# ERISA: An Introduction

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*Presented By*

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# Overview

- Why does ERISA matter in healthcare?
- Provider ERISA litigation
- ERISA Preemption
- Impact of the ACA

# The Employment Retirement Income Security Act (ERISA)

- 29 U.S.C. § 1001 et seq.
  - Pension
  - Disability
  - Life
  - Healthcare
- Funding, reporting, and disclosure obligations
- Incredible **preemptive** scope

# Why So Much Health Care Is Provided by Employers

- Historical accident – World War II
- Enshrined through tax break – employers pay for healthcare with pre-tax dollars
  - 1943 IRS ruling
  - Congressional Budget Office estimated a $248 billion reduction in federal revenue in 2013, equal to 1.5 percent of gross domestic product
- This is why your employer won't pay you to go buy your own health insurance

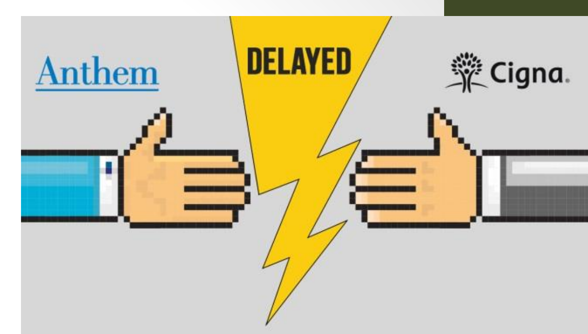
# ERISA Enacted in 1974

1. Permits wide latitude for companies to establish benefit programs
    1. Subject to funding, reporting, disclosure requirements
    2. Procedural protections
2. Plan Must Be Operated Pursuant to Written Instrument – 29 U.S.C. 1102
3. "Grand Bargain"
    1. Preemption of common law claims
    2. Nationally uniform regulation of multi-state employer benefit plans
4. Light on Details – 40+ years of federal common law

# “Self-funded” ERISA Plans

- Companies directly liable for benefits paid to healthcare providers
- Subject to less regulation
- ERISA preemption is stronger with respect to self-funded plans
- Is it *that* different than having an insurance policy?
  - Stop-Loss Insurance with low threshold
  - Major payors (Anthem, CIGNA, United) also serve as the Third Party Administrator / Claims Administrator for large employer plans, who use their provider network

# Administration of Self-Funded Plans Is Big Business




- U.S. V. Anthem, Inc. et al., No. 1:16-cv-01493-ABJ, Dkt. #498 (February 8, 2017)
- "[T]he merger will be enjoined due to **its likely impact on the market for the sale of health insurance to "national accounts**" – customers with more than 5000 employees, usually spread over at least two states –within the fourteen states where Anthem operates as the Blue Cross Blue Shield licensee. …"

# ERISA Benefits

1. Section 502(a)(1)(B) of ERISA (29 U.S.C. 1132(a)(1)(B))
    1. State or Federal Court
    2. A “beneficiary or participant”
    3. What about healthcare providers?
2. Creates “complete” preemption – means you cannot sue based on:
    1. Breach of contract re: interpretation of plan terms
    2. Tortious behavior re: wrongful denial of benefits
    3. Deceit re: what benefits are offered under the plan

# ERISA Benefits (con't)

1. Providers may sue pursuant to "assignment of benefits" from patient
   1. Hospital Conditions of Admission forms
   2. Does not need to expressly convey right to sue
   3. Confers "statutory" standing

# The Administrative Record

1. Includes:
    1. Evidence provided by patient (or provider) in support of claim for health benefits
    2. Appeal letters and correspondence
2. Standard of Review
    1. De Novo
    2. Abuse of Discretion
    3. Exhaustion
3. Written Plan documents
    1. Summary Plan Description

# Conflict Preemption
# 29 U.S.C. § 1144

- Preempts all state laws "in so far as they . . . relate to any employee benefit plan"
  - Almost unbounded in scope
  - "State laws" include **<u>both</u>** state legislation and common law causes of action brought by a plaintiff
- *New York State Conference of Blue Cross & Blue Shield Plans v.* ***<u>Travelers</u>*** *Insurance Company*, 514 U.S. 645, 668 (1995)
  - "Connection with"
  - "Reference to"

# *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002)

- Plaintiff, Debra Moran was covered under an Illinois HMO policy purchased by her employer
  - "Certificate of Group Coverage"
  - Employer-bought insurance -> ERISA applies
  - Discretionary clause
- HMO decided surgery sought was not "medically necessary"; the primary care physician disagreed
- Under Illinois law, HMO was required to submit its decision for independent review
- Held: <u>Not</u> preempted by ERISA

# Savings Clause (§ 1144(b)(2)(A))

- “Nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.”
- Recaptures much of the ground lost to preemption
- Two requirements (*Ky. Ass’n of Health Plans v. Miller*, 538 U.S. 329 (2003)):
  - Directed towards entities engaged in insurance
  - Must “substantially affect the risk pooling arrangement between the insurer and insured”

# Deemer Clause (§ 1144(b)(2)(B))

- Self-funded plans "shall [not] be deemed to be an insurance company . . . for purposes of any law of any State purporting to regulate insurance companies . . ."
- Results in a <u>broader</u> scope of preemption with respect to self-funded plans

# *Orzechowski v. Boeing*, 856 F.3d 686 (9th Cir. 2017)

- Cal. Ins. Code Section 10110.6 bans discretionary clauses in CDI-governed health insurance policies
- Held: saving clause applies
- *See also Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009)
  - Upheld Montana Insurance's Commissioner's practice of disapproving discretionary clauses

# *Morris B. Silver M.D., Inc. v. ILWU-PMA*

- 206 Cal.Rptr.3d 461 (Cal. App. 2016)
  - State courts can and do consider ERISA preemption
- Provider theories – promissory estoppel, breach of oral contract, quantum meruit
- Not preempted by ERISA
- Based on **oral representations** that insurer makes to provider when he/she calls to verify a patient' s benefits

# *Morris B. Silver M.D., Inc. v. ILWU-PMA*

- Misrepresentation-type claims were held not preempted
- Intentional interference with contract claim, however, was. Why?
  - Based upon statement on Explanation of Benefits (EOB) form that said the patient did not have to pay the unpaid balance
- Held: conflict preempted with respect to ERISA's disclosure requirements

# *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)

- Vermont all-payer claims database required all health plans to submit claims and pricing data to the staste of Vermont
- Liberty Mutual sued on behalf of a self-funded employer with employees all 50 states
- State laws that “govern[] ... a central matter of plan administration” or “interferes with nationally uniform plan administration’” are preempted.
- Fear of differing state reporting requirements

# Impact of ACA on ERISA?

1. Essential Health Benefits – no
2. Prohibition on Lifetime Benefit Maximums
3. Maximum Out-of-Pocket requirement for EHBs
4. Rule of Three
5. ACA extends *ERISA* procedural protections to exchange policies

# ACA Applies to Self-Funded ERISA Plans

- *King v. Blue Cross & Blue Shield of Illinois*, 871 F.3d 730 (9th Cir. 2017)
- Unless grandfathered or exempt, ban on lifetime maximums applies
- Ninth Circuit still held lifetime max unenforceable because of ERISA's "disclosure" requirements
- 29 U.S.C. § 1022 (Summary Plan Description)
- 29 C.F.R. § 2520.102-2(b) – DOL regulation

# Closing Thoughts

1. ERISA has outsized impact whenever employer-sponsored health care is involved
2. Formalities must be followed
3. ERISA as applied to healthcare is still an evolving area of law

# Questions?

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# …In the News…

- "Cadillac tax"
  - 40% excise tax on employer plans that pay more than $10,200 in premiums per year for individuals / $27,500 for families
  - Scheduled for 2020, but as part of the bill reopening the government in January, now delayed to 2022
- "Employer Mandate"
  - ACA's 'shared responsibility' provisions require employers that do not offer coverage that provides "minimum value," and who have one or more employees who receive subsidies from the exchanges, to pay their
  - IRS has begun sending Letter 226J to affected employers as of late last year