

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

UNITEDHEALTH GROUP,  
UNITEDHEALTHCARE  
INSURANCE COMPANY; UNITED  
HEALTHCARE SERVICES, INC.;  
UMR, INC.; OXFORD HEALTH  
PLANS, INC.; SIERRA HEALTH  
AND LIFE INSURANCE CO., INC.;  
SIERRA HEALTH-CARE OPTIONS,  
INC.; and HEALTH PLAN OF  
NEVADA, INC.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT, STATE OF NEVADA,  
CLARK COUNTY; and THE  
HONORABLE NANCY L. ALLF,  
District Court Judge,

Respondent,

and

FREMONT EMERGENCY  
SERVICES (MANDAVIA), LTD.;  
TEAM PHYSICIANS OF NEVADA-  
MANDAVIA, P.C.; CRUM,  
STEFANKO AND JONES, LTD. dba  
RUBY CREST EMERGENCY  
MEDICINE,

Real Parties in Interest.

Case No. 81680

District Court Case No. 21-07652  
Electronically Filed  
Mar 16 2021 05:36 p.m.

Elizabeth A. Brown

Clerk of Supreme Court

**REAL PARTIES IN INTEREST  
NOTICE OF  
SUPPLEMENTAL AUTHORITY**

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*Attorneys for Real Parties in Interest*

Pursuant to NRAP 31(e), Real Parties in Interest Fremont Emergency Services (Mandavia), Ltd. (“Fremont”); Team Physicians of Nevada-Mandavia, P.C. (“Team Physicians”); Crum, Stefanko and Jones, Ltd. dba Ruby Crest Emergency Medicine (“Ruby Crest” and collectively the “Health Care Providers”) respectfully submit this notice providing the Ninth Circuit Court of Appeals’ recent decision in *Emergency Group of Arizona PC v. United Healthcare, Inc.*, No. 20-15684, as further support for their Answer To Petition For Writ Of Prohibition, Or, Alternatively, Mandamus (“Petition”) filed by petitioners UnitedHealth Group, Inc.; United Healthcare Insurance Company; United Health Care Services, Inc.; UMR, Inc.; Oxford Health Plans, Inc.; Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc. and Health Plan of Nevada, Inc. (“United”).

On March 3, 2021 the Ninth Circuit Court of Appeals issued its decision in *Emergency Group of Arizona v. United Healthcare*. In a unanimous decision, the Ninth Circuit held that the plaintiffs’ state law claims—which are substantively identical to those in the case at bar—were not completely preempted by ERISA since the “alleged legal duties ‘would exist whether or not an ERISA plan existed’ and thus are independent from the legal obligations imposed by the ERISA plans.” (citing *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 950 (9th Cir. (2009))(legal duties based on an alleged oral contract between the parties were independent duties); *Barmat v. John & Jane Doe Partners*, A-D, 747 P.2d

1218, 1220 (Ariz. 1987)(en banc)(‘A contract implied in fact is a true contract—an undertaking for contractual duty imposed by ‘reason of promissory expression.’” (quoting 1 A. Corbin, Corbin on Contracts &18 at 39 (1963)). The Ninth Circuit reversed and remanded the action with instructions to the district court to remand to state court in Arizona. United’s Petition and Reply Brief relied on the now-reversed district court decision. *See* Petition p.4; Answering Brief pp. 13-14, 17. A copy of the Ninth’s Circuit’s decision is submitted herewith.

*Emergency Group of Arizona v. United Healthcare* supports the Health Care Provider’s arguments at pages 2-6, 9-14, and 22-25 of their Answering Brief. The Healthcare Providers respectfully request that the *Emergency Group of Arizona v. United Healthcare* opinion be included in the record and that the Court consider the opinion in resolving United’s Petition.

Dated this 16th day of March, 2021.

McDONALD CARANO LLP

By: /s/ Pat Lundvall

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 16th day of March, 2021, I caused a true and correct copy of the foregoing **REAL PARTIES IN INTEREST NOTICE OF SUPPLEMENTAL AUTHORITY** to be served via this Court's E-Flex Electronic Filing system in the above-captioned case, upon the following:

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/s/ Beau Nelson  
An employee of McDonald Carano LLP

# **EXHIBIT 1**

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

MAR 3 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

EMERGENCY GROUP OF ARIZONA  
PROFESSIONAL CORPORATION, an  
Arizona professional corporation; et al.,

Plaintiffs-Appellants,

v.

UNITED HEALTHCARE, INC., a  
Delaware corporation; et al.,

Defendants-Appellees.

No. 20-15684

D.C. No. 2:19-cv-04687-MTL

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
Michael T. Liburdi, District Judge, Presiding

Argued and Submitted February 4, 2021  
Phoenix, Arizona

Before: W. FLETCHER, MILLER, and HUNSAKER, Circuit Judges.

Plaintiff-Appellant Emergency Group of Arizona P.C. and other out-of-network emergency medical providers (collectively, the Medical Groups) appeal the district court's dismissal of their state-law claims against Appellee United Healthcare, Inc., et al., (United) challenging United's rate of reimbursement for

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

services provided to its insureds. United removed the action from Arizona state court to the federal district court, which concluded that the Medical Groups' claims were completely preempted by § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. § 1132(a). The parties are familiar with the facts, so we do not repeat them here. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand with instructions to the district court to remand this case back to state court.

Under *Aetna Health Inc. v. Davila*'s two-prong test, ERISA completely preempts a state-law claim if: (1) a plaintiff, "at some point in time, could have brought [the] claim under ERISA § 502(a)(1)(B)," and (2) "there is no other independent legal duty that is implicated by a defendant's actions." 542 U.S. 200, 210 (2004). United's preemption argument fails to satisfy prong two. *Id.* The Medical Groups assert legal duties arising under an implied-in-fact contract based on a course of dealing between the parties. These alleged legal duties "would exist whether or not an ERISA plan existed" and thus are independent from the legal obligations imposed by the ERISA plans. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 950 (9th Cir. 2009) (legal duties based on an alleged oral contract between the parties were independent duties); *Barmat v. John & Jane Doe Partners A-D*, 747 P.2d 1218, 1220 (Ariz. 1987) (in banc) ("A contract implied in fact is a true contract—an undertaking of contractual duty imposed 'by

reason of a promissory expression.” (quoting 1 A. Corbin, *Corbin on Contracts* § 18, at 39 (1963)). Thus, because the Medical Groups’ claims are based on independent legal duties, they are not completely preempted by § 502(a)(1)(B) of ERISA. *Marin*, 581 F.3d at 949–50.

Because prong two of the *Davila* complete preemption test fails, we need not reach prong one. *See Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1059 (9th Cir. 2018). Moreover, because we conclude the district court erred in dismissing the Medical Groups’ state-law claims based on complete preemption, we need not address the Medical Groups’ argument that the district court erred by treating all of their claims the same for purposes of preemption and dismissing their amended complaint in its entirety.

Absent complete preemption, the Medical Groups’ claims do not arise under federal law and there is no basis for federal-question jurisdiction. *Marin*, 581 F.3d at 951. We therefore reverse and remand with instructions for the district court to remand this case to state court.

**REVERSED and REMANDED with instructions to remand to state court.**



## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

**9th Cir. Case Number(s)**

**Case Name**

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

**Signature**

**Date**

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