement provision in the Service Benefit Plan."

In so finding, the appeals court reversed a decision of the U.S. District Court for the Northern District of Illinois finding that the federal court did not have subject matter jurisdiction (227 PBD, 11/26/03; 30 BPR 2655, 12/2/03; 32 EBC 1283).

**Participant Recovers from Third Party.** Jose A. Cruz was a participant in the Service Benefit Plan created under FEHBA. Health Care Service Corp. (HCSC) administered the plan for Blue Cross and Blue Shield of Illinois. The plan contained a subrogation and right-of-recovery provision requiring beneficiaries to notify the plan of any third-party recoveries and to reimburse the plan for any benefits the plan had paid. Cruz was injured in an automobile accident in May 1998 and HCSC paid \$4,682 in medical expenses. Cruz then settled with the third-party tortfeasor for \$30,000, but did not reimburse HCSC.

HCSC sued Cruz, alleging he breached his obligation under the plan by refusing to reimburse HCSC from his settlement proceeds. Cruz claimed the federal district court had no subject matter jurisdiction under FEHBA or federal common law. The district court agreed, and granted Cruz's motion to dismiss the case.

In a different action, Cruz and others brought a class action against HCSC, alleging it violated the Illinois "common fund" doctrine and the Illinois Consumer Fraud and Deceptive Practices Act by refusing to provide the participants with a full set-off for attorneys' fees and costs the participants incurred in obtaining settlements in third-party lawsuits. After HCSC removed that action to federal court, the court granted Cruz's motion to remand the case to state court on the grounds it was not preempted by FEHBA (*Doyle v. Blue Cross Blue Shield of Illinois*, 149 F.Supp.2d 427, 26 EBC 2114 (N.D. Ill. 2001)(111 PBD, 6/11/01; 28 BPR 1610, 6/12/01)). That case was still pending in state court at the time of the appeals court decision.

**Appeals Court Has Jurisdiction.** The appeals court reversed the district court, finding that FEHBA barred the plan's reimbursement claim. FEHBA's preemption provision states, "[T]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede any State or local law, or any regulation issued thereunder, which relates to health insurance or plans."

The court said that if FEHBA contract provisions did not preempt state law regarding subrogation, the practical effect would be that federal employees in different states paying the same premiums would not be required to repay benefits after recovery from third parties according to the same rules. "Federal employees in different states would have different reimbursement obligations and hence different net benefits. This is contrary to the uniformity goal of FEHBA in general and its preemption provision in particular," the court said.

The court noted that the Employee Retirement Income Security Act preempts state law claims regarding subrogation in connection with ERISA plans. "[I]f Congress intended to preempt state law when regulating private employers, it would be strange to leave regulation to the individual states when the employer is the United States itself," the court said.

**Second Circuit Finds Differently.** The U.S. Court of Appeals for the Second Circuit recently came to the opposite conclusion in *Empire HealthChoice Assurance Inc. v. McVeigh* (12 PBD, 1/19/05; 32 BPR 196, 1/25/05). After a FEHBA-plan enrollee's death in 2001, his estate settled a personal injury lawsuit and recovered \$3,175,000. Citing subrogation and right-of-recovery provisions in its FEHBA health plan, the plan administrator filed an action in federal district court seeking the \$157,309 in benefits it had paid the enrollee.

The Second Circuit found in a 2-1 decision that it did not have subject matter jurisdiction because FEHBA did not affirmatively authorize the creation of federal common law in this case and because there was no demon-

strated conflict with state law that would require federal common-law rulemaking.

The Second Circuit said that reading the preemption provision "as conferring federal jurisdiction over contract disputes between private parties strains the language of the provision and undermines the presumption against federal preemption that should guide our analysis in this case."

Judges Richard A. Posner and Ann C. Williams joined in the opinion of the Seventh Circuit.

Anthony F. Shelley of Miller & Chevalier, Washington, D.C., argued for HCSC. Michael R. Karnuth of Kirslov & Associates, Chicago, argued for Cruz.