Reynolds v. Preferred Medical Providers

DRAFTERS' POINT SHEET

In this performance test item, applicants' law firm represents Rowena Reynolds. Her deceased father, John Reynolds, was a participant in Elder Advantage, a Medicare health insurance plan issued by Preferred Medical Providers (Preferred), a Health Maintenance Organization (HMO).

During the two years before Mr. Reynolds died, he suffered from a kidney ailment. His primary care physician had recommended that Mr. Reynolds be given a newly developed treatment, but Preferred's medical evaluators refused to authorize and pay for it, asserting that it was new, unproven, and too expensive. Mr. Reynolds died as a result of the kidney ailment.

Rowena Reynolds filed a suit in Franklin state court to recover damages for a variety of torts and demanded a jury trial. Preferred's attorney, William Caldwell, wrote a letter demanding that Reynolds submit the dispute to arbitration pursuant to an arbitration clause contained in Mr. Reynolds' Elder Advantage enrollment contract. Preferred's theory is that the Federal Arbitration Act and the Medicare Act preempt a provision of the Franklin Medical Insurance Contract Act (MICA) that requires very specific language and placement of the arbitration clause in any health insurance plan contract. Preferred's arbitration clause does not appear "immediately above the signature line" as required by MICA § 63.1.

Applicants' task is to draft a letter to Preferred's attorney rejecting his demand to arbitrate, explaining why the Federal Arbitration Act and the Medicare Act do not preempt MICA § 63.1. The File contains a short excerpt from a recorded interview with Ms. Reynolds and a letter from Preferred's counsel. The Library contains MICA § 63.1, the federal statutes, an excerpt from the Congressional Record, and two cases.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the graders in the user jurisdictions.

I. Overview: The task is to write a letter to Preferred's attorney rejecting his demand to submit to arbitration, explaining why the Federal Arbitration Act and the Medicare Act do not preempt § 63.1.[1]

- The work product should resemble in form and content a letter to opposing counsel.

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[1] The drafters of this test item recognize that in this much-litigated area courts in various jurisdictions have sometimes ruled that the Medicare Act *does* preempt state laws such as MICA § 63.1. It is equally true that other state courts have ruled that there is no preemption. This test item is based on the latter construct.

        - It should contain legal citations as appropriate and references to the facts as needed.
        - It need not contain a separate statement of the facts.
    - The discussion section of the letter should be divided into headings preceding each of the major arguments in the discussion.
        - The case involves a largely legal argument, although there are *some* facts that should be incorporated.
- The issues that applicants must address are set forth in Preferred's letter and the call memo: (1) that the Federal Arbitration Act preempts MICA § 63.1 and (2) that § 1395mm of the Medicare Act also preempts § 63.1. The decision tree is as follows:
    - Section 63.1 requires that the arbitration clause appear "immediately above the signature line."
        - Preferred's enrollment contract does not comply. (Preferred concedes this.)
    - MICA § 63.1 is a Franklin (state) law that relates to the regulation of the business of insurance within the meaning of McCarran-Ferguson.
    - Thus, the Federal Arbitration Act, which is a law of *general* application, does not preempt § 63.1.
        - That is because McCarran-Ferguson prevents any federal law that does not itself *specifically* relate to the business of insurance from impairing or superseding any state law that does.
    - However, McCarran-Ferguson does not have the same non-preemption effect on the Medicare Act.
        - That is because the Medicare Act *is* a federal law that relates *specifically* to the business of insurance.
    - Whether the Medicare Act preempts MICA § 63.1 is determined by making the traditional preemption analysis—that is, whether Congress intended to preempt state laws that regulate the form and content of Medicare marketing materials.
        - Section 63.1 is an exercise of the states' police powers (public health), which makes the burden of asserting federal preemption a particularly heavy one. *See Casaro v. Super Sub Associates.*
    - Nothing in the excerpt of the Medicare Act suggests congressional intent to "occupy the field" of regulation of Medicare marketing materials. Thus, there is no "field" preemption.
    - It is arguable that 42 U.S.C. § 1395mm(c)(3)(C) expresses congressional intent to preempt state regulation of marketing materials—that is, on the theory of "conflict" preemption.

- But that is not a plausible theory because the excerpt from the Congressional Record makes it clear that Congress did not intend to preclude concurrent state regulation of marketing materials, as long as such state regulation does not impede the federal regulations.
- Thus, federal law does not preempt MICA § 63.1.

II. Discussion: The two headings below set forth the major parts of the discussion. The headings are *examples only* and not the prescribed headings.

- Section 63.1 contains the very specific requirement that any health care plan that includes a binding arbitration provision contain notice of that provision in at least 10-point bold red type "immediately above the signature line."
  - It is a requirement imposed by the Franklin Legislature to protect the civil and constitutional rights of plan participants by calling their attention at the last possible moment to the fact that by agreeing to submit claims to arbitration they are giving up valuable rights. *Smith v. ModernCare*.
  - It is an exercise of the State of Franklin's police powers (public health). *Cf.* CONG. REC.
- Preferred's Elder Advantage enrollment contract fails to comply with § 63.1 and is therefore unenforceable under Franklin law.
- Preferred's counsel concedes that its Elder Advantage enrollment contract does not comply with MICA § 63.1. (*See* letter from William Caldwell.)
  - *See also Smith v. ModernCare* ("As a result, ModernCare's arbitration clause may not be enforced because of its failure to satisfy the specific requirements [i.e., that it appear "immediately above the signature line"] imposed by MICA § 63.1.")

The Federal Arbitration Act Does Not Preempt MICA § 63.1 Because § 63.1 Is a State Law That Regulates the Business of Insurance, and the McCarran-Ferguson Act Prevents Any Federal Law That Does Not Itself *Specifically* Relate to the Business of Insurance from Impairing or Superseding a State Law That Does Relate to the Business of Insurance.

- McCarran-Ferguson is an expression of congressional intent to preserve for the states the regulation of the business of insurance. *Smith v. ModernCare*.
  - It provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."
- Medical and health care plans, such as Preferred's Elder Advantage, are forms of "insurance."

- HMOs such as Preferred are in the business of providing insurance; that is, the policyholder pays a fee and the HMO furnishes the services and spreads the risk among its policyholders.
    - *See Smith v. ModernCare*; *see also* Ms. Reynolds' comments in the excerpt of her interview.
    - Note also that the File is peppered with references to Elder Advantage and Medicare being health *insurance* plans.
- The question then becomes whether § 63.1 is a state law that regulates the business of insurance within the meaning of McCarran-Ferguson.
    - Section 63.1 is such a regulation. *Smith v. ModernCare* states it very clearly: "In protecting the insureds, the state has exercised its power through § 63.1 to regulate the performance of an insurance contract."
        - It regulates the language and the terms of policies HMOs can offer in Franklin. *See Smith v. ModernCare*.
    - Thus, § 63.1 is a state insurance regulation and is protected from preemption by McCarran-Ferguson unless the federal law that Preferred is asserting (the Federal Arbitration Act) *specifically* relates to the business of insurance.
- The Federal Arbitration Act is *not* a federal law that *specifically* relates to the business of insurance.
    - It is a law of general applicability that relates to contracts in general. *See Smith v. ModernCare* ("The Federal Arbitration Act is obviously not a federal law that specifically relates to the business of insurance.").
        - It makes contractual arbitration provisions enforceable "save upon such grounds as exist at law or in equity for revocation of *any contract*."
        - Caldwell's citation to *Casaro v. Super Sub Associates* is inapposite because *Casaro* dealt with the Federal Arbitration Act's preemption of a state law that did *not* relate to the business of insurance.
            - Applicants should explain why *Casaro* is not good authority for Preferred's position.
- For these reasons, the Federal Arbitration Act does not preempt MICA § 63.1.

MICA § 63.1 Is Not Preempted by the Medicare Act Because Congress Did Not Intend to Occupy the Field of Regulation of Medicare Marketing Materials and Because Application of § 63.1 to Medicare Insurance Plans Does Not Conflict with Federal Regulation in a Way That Makes Compliance with Both State and Federal Regulations Impossible.

- First, applicants should note that McCarran-Ferguson does not come into play on the question of preemption of § 63.1 by the Medicare Act.

- That is because the Medicare Act is a federal law that relates *specifically* to the business of insurance.
    - The excerpt from the Congressional Record describes the Medicare law as providing "for the delegation of Medicare health insurance benefit administration to . . . (HMOs)."
- Thus, whether the Medicare Act preempts MICA § 63.1 has to be analyzed under traditional "field" and "conflict" preemption doctrines. *See Casaro*.

- In order to show "field" preemption (i.e., that Congress intended to occupy the field of regulation in Medicare), Preferred carries the heavy burden of establishing that "preemption was the clear and manifest purpose of Congress." *See Casaro.*
    - That is especially true here because § 63.1 falls within the police powers (regulation of public health) of the State of Franklin.
- Field preemption is ordinarily present where Congress has *expressly* or *implicitly* stated an intent to exclude all state regulation.
    - The contrary is true here. "Congress previously has stated its intent to minimize federal intrusion in the traditionally state-regulated area of medical services for the elderly." *See* CONG. REC.
    - Thus, there is no *field* preemption.
- The "conflict" preemption argument centers on § 1395mm(c)(3)(C), which Preferred cites as a provision that specifically preempts state regulation of the form and content of marketing and informational materials such as the Elder Advantage enrollment contract.
    - On the surface, this provision may appear to vest exclusive power in the Secretary of Health and Human Services (Secretary) to regulate Medicare HMO plan materials.
        - This section of the statute prohibits any HMO from distributing marketing and informational materials before they have been vetted through the Secretary for inaccurate or misleading content. If, within 45 days after submission, the Secretary has not disapproved of them, the materials are deemed to be unobjectionable.
        - Preferred's letter states that its Elder Advantage materials were submitted in compliance with § 1395mm(c)(3)(C) and that the Secretary did not disapprove. Applicants should assume this is true.
    - However, as the court notes in *Casaro*, for there to be conflict preemption, compliance with both the federal and state regulations must be "impossible." That is not so in this case.
        - First, the federal and state regulatory schemes are similar. *Id*.

- Section 1395mm(c)(3)(C)'s requirement that the Secretary preview the materials and § 63.1's requirement that the disclosure be placed immediately above the signature line are *both* aimed at "preventing deception . . . in the area of ensuring that senior citizens are fully informed of their rights before they commit themselves to a plan of insurance upon which their very survival may depend." (CONG. REC.)
- Section 63.1 actually *advances* the intent of § 1395mm(c)(3)(C) by giving vulnerable elderly participants more meaningful notice of their rights. *Id*.

- Moreover, the Congressional Conference Committee expressly acknowledges in the Congressional Record excerpt that state and federal regulation of HMO marketing and information materials can coexist without conflict.

- Thus, there is no *conflict* preemption.

Conclusion: For all the foregoing reasons, there is no federal preemption of MICA § 63.1, and Preferred's demand that Rowena Reynolds submit her case to arbitration is rejected.