

# Health Law: Quality & Liability

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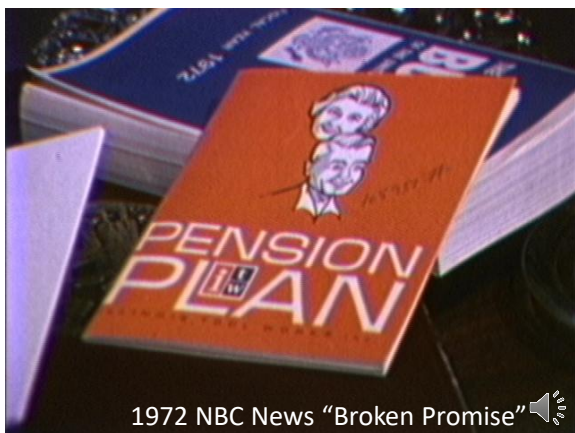
ERISA Preemption



# History



Studebaker default 1950s



1972 NBC News "Broken Promise"

# Sept. 2, 1974

Labor Day



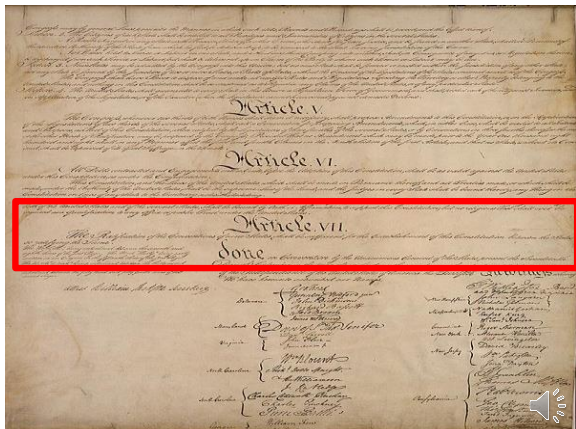
# Purpose

**Combat fraud** - guarantee beneficiaries benefits they were **promised** by employers

**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**.

**ERISA**  
**Preemption**  
**Who it affects**

**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%
<b>Private employers</b>	<b>46%</b>
Privately purchased	10%
Medicaid	12%
Medicare	14%

[http://www.census.gov/Press-Release/www/releases/archives/income\\_wealth/002484.html](http://www.census.gov/Press-Release/www/releases/archives/income_wealth/002484.html)

Public insurance (Medicare, Medicaid, Tricare, VHA...)

Private insurance

Individual

**Employer-provided**

Not just health insurance

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

## ERISA Preemption Consequences

**Deregulatory** – bumps out the state law controls & remedies

Makes federal remedies in ERISA **exclusive**

“Virtually all state law remedies are preempted but very few federal substitutes are provided”  
(Ginsburg, J.)

In 1974, coverage denial affected only payment not treatment

1974

Treat first  
Pay later



2017

Pay first  
Treat later



No coverage  
= no treatment  
= injury  
= no PI damages



Only value of the insurance benefit denied, not tort damages

**EXAMPLE**

Wickline gets value of 4 hospital days  
Not damages for a lost leg

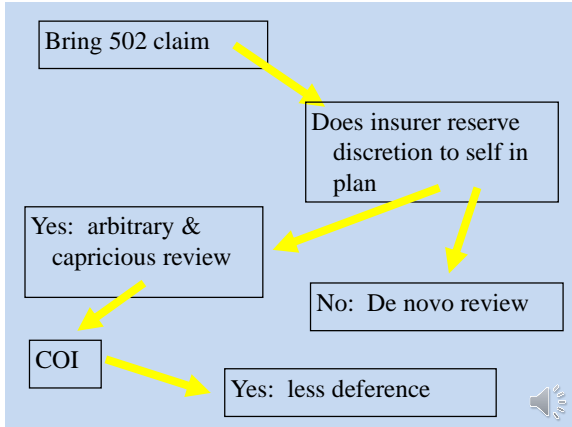


All I want for Christmas is compensation for my health plan's denial of benefits.



**ERISA Claims**  
**(on the merits)**





502 Standard	What it means	When applicable
De novo	Court interprets language itself	Default since contract interpretation is matter of law
Arbitrary and capricious	If rational basis, affirm plan interpretation  Common - most will give discretion	If plan reserves discretion to itself
Arbitrary and Capricious (less deference)	Variable standard – not total deference	When claim adjudicator has COI

# ERISA Preemption WHEN

- 2 preemption provisions**
- Section 502  
29 U.S.C. § 1132
  - Section 514  
29 U.S.C. § 1144

# ERISA Preemption 502

ERISA civil enforcement mechanism

Employee remedies

“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”



## Implied preemption

Statutory language says nothing about preemption (only about remedies)



**Contractual:** recover plan benefits owed

**Injunctive:** enforce plan benefits

**Declaratory:** clarify future rights under plan



Remedy =  
value of  
insurance  
benefit denied



### NOT recoverable

Compensatory damages (lost wages, medical expenses, pain & suffering)

Punitive damages

No jury trial



502 remedies  
are **exclusive**



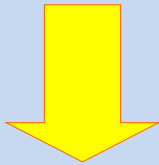
If you **can** use  
502, you may use  
**only** 502



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



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



You **must** use ERISA



Civil procedure  
illustrates the scope  
of preemption



### 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.



**502**  
**Summary**





**Preempted**

Negligent UR

**Not preempted**

Vicarious liability for negligent treatment  
 Negligent selection & retention



**Preempted**

Coverage  
 Quantity of benefits  
 Eligibility  
 Administrative

**NOT Preempted**

Treatment  
 Medical appropriateness  
 Quality of care



**502  
 Flowchart**



**Who** harmed you?

Your doctor (e.g. informed consent, malpractice) Not re 502

Claims administrator Re 502



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

Is your health insurance provided by your employer?

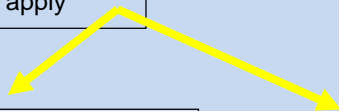
No: ERISA does not apply

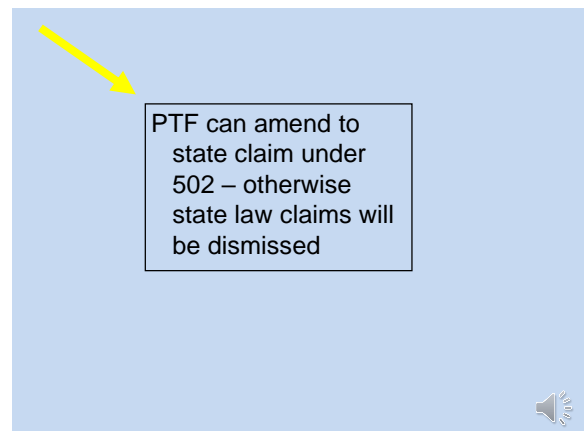
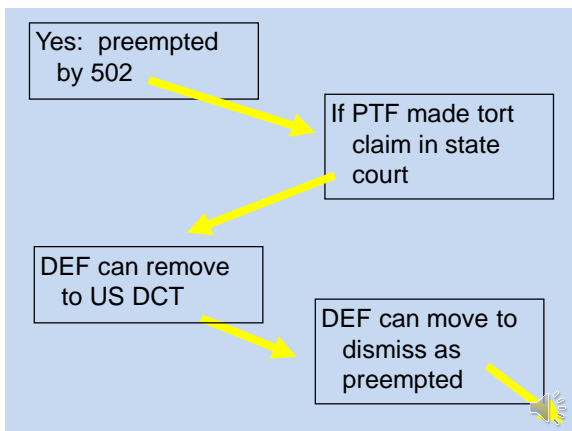
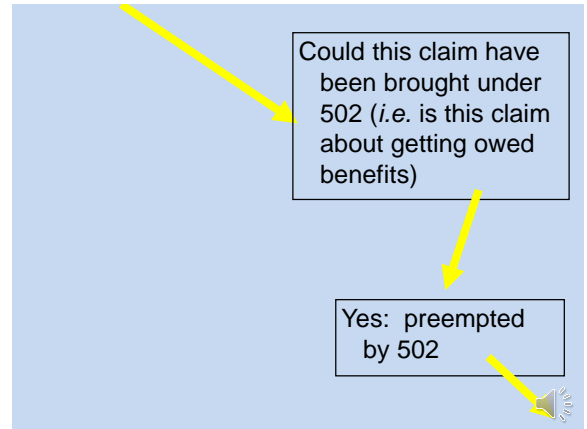
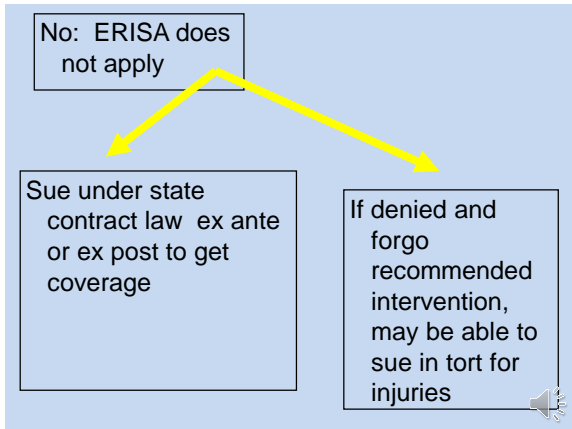
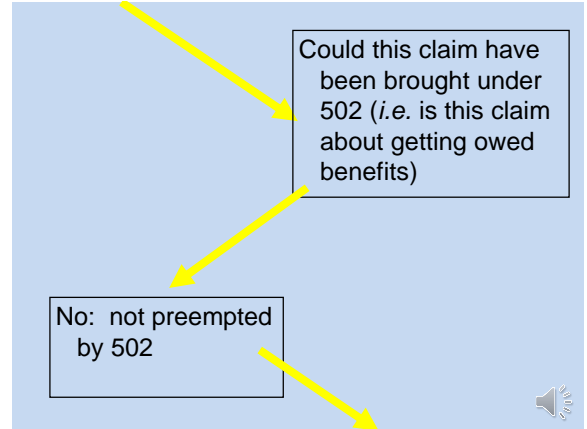
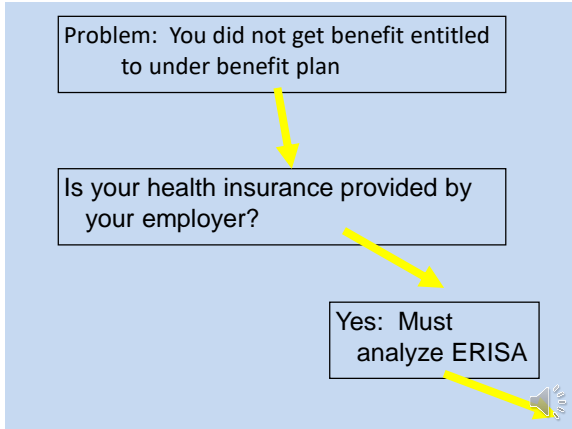


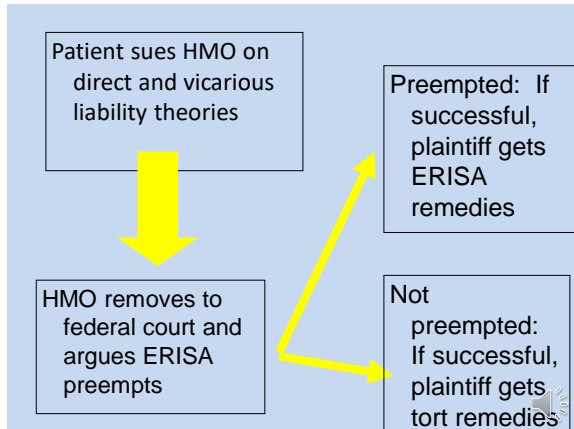
No: ERISA does not apply

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)

# Aetna v. Davila

## 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

5<sup>th</sup> Cir. – not preempted

These are tort claims

They are not duplicative of 502 remedies

▪ Why does SCOTUS reverse

		
MCO conduct		
Result MCO conduct		

# Sarkisyan v. CIGNA



## ERISA Preemption 514

**Section 514**

Express / conflict preemption

Primarily affects regulatory measures (but tort too)

### 514(a) - 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 . . .”



#### Section 502

- 29 U.S.C. § 1132
- Implied/complete preemption
- Federal jurisdiction
- Primarily affects tort & contract actions

#### Section 514

- 29 U.S.C. § 1144
- Express/conflict preemption
- Primarily affects regulatory measures



Does the state law “relate to” the EBP

No: not preempted by 514

Yes: preempted by 514

ERISA 514 does not apply (see check 502)



Yes: preempted by 514

Is the state law primarily directed at insurance regulation



### 514(b)(2)(A) - Savings Clause

“Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which **regulates insurance** . . .”

