Case No. S271501
2nd Dist. No. B303451
Los Angeles Superior Court Case No. BC631077

IN THE SUPREME COURT
OF CALIFORNIA

LARRY QUISHENBERRY

Plaintiff and Appellant

vs.

UNITED HEALTH CARE, INC., UNITED HEALTH GROUP, INC., UNITED HEALTH CARE – CALIFORNIA, UHC – CALIFORNIA, UNITED HEALTHCARE INSURANCE, INC., UNITED HEALTHCARE SERVICES, INC., HEALTHCARE PARTNERS AFFILIATES MEDICAL GROUP, AND HEALTHCARE PARTNERS MEDICAL GROUP

Defendants and Respondents.

From the Superior Court for Los Angeles County
Honorable Ralph Hofer, Judge
Department D
Phone: (818) 265-6413

OPENING BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate. Cal. Rules of Court, Rule 8.208(d)(3).

Dated: February 2, 2022

By: _____
RUSSELL S. BALISOK,
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Federal Statutes

California Cases

INTRODUCTION

This Court's grant of review is limited to the following two issues:

1. Are plaintiff's claims for negligence, elder abuse, and wrongful death expressly preempted by the Medicare Part C preemption clause (42 U.S.C. § 1395w-26(b)(3))?

2. Are Plaintiff's claims for negligence, elder abuse and wrongful death impliedly preempted based on the doctrine of "obstacle preemption?"

STANDARD OF REVIEW

On review of the judgment of dismissal after the superior court's orders sustaining defendants' demurrers, the standard of review is *de novo* to determine whether the complaint alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. *McCall v. PacifiCare of California* (2001) 25 Cal. 4th 412, 415.

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LEGAL DISCUSSION

1. THE MEDICARE PART C PREEMPTION CLAUSE DOES NOT EXPRESSLY PREEMPT CALIFORNIA COMMON LAW NOR CALIFORNIA STATUTES OF GENERAL APPLICABILITY SUCH AS THE ELDER ABUSE ACT

The Medicare preemption provision at 42 U.S.C. §1395w-26(b)(3) (hereinafter, "the clause") provides:

> (3) Relation to State laws
>
> The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part. (emphasis added.)

Plaintiff's claims each address the failure of the defendants to provide reasonably needed healthcare and therefore are claims which are traditionally regulated by the states. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 US 645, 661. *See also* 42 U.S.C. §1395 ("Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided,"). Thus courts are to assume that state laws are not to be expressly preempted unless that was the clear and manifest purpose of Congress. This is known as the presumption against preemption, and its role is to " ' "provide[ ] assurance that 'the federal-state balance' [citation] will not be disturbed

unintentionally by Congress or unnecessarily by the courts." ' *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal. 4th 772, 778.

There is nothing "clear or manifest" in the clause which would support express preemption of Plaintiff's claims. As noted in Quishenberry's Petition for Review, reviewing courts have reached conflicting decisions on the meaning of the clause. This split of authority is, itself, clear evidence that the clause is not clear and manifest in its expression of Congressional intent to preempt. Second, looking to the decision in *Cotton v. Starcare Medical Group* (2016) 183 Cal. App. 4th 437, Justice Rylarsdaam explained that the clause's use of the term "standards" and the phrases "law or regulation" and "with respect to MA plans" reflects Congress intended to preempt only 'positive state enactments,' that is laws and administrative regulations, but not the common law. *Cotton* at 450. *Cotton* explained that the phrase "law or regulation" is most naturally read as not encompassing common-law claims. *Id.*

Cotton went on to explain that the clause extends only to positive state laws or regulations "with respect to MA plans.' The phrase "with respect to" means with reference to, relating to or pertaining to. *Cotton* at 450-451. While state statutes and regulations seeking to regulate HMO appear within the scope of the express preemption of the clause, neither common law nor statutes of general applicability, such as the Elder Abuse Act would fall with the scope of that provision under *Cotton*.

In sum, with respect to the holding in *Cotton*, it plainly appears that the clause's express preemption effect does not extend to the Plaintiff's common law claims, nor its elder abuse claims.

Roberts v. United Healthcare Services, Inc. (2016) 2 Cal. App. 4th 132 reached the opposite result. ("Here, the plain language of the [clause] plainly spells out Congress's intent that the standards governing Medicare Advantage plans will displace 'any State law or regulation' . . . ." *Roberts* at 143. *Roberts* went on to explain that because the plaintiff's claims for violation of the unfair competition law, unjust enrichment and for financial elder abuse do not deal with either of the preemption clause's exceptions for licensing or plan solvency, they are preempted "with respect to [United Healthcare's] plan." *Id*. This last statement from *Roberts* applying the effect of preemption to the plan, shows that *Roberts* misread the "with respect to" clause language which qualifies the scope of the preemption provision.

Riegel v. Medtronic, Inc (2008) 552 U.S. 312 reviewed a preemption provision with markedly different language and found actions based on state common law claims to be preempted. In *Riegel* the Court examined the scope of preemption at 21 USC §360c: "Except as provided in subsection (b) of this section, no State or political subdivision of a state may establish or continue in effect with respect to a device intended for human use *any requirement* (1) which different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any

other matter included in a requirement applicable to the device under this chapter.

At p. 324 of its opinion, *Riegel* explained that in interpreting two other statutes the Court held that a provision preempting state "requirements" preempted common-law duties, citing *Bates v. Dow Agrosciences LLC,*(2005) 544 U.S. 431; and *Cipollone v. Liggett Group, Inc*. (1992) 505 US 504. *Riegel* explained that Congress is entitled to know what meaning the Court will assign to terms regularly used in its enactments. "Absent other indication, reference to a State's "requirements" includes its common law duties. *Id*. If Congress wanted to preempt state common law claims in an area traditionally reserved to the States, it certainly knew how to express that view.

Instead, Congress ambiguously used "state law or regulation" and <u>expressly restricted the scope of preemption to state laws with respect to Medicare Part C organizations</u>. *In effect, this condition more generally refers to state laws aimed at HMOs.*

There is another independent reason to find that Quishenberry's claims are not preempted. Instead of relying solely on state common law and statutes of generally, as the Respondents have noted, Quishenberry's claims include Respondents' violation of federal standards concerning his right to remain in a skilled nursing facility environment for 100 days to provide physical therapy to assist him to attain or maintain function. In addition the federal standard requires Respondents

to provide skilled nursing facility care when necessary to treat conditions arising out of his care at the nursing facility. This would include care for the pressure sores on his feet which either developed or progressed during his relatively brief residence at the skilled nursing facility. Such claims parallel federal requirements and these would not be preempted, even by the preemption provision in *Riegel*. *See Riegel* at 330.

In sum, while a state's enactment of statutes or regulations aimed at Medicare Part C plans, such as in an attempt to regulate those plans, appears expressly preempted, claims such as those stated by Mr. Quishenberry are based on laws which apply to every person within the state including the operators of Medicare Part C plans such as the Defendants in this action. In addition, Quishenberry's claims are also based on federal standards and these parallel claims are not preempted.

2. PLAINTIFF'S CLAIMS ARE NOT IMPLIEDLY PREEMPTED BASED ON THE DOCTRINE OF OBSTACLE PREEMPTION

> "Obstacle preemption permits courts to strike state law that stands as 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.] It requires [1] proof Congress had particular purposes and objectives in mind, [2] a demonstration that leaving state law in place would compromise those objectives, and [3] reason to discount the possibility the Congress that enacted the

legislation was aware of the background tapestry of state law and content to let that law remain as it was." (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 312).

A finding of obstacle preemption in this case fails to meet the second and third of the three required elements cited in *Quesada.* That is, it appears that Congress, and its delegated regulatory agency established regulatory standards to govern the operation of Medicare Part C plan operators and thus had particular purpose and objectives in mind. But the second element cannot be satisfied because application of the state laws on which the plaintiff relies in this case would not compromise any federal objective. This point clearly distinguishes Quishenberry's claims from the claims stated in *Roberts*, where the federal law stated the objective of reserving to the federal government the role of determining the truthfulness of marketing materials and the plaintiff's action alleged that those marketing materials were false.

The third element would require the defendants in this case to prove that Congress was unaware of the background tapestry of state laws in California and across the nation providing for civil actions based on breaches of the standard of car and other negligence principles, nor of state laws protecting elders and other disadvantaged persons across the nation. Any attempt to prove Congress' lack of such awareness is destined to failure

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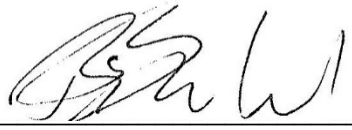
3. CONCLUSION

It is apparent that Plaintiff's action is neither expressly nor impliedly preempted, and that the opinion of the Court of Appeal should be vacated, and the judgment of the trial court dismissing this action should be reversed.

BALISOK & ASSOCIATES, INC.

BY: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

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Dated: February 2, 2022

RUSSELL S. BALISOK

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

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Hon. Ralph Hofer Glendale Courthouse 600 E. Broadway Glendale, CA 91206	Trial Court

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Executed on **February 2, 2022** at Los Angeles, California.

/s/ Dorothy A. Droke

_____

Dorothy A. Droke

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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