

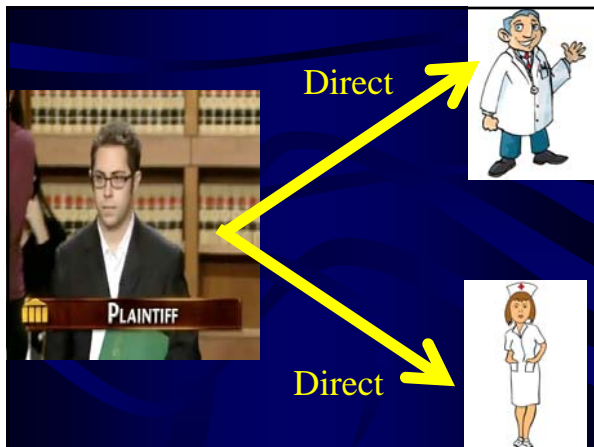
Health Law I

Professor Pope

Class 20: Nov. 1, 2011

Alternative Theories

Vicarious Liability





Respondeat superior
Actual agency
Employer-employee
Mater-servant



Choose when, where and how they perform services

Provide facilities, equipment, tools and supplies

Directly supervise the services

Set the hours of work

Require exclusive services (individual cannot work for your competitors while working for you.)

Set the rate of pay

	Employer/employee relationship	Independent contractor
Control over work	The employer has the right to direct the manner in which the work is performed. However, skilled workers may be extended a high level of independence.	Typically the contractor has a higher level of independence in the way the work is performed, within the limits of the contract for the work.
Power to delegate	The employee usually provides labour/services for one payer. The employee would reasonably be expected to perform work personally.	Free to work for others. May arrange for some or all of the work to be done by others without the approval of the principal (delegation rights).
Tools and equipment	Ordinarily provided by the payer except when specifically agreed otherwise.	Provides significant tools and equipment that are integral to business.
Independence	Employees have a duty to perform work for the employer as directed or in accordance with an employment contract.	The contractor must perform duties in accordance with the contract, but not in other roles except by agreement.
Mode of payment	Worker receives payment irrespective of output. For example hourly rates or commission. Payments for work are made directly to the employee, not to an intermediary such as a company, partnership or trust. Worker accrues paid leave entitlements.	Payment based on results not the time taken. Submission of invoices. Business name used. Not paid leave entitlements.
Legal liability	The employer is legally liable for the work.	The contractor is legally liable for the work performed under the contract.
Commercial risk	The employee is not liable for costs arising out of injury or defect in carrying out the work.	The contractor bears the risk and is able to benefit from good management. The contractor is responsible for remedying any defective work at their own expense.

Master is liable for the torts of:

1. Servants

- Agents over whom master has right to control physical conduct (e.g. “employees”)
- Contrast “independent contractors”

2. Acting in scope of employment

EXCEPTION: Master is NOT liable for torts of servant acting in scope of employment **IF:**

Servant is “borrowed” by another master and under the control of that other master

Apparent agency

Ostensible agency



Even if actor is not an actual agent, the principal could still be liable where the patient had **reasonable belief** that the actor was acting as principal's agent

Regardless of actual, specific arrangement

From perspective of reasonable patient

Reliance by patient
not required

Affirmative
misrepresentation not
required

Franklin
v.
Gupta

Theories to hold surgeon liable
for negligent acts of **others**

~~Captain of the ship (status)~~

Borrowed servant (actual control)

Agency through business entity

**Hospital
Vicarious
Liability
Introduction**

**Independence
of physicians
and hospitals**

Hospitals do not pay
physicians
Physicians bill
separate from hospital
E.g. Medicare Part A
vs. Part B

Physicians practice in
more than 1 hospital

BUT hospitals
sometimes employ:
Certain specialties
Staff in teaching and
government hospitals

Interdependence
and symbiosis of
physicians and
hospitals

Physicians

Get to use hospitals

“Medical staff” -- those physicians that have admitting privileges

Hospitals

Get a source of patients

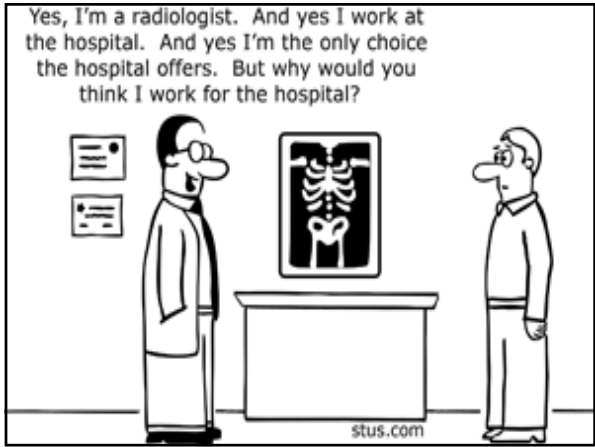
3 vicarious theories

Respondeat superior

Ostensible agency


Nondelegable duty

Apparent agency
Ostensible agency




Restatement Torts § 429

1. Hospital held out services
2. Plaintiff looked to hospital, not individual physician for care
3. Person would reasonably believe physician was hospital employee



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About Us

Methodist Healthcare is a healthcare delivery system based in Memphis, Tennessee, serving the communities of Eastern Arkansas, West Tennessee and North Mississippi. Methodist Healthcare operates seven hospitals, several ambulatory health clinics and a home health agency with approximately 10,249 Associates and 1,805 licensed beds.

Mission Statement
 Methodist Healthcare, in partnership with its medical staffs, will be the leader in providing high quality, cost-effective healthcare to benefit the communities we serve. Services will be provided in a manner which supports the health ministries and Social Principles of the United Methodist Church.

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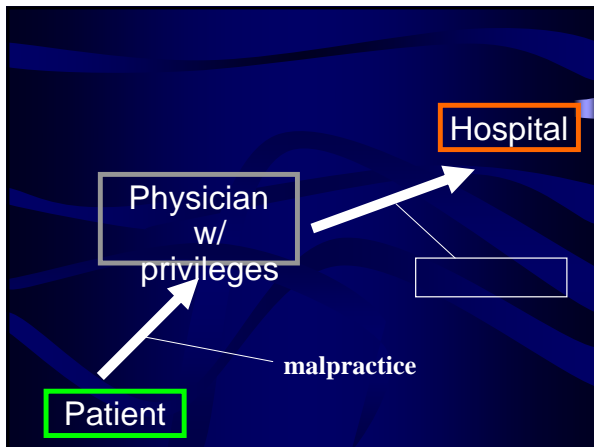
Nondelegable Duty Rule

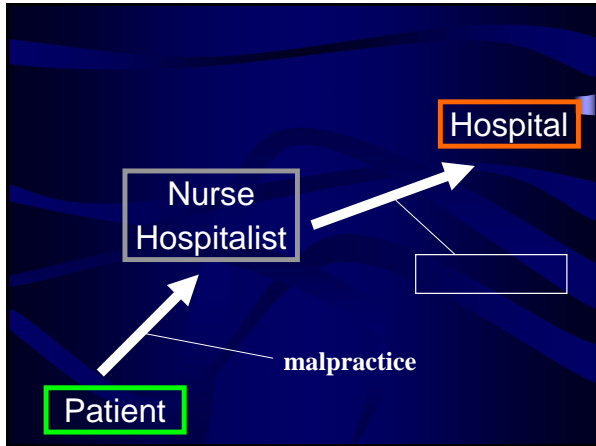
Statutes and regulations
evidence important public
policy considerations

These cannot be
“delegated” to independent
contractors

Hospital duties for public
policy reasons

- E.g.* statutes require hospital ER
- E.g.* regulations require ER procedures
- E.g.* JC requires ER plans & policies
- E.g.* hospital bylaws require supervise



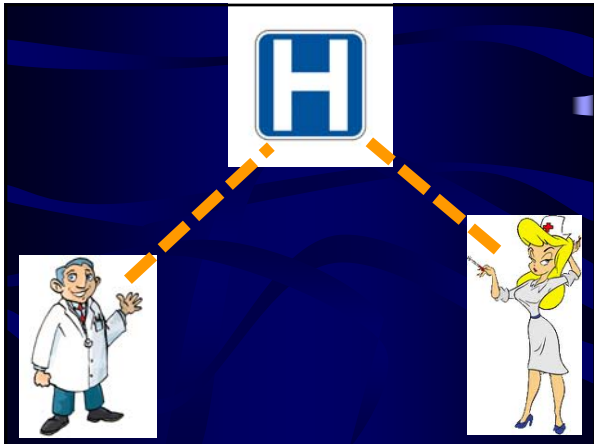


Hospital Vicarious Liability Cases

Schloendorff v. Soc'y NY Hosp.



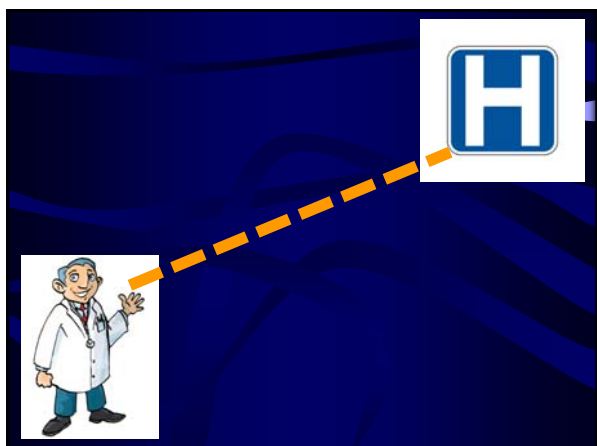
What are the legal bases for the hospital's **“charitable immunity doctrine”** defense



**Adamski
v.
Tacoma
Gen. Hosp.**







Health Law I

Professor Pope

Class 22: Nov. 8, 2011



Recapping Hospital Liability

Charitable immunity - gone

Durney v. St. Francis Hosp., Inc., 83 A.2d 753, 758 (Del. Super. Ct. 1951).

Flagiello v. Pennsylvania Hosp., 208 A.2d 193, 208 (Pa. 1965)

Is HCP employee

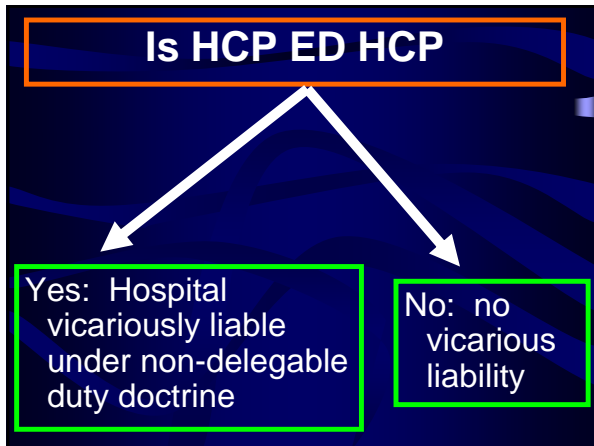
Yes: Hospital vicariously liable under respondeat superior

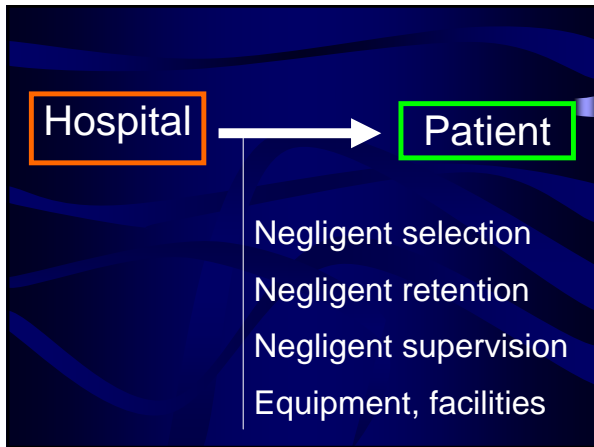
No

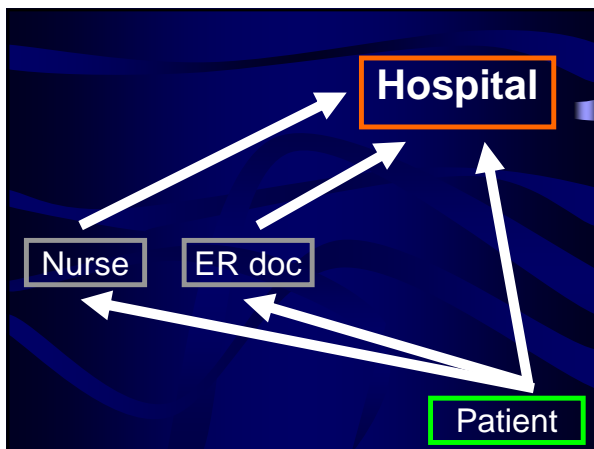
Is HCP ostensible agent

Yes: Hospital vicariously liable under ostensible agency

No







Quiz 8

In a patient's lawsuit for damages, a hospital CAN be found [CLICK ALL THAT APPLY]:

Vicariously liable for the negligence of an employed nurse

Vicariously liable for the negligence of a non-employed emergency room physician

Directly liable for granting staff privileges to an incompetent physician

Liable for violating EMTALA

A large object fell on Plaintiff and he was rushed to the Hospital, which was just a few blocks away. Plaintiff had never been to the hospital and knew no one associated with it. After taking X-rays, a physician told plaintiff that he suffered no broken bones. A few days later, another X-ray at another hospital showed that he had broken his vertebra. The delay in treatment caused Plaintiff injuries. Plaintiff has sued Hospital. But Hospital argues that the radiologist who reviewed the initial X-rays was **not its employee** and that while the X-ray laboratory occupied the ground floor of the Hospital, it was leased out and not part of the Hospital.

[SELECT ALL THAT ARE TRUE]
Plaintiff can hold hospital vicariously liable for the negligence of radiologist under respondeat superior


Plaintiff can hold hospital vicariously liable for the negligence of radiologist under ostensible agency

Plaintiff can hold hospital vicariously liable for the negligence of radiologist under the non-delegable duty doctrine

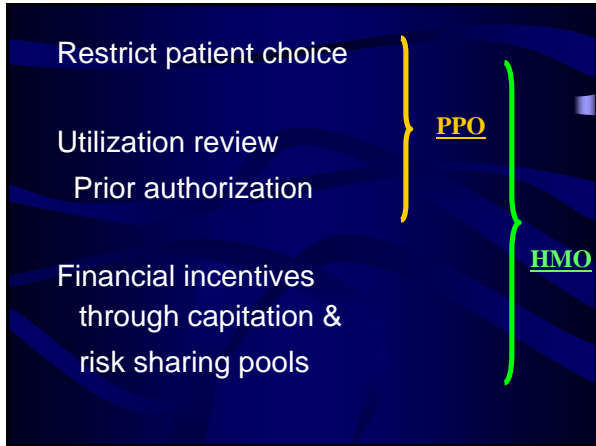
Nursing homes too

Scampone v. Grane
(Pa. Super. 2010)

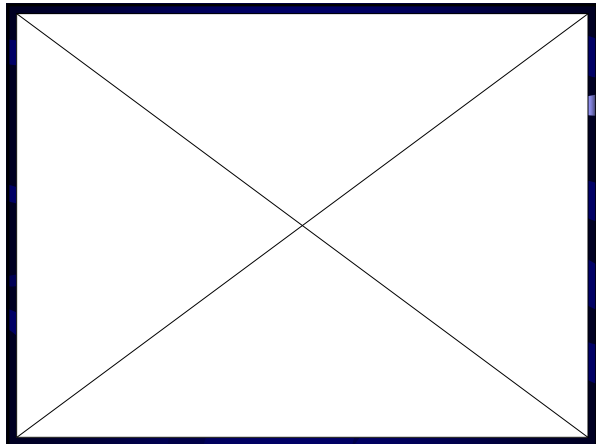
Direct liability theories

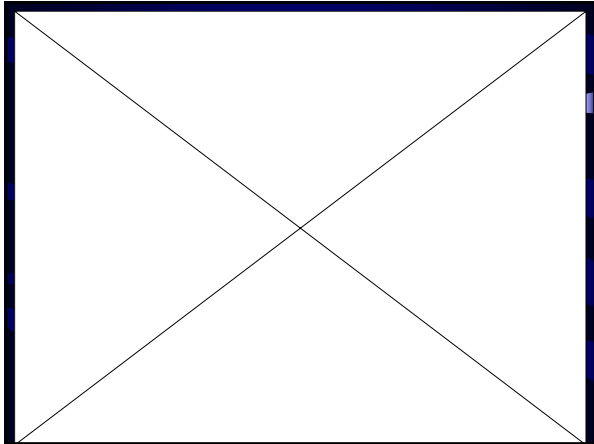


Managed Care









MCO Vicarious Liability

Staff / group model

Docs work exclusively for HMO in centralized clinic

Strongest case for showing master-servant

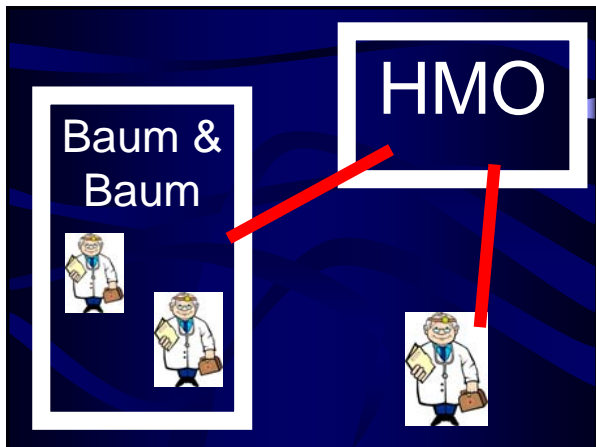


IPAs

No centralized office – docs have own offices

Probably will fail to show master-servant

Can still show other vicarious liability theories





MCO Direct Liability

- Direct
 - Negligent selection
 - Negligent retention
 - Negligent supervision
 - Negligent (UR)
 - Negligent reimbursement**
- Vicarious
 - Direct agency
 - Ostensible agency

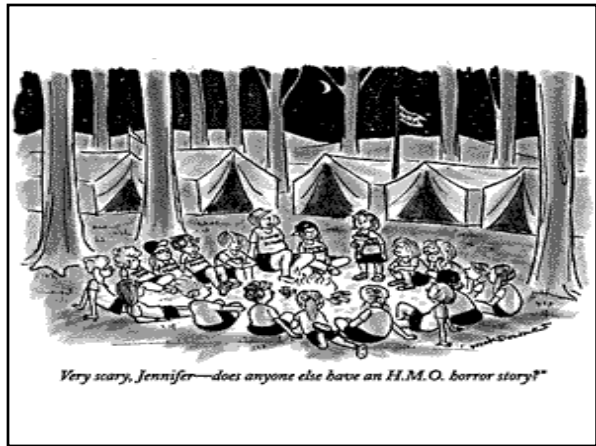


MCO Direct Liability for UR

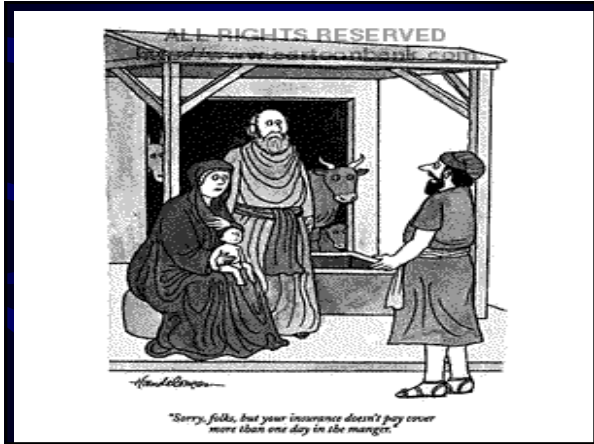








*Very scary, Jennifer—does anyone else have an H.M.O. horror story?**



Health Law I

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Class 23: Nov. 10, 2011

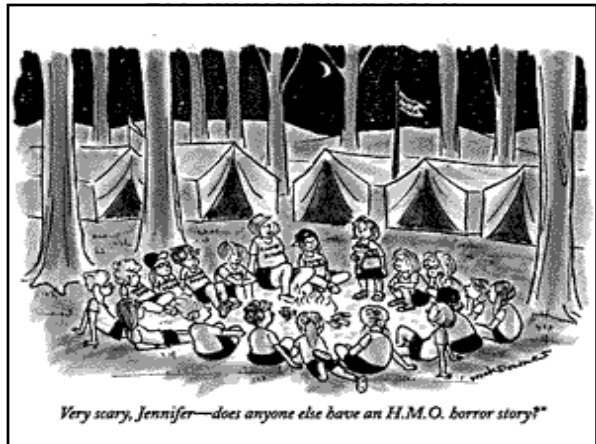
MCO Direct Liability for UR



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These are claims arising from a **coverage** decision

We are **not** talking about other forms of direct and vicarious liability (e.g. malpractice)

Wickline
v.
California

January 7, 1977

Dr. Polonsky repairs artery in leg

January 12, 1977

Complications

Lois needs follow-up surgery

January 16, 1977

Dr. Polonsky determines Lois need
8 more days

January 16, 1977

Medi-Cal authorizes 4 more days

January 21, 1977

Dr. Polonsky discharges Wickline

January 23, 1977

Complications at home

January 25, 1977

Dr. Polonsky's requested discharge
date

February 8, 1977

Amputate leg



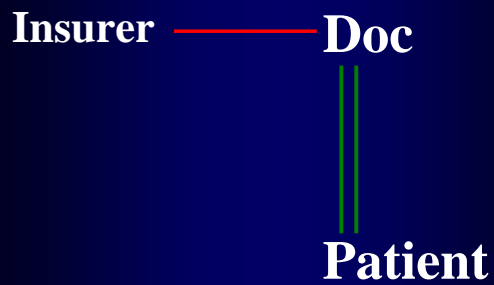
What theory of direct liability applies

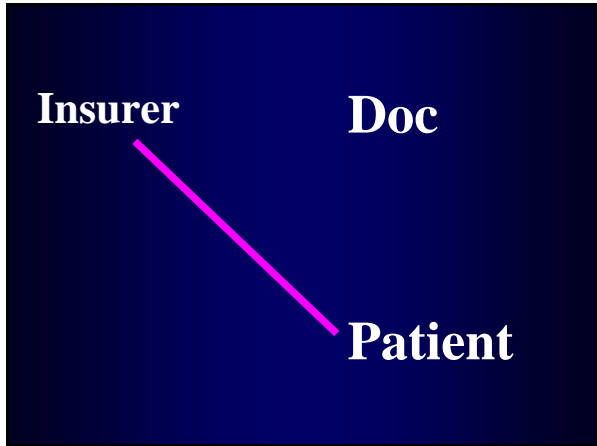
Malpractice case against Medi-Cal

Why does Wickline lose

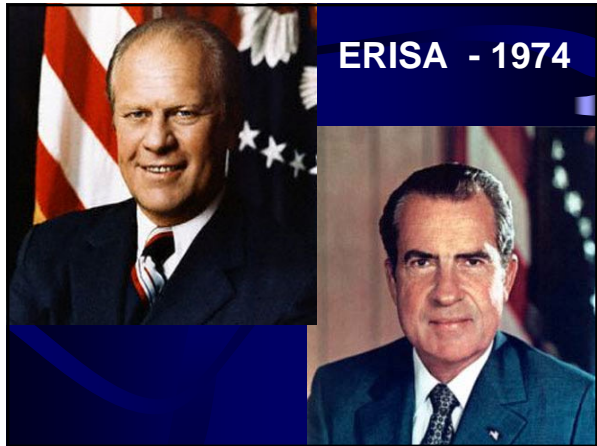
If Medi-Cal were liable, would Dr.
Polonsky be off the hook

- What about financial incentives
- Hold doc responsible if HMO not pay





ERISA Preemption Introduction



WHY

- Combat fraud -- ERISA has a framework to guarantee beneficiaries the benefits they were promised by their employers
- Provide uniform regulation -- encourage national employers to provide employee benefits

Purpose 1 -- ensure that workers get promised benefits

Purpose 2 -- preemption, so interstate employers not have varying administration rules

This Constitution, and the Laws of the United States . . . shall be the **supreme Law of the Land**;

and the judges in every State shall be **bound** thereby,

anything in the Constitution or Laws of any State to the Contrary **notwithstanding**.

Effect of preemption

Deregulatory – bumps out the state law controls and remedies

“Virtually all state law remedies are preempted but very few federal substitutes are provided”

(Ginsburg, J.)

29 U.S.C. 1003(a)

[T]his subchapter shall apply to any employee benefit plan if it is established or maintained—
(1) by **any employer engaged in commerce** . . .

29 U.S.C. 1003(b)

[T]his subchapter shall **not** apply to any employee benefit plan if—
(1) plan is a governmental plan [Medicare] . . .
(2) plan is a church plan . . .

Employer provided:

▪ State/local/fed gov. 14%

▪ **Private employers 46%**

Privately purchased 10%

Medicaid 12%

Medicare 14%

http://www.census.gov/Press-Release/www/releases/archives/income_wealth/002484.html

Not just health insurance

Any plan, fund, program that provides medical, disability, death, unemployment, vacation, and other benefits

2 preemption provisions

Section 502
29 U.S.C. § 1132

Section 514
29 U.S.C. § 1144

Section 502

- Implied / complete preemption
- Gives federal jurisdiction
- Primarily affects tort & contract actions

Section 514

- Express / conflict preemption
- Primarily affects regulatory measures (but tort too)

514(a) – **Express Preemption**

“Except as provided in subsection (b) of this section, the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter **relate to** any employee benefit plan . . .”

ERISA 502 preemption

502(a)(1)(B)

A civil action may be brought . . .
. . . to recover benefits due to him
under the terms of his plan, to
enforce his rights under the
terms of the plan, or to clarify
his rights to future benefits
under the terms of the plan

ERISA civil
enforcement
mechanism

Employee remedies

Contractual: recover plan benefits owed

Injunctive: enforce plan benefits

Declaratory: clarify future rights under plan

502

(a) A civil action may be brought

(1) . . . (B) to **recover** benefits due to him under the terms of his plan, to **enforce** his rights under the terms of the plan, or to **clarify** his rights to future benefits under the **terms of the plan**;

(3) . . . (A) to **enjoin** any act or practice . . . obtain other appropriate **equitable relief** . . . **terms of the plan**

- Value of the insurance benefit denied
- No compensatory damages
 - No lost wages
 - No pain & suffering
 - No medical expenses
- No punitive damages
- No jury trial

502 remedies are **exclusive**
(excluding state law)

If the gravamen of Complaint
concerns denial of benefits,
you **must** proceed under 502

If claim is, at bottom,
just about getting
benefits owed



You **must** use ERISA

All I want for Christmas is
compensation for my health
plan's denial of benefits.



ERISA claims can be litigated in **either** state **or** federal court

28 U.S.C. 1441(a)
“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, **may be removed by the defendant** . . . to the district court . . . where such action is pending.

Health Law I

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Class 24: Nov. 15, 2011

Problem: You did not get benefit entitled to under benefit plan

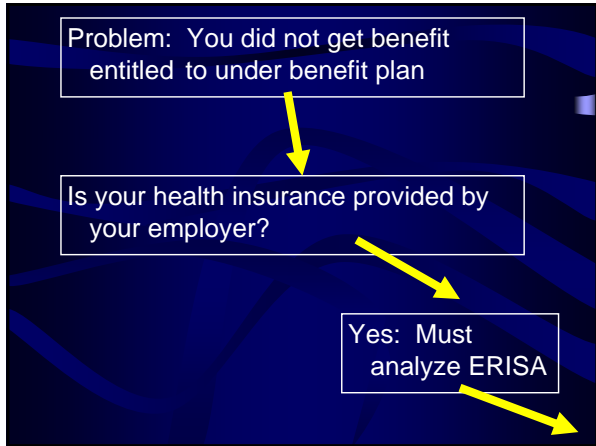
Is your health insurance provided by your employer?

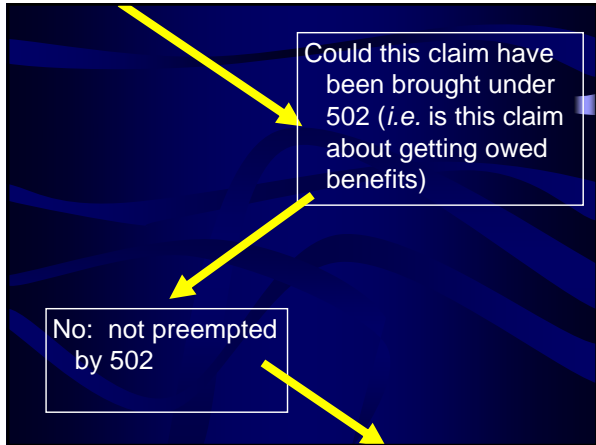
No: ERISA does not apply

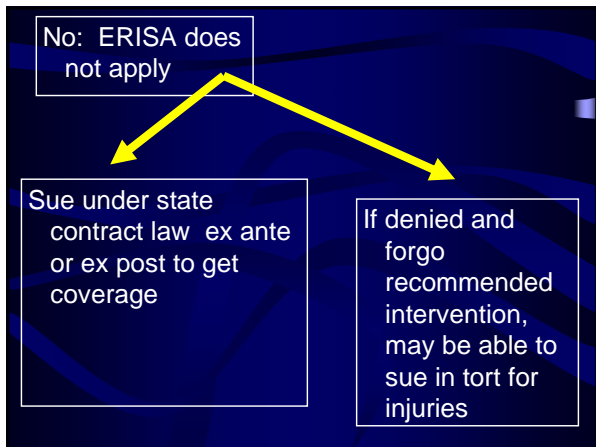
No: ERISA does not apply

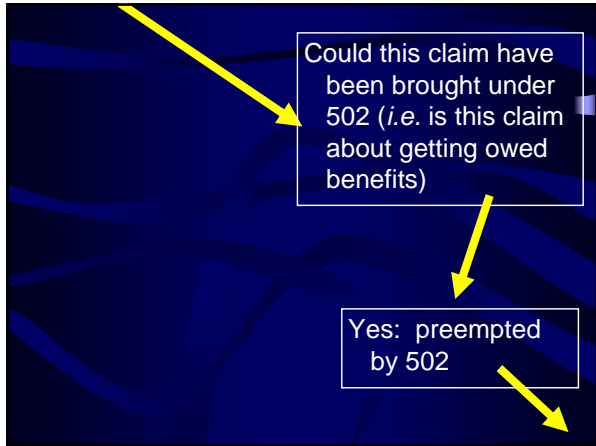
Sue under state contract law ex ante or ex post to get coverage

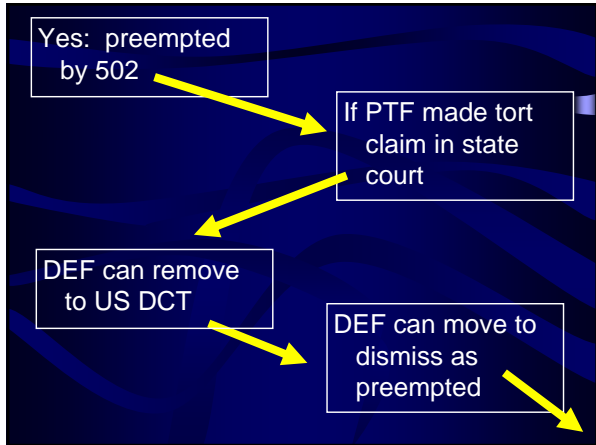
If denied and forgo recommended intervention, may be able to sue in tort for injuries

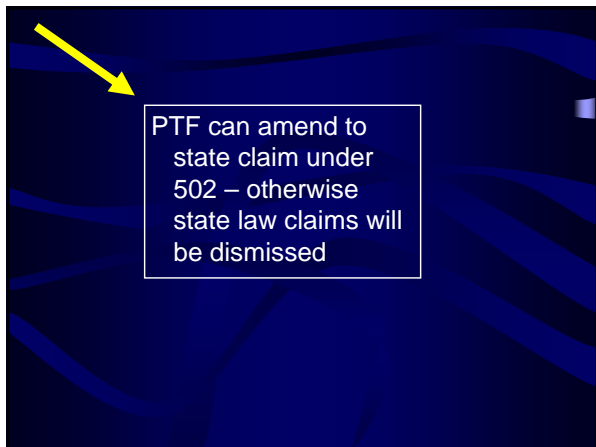


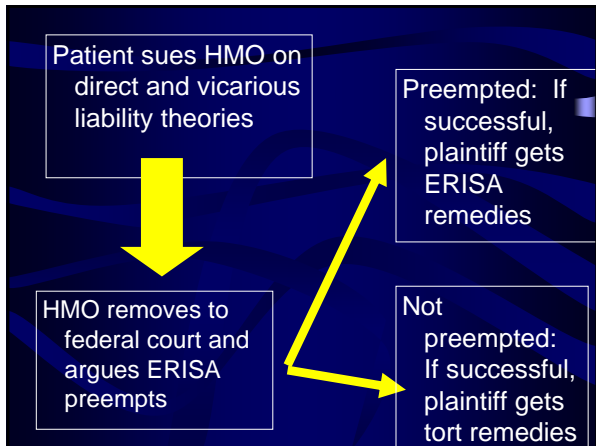












Could this claim have been brought under 502 (i.e. is this claim about getting owed benefits)

- Preempted**
- Negligent UR
- Not preempted**
- Vicarious liability for negligent treatment
 - Negligent selection & retention

<u>Preempted</u>	<u>NOT Preempted</u>
<ul style="list-style-type: none"> ▪ Coverage ▪ Quantity of benefits ▪ Eligibility ▪ Administrative 	<ul style="list-style-type: none"> ▪ Treatment ▪ Medical appropriateness ▪ Quality of care

Aetna v. Davila

		
MCO conduct		
Result MCO conduct		

Davila

- Aetna denies coverage for Vioxx
- D takes covered cheaper alternative
- Side effect intestinal bleeding

Calad

- Cigna denies coverage for extended hospital stay
- Post-surgery complications

Injured patients (e.g. Davila, Calad) do not want preemption

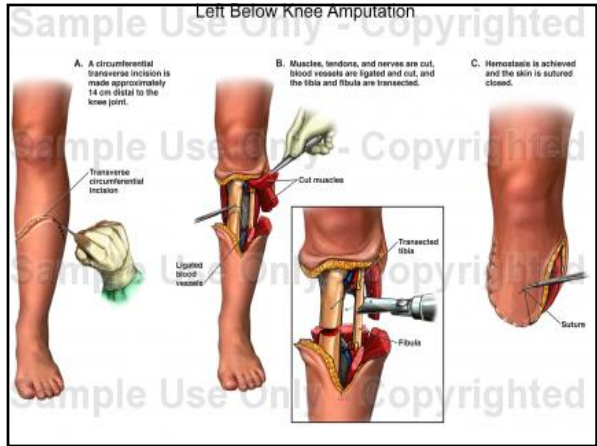
- Contractual damages (benefits owed under plan)
- No compensatory damages
- No punitive damages
- No jury trial

- 5th Cir. – not preempted
 - These are tort claims
 - They are not duplicative of 502 remedies
- Why does SCOTUS reverse

- 5th Cir. – not preempted
 - These are tort claims
 - They are not duplicative of 502 remedies

- Why does SCOTUS reverse

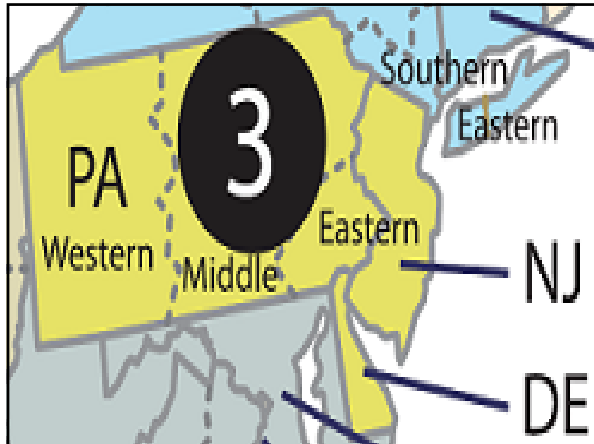
Gallagher v. CIGNA



Sarkisyan v. CIGNA







MCO - Case 1

MCO denied approval of hospitalization for pregnant high-risk woman.

During hours when nurse was not present at her home, the fetus went into distress and died. Mother brought a *Wickline* claim.

MCO - Case 2

Man family history of heart disease has with chest pain.

MCO telephone triage nurse says that it is just gastric upset.

Wrong.

MCO - Case 3

Snafu at the MCO delayed a pregnant woman's ultrasound appointment for three days.

Before the appointment, she delivered a very large baby with shoulder dystocia.

MD would have done a c-section if ultrasound had been done.

MCO - Case 4

Man with paralysis in extremities is told he needs spinal surgery immediately.

Small hospital transfers him to University Hospital, but MCO won't approve surgery there.

Eventually, another hospital is found, but only after surgery is delayed.

He never recovers use of his limbs.

Gallagher v. CIGNA

Maine Health Improvement Act

Breach of contract

IIED

NIED
