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## No Longer Whole: How the Federal Employee Health Benefits Act Preempts Arkansas's Made-Whole Doctrine

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In *Bell v. Blue Cross & Blue Shield (Bell II)*, No. 14-3731, 2016 U.S. App. LEXIS 9628 (8th Cir. May 26, 2016), the United States Court of the Appeals for the Eighth Circuit affirmed the lower court's ruling that the preemption provision within the Federal Employees Health Benefit Act ("FEHBA") expressly preempts the Arkansas state-law made-whole defense.

### Factual and Procedural Background

Ms. Bell, a federal employee, was injured in a car accident, and as a result, she sustained injuries and medical bills. *Bell II*, 2016 U.S. App. LEXIS 9628 at \*4. Subsequently, Ms. Bell received a settlement from the tortfeasor's insurance company, and Ms. Bell's government-sponsored, private insurance carrier, Blue Cross & Blue Shield ("BCBS"), filed a claim for subrogation per Ms. Bell's benefits plan. *Bell v. Blue Cross & Blue Shield (Bell I)*, 2014 U.S. Dist. LEXIS 155723, at \*2. The plan contained a provision that required that any money received from a third party be used to reimburse BCBS, despite whether the injured party was made whole. *Id.* Ms. Bell asserted that the BCBS's claim for reimbursement violated Arkansas law, which states that "an insurer may only be reimbursed after the insured has been 'wholly compensated for his injuries.'" *Id.* at \*4 (quoting *Shelter Mut. Ins. Co. v. Kennedy*, 347 Ark. 184, 189 (2001)). Furthermore, she asserted that she was not made whole, because the total amount paid by BCBS and the third-party insurance carrier was less than the cost of her injuries and damages. *Id.* BCBS contended that because Ms. Bell's plan was governed by FEHBA, federal law preempts state law. *Bell I*, 2014 U.S. LEXIS 155723 at \*6.

Although originally filed in state court, the case was removed to federal court per the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1). *Id.* at 7. Removal was proper, because Ms. Bell's BCBS plan was governed by FEHBA, 5 U.S.C. § 8901 *et seq.* Once the case was before the United States District Court for the Western District of Arkansas, it opined that Arkansas's made-whole doctrine is preempted by FEHBA's express preemption provision. *Bell*, 2014 U.S. LEXIS 155723. Accordingly, Ms. Bell appealed that decision. *Bell II*, 2016 U.S. App. LEXIS 9628.

### Discussion

The Eighth Circuit affirmed *Bell I* and held that FEHBA's express preemption provision supersedes Arkansas's made-whole defense. *Bell v. Blue Cross & Blue Shield (Bell II)*, No. 14-3731, 2016 U.S. App. LEXIS 9628 (8th Cir. May 26, 2016). Previously, the Eighth Circuit held that FEHBA's express preemption provision supersedes state law when state law is inconsistent with a FEHBA contract. *Med-Centers Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994). In *Med-Centers*, a FEHBA contract containing a subrogation and reimbursement clause preempted Minnesota's "full recovery rule." *Id.* FEHBA's express preemption provision states:

The terms of any contract under this chapter related to the nature, provision, 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.

5 U.S.C. § 8902(m)(1).

The Supreme Court of the United States has noted that FEHBA's express preemption provision is open to interpretation, specifically regarding FEHBA's

use of the term “relate to.” *Empire HealthChoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 682 (2006). If a preemption clause is open to interpretation, there is a presumption against preemption. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). However, the presumption does not apply when significant federal interests are involved. *Bell II*, 2016 U.S. App. LEXIS 9628 at \*8. The presumption did not apply in this case, because it involved substantial federal interests pertaining to a “federal health insurance plan for federal employees that [arose] from a federal law.” *Id.* at \*8-9.

In order for FEHBA’s express preemption provision to apply, two conditions precedent must be met. *Bell I*, 2014 U.S. Dist. LEXIS 155723, at \*14. The health insurance’s contractual provisions must “related to the...coverage or benefits (including payments with respect to benefits),” and the state law in question “relates to health insurance or plans.” *Id.* (quoting 5 U.S.C. § 8902(m)(1)). Whether FEHBA’s express preemption provision superseded Arkansas’s made-whole law turned on whether the subrogation and reimbursement provisions related to the plan’s benefits. *Id.*

Subrogation and reimbursement provisions relate to the FEHBA plans’ benefits in multiple ways. *Bell II*, 2016 U.S. App. LEXIS 9628 at \*12. First, these clauses act as a limitation on benefit disbursement, because they restrict payment of benefits. *Id.* at \*13. Second, FEHBA contracts require reimbursement of previous benefit payments when the insured recovers from a third party. *Id.* Third, the carrier can implement its right of recovery through an offset of future benefits, and offsets affect future benefit payments. *Id.* at \*14. Fourth, FEHBA’s statutory scheme affects benefits. *Id.* at \*14. Under FEHBA, all monies collected through subrogation and reimbursement is returned to the United States Treasury. *Id.* at \*13. The United States Treasury credits all monies collected through subrogation and reimbursement to the Federal Employees Health Benefits Fund. *McVeigh*, 547 U.S. at 685. If the fund has a surplus, this may be used “to reduce premiums, to increase plan benefits, or to make a refund to the Government and enrollees.” *Id.* at 703. Finally, FEHBA does not require an immediate correlation between the subrogation claim and payment of benefits in order to relate to the plan’s benefits. *Bell II*, 2016 U.S. App. LEXIS 9628 at \*15.

The Eighth Circuit held that FEHBA’s express preemption provision supersedes Arkansas’s made-whole law. *Bell II*, 2016 U.S. App. LEXIS 9628. Subrogation and reimbursement provisions relate to FEHBA plans’ benefits; accordingly, FEHBA’s express preemption provision applies. *Id.* at \*15. Therefore, government-sponsored, private health insurance carriers administered by FEHBA, under 5 U.S.C. § 8901 *et seq.*, may enforce subrogation and reimbursement provisions in health insurance plans regardless of whether the insured has been made whole.

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