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April 25, 2022

Mr. Robert Wake, Chair
National Association of Insurance Commissioners
Employee Retirement Income Security Act (ERISA) (B) Working Group
Delivered via email to Mr. Bob Wake and Ms. Jennifer Cook

Re: *Rutledge v PCMA* Summary for the NAIC ERISA Handbook

Dear Chairman Wake;

On behalf of AHIP and its members, we appreciate the opportunity to provide our input on the proposed *ERISA Handbook case summary Rutledge* ([Rutledge summary](#)). The document provides an objective summary of the *Rutledge v PCMA decision*; however, there are four specific clarifications AHIP is requesting to ensure alignment with the court's ruling. AHIP respectfully requests the Working Group include the detailed edits which follow, and at the conclusion of our comments, is a copy of the Rutledge summary with AHIP's redline recommendations.

Recommendation 1: In the fourth paragraph please delete the sentence, "The court emphasized that State law governs disputes between plans and providers." The sentence does not accurately represent the focus or nuance of the Court's decision, which found that any economic impact Act 900 had on plans was indirect and did not force an ERISA plan to adopt a certain scheme of substantive coverage. Indeed, the Court was careful to reinforce its earlier precedent by making clear, by way of example, that the following types of state laws would continue to be preempted by ERISA:

- Laws that impose specific benefit mandates on plans;
- Laws that bind plans to certain eligibility criteria; and
- Laws that impose "acute" economic conditions to such an extent that the state law upsets ERISA's goal of nationally uniform plan administration.

In such cases, should a dispute arise between plans and providers, state law would be preempted by ERISA. Therefore, we are deeply concerned the Rutledge summary misstates the Court's analysis and the continued scope of ERISA preemption.

Recommendation 2: In the first two sentences of the last paragraph, the following edits ensure that the Rutledge summary most accurately captures the court's decision:

~~Current Language: However, *Rutledge* does not represent an open-ended approval of state pharmacy benefit regulation in general. The Court only considered the provisions of the Arkansas PBM law as they stood at the time PCMA filed its preemption challenge.~~

Recommended Language: The Rutledge decision relied on the specific facts presented by the Arkansas law and does not represent an open-ended endorsement of state pharmacy benefit regulation in general. Instead, the decision upholds a type of rate regulation and does not represent a broad new category of permissible regulation under ERISA.


Recommendation 3: Please delete the reference to "the corporate practice of medicine" in the last paragraph. Health insurance providers and pharmacy benefit managers contract with pharmacies and do

not typically contract or employ physicians to provide direct medical services to members. This is not a direct issue in relation to the *Rutledge v PCMA* case and not debated in recent PBM discussions.

Recommendation 4: As lower court proceedings involved questions of preemption under the Medicare statute and its implementing regulations, we believe it is important the summary clarify the Supreme Court was not asked to consider, and its decision in *Rutledge* did not address, the question of whether the Medicare statute and federal regulations preempted Act 900 with respect to Medicare Part D prescription drug plans. The 8th Circuit finding the Medicare statute and its implementing regulations preempted state law with respect to Part D plans was not subsequently included in the parties' *certiorari* petitions to the Supreme Court. As a result, the *Rutledge* decision is limited only to ERISA's preemptive force on commercial employer plans. The below edits in red in the second and third paragraphs, includes edits reflecting this important clarification, which we believe will help avoid confusion regarding the applicable scope of the *Rutledge* decision.

AHIP requests the clarifications above be included within the proposed *Rutledge* summary prior to its approval by the ERISA Working Group. Thank you very much for the opportunity to provide feedback on the draft document. If you have any questions or concerns regarding our feedback and would like to discuss the matter further, please contact me at khathaway@ahip.org or by phone at (202) 870-4468.

Sincerely,



Kris Hathaway
Vice President, State Affairs
America's Health Insurance Plans

America's Health Insurance (AHIP) is the national association whose members provide health care coverage, services, and solutions to hundreds of millions of Americans every day. We are committed to market-based solutions and public-private partnerships that make health care better and coverage more affordable and accessible for everyone. Visit www.ahip.org to learn how working together, we are Guiding Greater Health.

Redlined copy (Recommendations 1-3 are in blue type, Recommendation 4 is in red type):

RUTLEDGE v. PHARMACEUTICAL CARE MANAGEMENT ASS'N,
141 S.Ct. 474 (2020)

In *Rutledge v. PCMA*, the Court upheld an Arkansas law, Act 900, which required pharmacy benefits managers ("PBMs")¹ to reimburse pharmacies at a price equal to or higher than what the pharmacy paid to buy the drug. Act 900 required PBMs to provide administrative appeal procedures for pharmacies to challenge reimbursement prices that are below the pharmacies' acquisition costs, and it also authorized pharmacies to decline to dispense drugs when a PBM

¹ As the term is spelled in Act 900. Supreme Court style refers to "pharmacy benefit managers."

would provide a below-cost reimbursement. Act 900 applied to all transactions between PBMs and pharmacies, including transactions where the PBM was acting on behalf of a self-insured ERISA plan. Thus, the saving clause was not at issue in this case.

In a suit brought by Pharmaceutical Care Management Association (“PCMA”), a national trade association representing 11 PBMs, the Eastern District of Arkansas had ruled that Act 900 was preempted by ERISA, but not preempted by Medicare. ~~and~~ The Eighth Circuit affirmed in part and reversed in part, holding that Act 900 was preempted by both ERISA and the Medicare statute.² Both courts relied on a recent Eighth Circuit decision striking down a similar Iowa law because it “made ‘implicit reference’ to ERISA by regulating PBMs that administer benefits for ERISA plans”³ and “was impermissibly ‘connected with’ an ERISA plan because, by requiring an appeal process for pharmacies to challenge PBM reimbursement rates and restricting the sources from which PBMs could determine pricing, the law limited the plan administrator’s ability to control the calculation of drug benefits.”⁴ On the issue of Medicare preemption, the Eighth Circuit found that Act 900 acted “with respect to” CMS standards, in violation of the non-interference clause.⁵

The case was appealed to the United States Supreme Court on the sole issue of ERISA preemption. The ~~Supreme Court went on to find, however, 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.’”⁶ The Court held that under *Travelers*, “State rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not preempted by ERISA.”⁷

The Court rejected PCMA’s contention “that Act 900 has an impermissible connection with an ERISA plan because its enforcement mechanisms both directly affect central matters of plan administration and interfere with nationally uniform plan administration.”⁸ The Court acknowledged that Act 900 required ERISA plan administrators to “comply with a particular process” and standards,⁹ but explained that those enforcement mechanisms “do not require plan administrators to structure their benefit plans in any particular manner, nor do they lead to anything more than potential operational inefficiencies” for PBMs.¹⁰ ~~The Court emphasized that~~

² *PCMA v. Rutledge*, 891 F.3d 1109 (8th Cir. 2018).

³ 141 S.Ct. at 479, quoting *PCMA v. Gerhart*, 852 F.3d 722, 729 (8th Cir. 2017).

⁴ *Id.* at 479, quoting *Gerhart*, 852 F.3d at 726, 731.

⁵ *PCMA v. Rutledge*, 891 F.3d 1109, 1113 (8th Cir. 2018).

⁶ *Id.* at 481, quoting *Travelers*, 514 U.S. at 656.

⁷ *Id.* at 480, citing *Travelers*, 514 U.S. at 668.

⁸ *Id.* at 481–482.

⁹ *Id.* at 482, quoting PCMA brief at 24.

¹⁰ *Id.*

~~State law governs disputes between plans and providers.~~¹¹ The Court held further that ERISA did not preempt Act 900's decline-to-dispense provision, even though it "effectively denies plan beneficiaries their benefits" because any denial of benefits would be the consequence of the lawful state regulation of reimbursement rates and the PBM's refusal to comply.¹²

Finally, the Court rejected PCMA's claim that the law had an impermissible "reference to" ERISA. As the Court explained, Act 900 "applies to PBMs whether or not they manage an ERISA plan," and Act 900 did not treat ERISA plans differently than non-ERISA plans.¹³

~~However, *Rutledge* does not represent an open-ended approval of state pharmacy benefit regulation in general. The Court only considered the provisions of the Arkansas PBM law as they stood at the time PCMA filed its preemption challenge. The *Rutledge* decision relied on the specific facts presented by the Arkansas law, and does not represent an open-ended endorsement of state pharmacy benefit regulation in general. Instead, the decision upholds a type of rate regulation and does not represent a broad new category of permissible regulation under ERISA.~~ 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.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 481.