



April 21, 2022

The Honorable Robert Wake, Chair
Employee Retirement Income Security Act (ERISA) (B) Working Group
Regulatory Framework (B) Task Force
National Association of Insurance Commissioners (NAIC)
444 North Capitol Street, NW, Suite 700
Washington, DC 20001
EMAIL: Jcook@naic.org

SENT VIA EMAIL

Re: ERISA Handbook case summary – *Rutledge*

Dear Chair Wake:

Thank you for the opportunity to provide comments on the exposure draft of the ERISA handbook case summary – *Rutledge*. The Pharmaceutical Care Management Association (PCMA) appreciates the willingness of the NAIC to consider industry feedback on exposure drafts. PCMA believes it is a necessary practice to ensure thoughtful and efficient regulations for the private sector.

PCMA is the national trade association representing pharmacy benefit managers (“PBMs”). PCMA’s PBM member companies administer drug benefits for more than 266 million Americans who have health insurance through employer-sponsored health plans, commercial health plans, union plans, Medicare Part D plans, managed Medicaid plans and others. The ERISA benefit plans with which PCMA’s members contract include both insured and self-funded benefit plans sponsored by employers and labor unions. PBMs use a variety of benefit management tools to help these plans provide high quality, cost-effective prescription drug coverage to plan beneficiaries (employees and their families).

In light of the NAIC’s solicitation of industry feedback for the ERISA handbook case summary – *Rutledge*, PCMA offers what is outlined below.

PAGE 1

Paragraph 1

Sentence 1

- Strike “upheld” and insert “held that”
- After “drug” insert “was not preempted by ERISA”

Sentence 2

- Before “Act 900” insert “Substantively,”

Sentence 3



- After “including” insert “both”
- After “plan” insert “or an insurer insuring an ERISA plan.”

Sentence 4

- Strike entire sentence stating, “Thus, the saving clause was not at issue in this case.”

The current phrasing is misleading. The savings clause was not invoked because a court would not reach the savings clause question unless the court determined there was a connection with the clause. This would be more accurately addressed in the new proposed language below for **Page 2 – Paragraph 2 – Sentence 3** (“Furthermore, because the Court found that Act 900 was not preempted, it did not address the question of whether the Act could be saved from preemption.”).

Paragraph 2

Sentence 1

- Strike “had” and insert “initially”
- Within Footnote 2, after “(8th Cir. 2018) insert “The Eight Circuit’s separate holding that Act 900 was preempted by Medicare was not appealed to the U.S. Supreme Court and still stands today.”

Paragraph 3

Sentence 1

- Strike “however” and insert “reversed the Eighth Circuit finding of ERISA preemption.”
- Strike “held that because Act 900 ‘regulates PBMs whether or not the plans they service fall within ERISA’s coverage,’ it is analogous to the law upheld by the Court in *Travelers*, ‘which did not refer to ERISA plans because it imposed surcharges ‘regardless of whether the commercial coverage [was] ultimately secured by an ERISA plan, private purchase, or otherwise’.”
 - and insert “In its holding,” – *becomes Sentence 2*
 - Change the upper case “T” in “The” formerly at the beginning of the sentence to lower case “t”
 - and insert “described pharmacy reimbursement statutes like Act 900 as ‘a form of cost regulation,’ as to which ‘[t]he logic of *Travelers*’ controls.’ The Court concluded that Act 900 ‘does not require plans to provide any particular benefit to any particular beneficiary in any particular way.’
 - After “way” strike “held” and insert “and”
 - Change upper case “S” in “State” to “[s]”
- These changes would also strike *existing* footnote “5”
- After “controls” mentioned above insert the *new* footnote “5” that should read “*Id.* at 481.”

Paragraph 4 (continues to **PAGE 2** on which it is Paragraph 1)

Sentence 3

- Strike current language that states, “The Court emphasized that State law governs disputes between plans and providers.”

- This change would also strike existing footnote number 11 as a reference for this language.

This language should be stricken because it does not accurately represent what the Court “emphasized” and is misleading. For example, state law does not govern prompt payment disputes between plans and “providers.”. Furthermore, this language is not sufficiently pertinent to what this case summary is attempting to convey in summarizing *Rutledge*.

PAGE 2

Paragraph 2

Sentence 3 - NEW

- Insert “Furthermore, because the Court found that Act 900 was not preempted, it did not address whether the Act could be saved from preemption.

Paragraph 3

Sentence 2 – NEW

- Insert “The Court narrowly rules that state-imposed conditions on pharmacy reimbursement were non-preempted cost regulations under *Travelers*, while acknowledging that state laws may govern a central matter of plan administration, interfere with nationally uniform plan administration, or force certain schemes of substantive coverage may be subject to preemption under other ERISA precedent.”

Sentence 3

- Add “Furthermore,” to the beginning of the sentence
- Change upper case “T” in “The” formerly at the beginning of the sentence to lower case “t”

Sentence 5

- After “regulating” insert “provider.”
- Strike “, prohibitions and limitations on corporate practice of medicine, and laws regulating what pharmacies may discuss with their patients.”

Sentence 6

- Begin sentence by inserting “Since”
 - Change upper case “T” in “The” formerly at the beginning of the sentence to lower case “t”
- After “decision” insert “, there have been”
- Strike “has opened the door to”

PBMs contract with pharmacies and do not typically contract with, or employ, physicians to provide direct medical services to members. Currently, this is not an issue in other state laws. Thus, it was not an issue in *Rutledge* and should therefore be deleted.



Thank you again for the opportunity to provide feedback on NAIC's ERISA handbook case summary – *Rutledge*. PCMA appreciates your consideration of our concerns and look forward to a continued dialog.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Peter Fjelstad

Peter Fjelstad
Director, State Regulatory & Legal Affairs

CC: Jennifer Cook, Senior Health Policy & Legislative Analyst & Counsel

Enclosure: 1