

April 21, 2022

Robert Wake, Esq.
Chair, Employee Retirement Income Security Act (ERISA) (B) Working Group
National Association of Insurance Commissioners
444 North Capitol Street NW, Suite 700
Washington, DC 20001

RE: COMMENTS ON RUTLEDGE SUMMARY

Dear Chair Wake and members of the Employee Retirement Income Security Act (ERISA) (B) Working Group:

I am writing on behalf of the undersigned pharmacy organizations to provide comments on the *Rutledge* case summary for the ERISA Handbook. We applaud the Working Group's acknowledgement that *Rutledge v. PCMA* is a seminal case addressing a state's authority to enforce PBM regulations and other consumer protections and should be included in NAIC's ERISA Handbook.

The summary effectively lays out the Supreme Court's holding that the PBM regulations of Act 900, specifically rate regulations and enforcement mechanisms, do not contain an impermissible "connection with" an ERISA plan or "reference to" ERISA. This is the case even though the regulations apply to PBMs that manage ERISA plans.

The summary also correctly acknowledges that the Supreme Court did not consider or rule on all state PBM regulations. However, we believe the following edits to the summary's final paragraph would clarify the extent and limits of the *Rutledge* holding. The edits are explained in detail below:

~~However, *Rutledge* does not represent an open ended approval of state pharmacy benefit regulation in general. The~~ At the same time, the Court only considered the provisions of the Arkansas PBM law as they stood at the time PCMA filed its preemption challenge. While *Rutledge* was making its way through the appellate courts, Arkansas amended its PBM law to add new requirements and prohibitions, so it is important that *Rutledge* not be read as a finding that the Court analyzed Arkansas' PBM law as it existed in 2020. Additionally, the Court did not address issues that have been raised by other State PBM-pharmacy laws, including laws regulating networks, prohibitions and limitations on corporate practice of medicine, and laws regulating what pharmacies may discuss with their patients. ~~The *Rutledge* decision has opened the door to additional ERISA challenges, which, at the time of this writing are making their way through the courts.~~ Nevertheless, the Court's decision in *Rutledge* makes clear that ERISA is "primarily concerned with pre-empting laws that require providers to structure benefit plans in particular ways, such as by requiring payment of specific benefits or by binding plan administrators to

specific rules for determining beneficiary status.”¹ And the Court emphasized that “not every state law that affects an ERISA plan or causes some disuniformity in plan administration has an impermissible connection with an ERISA plan.”² As such, lower courts have relied on the breadth of the *Rutledge* decision to rule on state PBM laws that go beyond the scope of Act 900 (e.g., *PCMA v. Wehbi*³ and *PCMA v. Mulready*⁴).

Edit #1: Remove the first sentence of the last paragraph

The first sentence of the paragraph is redundant and should be removed. It appears to address a potential misconception that the *Rutledge* decision is a blanket approval of all PBM regulations. However, the summary expertly avoids the potential for such a misconception. Specifically, the next sentence correctly notes that the Court considered only the law as it existed when the suit was first filed, and it is followed by an acknowledgement that subsequent changes to Arkansas’s law were not considered by the Court. Additionally, the body of the summary lays out the extent of the types of regulations that are included in Act 900. The summary, as written, precludes a reader from concluding that the Supreme Court considered any laws that are not included in Act 900. As such, the redundant sentence is unnecessary, and its mention of a hypothetical “open-ended approval” would only serve to add confusion where there is none. Therefore, we ask the Working Group to remove the sentence from the summary.

Edit #2: Remove the last sentence of the last paragraph

The last sentence of the paragraph is incorrect and should be removed. The sentence mentions that the *Rutledge* decision has “opened the door to additional ERISA challenges,” which is not true. The *Rutledge* decision did not remove any barriers to filing a lawsuit on the grounds of an ERISA violation. In other words, it did not “open the door” to ERISA litigation; that door has been, and remains, open. Instead, the *Rutledge* decision creates much-needed clarity regarding a state’s authority to regulate PBMs that manage ERISA plans. Admittedly, the decision does not answer every question regarding ERISA preemption, but those remaining questions stem from the federal ERISA statute, itself. The last sentence, as written, may give a reader the mistaken impression that the *Rutledge* decision creates confusion or makes it more likely that a state will be sued on ERISA grounds. Instead, the *Rutledge* decision creates clarity on an issue suffering from congressionally created confusion, and the decision provides states with a legal authority on which to base their defense in ERISA lawsuits. Therefore, we ask the Working Group to remove the sentence from the summary.

¹ *Rutledge*, 141 S. Ct. at 480.

² *Id.*

³ 18 F.4th 956 (8th Cir. 2021).

⁴ No. 19-cv-977 (W.D. Okla. Apr. 4, 2022).

Edit #3: Address the breadth of the *Rutledge* decision

A sentence or two addressing the significance of the decision for other states and subsequent lower court decisions should be added to the summary. As previously mentioned, the summary correctly notes that the Court considered only Arkansas Act 900 in its decision. However, as with all Supreme Court decisions, the significance of the holding and analysis extend beyond the specific statute presented to the Court. The decision makes clear that a state need not adopt Act 900 verbatim in order to avoid ERISA preemption issues. Instead, the Court opines that, to avoid ERISA preemption, state PBM regulations must avoid enacting “laws that require providers to structure benefit plans in particular ways.”⁵

As the summary mentions, there are additional ERISA challenges regarding PBM regulations making their way through lower courts. None of those challenges involve statutes that are identical to Act 900. Instead, the statutes at issue in those lawsuits address PBM regulations, such as network adequacy and gag clauses, that were not considered in the *Rutledge* decision. Nevertheless, lower courts are relying on *Rutledge’s* holding to decide those cases. Two such cases have already resulted in rulings citing *Rutledge*: *PCMA v. Wehbi* and *PCMA v. Mulready*.

Ultimately, this summary is meant to help state insurance commissioners determine how to apply the *Rutledge* decision to the laws in their states. This requires a discussion, not only of the specific provisions in Act 900, but also of the reasoning behind the Court’s holding. The *Rutledge* decision applies to each U.S. jurisdiction, and the summary must address that fact. Therefore, we ask the Working Group to add the suggested sentences.

Conclusion

Thank you for the opportunity to provide these comments. If you have any questions about the information provided in this letter, please contact Matthew Magner at (703) 600-1186 or matthew.magner@ncpa.org.

Sincerely,

National Community Pharmacists Association
Alabama Pharmacy Association
Alaska Pharmacists Association
Arizona Pharmacy Association
Arkansas Pharmacists Association
California Pharmacists Association
Colorado Pharmacists Society
Connecticut Pharmacists Association
Delaware Pharmacists Society
Florida Pharmacy Association

Georgia Pharmacy Association
Hawaii Pharmacists Association
Idaho State Pharmacy Association
Illinois Pharmacists Association
Indiana Pharmacists Association
Iowa Pharmacy Association
Kansas Pharmacists Association
Kentucky Pharmacists Association
Michigan Pharmacists Association
Minnesota Pharmacists Association

⁵ *Rutledge*, 141 S. Ct. at 480.

Mississippi Pharmacists Association
Missouri Pharmacy Association
Montana Pharmacy Association
Nebraska Pharmacists Association
Nevada Pharmacy Alliance
New Jersey Pharmacists Association
New Mexico Pharmacists Association
North Carolina Association of
Pharmacists
North Dakota Pharmacists Association
Oklahoma Pharmacists Association
Oregon State Pharmacy Association
Pennsylvania Pharmacists Association
Pharmacists Society of the State of
New York
Pharmacy Society of Wisconsin
South Dakota Pharmacists Association
Tennessee Pharmacists Association
Texas Pharmacy Association
Vermont Pharmacists Association
Virginia Pharmacists Association
Washington State Pharmacy
Association
West Virginia Pharmacists Association
Wyoming Pharmacy Association

Cc: Jennifer Cook, Esq.