IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC01-1397

ROLANDO VILLAZON, as Personal Representative of the Estate of SU-SAN COHEN VILLAZON, deceased, :

Petitioner, :

vs. :

PRUDENTIAL HEALTH CARE PLAN, INC., :

Respondent. :

ON PETITION FOR REVIEW OF A DECISION
FROM THE THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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Respondent. :

REPLY ARGUMENT

PruCare calls Villazon confused and uncomprehending of the differences between ERISA Sections 502(a) and 514(a). Such ad hominem argument does not assist the Court and does not enhance PruCare's defense. Villazon's understanding of ERISA preemption under both section 502(a) and 514(a) is aided in part by the Third Circuit opinion in Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 279 (3d Cir. 2001), as quoted in Villazon's main brief at page twenty, "There is no reason why the distinction between quality of care issues and benefits administration issues made

in those cases, which arose in the context of complete preemption under §502(a), would not be equally applicable to express preemption under § 514(a)."

If confused and uncomprehending, Villazon is in good company. See, Yanez v. Humana Medical Plan, Inc., 969 F.Supp. 1314, 1315-16 (S.D. Fla. 1997), Highsmith, J.,construing section 514(a):

> The claims against the HMO are based on vicarious liability for the alleged negligence of its agent health care providers, and on direct negligence.
>
> * * *
>
> [T]he United States Supreme Court has found that "run-of-the-mill state law claims such as . . . torts committed by an ERISA plan" fall outside the scope of section 514(a) of ERISA. *Mackey v. Lanier Collection Agency & Serv., Inc.,* 486 U.S. 825, 832-33, 108 S.Ct. 2182, 2186, 100 L.Ed.2d 836 (1988). Moreover, within this Circuit, courts have found that tort actions that seek to hold defendant health maintenance organizations vicariously liable for medical malpractice are not preempted by ERISA.

See, Dearmas v. Av-Med, Inc., 865 F.Supp. 816, 817-18 (S.D. Fla. 1994), James Lawrence King, J.,construing section 514(a):

> Run-of-the-mill tort actions against ERISA plans fall outside the scope of section 514(a) of ERISA. . . . Count I of the First Amended Complaint, which seeks to hold Av-Med vicariously liable for the actions of the treatment physicians, does not relate to the plan administration and is not preempted by ERISA.

See also, Paterno v. Albuerne, 855 F.Supp. 1263, 1264 (S.D. Fla. 1994), Gonzalez, J., construing section 514(a):

> Does ERISA preempt the type of vicarious liability claim brought by Plaintiff against the defendant health plan? This question is further broken down into the question of whether the tort claim "relates to" the employee benefit plan for the purposes of 29 U.S.C. § 1144(a). . . . The fact that the instant cause of action does not challenge a core function of ERISA-- such as the administration of benefits--lends to a finding of tenuousness and remoteness. In other words, the Court believes that drawing a distinction between a suit for wrongful denial of benefits and a suit for the type of vicarious liability alleged here is well founded in the context of preemption analysis.

Villazon's ERISA argument is summarized in the main brief at page eleven: "Claims against an HMO for its vicarious liability for the negligence of its contracting physicians are not preempted by ERISA. See, In re Estate of Frappier, 678 So.2d 884, 886-7 (Fla. 4th DCA 1996); Pappas v. Asbel, 768 A.2d 1089 (Pa. 2001); Hinterlong v. Baldwin, 720 N.E.2d 315 (Ill. App. 1999). Cf. Lazorko v. Pennsylvania Hospital, 237 F.2d 242 (3d Cir. 2000); In re: U.S. Healthcare, Inc., 193 F.3d 151 (3d Cir. 1999); Rice v. Panchal, 65 F.3d 637 (7th Cir. 1995); Pacificare of Oklahoma, Inc. v. Burrage, 59 F.3d 151 (10th Cir. 1995); Dukes v. U.S. Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995); Paterno v. Albuerne, 855 F.Supp. 1263 (S.D. Fla.

1994)." These cases interpret both section 502(a) and section 514(b) ERISA preemption and hold that Villazon's claims against PruCare are not preempted under either section.

Pacificare v. Burrage is historically noteworthy because it was the first Circuit Court decision in this area ("No circuit has decided whether ERISA preempts a claim that an HMO is vicariously liable for alleged malpractice of one of its physicians, and the district courts are divided on the issue." 59 F.3d at 153).

Pacificare is a section 514(a) case and it expressly construes the section 514(a) "relate to" language. At the risk of oversimplification, Pacificare efficiently dispatches all PruCare's contentions in this case.

> [T]he present claim does not involve the administration of benefits or the level or quality of benefits promised by the plan; the claim alleges negligent care by the doctor and an agency relationship between the doctor and the HMO. [citations omitted]. We agree with the district court that reference to the plan to resolve the agency issue does not implicate the concerns of ERISA preemption. [59 F.3d at 155].

A review of the PacifiCare district court opinion indicates the HMO was an IPA model HMO – just like PruCare. See, Schachter v. PacifiCare of Oklahoma, Inc., 923 F.Supp. 1448, 1450 (N.D. Okla.1995):

> The defendant, PacifiCare of Oklahoma, Inc. . . . is a health maintenance organization, which furnished employee health care for the employer of Schachter's deceased mother . . . . The defendant, Dr. Raymond W. Goen, . . . was . . . the physician who provided medical care to [the deceased]. The defendant, The Wheeling Medical Group . . . was . . . the employer of Dr. Goen. . . . Schachter alleges that PacifiCare is liable (i) vicariously for the medical malpractice of its alleged ostensible agent, Dr. Goen, ...

Villazon cited and relies upon Hinterlong v. Baldwin, because it holds that a claim of vicarious liability against an IPA model HMO is not preempted by Section 514(a). It provides a thorough treatment of the United States Supreme Court ERISA section 514(a) analyses in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) and DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997), and makes short work of Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996):

> [W]e are unmoved by defendant's assertion that we should follow *Jass* 's conclusion that a medical malpractice claim based on a theory of vicarious liability brought against an IPA-model HMO is in reality a denial of plan benefits and thus subject to ERISA preemption (*Jass,* 88 F.3d at 1494). *Jass* suffers several infirmities. Most notably, *Jass* completely ignores *Travelers* and engages in the purely textual analysis of section 514(a) called into question by *Travelers.*

> *Jass* is also factually distinguishable from the case before us.
>
> In *Jass,* the plaintiff sued her doctor and HMO, alleging negligence after a utilization review nurse determined a course of physical therapy following knee surgery was unnecessary. The plaintiff claimed that as a result of the HMO's denial of physical therapy she suffered permanent injury to her knee. *Jass,* 88 F.3d at 1485. The court held that the plaintiff's claims were preempted not because they asserted the physician's negligent treatment but because the physician's failure to treat stemmed from a denial of benefits--physical therapy--by a utilization review administrator. *Jass,* 88 F.3d at 1493.

A fair reading of Jass does reveal that it is a "denial of benefits" case with no application to Villazon's "negligent treatment" claim against PruCare:

> The alleged negligence of Dr. Anderson underlying the vicarious liability claims against PruCare do not assert his negligent treatment, but his negligent failure to treat. This alleged negligence directly "relate[s] to the benefit plan" because Dr. Anderson's failure to treat stemmed from Margulis' denial of benefits based on her conclusion, as PruCare's utilization review administrator, that treatment was unnecessary. [Jass, 88 F.3d at 1493].

Villazon cited and relies upon Pappas v. Asbel because it also holds that a claim of vicarious liability against an IPA model HMO is not preempted by Section

514(a). It addresses section 514(a) preemption after Pegram, on express remand from the United States Supreme Court for that purpose. One footnote is noteworthy here:

> The HMO in *Pegram* was owned by its physicians. U.S. Healthcare contracts with independent physicians to provide services. *Pegram's* result was based on the nature of the HMO's decision, not on the structure of the HMO making it. *Pegram,* 530 U.S. at 230-31, 120 S.Ct. at 2155. Further, the Supreme Court's holding was all-inclusive as to HMOs. *Id.* Thus, the difference in organization between the HMO in *Pegram* and U.S. Healthcare is not relevant to this analysis. [768 A.2d at 1094 n.4].

That PruCare and its Amicus ignore Pacificare, Hinterlong, and Pappas speaks volumes. They are the "brown cow" 514(a) negligent treatment cases.

Villazon cited and relies upon Rice v. Panchal, because it holds that a claim of vicarious liability against Prudential for the negligence of "Prudential Health Care Providers" is not preempted by ERISA Section 502(a). Here, PruCare claimed 502(a) preemption in both the trial court and the District Court of Appeal. The filing of the answer brief in this Court is the first concession by PruCare that it is not entitled to 502(a) preemption. Even so, Rice v, Panchal has relevance beyond section 502(a).

> Rice had sought medical treatment under a welfare benefits plan that named [Dr.] Sotillo as a designated care provider, so Rice also sued the plan administrator, the Prudential Insurance Company of America ("Prudential"). Rice alleged that Prudential was liable for the medical malpractice

> of Sotillo under the state law theory of respondeat superior. [65 F.3d at 638].
>
> * * *
>
> The Plan defines a "Prudential Health Care Provider" as "A Doctor, Hospital or other provider of medical services or supplies which has agreed with Prudential, directly or indirectly, to arrange to provide for furnishing medical or surgical services and supplies to Covered Persons. [65 F.3d at 642, n. 5].
>
> * * *
>
> Since Rice has not rested his claim [of malpractice] on the terms of the Plan, the question is whether Rice's claim that Prudential is liable for the medical malpractice of Sotillo under the state law of respondeat superior will require construing the ERISA plan, a question of federal law. . . . We conclude that it does not. . . . In this case, there is no dispute that Sotillo is a Prudential Health Care Provider. The only question is whether Sotillo's status as a Prudential Health Care Provider makes Prudential liable for Sotillo's alleged malpractice under the state law of respondeat superior. . . . While the Plan will serve as evidence of Sotillo's apparent agency, the alleged agency does not necessarily rise and fall with the Plan. Rather, this is a case in which "[b]eyond the simple need to refer to the . . . [Plan], the . . . [Plan] is irrelevant to the dispute. . . ." [65 F.3d at 645].

Here, Villazon does not rely at all upon the "Plan" to establish PruCare's vicarious liability. Villazon relies upon the non-delegable duties owed by all HMO's to all their subscribers. Villazon also relies upon the contract between PruCare and the Prudential Primary Care Physicians in the Prudential Health Care System. Nothing

about this case relates to Villazon's employment or the benefits of employment. There was no denial of an employee benefit nor any mal-administration of any benefit plan. See, Smith v. HMO Great Lakes, 852 F.Supp. 669, 671-2 (N.D. Ill. 1994):

> [P]laintiffs' negligence and professional malpractice claims against defendant HMO are based not on the insurance plan between HMO and plaintiff Charles Smith but on the principles of professional malpractice and the contractual relationships between defendant HMO and the doctors who treated Ginny. These claims have nothing to do with any denial of plaintiffs' rights under the plan. *See Independence HMO, Inc. v. Smith,* 733 F.Supp. 983, 988 (E.D. Pa.1990). Plaintiffs' claims against HMO are based on HMO's contractual relationships with its participating doctors. Plaintiffs allege that HMO is responsible for the allegedly medically negligent treatment of Ginny Smith by HMO doctors. . . . Clearly plaintiffs' claims against HMO would not exist but for the existence of an insurance benefits plan between plaintiff Charles Smith and HMO, yet these claims are not preempted because the connection between the claims against the HMO and the plan is too remote to warrant a finding that the state action "relates to" the covered plan.

As made clear in Pegram v. Herdrich, 530 U.S. 211, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000), HMO's, as managed care entities, wear two hats — one as plan administrator *and* one as health care provider. Pegram, 530 U.S. at 218-19, 120 S.Ct. at 2149. "ERISA does require, however, that the fiduciary with two hats wear only one at a time." Pegram, 530 U.S. at 225, 120 S.Ct. at 2152. Plan administration is an

ERISA fiduciary function. Provision of comprehensive health care is not. This lawsuit relates solely to the provision of health care.

Determining which hat is being worn is critical to determining whether a state law or claim is preempted under Section 514(a), because section 514(a) only protects ERISA plans from state regulation. ERISA does not insulate vendors or service providers to ERISA plans from state regulation simply because of their connection to ERISA plans. The distinction between acts of plan administration and acts that relate to the provision of services is central to evaluating the merits of an ERISA preemption defense to a state law claim. Cf. Washington Physicians Service Association v. Gregoire, 147 F.3d 1039, 1045 (9th Cir. 1998).

> The mere fact that many ERISA plans choose to buy health insurance for their plan members does not cause a regulation of health insurance automatically to "relate to" an employee benefit plan--just as a plan's decision to buy an apple a day for every employee, or to offer employees a gym membership, does not cause all state regulation of apples and gyms to "relate to" employee benefit plans. After *Travelers,* ERISA plans no longer have a Midas touch that allows them to deregulate every product they choose to buy as part of their employee benefit plan. . . . [T]he mere fact that the Act regulates a product that ERISA plans often choose to buy does not mean that it "relates to" an ERISA plan.

See also, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company, 514 U.S. 645, 661, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) ("nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern"); and DeBuono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 117 S.Ct. 1747, 1749, 138 L.Ed.2d 21 (1997) (hospitals operated by ERISA plans are subject to the same laws as other hospitals).

PruCare undeniably provides health care, exercises significant control over the provision of health care, and retains the right of control over the provision of health care by the Prudential Health Care Providers. Supervision and management of the Prudential Health Care System is not the same as and should not be confused with PruCare's separate responsibility for administration of some employee benefit "Plan" that by happenstance pays premiums for employee HMO membership.

It is PruCare's supervision and management of the Prudential Health Care System that creates vicarious liability for the medical negligence of Prudential Primary Care Physicians such as Dr. Sarnow in this case. PruCare is a provider of comprehensive health care. All health care providers are liable in tort for providing

substandard health care. Villazon does not seek to "create" some new theory of liability — it is PruCare that seeks to "create" an IPA HMO exception to traditional tort liability for the provision of negligent health care, invoking a parade of imaginary horribles that find no support in the record on appeal, the statutes in issue, or case law precedent.

All HMO's provide health care and all HMO's logically and legally should be responsible for the consequences of providing substandard care. Why should PruCare be excused from liability? Why should PruCare be given an economic advantage over all other HMO's that are held accountable for the quality of care provided? Responsibility and accountability are the cornerstones to ensuring that comprehensive prepaid health care plans deliver high-quality health care.

Under Section 641.18(4)(c), Florida Statutes 2000, it is "the policy of this state to ensure that comprehensive prepaid health care plans deliver high-quality health care." It is not the policy of this state to insulate PruCare from longstanding common law principles of tort liability.

PruCare's fears of unlimited tort liability are unfounded (PruCare brief at p. 41, n. 23). PruCare is only liable for Prudential Health Care Providers who provide health care on behalf of PruCare. Chapter 641 draws a clear distinction

between PruCare's provision of health care (by PruCare and its contract providers) and PruCare's liability for payment of medical services rendered outside its provider network. See, Section 641.31(12) ("Each health maintenance contract . . . shall state that emergency services and care shall be provided to subscribers in emergency situations not permitting treatment through the health maintenance organization's providers, without prior notification to and approval of the organization. . . . reasonable charges for covered services and supplies shall be paid by the organization, . . . The health maintenance contract . . . shall describe procedures for determination by the health maintenance organization of whether the services qualify for reimbursement as emergency services and care"). PruCare's vicarious liability is limited to Prudential Health Care Providers within its network.

PruCare wants to be a sheep in wolf's clothing. It bleats like a PPO that it simply pays for health care, but in truth and in fact it is an HMO that is required by statute and contract to provide health care. PruCare is responsible and accountable for its contract physicians. The form of contract and method of compensation of its physicians is irrelevant. It simply makes no difference whether Dr. Sarnow was paid by the hour, annually, or by capitation agreement. Dr. Sarnow was providing health care for PruCare when he maltreated Susan Villazon.

The Amicus Curiae Florida Association of Health plans cites Greene v. Well Care HMO, Inc., 778 So.2d 1037 (Fla. 4th DCA 2001), as a decision that "wrongly suggests that the [HMO] contract may give rise to tort liabilities" (FAHP brief at pp. 16-17, n.4). Regardless of whether it is the Fourth District or the Florida Association that is wrong about this, Greene does demonstrate the difference between an insurer/PPO and an HMO referable to provision of health care.

> Well Care, which is *not* an insurer, appears to be in charge of treatment decisions for its members, rather than simply authorizing the payment of the claims or providing indemnity to the patient for claims for which the patient remains financially responsible. While the entire contract is not in the record, it is clear from the portions that are available that Well Care must authorize treatment in advance. It is Well Care's decision, not that of the physician, as to what medical services are medically necessary for a patient. Since Well Care has placed itself in charge of such decisions for the patient, the relationship is certainly more than one of debtor and creditor. [778 So.2d at 1042].

By statutory definition, a Health Maintenance Organization, "Provides emergency care, inpatient hospital services, physician care . . . diagnostic treatment, and preventive health care services." Section 641.19(13), Florida Statutes (2000). A "Health Maintenance Contract" is a contract between an HMO and its subscribers "to provide comprehensive health care." Section 641.19(12), Florida Statutes (2000). The

Florida Association argues that HMO's do not provide health care, but only provide *for* health care. That is not what the statutes say, however. PruCare had the non-delegable duty to provide, i.e. furnish or supply, comprehensive health care.

Even so, an obligation to provide *for* future services is no less a non-delegable duty with correlative responsibility and tort liability. For example, the lessor Porter agreed prospectively during the term of a lease to maintain the roof, and did so indirectly through an independent roofing contractor. Porter was nonetheless liable under its non-delegable duty. CISU of Florida, Inc. v. Porter, 457 So.2d 1118, 1119 (Fla. 1st DCA 1984). Likewise, in Atchley v. First Union Bank of Florida, 576 So.2d 340, 343-4 (Fla. 5th DCA 1991), the bank was selling real estate with the promise, should roof repairs be required, "Seller shall pay . . . for such repairs or replacements by an appropriately licensed person." The bank was responsible for negligent roof repairs indirectly performed by an independent licensed roofer.

PruCare argues it is not liable for its "indirect" provision of substandard health care. The fallacy should be obvious. Villazon string cited numerous non-delegable duty cases in the main brief. In every instance the defendant was not "directly" involved, but acted "indirectly" through independent contractors. That is the essence of non-delegable duty liability PruCare seeks to avoid.

CONCLUSION

This Court should quash the decision of the District Court and reinstate Villazon's claim against PruCare.

By___________________________
James C. Blecke
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon the Law Offices of Steven M. Ziegler, P.A., Presidential Circle, 4000 Hollywood Boulevard, Suite 375 South, Hollywood, Florida 33021; Diane H. Tutt, P.A., 8211 West Broward Boulevard, Suite 420, Plantation, Florida 33324; David J. Sales, Esquire, Searcy, Denney, Scarola, Barnhart & Shipley, 2139 Palm Beach Lakes Blvd., P.O. Drawer 3626, West Palm Beach, Florida 33402; Louise H. McMurray, Esquire, McIntosh, Sawran, Peltz & Cartaya, P.A., Biscayne Building, Suite 920, 19 West Flagler Street, Miami, Florida 33130; and Joel L. Michaels, Esquire, McDermott, Will & Emery, 600 Thirteenth Street, N.W., Washington, D.C. 20005-3096, this 15th day of February, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with font requirements.

By___________________________
James C. Blecke
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