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VIA EMAIL

Mr. Edwin S. Kneedler
Deputy Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *Blue Cross & Blue Shield of Montana, Inc. v. Fossen et al.*
(U.S. Supreme Court Docket No. 11-1155)

Dear Mr. Kneedler:

Respondents do not believe that further review in this case is appropriate or necessary. The decision below is correct. Indeed, it reflects the position explicitly taken by the federal government in *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999) (*infra* at 2-3). Moreover, it is consistent with decades of Supreme Court precedent (*infra* at 3-5) and does not conflict with the decision of any court of appeals (*infra* at 6-7).

Relevant Procedural History

In this case, the Ninth Circuit concluded that a Montana "Unfair Insurance Practices" statute was not preempted by the Employee Retirement Security Act of 1974, 29 U.S.C § 1001 *et seq.*, ("ERISA"). *See Fossen et al. v. Blue Cross and Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1113-14 (2011) (the "Opinion").

In conducting its analysis, the court of appeals proceeded in three steps: First, the panel accepted that the Montana statute was covered by the express preemption provision of ERISA because "[t]he parties [did] not dispute that the statute 'relate[s] to' an ERISA plan. 29 U.S.C. § 1144(a)." Opinion at 1113 n.9. Second, the panel concluded that the Montana statute was "exempt from [express] preemption [under ERISA] because it falls within the insurance savings clause of [29 U.S.C. § 1144](b)(2)(A)." Opinion at 1114. Finally, the panel determined that the Montana statute was not conflict preempted because it "does not run afoul of [ERISA's civil remedies provisions] and [*Aetna Health Inc. et al. v.*] *Davila* [*et al.*, 542 U.S. 200 (2004)] . . . ." *Id.*

Petitioner filed a petition for *certiorari* in which it challenged only the conflict preemption holding of the court of appeals. In other words, Petitioner has accepted that the Montana statute is "saved" from express preemption under ERISA.

To be clear: the position advanced by Petitioner is that any state law cause of action that is expressly preempted under 29 U.S.C. § 1144(a) but saved under 29 U.S.C. § 1144(b)(2)(A) must be enforced exclusively under 29 U.S.C. § 1132(a). Petitioner maintains that Respondents "could have, and should have, pursued a claim under ERISA . . . to enforce any saved anti-discrimination rule contained in the Montana unfair-trade-practices statute." Pet. 26. Specifically, Petitioner contends that "a saved anti-discrimination rule in the Montana unfair-insurance-practices statute was a term of the [relevant ERISA] Plan and enforceable through [29 U.S.C. § 1132](a)(3)." Pet. 27.

The Decision Below Reflects the Previously Endorsed View of the United States

In *UNUM Life Ins. Co. of America v. Ward*, the United States urged the Court to avoid reaching the very question presented by Petitioner in this case: "the difficult issue of whether ERISA preempts a state law cause of action or remedy independent of Section 502, even where the state law in question 'regulates insurance' within the meaning of the insurance savings provision." Brief for the United States as *Amicus Curiae* Supporting Petitioner in Part and Supporting Respondent in Part in *UNUM Life Ins. Co. of America v. Ward*, O.T. 1998, No. 97-1868, 1998 WL 839957, *19 (the "U.S. *UNUM* Br.").[1]

The government went on, however, to articulate its position on the merits of that "difficult issue." Put simply: "Section 502(a). . . . does not in itself require that a state law that "regulates insurance" [be] preempted if it provides a state-law cause of action or remedy." U.S. *UNUM* Br. at *25. In defending this position, the government made several arguments that bear mention:

1. The plain language of 29 U.S.C. § 1144(b)(2)(A) saves even state laws that "confer[ ] causes of action or affect [ ] remedies that regulate insurance." U.S. *UNUM* Br. at *23. The logic of this argument is simple:

> The savings clause states that "*nothing in this subchapter* shall be *construed* to exempt or relieve any person from any law of any state which regulates insurance. (citation omitted). "[T]his subchapter" includes, Section 502, which has been construed to provide exclusive remedies under ERISA. . . . Accordingly, the savings clause by its terms directs that nothing in Section 502, which concerns causes of action and remedies under ERISA, shall be "construed" to relieve or exempt any person from "any law" of a State that regulates insurance. Thus, the insurance savings clause, on its face, saves state law conferring causes of action or affecting remedies that regulate insurance. . . .

U.S. *UNUM* Br. at *23 (emphasis in original).

2. Common sense further bolsters the plain language. To wit: "[i]t is not clear why Congress would have wanted to foreclose all access to state-created remedies or sanctions to enforce [saved] substantive law. . ." U.S. *UNUM* Br. at *23. "Surely, for example, ERISA's saving of 'any generally applicable criminal law of a State,' 29 U.S.C.

[1] The Court agreed. *See UNUM*, 526 U.S. at 377 ("The case . . . does not raise the question whether 502(a) provides the sole launching ground for an ERISA enforcement action.").

§ 1144(b)(4), authorizes the State to bring a criminal prosecution, not merely to have its substantive law applied in a suit brought under ERISA." U.S. *UNUM* Br. at *23 n.12.[2]

3. "[T]he force of the savings provision's express terms is reinforced by the Court's frequent recognition. . . that ERISA's preemption provisions must be read against the background of the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" U.S. *UNUM* Br. at *24-25.[3] And "it is now clear that preemption analysis must begin with the presumption that Congress did not intend to preempt state law, particularly in 'fields of traditional state regulation [like insurance].'" U.S. *UNUM* Br. at *25 (quoting *Travelers*, 514 U.S. at 654-655).

According to Petitioner, "the Solicitor General arguably has switched positions on the issue in the past." Pet. 14; *see also* Pet. 21 (describing the position of the United States in *UNUM*); Pet. 23 (describing the position of the United States in *Davila*). Petitioner is mistaken. As explained in *UNUM*, the positions taken by the government are consistent. In *Pilot Life*, it focused on the exclusive nature of ERISA's civil remedies provisions because "Congress, in short, clearly intended the remedial provisions of ERISA to be exclusive of any generally applicable state-law remedies related to ERISA plans." U.S. *UNUM* Br. at *22 (citations omitted). "It does not follow, however, that ERISA Section 502 should inform the preemption inquiry to the same extent with respect to a state-law cause of action or remedy that specifically 'regulates insurance' as it does with respect to one of general applicability." *Id.* And, as explained below (*infra* at 4-5), the United States position in *Davila* reflects this essential distinction.

The Decision Below Is Consistent with Supreme Court Precedent

Petitioner argues that the decision below is contrary to two lines of cases by the Court: ERISA preemption cases and ERISA remedies cases. Petitioner is wrong on both counts.

First, the decision below does not conflict with any previous ERISA preemption case.

1. There is no conflict with *Pilot Life*. Petitioner's contrary position (Pet. Reply 10) is untenable. In *Pilot Life*, the Court held that the state law causes of action pled by plaintiff were not "laws that 'regulate[e] insurance' under the savings clause." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). As such, any discussion of conflict preemption was merely *dictum*. *See, e.g.*, Pet. 21 (conceding that "in *Rush Prudential HMO, Inc. v. Morgan*, 536 U.S. 355, 377 (2002), the Court termed *Pilot Life's* discussion of the preemptive force of ERISA's remedies in situations involving saved state insurance laws to be 'dictum.'").

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[2] Moreover, there is no risk to the federal interest because "notwithstanding the savings clause, an insurance law that conflicts with a provision of ERISA itself is preempted by virtue of the Supremacy Clause." *Id.* (citation omitted).

[3] The brief quoted *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) and cited *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n.8 (1997) and *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316, 325 (1997).

2. There is no conflict with *UNUM*. Petitioner suggests that there is a conflict arguing that "[t]he Court of Appeals. . . failed to follow UNUM's lead. . .", Pet. 31, by permitting something other than "the application of saved state insurance law as a relevant rule of decision in [a] §502(a) action." Pet. 21. But the plaintiff in *UNUM* sued in federal court under 29 U.S.C. § 1132(a)(1)(B) seeking benefits under ERISA. The only issue was whether a state insurance law could be applied by the federal court to avoid dismissal of the ERISA action as procedurally barred. Indeed, the Court expressly noted that "[w]hatever the merits of UNUM's view of §502(a)'s preemptive force, the issue is not implicated here." *UNUM*, 526 U.S. at 376 (footnote omitted).

3. There is no conflict with *Davila*. Petitioner incorrectly argues that *Davila* stands for the proposition that: "Whenever a litigant seeks to use an otherwise saved state law as a '*separate* vehicle' for enforcement 'outside of, or in addition to ERISA's remedial scheme". . . "the state law claim is preempted." Pet. 25 (citing *Davila*, 542 U.S. at 216-17). The complete quotation from *Davila*, however, reads: "even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Davila*, 542 U.S. at 217-18 (emphasis added).

The words omitted by Petitioner are *critical* to the holding of the *Davila* Court. To be clear: the *Davila* Court held that Congress preempted the field in one important area: claims for benefits due from an ERISA plan. And, as such, any state law cause of action (even those that might "arguably" be characterized as "regulating insurance") may be removed to federal court and litigated under 29 U.S.C. §1132(a)(1)(B) or not at all.

Nowhere, however, did the *Davila* Court hold that Congress preempted the field in other areas. In fact, the Court repeatedly made clear that its holding was addressed only to a plaintiff's attempted use of a state-law cause of action to vindicate "particular rights and obligations established by [ERISA] benefit plans." *Davila*, 542 U.S. at 213. *See also id.* at 206 n.1. ("[W]e can resolve these cases entirely by reference to ERISA § 502(a)(1)(B)."); *id.* at 209 ("Since LMRA § 301 converts state causes of action into federal ones for purposes of determining the propriety of removal, so too does ERISA § 502(a)(1)(B).") (citation omitted); *id.* at 211 ("It is clear, then, that respondents complain only about denials of coverage promised under the terms of ERISA regulated employee benefit plans.").[4]

Indeed, as the United States expressly acknowledged in *Davila*: "Because the state-law claims in these cases depend on a showing that respondents were entitled to benefits

[4] Moreover, the *Davila* Court also determined that Congress did not intend to preempt state law to the extent that it implicates a legal duty that is independent of ERISA or the terms of an ERISA plan. *See Davila*, 542 U.S. at 210 ("[I]f an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B).") (emphasis added). *See also id.* at 212 ("The duties imposed by the [Texas law] in the context of these cases, however, do not arise independently of ERISA or the plan terms."); *id.* at 214 ("[R]espondents bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA.").

under their ERISA plans, these cases do not present the question whether a state-law claim that does not require adjudication of rights under an ERISA plan may nonetheless fall within the scope of Section 502(a) and therefore be completely preempted." Brief for the United States as *Amicus Curiae* Supporting Petitioners in *Aetna Health Inc. et al. v. Davila et al.*, O.T. 1993, Nos. 02-1845, 03-83, 2003 WL 23011479, *13 n.2.

Second, the decision below does not conflict with any previous ERISA remedies case.

1. Because the "saved" Montana statute is not conflict preempted, Respondents are not limited to ERISA causes of action or remedies. Respondents agree with the position articulated by the United States in *UNUM*: "where ERISA does *not* preempt the field – here, because the insurance "exception" in Section 514(b) applies – there is force to the corresponding proposition that both state substantive insurance law and at least some enforcement measures necessary to make that substantive law effective are saved." U.S. *UNUM* Br. at *23 n.12. No decision of the Court has ever held to the contrary.

As acknowledged above (*supra* at 4): the Court in *Davila* held that Congress intended to limit all claims for benefits from an ERISA plan to litigation in federal court under 29 U.S.C. § 1132(a)(1)(B). Accordingly, state causes of action that, in essence, are disguised benefit claims, are preempted by 29 U.S.C. § 1132(a)(1)(B) even if they would "arguably" be saved from express preemption by 29 U.S.C. § 1144(b)(2)(A). One could not, however, fairly read any prior decision of the Court (including *Davila*) as placing such a limitation on "saved" causes of action or remedies that do not seek any benefits from an ERISA plan. The reason is simple: a contrary rule would result in a limited "catchall" civil remedies provision (29 U.S.C. § 1132(a)(3)) extinguishing or emasculating a wide range of "saved" state insurance laws and enforcement measures.

2. In any event, the remedies available to Respondents under ERISA and the "saved" Montana statute in this case are effectively conterminous.[5] As the Ninth Circuit noted, "the Fossens seek relief (restitution) that is consistent with ERISA's enforcement scheme. . . ." Opinion at 1114. If necessary, Respondents will seek relief under 29 U.S.C. § 1132(a)(3) and establish that Petitioner breached its fiduciary duties. If Respondents succeed, Petitioner will be "surcharged" in the amount of its ill-gotten gains (e.g., excessive premiums). Petitioner's response – that the Court's endorsement of various categories of equitable relief including "surcharge" in *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011) is merely *dictum* – is simply not credible.

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[5] The court of appeals expressly found that "the unfair insurance practices statute creates a right that is separate from *and could not possibly be remedied under ERISA*." Opinion at 1114. It is unclear whether the legal position advanced by Petitioner is predicated on the assumption that a "saved" state insurance law is, in fact, enforceable under ERISA. If yes, then the petition is nothing more than a well-dressed plea for error correction. If no, then the petition is a radical and unprecedented attempt to gut the savings clause, which would prevent state legislators and insurance regulators from prohibiting any conduct that is not already prohibited by ERISA. In any event, Respondents reserve the right to pursue a claim under 29 U.S.C. § 1132(a)(3) if necessary and appropriate as the lawsuit continues.

The Decision Below Does Not Conflict With the Decision of Any Court of Appeals

Petitioner claims that the Ninth Circuit has joined the Third Circuit in splitting with decisions of the Fourth, Sixth, Seventh, and Eighth. Pet. Reply 2. Petitioner is wrong.

Each of the decisions cited by Petitioner from the Fourth, Sixth, Seventh, and Eighth Circuits hold – at best – that a plaintiff seeking ERISA benefits is limited to a 29 U.S.C. § 1132(a)(1)(B) claim even if that plaintiff is relying on a state law that the court has found to be "saved" under 29 U.S.C. § 1144(b)(2)(A).[6]

- In the Fourth Circuit, Petitioner cites *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278 (CA4 2003). But *Singh* merely held that "once [a saved state-law insurance] term or benefit becomes part of the plan, a suit to enforce [the plan] may only be brought under 502(a)." *Id.* at 289 (emphasis added).
- In the Sixth Circuit, Petitioner cites *Ruble v. UNUM Life Ins. Co.*, 913 F.2d 295 (CA6 1990). But *Ruble* merely held that "regardless of how Michigan's insurance code might have modified the terms of the . . . insurance policy . . . any action brought by a beneficiary to enforce the policy as so modified could only be brought under 502 of ERISA". *Id.* at 297 (emphasis added)
- In the Seventh Circuit, Petitioner cites *Plumb v. Fluid Pump Serv., Inc.*, 124 F.3d 849 (CA7 1997). But *Plumb* merely held that "any action brought by a beneficiary to enforce the policy as so modified could only be brought under 502 of ERISA." *Id.* at 862 (quoting *Ruble*, 913 F.2d at 297) (emphasis added).
- In the Eighth Circuit, Petitioner cites *Fink v. Platte Community Mem. Hosp., Inc.*, 324 F.3d 685 (CA8 2003) and *Donatelli v. Home Ins. Co.*, 992 F.2d 763 (CA8 1993). The former merely held that "state law causes of action are completely preempted by ERISA when they ''arise from the administration of benefits'." *Fink*, 324 F.3d at 689 (citations omitted). And the latter decision is no different. As the court noted: "[Plaintiff] seeks to recover benefits under [an ERISA] policy. Her state law claim [is thus] preempted by § 1132. . . . " *Donatelli*, 992 F.2d at 765.

To be clear: the law is precisely the same in the Third and Ninth Circuits. *See, e.g., Barber v. Unum Life Ins. Co. of Am.*, 383 F.3d 134, 141 (CA3 2004) (holding, in a case involving a claim for benefits, that "even if [the state law] were found to 'regulate insurance' under the saving clause, it would still be preempted because the punitive damages remedy supplements ERISA's exclusive remedial scheme."); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 494 (CA9 1988) (holding that a private right of action created by an assumed to be saved state-law was conflict preempted and

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[6] Petitioner also argues that the Ninth Circuit decision in this case is in tension with decisions of the Fifth and Eleventh Circuits involving the jurisdictional question of complete preemption. Pet. 18 n.2. But the Fifth and Eleventh Circuit decisions cited by Petitioner are also limited to the benefits context. *See Arana v. Ochsner Health Plan*, 338 F.3d 433, 435 (CA5 2003) (en banc) ("Arana states a claim to recover benefits or to enforce his rights that is completely preempted by ERISA § 502(a)(1)(B)."); *Ervast v. Flexible Prods. Co*, 346 F.3d 1007, 1013 n.7 (CA11 2003) ("if a claim were for the recovery or clarification of benefits under an ERISA plan").

therefore could not "supplement the ERISA civil enforcement provisions available to remedy improper claims processing.").

Respondents are not aware of any court of appeals case – and none is cited by Petitioner – that has held that a plaintiff who is not seeking any ERISA benefits is somehow limited to a 29 U.S.C. § 1132(a)(3) claim rather than a state-law cause of action that such court has found to be "saved" under 29 U.S.C. § 1144(b)(2)(A).

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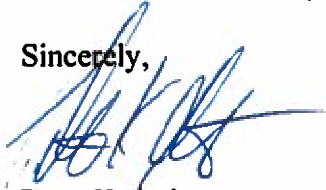
If you have any questions, please let me know. Otherwise, my colleagues and I look forward to our meeting at 3pm EST on Thursday, September 6th.

Sincerely,



Peter K. Stris
Counsel for Respondents

cc: Mr. Curtis E. Gannon, Assistant to the Solicitor General