Exam ID # _____

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW II MIDTERM EXAM

Professor Pope **Spring 2009**

GENERAL INSTRUCTIONS:

1. **Honor Code:** While you are taking this exam, you may not discuss it with anyone.

2. **Competence:** Accepting this examination is a certification that you are capable of completing the examination. Once you have accepted the examination, you will be held responsible for completing the examination.

3. **Exam Packet:** This exam consists of eleven (11) pages, including this cover page. Please make sure that your exam is complete.

4. **Identification:** Write your exam number in these three places: (i) in the upper-right hand corner of this page, (ii) on the cover of ***each*** Bluebook (or your ExamSoft file) that you use for Parts Two and Three, and (iii) on the outside of the exam envelope.

5. **Anonymity:** The exams are graded anonymously. Do ***not*** put your name or anything else that may identify you (except for your student number) on the exam.

6. **Timing:** This exam must be completed by 7:55 p.m. Time will commence as soon after 6:30 p.m., as everyone has completed reviewing the instructions. Therefore, while the exam is timed and graded as a 60-minute exam, you will probably have around 80 minutes in which to complete it.

7. **Scoring:** There are 60 points on the exam, one per graded minute. Thus, you should allot a twenty (20) point question approximately twenty (20) minutes.

8. **Open Book:** This is an OPEN book exam. You may use ***any*** written materials, including, but not limited to: the Furrow casebook, other required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. You may not use a computer other than in its ExamSoft mode.

9. **Format:** The exam consists of three (3) parts which count toward your grade in proportion to the amount of time allocated.

PART ONE comprises six (6) multiple choice questions worth a ***combined*** total of 10 points. The suggested completion time is 10 minutes.

PART TWO comprises one short essay question worth 10 points. The suggested completion time is 10 minutes.

PART THREE comprises one long essay question worth 40 points. The suggested completion time is 40 minutes.

10. **Grading:** All exams will receive a raw score from zero to 60. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 40 of 60, then that student would typically receive an "A." I will post an explanatory memo and/or a model answer to TWEN a few weeks after the exam. L.L.M. and M.J. students are curved separately.

11. **Special Instructions:** Instructions specific to each exam section are printed immediately below.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Format:** The first four questions are worth 1-point each. The last two questions are worth 3-points each.

2. **Identification:** Write your Student ID on the first page of this exam booklet.

3. **Circle the Best Answer:** Clearly ***circle*** the best answer choice for each of the six multiple choice questions.

4. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why in the margin near the question. Your objection must (i) identify the ambiguity or problem in the question and (ii) reveal what your answer would be for all possible resolutions of the ambiguity. I do ***not*** expect this to be necessary.

SPECIAL INSTRUCTIONS FOR PARTS TWO AND THREE:

1. **Submission:** Write your answers in your Bluebook examination booklets or ExamSoft file. I will not read any material which appears only on scrap paper or this exam.

2. **Legibility:** If you are not typing, write legibly. Please write only on one side of the page. Leave a blank space/line between paragraphs. I will do my best to read your

handwriting, but must disregard (and not give you points for) writing that is too small to read or otherwise illegible.

3. **Outlining Your Answer:** You are strongly encouraged to use one-fourth of the allotted time per essay question to outline your answers on scrap paper ***before*** beginning to write in your exam booklet or ExamSoft file.

   Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues ***will*** negatively affect your grade.

4. **Answer Format:** This is important. ***Use headings and subheadings*** to separate chunks of text concerning a particular party, a particular legal theory, or a particular element of a legal theory (*e.g.* "Patient v. Doctor - ADA" and "ADA – Harm to others defense"). Use short single-idea paragraphs (leaving a space between paragraphs). Less important, but sometimes helpful, are introductory roadmaps.

5. **Answer Content:** Answer all (but only) relevant issues that arise from the fact pattern. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, ***apply*** the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.

6. **Citing Cases:** You are welcome but not required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a substitute for stating the law. For example, do ***not*** write: "Plaintiff should be able to recover under *Bragdon.*" Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?

7. **Cross-Referencing:** You may reference your own previous analysis (*e.g.* "the duty of defendant B is the same as defendant A."). But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.

8. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize key weaknesses in your position and make the argument on the other side. Do not make only slam-dunk arguments for a party. Make ***all*** plausible arguments implicated by the facts. If some of those are weak, say why.

9. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (implied by or at least consistent with the fact pattern) that you believe to be necessary to answer the question.

STOP!

DO NOT TURN THIS PAGE UNTIL THE PROCTOR SIGNALS

PART ONE

6 questions worth a total of 10 points

Circle the best answer

ONE POINT EACH

1. U.S. citizens must enroll in all four parts of Medicare -- parts A, B, C, and D.

True

False

2. All U.S. citizens aged 65 and over are eligible for:

A. Medicare

B. Medicaid

C. SCHIP

D. Both A and B

E. All of the above

3. Under Medicare, hospitals are paid:

A. Through the Prospective Payment System (PPS), which was introduced in 1983, as a way to change hospital behavior through financial incentives that encourage more cost-efficient management of medical care

B. By classifying each patient into a Diagnosis Related Group (DRG) on the basis of clinical information

C. A pre-determined flat rate for each Medicare admission, regardless of the actual services provided (except for certain "outlier" patients with exceptionally high costs)

D. All of the above

4. Under state contract law, a court will construe a health insurance contract:

A. Under an abuse of discretion standard, deferring to the insurance company's interpretation, unless it is arbitrary or capricious, so long as the insurance company reserved itself that discretion in the contract

B. Under an abuse of discretion standard, as in Answer A, except that the court will grant less deference to the insurance company's interpretation relative to the degree the insurance company suffers from a financial conflict of interest in paying the claim

C. Using the doctrine of *contra proferentum*, interpreting any ambiguity against the insurance company that drew up the contract

D. *De novo*, giving no deference to either party's interpretation

THREE POINTS EACH

5. Margaret was forty-eight, obese, a cigarette smoker, and had a family history of coronary artery disease and diabetes. On February 10, 2009, Margaret arrived at the Brandywine Hospital emergency department. During Brandywine Hospital's initial screening during triage, Margaret reported pain in the middle of her chest that radiated down both arms and her back, right side neck pain, and right-arm numbness.

Margaret was seen first by Dr. Dan, who ordered the following tests: a complete blood count, a blood serum chemistry panel, chest x-rays, a computerized tomography scan ("CT") of her chest, cardiac marker tests, and an electrocardiogram ("EKG"). The test results were normal with no indication that Margaret was having a cardiac event. Margaret's pain was somewhat alleviated by two doses of nitroglycerin spray. Dr. Dan concluded that Margaret was suffering from "atypical chest pain" and ordered a second enzyme test to check for abnormal cardiac markers.

Brandywine Hospital has a standard screening exam for chest-pain patients which was applicable to patients with the same or similar symptoms as Margaret. The guidelines provided for serial cardiac enzyme measurements, serial EKG testing, and cardiology consultation. Margaret did not receive serial enzyme tests, serial EKGs, a cardiology consultation, or a cardiac perfusion scan; because Dr. Dan did not consider them necessary in her case. Dr. Dan ordered Demerol for Margaret to treat her continuing pain, which lessened it. After the second set of cardiac markers were normal, Dr. Dan determined that Margaret could be discharged from the emergency department.

The next day, Margaret died from hemopericardium with cardiac tamponade (fluid accumulated in the sac in which the heart is enclosed), which was due to rupture of acute myocardial infarction due to ischemic heart disease.

Margaret's heirs probably have a strong EMTALA claim against:

A. Brandywine Hospital

B. Dr. Dan

C. The triage screener

D. All of the above

E. None of the above: these facts do not clearly demonstrate a violation of either the screening or stabilization requirement

6. In a complaint filed in federal district court, Plaintiff alleges the following:

> My mother sought treatment at Hospital's emergency room, complaining of abdominal pain and "vomits." The ER physician "conducted a physical examination, ordered a CBC, as well as other tests." According to emergency room records, the physician "reached a diagnostic impression of colelithiasis (gall bladder inflammation) and discharged mother. But an X-ray was "suggestive for pneumonia" and an ultrasound was "suggestive for colelithiasis."
>
> Mother "was a diabetic" and had a "previous history of cancer" which compromised her immune system. Despite both mother's previous medical history and clinical condition at the time, she was discharged in an "alleged stable condition."

Hospital may have a plausible argument that Plaintiff has failed to sufficiently plead an EMTALA claim because Plaintiff failed to specifically allege:

A. That his mother had an "emergency medical condition" that was not stabilized at discharge

B. That the hospital's screening was "faulty" and fell below the generally applicable standard of care

C. Both A and B

D. None of the above

PART TWO

1 short essay question worth 10 points

Lessandra was a nurse, whose professional licensure is governed by The Nursing Practice Act.[*] Lessandra began working for Hospital as an employee-at-will in 1997. On August 30, 2004, Lessandra was involved in the care of a patient who had been admitted for depression and alcoholism ("Patient"). Patient began experiencing problems that Lessandra believed to be a combination of anxiety and extrapyramidal symptoms. Lessandra documented Patient's symptoms in her progress notes and relayed them to Dr. Collins.

Lessandra asked Dr. Collins to allow her to administer Serax (an anti-anxiety drug) earlier than scheduled, but Dr. Collins refused. Lessandra called Dr. Collins again and told him that Patient's symptoms were worsening. Dr. Collins ordered her to administer the drug Haldol. He later directed that the patient be given Congentin. Still later the same afternoon, Lessandra called Dr. Collins a fourth time and was given permission to administer Serax. After receiving the Serax (and some Benadryl), Patient relaxed and went to sleep. At no time on this date was Lessandra ever criticized about the care she had provided to Patient.

Two days later, Lessandra was asked by her Supervisor to "take it out and rewrite" certain portions of her progress notes that had been indicated with brackets. The bracketed portions referred to Dr. Collins's refusal to allow early administration of Serax and to his decision to have Cogentin administered to Patient. Lessandra rewrote her progress notes and took the revised version to Supervisor. Supervisor asked Lessandra to also return the original progress notes that had been marked with the brackets, but Lessandra refused because she had been advised by another employee to do so and "under the circumstances [she] felt like [she] was protecting [herself]."

Later that afternoon, Supervisor brought Lessandra the revised copy and said "[t]his isn't exactly what we wanted" and asked Lessandra to make an addendum to the notes. Lessandra replied: "Sure. I can make an addendum. What do you want me to say? I'll say whatever you want, but I won't lie." Supervisor then said, "[w]ell, we don't want to do this" and put the revised progress notes in the shredding machine. Two days later, Hospital terminated Lessandra's employment.

Evaluate Lessandra's wrongful discharge claim against Hospital.

[*] Under the NPA, the license of a registered nurse is subject to being suspended or revoked for "misconduct, . . . fraud, misrepresentation or dishonesty" in the performance of professional functions or duties.

PART THREE

1 long question worth 40 points

The following Complaint (edited for exam purposes) was recently filed in California state court. You have been hired by defendant CIGNA to identify and evaluate CIGNA's procedural options to dispose of this case quickly and cheaply.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

NATURE OF THE CASE

1. CIGNA wrongfully denied PLAINTIFFS' daughter's full insurance benefits after PLAINTIFFS' daughter became in need of a life saving liver transplant. As a direct result of CIGNA's wrongful denial, delay tactics, and tortuous conduct, PLAINTIFFS' daughter died in need of the liver transplant.

INSURANCE COVERAGE

2. Defendant CIGNA, in its capacity as insurance agents, induced PLAINTIFFS to purchase healthcare insurance coverage that was offered by Sonic Automotive, Inc. to its employees, including PLAINTIFF Grigor Sarkisyan.

3. CIGNA issued the policy of insurance (the "POLICY") which was in effect on or about December 2007, covering healthcare costs from various illnesses including, without limitation, illness of end-stage liver failure.

FACTUAL BACKGROUND

4. PLAINTIFFS, Hilda and Grigor Sarkisyan were the parents of minor Nataline Sarkisyan. Nataline was a beneficiary under her parents CIGNA Healthcare Insurance plan.

5. In 2004, Nataline was diagnosed with Acute Lymphoblastic Leukemia at age fourteen. After chemotherapy treatment, Nataline was determined to be in remission by her physicians.

6. In or about August of 2007, it was discovered that Nataline had relapsed, and again needed chemotherapy treatment. After a course of treatment which began in September 2007, it was determined that Nataline would need a bone marrow transplant.

7. The day before Thanksgiving, 2007 Nataline underwent a bone marrow transplant with her brother's bone marrow. Brother and sister were a perfect match, and the transplant was a complete success. It was then determined that Nataline had an 85% chance of "lifetime no disease reoccurrence."

8. However, in early December 2007, while Nataline was recovering from this bone marrow transplant, her liver began to fail. Her physicians immediately informed her parents that a liver transplant would be necessary to save Nataline's life.

9. In or about the first week of December 2007, PLAINTIFFS and their representative physicians from UCLA Medical Center timely contacted CIGNA to report that Nataline would need a life saving transplant, the cost of which was covered by Nataline's Health Insurance Plan.

10. CIGNA immediately sent a Notice of Denial of Coverage letter, denying payment for Nataline's life saving liver transplant.

11. PLAINTIFFS and Nataline's physicians from UCLA Medical Center appealed CIGNA's wrongful denial of cost coverage for Nataline's liver transplant.

12. On December 11, 2007, four of Nataline's physician's sent a joint letter to CIGNA's Transplant Department, urging and imploring CIGNA to reconsider their denial of coverage for Nataline's liver transplant. The letter stated the urgency of Nataline's situation, and the fact that Nataline was considered an excellent candidate for this life saving liver transplant.

13. Despite PLAINTIFFS' and UCLA physician's urging, CIGNA pursued denial of benefits based on CIGNA's assertions that Nataline's medical benefits did not cover "experimental, investigational and unproven services."

14. Nataline's condition began to worsen. On the afternoon of December 20, 2007, Nataline died of Acute Liver Failure.

15. Throughout the last days of Nataline's life, CIGNA repeatedly stonewalled PLAINTIFFS' and Nataline's physicians' and their request that CIGNA approve this life saving procedure.

16. As a direct result of CIGNA's conduct, PLAINTIFFS lost their seventeen year old daughter, all to the emotional distress and mental anguish of PLAINTIFFS.

17. By its unlawful, unfair, and/or fraudulent business practices, CIGNA intended to minimize its costs of paying the POLICY'S benefits to PLAINTIFFS and their daughter Nataline, and maximize profits obtained through its collection of premiums.

FIRST CLAUSE OF ACTION: BREACH OF CONTRACT

18. CIGNA has breached the POLICY by unreasonably refusing to pay, and continuing to withhold POLICY benefits due and payable, under the terms of the POLICY.

19. Wherefore, PLAINTIFFS pray for special, incidental, and consequential damages according to proof.

SECOND CLAUSE OF ACTION: HEALTH INSURANCE FAIR TREATMENT ACT

20. CIGNA has violated the California Health Insurance Fair Treatment Act, by engaging in the following improper, unfair, fraudulent claims practices:

    a. Unreasonably and unjustifiably failing to timely pay PLAINTIFFS' claims under the POLICY;

    b. Misrepresenting the terms of PLAINTIFFS' POLICY;

    c. Deliberately delaying any approval of life saving medical procedures in hopes that Nataline's condition would deteriorate to the point of making any liver transplant operation moot.

21. Wherefore, PLAINTIFFS pray for: general damages, special damages for emotional distress and mental anguish, and punitive and/or exemplary damages.

MEMORANDUM

TO: Health Law II class
FROM: Prof. Pope
DATE: March 30, 2009
RE: Midterm Exam (Spring 2009)

Attached to this memorandum are three tables. The **first table** is the scoring sheet that I used to grade the midterm exams. As you can see, the table leaves room only for recording a numerical score relative to the indicated criteria. While I made some margin notes on the exams, I did *not* provide detailed individualized feedback either on the scoring sheet or on the exam itself. First, students are typically able to "self-diagnose" their exam performance by using the exam, the scoring sheet, and their own notes. Second, I regularly provide – and am happy to provide – individualized feedback in one-on-one conferences upon request. Indeed, I encourage you to resolve any uncertainty concerning your exam performance.

The **second table** shows the distribution of midterm scores. The **third table** correlates the raw scores to approximate letter grades. But the raw score is relevant to a law school course letter grade only to the extent that it is added to both your quiz total and final exam total. J.D., L.L.M., and M.J. students have separate grading curves. I did not break these out, here, because I cannot correlate exam ID numbers to students or student degree types. Given the numeric breakdowns of different degree students, I do not believe that any mandatory curve applies.

As we discussed, the points from the short essay do *not* count toward the midterm or cumulative course totals. They will be treated as "bonus" points – added *after* total course points (midterm + quizzes + final) have been computed and correlated to letter grades. Moreover, if you did not earn all the bonus points (maximum 10) from the short essay that you would have liked to, then you can earn up to the same amount by completing an alternative short problem that will be a voluntary extension to Quiz 10. You need not choose between points from the midterm and points from the extra problem. You can add both sets of points together up to a maximum of ten.

Finally, you should know that all the fact pattern-based questions were not the mere imagination of a law professor. They were based on recently decided cases.

- The short essay is based on *Hughes v. Freeman Health System*, No. SD28921 (Mo. App. 2009).
- The long essay is based on *Sarkisyan v. CIGNA*, No. CV09-0335 (C.D. Cal. 2009) (Notice of Removal).

I have posted these case materials to the course TWEN site. I have also posted some model exam essays.

Exam ID _____

Multiple Choice

1	F	1		4	C	1	
2	A	1		5	A	3	
3	D	1	A, B, C say the same thing	6	A	3	B could never be true

Total ____ of 10

Short Essay

At-will employment: Nurse is an at-will employee. Therefore, she can be terminated for any reason or no reason. But she cannot be terminated for an illegal reason.	3	
Public policy exists: Here, there is public policy against record falsification. The public policy is evidenced by a statute (not mere professional code).	3	
Public policy applies: The nurse was probably terminated because she refused to falsify records. The timing of her refusal and the termination seems suspicious. The nurse should at least get past summary judgment, especially since there appears to be no alternative legitimate basis for her termination.	4	

Total ____ of 10

Long Essay

ERISA applies: Nataline is covered under her father's insurance plan, which is a benefit of his employment. (*Pegram* does not apply because the challenged conduct was a pure eligibility decision determining application of the "experimental" exclusion (e.g. ¶¶ 11, 17).)	4	
Removal: Defendant should remove to federal court under 502 complete preemption. (Defendant could alternatively file to dismiss the action in state court.)	4	
Motion to dismiss breach of contract claim under 502: This claim duplicates 502 (e.g. ¶ 18) in that it concerns reclamation of owed employee benefits. Under *Davila*, Plaintiff must use 502 for this objective. Plaintiff cannot get damages claimed in ¶ 19.	8	
Motion to dismiss breach of contract claim under 514: The breach of contract claim is state law that relates to the EBP. It is not "saved" because it is not directed primarily at the regulation of insurance.	8	
Motion to dismiss HIFTA claim under 502: This claim also duplicates 502 (e.g. ¶¶ 20a, 20c). Plaintiff must use 502, and cannot get the damages claimed in ¶ 21.	8	
Motion to dismiss HIFTA claim under 514: HIFTA is a state law that "relates to" the EBP. But it is "saved" because, like *Moran*, it is a state law that is directed at the regulation of insurance. (The "deemer clause" does not apply because employer is not self-insured.) The savings clause does not save from 502 preemption.	8	
Right to Coverage: 502 standard of review probably less deferential than A&C given the COI. Insufficient information to analyze the merits of the claim.	--	

Total ___ of 40

Total ____ of 50 + ___ of 10

Midterm raw scores		
Student ID	**Score**	**Bonus**
Total Possible	50	10
368655	27	6
429123	22	2
466949	14	0
468999	16	7
484314	31	2
505753	19	0
522053	25	6
540445	10	4
546377	17	3
56118	30	3
565031	22	8
585597	11	8
587668	29	10
600306	29	7
605586	16	7
620578	36	10
623880	25	3
626221	19	7
640933	22	0
660831	27	10
663593	30	5
668935	33	8
701998	34	10
703386	28	6
708807	31	3
7222	16	0
760094	35	8
781104	47	10
801047	22	7
809590	13	3
827751	24	5
867735	25	6
979484	40	7

Rough letter grades approximations. The only "real" letter grades are correlated to cumulative *course* totals.

	Raw Score	**# Students**
A	40 – 50	2
A-	35 – 39	2
B+	30 – 34	6
B	25 – 29	8
B-	20 – 24	5
C+	15 – 20	6
C	10 – 14	3

[redacted] HealthLawII-midterm_(Pope)_SP09 Pope

1)

Part 2 (Short Essay)

Lessandra is an employee at will

The facts indicate that Lessandra (L) is clearly an employee at will. She was hired that way as a nurse in 1997. Employees at will can be terminated without notice for almost any or no reason, EXCEPT if the reason is contrary to public policy. L will argue that she was terminated for refusing the discard the original progress note which is contrary to public policy. Hospital (H) will argue that L was not fired for that reason and that they need not give a reason as she is an employee at will.

L's firing was contrary to public policy

An employee at will's firing can be contrary to public policy for several reasons including but not limited to: refusing to commit illegal acts; retaliation for whistle-blowing; taking leave; discrimination; and violating a written termination procedure. L can argue two of these: refusing to commit an illegal act and retaliation. First, L will argue that by refusing to return the original progress notes that showed Dr. Collins (Dr. C) ignored her request to administer Cerax until the fourth time that H is committing an illegal act. L will point to the Nursing Practice Act (NPA) that altering original documents amounts to "fraud, misrepresentation or dishonesty" and that's why she refused to do it. Courts want to see statutes when people argue that they were fired for refusing to commit an illegal act. By pointing to the NPA, L has done this. H will likely argue that the NPA only deals with nurse misconduct and has nothing to do with the real issue which is

falsifying documents. This is an issue for the Court to decide, but there is probably some statute or law that forbids what H asked her to do.

Nonetheless, L can still argue that her firing was retaliatory because she told her Supervisor that she would not lie. She may have a strong argument here because she was fired just 2 days after that incident so there is clearly a nexus between her refusal to lie and her termination. H will argue that her termination has nothing to do with that incident and that they need not give a reason for her termination as L is an employee at will. L has the stronger argument.

Conclusion

Although L is an employee at will, her wrongful discharge claim will probably be successful because her termination was contrary to public policy. Namely, by forcing L to alter to orginal progress note, H engaged in an illegal act. This act is barred by the NPA as "fraud, misrepresentation or dishonesty" and, probably by other law and statutes as well. Also, her firing appears retailatory for refusing to lie. L's has a strong wrongful discharge claim.

Part 3 (Long Essay)

ERISA applies

This issue presented is clearly whether CIGNA, the defendant, can argue that plaintiff's causes of

Model #2

[redacted] HealthLawII-midterm_(Pope)_SP09 Pope

1)

Athough hospitals are permitted to discharge at will employees with or without cause, however if the employee's discharge is in violation of public policy, the employee may have a wrongful discharge claim. Here, the nurse could claim that her discharge was in violation of public policy based on the NPA's mandate of policy prohibiting nurses from acting in fraud, misrepresentation or dishonesty. Lessandra should allege that she was discharged in retaliation for her refusal to lie on her progress notes.

The hospital will argue that the NPA doesn't constitute a clear mandate of public policy since it is merely a a regulation governing the nursing profession and does not constitute a policy sufficient to modify the "at will employment" rule. This argument is relatively strong, and there is come case support for this assertion. However, the NPA sounds by its title, to be legislation as opposed to professional regulations or rules. IF the NPA is legislation, it is likely that it would constitute a clear mandate of public policy, and if Lessandra was dismissed based on her refusal to violate the Act, then it would be wrongful.

It is unclear whether the court would find that the NPA constitutes a sufficient mandate of public policy to apply the exception to the at will employee rule. If the court does apply the exception, Lessandra will have to show that her discharge was actually a result of her refusal to act in a manner that she believed was in violation of the NPA rules. IF the court finds the NPA isn't a sufficient mandate of public policy, then her refusal to violate the rules wouldn't be grounds for a wrongful discharge claim.

If the court does find that the NPA is a mandate of public policy, then the hospital will have to show that their decision to discharge Lessandra was not arbitrary and capricious. The

hospital will most likely point to the fact that Lessandra repeatedly phoned Dr. Collins after he had already given her instructions, and that she was hard to deal with as an employee. Given that she is an at will employee, her being annoying would be an acceptable reason for her discharge. Lessandra on the other hand would need to show that the offered reasons for her discharge were pretextual and that her discharge was actually out of retaliation for her refusal to violate the NPA guidelines. The court will most likely be deferential to the hospital's decision to discharge Lessandra, and given that the progress report is an internal matter, the court will most likely find that she doesn't have a wrongful discharge claim based on these facts. Courts have a high level of respect for hospital's freedom to conduct its business the manner in which it pleases, and courts are reluctant to interfere with that freedom. This is unfortunate in LEssandra's case because she was merely trying to be honest in doing her job properly, but if the NPA is merely a professional rule, this is the most likely result. However, the analysis changes somewhat if the NPA is legislation, as noted above. However, the outcome will most likely turn on whether the court is convinced that her dismissal is in violation of public policy and whether the wrongful nature of it outweigh the court's practice of affording discretion to the hospitals in their employment decisions.

Model # 3

[redacted] HealthLawII-midterm_(Pope)_SP09 Pope

2)

ERISA applies because this is an employee benefit plan and the Ps are suing for denial of benefits and other state tort and breach of contract claims.

Removal:

CIGNA should first remove the action to federal court on the basis that the claim is preempted by ERISA. This family is enrolled in an insurance plan provided by the employer (employee benefit plan--EBP), Sonic Automotive. ERISA preempts all causes of action that deal with denial or clarification of benefits under EBPs (502) or laws relating to EBPs (514). This complaint has two causes of action (1) breach of contract, and (2) HIFTA. Both should be removed to federal court and preempted by ERISA for the following reasons.

Breach of Contract

502 claim

The breach of contract action deals with a denial of benefits under an EBP. This is about the QUANTITY of benefits recieved by the patient in the time of need. All claims dealing with the disbursement of benefits have to do with the administration of the EBP, and are preempted by ERISA 502. CIGNA should file a motion to dismiss the claim under F.R.C.P. 12(b)(6) on the theory that Nataline did not state a claim upon which relief could be granted because the breach

of contract claim is a state law claim which is preempted by ERISA, and the remedies provided by 502 include only benefits denied or clarification of benefits under the plan, neither of which Nataline's family is requesting.

The federal court would likely give Nataline's family time to amend the complaint to include a cause of action for ERISA 502 and request payment for the liver transplant. This would be the only remedy available to Nataline's family under 502. CIGNA will argue that Nataline's family should have paid upfront for the liver transplant and then gone to federal court in a 502 ERISA claim to recover benefits under the plan.

Standard of Review

CIGNA will argue that the claim should be evaluated under an arbitrary and capricious standard of review (assuming that CIGNA reserved discretion in the contract). This would give a lot of deference to CIGNA's intrepretation of the contract. If the court allowed this standard of review, CIGNA might prevail on the 502 claim because courts will not disturb the insurance company's judgment, the court will review only for abuse. Nataline's family will argue that the standard of review should be less deferential because CIGNA had a conflict of interest because it both funded and adminstered the plan. CIGNA, in turn, would argue that even if that was the case, the funding and administration element is just one factor to take into account in determining the standard of review, it does not mean an automatic win for the plaintiff.

Nataline's family might also argue that because this originated as a breach of contract claim, the contract should be construed against the drafter (contra prof.). This argument will fail because we are dealing with 502 which normally has a de novo standard of review, but is changed becuase of the presumed reserved discretion in the insurance company to arbitrary and capricious.

514 claim

The breach of contract claim is probably not preempted by 514 (assume removal to federal court and dismissal of state claim as above). Generally, 514 expressly preempts ANY state law that "relates to" an EBP. A claim for breach of contract would be brought under a law that "relates to" an EBP in the sense that it is regulating the dealings between the insurer and the insured. HOWEVER, this cause of action for breach of contract might be saved by the savings clause under 514 as a state law regulating insurance. States reserve the right to regulate insurance (save for the deemer clause which protects self-insured employers).

Even if this breach of contract claim is "saved" under 514, it is preempted under 502, and thus Nataline's family MUST proceed under 502 with this claim.

HIFTA Claim:

Assume removal to federal court as above.

502

CIGNA is going to argue here that this is a state law that provides alternative remedies for an action that could have been brought under ERISA 502. The complaint alleges that CIGNA unreasonably and unjustifiably failed to pay under the policy and that CIGNA deliberately denied approval of the liver transplant. These are clear requests for benefits under the plan which are completely preempted by ERISA. CIGNA will also argue that Nataline's family is requesting remedies not available to her under 502. Since under 502, a P can only get benefits due to him under the plan or injunctive relief, CIGNA will argue that Nataline's request of punitive and other speical damages would not be allowed because of 502. Nataline's family will argue that 502 preemption is irrelevant becuase the statute is saved under 514. CIGNA would probably prevail here because even if a law is saved under 514, it can be preempted under 502.

Standard of review for this 502 claim would be the same as the standard for the first cause of action's 502 claim.

514

The HIFTA is clearly a state law relating to an employee benefit plan, and would thus be preempted under 514. However, HIFTA regulates insurance, so it is saved under the savings

clause (described above) Section a. dealing with denial of benefits is preempted by 502 notwithstanding 514 non-preemption. Secton b., however might survive 514 preemption because ERISA plans are required to provide specific information about the plan, so it might be a breach for plan design or not disclosure for misrepresenting the terms of Nataline's contract.

Nataline will argue that the entire HIFTA is saved and that all of her claims can be brought under HIFTA. CIGNA will argue that it is irrelevant that the claims are saved under 514, they are preempted under 502, so only 502 remedies would be available. Under ERISA, this would mean that Nataline's family could only get the value of the liver transplant, and not any other damages (besides further clarification of benefits under the plan).