

RECENT CASE DEVELOPMENTS

Puerto Rico's Attempts to Address a Public Health Crisis Struck Down by the United States Court of Appeals for the First Circuit

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Abstract

This RCD discusses a recent decision by the United States Court of Appeals for the First Circuit that struck down Puerto Rico's Act 90-2019, which aimed to regulate pay structures for Medicare Advantage insurers in Puerto Rico. The court found that the provision in Act 90, known as the "Mandated Price Provision," is preempted by federal law. However, the author argues that the court's decision did not adequately consider the congressional intent of the Medicare Advantage Act in weighing the public health crisis in Puerto Rico. The RCD provides background on the Medicare Advantage program and Act 90 and explains how Act 90 aimed to eliminate insurers' practice of paying providers at rates below the CMS's minimum reimbursement rates under the traditional Medicare program. The article concludes that the court's decision inadequately considered the larger purpose of the Medicare Advantage Act and the relevant public health crisis in Puerto Rico.

Keywords: Medicare Advantage Program; Medicare Advantage Act Preemption; Puerto Rico Act 90; Act 90-2019; Preemption; Takings Clause

Summary and Legal Background

On January 18, 2023, the United States Court of Appeals for the First Circuit affirmed the United States District Court for the District of Puerto Rico's ("District Court's") judgment on the pleadings that the Puerto Rican legislature's Act 90-2019 ("Act 90"), which attempted to regulate pay structures in Puerto Rico for Medicare Advantage insurers, is preempted by federal law.¹ The case began when a trade organization representing Medicare Advantage Organizations ("MAOs") and several individual MAOs filed suit against the Attorney General and the Insurance Commissioner of Puerto Rico.² The suit sought a declaratory judgment and an injunction barring enforcement of a provision in a law known as Act 90, also known as the "Mandated Price Provision."³ The appellees (the trade organization and MAOs) asserted that the Medicare Advantage Act preempts Act 90 and that the provision also violates the U.S. Constitution's Contract and Takings Clauses.⁴

The appellees opposed the motion to dismiss and cross-moved for partial summary judgment on the preemption claim.⁵ The district court had ruled in favor of the appellees, holding that the Medicare

¹Medicaid & Medicare Advantage Prod. Ass'n of Puerto Rico, Inc. v. Emanuelli-Hernández, Nos. 21-1297, 21-1379, 2023 WL 234310 (1st Cir. Jan. 18, 2023).

²Medicaid & Medicare Advantage Prod. Ass'n of Puerto Rico, Inc. v. Emanuelli-Hernández, Civ. No. 20-1760, 2022WL 889473 (D.P.R. Mar. 25, 2022).

³*Id.*

⁴*Id.*

⁵*Id.*

Advantage Act expressly preempts the Mandated Price Provision in Act 90.⁶ Accordingly, the district court denied the appellants' motion to dismiss and granted the appellees' summary judgment motion as a motion for judgment on the pleadings.⁷ Upon appeal, the United States Court of Appeals for the First Circuit affirmed the District Court's decision.⁸ While it may be true that the language of the Medicare Advantage Act expressly provides for preemption, the decisions of both courts inadequately considered the larger purpose of the Medicare Advantage Act and the relevant public health crisis in Puerto Rico's resulting from the mass exodus of physicians.

The Medicare Advantage Program

The federal Medicare program provides health insurance coverage to individuals 65 years of age and older as well as to other qualifying beneficiaries.⁹ The Medicare program for healthcare services is broadly categorized into Parts A, B, and C¹⁰. Under the traditional Medicare program (also known as Medicare Parts A and B), the federal government directly pays healthcare providers for services enumerated in the Center for Medicare and Medicaid Services' ("CMS's") schedule of fee-for-service rates.¹¹ In 2003, the Medicare Advantage program (also known as Medicare Part C) expanded the Medicare program by establishing a new system in which the CMS contracts with private organizations or insurers who then contract with healthcare providers to supply core Medicare services and additional benefits which are not included in the traditional Medicare program (e.g. hearing and dental care).¹² Unlike under traditional Medicare, these private organizations, or ("MAOs"), negotiate payment and network inclusion terms with in-network healthcare providers independently without deference to the CMS's fixed fee-for-service schedule.¹³ MAOs typically receive a per-beneficiary monthly payment as determined by the Secretary of the United States Department of Health and Human Services acting through the CMS.¹⁴ The pay structure of the Medicare Advantage Program was designed to promote competition and increase the use of managed care to generate cost savings for both the federal government and enrollees.¹⁵ In other words, the Medicare Advantage Program was designed to allow the competitive effects of the private market to improve care and access to care for Medicare beneficiaries. As such, the Secretary may not "require a particular price structure for payment" under a MAO's contract with a particular hospital, physician, or other entity or individual.¹⁶ To further reinforce this idea, an included preemption clause reads that:

"The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to [Medicare Advantage] plans which are offered by [Medicare Advantage] organizations under this part."¹⁷

⁶*Id.*

⁷*Id.*

⁸*Medicaid & Medicare Advantage Prod. Ass'n of Puerto Rico, Inc. v. Emanuelli-Hernández*, Nos. 21-1297, 21-1379, 2023 WL 234310 (1st Cir. Jan. 18, 2023).

⁹See 42 U.S.C. § 1395c.

¹⁰Part D covers prescription drugs and is excluded for this discussion. *Medicare Basics: Parts of Medicare*, MEDICARE.GOV (last visited January 28, 2023, 12:00 PM), <https://www.medicare.gov/basics/get-started-with-medicare/medicare-basics/parts-of-medicare> [<https://perma.cc/NQR4-Y95L>].

¹¹See *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 48 (1st Cir. 2007); 42 U.S.C. §§ 1395c–1395i-6; 42 U.S.C. §§ 1395j–1395w-6.

¹²Pub. L. No. 108-173, 117 Stat. 2066 (2003) (codified at 42 U.S.C. §§ 1395w-21–1395w-28).

¹³See generally 42 U.S.C. § 1395w-23(a); 42 C.F.R. § 422.520(b)(2).

¹⁴42 U.S.C. § 1395w-23(b); *UnitedHealthcare Ins. Co. v. Becerra*, 16 F.4th 867, 872-73 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 2851 (2022).

¹⁵Establishment of the Medicare Advantage Program, 70 Fed. Reg. 4588, 4589 (Jan. 28, 2005) (codified at 42 C.F.R. pts. 417, 422).

¹⁶42 U.S.C. § 1395w-24(a)(6)(B)(iii).

¹⁷42 U.S.C. § 1395w-26(b)(3).

Puerto Rico's Act 90

The Puerto Rico legislature passed Act 90 in 2019 in response to a mass exodus of healthcare providers seeking higher-pay employment from Puerto Rico to the continental United States.¹⁸ This loss of medical professionals to the continental United States has been regarded as “a major public health crisis afflicting the island for more than a decade.”¹⁹ The crisis was further exacerbated by Hurricane Maria in 2017, leaving only 9,500 physicians in Puerto Rico to care for and treat a population of 3.2 million.²⁰ Particularly concerning is the even more limited availability of specialty practitioners. For example, Puerto Rico's health secretary Dr. Carlos Mellado stated that there are only 17 neurosurgeons in Puerto Rico for its 3.2 million residents.²¹

The CMS already sets traditional Medicare fee-for-service rates for Puerto Rican physicians at a third less than those established for physicians in any other state or territory of the United States.²² Yet insurers in Puerto Rico pay rates even further below the nominal traditional Medicare rates under the Medicare Advantage program, encouraging “the flight of medical professionals to other jurisdictions where reimbursement rates are higher.”²³ Medicare Advantage reimbursement rates are 43 percent lower in Puerto Rico than the U.S. average, and significantly lower even among nonstate U.S. territories.²⁴ For example, average Medicare Advantage reimbursement rates in Puerto Rico are still 26 percent lower than the same reimbursement rates in the U.S. Virgin Islands.²⁵ Act 90 was enacted to eliminate insurers' practice of paying providers at rates below the CMS's minimum reimbursement rates under the traditional Medicare program.²⁶ To achieve this, Act 90 set Medicare's traditional reimbursement rates as a floor for rates at which MAOs paid Medicare Advantage providers in Puerto Rico.²⁷ Act 90 further held that any agreements inconsistent with the aforementioned Mandated Price Provision would be deemed void.²⁸

Court Opinion

Act 90 was challenged by a trade organization representing several MAOs, seeking a declaratory judgment and an injunction prohibiting enforcement of the Mandated Price Provision. The district court ruled in favor of the trade organization, holding that the Medicare Advantage Act expressly preempts the Act 90's Mandated Price Provision. On appeal, the United States Court of Appeals for the First Circuit reexamined whether the Medicare Advantage Act's preemption clause expressly preempted Act 90's Mandated Price Provision using the following considerations.

¹⁸Act 90-2019, 2019 P.R. Laws 660 (codified at P.R. Laws Ann. tit. 26, § 1915 (7))

¹⁹Medicaid & Medicare Advantage Prods. Ass'n of P.R. v. Emanuelli-Hernández, Civ. No. 19-1940 (SCC), 2021 U.S. Dist. LEXIS 39402, [2021 BL 70580], 2021 WL 792742, at *1 (D.P.R. Mar. 1, 2021).

²⁰Thomas F. Harrison, *Puerto Rico's Medical Brain Drain Put Under Court Microscope*, COURTHOUSE NEWS SERVICE (Mar. 10, 2022), <https://www.courthousenews.com/puerto-ricos-medical-brain-drain-put-under-court-microscope/#:~:text=One%20of%20the%20biggest%20reasons,U.S.%20Bureau%20of%20Labor%20Statistics> [<https://perma.cc/L45J-KWE2>].

²¹David Begnaud, *Health care system “collapse”: Doctors, experts sound alarm over Puerto Rico's medical system*, CBS NEWS (Sept. 21, 2022, 3:08 PM), <https://www.cbsnews.com/news/puerto-rico-health-care-system-collapse> [<https://perma.cc/K4JR-5AMN>].

²²Emanuelli-Hernández, 2021 U.S. Dist. LEXIS 39402 at *8.; Carmen Heredia Rodriguez, *Exodus By Puerto Rican Medical Students Deepens Island's Doctor Drain*, KHN (May 1, 2017), <https://khn.org/news/exodus-by-puerto-rican-medical-students-deepens-islands-doctor-drain> [<https://perma.cc/ANW3-A9TM>].

²³Id.

²⁴Eli Richman, *Medicare Advantage Enrollment Soared in Puerto Rico. Now it's Starving the Island's Healthcare System*, FIERCE HEALTHCARE (Aug. 8, 2018, 1:11PM), <https://www.fiercehealthcare.com/payer/puerto-rico-s-medicare-advantage-participation-through-roof-but-program-s-low-reimbursement> [<https://perma.cc/VQ48-VWB6>].

²⁵Id.

²⁶Emanuelli-Hernández, 2021 U.S. Dist. LEXIS 39402, 2021 BL 70580, 2021 WL 792742, at *8 (D.P.R. Mar. 1, 2021).

²⁷P.R. Laws Ann. tit. 26, § 1915 (7).

²⁸Id.

First, the Court determined that no presumption against preemption applied to Act 90.²⁹ Pointing to a recent 2016 Supreme Court case which stated that when a statute “contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption,” the Court held that there was no indication of Congress’s “clear and manifest purpose” to prevent federal Medicare law from preempting Puerto Rico’s Act 90.³⁰ Federal preemption power stems from the Supremacy Clause of the U.S. Constitution, which holds that federal law is the “supreme Law of the Land”³¹ and as such, Congress has “the power to pre-empt state law.”³² Though Puerto Rico is a U.S. territory and not a state, the Supreme Court has determined the test for federal preemption of Puerto Rican law to be the same as the test for preemption of a state law.³³ Though federal preemption of state law may be expressed or implied, where federal law expressly preempts state law, the plain wording of the clause is examined to determine “Congress’ preemptive intent.”³⁴ However, in addition to the plain language of a federal statute and its legislative history, courts assess whether the purpose of the federal act would be hindered or prevented by the state law.³⁵ The Court held that while before the Franklin case a presumption against preemption may have applied, post-Franklin an express preemption clause in a federal statute such as the Medicare Advantage Act does not invoke any presumption against preemption.³⁶ The Court concluded that the plain language and legislative history of the Medicare Advantage Act demonstrated Congressional intent to preempt state laws such as Act 90’s Mandated Price Provision.³⁷

Discussion

Puerto Rico’s public health crisis will worsen in the next decade due to an aging primary care workforce and low physician retention rates of residency graduates.³⁸ In 2018, two-thirds of primary care physicians were over the age of 55 (compared to 43% nationwide).³⁹ In 2018 the median age of primary care physicians was 60 years, compared to 53 years nationally.⁴⁰ Despite graduating 111 family medicine residents between 2011-2018, only 45 were practicing on the island in 2018, leaving it with the lowest retention rate in the nation.⁴¹ Furthermore, while, on average, 155 new graduates entered the medical profession in each state from out of state during the same time period, only five new graduates of residency programs outside of Puerto Rico moved to the U.S. territory to practice.⁴² Puerto Rico’s total recruitment and retention rate sat at 45% overall; in comparison, the second lowest rate was in the District of Columbia at 57.8%.⁴³ Puerto Rico is neither recruiting nor retaining sufficient primary care physicians trainees to replace its aging physician workforce. The overall economic state of the island further exacerbates workforce retention issues. In 2022,

²⁹Medicaid & Medicare Advantage Prods. Ass’n of P.R., Inc. v. Emanuelli-Hernández, No. 21-1297, 2023 BL 15387, at 5 (1st Cir. Jan. 18, 2023).

³⁰Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125, 136 S. Ct. 1938, 195 L. Ed. 2d 298 (2016).

³¹U.S. CONST. art. VI, cl. 2.

³²Me. Forest Prods. Council v. Cormier, 51 F.4th 1, 6 (1st Cir. 2022) (quoting Arizona v. United States, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)).

³³P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 499, 108 S. Ct. 1350, 99 L. Ed. 2d 582 (1988).

³⁴Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 594, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011).

³⁵Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (quoting Savage v. Jones, 225 U.S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182 (1912)).

³⁶Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125, 136 S. Ct. 1938, 195 L. Ed. 2d 298 (2016).

³⁷Medicaid & Medicare Advantage Prods. Ass’n of P.R., Inc. v. Emanuelli-Hernández, No. 21-1297, 2023 BL 15387 at 5 (1st Cir. Jan. 18, 2023).

³⁸Elizabeth Wilkinson et. al, *A Shrinking Primary Care Workforce in Puerto Rico*, ROBERT GRAHAM CNTR. (December 13, 2019), <https://www.graham-center.org/publications-reports/publications/one-pagers/shrinking-pc-workforce-puerto-rico.html> [<https://perma.cc/AYA5-48NB>].

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

Puerto Rico filed for the largest municipal bankruptcy in U.S. history and entered a debt restructuring plan for its more than \$70 billion in public debt and more than \$50 million in public pension liabilities.⁴⁴

Immediate and large-scale interventions are necessary to encourage physicians to stay or migrate to Puerto Rico to ameliorate the ever-escalating public health crisis. Some legislative efforts have been made from within, such as the Incentives for the Retention and Return of Medical Professionals Act which former Puerto Rico Governor Ricardo Roselló signed in 2017. This act lowered the income tax rate of Puerto Rican physicians from 33 percent to 4 percent, contingent on completing 180 hours of community service annually.⁴⁵ However, given the extreme discrepancy between the economic powers of recently bankrupted Puerto Rico and that of the mainland United States, true progress must come from decisions made by the mainland United States. Unfortunately, the U.S. has historically demonstrated a lack of urgency when it comes to ensuring access to high-quality critical health services in Puerto Rico. For example, in 2017 Hurricane Maria destroyed the Family Health Center Susana Centeno, the only hospital on the island of Vieques in which nearly 9,000 U.S. citizens reside.⁴⁶ Yet for nearly three years, the Federal Emergency Management Agency (“FEMA”) failed to approve \$39.5 millions of funding to rebuild the hospital.⁴⁷ The tragic consequences prompted several senators to send a letter to the Department of Homeland Security on December 16, 2019 requesting an evaluation of the FEMA’s response to the destruction of Vieques’s only hospital.⁴⁸

In *Medicaid & Medicare Advantage Products Association of Puerto Rico, Inc. et al., v. Domingo Emanuelli-Hernández et al.*, the First Circuit court based its decision on a technical preemption argument based on statutory text, but failed to adequately assess its legislative history and “whether the purpose of the federal act would be hindered or prevented by the state law” in addition to the plain text of the law.⁴⁹ The congressional purpose of the Medicare Advantage program was to “harness the power of private sector competition to stimulate experimentation and innovation to create a more efficient and less expensive Medicare system.”⁵⁰ It was meant to give Medicare beneficiaries a wider variety of private health plan choices by mimicking the cost-savings and expanded healthcare delivery options seen in the private sector.⁵¹ In other words, it was created to improve beneficiaries’ quality and access to care. Yet the Medicare Advantage program has inadvertently decreased beneficiaries’ quality and access to care by encouraging physicians and other healthcare professionals to flee the island, placing Puerto Rico as a winner in the Medicare Advantage program’s “race to the bottom”. The unintended consequences have not supported and even hindered the Medicare Advantage Act’s congressional intent of “creat[ing] a more efficient and less expensive Medicare system” by significantly increasing wait times to see a doctor.⁵² Thus, had the Court equally weighed the three factors the of determining pre-emption—(1) “the plain language of the Medicare Advantage program’s statutory text”; (2) “its

⁴⁴Associated Press, Puerto Rico Formally Exits Bankruptcy Following Largest Public Debt Restructuring, NBC NEWS (Mar. 15, 2022, 8:47 AM), <https://www.nbcnews.com/news/latino/puerto-rico-formally-exits-bankruptcy-largest-public-debt-restructurin-rcna20054> [<https://perma.cc/V6UE-2F9Z>].

⁴⁵Mariela Patron, Puerto Rico’s Exodus of Doctors Adds Health Care Strain to Dire Financial Crisis, NBC News (August 8, 2017, 3:42 PM), <https://www.nbcnews.com/news/latino/puerto-rico-s-exodus-doctors-adds-health-care-strain-diren7833776> [<https://perma.cc/NCW4-E6Z5>].

⁴⁶Patricia Mazzei, Hunger and an ‘Abandoned’ Hospital: Puerto Rico Waits as Washington Bickers, THE N.Y. TIMES (April 7, 2019), <https://www.nytimes.com/2019/04/07/us/puerto-rico-trump-vieques.html> [<https://perma.cc/LT8R-ZXV3>].

⁴⁷*Id.*

⁴⁸Letter from Senator Bob Menendez et al., New Jersey Senator, U.S. Senate, to the Department of Homeland Security (Dec. 16, 2019), <https://www.menendez.senate.gov/newsroom/press/menendez-bicameral-group-of-colleagues-request-that-inspector-general-review-femas-faltering-efforts-to-rebuild-vieques-closed-health-care-facility> [<https://perma.cc/ACT3-B5D>].

⁴⁹Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (quoting Savage v. Jones, 225 U.S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182 (1912)).

⁵⁰H.R. Rep. No. 105-217, at 585 (1997) (Conf. Rep.); D. Gary Reed, *Medicare Advantage Misconceptions Abound*, 27 HEALTH LAW. 1, 3 (2014).

⁵¹Caroline Schiff & Michael P. Abate, *Medicare Advantage: Fading Misconceptions and Remaining Uncertainty*, 29 HEALTH LAW. 21 (2016).

⁵²Reed, *supra* note 50.

legislative history”); and (3) “whether the purpose of the Medicare Advantage Act would be hindered or prevented by”⁵³ Act 90—it may have come to a different conclusion.

Though the Medicare Advantage program was intended to encourage lower Medicare costs, and healthcare costs are in fact lowered in Puerto Rico through depressed reimbursement rates, these rates fail to consider the implausibility of the market generating the wage increases necessary to recruit and retain healthcare professionals.⁵⁴ The Medicaid and Medicare Advantage Products Association of Puerto Rico Policy Committee and the Puerto Rico Chamber of Commerce Health Committee even characterized the reimbursement rates of Medicare in Puerto Rico as “almost a case of unfair competition, where the different version of the Medicare Program existing in the mainland increasingly pulls the most qualified human resources out of the island.”⁵⁵

The ultimate administrative responsibility to legitimately adjust reimbursement rates for the Medicare Advantage program lies with the CMS. The CMS’s rates fail to adequately consider the statutory differences that created a distinct Medicare content in Puerto Rico and use data that has been confirmed to contain critical issues, such that rate setting and program economics are likely to be erroneous.⁵⁶ While the CMS takes its time in conducting further research and assessing the unintended consequences of the Medicare Advantage program in Puerto Rico, legislation such as Act 90 should not be preempted to avoid increasing harm in the meantime.

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⁵³Crosby, 530 U.S. at 373 (quoting Savage, 225 U.S. at 533).

⁵⁴THE MEDICAID AND MEDICARE ADVANTAGE PRODUCTS ASSOCIATION OF PUERTO RICO & THE P.R. CHAMBER OF COMMERCE HEALTH COMMITTEE, ADDRESSING PUERTO RICO’S MEDICARE CRISIS AND IMPLEMENTING AN URGENT PATH TO RECOVERY (WORKING PAPER v. 8, 2015), [https://www.finance.senate.gov/imo/media/doc/Puerto%20Rico%20Healthcare%20Community%20\(Attachment%201\).pdf](https://www.finance.senate.gov/imo/media/doc/Puerto%20Rico%20Healthcare%20Community%20(Attachment%201).pdf) [https://perma.cc/NLL7-2TKN].

⁵⁵*Id.*

⁵⁶*Id.*

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