

**BEFORE ALLAN L. MCVEY, INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA**

**ASHLEY HOUVOURAS and
VALLEY HEALTH PHARMACY,**
Complainant,

v.

Administrative Proceeding No. 24-IC-175889

PRIME THERAPEUTICS, LLC,
Respondent.

FINAL ORDER

The undersigned Insurance Commissioner of the State of West Virginia hereby adopts and approves the Recommended Decision of the Hearing Examiner, appended hereto, as well as the findings of fact and conclusions of law therein contained.

In accordance with the Hearing Examiner's findings of fact and conclusions of law, the Commissioner **ORDERS** the following:

The Commissioner's November 1, 2024, Order shall be **MODIFIED** such that numbered paragraphs 2 and 3 on Page 7 of the Order are stricken from the Order and are unenforceable.

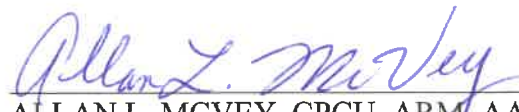
The remainder of the November 1, 2024, Order, is **AFFIRMED** and is enforceable, including the findings that Epclusa does not meet the statutory definition of specialty drug in West Virginia; that Respondent limited a beneficiary's access to Epclusa by unreasonably designating Epclusa as a specialty drug; and the Commissioner's order that Respondent pay an administrative penalty in the amount of Ten-Thousand Dollars (\$10,000.00).

The administrative stay placed on the November 1, 2024, Order is hereby lifted.

The objections of any party aggrieved by this Order and to the Recommended Decision herein adopted are preserved.

The Commissioner's final orders are subject to judicial review in the Intermediate Court of Appeals as set forth in W.Va. Code § 51-11-4(b)(4). Any person aggrieved by this Order may, **within 30 days of the entry of the judgment being appealed**, file an appeal as set forth in W.Va. Code § 33-2-14 and Rule 5(b) of the West Virginia Rules of Appellate Procedure.

ENTERED this 9th day of March, 2026.



ALLAN L. MCVEY, CPCU, ARM, AAI, AAM, AIS
INSURANCE COMMISSIONER

**BEFORE ALLAN L. MCVEY INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA**

**Ashley Houvouras and
Valley Health Pharmacy,**

Complainant,

v.

ADMINISTRATIVE PROCEEDING NO.: 24-IC-175889

Prime Therapeutics, LLC.,

Respondent.

**RECOMMENDED DECISION
OF THE HEARING EXAMINER**

On December 15, 2025, a hearing was held before Hearing Examiner Mark W. Carbone, Esquire, at the West Virginia Offices of the Insurance Commissioner, Charleston, West Virginia. Andrew Ryan, Esquire, and Jeff Black, Esquire, made appearances on behalf of the West Virginia Offices of the Insurance Commissioner (hereinafter “Commissioner”). Andrew Holly, Esquire, Brock Huebner, Esquire, Alexander Macia, Esquire, and Nicholas Bullard, Esquire appeared on behalf of Prime Therapeutics, LLC (hereinafter “Respondent”).

Based upon a thorough review of the entire record in this case, the undersigned now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. An Ohio resident, [REDACTED] presented to a Valley Health Pharmacy seeking to fill a prescription for Epclusa. Epclusa is a drug that is used to cure Hepatitis C. [REDACTED] works for Shaner Corporation.

2. The request to fill a prescription for Epclusa was presented to a Valley Health pharmacy located 5636 U.S. Route 60, Suite 1B, Huntington, West Virginia. Valley Health Pharmacy is chain of drugstores and health care facilities serving over 100,000 individuals in Southern West Virginia, Eastern Kentucky, and Southeast Ohio.

3. The prescription was denied by the [REDACTED] group health plan because it characterized Epclusa as a Specialty Drug and the plan required that all Specialty Drugs had to be issued from a Specialty Pharmacy.

4. The State of West Virginia does not have the classification of Specialty Pharmacies.

5. Shaner Corporation is based in Pennsylvania and operates over sixty properties throughout the United States, Italy, and the Bahamas. One of those properties is in Huntington, West Virginia, the Double Tree Hotel. Shaner is self insured.

6. Shaner retained Capital BlueCross as a third-party administrator to administer its employers' group health plan. Capital BlueCross is a health plan, also based in Pennsylvania. Its service area covers 21 counties in Pennsylvania. (Tr. P. 6)

7. Capital BlueCross employed the Respondent as its Pharmacy Benefits Manager (hereinafter "PBM") for Shaner employees (hereinafter called the "Shaner Plan"). The Respondent

is licensed to do business in every state, including West Virginia. The Respondent is authorized to do business pursuant to West Virginia Code § 33-51-8.

8. PBMs are organizations that are third-party administrators of prescription drug programs for commercial health plans and self-insured employer plans. PBMs are designed to aggregate the collective buying power of enrollees through their client health plans.

9. As part of its service as a PBM, the Respondent has developed four different formularies. A formulary is a list of generic and brand-name prescription medications covered by the health insurance plan. In the formulary that was chosen for Shaner employees, Epclusa is classified as a Specialty Drug.¹

10. The Shaner Plan is self-funded, and the plan states that “[a]ll issues and questions concerning the construction, validity, enforcement and interpretation of the group contract is governed by, and construed in accordance with, the laws of the Commonwealth of Pennsylvania, without giving effect to any choice of law or conflict of law rules or provisions, other than those of the federal government of the United States of America, that would cause the application of the laws of any jurisdiction other than the Commonwealth of Pennsylvania.”

11. The Shaner Plan states that participants in the plan “use select specialty prescription drugs as referenced on formulary they must use the Specialty medication preferred network designated by us to receive benefits under the coverage.” In other words when obtaining a prescription for Epclusa, the member must use a Specialty Pharmacy designated by the Health Plan.

¹ Epclusa, like many prescriptions requires prior authorization prior to the prescription being filled. It is unknown whether there was prior authorization for the prescription in question but since neither side raised that issue in their oral or written arguments, it is safe to assume that there had been prior authorization for this individual to be treated with the drug

12. In the agreement between Capital BlueCross and the Respondent, Capital BlueCross determines which drugs are classified to be Specialty Drugs.

13. In an opinion prepared by the West Virginia Board of Pharmacy, at the request of the West Virginia Offices of the Insurance Commissioner, the West Virginia Board of Pharmacy found that Epclusa did not meet the West Virginia definition of a Specialty drug as found in W.Va. Code § 33-51-11

PROCEDURAL HISTORY

On March 27, 2024, Ashley Houvouras and Valley Health filed a complaint with the West Virginia Offices of the Insurance Commissioner. The complaint alleged that the Respondent violated West Virginia law by rejecting the Epclusa prescription for [REDACTED]

The Respondent filed its initial response to the Complaint on April 11, 2024. The Respondent provided supplementary written responses on July 18, and August 23, 2024. A phone conference was held with the Commissioner on July 24, 2024.

On November 1, 2024, the West Virginia Offices of the Insurance Commissioner issued its Findings of Fact and Conclusions of Law and an Order assessing a fine against the Respondent for violation of West Virginia Code § 33-51-11.

The Order stated as follows: “Prime’s classification of Epclusa as a Specialty Drug has limited the beneficiary’s access to this drug in violation of W.Va. Code § 33-51-11(7) and (8) because the beneficiary could not fill the prescription at the pharmacy of their choice.

The Respondent has appealed that Order.

Issue

Whether the West Virginia Offices of the Insurance Commissioner erred when it found that the Respondent violated West Virginia Code §§ 33-51-11(7) and (8). If so, what is the remedy?

Burden of Proof

The parties disagree on which entity has the burden of proof. See discussion below.

Jurisdiction

The West Virginia Offices of the Insurance Commissioner has jurisdiction over this matter under West Virginia Code § 33-51 et seq..

Analysis

A. BURDEN OF PROOF

The burden of proof is borne by the party attempting to challenge a decision. In the instant matter, the Respondent is alleging that the West Virginia Offices of the Insurance Commissioner erred when it found that the Respondent violated West Virginia Code § 33-51-11(7) and (8).

The Respondent argues that the burden of proof should be on the West Virginia Offices of the Insurance Commissioner. In its brief, the Respondent correctly cites *PNGI Charles Town Gaming LLC v. W.Va. Racing Comm'n*, 765 S.E.2d 241 (W.Va. 2014) which states “an applicant for relief ... has the burden of proof.” The Respondent goes on to argue that the Commissioner is the party that is the applicant for relief. That is not the situation here. The Commissioner is not the one seeking relief.

The Respondent cites 73 A C.J.S. *Public Administrative Law & Procedure* § 296 (2014) as support for its position that the West Virginia Offices of the Insurance Commissioner has the burden of proof. C.J.S. states that the burden is on the party making the charge when the charge is made by an administrative agency. That was true when the initial charge was made. The West Virginia Offices of the Insurance Commissioner had the burden of proof when it initially charged the Respondent with the violation, however, in the Findings of Fact and Conclusion of Law decision issued by the Commissioner, it was determined that the Respondent did violate West Virginia Code § 33-51-11 (7) and (8). The Respondent is seeking relief from that Order. The Commissioner met his burden of proof in the underlying decision.

The Respondent is now challenging the underlying decision, so the burden of proof now shifts to the challenger and that is the Respondent. The Respondent has the burden of proof, by a preponderance of the evidence, to prove that the West Virginia Offices of the Insurance Commissioner erred when it found that the Respondent violated West Virginia Code § 33-51-11(7) and (8).

**B. IS WEST VIRGINIA CODE § 33-51-11 APPLICABLE SINCE [REDACTED] IS A
RESIDENT OF THE STATE OF OHIO**

The Respondent made the argument that since the individual that attempted to fill the prescription for Epclusa is not a resident of West Virginia, West Virginia Code § 33-51-11 would not be applicable to the facts of this case.

West Virginia Code § 33-51-11 spells out limitations on a Pharmacy Benefits Manager. This is known as the “Freedom of Consumer Choice for Pharmacy” Act. The issue raised here is

whether a PBM can deny a prescription because the PBM categorizes a particular drug a Specialty Drug. 33-51-11 states as follows:

A pharmacy benefits manager may not:

(7) Prohibit or otherwise limit a beneficiary's access to prescription drugs from a pharmacy or pharmacist enrolled with the health benefit plan under the terms offered to all pharmacies in the plan coverage area by unreasonably designating the covered prescription drug as a Specialty drug. Any beneficiary or pharmacy impacted by an alleged violation of this subsection may file a complaint with the Insurance Commissioner, who shall, in consultation with the West Virginia Board of Pharmacy, make a determination as to whether the covered prescription drug meets the definition of a Specialty drug;

(8) Limit a beneficiary's access to Specialty drugs;

In particular, the Respondent argues that West Virginia Code § 33-51-11(e) restricts the ability of the West Offices of the Insurance Commissioner to act against the Respondent. That Code section states as follows:

(e) This section shall apply to all pharmacy benefits managers and health benefit plans providing pharmaceutical services benefits, including prescription drugs, to any resident of West Virginia. This section shall not apply to any entity that has its own facility, employs or contracts with physicians, pharmacists, nurses, and other health care personnel, and that dispenses prescription drugs from its own pharmacy to its employees and dependents enrolled in its health benefit plan; but this section shall apply to an entity otherwise excluded that contracts with an outside pharmacy or group of pharmacies to provide prescription drugs and services.

The Respondent argues that since the individual seeking the prescription is a resident of Ohio, this section would not be applicable to the facts of this case. That is a misinterpretation of this Code Section. This Code Section states that the Act is applicable to all PBMs that provide pharmaceutical services, including prescription drugs to **any** West Virginia resident. While it is true that the individual in the instant matter is a resident of Ohio, the Respondent has not made the case that all its insureds are not residents of West Virginia. Since Shaner has a hotel in Huntington,

West Virginia, it is a safe assumption that some of the other employees of Shaner are West Virginia residents, therefore, the Respondent is providing those West Virginia Residents prescription drug services. Unless all Shaner employees or other employees using the Respondent as their PBM are domiciled in other states, West Virginia Code § 33-55-11 would be applicable to the Respondent.

C. IS EPCLUSA A SPECIALTY DRUG UNDER WEST VIRGINIA LAW

The Respondent argues that Epclusa is a Specialty Drug under the relevant West Virginia Code section. The relevant Code section is West Virginia Code § 33-51-3 which defines what a Specialty Drug is in West Virginia. The Code states in relevant part as follows:

“Specialty drug” means a drug used to treat chronic and complex, or rare medical conditions and requiring special handling or administration, provider care coordination, or patient education that cannot be provided by a non-Specialty pharmacy or pharmacist.

In his testimony, Mr. Dum, Director of Commercial Pharmacy for Capital BlueCross, relied heavily on the fact that the State of Pennsylvania, in criteria found in Pennsylvania House Bill 1993, classifies Epclusa as a Specialty Drug. The criteria used by Pennsylvania to classify a particular drug as a Specialty Drug is different from the State of West Virginia.

A drug must meet three of four requirements to be a Specialty Drug in Pennsylvania. The first requirement to be a Specialty Drug is that the cost must exceed \$950.00. Epclusa meets this requirement. West Virginia does not require that a drug be expensive to be classified as a Specialty Drug.

The second requirement in Pennsylvania is clinical monitoring. The third requirement is that there be a chronic medical condition and the fourth requirement is that the drug is not normally stocked at retail pharmacies. The West Virginia statute does not have the requirement that a drug be not normally stocked at retail pharmacies.

This West Virginia definition can be broken down into three distinct categories. The first is whether the drug is designed to treat a chronic and complex or rare medical condition. Epclusa is used to treat Hepatitis C, which both parties agree is a chronic and complex condition. Therefore, Epclusa meets that test under both Pennsylvania and West Virginia definitions of a Specialty Drug.

Pennsylvania law does not have the requirement of special handling or administration and both parties agree that Epclusa does not require any special handling or administration. Epclusa is prescribed in tablet form and does not require any specialized storage or distribution method. Epclusa is an expensive drug, costing \$80,000.00 for a three-month treatment regime.

Where the parties differ is the category of whether Epclusa requires provider care coordination or patient education that a normal pharmacist or pharmacy cannot provide.

According to the testimony of both Mr. Dum and Doctor Capehart there is some patient education required when the patient is prescribed the drug. Epclusa must be taken daily for three months. Some of the side effects of taking the drug are headaches, fatigue, and possible reactivation of Hepatitis B.

The Respondent, through the testimony of Mr. Dum, argues that these side effects may cause an individual to stop taking the drug which could result in possible death from Hepatitis C. To avoid that risk, the patient needs to be constantly monitored and educated. Mr. Dum goes on to argue that a local West Virginia retail pharmacy does not and cannot provide that monitoring.² This argument is based on the Respondent's position that most West Virginia pharmacies do not have the staff necessary to perform this task. Mr. Dum goes on to allege that since Hepatitis C is

² Mr. Dum has never worked as a pharmacist in West Virginia.

a rare disorder, most pharmacists are unaware of the complexity of Epclusa. Without counseling, monitoring and knowledge, the drug will not be taken properly potentially causing grave consequences for the patient.

Dr. Capehart, Director of Professional and Regulatory Affairs for the West Virginia Board of Pharmacy, in her testimony, stated that while many pharmacies may not have the staff to monitor whether a patient is properly taking the drug, she says that it is the duty of every pharmacist in the state to understand the drugs they are providing to a patient and that would include Epclusa, if the pharmacy chooses to carry the drug.

Dr. Capehart goes on to say that many drugs, which are available at local West Virginia pharmacies, require special instructions and education. Failure to take these drugs appropriately can be life threatening. In other words, she stated that such drugs that treat heart ailments or cancer have the same or similar requirements to make sure the patient understands the course of treatment for the drugs to be effective. Dr. Capehart says that if a pharmacy chooses to carry Epclusa, it is the duty of the pharmacist to understand the drug and to make sure that the patient is educated on the proper procedures of taking the drug, including potential side effects.

Mr. Dum stated that a Specialty Pharmacy will educate the patient when the medicine is first prescribed and will follow up with that patient to make sure that he is taking the drug as prescribed. This is accomplished through phone calls from the Specialty Pharmacy to the patient. Dr. Capehart counters that argument by stating that face-to-face education of the patient at the time the prescription is filled is more effective than a telephone calls.

Based on Dr. Capehart's expertise and experience, it was her opinion, as well as the opinion of the West Virginia Board of Pharmacy, that Epclusa is not a Specialty Drug. While Dr. Capehart

testified that many pharmacies do not have the staff to constantly monitor whether the patient is properly taking the medication, those that dispense Epclusa have a duty to educate their patients with sufficient knowledge to properly make sure that the patient understands the risks of not following the protocols surrounding the drug.

One argument that Mr. Dum failed to appreciate is the role that a physician has in making sure that the patient is educated. With such a chronic and serious condition, the physician plays a key role in educating and making sure that the patient follows the proper protocols both prior to and after receiving the prescription. The combination of physician involvement and the education provided by those pharmacists that choose to carry Epclusa is sufficient to provide proper education and monitoring so that it is reasonable that under West Virginia law that Epclusa is not classified as a Specialty Drug.

D. DOES ERISA PREEMPT THE COMMISSIONER’S ORDER

ERISA shall “supersede any and all State laws as far as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C.1144. It is the position of the West Virginia Offices of the Insurance Commissioner that while ERISA does relate to the Shaner Plan This matter is not subject to the ERISA premonition. . It cites the United States Supreme Court decision in *Rutledge v. Pharm Care Mgmt. Ass’n*, 992 U.S. 90 (2020) as the summation of case law as to the preemption criteria to be used when determining whether state law is preempted.

In *Shaw v. Delta Airlines*, 463 U.S.86, 97 (1983), the United States Supreme Court established a two-part test to determine whether ERISA preempts a state law. ERISA will preempt a state law “if it has [1] a connection with or [2] reference” to an ERISA plan.

The first issue is to determine whether the interpretation and application of West Virginia State Code § 33-51-3 has a connection with ERISA. In *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016) the United States Supreme Court held that there is a connection with ERISA if a state law attempts to regulate “as central matter of plan administration” such as recordkeeping, disclosure duties, or fiduciary obligations. (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)).

The issue then becomes whether the actions of the Commissioner rise to the level of regulating a central matter of plan administration. It does not affect recordkeeping, disclosure duties, or fiduciary duties. Therefore, it does not regulate a central matter of plan administration. Without this occurring, there is no connection with the West Virginia Code § 33-51-3 and ERISA.

The Respondent relies heavily on the argument that regulating PBMs are the same as regulating the ERISA plan. It cites a Tenth Circuit decision, *Pharm. Care Mgmt. Ass’n v. Mulready*, 78 F.4th 1183 (10 th Cir. 2023) and *Iowa Ass’n of Bus. & Indus v. Ommen*, 799 F.Supp 3d 795 (S.D. Iowa 2025). Neither one of these cases is binding on the Courts in West Virginia and at most can be characterized as persuasive. Since neither the Fourth Circuit nor any Federal Court in West Virginia has opined on whether regulation of a PBM is the same as regulating an ERISA plan, there is no reason to believe that the courts here would adopt the same rationale. Therefore, without binding precedent, it is reasonable to conclude that ERISA does not preempt West Virginia Code § 33-51-3.

Assuming arguendo that ERISA does apply, the Respondent argues that there are four reasons why the Commissioner’s Order is preempted.

The first reason stated by the Respondent is that the Order “require[s] [Shaner] to structure [its] benefit plan in particular ways, such as requiring payment of specific benefits...” *Rutledge*,

592 U.S. at 86-87 (citing *Shaw*, 463 U.S. at 85) The Order of the Commissioner does not require payment of any specific benefits since the Respondent already pays for prescriptions of Epclusa. The Order simply directs that the prescription can be filled by a West Virginia pharmacy. The Order does not add additional payments nor any specific benefits.

The next reason cited by the Respondent is that the Order is preempted because it has the “acute, albeit indirect, economic effects” of “for[cing] [benefit plans] to adopt certain scheme of substantive coverage.” *Gobeille*, 577 U.S. at 320 (quotations omitted). It is unreasonable to argue that allowing a West Virginia Pharmacy to dispense Epclusa affects substantive coverage. The medicine is already covered under the Shaner Plan. The only change under the Order is that the medicine can be obtained at a West Virginia pharmacy, this simply is not a change of substantive coverage.

The third reason stated by the Respondent is that the Order interferes with “central matter[s] of plan administration.” *Gobeille*, 577 U.S. at 320. It is not plausible to argue that prescription of one drug interferes with the central plan of the Respondent. There are hundreds of drugs in the formularies. It is not reasonable to argue that not allowing the classification of one drug as a Specialty Drug will interfere with the Respondent’s central matters of administration of the plan.

Finally, the last argument of the Respondent is that the Order undermines “nationally uniform plan administration.” *Gobeille*, 577 U.S. 323. There was no evidence submitted at the hearing that any other state other than Pennsylvania classifies Epclusa as a Specialty Drug. Without evidence that all other states classify Epclusa as a Specialty Drug, there is no reason to believe that the Commissioner’s Order upset a nationally uniform plan administration.

The Respondent argues that the Order is preempted because of the “reference to” test. Again, citing *Gobeille* it argues that “the existence of ERISA plans is essential to the [Order’s] operation .. “ Id at 319-20 The Order does one thing and that is make it clear that Epclusa is not a Specialty Drug. This is applicable to ERISA plans as well as any other supplier of medication and is not limited to the Shaner Plan. While it is true that the Shaner Plan is an ERISA plan, that is immaterial to the classification of Epclusa. Therefore, the Order does not reference the fact that the Shaner Plan is an ERISA plan, and it is not preempted by ERISA.

For the above stated reasons, ERISA does not preempt the Order of the Commissioner.

E. DOES THE COMMISSIONER’S ORDER VIOLATE EXTRATERRITORIALITY PRINCIPLES

As a general principle, the Respondent cites well established law that a state can only legislate within its own jurisdiction. *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). There can be no doubt that the decision by the Commissioner that Epclusa is not a Specialty Drug only affects those prescriptions that occur in the State of West Virginia, therefore the Order only affects parties within its own jurisdiction.

The Respondent goes on the state that “a State may not regulate commerce occurring wholly outside of its borders.” *Ass’sn Accessible Meds v. Frosh*, 887 F.3d 667 (4th Cir. 2018) While that statement is true, in the instant matter, the commerce in question occurs both in state and out of West Virginia. While it is true that the agreement between Prime and Capital BlueCross occurred out of state, that agreement is trying to regulate commerce in West Virginia. In other words, the commerce between the Respondent and Capital BlueCross is not wholly in any state, therefore West

Virginia can regulate, through the Commissioner's Order, the portion of commerce that occurs in West Virginia.

The Order of the Commissioner is not trying to regulate the Respondent and Capital BlueCross except for when their commerce occurs in West Virginia. Therefore, under the rule spelled out in *Frosh*, the Commissioner's Order is valid.

The Respondent argues that the imposition of requiring that Epclusa be classified as non-Specialty Drug, is a violation of the dormant Commerce Clause and the Due Process Clause of the United States Constitution. It states that because West Virginia is attempting to regulate conduct and contracts entered outside the state the dormant Commerce Clause and the Due Process Clause are being violated. It is true that contract between Shaner and Capital BlueCross was entered into under Pennsylvania law. In addition, the contract between the Respondent and Capital BlueCross was also entered into under Pennsylvania law. However, it is also true that Valley Health is a West Virginia entity.

The Respondent cites the case *Healy v. Beer Inst*, 491 U.S.324 (1989) as support for its contention that Order by the Commissioner is a state statute attempting to regulate commerce outside the state. *Healy* goes on to say that the attempt to regulate out-of-state commerce is not allowed even if the statute has effects inside the state.

In *Healy*, the state of Connecticut enacted a statute that out of state beer sellers must sell their product in Connecticut at the same price it sold the product in other states. There is no nexus between what the Respondent is being ordered to do and how it conducts its business in other states.

In *Rutledge*, the issue presented was whether an Arkansas law that “required PBMs to reimburse Arkansas pharmacies at a price equal to or higher than that which the pharmacy paid to buy the drug from a wholesaler.” *Id.* at 84.

The West Virginia Offices of the Insurance Commissioner cites this case in support of its contention that ERISA does not preempt state laws that only increase the cost to a PBM as long as the law does not force a plan to adopt any particular scheme or substantive coverage. The Respondent cites the same case for the position that ERISA preempts state laws that interfere with the design or administration of the plan.

The key issue to take from *Rutledge* is does the order of the Commissioner interfere with the plan in such a way that it interferes with design, administration or substantive coverage of the plan and it does not.

F. IS THE INJUNCTIVE RELIEF ORDER IMPERMISSIBLY BROAD

The Respondent is correct in its concerns that the certain language in the Commissioner’s Order is overbroad. The language which state that the Respondent must “cease and desist from failing to comply with Statutes, Rules and Regulations of the State of West Virginia” and “ensure compliance with the West Virginia Code and Code of State Rules” are not proper under Rule 65 of the West Virginia’s Rules of Civil Procedure. While Rule 65 is not binding on this action it does present some guidance as to the proper language to be used in an injunction. The language above does not specifically state the terms of the injunction and does not describe the required acts in reasonable detail.

Conclusion

The Respondent failed to prove, by a preponderance of the evidence, that the burden of proof was on the Commissioner. It also failed to prove that West Virginia Code § 33-51-11(e) is applicable to the instant matter. The Respondent failed to meet its burden of proof to prove that Epclusa should be classified as a Specialty Drug. The Respondent failed to prove that ERISA preempts the Commissioner's Order. The Respondent did not prove that the Commissioner's Order violated extraterritoriality principles. The Respondent did prove, in part, that the Commissioner's order as to injunctive relief was overly broad.

Conclusions of Law

1. The West Virginia Offices of the Insurance Commission have jurisdiction over this matter by virtue of West Virginia Code Chapter § 33-51 et seq.
2. The Respondent has the burden of proof by a preponderance of the evidence, since the Respondent is the entity seeking relief.
3. The Respondent failed to prove, by a preponderance of the evidence, that West Virginia Code § 33-51-11(e) was not applicable to the Shaner Plan.
4. The Respondent failed to prove, by a preponderance of the evidence, that Epclusa should be classified as a Specialty Drug under West Virginia law.
5. The Respondent failed to prove, by a preponderance of the evidence, that ERISA preempted the Commissioner's Order.
6. The Respondent failed to prove, by a preponderance of the evidence, that the Commissioner's Order violated extraterritoriality principles.
7. The Respondent proved, by a preponderance of the evidence, that the injunctive

relief found in the Commissioner's Order was overly broad only as to the language of "cease and desist from failing to comply with Statutes, Rules and Regulations of the State of West Virginia" and "ensure compliance with the West Virginia Code and Code of State Rules".

Recommended Decision

It is the recommendation of the Hearing Examiner that the Respondent failed to prove that the Commissioner had the burden of proof, that West Virginia Code § 33-52-11(e) is not applicable to the instant matter, that Epclusa is a Specialty Drug under West Virginia law, that ERISA preempts the Commissioner's Order, and that the Commissioner's Order violated extraterritoriality principles. The Respondent did prove that a portion of the injunctive relief sought by the Commissioner was overbroad. Therefore, the appeal should be denied in part and upheld in part.

Respectfully recommended,



MARK W. CARBONE