

Morgan Lewis

FAST BREAK: **ERISA**

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Agenda

- Developments in Medical Provider Litigation
- How Providers Use ERISA for Pay and Reimbursement Disputes
- Provider ERISA Litigation
- ERISA Litigation Risk

Developments in Medical Provider Litigation

- For decades, defendant plans and insurers have invoked ERISA preemption (with varying success) to thwart efforts by medical service provider plaintiffs to utilize state law to obtain greater remedies in provider pay and services disputes.
- Now, many providers are trying to turn the tables by directly invoking ERISA, claiming to have assignments from participants or beneficiaries that purportedly give them standing to sue.
- The result: A sizeable uptick in provider-initiated class and mass action suits under ERISA for denial of the providers' alleged rights.

How Providers Use ERISA for Pay and Reimbursement Disputes

- Defensively – ERISA Complete Preemption
 - If a provider sues the insurer asserting state law claims, the insurer may invoke the classic insurer/plan line: “This claim arises only under ERISA.”
- Affirmatively – Getting in the ERISA Door
 - “I have an assignment.” Providers argue that this allows them to stand in the shoes of the patient/ERISA beneficiary that provided the assignment.
 - “Plan documents or contracts say I am a beneficiary.”

How Providers Use ERISA for Pay and Reimbursement Disputes

- Common Claims

- ERISA § 502(a)(1)(B) claims for benefits due under plan terms
- ERISA § 502(a)(2) claims for breach of fiduciary duty
 - Not only against the insurer/claims administrator for improperly denying claims or failing to provide a full and fair review of claims, but also against plan sponsors for failing to monitor/replace a claims administrator
- ERISA § 502(a)(3) claims for “equitable relief”
- ERISA § 502(c) claims for statutory penalties (\$110 per day) for failure to provide plan documents upon request

Provider ERISA Litigation

- Standing
 - Are the assignments anything more than grants of the right to pursue payment on behalf of plan participants?
- *Twombly*
 - Have only generalized mass allegations been made against the defendants?
 - Have the plaintiffs specified the particular patient claims at issue?

Provider ERISA Litigation

- Failure to Exhaust
 - Have the plaintiffs exhausted administrative remedies as to each of the patient claims at issue?
- Plan-Specific Defenses
 - Are there anti-assignment provisions?
 - Does the plan/insurance policy actually provide the benefit sought?
 - Are there forum selection or limitations period clauses?

ERISA Litigation Risk

Hospitals are the next targets for 401(k) and 403(b) fees and expenses claims

QUESTIONS/COMMENTS

Thanks!



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Jeremy P. Blumenfeld represents defendants on a range of employee benefit litigation matters, including numerous Employee Retirement Income Security Act (ERISA) class actions. Co-chair of the firm's ERISA litigation practice, Jeremy's experience includes defending class action claims challenging the administration of 401(k) savings plans, stock drop litigation involving 401(k) savings plans, cash balance and other defined benefit plans, and employee stock ownership plans (ESOPs) and traditional severance pay plans. He also advises clients on litigation and risk avoidance.

Thanks!



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Brian T. Ortelere defends employee benefits litigation, including Employee Retirement Income Security Act (ERISA) class actions. Co-chair of the ERISA litigation practice, he litigates class action claims challenging the administration of 401(k) plans, cash balance plans, and employee stock ownership plans (ESOPs). With his victory in *Renfro v. Unisys*, Brian became the first US lawyer to defeat “401(k) excessive fee” claims on a motion to dismiss and to successfully defend the judgment in the US Court of Appeals. Brian is ranked among the top three ERISA litigators in the nation according to *Chambers & Partners*.

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Featuring Tim Lynch

➤ September 28 3:00 PM (EST)