

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*Reconciling McCarran-Ferguson (Insurance) Case Law and
ERISA Preemption: Kentucky Assn of Health Plans, Inc. v.
Miller*

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Abstract. In *Kentucky Assn of Health Plans, Inc. v. Miller*, the Supreme Court ruled that Kentucky's any willing provider statutes, which mandate that health plans and health insurers may not exclude from their networks any health-care providers that agree to the plans participation terms, are not preempted by ERISA; as statutes that regulate and are specifically directed toward the insurance industry they are exempted from such preemption by the savings clause in ERISA, which precludes preemption for state laws that regulate insurance, banking, or securities.

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Reconciling McCarran-Ferguson (Insurance) Case Law and ERISA Preemption: *Kentucky Ass'n of Health Plans, Inc. v. Miller*

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Summary

In *Kentucky Ass'n of Health Plans, Inc. v. Miller*,¹ the Supreme Court ruled that Kentucky's "any willing provider" statutes, which mandate that health plans and health insurers may not exclude from their networks any health-care providers that agree to the plans' participation terms, are not preempted by ERISA; as statutes that regulate and are specifically directed toward the insurance industry they are exempted from such preemption by the "savings" clause in ERISA, which precludes preemption for state laws that "regulate ... insurance, banking, or securities." Rejecting plaintiffs' arguments – grounded in case law interpreting the McCarran-Ferguson Act's antitrust exemption for the "business of insurance" – that the Kentucky laws, because they also reach health-care providers, are not 'specifically directed toward' insurers, and do not regulate insurance practices, the Court reconsidered and rejected prior judicial reliance upon McCarran-Ferguson case law as a guide to interpreting ERISA's applicability to and preemption of state laws purporting to deal with insurance. The Court emphasizes the distinction between the *conduct of private parties* that is the focus of McCarran-Ferguson interpretation and the *state laws* that are the subject of the current litigation to conclude that "our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to the lower federal courts, and ... added little to the relevant analysis."²

Kentucky has enacted statutory provisions that prohibit health insurers from discriminating against any health providers who are willing to abide by a health plan's participation terms – so-called "any willing provider" statutes.³ ERISA (Employee Retirement Income Security Act of 1974) generally preempts state laws "insofar as they

¹ 538 U.S. 329 (2003)

² *Id.* at 339-340.

³ Ky. Rev. Stat. Ann. § § 304.17A-270, 304.17A-271.

may now or hereafter relate to any employee benefit plan.”⁴ State laws that regulate, *inter alia*, “insurance” are not, however, preempted.⁵ The McCarran-Ferguson Act exempts the “business of insurance” from the federal antitrust laws to the extent that nothing in such business constitutes a boycott,⁶ thus leaving insurance regulation predominantly to the states.⁷ Petitioner health plans, in *Kentucky Ass’n of Health Plans, Inc. v. Miller*, argued to the Supreme Court that because the Kentucky statutes required actions not encompassed in the McCarran-Ferguson “business of insurance” exemption, they did not qualify for ERISA’s non-preemption treatment. The Court took the opportunity to clarify the difference between the two federal statutes, and announced that it would no longer rely upon case law interpreting the McCarran-Ferguson exemption in deciding whether the ERISA “savings” clause would protect challenged state laws.

During the more than 50 years of its existence, the applicability of McCarran-Ferguson has been interpreted in a series of decisions clarifying the exemption, culminating in 1979, with the Court’s opinion in *Group Life Ins. Co. v. Royal Drug*,⁸ synthesized in *Union Labor Life Ins. Co. v. Pireno*.⁹ In *Pireno*, the Supreme Court restated the three factors a court must find in order to determine that a practice constitutes the “business of insurance” and qualifies for the McCarran-Ferguson exemption: it must have the effect of transferring or spreading a policyholder’s risk; it must constitute an “integral” part of the policy relationship between the insured and the insurer; and it must be limited to entities within the insurance industry.¹⁰

The *Pireno* Court had also noted that even express exemptions from the antitrust laws “must be” construed narrowly, and the *Kentucky Ass’n of Health Plans* Court thus agrees with petitioners’ argument that the challenged “any willing provider” statutes probably would not, under *Royal Drug* and *Pireno*, be entitled to the McCarran-Ferguson exemption because they address entities both within and outside the insurance industry. But the savings clause in ERISA, the Court notes, unlike the McCarran-Ferguson exemption, is not limited to the “business of insurance,” and the health plans cannot prevail upon the Court to allow ERISA to preempt the Kentucky statutes: “whether or not

⁴ 29 U.S.C. § 1144(a).

⁵ 29 U.S.C. § 1144 (b)(2)(A).

⁶ 15 U.S.C. § § 1011 *et seq.*

⁷ McCarran-Ferguson does not preclude federal regulation of the business of insurance, prohibiting all preemption of state laws; only *indirect* regulation by application of statutes such as, *e.g.*, the antitrust laws, is prohibited: “No Act of Congress shall be construed to ... supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act *specifically relates* to the business of insurance.” 15 U.S.C. § 1012(b) (emphasis added).

⁸ 440 U.S. 205 (1979).

⁹ 458 U.S. 119 (1982).

¹⁰ In other words, McCarran-Ferguson addresses the “business of insurance” (and not the business of insurance companies); *see* *Royal Drug*, 440 U.S. at 216-217. For a less cursory treatment of the McCarran-Ferguson exemption and its background, *see* CRS Report 90-212, *The McCarran-Ferguson Act’s Exemption of the Business of Insurance From Federal Antitrust Law*.

an HMO's contracts with providers constitute the 'business of insurance' under *Royal Drug* is beside the point."¹¹

We believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis. That is unsurprising, since the statutory language of [ERISA's "savings" clause] differs substantially from that of the McCarran-Ferguson Act. Rather than concerning itself [as does McCarran-Ferguson] with whether certain practices constitute '[t]he business of insurance ... or whether a state law was 'enacted ... *for the purpose of* regulating the business of insurance' ... [the ERISA clause] asks merely whether a state law is a 'law ... which regulates insurance ...' What is more, the McCarran-Ferguson factors were developed in cases that characterized *conduct* by private actors, not state laws.¹²

Because the two statutes are worded differently and serve different purposes, therefore, the Court finds that it can no longer, without creating additional confusion and disagreement among participants in the judicial system, utilize the case law interpreting the McCarran-Ferguson Act to inform decisions concerning the applicability of the "savings" clause of ERISA.

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¹¹ 538 U.S. at 338.

¹² *Id.* at 539-540 (emphasis in original). The Court had noted previously that not all state laws directed at the insurance industry would necessarily pass ERISA "savings-clause" muster, giving as an example of one that would not, a law mandating that insurance companies pay their janitors "twice the minimum wage": even though such a statute would undoubtedly constitute a prerequisite to an entity's ability to engage in the business of insurance, it would not affect the traditional risk-pooling arrangements between an insurer and insured.