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Re: The Preemption of SB 383 by the Employee Retirement Income Security Act

Dear Mr. Graff:

You have requested our opinion regarding the potential preemption by the Employee Retirement Income Security Act of 1974 ("ERISA") of Nevada SB 383 (the "Statute") which was signed into law on June 2, 2017, and became effective on July 1, 2017. As set forth below, we conclude, based on our analysis of applicable law, that courts would find that the Statute is preempted by ERISA to the extent it seeks to regulate financial advisers that provide services to a retirement plan governed by ERISA, to the plan's fiduciaries and/or to the plan's participants or beneficiaries.

We first discuss the Statute and the changes that it has made to Nevada law. We then discuss ERISA preemption concepts, and how those concepts are likely to be applied to the Statute by reviewing courts.

THE STATUTE

NRS Chapter 628A regulates "financial planners." Prior to the enactment of the Statute, NRS 628A.010 defined "financial planner" as a person who for compensation advises others upon the investment of money or upon provision for income to be needed in the future, or who holds himself or herself out as qualified to perform either of these functions, but does not include:

(a) An attorney and counselor at law admitted by the Supreme Court of this State;

(b) A certified public accountant or a public accountant licensed pursuant to NRS 628.190 to 628.310, inclusive, or 628.350;

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(c) A broker-dealer or sales representative licensed pursuant to NRS 90.310 or exempt under NRS 90.320;

(d) An investment adviser licensed pursuant to NRS 90.330 or exempt under NRS 90.340; or

(e) A producer of insurance licensed pursuant to chapter 683A of NRS or an insurance consultant licensed pursuant to chapter 683C of NRS, whose advice upon investment or provision of future income is incidental to the practice of his or her profession or business.

The Statute amended subsections (c) and (d), above, to remove the statutory exemptions that precluded broker-dealers, broker-dealer sales representatives, and most investment advisers licensed under state or federal law from being classified as a "financial planner." As a result, effective July 1, 2017, these individuals will now be subject to a fiduciary standard under state law if they otherwise fit within the definition of "financial planner."

NRS 628A.020 provides that "[a] financial planner has the duty of a fiduciary toward a client. A financial planner shall disclose to a client, at the time advice is given, any gain the financial planner may receive, such as profit or commission, if the advice is followed. A financial planner shall make diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client's financial circumstances and obligations and the client's present and anticipated obligations to and goals for his or her family." NRS 628A.010 broadly defines "Client" as "a person who receives advice from a financial planner."

NRS 628A.030 provides that if loss results from a financial planner's advice under subsection (2) of that section, "… the client may recover from the financial planner in a civil action the amount of the economic loss and all costs of litigation and attorney's fees."

In addition to expanding the list of persons subject to liability as a "financial planner," the Statute amended NRS Chapter 90 to add a new section that mandates, "A broker dealer, sales representative, investment adviser or representative of an investment adviser shall not violate the fiduciary duty toward a client imposed by NRS §628A.020." Civil penalties of up to $25,000 may apply for a willful violation of the Nevada securities law. NRS 90.630(2)(d). Pursuant to the Statute's amendment of Nevada law, the Administrator of the Nevada Secretary of State's Division of Securities is authorized to issue regulations that:

(a) Define or exclude an act, practice or course of business of a broker-dealer, sales representative, investment adviser or representative of an investment adviser as a violation of the fiduciary duty toward a client imposed by NRS §628A.020; and

(b) Prescribe means reasonably designed to prevent broker-dealers, sales representatives, investment advisers and representatives of investment advisers from engaging in acts, practices and courses of business defined as a violation of such fiduciary duty.

The Statute therefore broadens the list of persons who, under Nevada law, are considered "financial planners," and subjects "financial planners" to liability for certain remedies (including

the civil penalties referred to above) in connection with services provided to "clients." The term "client" is broadly defined under relevant Nevada law to mean "a person who receives advice from a financial planner." Accordingly, the term would include a participant or beneficiary who receives advice with respect to the investment of money held within an employee benefit plan governed by ERISA or with respect to a rollover, distribution or transfer of monies held by such a plan. It would also apply to advice given to the fiduciaries of an ERISA plan who are responsible for managing the plan's assets or for selecting and monitoring the plan's designated investment alternatives.

ERISA's REGULATION OF "FIDUCIARIES"

While Nevada purports to regulate "financial planners," ERISA regulates the relationship between "fiduciaries" (as defined by ERISA) and employee benefit plans.

ERISA §3(3) (29 U.S.C. §1002(3)) defines "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." "Employee pension benefit plan" means "... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan." (ERISA §3(2)(A), 29 U.S.C. §1002(20)(A).)

ERISA defines "fiduciary" in functional terms. That is, persons who perform the functions set forth in ERISA §3(21) (29 U.S.C. §1002(21)) are fiduciaries within the meaning of ERISA. This would include the plan fiduciaries who are responsible for managing plan administration or who exercise any discretionary control over plan assets. ERISA §3(21)(a)(i) and (iii) (29 U.S.C. §1002(21)(A)(i) & (iii)). It would also include so-called "investment advice fiduciaries."

An "investment advice fiduciary" is defined in ERISA §3(21)(A)(ii) (29 U.S.C. §1002(21)(A)(ii)). It states, in relevant part, that "a person is a fiduciary with respect to a plan to the extent ... (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." This statutory language has been the subject of an extensive, ongoing rulemaking project by the Department of Labor to update the regulations defining fiduciary status under ERISA as a result of giving investment advice (the "Fiduciary Regulation"). *See,* Definition of the Term Fiduciary, 81 Fed Reg 20946 (April 8, 2016). The Fiduciary Regulation makes clear that recommendations to a participant or beneficiary with respect to a rollover, distribution or

transfer of assets from an ERISA plan constitutes investment advice that would make the adviser an investment advice fiduciary under ERISA.

So, both the definition of "financial planner" under Nevada law, and the definition of an investment advice fiduciary under ERISA, turn on the issue of whether the person is providing investment advice for compensation. A "financial planner" under Nevada law would therefore likely be considered a "fiduciary" under ERISA, to the extent the financial planner is rendering services to an employee benefit plan governed by ERISA, to the plan's fiduciaries and/or to the participants and beneficiaries of the plan.

ERISA §404 (29 U.S.C. §1104) sets forth standards that apply to fiduciaries in their dealings with ERISA plans and the plan's participants and beneficiaries. Among other things, an ERISA fiduciary must "...discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." ERISA also prohibits fiduciaries from engaging in "self-dealing" transactions. *See,* ERISA §406(b) (29 U.S.C. §1106(b)), which prohibits fiduciaries from dealing with plan assets in their own interest or for their own account, acting in a transaction involving the plan on behalf of a party whose interests are adverse to those of the plan, or receiving consideration for their own personal account from any party dealing with the plan in a transaction involving plan assets.

ERISA §502(a) (29 U.S.C. §1132(a)(2)) provides several causes of action that participants and beneficiaries (and the Secretary of Labor) may pursue to remedy a violation of ERISA. ERISA §502(a)(2) permits a participant to bring a direct civil action against an ERISA fiduciary for breach of fiduciary duty. ERISA §502(a)(3) permits an aggrieved participant to initiate a private cause of action for injunctive and equitable relief for a violation of ERISA. "This integrated enforcement mechanism, ERISA §502(a), 29 U.S.C. §1132(a), is a distinctive feature and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans." *Aetna Health Inc. v. Davila,* 542 U.S. 200, 208 (2004). It is also extremely important to note that these enforcement mechanisms are unaffected by the DOL review of the Fiduciary Regulation and remain in full force and effect. The review itself is focused on the regulation and related exemptions and not the enforcement mechanisms that regulate fiduciary conduct under ERISA. *See*, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed Reg 31278 (July 6, 2017).

ERISA PREEMPTION

The question that you have posed is whether Nevada law, as amended by the Statute, is preempted by ERISA to the extent that it may purport to regulate the relationship of "financial planners" to: an employee benefit plan governed by ERISA; the plan's fiduciaries; and/or the plan's participants and beneficiaries.

ERISA's general preemption provision - ERISA §514 (29 U.S.C. §1144) - provides in relevant part: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or

hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

According to the United States Supreme Court, "Congress enacted ERISA to 'protect ... the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans, and to 'provide for appropriate remedies, sanctions, and ready access to the federal courts.' 29 U. S. C. §1001(b)." To this end, ERISA has an expansive pre-emptive reach that is intended to ensure that employee benefit plan regulation is "... exclusively a federal concern." *Davila, supra,* 542 U.S. at 208, citing *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981). ERISA's civil enforcement provisions are intended by Congress to be exclusive such that "... any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with this clear congressional intent [and is pre-empted.] *Davila* at 209. "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Pilot Life Ins. Co v. Dedeaux*, 481 U.S. 41, 54 (1987).

Courts that have analyzed ERISA preemption sometimes differentiate between "express preemption," "conflict preemption" and "complete preemption." "There are two strands of ERISA preemption: (1) 'express' preemption under ERISA §514(a), 29 U.S.C. § 1144(a); and (2) preemption due to a 'conflict' with ERISA's exclusive remedial scheme set forth in [ERISA § 502(a),] 29 U.S.C. § 1132(a)." *Fossen v. Blue Cross & Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011), citing *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1081 (9th Cir. 2009).[1] "All of these preemption provisions defeat state-law causes of action on the merits." *Fossen* at 1107, citing *Pilot Life,* 481 U.S. at 57.

A third preemption concept - "complete preemption" - comes into play when analyzing whether a state-law claim that is originally filed in a state court may be removed to federal court. *See, generally, Marin Gen. Hosp. v. Modesto & Empire Traction Co.,* 581 F.3d 941, 945 (9th Cir. 2009).

Express Preemption

Express preemption under ERISA §514 is governed by a two-prong test. Under § 514(a), ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any [covered] employee benefit plan...." 29 U.S.C. § 1144(a). But this broad preemption provision is tempered by the "savings clause" of ERISA §514(b), which spares from ERISA's preemptive reach "any law of any State which regulates insurance, banking, or securities." *Fossen,* 660 F.3d at 1108.

"Relate to ..."

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines,* 463 U.S. 83, 96-97

[1] The United States Court of Appeals for the Ninth Circuit has appellate jurisdiction over the United States District Court for the District of Nevada.

(1983). While the Statute may make no direct "reference to" employee benefit plans, the question of whether it has a "connection with" such plans remains. The starting point in determining whether a state law - such as the Statute - has an impermissible "connection with" an employee benefit plan (and is therefore preempted) is with an analysis of Congress's intent in passing the preemption provision. Specifically, Congress intended "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government ..., [and to prevent] the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656–57 (1995), citing *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 142 (1990). "The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers,* 514 U.S. at 657.

In the recent case of *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 941 (2016), the Court shed further light on what it means for a state law to have an impermissible "connection with" an ERISA plan. According to the Court, "[E]RISA pre-empts a state law that has an impermissible 'connection with' ERISA plans, meaning a state law that 'governs… a central matter of plan administration' or 'interferes with nationally uniform plan administration.'" The *Gobeille* decision related to a Vermont law requiring certain health plans to provide data to a state agency. The Court found that the state's law and regulation required reporting, disclosure and recordkeeping by an ERISA plan in violation of ERISA's pre-emption provisions:

> These matters are fundamental components of ERISA's regulation of plan administration. Differing or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide ranging liability…. Pre-emption is necessary to prevent the States from imposing novel, inconsistent and burdensome reporting requirements on plans.

Gobeille, 136 S..Ct. at 945.

This analysis applies equally to the provisions of ERISA that regulate fiduciary conduct. In the *Travelers* decision, the Court specifically listed the fiduciary responsibility rules found in ERISA §§401-414 (29 U.S.C. §1101-1114) as an area of plan administration controlled by ERISA. 514 U.S. at 651. In addition, the Court cited several prior decisions in which it concluded that state laws related to employee benefit plans, and were therefore preempted:

- *Shaw v. Delta Air Lines,* 463 U.S. at 97 (finding that New York's "Human Rights Law, which prohibit[ed] employers from structuring their employee benefit plans in a manner that discriminate[d] on the basis of pregnancy, and [New York's] Disability Benefits Law, which require[d] employers to pay employees specific benefits, clearly 'relate[d] to' benefit plans").

- *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (Pennsylvania's law that prohibited "plans from ... requiring reimbursement [from the beneficiary] in the event of recovery from a third party" related to employee benefit plans within the meaning of § 514(a).)
- *Alessi v. Raybestos-Manhattan, Inc., supra,* 451 U.S. at 524 (New Jersey could not prohibit plans from setting workers' compensation payments off against employees' retirement benefits or pensions, because doing so would prevent plans from using a method of calculating benefits permitted by federal law).

The Court in *Travelers* noted that, in each of these cases, "ERISA pre-empted state laws that mandated employee benefit structures or their administration" and that, "[e]lsewhere, we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption." *Travelers*, 514 U.S. at 658.

In our view, the Statute, and the resulting modifications to Nevada state law, as applied to the services provided by a "financial planner" to an ERISA plan, to the fiduciaries of the plan and/or the plan's participants and beneficiaries would be viewed by the courts as "relating to" or otherwise having an impermissible "connection with" an ERISA plan. This is because such a "financial planner" as defined under the Statute, who would also meet the definition of a fiduciary under ERISA, would be subjected, under the Statute, to alternative regulatory schemes and enforcement mechanisms beyond those provided by ERISA. As a result, Nevada law, as amended by the Statute, would be preempted in the context of an ERISA plan.

The Savings Clause

The second prong of "express preemption" analysis involves determining whether the state law at issue is "saved" from ERISA preemption because it is a law regulating insurance, securities or banking. The vast majority of cases addressing ERISA's savings clause arise in the context of state laws regulating insurance. Conversely, very few cases have considered whether state laws regulating securities are saved from ERISA preemption. Because of the relative dearth of case law on the issue of whether state laws regulating securities are saved from preemption, and because earlier cases on that subject relied in part on cases interpreting the savings clause in the context of insurance laws, it is appropriate to address the savings clause in the insurance context.

In *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. 329 (2003), the Supreme Court modified existing jurisprudence governing whether state laws regulate insurance and are therefore saved from ERISA preemption. The Court held that for a state law to be deemed a law which regulates insurance for savings clause purpose, it must satisfy two requirements. "First, the state law must be specifically directed toward entities engaged in insurance. Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured." *Kentucky Ass'n of Health Plans, Inc.*, 538 U.S. at 342. (Internal citations omitted.) Obviously, that analysis does not bear directly on state laws regulating securities, because the concept of "risk pooling arrangements" is not applicable in the securities setting.

However, before *Kentucky Ass'n of Health Plans, Inc.* was decided, at least one Circuit Court of

Appeals applied then-governing Supreme Court authority interpreting the saving clause in the context of state insurance laws to a state law regulating securities. In *Smith v. Provident Bank,* 170 F.3d 609 (6th Cir. 1999), plaintiff brought both ERISA claims and state statutory and common law claims against Provident Bank. Plaintiff argued his statutory claim was saved from ERISA preemption. The Court of Appeals first recognized that "[m]ost cases interpreting ERISA's 'saving clause' have arisen in the context of insurance rather than banking or securities. In that context the Supreme Court laid out the criteria for applying the saving clause in [*Pilot Life*]:

> First, we [take] what guidance [is] available from a "common-sense view" of the language of the saving clause itself.... Second, we [make] use of the case law interpreting the phrase "business of insurance" under the McCarran–Ferguson Act.... [That case law establishes three criteria:] "[F]irst whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."

Smith, 170 F.3d at 614.

The McCarran-Ferguson test that the *Smith* court referred to has now been displaced by the two part analysis set forth in *Kentucky Ass'n of Health Plans, Inc.* It is reasonable to assume, however, that a court today would look to the test established in *Kentucky Ass'n of Health Plans, Inc.* (relating to state laws purporting to regulate insurance) for guidance in determining whether the Statute is saved from ERISA preemption because it may regulate securities. In doing so, a court would first analyze whether the Statute is "specifically directed toward" entities engaged in securities. That is similar to the first part of the analysis engaged in by the Court in *Smith,* which held that in applying a "common sense view" to the issue, a court asks whether the state law at issue is "specifically directed" toward the insurance industry.

The Statute appears to generally regulate the standards and conduct of "financial planners" in the advice that they give to clients, and provides for certain remedies in the event financial planners violate those standards. In other words, the Statute is arguably not "specifically directed toward" regulating securities but has much broader application to anyone who provides advice on the investment of monies or the provision of future income irrespective of whether that advice might relate to a security.

Conflict Preemption

Assuming, for the purposes of discussion only, that the Statute was "saved" from ERISA's express preemption provision, it is likely that its application in the context of an ERISA plan would nevertheless be preempted pursuant to the principles of conflict preemption. This conclusion is supported by *Davila:* "Under ordinary principles of conflict pre-emption, then, 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.

"[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Davila* at 209. A state cause of action that would fall within ERISA's scheme of remedies is preempted as conflicting with the intended exclusivity of the ERISA remedial scheme, even if those causes of action would not necessarily be preempted by section 514(a). *Cleghorn v. Blue Shield of California*, 408 F.3d 1222, 1225 (9th Cir. 2005). Stated otherwise, if a state law cause of action conflicts with ERISA's exclusive civil enforcement scheme (ERISA §502(a)), it is preempted, even if the state law at issue is not expressly applicable to employee benefit plans. *See, Cleghorn* at 1227, holding that "[w]hether or not [California *Health & Safety Code* §1371.4(c)] may be applicable to ERISA plans, it may not be enforced against an ERISA plan by way of this lawsuit asserting state-law causes of action against Blue Shield because of its denial of ERISA plan benefits." "Conflict preemption under ERISA §502(a) …also confers federal subject matter jurisdiction for claims that nominally arise under state law." *Id.*, citing *Marin Gen. Hosp., supra,* 581 F.3d at 945.

In analyzing whether conflict preemption exists, a court must determine "… whether the state-law claims 'arise independently of ERISA or the plan terms.'" *Fossen,* 660 F.3d at 1110, citing *Davila,* 542 U.S. at 210. "This question requires a practical, rather than a formalistic, analysis because '[c]laimants simply cannot obtain relief by dressing up an ERISA benefits claim in the garb of a state law tort.'" *Id.* at 1110-11, citing *Cleghorn,* 408 F.3d at 1225.

> Consistent with this practical approach, the Supreme Court has held that § 502(a) preempts various state laws that, at first glance, appear to be independent of ERISA. For example, in *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 143, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), the Court addressed a state-law wrongful discharge claim arising out of a "termination motivated by an employer's desire to prevent a pension from vesting." The Court held that this claim was conflict preempted because, although the claim was nominally premised on a state-law tort duty that was separate from ERISA, the claim was identical to "a right expressly guaranteed by [ERISA] § 510 and exclusively enforced by § 502(a)." *Id.* at 145, 111 S.Ct. 478. Similarly, in *Davila*, the Court addressed a state law that imposed a duty on insurers to use ordinary care when making medical treatment decisions. 542 U.S. at 204–06, 124 S.Ct. 2488. The Court rejected the court of appeals's reasoning that the plaintiff "request[ed] 'tort damages' arising from 'an external, statutorily imposed duty of "ordinary care." ' " *Id.* at 206, 124 S.Ct. 2488 (quoting *Roark v. Humana, Inc.*, 307 F.3d 298, 309 (5th Cir. 2002)). Instead, the Court refused to "elevate form over substance," and held the state-law cause of action merely duplicated rights and remedies available under ERISA, and therefore was preempted. *Id.* at 214, 124 S.Ct. 2488; *see* also *Cleghorn*, 408 F.3d at 1226 (holding that state-law statutory claim was completely preempted under *Davila* because "the factual basis of the complaint ... was the denial of reimbursement of plan benefits to Cleghorn").

Fossen v. Blue Cross & Blue Shield of Montana, Inc., 660 F.3d 1102, 1111 (9th Cir. 2011) 660 F.3d at 1111.

In our view, courts reviewing the Statute would likely take a similar view, and conclude that

claims arising under Nevada law, as amended by the Statute, against a "financial planner" to an ERISA plan, to the fiduciaries of the plan and/or to the plan's participants and beneficiaries would merely be duplicative of rights and remedies available under ERISA, and would therefore be preempted.

Complete Preemption

Assuming that a fiduciary of an employee benefit plan (or participant or beneficiary in an ERISA plan) were to pursue a claim against a "financial planner" under Nevada law, as amended by the Statute, an issue arises regarding the likely venue for the disposition of the claim. More specifically, the issue is whether any such claim would be addressed in a Nevada state court, or a federal district court.

In a typical circumstance, a Nevada resident may bring an action under Nevada law in a Nevada state court to enforce Nevada law. However, defendants may remove matters to federal court in those instances where the district courts of the United States have original jurisdiction. (28 U.S.C. §1441.) The question arises whether, assuming a Nevada resident were to bring an action in Nevada state court under Nevada law (as amended by the Statute), the claim could be properly removed to federal district court. The answer turns on whether the claim would be "completely preempted."

The Supreme Court first articulated the doctrine of complete preemption under ERISA §502(a) as a basis for federal question removal jurisdiction in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). In *Taylor,* the Court held that ERISA §502(a) reflected Congress's intent to "so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63–64. "Complete preemption removal is an exception to the otherwise applicable rule that a 'plaintiff is ordinarily entitled to remain in state court so long as its complaint does not, on its face, affirmatively allege a federal claim.'" *Marin Gen. Hosp.*, 581 F.3d at 945, citing *Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 398 (3rd Cir. 2004).

A party seeking removal based on federal question jurisdiction must show either that the state-law causes of action are completely preempted by § 502(a) of ERISA, or that some other basis exists for federal question jurisdiction. If a complaint alleges only state-law claims, and if these claims are entirely encompassed by § 502(a), that complaint is converted from "an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Taylor,* 481 U.S. at 65–66.

Complete preemption is "... really a jurisdictional rather than a preemption doctrine, [as it] confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim." *Marin Gen. Hosp.*, 581 F.3d at 945. "... [A] court need not consider whether a statute 'relates to' ERISA under §514(a) when considering §502(a) complete preemption." *Marin Gen. Hosp., supra,* 581 F.3d at 946, citing *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund*, 538 F.3d 594, 596 (7th Cir. 2008).

Following *Davila,* the Ninth Circuit has "…distilled a two-part test for determining whether a state-law claim is completely preempted by ERISA §502(a): 'a state-law cause of action is completely preempted if (1) 'an individual, at some point in time, could have brought the claim under ERISA §502(a)(1)(B),' and (2) 'where there is no other independent legal duty that is implicated by a defendant's actions.'" *Fossen,* 660 F.3d at 1107–08, citing *Marin Gen. Hosp.,* 581 F.3d at 946. Although both *Davila* and *Marin Gen. Hosp.* discussed complete preemption in the context of ERISA's benefit claim provision (§502(a)(1)(B)), "[t]he complete preemption doctrine applies to the other subparts of § 502(a) as well." *Fossen,* 660 F.3d at 1108.

Based on this analysis, it is our view that if a plaintiff brought a claim against a "financial planner" in Nevada state court, relative to services provided to an ERISA plan, the fiduciaries of the plan and/or to the plan's participants or beneficiaries, the claim would satisfy both parts of the two-part test established in *Davila,* and therefore be completely preempted. First, it is clear that a fiduciary, participant or beneficiary of an employee benefit plan subject to ERISA that brings a claim against a "financial planner" under Nevada law relative to that person's services for the plan could also bring an action under ERISA §502(a)(2) and/or 502(a)(3) (seeking damages for the benefit of the plan, and/or appropriate equitable relief).

Courts would also likely find the second prong of the *Davila* test to be satisfied. In *Davila,* for example, the Supreme Court rejected plaintiffs' argument that their claim relied upon an independent legal duty in the form of a state statute that required health insurers to exercise ordinary care when making health care treatment decisions. The Court concluded that the duties imposed by that statute did not "arise independently of ERISA or the plan terms," because the standards set forth in the statute "create[d] no obligation on the part of the health insurance carrier ... to provide to an insured or enrollee treatment which is not covered by the health care plan of the entity." *Davila* at 214.

Any claim that may be brought against a financial planner/fiduciary relative to the services provided to an employee benefit plan subject to ERISA necessarily involves the plan, and implicates the duties imposed by ERISA. Indeed, any plaintiff bringing a claim against a financial planner/fiduciary in these circumstances would necessarily be bringing suit for the benefit of the plan itself, since it would be the plan that would benefit from any recovery.

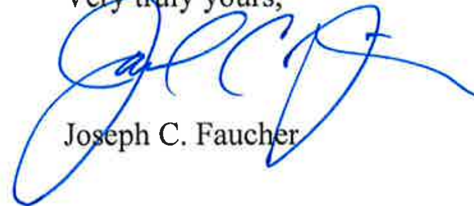
Accordingly, in our view, any claim filed originally in any Nevada state court seeking to enforce Nevada law, as amended by the Statute, against a "financial planner" who allegedly provided services to an employee benefit plan subject to ERISA, the plan's fiduciaries and/or the plan's participants or beneficiaries would be subject to removal to federal district court on the basis of complete preemption.

CONCLUSION

For the foregoing reasons, we believe that courts would find that Nevada law, as amended by the Statute, would be preempted by ERISA to the extent it relates to services provided by a "financial planner" to an employee benefit plan governed by ERISA, the fiduciaries of an ERISA plan and/or the plan's participants and beneficiaries. Similarly, any claims relating to those

services would also be preempted. In our view, it would be prudent for the regulators overseeing implementation of the Statute to expressly exempt services provided to an ERISA-governed employee benefit plan, the fiduciaries of the plan and/or to the plan's participants and beneficiaries from the reach of Nevada law as amended, in recognition of the preemption of that law in this regard by ERISA.

Very truly yours,



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