



**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

21 SOUTH FRUIT STREET SUITE 14
CONCORD, NEW HAMPSHIRE 03301

Roger A. Sevigny
Commissioner

Memorandum

Alexander K. Feldvebel
Deputy Commissioner

To: Senator Jeb Bradley

**From: Jennifer Patterson, Life, Accident and Health Legal Counsel
New Hampshire Insurance Department**

Handwritten initials "JJP" in black ink.

Date: June 13, 2013

Re: HB 668 Preemption Analysis

1. Introduction and Background

This memo is in response to your request for a more detailed explanation of how preemption might affect New Hampshire's health insurance markets in the event HB 668 (relative to individual and group health insurance market rules) is not enacted. HB 668 was drafted and introduced at the request of the New Hampshire Insurance Department to answer two questions with regard to health insurance markets in New Hampshire after the main provisions of the Affordable Care Act ("ACA") take effect on January 1, 2014. The two questions are (1) Who will be the regulator of these markets?; and (2) What are the rules with which health insurance carriers must comply in designing their policies in these markets?

On May 24, 2013, the Department wrote a letter to the Senate Commerce Committee,¹ where the bill was pending, to urge passage of the bill and to explain its importance in retaining state regulatory authority over New Hampshire's insurance markets. The May 24 letter noted that because federal law takes precedence over state law, a legal doctrine known as preemption, the ACA is independently binding on the state's health insurance carriers, and they are required to comply with it. The May 24 letter also explained that failure to align the state and federal market rules through passage of HB 668 could result in the federal government becoming the primary regulator of health insurance in New Hampshire, because the ACA provisions that take effect January 1, 2014 are binding on the entire individual and small group markets, not just on products offered through the health benefit exchanges set up under the ACA. Because there is no general New Hampshire statute authorizing the Department to enforce federal law, the letter stated, the federal government might be forced to step in to enforce the ACA standards.

On June 4, 2013, after Senate Commerce recommended that HB 668 be found inexpedient to legislate, the Department wrote another letter,² sent to all members of the Senate, explaining that another potential consequence of not passing HB 668 could be to shift the entire small group

¹ The May 24 letter is posted at <http://www.nh.gov/insurance/consumers/documents/Letter05.24.13.pdf>.

² The June 4 letter is posted at http://www.nh.gov/insurance/documents/hb_668_senltr.pdf.

market in New Hampshire to a pure community rating system in which all covered persons would be charged the same premium, with rates varying only by the number of persons covered, not by any other factor. The Department expressed concern that the sudden switch to pure community rating could cause premiums to go up.

During discussion on the Senate floor, you asked the Department to submit a more detailed explanation of how it arrived at the conclusions expressed in its letters with respect to preemption and the possible consequences of not passing HB 668. Preemption is a detailed legal analysis involving consideration of the interaction of specific statutory provisions and legislative intent, so the Department's explanation is somewhat lengthy and technical.

2. Federal law preempts conflicting state law, but preserves state law where it is possible to comply with both, particularly in areas traditionally regulated by the states.

Under the Supremacy Clause of the U.S. Constitution, “[a] fundamental tenet of our federalist system is that constitutionally enacted federal law is supreme to state law. . . . As a result, federal law sometimes preempts state law either expressly or by implication.” N.H. Motor Transp. Ass'n v. Rowe, 448 F.3d 66, 74 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008). One way federal law preempts state law is “field preemption” - when Congress indicates “an intent to occupy an entire field to the exclusion of state law.” Good v. Altria Group, Inc., 501 F.3d 29, 47 (1st Cir. 2007), *aff'd*, 555 U.S. 70 (2008), quoting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988).

In the context of insurance, an area traditionally regulated by the states, courts do not rely on a field preemption analysis. See Solis v. Home Ins. Co., 848 F.Supp.2d 91 at 99 (D.N.H. 2012). Instead, the analysis is one of “conflict preemption”:

. . . even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Bartlett v. Mutual Pharmaceutical Company, Inc., et al., 659 F.Supp.2d 279, 290 (D.N.H. 2009), *aff'd* 678 F.3d 30 (2012), *cert. granted*, 133 S.Ct. 694 (2012), quoting Good v. Altria Group, Inc., 501 F.3d 29 at 47.

A court will find conflict preemption only if compliance with both state and federal law is impossible, for example where they impose directly conflicting duties, or when the state law “stands as an obstacle” to accomplishing the purpose of the federal law. Thus, carefully examining Congress' intent is a central part of any preemption case:

As the Supreme Court reaffirmed in Wyeth, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” . . . The Court also reaffirmed in

Wyeth that “[i]n all preemption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

Bartlett, 659 F.Supp.2d 279 at 290-91, quoting Wyeth v. Levine, 555 U.S. 555, 564-65 (2009).

3. The determination of whether any specific state law is preempted by the ACA ultimately rests with the federal courts.

The express language of the ACA creates a presumption against preemption of state law, and adopts a conflict preemption standard. Specifically, the federal law provides that “nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title.” 42 U.S.C. 18041(d), enacted by Section 1321 of the ACA.

Given Congress’s intent that the ACA not preempt any state law that does not prevent its application, any analysis of whether the ACA preempts New Hampshire law governing health insurance policies, mainly contained in RSA chapter 420-G, would involve a detailed comparison of federal and state law provisions to determine whether compliance with both provisions is possible, and if so, whether complying with the state law provision would “stand as an obstacle” to accomplishing the Congressional purposes expressed in the ACA.

The power to determine whether state law is preempted rests ultimately with the federal courts. If New Hampshire does not pass legislation setting forth the state’s chosen approach to aligning the state and federal market rules, it will likely fall to the federal courts to determine whether particular provisions of New Hampshire law are preempted. Such litigation would be a lengthy process, and one that, as expressed in the Department’s May 24 letter, could lead to substantial confusion in the individual and small group insurance markets due to ongoing uncertainty regarding the market rules for 2014 products.

4. Under the Department’s preliminary analysis, some New Hampshire state law provisions are likely preempted under the ACA, but others are not.

Given the complexity of these issues and the fact that the final decision would rest with the courts, engaging in a detailed analysis of each area of potential preemption is beyond the scope of this memo. Nevertheless, in the Department’s view it appears likely that some state law provisions would be found to be preempted. For example, present New Hampshire law allows sole proprietors to access health coverage in either the small employer market or the individual market. These provisions conflict directly with the ACA’s requirement that all individuals be rated in a single risk pool, 42 U.S.C. 18032(c), enacted by section 1312 of the ACA, and would likely be found to be preempted.

For other provisions, it appears to the Department that it is possible for health insurance carriers to comply with both state and federal law, creating a situation in which state law would likely survive a preemption challenge in court, but its continued applicability in addition to ACA requirements would pose tremendous practical problems for the carriers. The biggest area of concern to the Department in the context of HB 668 is the practical effect on the market that will likely result from the combined application of the state and federal rating factors.

a. New Hampshire law and the ACA each include detailed provisions about what rating factors health insurance carriers may use to calculate premiums.

“Rating factors” are the criteria that health insurance carriers are permitted to use in calculating premiums. For the individual and small group markets, both state law and the ACA limit the rating factors health insurance carriers may use in these markets, but make use of any particular factor permissive (i.e., carriers can choose whether or not to use it). Under the ACA, only four rating factors may be used in the individual and small group markets:

With respect to the premium rate charged by a health insurance issuer for health insurance coverage offered in the individual or small group market—

(A) such rate shall vary with respect to the particular plan or coverage involved only by—

(i) whether such plan or coverage covers an individual or family;

(ii) rating area, as established in accordance with paragraph (2);

(iii) age, except that such rate shall not vary by more than 3 to 1 for adults. . . ; and

(iv) tobacco use, except that such rate shall not vary by more than 1.5 to 1; and

(B) such rate shall not vary with respect to the particular plan or coverage involved by any other factor not described in subparagraph (A).

42 U.S.C. 300gg(a)(1), enacted by ACA section 1201. In addition to the statutory language quoted above, the U.S. Department of Health and Human Services (US DHHS) has adopted a final market rules regulation under the ACA that has the force of law and is binding on the carriers. Among other things, the market rules regulation requires that carriers choosing to rate by age use a uniform age rating curve established by US DHHS. 45 CFR 147.102(e).³

³States wanting to establish their own rating curves applicable to 2014 health insurance policies were required to submit them to US DHHS by March 29, 2013. 45 CFR 147.103 (a)(6). New Hampshire did not make such a submission, and the age brackets allowed under current New Hampshire law (RSA 420-G:4, I(e)(2)), standing alone, would not have met the US DHHS standards for approval.

Like the ACA, New Hampshire law limits the rating factors that may be used, with different factors allowed for the individual and small group markets. For the individual market, New Hampshire law allows carriers to rate using age, health status, tobacco use and membership tier. Specifically, the statute allows the use of the following factors:

In establishing the premium charged, health carriers providing coverage to individuals shall calculate a rate that is derived from the health coverage plan rate through the application of rating factors that the carrier chooses to utilize for age, health status, and tobacco use. Such factors may be utilized only in accordance with the following limitations:

(1) The maximum premium differential for age as determined by ratio shall be 4 to 1. The limitation shall not apply for determining rates for an attained age of less than 19.

(2) The maximum differential due to health status shall be 1.5 to 1 and the maximum differential rate due to tobacco use shall be 1.5 to 1. Rate limitations based on health status do not apply to rate variations based on an insured's status as a tobacco user.

(3) Permissible rating characteristics shall not include changes in health status after issue.

RSA 420-G:4, I(d). New Hampshire's permissible rating factors in the small group market are age, group size, industry and membership tier. Specifically, the law provides as follows:

In establishing the premium charged, health carriers offering coverage to small employers shall calculate premium rates that are derived from the health coverage plan rate by making adjustments to reflect one or more case characteristics. Such adjustments from the health coverage plan rate may be made only in accordance with the following limitations:

(1) In establishing the premium rates, health carriers offering coverage to small employers may use only age, group size, and industry classification as case characteristics. No consideration shall be given to health status, claim experience, duration of coverage, geographic location, or any other characteristic of the group.

(2) Carriers making adjustments from the health coverage plan rate for age may do so only by using the following age brackets:

0 - 18
 19 - 24
 25 - 29
 30 - 34
 35 - 39
 40 - 44
 45 - 49
 50 - 54
 55 - 59
 60 - 64
 65 +

(3) The maximum premium rate differential after adjusting for all case characteristics as determined by ratio shall be 3.5 to 1. This limitation shall not apply for determining premium rates for covered persons whose attained age is less than 19.

(4) In establishing the premium rates, health carriers offering coverage to small employers may make further adjustments based on family composition.

(5) The small employer health carrier shall set premium rates for small employers after consideration of case characteristics of the small employer group as well as family composition. No small employer health carrier shall inquire regarding health status or claims experience of the small employer or its employees or dependents until after the premium rates have been agreed upon by the carrier and the employer.

(6) Carriers may calculate premium rates using either list billing or composite billing. Carriers shall use the same billing method in all succeeding rating periods unless the small employer agrees to allow the carrier to change the methodology.

RSA 420-G:4, I(e).

- b. State law is not preempted unless it is impossible to comply with both standards, or complying with the state standard would stand as an obstacle to accomplishing the purpose underlying the federal standard.**

From a legal perspective, a court will approach a question of preemption by first inquiring whether it is possible to comply with both the state and the federal standard. The Bartlett case, discussed above, involved a question of whether New Hampshire's common law duty to warn about the possible side effects of a generic drug was preempted by federal labeling requirements. The federal district court found that New Hampshire law was not preempted, because it was possible for the drug company to comply with both sets of requirements:

To succeed with their impossibility pre-emption argument, the defendants must show "that it would have been impossible for [them] to comply with the state-law duty to modify [Sulindac's] labeling without violating federal law," . . . i.e., that " 'compliance with both federal and state [law] is a physical impossibility.' " As this standard suggests, "[i]mpossibility pre-emption is a demanding defense," . . . The defendants have not satisfied those demands here.

Bartlett, 659 F.Supp.2d at 292-293 (internal citations omitted). The court noted that, absent directly conflicting mandates or prohibitions, it is difficult to demonstrate impossibility:

Impossibility pre-emption arises where federal and state law “impose directly conflicting duties,” e.g., “if the federal law said, ‘you must sell insurance,’ while the state law said, ‘you may not.’ ” . . . To fit their claimed predicament into this framework, the defendants would need to show a federal law saying “You may not change your label” to conflict with the state law underlying the Bartletts’ failure-to-warn claims, i.e., “You must change your label.” So the defendants’ assertion that the FDCA does not say one way or the other whether they can change their label is insufficient.

Bartlett, 659 F.Supp.2d at 293, quoting Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31(1996).

If compliance with both standards is possible, the court will then look at whether complying with the state standard would, as a practical matter, undercut the purpose of the federal law. On this issue, the Bartlett court found that warning customers about possible side effects, thus protecting them even more strongly than the federal labeling requirements, was not inconsistent with the purpose of the federal statutory scheme:

As the court of appeals has instructed, “it is not the fact of [federal] action on a particular subject alone—but the reasons for the action—that control its preemptive effect.” . . . Lacking any evidence that Congress passed the Hatch–Waxman Amendments intending to displace state-law labeling requirements on generic drugs, the defendants have provided no basis for finding those requirements pre-empted by the Amendments.

Bartlett, 659 F.Supp.2d at 308, quoting Good, 501 F.3d at 55.

- c. **A court would likely find that the state rating factors are not preempted, because it is possible for carriers to comply with both by using only those factors that are permitted under both state and federal law; moreover, using fewer rating factors is more protective of consumers, consistent with the Congressional purpose underlying the ACA’s rating provisions.**

A court applying a preemption analysis to the state and federal market rules would likely reach a similar conclusion to what the federal District Court found in Bartlett. For both the individual and small group markets, it would be possible for a carrier to comply with both sets of rating rules, by using only those factors that are permitted under both state and federal law.

Specifically, the carriers could not rate by geographic area in either market, even though federal law would permit it, because state law does not allow the use of this factor. In the individual market, carriers could gain approval for a product rated by membership tier, age (at a ratio of no more than 3:1, using the federal uniform age curve) and tobacco use at no more than 1.5:1, all factors allowed under both state and federal law.

In the small group market, carriers could gain approval for a product that used membership tier as the only rating factor. Tobacco use is not a permissible rating factor in New Hampshire's small group market under RSA 420-G:4, I(e), so it could not be used in this market. With respect to age rating, a product using the uniform age curve established by federal regulation could not be approved under state law, because of its inconsistency with the five-year age brackets under RSA 420-G:4, I(e)(2), which are mandatory for a carrier choosing to rate by age in the small group market. However, because use of an age factor is permissive, not mandatory, under both the federal and state laws, this conflict would not give rise to a finding of preemption. The carrier could comply with both laws by not rating for age in the small group market.

Finally, a court would look at whether the application of both sets of requirements would "prevent the application" of the ACA. In the Department's view, a court would find that, as in the Bartlett case, the combined application of state and federal law would be more protective to consumers, and thus would not stand as an obstacle to the federal purpose. The purpose of the market rules section of the ACA, as stated in its title, is to prohibit discriminatory premium rates. The end result of applying both state and federal law in this instance, community rating of small group health insurance policies, goes even further in prohibiting discriminatory premium rates than the ACA's requirements. Thus, a court would likely find that state law is not preempted.

5. Without statutory authorization, the Department lacks authority to ignore state law provisions or to enforce federal standards, creating a situation of profound uncertainty in the market.

As noted in the Department's May 24 letter, the carriers must comply with federal law requirements, regardless of whether they are enforced by state regulators or the federal government. If the General Court does not act to clarify the applicable requirements, the carriers will be required to comply not only with federal law, but also with state law. Whatever preliminary preemption analysis the Department might articulate could be reversed by a court if challenged by an affected party. Nor can the Department be assured of its ability to enforce the federal standards, creating the potential, as articulated in the May 24 letter, that the federal government might choose to become the regulator of the state's individual and small group markets.

Finally, given the likely lack of preemption with respect to the permissive rating factors, carriers in New Hampshire could be subject to a de facto requirement of pure community rating in the small group market, a market regime that would reflect a much greater change from current market rules than would be required to align the state's market rules with the ACA. If the federal courts were to agree with the Department's preemption analysis on this point, the situation could be addressed *only* through the passage of legislation; even a federal court ruling would not release the carriers from their obligation to comply with state law as well as federal law requirements.