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Maine Wins Right to Seek Drug Discounts

Supreme Court Sees No Conflict With Medicaid

By Charles Lane
Washington Post Staff Writer
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The Supreme Court yesterday gave the state of Maine the go-ahead to pressure drugmakers for discounts on behalf of its citizens, a decision that opens the door to similar experimentation by other states.

By a vote of 6 to 3, the court ruled that the program, which seeks to use the state's power as a bulk purchaser of drugs for Medicaid patients to force drug companies to make medicine cheaper for the state's non-Medicaid population, would not necessarily undermine Medicaid, the federal government's primary health care program for the poor. A lower court, the drug industry and the Bush administration had argued that it would.

"[T]he severity of any impediment that Maine's program may impose on a Medicaid patient's access to the drug of her choice is a matter of conjecture," Justice John Paul Stevens wrote in an opinion that was joined fully by Justices David H. Souter and Ruth Bader Ginsburg, and partially by Justice Stephen G. Breyer.

"I think it's terribly important in that it says a state can enact a law that uses Medicaid . . . to negotiate reduced drug prices for the non-Medicaid population," said Steven Rowe, Maine's attorney general. "We have received calls from a lot of states . . . They've been watching and waiting." The state's program, Maine Rx, was enacted in 2000 but has been on hold ever since due to litigation.

Even as the court seemed to validate state efforts to cope with the high cost of medicine at a time of deadlock between the White House and Congress, it set the stage for possible wrangling between the states and the Bush administration over the politically sensitive issue.

Emphasizing that yesterday's opinion would not be the last word, four justices in the majority said that the ultimate fate of Maine's program, and others like it being contemplated elsewhere, could hinge on the view of Health and Human Services Secretary Tommy G. Thompson, who has supervisory authority over state implementation of Medicaid.

"The issue we confront is, of course, quite different from the question that would be presented if the Secretary, after a hearing, had held that the Maine Rx program was an impermissible amendment of its Medicaid Plan," Stevens, joined by Souter, Ginsburg and Breyer, wrote. "In such event, the Secretary's ruling would be presumptively valid."

It is unclear, though, how or even when Thompson would have a chance to rule.

A spokesman for HHS, Campbell Gardett, said the court had "vindicated" the department's position that states must come to the secretary for approval. HHS "anticipates" that Maine will now do so, he added.

But Rowe said the court had actually left that point open. "We do not believe there is any legal requirement" that the state go to Thompson for permission, he said. But he added, "We want to work with the federal government."

If Maine or other states were to implement plans without HHS approval, the department would have the option of cutting off Medicaid funding. But both sides have reasons to avoid that politically explosive step.

The case has shown how hard it can be for the Bush administration, which must respond to public demands for wider drug coverage even as the drug industry supplies a large chunk of the Republican Party's campaign funding, to calibrate its policy.

While the drug industry's appeal was pending, the court asked the Bush administration for its view of the case. The Justice Department urged the court not to hear it, to allow Thompson time to sort through the state programs.

Maine Rx empowers the state to require that drugmakers who want to sell to the state's Medicaid patients also finance a rebate on medicines for non-Medicaid patients. Drugs made by companies that refuse can be sold through Medicaid only if a state official gives "prior authorization" -- a significant handicap.

The Pharmaceutical Research and Manufacturers of America (PhRMA), an industry group, sued to block the program, arguing that it amounted to regulation of interstate commerce by one state and that it conflicted with the federal government's authority to set the rules for Medicaid.

A federal district judge in Maine ruled that Maine Rx was preempted by federal law and granted PhRMA a preliminary injunction preventing the plan from taking effect. A federal appeals court said in 2001 that the judge was wrong, but let the injunction stand until the Supreme Court acted.

Justices Clarence Thomas and Antonin Scalia also agreed that Maine could go ahead. Thomas saw no circumstances under which the Medicaid statute would pre-empt Maine Rx, and Scalia thought HHS, not the courts, should already have dealt with any alleged violation by Maine.

Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist and Justice Anthony M. Kennedy, dissented, arguing that the district judge had reasonably concluded that Maine Rx would harm Medicaid recipients.

No justice agreed with PhRMA that the law unconstitutionally regulated interstate commerce.

The case is *PhRMA v. Walsh*, No. 01-188.

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