Preemption: The Federal Employees Health Benefit Act (FEHBA): Why the Oklahoma Supreme Court Was Wrong in Allowing State Claims in *Kincade v. Group Health Services*

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Preemption: The Federal Employees Health Benefit Act (FEHBA): Why the Oklahoma Supreme Court Was Wrong in Allowing State Claims in *Kincade v. Group Health Services*

1. Introduction

Federal law is the supreme law of the land and when in conflict with state law, federal authority should supersede state law.\(^1\) Whether a federal statute preempts a particular or all state claim(s) requires inquiry into the congressional intent behind passing the law.\(^2\) Congressional purpose is the "ultimate touchstone."\(^3\) Sometimes the courts, however, cannot agree on the issue of congressional intent.\(^4\) Consequently, courts occasionally reach different conclusions concerning whether a federal statute preempts a state claim.\(^5\) The problem of defining the scope and extent of federal preemption is extremely prevalent in claims based on the Federal Employees Health Benefit Act (FEHBA).\(^6\)

The FEHBA establishes a system for the federal government to "procure contracts with medical service providers whereby federal employees can choose a particular provider's plan as part of the employee's benefit package."\(^7\) Under the FEHBA system, the individual employee and the federal government share the cost of the medical insurance.\(^8\) In applying FEHBA, a majority of federal courts find that FEHBA preempts state law claims.\(^9\) However, one federal court seems to have determined that state claims are not preempted by FEHBA (despite concluding federal courts have no jurisdiction to hear this "private controversy"),\(^10\) and another circuit court has decided the issue is one to be settled solely in state courts due to the "lack of a federal statutory cause of action vindicating the same interests as the insured's state" claim.\(^11\) The Supreme Court of Oklahoma has relied on these two minority decisions and simply stated that FEHBA does not preempt state claims.\(^12\)

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1. *See* U.S. CONST. art. VI, cl. 2.
3. *Id*.
5. *See id*.
8. *See id*.
9. *See generally* Caudill v. Blue Cross & Blue Shield, 999 F.2d 74 (4th Cir. 1993); Burkey v. Government Employees Hosp. Ass'n, 983 F.2d 656 (5th Cir. 1993); Harris v. Mutual of Omaha Cos., 992 F.2d 706 (7th Cir. 1993); Nessein v. Mail Handlers Benefit Plan, 995 F.2d 804 (8th Cir. 1993); Hayes v. Prudential Ins. Co. of Am., 819 F.2d 921 (9th Cir. 1987); Blue Cross & Blue Shield v. Department of Banking, 791 F.2d 1501 (11th Cir. 1986).
The Supreme Court of Oklahoma in *Kincade v. Group Health Services* held that a plaintiff could recover through a state claim under FEHBA for a carrier's refusal to pay a valid insurance claim. The court stated that it was following precedents set down by the United States Courts of Appeals for the Tenth and Third Circuits. However, a more recent opinion by a district court for the Eighth Circuit rejected the rationale used by the United States Court of Appeals for the Third Circuit. The reasoning used by the United States Court of Appeals for the Tenth Circuit may too be disregarded.

The Supreme Court of Oklahoma's decision in *Kincade*, while supported by case law, is in error. Congress intended FEHBA to preempt state claims that were inconsistent with FEHBA's goals. The controversy surrounding FEHBA focuses on what claims courts have deemed inconsistent with FEHBA's objectives. The majority of courts have, for the most part, decided that all state claims are incompatible with FEHBA and are thus preempted by the Act. Hence, these courts find most (if not all) state claims are "inconsistent with such contractual provisions." Courts in the minority seem to indicate few state claims would be contradictory to FEHBA and conclude a plaintiff can probably maintain his suit, albeit in state court.

Clearly, the Supreme Court of Oklahoma's holding in *Kincade* is inconsistent with past United States Supreme Court opinions regarding similar preemption issues in relation to health care benefits under the Employee Retirement Income Security Act of 1974 (ERISA) and the Labor Management Relations Act (LMRA). The language in ERISA is very similar to the language used in FEHBA.

When one considers the divergent views taken by the courts on this question, it becomes quite clear that the United States Supreme Court should rule on this issue.

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14.  See id. at 489.
15.  See id.
18.  See, e.g., Caudill v. Blue Cross & Blue Shield, 999 F.2d 74 (4th Cir. 1993); Burkey v. Government Employees Hosp. Ass'n, 983 F.2d 656 (5th Cir. 1993); Harris v. Mutual of Omaha Cos., 992 F.2d 706 (7th Cir. 1993); Nesseim v. Mail Handlers Benefit Plan, 995 F.2d 804 (8th Cir. 1993); Hayes v. Prudential Ins. Co. of Am., 819 F.2d 921 (9th Cir. 1987); Blue Cross & Blue Shield v. Department of Banking, 791 F.2d 1501 (11th Cir. 1986).
21.  See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218-19 (1985) (holding a state law claim for bad faith handling of an insurance claim is preempted by federal labor-contract law); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) (concluding state law claims for breach of contract and tort in relation to improper processing of a claim for benefits under an ERISA-regulated plan are preempted by federal law); see discussion infra Part IV.C-D.
22.  See Hanson, 953 F. Supp. at 274.
Yet, despite recent efforts to bring the conflict to an end, the controversy surrounding FEHBA still remains. On March 29, 1995, the Office of Personnel Management of the United States of America (OPM) stated that FEHBA plans are "federal contracts" and that "legal actions concerning disputes arising or relating to those contracts are controlled by federal, rather than state law."24 Thus, "Congress recognized that allowing state courts to adjudicate FEHBA benefit claims would undercut the consistency that it intended when it established FEHBA"25 and changed the civil enforcement provisions, making FEHBA claims the sole province of federal courts.26

This note will outline five reasons why the conclusion reached by the Supreme Court of Oklahoma in Kincade should not be followed. First, the court ignored the congressional intent argument calling for preemption (or in the alternative the presence of a uniquely federal interest requiring application of federal common law).27 Second, the court completely disregarded the similarity in language between ERISA and FEHBA. This nearly identical language is important because the United States Supreme Court said that ERISA preempts state claims.28 Third, the court failed to recognize the changes made by the OPM on March 29, 1995.29 Fourth, the reasoning applied by the court in Kincade misconstrued the holdings and rationale of the two cases upon which the court based its decision.30 Finally, the court neglected to force the plaintiff to exercise all of his administrative remedies as required by the OPM before allowing the claim to be heard.31 Consequently, had the court followed the appropriate procedural requirements of the OPM, the plaintiff would not have been allowed to recover. Therefore, the decision reached by the Supreme Court of Oklahoma is erroneous and should not become majority law.

II. FEHBA Background and Prior Case Law History

FEHBA, codified at 5 U.S.C. §§ 8901-8914, is the federal statute that governs health benefits for federal employees.32 FEHBA provides that the United States, "through the OPM, contracts with various private carriers to develop health care plans

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but subsequently dismissing case in 514 U.S. 1048 (1995) because it was settled).

25. Hanson, 953 F. Supp. at 274.
26. See id.
27. See Burkey v. Government Employees Hosp. Ass'n, 983 F.2d 656, 660 (5th Cir. 1993); Hayes v. Prudential Ins. Co. of Am., 819 F.2d 921, 925-26 (9th Cir. 1987).
28. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91, 97 (1983) (holding ERISA preempts "any and all state law insofar as they may now or hereafter relate to any employee benefit plan . . . if it has connection or reference to the plan").
29. See Hanson, 953 F. Supp. at 275 n.4.
30. See id.
31. See Nesseim v. Mail Handlers Benefit Plan, 995 F.2d 804, 807 (8th Cir. 1993) ("No action at law or equity shall be brought to recover on a claim for benefits under the Plan until the administrative remedy provided at Title 5 of the Code of Federal Regulations, section 890.105 has been exhausted.") (alteration in original).
32. See Hayes v. Prudential Ins. Co. of Am., 819 F.2d 921, 922 (9th Cir. 1985).
with varying coverages and costs." The plans run for one year and are annually renegotiated. Almost nine million federal employees and their dependents are covered by the 300 health benefit plans procured by the OPM under FEHBA. Under these plans, the federal government will pay no more than seventy-five percent of the premiums, an expenditure of nearly eleven billion dollars annually.

Federal employees covered by this plan enroll in the Service Benefit Plan pursuant to FEHBA and the OPM regulations. An employee selects the benefits for each FEHBA plan for the year. The OPM then provides a "detailed statement of benefits" for enrollees, setting forth the plan's benefits that the OPM "considers necessary or desirable."

Enrollees must initially submit all claims to the health benefit carrier in which they are enrolled. The enrollees have the right to request reconsideration when they object to the plan's decision denying payment. When the OPM concludes that the carrier's denial of benefits is correct, a problem for the enrollees and needless controversy for the courts emerges.

The FEHBA provides:

The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions.

A claim "relates to" the plan under 5 U.S.C. § 8902(m)(1) as long as it has a connection with or refers to the plan. The Civil Service Commission also agrees that FEHBA preempts conflicting state law.

Prior to March 29, 1995, an enrollee was required to sue the carrier for problems arising from the denial of health benefits. However, the regulations have since

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33. id.
34. See id.
37. See id. § 8905.
38. Id. § 8902(d).
40. See id.
42. See Blue Cross & Blue Shield, Inc. v. Department of Banking, 791 F.2d 1501, 1505 (11th Cir. 1986).
43. See Kincade v. Group Health Servs., 945 P.2d 485, 488 (Okla. 1997); see S. REP. NO. 95-903, at 4, reprinted in 1978 U.S.C.C.A.N. at 1415 (stating "while the FEHBA law gives the Civil Service Commission sole authority to negotiate contracts with participating carriers and to prescribe regulations to implement that law, the law does not give the Commission clear authority to issue regulations restraining the application of State laws when their provisions do not parallel the provisions in the Commission's health benefits contracts").
changed and enrollees now sue the OPM directly when challenging an adverse decision concerning FEHBA benefits. The United States Court of Appeals for the Third Circuit in Goepel v. National Postal Mail Handlers Union held that in order for federal law to completely preempt state claims, the statute relied upon by the defendant must contain civil enforcement provisions. This requirement was enunciated by the United States Supreme Court.

The second prerequisite identified by the United States Supreme Court before a federal law can preempt state law is "a clear indication of Congressional intention to permit removal despite the plaintiff's exclusive reliance on state law." In 1978, Congress enacted 5 U.S.C. § 8902(m)(1) in response to concern that the application of inconsistent state law would result in an increase in premium costs to both the government and federal employees. Furthermore, Congress feared that a lack of uniformity of benefits would result in participants in some states paying a premium based, at least in part, on the cost of benefits provided only to participants in other states. The Civil Service Commission recommended the adoption of subsection (m) for the same reasons.

The United States Court of Appeals for the Tenth Circuit indicated that FEHBA did not preempt state claims, but ruled that federal courts exercised no jurisdiction on the matter. Despite the changes made in March 1995 by the OPM, other courts in the Tenth Circuit have adhered to this appellate decision and claim that the Tenth Circuit's position on the issue has not been invalidated.

Therefore, the Supreme Court of Oklahoma was presented with a controversy that need not exist. If the Supreme Court of Oklahoma followed the Tenth Circuit's analysis, then Kincade's claim could not only be heard, but had already been determined not to be preempted by federal law. Certainly, the court was not obligated to follow the Tenth Circuit's opinion because state courts clearly have independent jurisdiction to interpret federal law. The Supreme Court of Oklahoma had the option to follow the great weight of authority by holding that the claim was barred either because it was preempted, or because the matter had become one of exclusive jurisdiction of the federal courts.

45. See id.
46. 36 F.3d 506 (3rd Cir. 1994).
47. See Goepel, 36 F.3d at 311.
51. See id.
54. See Roux v. Lovelace Health Sys., Inc., 947 F. Supp. 1534, 1541 (D.N.M. 1996) (noting the critical provisions discussed in Howard as to not granting federal question jurisdiction have not been amended).
55. See Howard, 739 F.2d at 1510-12.
57. See generally Caudill v. Blue Cross & Blue Shield, 999 F.2d 74 (4th Cir. 1993); Burkey v. Government Employees Hosp. Ass'n, 983 F.2d 656 (5th Cir. 1993); Harris v. Mutual of Omaha Cos.,
III. Kincade v. Group Health Services

Appellants sued Group Health Services of Oklahoma, d/b/a/ Blue Cross and Blue Shield, for bad faith refusal to pay a valid claim and for tortious interference with a physician-patient relationship.58 Kincade, a minor child, suffered from a compulsive disorder and tried to end his own life due to his parents' divorce.59 A physician recommended that the child be treated through in-patient care.60 The coverage and benefits of Kincade's federal health insurance plan were contracted between the OPM and Blue Cross and Blue Shield and selected by his father, pursuant to FEHBA.61 Blue Cross and Blue Shield declined to pay for in-patient care and defended the action brought by Kincade in the District Court of Oklahoma by declaring FEHBA, pursuant to 5 U.S.C. § 8902(m)(1), preempted state claims.62 The District Court agreed with Blue Cross and Blue Shield dismissing the claim and the Oklahoma Court of Appeals affirmed.63 Subsequently, the Supreme Court of Oklahoma granted certiorari.64

Kincade presented the Supreme Court of Oklahoma with the question of whether FEHBA, pursuant to 5 U.S.C. § 8902(m)(1), preempted state causes of action.65 The court determined preemption of state claims was not a "clear and manifest purpose of Congress" in enacting 5 U.S.C. § 8902(m)(1).66 The court further noted that it found "nothing in the language of the preemption statute, nor its most recent legislative history, that reveals any intent to preempt state law causes of action that may arise in the performance of a health insurance plan contracted under the FEHBA."67 The court followed two minority decisions on the issue.68 One of the decisions followed by the court held that FEHBA preemption was an issue to be settled solely by state courts.69 The other decision followed, a Tenth Circuit case, held that a suit concerning FEHBA did not afford federal courts jurisdiction over the issue, but went on to suggest that state claims were not preempted.70 Although a majority of courts have held otherwise, the Supreme Court of Oklahoma was not persuaded that the congressional intent of 5 U.S.C. § 8902(m)(1) or the recent

992 F.2d 706 (7th Cir. 1993); Nesseim v. Mail Handlers Benefit Plan, 995 F.2d 706 (8th Cir. 1993); Hayes v. Prudential Ins. Co. of Am., 819 F.2d 921 (9th Cir. 1987); Blue Cross & Blue Shield v. Department of Banking, 791 F.2d 1501 (11th Cir. 1986); Hanson v. Blue Cross Blue Shield, 953 F. Supp. 270 (N.D. Iowa 1996).
59. See id.
60. See id.
61. See id.
62. See id.
63. See id. at 486-87.
64. See id. at 487.
65. See id.
66. Id. at 489.
67. Id.
68. See id.
69. See Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 312 n.7 (3rd Cir. 1994).
70. See Howard v. Group Hosp. Serv., 739 F.2d 1508, 1510-12 (10th Cir. 1984).
changes made by the OPM to the civil enforcement procedures preempted state causes of action.\(^{71}\) In passing, the court did mention that six of the federal circuit courts of appeals have ruled that state claims are preempted.\(^{72}\) However, the Supreme Court of Oklahoma failed to mention that a majority of state courts that have addressed the issue also concluded that state claims are preempted.\(^{73}\) Finally, the court observed that state remedies may coexist with a scheme of federal remedies.\(^{74}\)

The decision reached by the Supreme Court of Oklahoma further complicates the preemption issue surrounding FEHBA. Absent a United States Supreme Court ruling, the conflict will likely continue to exist. Even an amendment to FEHBA by the OPM, which requires claimants to sue the OPM directly and not the individual carrier, was not dispositive on the issue for the Supreme Court of Oklahoma.\(^{75}\) Initially, the court should have recognized that congressional intent should be conclusive on the issue, resulting in preemption of Kincade's claim (or could have displaced state law with federal common law because a significant conflict existed between the two).\(^{76}\) Second, the court failed to compare the similarities between ERISA and FEHBA. ERISA preempts state claims and illustrates by analogy that FEHBA suits should not be heard by state courts.\(^{77}\) Likewise, the court should not have ignored the changes made by the OPM on March 29, 1995.\(^{78}\) Finally, the court should have more closely analyzed the holdings and rationale of the two cases in which it based its decision.\(^{79}\) Furthermore, regardless of the questions surrounding preemption, the court should have required the plaintiff to exercise all of his administrative remedies before bringing action.\(^{80}\)

\(^{71}\) See Kincade, 945 P.2d at 489-92.

\(^{72}\) See id. at 489 n.20.


\(^{75}\) See Hanson v. Blue Cross Blue Shield, 953 F. Supp. 270, 275 n.4 (N.D. Iowa 1996).


\(^{77}\) See Shaw v. Delta Air Lines, 463 U.S. 85, 91 (1983) (holding ERISA preempts "any and all state law insofar as they may now or hereafter relate to any employee benefit plan . . . if it has connection or reference to the plan").


\(^{79}\) See Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 315 (3rd Cir. 1994); Howard v. Group Hosp. Serv., 739 F.2d 1508, 1510-12 (10th Cir. 1984).

\(^{80}\) See Nesseim v. Mail Handlers Benefit Plan, 995 F.2d 804, 807 (8th Cir. 1993) (holding no action at law or equity shall be brought to recover a claim for benefits until administrative remedies have been exhausted).
IV. Analysis

A. Congress Intended to Preempt State Claims Concerning FEHBA

The United States Congress had one overall objective in mind in enacting the preemption clause of FEHBA. That goal was to provide uniform benefits to federal employees, regardless of their location in the United States, in order to assist in containing the costs of providing those benefits.\(^{81}\) The limitation language "to the extent that such law or regulation is inconsistent with such contractual provisions" was added to the preemption clause for two stated purposes.\(^{82}\) First, the clause recognizes the rights of states to determine who is to provide health services.\(^{83}\) Second, the clause guarantees that insurance carriers under the program are not granted exemptions from state laws and regulations governing other aspects of the insurance business, including the payment of premium taxes and the requirement for statutory reserves.\(^{84}\)

Several federal circuit courts of appeals have stated that congressional intent is of primary importance when courts are determining if FEHBA preempts state tort claims.\(^{85}\) The United States Court of Appeals for the Ninth Circuit held that the policy underlying the preemption clause of 5 U.S.C. § 8902(m)(1) is to insure uniformity of the administration of FEHBA benefits.\(^{86}\) Furthermore, the United States Supreme Court has found that Congress did not intend tort claims to be held separable from the terms of the contract.\(^{87}\) When courts hold otherwise, state law is used to expand the benefit provider's obligations under the terms of the plan.\(^{88}\) The courts are then creating requirements that are inconsistent with the plan and clearly conflicting with the express language of 5 U.S.C. § 8902(m)(1).\(^{89}\) Thus, Kincade's state tort claims should have been barred.

In a case in the United States Court of Appeals for the Fifth Circuit,\(^{90}\) the court rejected an argument that a distinction can be made between a plaintiff seeking remedies and a claim relating to the "nature or extent of coverage of benefits."\(^{91}\) The court stated no such difference can be reasonably recognized.\(^{92}\) Such claims "relate to" the plan under 5 U.S.C. § 8902(m)(1) provided they have a connection with or refer to the plan.\(^{93}\) The statements by the House Committee report on the

\(^{85}\) See generally Caudill v. Blue Cross & Blue Shield, 999 F.2d 74, 79 (4th Cir. 1993); Burkey v. Government Employees Hosp. Ass'n, 983 F.2d 656, 660 (5th Cir. 1993); Hayes v. Prudential Ins. Co., 819 F.2d 921, 925 (9th Cir. 1987).
\(^{86}\) See Hayes, 819 F.2d at 925.
\(^{87}\) See id. at 926 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213-20 (1985)).
\(^{88}\) See Hayes, 819 F.2d at 926.
\(^{89}\) See id.
\(^{90}\) See Burkey v. Government Employees Hosp. Ass'n, 983 F.2d 656 (5th Cir. 1993).
\(^{91}\) Id. at 660.
\(^{92}\) See id.
\(^{93}\) See Blue Cross & Blue Shield, Inc. v. Department of Banking, 791 F.2d 1501, 1504 (11th Cir.
future 5 U.S.C. § 8902(m) entitled "Preemption of State Laws Inconsistent with Federal Employee Health Benefits Program,"\textsuperscript{94} and the official statements by the Civil Service Commission and the White House\textsuperscript{95} "suggest an intent to preempt any inconsistent state law no matter how tenuous its relation to insurance."\textsuperscript{96} Kincade's claims definitely "related to" the plan, and under this analysis the claimant should not have been allowed to recover. The United States Courts of Appeals for the Fifth and Ninth Circuits have essentially determined that any claim in reference to the contract is "inconsistent" with goals of FEHBA and is therefore preempted.\textsuperscript{97} However, the United States Court of Appeals for the Fourth Circuit has found federal common law displaces state law without determining whether FEHBA completely preempts state law claims.

B. Creation of Federal Common Law to Displace State Law

Even when a court decides that Congress has failed to show sufficient intent to preempt state law, a court may, by utilizing a two-part test, find that federal common law still governs a dispute.\textsuperscript{98} First, the claim must involve a uniquely federal interest.\textsuperscript{99} A significant interest exists if the dispute "touch[es] the rights and duties of the United States."\textsuperscript{100} The claim may involve private parties and federal common law may still apply.\textsuperscript{101} Kincade's interest is uniquely federal because it involves health benefits that are available to federal employees across the country. Imposition of state law liability in Kincade's case would "seriously damage not only the government's ability to enter into contracts with health insurers, but also would affect the price paid for such contracts."\textsuperscript{102} It is important to note that because the federal government is a party to the contract,\textsuperscript{103} there is a significant federal interest in the outcome of Kincade's litigation. For a court to apply federal common law, however, the second part of the test must also be met.\textsuperscript{104}

In addition to a federal interest, "a significant conflict' must exist between the federal interest or policy and the effect of the state law, 'or the application of the state law must frustrate specific policy objectives of the federal legislation.'\textsuperscript{105} Application of fifty different states' laws to claims arising under FEHBA would entirely defeat the purpose of the OPM review.\textsuperscript{106} Kincade could be entitled to

\begin{itemize}
\item \textsuperscript{95} See id. at 6-8, reprinted in 1977 U.S.C.C.A.N. at 1417-20.
\item \textsuperscript{96} Blue Cross & Blue Shield, Inc., 791 F.2d at 1505 (emphasis added).
\item \textsuperscript{97} See infra notes 111, 115 and accompanying text.
\item \textsuperscript{98} See Caudill v. Blue Cross & Blue Shield, 999 F.2d 74, 78 (4th Cir. 1993).
\item \textsuperscript{100} Id. at 506 (quoting Bank of America Nat'l Trust & Sav. Ass'n v. Parmell, 352 U.S. 29, 33 (1956)).
\item \textsuperscript{101} See id. at 507.
\item \textsuperscript{102} Caudill, 999 F.2d at 78.
\item \textsuperscript{103} See id.
\item \textsuperscript{104} See id.
\item \textsuperscript{105} Id. (alteration in original).
\item \textsuperscript{106} See id. at 79.
\end{itemize}
benefits not provided to many other federal employees in different states because of the vast difference in the common law from state to state. Furthermore, enrollees in some states would pay higher premiums to cover services provided only to Kincade in his state. For instance, if Kincade is allowed to recover for services that were required to be provided in Oklahoma (if the court so determines), but are in fact furnished in no other state, then individuals in other states will be forced to finance services they do not receive. Such an allowance would fly in the face of FEHBA's purpose. Therefore, allowing state courts to adjudicate state claims would "undercut the consistency Congress intended when it provided the OPM review process." 107

Therefore, as other courts have held in the area of federal employee health benefits, federal common law should have entirely replaced Oklahoma state law. 108

It is clear, regardless of whether a court determines Congress has expressly manifested the requisite intent to preempt a state claim, that either displacement or preemption of state law claims is the only means to properly achieve the goals of uniformity of benefits and cost containment Congress had in mind when passing FEHBA. Therefore, in order to appropriately serve congressional ends, Kincade's state claims should have been preempted or replaced, and federal common law should have governed because a uniquely federal interest and significant conflict were present.

C. Similarity Between ERISA and FEHBA

If one were to examine the language used in ERISA and FEHBA, it is apparent the statutes closely resemble one another. The United States Supreme Court held that state law claims for breach of contract and tort concerning the improper processing of a claim for benefits under an ERISA regulated plan are preempted by federal law. 109 The Court stated that "[t]here is no dispute that the common law causes of action asserted in . . . the complaint 'relate to' an employee benefit plan and therefore fall under ERISA's express preemption clause." 110 Some courts have observed that the language in ERISA is very comparable to the words used in FEHBA. 111 The pertinent part of ERISA's preemption clause provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 112 FEHBA's preemption clause, as stated earlier, states, "The provisions of any contract which relate to the nature or extent of coverage shall supersede or preempt any State or local law . . . which relates to . . . plans to the extent such law . . . is inconsistent . . . ." 113

107. Id.
108. See id.
110. Id.
In reaching its decision that state claims concerning FEHBA were prohibited, the United States Court of Appeals for the Ninth Circuit partially relied on the similarity between ERISA's preemption clause and FEHBA.\textsuperscript{114} The court pointed out that the United States Supreme Court has held that state claims are preempted under ERISA despite a savings clause.\textsuperscript{115} The clause reads in part, "Nothing in this subchapter shall be constructed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities."\textsuperscript{116} Furthermore, the court determined that FEHBA has no such clause.\textsuperscript{117} The relevance of this point cannot be understated. FEHBA preempts any inconsistent state law that relates to the health benefit plan and makes no allowance to save certain state laws. If Kincade's state claims expand the provider's obligations under the plan, then the claims would relate to and be inconsistent with the contractual provisions. Therefore, such claims would be preempted and incapable of being saved under FEHBA.

Although the United States Supreme Court has noted that some state laws "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan,"\textsuperscript{118} no such argument is applicable in Kincade. If the statement of benefits, which is incorporated as part of the insurance contract, is construed together with 29 U.S.C. § 8902(m), the same result as that of ERISA's preemption clause is reached.\textsuperscript{119} The statement of benefits expressly provides that "federal law exclusively governs all claims of relief in a lawsuit that relate to Service Benefit Plan benefits or coverage or payments with respect to those benefits."\textsuperscript{120} Such a tenuous relationship cannot be found in Kincade when one considers, as previously stated, the United States Supreme Court has refused to allow the same type of claims in regards to other health benefit plans.\textsuperscript{121}

There are other provisions found in ERISA that are also now present in FEHBA, indicating that additional grounds exist for finding FEHBA preempts state claims.\textsuperscript{122} These provisions will be addressed under the next section, which concerns the changes made by the OPM on March 29, 1995.

\textsuperscript{114} See Hayes v. Prudential Ins. Co. of Am., 819 F.2d 921, 926 (9th Cir. 1987).
\textsuperscript{115} See id.
\textsuperscript{117} See id.
\textsuperscript{118} Shaw v. Delta Air Lines, 463 U.S. 85, 100 n.21 (1983).
\textsuperscript{120} Id.
\textsuperscript{121} See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) (concluding state law claims for breach of contract and tort in relation to improper processing of a claim for benefits under an ERISA-regulated plan are preempted by federal law); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218-19 (1985) (holding a state law claim for bad faith handling of an insurance claim is preempted by federal labor-contract law); see also supra note 21 and accompanying text.
\textsuperscript{122} See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987) (extending the complete preemption doctrine to an action arising under ERISA because "ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA").
D. The OPM's Changes Should Have Resulted In Complete Preemption

The United States Supreme Court has found complete preemption of state claims in two areas that specifically relate to FEHBA.\(^\text{123}\) These cases, calling for complete preemption, involve ERISA, 29 U.S.C. §§ 1001-1461, and section 301 of the LMRA, 29 U.S.C. § 185.\(^\text{124}\)

There are two ways in which a federal court can confer jurisdiction over a particular claim: diversity jurisdiction or federal question jurisdiction. The well plead complaint rule states that federal question jurisdiction is present only when a federal question appears on the face of the plaintiff's complaint.\(^\text{125}\) There is, however, an exception to this rule. The complete preemption doctrine "prohibits a plaintiff from defeating removal by failing to plead necessary federal questions in a complaint and allows a defense of federal preemption as a basis of removal."\(^\text{126}\) Many of the cases surrounding FEHBA were tried in federal courts because the suits were transferred from state courts.\(^\text{127}\) Prior to the OPM changes on March 29, 1995, an enrollee sued the carrier, not the OPM. A jurisdictional problem existed in the sense that the dispute seemed to be between nondiverse private parties involving state claims, and consequently, there was no federal question jurisdiction. The United States Court of Appeals for the Fourth Circuit hurdled this obstacle by using another test enunciated by the United States Supreme Court (matter at issue governed by federal common law) and thus did not answer the question of whether all state claims are preempted under FEHBA.\(^\text{128}\) Other federal courts seem to have avoided the issue and simply assumed jurisdiction.\(^\text{129}\) Nevertheless, the problems concerning federal jurisdiction are no longer present because the OPM has changed the procedures for filing suit.\(^\text{130}\) The complete preemption doctrine represents an exception to the well plead complaint rule, and as analysis will show, the test is satisfied to preempt state claims relating to FEHBA.

When determining if the complete preemption doctrine allows a case to properly be removed from state to federal court, the United States Supreme Court has established a two-part test.\(^\text{131}\) First, a court must determine whether FEHBA completely preempts the field of benefits claim under the Service Benefit Plan.\(^\text{132}\) Second, the court must decide if the plaintiff's claim falls within the civil enforcement provisions of FEHBA.\(^\text{133}\)

\(^\text{123}\) See The Queen v. City of Detroit, 874 F.2d 332, 342 (6th Cir. 1989).
\(^\text{124}\) See id.
\(^\text{126}\) Id.
\(^\text{128}\) See Boyle v. United Techns. Corp., 487 U.S. 500 (1987); Caudill v. Blue Cross & Blue Shield, 999 F.2d 74 (4th Cir. 1993); see also supra notes 98-108 and accompanying text.
\(^\text{129}\) See Goepel, 36 F.3d at 316 n.13.
\(^\text{130}\) See Hanson, 953 F. Supp. at 275 n.4.
\(^\text{131}\) See Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996).
\(^\text{133}\) See Gaming Corp., 88 F.3d at 543.
The United States Supreme Court, in determining if Congress intended ERISA to preempt state claims, looked to whether there was a clear indication by Congress to permit removal despite plaintiff's reliance on state law and the civil enforcement provisions of the Act. Section 1132(a) of ERISA calls for a participant or beneficiary to file a civil action to recover benefits under an ERISA plan. An ERISA provision also calls for "district courts of the United States to have exclusive jurisdiction of civil actions." Combining these two provisions creates an exclusive federal cause of action vindicating a beneficiary's interest in recovering his or her benefits under a plan. A very similar result is reached when FEHBA's civil enforcement provisions are combined.

On March 29, 1995, the OPM promulgated a restriction requiring enrollees to sue the OPM directly when challenging an adverse decision relating to FEHBA benefits. Akin to ERISA, FEHBA empowers an individual to bring suit against the OPM to review a denial of health benefits under the plan. Furthermore, the jurisdictional provision of FEHBA, like ERISA, provides that "the district courts of the United States have original jurisdiction . . . of a civil action or claim against the United States." Congress specifically made no allowance for state courts to adjudicate FEHBA claims for fear that state courts would undercut the consistency that was intended by the Act. Comparing the two acts, it is clear that the combination of the civil enforcement and jurisdictional provisions creates an exclusive federal claim under both acts.

In Kincade, the Supreme Court of Oklahoma chose to ignore the changes made by the OPM. It is undisputed that Kincade's claim was filed on February 5, 1995, and the changes made by the OPM did not occur until March 29, 1995. However, jurisdictional provisions, such as the new OPM regulations, are procedural and these provisions apply to pending cases. Nevertheless, the Supreme Court of Oklahoma stated that the changes did not affect the reasoning it used to reach its decision. The court also found that another court came to the same conclusion. Regardless of the rationale used by the Supreme Court of Oklahoma in its opinion, changes have been made by the OPM to FEHBA that are completely

134. See Metropolitan Life, 481 U.S. at 64-66.
136. Id. § 1132(e)(1).
138. See id.
139. See id. at 275 n.4.
140. See id. at 274.
143. See Hanson, 953 F. Supp. at 275.
146. See Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994).
147. See Kincade, 945 P.2d at 491-92.
148. See id. (citing Roux v. Lovelace Health Sys., 947 F. Supp. 1534, 1541, n.6 (D.N.M. 1996)).
consistent with similar provisions in ERISA. And as stated previously, the United States Supreme Court has determined that ERISA claims are within the exclusive province of federal courts and state claims are preempted.\textsuperscript{149} Therefore, FEHBA suits, like the one brought in \textit{Kincade}, should be heard only by federal courts. The Supreme Court of Oklahoma should never have heard the case.

\textbf{E. Misconstruing Prior Precedent}

The Supreme Court of Oklahoma relied primarily on two cases in reaching its decision.\textsuperscript{150} These cases are \textit{Goepel v. National Postal Mail Handlers}\textsuperscript{151} and \textit{Howard v. Group Hospital Service}.\textsuperscript{152} The Supreme Court of Oklahoma simply misconstrued the rationale used by the \textit{Goepel} court. The reasoning used in \textit{Howard} will be shown to be unsound.

The \textit{Goepel} court prefaced its decision, which stated that claims arising under FEHBA did not present federal jurisdiction,\textsuperscript{153} on the basis that FEHBA did not contain the requisite civil enforcement provisions to allow for complete preemption of state claims.\textsuperscript{154} The United States Court of Appeals for the Third Circuit previously concluded that "state courts are competent to determine whether state law has been preempted by federal law."\textsuperscript{155} The civil enforcement provisions have since been amended, and the changes made now call for the claimant to file an action directly against the OPM and not the carrier.\textsuperscript{156} Therefore, a major premise on which the \textit{Goepel} court relied,\textsuperscript{157} and in turn the Supreme Court of Oklahoma applied, is no longer applicable.\textsuperscript{158} The court misconstrued why the \textit{Goepel} court reached such a decision and by doing so allowed a needless controversy to continue to exist.

In \textit{Howard}, the United States Court of Appeals for the Tenth Circuit held that it failed "to see how various state court adjudications of [FEHBA] ... benefits claims ... [would] frustrate the operation of that program or conflict with a specific national policy."\textsuperscript{159} This rationale is not sound when one examines the intent Congress stated in passing FEHBA.\textsuperscript{160} The \textit{Howard} court said that a FEHBA dispute is solely a private matter and that "the federal government simply does not

\begin{itemize}
  \item \textsuperscript{150} See \textit{Kincade}, 945 P.2d at 489-91.
  \item \textsuperscript{151} 36 F.2d 306 (3rd Cir. 1994).
  \item \textsuperscript{152} 739 F.2d 1508 (10th Cir. 1984).
  \item \textsuperscript{153} See \textit{Goepel} v. National Postal Mail Handlers, 36 F.3d 306, 316 (3rd Cir. 1994).
  \item \textsuperscript{154} See id. at 311.
  \item \textsuperscript{155} See \textit{Kincade}, supra note 150 at 311.
  \item \textsuperscript{156} See \textit{Hanson} v. Blue Cross Blue Shield, 953 F. Supp. 270, 275 n.4 (N.D. Iowa 1996); 5 C.F.R. § 890.107(c) (1996).
  \item \textsuperscript{157} See \textit{Goepel}, 36 F.3d at 311.
  \item \textsuperscript{158} See \textit{Kincade} v. Group Health Servs., 945 P.2d 485, 489-91 (Okla. 1997).
  \item \textsuperscript{159} Howard v. Group Hosp. Serv., 739 F.2d 1508, 1511 (10th Cir. 1984).
\end{itemize}
have an interest sufficient to justify invoking federal question jurisdiction.\textsuperscript{166} The court declined to follow the principle that a claim can involve private parties and federal common law may still apply.\textsuperscript{162} For a court to apply federal common law and thus exercise federal question jurisdiction, the two-part test must be met.\textsuperscript{163} Both a "uniquely federal interest" and "a significant conflict" must exist between the federal interest or policy and the effect of the state law, "or the application of the state law must frustrate specific policy objectives of the federal legislation."\textsuperscript{164} As previously stated, the application of fifty different state laws would definitely frustrate the purpose Congress had in mind when passing FEHBA. Even before the OPM changes, the jurisdictional provision of FEHBA clearly provides federal courts with jurisdiction over FEHBA claims.\textsuperscript{166} It is probably safe to assume Congress was not attempting to unconstitutionally enlarge the federal district court's jurisdiction, but rather intending that the courts either find a "uniquely federal interest" or completely preempting state law claims. Furthermore, under careful examination of the jurisdiction and civil enforcement provisions, it is clear now that a federal cause of action is not only present, but that only federal jurisdiction exists.\textsuperscript{166} State courts normally have independent jurisdiction to interpret federal law,\textsuperscript{167} but courts may not have such freedom in cases concerning FEHBA.\textsuperscript{168}

A United States District Court opinion from New Mexico, also a court in the Tenth Circuit, concluded that Howard was still good law.\textsuperscript{169} The district court stated that the critical statutory provisions, 5 U.S.C. §§ 8902(m)(1) and 8912, had not been changed.\textsuperscript{170} Whether the "critical statutory provisions" relied upon in Howard had changed is irrelevant; FEHBA actions are no longer "private controversies" because plaintiffs must now file suit against the OPM. Thus, this change (requiring a plaintiff to sue the OPM directly), along with the jurisdictional provisions, creates exclusive federal question jurisdiction and prohibits the Supreme Court of Oklahoma from hearing Kincade.

The Supreme Court of Oklahoma should have followed the great weight of decisions\textsuperscript{170} and held in Kincade that state claims were either preempted by federal

\textsuperscript{161} Howard, 739 F.2d at 1512.

\textsuperscript{162} See id. at 1512; see also Caudill v. Blue Cross & Blue Shield, 999 F.2d 74, 78-80 (4th Cir. 1993) (applying the uniquely federal interest and significant conflict test to displace state claims and implement federal common law).

\textsuperscript{163} See Caudill, 999 F.2d at 78.

\textsuperscript{164} Id.


\textsuperscript{166} See Hanson v. Blue Cross Blue Shield, 953 F. Supp. 270, 275 n.4 (N.D. Iowa 1996).


\textsuperscript{168} See Hanson, 953 F. Supp. at 274.


\textsuperscript{170} See id. at 1541.

\textsuperscript{171} See generally Caudill v. Blue Cross & Blue Shield, 999 F.2d 74 (4th Cir. 1993); Burkey v. Government Employees Hosp. Ass'n, 983 F.2d 656 (5th Cir. 1993); Harris v. Mutual of Omaha Cos., 992 F.2d 706 (7th Cir. 1993); Nesheim v. Mail Handlers Benefit Plan, 995 F.2d 804 (8th Cir. 1993); Hayes v. Prudential Ins. Co. of Am., 819 F.2d 921 (9th Cir. 1987); Blue Cross & Blue Shield v.
law or FEHBA suits had fallen into the exclusive province of federal courts. Either way, a more just outcome would have been obtained and a needless controversy would be much closer to coming to an end.

F. Application of the Arbitrary and Capricious Standard

A court's examination of an administrative agency's decision is generally reviewed under the arbitrary and capricious standard set forth in 5 U.S.C. § 706(2)(A). In Kincade, the arbitrary and capricious standard was never used because the plaintiff failed to exhaust all of his administrative remedies as required before filing suit. Kincade did not appeal to the OPM as he was required to do under FEHBA after Blue Cross and Blue Shield denied his claim. He simply filed suit, even though "[a] covered individual must exhaust both the carrier and OPM review processes ... before seeking judicial review of the denied claim." The Supreme Court of Oklahoma chose not to address this issue. The United States Court of Appeals for the Eighth Circuit said a claim for denial of benefits was not actionable in courts until administrative remedies are first exhausted. Accordingly, Kincade could have been dismissed on other grounds.

V. Conclusion

The Supreme Court of Oklahoma's decision in Kincade further muddles the preemption question concerning FEHBA. An effort by the OPM, which requires a plaintiff to file suit directly against the office, has not yet solved the problem. Despite the fact that the goals of Congress in passing FEHBA are undisputed, the Supreme Court of Oklahoma did not conclude that state claims were intended to be preempted. The congressional goals for the Act include providing uniform benefits to all federal employees regardless of their location and avoiding the application of inconsistent state laws in order to keep costs contained both for the government and employees. By allowing Kincade's state claims to go forward,
the court frustrates these goals. While the best result would have been to find Kincade's state claims preempted, the court could have instead applied federal common law because of the presence of a uniquely federal interest and significant conflict with state law. This result, while not entirely accurate, would have been preferable to allowing Kincade's state claims.

The Supreme Court of Oklahoma ignored the fact that the language in FEHBA closely resembles the provisions in ERISA. The United States Supreme Court has held that suits filed in state court for breach of contract and tort relating to the wrongful processing of a claim for benefits under an ERISA regulated plan are preempted by federal law. The Court stated the key question was whether the claim "relates to" an employee benefit plan. The Supreme Court of Oklahoma should have used this same rationale to preempt Kincade's claims concerning FEHBA.

Furthermore, the Supreme Court of Oklahoma failed to recognize the changes made by the OPM on March 29, 1995, which created exclusive federal jurisdiction for FEHBA claims. Likewise, the court misconstrued the holdings and rationale of the two cases on which it based its decision. One of the decisions is no longer valid due to the OPM amendment which added the civil enforcement provisions, the other decision can be dismissed because the great weight of authority and evidence indicates state claims are preempted.

Finally, the Supreme Court of Oklahoma chose not to dismiss Kincade's claims despite the plaintiff's failure to follow administrative procedures. And as the Civil Service Commission predicted, enforcement of this preemption policy has led to time-consuming and costly litigation because the courts, as foreseen, have not unanimously or immediately upheld the policy. Yet, the need for uniformity of benefits and efficient application outweigh the unnecessary litigation that unfortunately and invariably will continue. For the reasons stated, the decision reached by the Supreme Court of Oklahoma is erroneous.

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50-51 and accompanying text.
184. See Shaw v. Delta Air Lines, 463 U.S. 85, 91, 97 (1983) (holding ERISA preempts "any and all state law insofar as they may now or hereafter relate to any employee benefit plan . . . if it has connection or reference to the plan").
186. See id.
188. See Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 315 (3rd Cir. 1994); supra note 11 and accompanying text.
189. See supra note 171 and accompanying text.
190. See Nesseim v. Mail Handlers Benefit Plan, 995 F.2d 804, 807 (8th Cir. 1993) ("No action at law or equity shall be brought to recover on a claim for benefits under the Plan until the administrative remedy provide at Title 5 of the Code of Federal Regulations, section 890.105 has been exhausted.") (alteration in original); supra note 31 and accompanying text.
192. See id.