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Opinion No. 13-21

State Regulation of Insurers Offering Health Insurance in Federal Exchanges

QUESTION

Is Senate Bill 666/ House Bill 476 of the 108th Tennessee General Assembly, 1st Sess. (2013) (hereinafter "HB476") constitutional?

OPINION

HB476 is constitutionally suspect under the Supremacy Clause of the United States Constitution.

ANALYSIS

HB476 proposes to amend the Tennessee Insurance Law by adding a new section to Chapter 7, Part 10 of Title 56. HB476 provides that "[n]o insurance company doing business in this state shall be authorized or permitted to sell or offer health insurance coverage, as such term is defined in § 56-7-2802,[1] under this chapter through any American Health Benefit Exchange or any other health insurance exchange operated in this state under the Patient Protection and Affordable Care Act (Public Law 111-148), as amended." HB476, 108th Leg., 1st Sess. § 1 (2013).

The legislative intent of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), was to reform the nation's health insurance and health care delivery markets with the aims of improving access to those markets and reducing health care costs and uncompensated care. *See Seven-Sky v. Holder*, 661 F.3d 1, 4 (D.C. Cir. 2011), *abrogated by National Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012). In order to accomplish these goals, Title I of the Act provides for the establishment of state-based health insurance exchanges, which are insurance marketplaces where individuals, families,

[1] Tenn. Code Ann. § 56-7-2802(15) defines "health insurance coverage" as "benefits consisting of medical care, provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care, under any policy, certificate, or agreement offered by a health insurance issuer." A "health insurance issuer," in turn, is defined as "an entity subject to the insurance laws of this state, or subject to the jurisdiction of the commissioner, that contracts or offers to contract to provide health insurance coverage, including, but not limited to, an insurance company, a health maintenance organization and a nonprofit hospital and medical service corporation." Tenn. Code Ann. § 56-7-2802(16). "'Health insurance issuer' does not include a group health plan." *Id.*

and small employers can compare prices and buy coverage from one of the exchange's issuers. The health benefit exchanges are intended to allow individuals and small businesses to leverage their collective buying power to obtain prices competitive with group plans. *See* ACA, Pub. L. No. 111-148, § 1311 (codified at 42 U.S.C. § 18031); ACA: Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 Fed. Reg. 18310 (Mar. 27, 2012).[2]

The exchanges are to offer a choice of plans that must include a package of "essential health benefits."[3] *See* ACA, Pub. L. No. 111-148, §§ 1301(a), 1302 (codified at 42 U.S.C §§ 18021(a), 18022). These plans, referred to as "qualified health plans," must be offered by a "health insurance issuer"[4] that is licensed and in good standing to offer health insurance coverage in each state in which such issuer offers health insurance coverage. *Id*. § 1301(a) (codified at 42 U.S.C § 18021(a)).

Turning to HB476, an analysis of the constitutionality of this bill begins with the federal McCarran-Ferguson Act, since the proposed bill is one that would regulate the business of insurance. The McCarran-Ferguson Act confirms the states' authority to regulate the business of insurance, and it protects such regulation from federal intrusion in some instances. Towards this end, the Act provides that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). The Act goes on to protect state legislation from unintended federal intrusion in the insurance industry, but the Act does retain the power of Congress to override state insurance law when Congress desires. With respect to federal regulation, 15 U.S.C. § 1012(b) provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by a State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]" Thus, when a federal law specifically relates to the business of insurance, the states remain authorized to regulate the business of insurance but are subject to the limitations imposed by the Supremacy Clause of the United States Constitution. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 38-39

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[2] The ACA provides for three types of health insurance exchanges: state-based exchanges, state partnership exchanges, and federally-facilitated exchanges. If a state elects not to operate a state-based exchange, the Secretary of Health and Human Services will establish and operate a federally-facilitated exchange for that state. *See* 45 C.F.R. § 155. On December 10, 2012, Governor Haslam announced that Tennessee would not operate a state-based exchange. The federal government will begin to operate an insurance exchange in Tennessee in October 2013. *See* http://www.tn.gov/nationalhealthreform/exchange.shtml (last visited March 14, 2013).

[3] The essential health benefits package includes the following general categories of items and services: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care. ACA, Pub. L. No. 111-148, §1302 (codified at 42 U.S.C § 18022).

[4] A "health insurance issuer" is "an insurance company, insurance service, or insurance organization . . . which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance . . . . Such term does not include a group health plan." ACA, Pub. L. No. 111-148, § 1301(b)(2) (codified at 42 U.S.C § 18021(b)(2)).

(1996); *see* also *Tafflin v Levitt*, 493 U.S. 455, 458 (1990). Because ACA is specifically related to the business of insurance, HB476 is subject to the constraints of the Supremacy Clause.

The Supremacy Clause provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. This clause provides Congress with the power to preempt state law. Congressional purpose is the "ultimate touchstone" of the preemption inquiry. *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992); *Riggs v. Burson*, 941 S.W.2d 44, 49 (Tenn. 1997). Congress's preemptive intent may be either express or implied. Express preemption occurs when Congress includes explicit preemptive language in federal statutes. Implied preemption occurs when the federal statutes occupy the entire legislative field leaving no room for state regulation or, where Congress has not occupied the entire field, when a conflict exists between federal and state law. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992); *LeTellier v LeTellier*, 40 S.W.3d 490, 497 (Tenn. 2001). Conflict preemption arises when compliance with both federal law and state law is impossible or when state law presents an obstacle to the accomplishment of the full purposes and objectives of Congress. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Swift v. Campbell*, 159 S.W.3d 565, 577 (Tenn. Ct. App. 2004) (citing *Gade*, 505 U.S. at 98).

In accordance with the implied preemption precedent discussed above, any state law that prevents the application of Title I of the Act is preempted. ACA provides that the health plans offered through the exchanges must be certified as qualified health plans. A requisite of such a plan is that the plan be offered by a health insurance issuer that is licensed and in good standing to offer health insurance coverage in each state in which the plan offers health insurance coverage. With few exceptions, a company engaged in the business of insurance may not enter into a contract of insurance or transact insurance business in Tennessee without a certificate of authority from the Commissioner of Commerce and Insurance. *See* Tenn. Code Ann. §§ 56-1-102, 56-2-105. Thus, the provisions of HB476, for all intents and purposes, would prevent the application of Title I of ACA.

Moreover, HB476 runs afoul of the doctrine of conflict preemption. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64, 65 (2002); *Geier v. American Honda Motor Co., Inc*., 529 U.S. 861, 869 (2000). As set forth above, conflict preemption arises when state law presents an obstacle to the accomplishment of the full purposes and objectives of Congress. A core purpose of ACA is to enable individuals and small businesses to obtain affordable health insurance through state-based exchanges. Congress has designed the exchanges to facilitate the purchase of qualified health plans and to create a more organized and competitive market for buying health insurance. Preventing insurance companies licensed in Tennessee from selling or offering health insurance coverage through an exchange established for Tennesseans under ACA stands as an obstacle to the accomplishment of Congress's objectives.

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