Analysis
of
Guardian Flight L.L.C. v. Godfread
and State Regulation of Air Ambulance Subscriptions

Professor Daniel Schwarcz

July 15, 2021

Analysis of Guardian Flight L.L.C. v. Godfread and State Regulation of Air Ambulance Subscriptions

Executive Summary

Efforts by individual states to regulate air ambulance subscriptions as insurance products are almost certain to continue being struck down by federal courts as preempted by the Airline Deregulation Act (ADA). This is because the sale of air ambulance subscriptions clearly does not constitute the "business of insurance" under the McCarran Ferguson Act's reverse preemption provision. Directly relevant Supreme Court precedent clarifies that the "business of insurance" in the McCarran Ferguson Act's reverse preemption provision involves risk-based pricing and underwriting of coverage by firms that are principally concerned with spreading and transferring risk by making contingent payments to the insured or to third-party service providers on the occurrence of a loss. By contrast, air ambulance subscriptions such as that offered by Global Medical Response, Inc. ("GMR") and its affiliates are neither underwritten nor sold using risk-based pricing; instead, they are sold to all comers for a fixed fee. Moreover, the companies that sell air ambulance subscriptions do so principally to facilitate their business of providing medical services to customers, rather than for the principal purpose of transferring or spreading risk. Consistent with this goal, air ambulance subscriptions more closely resemble debt cancellation contracts than traditional insurance policies, as the seller need not make any payments to the subscriber or to a third party in the event of a loss. Consequently, unlike insurers, sellers of air ambulance subscriptions need not reserve for potential future losses, attempt to invest in assets whose maturities match their liabilities, or bear any investment risk in connection with their sales of subscriptions. Additionally, because this analysis focuses exclusively on the meaning of federal statutory language, it is not impacted by recent state efforts to deem the sale of air ambulance subscriptions to be insurance for purposes of state law. These conclusions are consistent with two recent federal court decisions addressing these precise issues. *See Guardian Flight L.L.C. v. Godfread*, 991 F.3d 916 (8th Cir 2021); *Air Evac EMS, Inc. v. Dodrill*, N0. 2:21-CV-00310 (S.D.W. Va. Jul 8, 2021).

Nature of Report

In June, 2021, my firm Schwarcz Consulting LLC was retained on behalf of GMR. The purpose of this engagement was for me to provide an independent assessment of the case *Guardian Flight L.L.C. v. Godfread*, 991 F.3d 916 (8th Cir 2021) and its implications for various state efforts to regulate subscriptions sold by air ambulance companies like GMR and its subsidiaries as insurance products. Pursuant to that agreement, this report reflects my independent judgment on this issue. It is intended to present an objective prediction of how courts will resolve litigation surrounding this issue in the future; it is not intended to advocate for any particular position.

I am the Fredrikson & Byron Professor of Law at the University of Minnesota Law School. My research focuses on a broad range of issues in insurance law and regulation and has won numerous awards, including the American Law Institute's highly selective Early Career Scholars Medal and the Liberty Mutual Prize. I am the co-author of the leading insurance law casebook in the country, Insurance Law and Regulation (7th ed. 2020). Media outlets such as the New York

Times, Wall Street Journal, and National Public Radio have covered my scholarship. I have testified to U.S. Congressional committees on insurance matters over half-a-dozen times and have served as an expert witness in a wide range of insurance disputes. From 2007 to 2014, I served as a consumer representative at the National Association of Insurance Commissioners. I earned my A.B., magna cum laude, from Amherst College and my J.D., magna cum laude, from Harvard Law School. While in law school, I was an articles editor for the Harvard Law Review and a John M. Olin Fellow in Law and Economics. After law school, I clerked for Judge Sandra Lynch of the United States Court of Appeals for the First Circuit and practiced at the law firm Ropes & Gray, where I worked mainly on insurance law matters. I subsequently spent two years as a Climenko Fellow and Lecturer on Law at Harvard Law School.

Key Factual Background

Various companies, including GMR and its subsidiaries (collectively "GMR"), provide air ambulance services to critically ill or injured individuals who require emergency transport to medical facilities. Private health insurance plans typically cover only part of the costs of air ambulances, imposing the remainder of these costs on patients. To help address the risk to accident victims of uncovered costs for air ambulance services, GMR and some other air ambulance companies sell subscriptions to individuals.

GMR and its affiliates sell air ambulance subscriptions to individuals for a fixed price. These subscriptions guarantee that if a GMR air ambulance provides transportation to a subscriber, then GMR will not require the subscriber to pay any out-of-pocket expenses for these services beyond the amount that their health insurer or other responsible third party pays. However, the subscription does not guarantee that a GMR air ambulance (as opposed to a competing air ambulance service provider) will be dispatched to transport an ill or injured subscriber, and it provides that GMR will not pay anything for services provided by an unaffiliated air ambulance provider.

In recent years, several states have attempted to regulate air ambulance subscriptions as insurance products. In some cases, these efforts have taken the form of state laws. For instance, a 2017 North Dakota law, N.D. Cent. Code § 26.1-47-09(3), provided that "An air ambulance provider, or an agent of an air ambulance provider, may not sell, solicit, or negotiate a subscription agreement or contract relating to services or the billing of services provided by an air ambulance provider." Similarly, a 2021 West Virginia law attempted to designate air ambulance companies that sell subscriptions as being engaged "in the business of insurance." *See* W.V. Legis H.B. 2776 (2021). In other cases, state insurance departments have attempted to regulate air ambulance service contracts under their general statutory authority to regulate insurers.[1]

[1] *See Air Evac EMS, Inc. v. Dodrill*, No. 2:21-CV-00105, 2021 WL 781679, at *3 (S.D.W. Va. Mar. 1, 2021) (describing the West Virginia Insurance Commissioner's efforts to regulate air ambulance subscriptions as a form of insurance); NY General Counsel Opinion No. 7-7-2008 (describing the "longstanding view of this Department that ambulance membership or subscription plans constitute the doing of an insurance business within the meaning of the Insurance Law").

Key Legal Background

(1) The Airline Deregulation Act (ADA) and the McCarran Ferguson Act

The legality of state efforts to regulate air ambulance subscriptions turns on the application of two federal statutes. The first is the Airline Deregulation Act (ADA), 49 U.S.C. § 41713(b), which prohibits states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." The Supreme Court has interpreted this language to evince a "broad pre-emptive purpose," and to therefore preempt state laws that have a "connection with or reference to" an air carrier's price, route, or service. *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 383-84 (1992). Various federal courts have consequently held that, standing alone, the ADA would preempt state efforts to regulate air ambulance subscriptions, as these agreements attempt to establish the "price" that individuals will pay to an "air carrier" for air ambulance services. *Guardian Flight LLC v. Godfread*, 991 F.3d 916, 921 (8th Cir. 2021); *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 767 (4th Cir. 2018).

The second key federal statute impacting the legality of state efforts to regulate air ambulance subscriptions as insurance contracts is the McCarran Ferguson Act, 15 U.S.C. § 1012(b). Section 2(b) of the Act contains a unique "reverse preemption" provision, which provides that "No Act of Congress shall be construed to invalidate, impair, or 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." Under this provision, state law reverse preempts federal law when three conditions are met: (i) the federal law does not "specifically relate[]" to the "business of insurance," (ii) application of the federal law would "invalidate, impair or supersede" a state law, and (iii) the state law was enacted for the purpose of "regulating the business of insurance."

Taken together, the ADA and the McCarran Ferguson Act mean that state efforts to regulate air ambulance subscriptions are preempted by federal law if, and only if, the sale of these subscriptions does not constitute the "business of insurance" under the McCarran Ferguson Act. This conclusion follows from the fact that the ADA rather clearly does not specifically relate to the business of insurance: the Act does not even mention insurance, and was instead intended to broadly deregulate the airline industry. Similarly, applying the ADA to preempt state efforts to regulate air ambulance subscriptions would rather clearly "invalidate, impair or supersede" state law by preventing its operation. Finally, there can be little doubt that state laws targeting air ambulance subscriptions are enacted "for the purpose" of regulating those agreements. Hence, the preemption analysis turns exclusively and definitively on the question of whether the sale of air ambulance subscriptions by air ambulance companies constitutes the "business of insurance" under the federal McCarran Ferguson Act.

(2) Supreme Court precedent on the "business of insurance" under the McCarran Ferguson Act

Two key Supreme Court cases help to clarify what activities constitute the "business of insurance" under the McCarran Ferguson Act.[2] The first is *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). That case involved an agreement between health insurer Blue Shield and various pharmacies in which the pharmacies agreed to only directly charge individuals insured by Blue Shield $2 for prescription drugs. Blue Shield would then reimburse the pharmacy for its cost to purchase the drug, thus providing the pharmacy with compensation for its costs plus a $2 markup for each prescription it sold to an individual insured by Blue Cross. The Court held that this agreement between Blue Cross and various pharmacies did not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act.[3]

The *Royal Drug* court grounded its conclusion that Blue Cross's agreements with pharmacies did not constitute "the business of insurance" under the McCarran Ferguson Act in large part on Congress's understanding of this business in 1945, when it passed that Act. At that time, the

---

[2] Two different Supreme Court cases tackle the related question of when a state law is enacted "for the purpose of regulating the business of insurance." *See Securities & Exchange Commission v. National Securities, Inc.,* 393 U.S. 453 (1969) (holding that state law requiring regulator to approve merger between two insurance companies was not enacted for "the purpose of regulating the business of insurance," because it was intended to protect security holders in the insurers rather than policyholders); *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993) (holding that state laws granting priority to policyholder claims over federal government claims were enacted for the purpose of regulating the business of insurance under the McCarran Ferguson Act because these laws "possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance"). These cases, in my view, are not particularly relevant to the question of whether state laws attempting to regulate air ambulance subscriptions as insurance were enacted "for the purpose of regulating the business of insurance." This is because there is little question as to the purpose of such state laws: to regulate air ambulance subscriptions. Instead, the key question is whether the sale of air ambulance subscriptions constitutes the business of insurance. If so, then the relevant state laws were clearly enacted for the purpose of regulating that business. By contrast, if the sale of air ambulance subscriptions is not the business of insurance, then it clearly follows that state laws attempting to regulate these contracts are not enacted for the purpose of regulating the business of insurance.

[3] The implication of this finding in *Royal Drug* was that the health insurer's agreement with pharmacies did not enjoy potential exemption from federal Antitrust Laws under Section 2(b) of the McCarran Ferguson Act. The potential reach of the limited antitrust exemption in Section 2(b) is distinct from the scope of the reverse preemption provision in that same provision. However, both issues turn on the meaning of the same phrase, the "business of insurance," which is used twice in Section 2(b) of the McCarran Ferguson Act: first in the reverse preemption provision and then in the limited antitrust exemption. *See* McCarran Ferguson Act, 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating *the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to *the business of insurance*. Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to *the business of insurance* to the extent that such business is not regulated by State law."(emphasis added)). However, it is a widely-accepted principle of statutory interpretation that identical phrases used in a single statutory section should be interpreted in the same way, especially when, as here, the language encompassing these two provisions was enacted at the same time and for the same statutory purposes. As such, it is immaterial that *Royal Drug* was focused on the meaning of the phrase "the business of insurance" in the context of the Act's limited antitrust exemption rather than its reverse preemption provision. *See, e.g., Milliman, Inc. v. Roof*, 353 F.Supp.3d 588, 601 (E.D. Ky. 2018) (relying on *Royal Drug* test for "the business of insurance," which was created to determine the scope of the McCarran-Ferguson Act's antitrust exemption, to assess when a state law was enacted "for the purpose of regulating the business of insurance" under the Act's reverse preemption provision).

Court emphasized, Congress understood "the business of insurance" to involve "the distribution of risk according to hazard, experience, and the laws of averages," rather than the direct provision of medical services, even if these services were provided for a fixed annual payment and thus helped to mitigate the risk faced by an individual purchaser. To illustrate this point, the *Royal Drug* court described in detail a 1939 D.C. Circuit case, *Jordan v. Group Health Assn*., 107 F.2d 239 (D.C Cir. 1939). In exchange for a fixed annual payment, the defendant in that case provided its members with medical services through independent providers with whom the defendant contracted. Concluding that the defendant was not engaged in the business of insurance under the law of the District of Columbia, the *Jordan* court held that even though this arrangement did create "security against loss from illness or accident," it was not insurance because it "more truly" constituted the "purchase of well-rounded, continuous medical service by its members." This followed from the fact that the defendant was concerned principally not with underwriting risk, but "with getting service rendered to its members and doing so at lower prices made possible by quantity purchasing and economies in operation." *Id.* at 245, 247. Based on this contemporaneous precedent regarding the scope of the business of insurance, the *Royal Drug* Court held that it was "next to impossible to assume that Congress could have thought that agreements (even by insurance companies) which provide for the purchase of goods and services from third parties at a set price are within the meaning of that phrase."

The second key Supreme Court case regarding the meaning of "the business of insurance" under the McCarran Ferguson Act is *United Labor Life Insurance Co. v. Pireno,* 458 U.S. 119 (1982).[4] That case focused on whether a health insurer's use of a "peer review" panel to help determine the medical necessity of claims for chiropractic care constituted the business of insurance. Drawing from *Royal Drug*, the Court devised a three-part test to define the scope of the business of insurance under the McCarran Ferguson Act:

> first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself.

Id. at 129. Applying this test to the insurer's peer-review process, the Court held that it did not constitute the business of insurance. First, the Court held that the peer review practice did not have the effect of spreading or transferring risk because it "is logically and temporally unconnected to the transfer of risk accomplished by [the insurer's] insurance policies." *Id.* at 130. Second, the court concluded that the peer-review practice was not an integral part of the policy relationship, in part because it involved an arrangement between the insurer and third parties not engaged in the business of insurance. Finally, the Court emphasized that the peer-review process was clearly not limited to entities within the insurance industry given that it relied on independent, volunteer chiropractors.

(3) Federal court decisions on whether the sale of air ambulance subscriptions constitutes "the business of insurance" under the McCarran Ferguson Act

[4] Like *Royal Drug*, *Pireno* focused on the meaning of "the business of insurance" in the context of the McCarran Ferguson Act's antitrust provision rather than its reverse preemption provision. For reasons explained earlier, however, the Court's analysis is equally applicable to interpreting the phrase in the context of the Act's reverse preemption provision.

In recent years, various federal courts have been asked to apply the foregoing legal principles to determine whether state laws attempting to regulate air ambulance subscriptions as insurance were preempted by the ADA or whether, instead, the McCarran Ferguson Act reverse-preempted the ADA with respect to these state laws. These opinions have concluded that state efforts to regulate air ambulance subscriptions like GMR's as insurance are preempted by the ADA because the McCarran Ferguson Act's reverse preemption provision does not apply in these cases.

The most significant of these decisions is the Eighth Circuit case *Guardian Flight L.L.C. v. Godfread*, 991 F.3d 916 (8th Cir 2021). In concluding that North Dakota's effort to regulate GMR's air ambulance subscriptions as insurance was preempted by federal law, the court emphasized that the sale of air ambulance subscriptions was not "the business of insurance" under Section 2(b) of the McCarran Ferguson Act and relevant Supreme Court precedent. While acknowledging that air ambulance subscriptions mitigate some risk for subscribers, it held that these subscriptions are not insurance contracts. In part, the court rested this holding on the fact that the subscriptions did not require GMR's affiliate, Guardian Flight, to indemnify its members or any other third-party providers, as do traditional insurance contracts. Nor did the subscriptions guarantee that Guardian Flight would provide air ambulance services to subscribers in need, as do typical insurance policies.

Instead, the court held that air ambulance subscriptions were akin to debt-cancellation contracts. In exchange for a flat fee, these contracts merely cancelled any debt that a subscriber would otherwise owe to an air ambulance provider as a result of any expenses that the air ambulance firm provided directly to the subscriber but that were not covered by their health insurance. The Eighth Circuit had previously held that debt-cancellation contracts sold by banks did not involve the business of insurance under Section 2(b) of the McCarran Ferguson Act, as these contracts did not implicate the primary concern of state insurance regulation, which is preventing insurers from becoming insolvent. *See First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir. 1990). So too, the *Guardian Flight* court held, state laws attempting to regulate air ambulance subscriptions do not "address the concern of insurer insolvency." This is because, unlike insurers, providers of debt cancellation contracts do not need to invest premiums to pay out future claims, meaning that they need not "incur an insurance company's investment risk."

A recent federal district court opinion, *Air Evac EMS, Inc. v. Dodrill*, N0. 2:21-CV-00310 (S.D.W. Va. Jul 8, 2021), reaches the same conclusion as *Guardian Flight*: that state efforts to regulate air ambulance subscriptions as insurance do not reverse preempt the ADA because they do not constitute a "law enacted by any State for the purpose of regulating the business of insurance." Like the *Guardian Flight* court, the *Dodrill* court emphasized that air ambulance subscriptions are not insurance policies, but are instead akin to debt cancellation contracts. Such contracts, the court noted, are found in a broad array of non-insurance industries and cannot be considered insurance policies merely because they transfer some risk from the purchaser to the seller. Importantly, the court concluded that this analysis was not impacted by a West Virginia statute declaring the sale of air ambulance subscriptions to constitute the business of insurance,

noting that "simply saying the sky is green does not make the sky green and simply calling something insurance does not make it insurance." *Id.*

Analysis of New Proposals to Regulate Air Ambulance Subscriptions as Insurance

Based on the foregoing authorities, it is my opinion that any attempt by states to regulate air ambulance subscriptions, such as GMR's, as insurance products is highly likely to continue to be struck down by federal courts. In particular, federal courts are likely to deem such efforts to be preempted by the ADA, and to not be entitled to reverse-preemption under the McCarran Ferguson Act. This is true, I believe, irrespective of how the relevant state laws are crafted or whether they purport to explicitly declare the sale of air ambulance subscriptions to constitute the business of insurance or to otherwise alter the state's definition of the business of insurance.

As noted above, the key question on which the preemption analysis turns is whether air ambulance subscriptions constitute the "business of insurance" under Section 2(b) of the McCarran Ferguson Act. If they do, then it follows that state laws attempting to regulate or prohibit these agreements would be enacted for the purpose of regulating the business of insurance, and would thus reverse preempt the ADA, which is a federal law that does not "specifically relate" to the business of insurance. By contrast, if the sale of air ambulance subscriptions does not constitute the business of insurance, then reverse-preemption under the McCarran Ferguson Act would not be available, and the ADA would indeed preempt the proposed state laws.

Importantly, this question of whether a state law regulates the business of insurance under Section 2(b) of the McCarran Ferguson Act is fundamentally a federal question regarding the meaning of a federal statute. It therefore follows that any efforts to alter state law definitions of "the business of insurance" or to declare that the sale of air ambulance subscriptions constitutes the business of insurance under state law would be irrelevant to the question of whether state laws reverse-preempt the ADA under the McCarran Ferguson Act. Such state efforts do not impact analysis of the fundamental question regarding the plain meaning of "the business of insurance" or of Congress's intent when it passed the McCarran Ferguson Act in 1945. No court has ever endorsed the notion that states can somehow expand the scope of reverse-preemption under the McCarran Ferguson Act merely by adopting state-specific definitions of the "business of insurance" that are broader than the term's plain meaning would suggest or than Congress intended when it passed the McCarran Ferguson Act.[5] This is exactly what the *Dodrill* court meant when it held that "simply calling something insurance does not make it insurance." Concluding, as some state legislators seem to believe, that they can expand the domain of their reverse preemption power under the McCarran Ferguson Act merely by declaring activities to constitute the business of insurance would fundamentally undermine basic principles of federalism, allowing states to determine for themselves how broadly they would like to displace otherwise-applicable federal law.

---

[5] There is nothing unusual about the proposition that "the business of insurance" might be defined differently for purposes of state and federal law. For instance, variable annuities are not considered insurance under federal securities laws, even though they are considered insurance products under the laws of many states. *See SEC v. Variable Annuity Life Ins. Co. of Am. (VALIC)*, 359 U.S. 65, 67–68 (1959).

In my view, it is virtually certain that federal courts will continue to conclude that the sale of air ambulance subscriptions does not constitute "the business of insurance" under the McCarran Ferguson Act, just as *Guardian* and *Dodrill* courts found. In fact, in my view the reasoning for this conclusion is much stronger than even the *Guardian* or *Dodrill* courts recognized. In particular, I view the U.S. Supreme Court case *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), as directly on point and dispositive with respect to this issue. Recall that the *Royal Drug* Court emphasized that "the business of insurance" involves "the distribution of risk according to hazard, experience, and the laws of averages" by an insurer that does not directly provide customers with services in the event of a loss. It was for this reason that the *Royal Drug* Court emphasized the holding in *Jordan v. Group Health Assn.*, 107 F.2d 239 (D.C Circ. 1939), that a medical service provider that charged fixed, advanced payments for the provision of necessary medical care over the future year was not engaged in the business of insurance.

This understanding of "the business of insurance" clearly does not encompass the sale of air ambulance subscriptions, for several key reasons. First, just like the scheme at issue in *Jordan*, the price of air ambulance subscriptions is uniform for all purchasers, and any interested party is eligible to purchase such a subscription. Thus, unlike ordinary insurance products – both as they were understood in 1945 and as they are conceived of in modern society – air ambulance subscriptions involve absolutely no rating or underwriting of risk based on the particularities of individual purchasers. This is the exact opposite of the "distribution of risk according to hazard" or "experience," whereby insurers set rates that correspond to the particular chance of loss that is posed by individual purchasers. It was such risk-based pricing that Congress had in mind when it passed the McCarran Ferguson Act, as insurers and states lobbied for the Act's reverse preemption and antitrust provisions in large part by insisting that they needed to share collective industry data about losses in order to accurately predict the risk of loss posed by individual insureds.

Second, just as in *Royal Drug*, air ambulance subscriptions, such as GMR's, fundamentally concern the purchase of services rather than the transfer and spreading of risk. This is because the primary business of the GMR companies that sell air ambulance subscriptions is, of course, to provide air ambulance services. As the *Dodrill* court stated, "Air Evac is not an insurance company – it is an air ambulance company." In that sense, the sellers of these agreements are just like the pharmacies that sold drugs in *Royal Drug* and the medical service providers that sold annual subscriptions in *Jordan*.

To be sure, it is indeed the case that air ambulance subscriptions have certain features of insurance contracts. Most notably, they do indeed transfer the risk that a subscriber will face uncovered expenses for necessary air ambulance services. Additionally, the seller of air ambulance subscriptions is able to spread this risk across a large number of people and therefore make it predictable by relying on the fact that a large number of independent risks will tend to produce predictable aggregate losses.

But GMR's air ambulance subscriptions contain these insurance-like features not for the purpose of transferring and spreading broad categories of risk, but instead as a means to manage a specific business problem that arises from the sale of conventional medical services. In

particular, air ambulance providers frequently feel that they cannot collect sufficient reimbursement from individuals' health insurers for their services, yet they are obligated by federal law to provide their services to those experiencing an emergency. The risk transfer and spreading features of air ambulance subscriptions are thus fundamentally designed to help address this perceived problem arising from the firm's broader provision of medical services; they are not designed merely to create a risk-transfer product.

In addition to the crucial fact that GMR's air ambulance subscriptions are not rated or underwritten and are sold principally to facilitate a provider's profitable provision of services, it is also highly significant to the analysis that air ambulance subscriptions do indeed closely resemble debt cancellation contracts, as the *Guardian* and *Dodrill* courts both emphasized. Unlike traditional insurance policies, the seller of an air ambulance subscription need not make any future payments to the insured or a third party in the event of a loss. Instead, it merely promises not to collect a debt that would otherwise be owed by the subscriber. Although the *Guardian* court perhaps went too far in suggesting that the conventional insurance regulatory concern of insolvency is therefore irrelevant in the context of these agreements – a purchaser of an air ambulance subscription surely has an interest in the company that sold it this subscription remaining in business so that it can provide any necessary services in the future – it was right to suggest that the nature of this concern is fundamentally altered when it comes to debt cancellation contracts. In particular, insurers must conventionally "reserve" for anticipated future losses by booking liabilities that correspond to conservative estimates of future payouts. These reserves must then typically be supported by the purchase of assets that can be used to pay the liabilities when they come due. As the Supreme Court held in in *SEC v. Variable Annuity Life, Ins. Co*., 359 U.S. 65 (1959) and reaffirmed in *Royal Drug*, "the concept of 'insurance' [consequently] involves some investment risk-taking on the part of the company." 359 U.S., at 71. By contrast, sellers of debt cancellation contracts like air ambulance subscriptions need not worry about these accounting and investing considerations because no future, contingent payments must be made to purchasers or third-parties.

Notably, this analysis largely sidesteps the three-part *Pireno* test. It does so because application of the *Pireno* test to the facts of this case is largely question-begging, in my view.[6] The *Pireno* test was devised in a setting where the identity of the insurer, the policyholder, and the non-insurer third-party (the chiropractors who operated the peer review system) was clear, and the relevant question was whether a contractual arrangement among a subset of these parties constituted "the business of insurance." In that context, the *Pireno* test made abundant sense. By contrast, application of the *Pireno* test to air ambulance subscriptions first requires deciding whether the air ambulance companies that sell subscriptions are "insurers" and the subscribers who purchase these contracts are "policyholders." If one assumes this to the case, then the *Pireno* test does indeed suggest that the sale of air ambulance subscriptions constitutes the business of insurance: the subscriptions would then "transfer or spread" a "policyholder's risk;" it would of course be an "integral part of the policy relationship between insurer and insured," as the subscription would on this understanding constitute the insurance policy itself; and the

---

[6] Both the *Guardian* and *Dodrill* courts viewed the *Pireno* test as more relevant to their analysis, and it is surely possible to incorporate the reasoning laid out herein into the confines of the *Pireno* test, should that be viewed as the preferable mode of analysis.

practice would of course be limited to entities in the insurance business because, by assumption, the sellers of air ambulance subscriptions would be deemed insurers.

If, however, one starts from the premise that the air ambulance companies that sell subscriptions are not insurers, then the *Pireno* test yields the opposite conclusion. First, it would not involve transferring or spreading the risk of "policyholders." Instead, the individuals who purchased air ambulance subscriptions would be understood to do so to manage a portion of their health risk —air ambulance expenses — that their health insurance does not cover. Moving to the second prong in the *Pireno* test, the management of these uncovered expenses would thus not at all be "an integral part of the policy relationship between the insurer and the insured," but instead largely a matter of indifference to the health insurer, who need only pay the air ambulance expenses that it covers in its own policy. And because sellers of air ambulance subscriptions are assumed in this analysis not to constitute insurers, the practice would of course exclusively involve entities outside of the insurance industry.

Thus, while the *Royal Drug* case predates the *Pireno* case, it provides a much more directly relevant set of considerations than *Pireno* for interpreting whether the sale of air ambulance subscriptions constitutes "the business of insurance" under Section 2(b) of the McCarran Ferguson Act. Focusing on the considerations from *Royal Drug* makes it plain, in my view, that the sale of air ambulance subscriptions by air ambulance providers does not constitute "the business of insurance" under the McCarran Ferguson Act. And the *Guardian* court's and *Dodrill* court's analysis only further substantiates this conclusion by emphasizing that air ambulance subscriptions more closely resemble debt cancellation contracts than insurance policies. Consequently, sellers of air ambulance subscriptions need not reserve for future losses, match these liabilities with assets, or bear any investment risk at all. These facts once again distinguish the air ambulance companies that sell subscriptions with entities engaged in "the business of insurance." For these reasons, I am highly confident in predicting that any current or future effort by a state to regulate air ambulance subscriptions as insurance will ultimately be preempted by federal law, irrespective of whether or how the underlying state statute attempts to deem such subscriptions to constitute the business of insurance for purposes of state law.