

# Health Law I

Professor Pope

Class 20: Nov. 1, 2011

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## Alternative Theories

### Vicarious Liability

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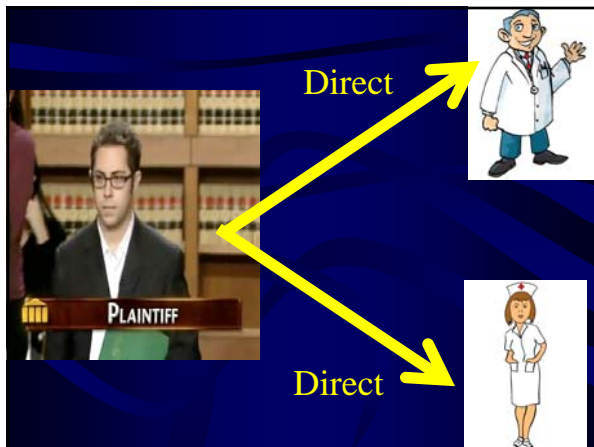
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Respondeat superior  
Actual agency  
Employer-employee  
Mater-servant

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Choose when, where and how they perform services

Provide facilities, equipment, tools and supplies

Directly supervise the services

Set the hours of work

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

Set the rate of pay

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	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.

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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**

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**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

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Apparent agency

Ostensible agency

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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

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Regardless of actual, specific arrangement

From perspective of reasonable patient

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Reliance by patient  
not required

Affirmative  
misrepresentation not  
required

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# Franklin v. Gupta

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

~~Captain of the ship (status)~~

Borrowed servant (actual control)

Agency through business entity

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**Hospital  
Vicarious  
Liability  
Introduction**

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**Independence  
of physicians  
and hospitals**

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

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Physicians practice in  
more than 1 hospital

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

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Interdependence  
and symbiosis of  
physicians and  
hospitals

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## Physicians

Get to use hospitals

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

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## Hospitals

Get a source of patients

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## **3 vicarious theories**

Respondeat superior

Ostensible agency

Nondelegable duty

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Apparent agency  
Ostensible agency

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**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](#)
[Services](#)
[Locations](#)
[Careers](#)
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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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Best Western Bromley Court Hotel  
 Bromley Hill, Bromley, Kent  
 BR1 4JD

Telephone: 020 84618600  
 Fax: 020 84600899  
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# Nondelegable Duty Rule

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Statutes and regulations  
evidence important public  
policy considerations

These cannot be  
“delegated” to independent  
contractors

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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

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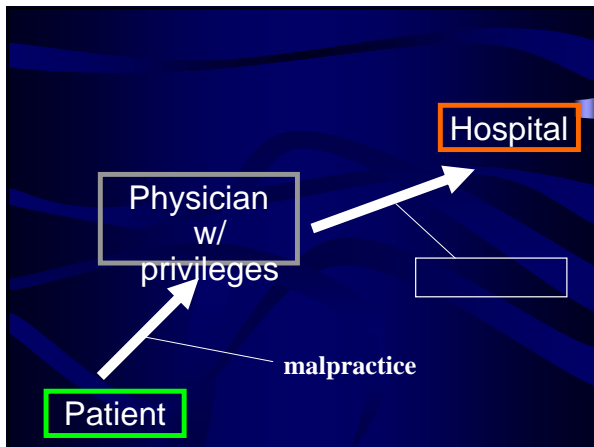
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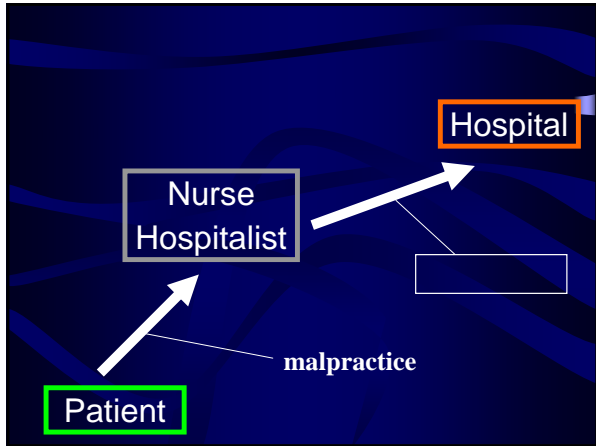
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# Hospital Vicarious Liability Cases

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# Schloendorff v. Soc'y NY Hosp.

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

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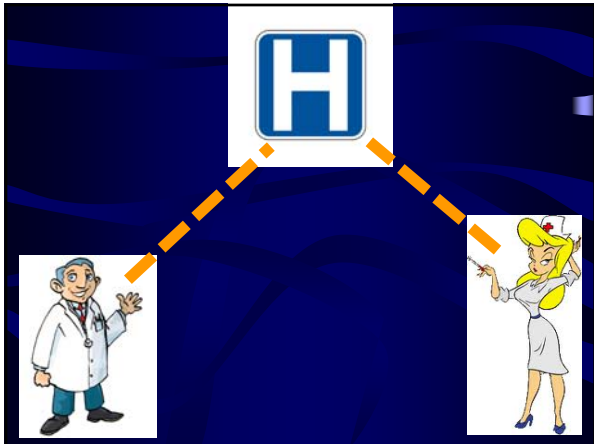
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**Adamski  
v.  
Tacoma  
Gen. Hosp.**

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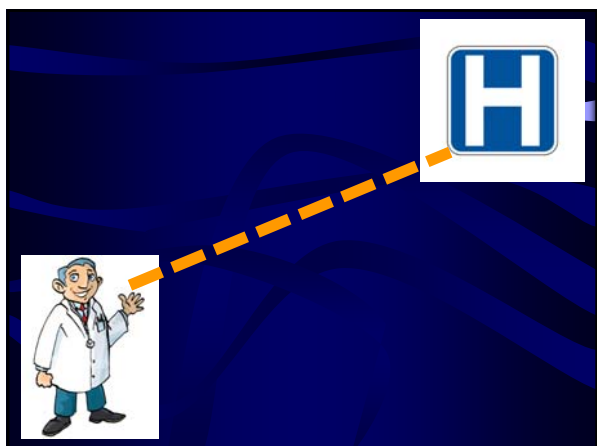
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# Health Law I

Professor Pope

Class 22: Nov. 8, 2011

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# Recapping Hospital Liability

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## 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)

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### Is HCP employee

Yes: Hospital vicariously liable under respondeat superior

No

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### Is HCP ostensible agent

Yes: Hospital vicariously liable under ostensible agency

No

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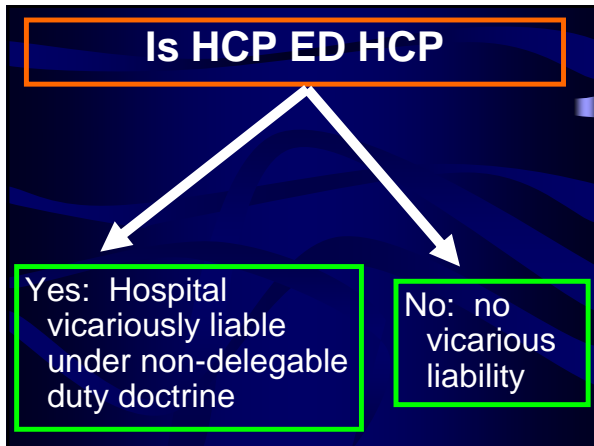
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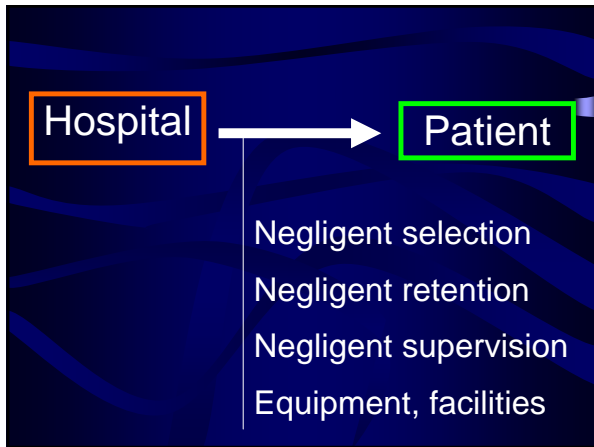
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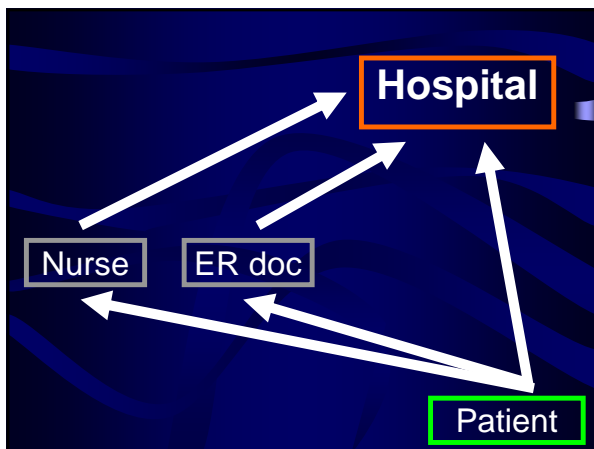
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# Quiz 8

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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

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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.

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[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

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**Nursing homes too**

*Scampone v. Grane*  
(Pa. Super. 2010)

Direct liability theories



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**Managed Care**

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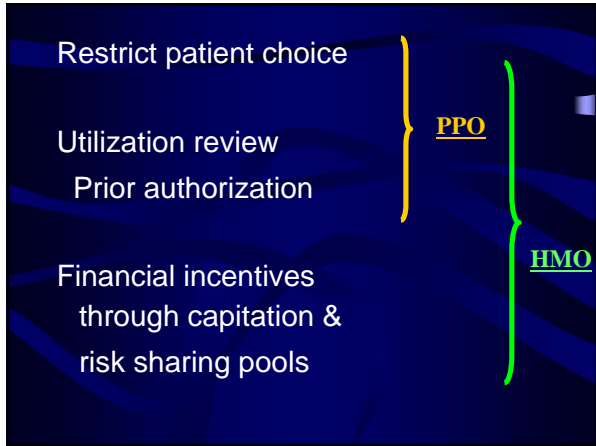
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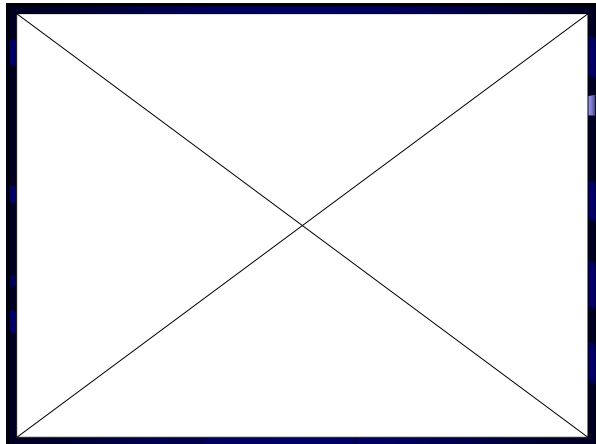
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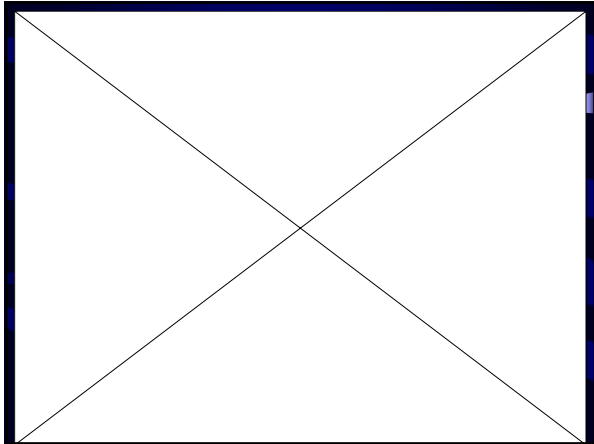
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# MCO Vicarious Liability

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**Staff / group model**

Docs work exclusively for HMO in centralized clinic

Strongest case for showing master-servant

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**IPAs**

No centralized office – docs have own offices

Probably will fail to show master-servant

Can still show other vicarious liability theories

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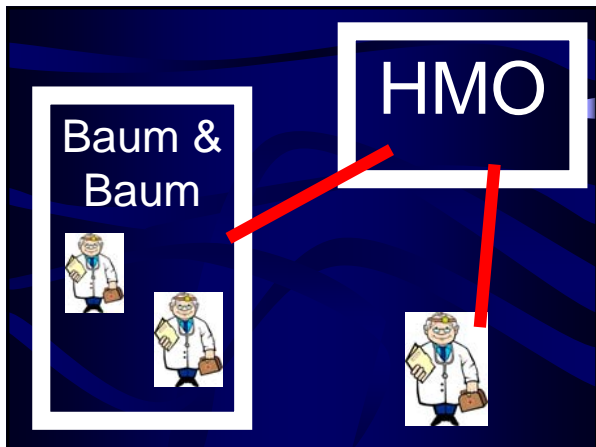
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# MCO Direct Liability

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

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# MCO Direct Liability for UR

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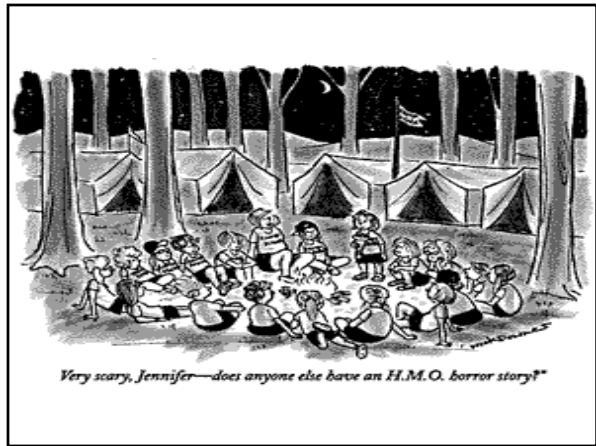
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*Very scary, Jennifer—does anyone else have an H.M.O. horror story?\**

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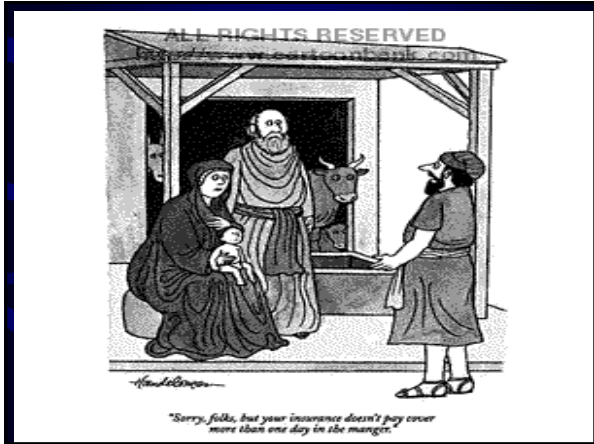
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# Health Law I

Professor Pope

Class 23: Nov. 10, 2011

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# MCO Direct Liability for UR

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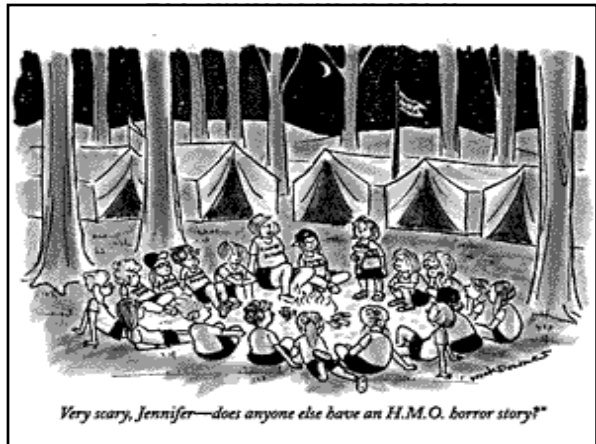
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These are claims arising from a **coverage** decision

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

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**Wickline**  
**v.**  
**California**

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1. Public
  - a. Medicare
  - b. Medicaid
  - c. Other
2. Private
  - a. Individual
  - b. Employer

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HOSPITAL NAME & ADDRESS Community Acute Hospital 123 Health Road Anytown, CA 95814		<b>CONFIDENTIAL Patient Information</b> <b>MEDI-CAL</b> <b>MANAGED CARE AUTHORIZATION</b>		PATIENT'S AUTHORIZED REPRESENTATIVE NAME: Raquel Conrad ADDRESS: 789 River Road Anytown, CA 95814	
<b>PATIENT INFORMATION</b>					
PATIENT NAME: Conrad, Jose M		AGE: 58 SEX: <input checked="" type="checkbox"/> MALE <input type="checkbox"/> FEMALE		MEDICAL NUMBER: [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ]	
PATIENT ADDRESS: 789 River Road, Anytown, CA 95814		DATE OF BIRTH: 06 / 30 / 42		COUNTY CODE: 34 AD CODE: 60 HOME: <input checked="" type="checkbox"/> BOARD & CARE: <input type="checkbox"/>	
MEDICARE? <input type="checkbox"/> YES <input type="checkbox"/> NO ICD-9-CM: 897.2		SOCIAL SECURITY NO: 1 1 1 - 2 2 - 3 3 3		DIAGNOSIS: S/P traumatic amputation, above knee, left leg	
<b>SPECIFIC SERVICES REQUESTED</b>					
1	FROM: 08/01/17 TO: 08/15/17	COMMENTS: Open draining stump wound requires daily dressing changes for one week. 3x week for 2 weeks, 2x week for one week.	PROVIDER NO: HHA666660	PROVIDER NAME: Caring Home Health Agency (916) 555-1111	SFY: 15
PREFERRED CONTROL NO: S0012821		ACTION AUTHORIZED: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		SERVICE DESCRIPTION: Skilled Nursing Services	
2	FROM: 08/01/17 TO: 08/03/17	COMMENTS: To continue range of motion - transfer - ambulation with assistive device 3x week for 3 weeks.	PROVIDER NO: HHA666660	PROVIDER NAME: Caring Home Health Agency (916) 555-1111	SFY: 9
PREFERRED CONTROL NO: S0012821		ACTION AUTHORIZED: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		SERVICE DESCRIPTION: Physical Therapy Services	
3	FROM: 08/01/17 TO: 08/03/17	COMMENTS: To continue goal of independent wheelchair transfer from bed to commode 3x week for 3 weeks.	PROVIDER NO: HHA666660	PROVIDER NAME: Caring Home Health Agency (916) 555-1111	SFY: 9
PREFERRED CONTROL NO: S0012821		ACTION AUTHORIZED: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		SERVICE DESCRIPTION: Occupational Therapy Services	
4	FROM: 08/01/17 TO: 08/11/17	COMMENTS: Requires varying bed height to facilitate patient transfers and personal care.	PROVIDER NO: DME234560	PROVIDER NAME: Hospital Equipment Inc. (916) 555-2222	SFY: 1
PREFERRED CONTROL NO: S0012821		ACTION AUTHORIZED: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		SERVICE DESCRIPTION: 1 month rental of <u>adjustable hospital bed</u>	
NOTE: Approval does not guarantee payment. Patient's eligibility must be current and claims properly submitted.					
MEDICAL CONSULT COMMENTS:					
APPROVED BY: <u>7. E. Green</u> DATE: <u>11/18/04</u>					

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August 1976  
Lois Wickline is treated by Dr. Daniels.

October 1976  
Dr. Polonsky diagnoses Leriche syndrome.

January 6, 1977  
Wickline is admitted.  
Medi-Cal authorizes 10 days.

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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

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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

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February 8, 1977

Amputate leg



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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

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

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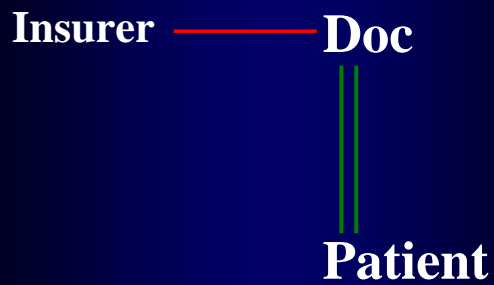
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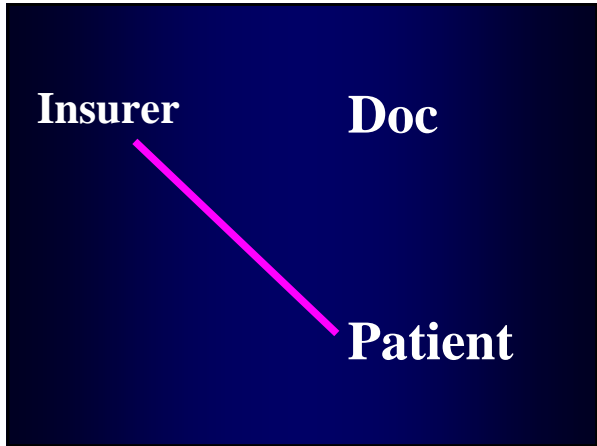
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# ERISA Preemption Introduction

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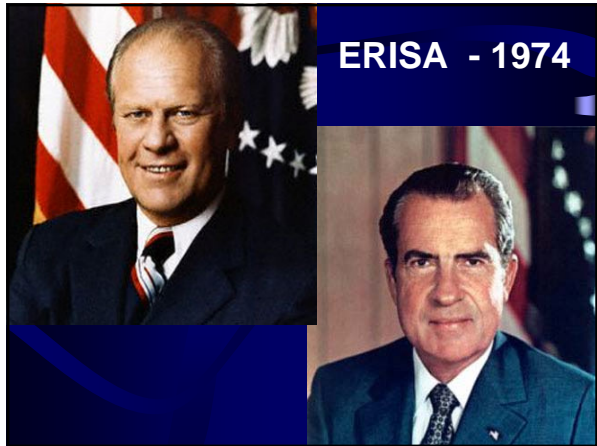
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## WHY

- 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

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**Purpose 1** -- ensure that workers get promised benefits

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

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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**.

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### 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.)

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### 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** . . .

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### 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 . . .

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

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Not just health insurance

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

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**2 preemption provisions**

Section 502  
29 U.S.C. § 1132

Section 514  
29 U.S.C. § 1144

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## Section 502

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

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## Section 514

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

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### 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 . . .”

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# ERISA 502 preemption

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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

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ERISA civil  
enforcement  
mechanism

Employee remedies

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**Contractual:** recover plan benefits owed

**Injunctive:** enforce plan benefits

**Declaratory:** clarify future rights under plan

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**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**

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

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

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

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



You **must** use ERISA

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



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

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**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.

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# Health Law I

Professor Pope

Class 24: Nov. 15, 2011

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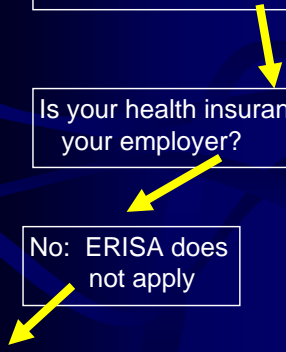
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Problem: You did not get benefit entitled to under benefit plan

Is your health insurance provided by your employer?

No: ERISA does not apply



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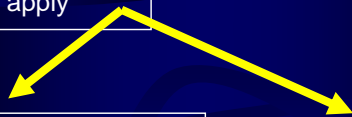
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No: ERISA does not apply

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



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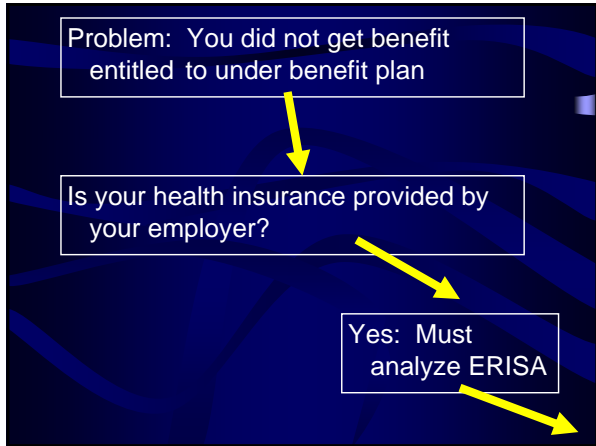
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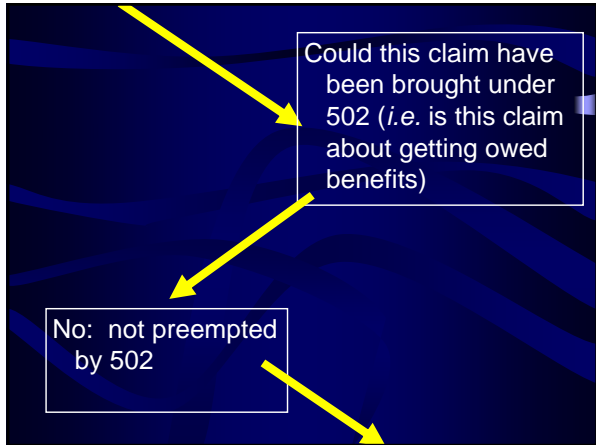
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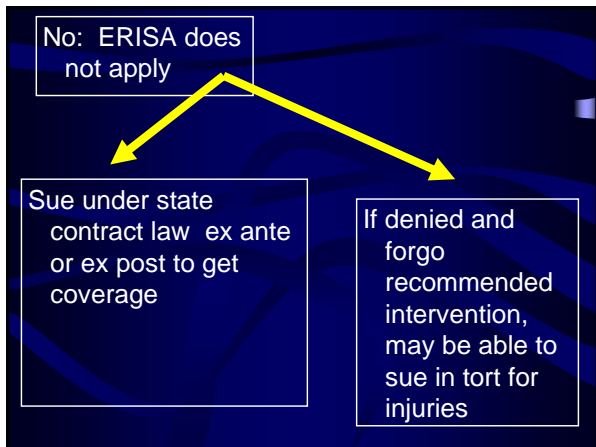
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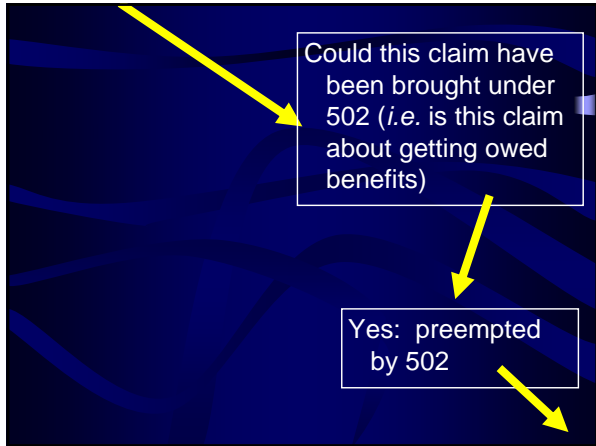
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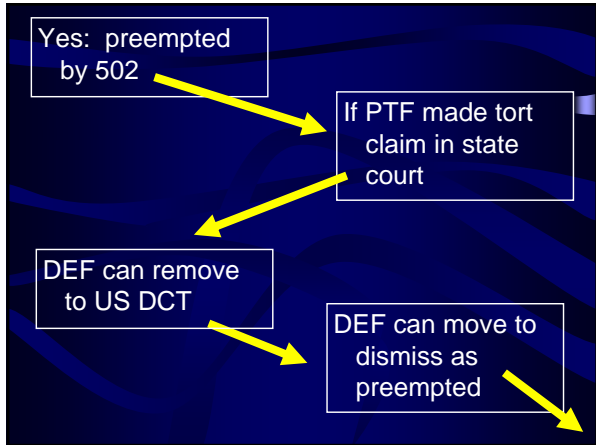
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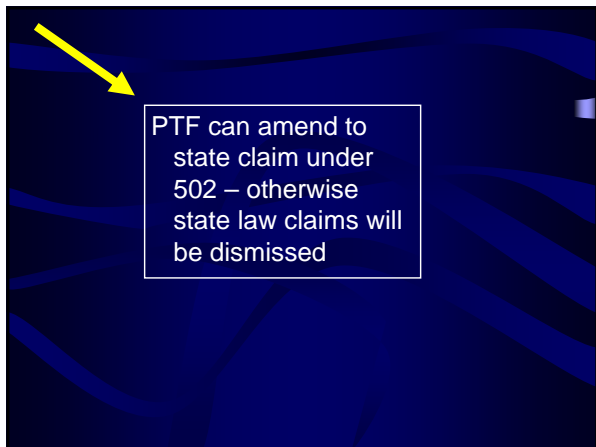
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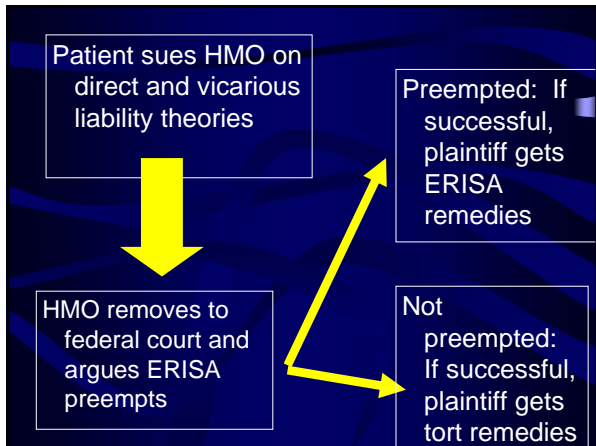
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Could this claim have been brought under 502 (i.e. is this claim about getting owed benefits)

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

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

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# Aetna v. Davila

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MCO conduct		
Result MCO conduct		

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**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

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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

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

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

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# Gallagher v. CIGNA

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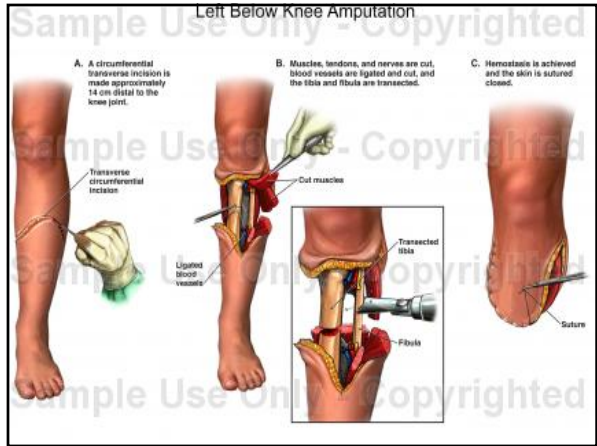
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# Sarkisyan v. CIGNA

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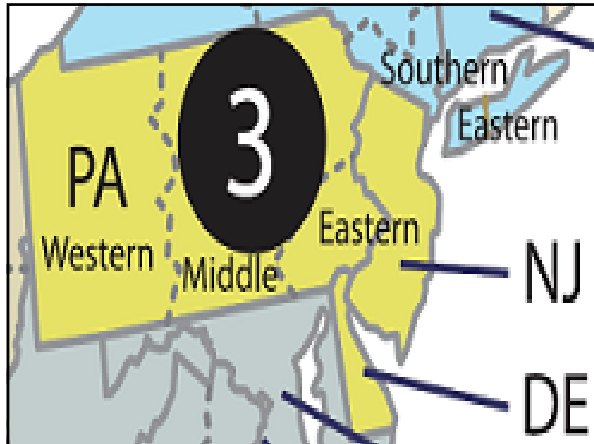
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### MCO - Case 1

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.

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### 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.

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### 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.

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### 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.

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### Gallagher v. CIGNA

Maine Health Improvement Act

Breach of contract

IIED

NIED

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