



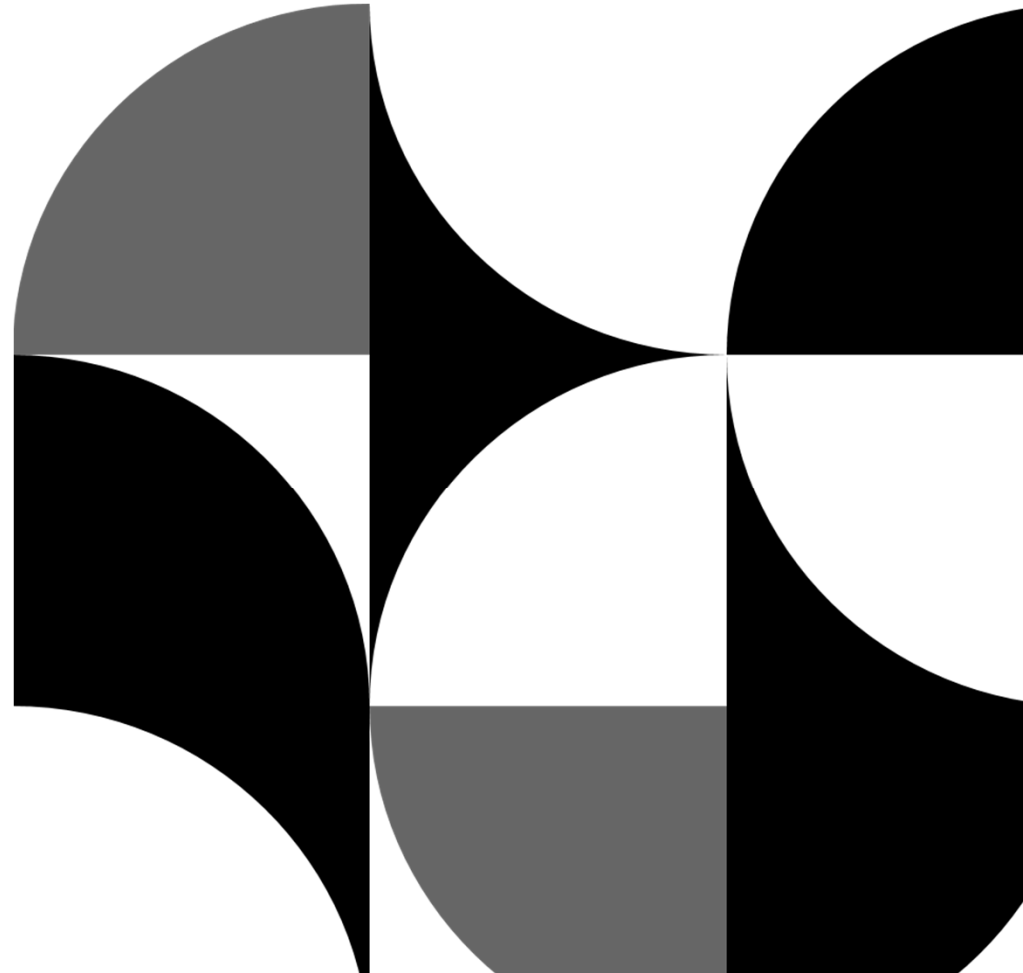
# ERISA Litigation Updates

California Leads the Way

October 8, 2024

**Seyfarth Shaw LLP**

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# Speakers

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# Agenda

## 01 Provider Litigation Trends

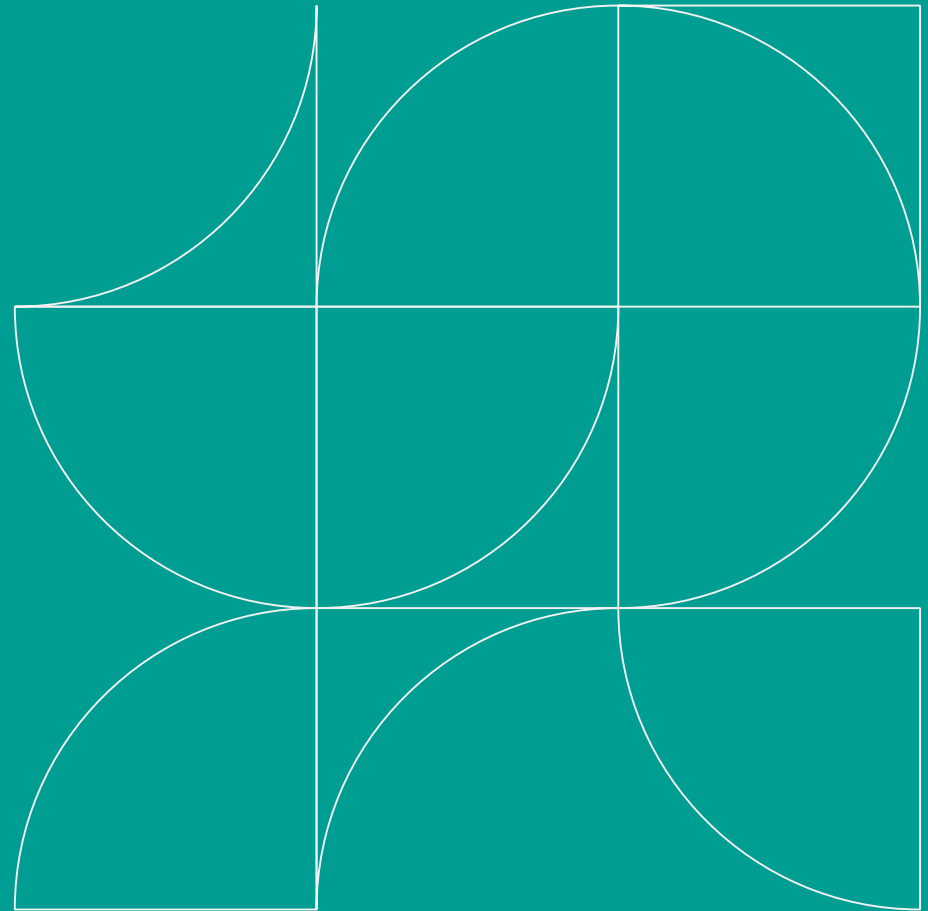
- Causes of Action
- Strategies for Responding
- Erosion of Anti-Assignment Provisions

## 02 Welfare and Pension Issues

- Fiduciary Claims re Pharmacy Benefits
- Challenging Use of Forfeited Contributions

## 03 Discovery and Trial Issues

# Provider Litigation



# Provider Litigation

## Recent Trends in Provider Litigation

- 01** Shifts in Causes of Action
- 02** Strategies for Responding
- 03** Erosion of Anti-Assignment Provisions

# Provider Litigation

## Trends in Provider Litigation

- Claims for Benefits pled in connection with Promissory Estoppel or Quantum Meruit claims
  - phone calls to support claims, get transcripts
  - unfair business practices in violation of Business and Professions Code 17200
  - assignment of claims – trust but verify
- Only State Law Claims
  - Knox-Keene Act – quantum meruit claims
  - See Request for Judicial Notice– public licensure
  - DMHC letters – public records
- Only State Law Claims with less than \$75k alleged
  - Allegations of refusal to pay but asking for the “total UCR value”
  - Are billed charges alleged to be UCR?

## Strategies for Responding

### What to do now?

- Answer in State Court?
- Demurrer?
  - state courts increasingly more sophisticated
- Remove?
  - Preemption of the State Law Claims
  - Bald assertions on the cover page of the complaint does not establish that the amount in controversy is below \$75k when the allegations seek more than \$75k
  - Then set up Motion to Dismiss

Providers may file Motion to Remand

Briefing both remand and motion to dismiss at same time to highlight ERISA 514 preemption vs complete preemption



## Strategies for Responding

### What to do now?

- ERISA Preemption
  - We often see state law causes of action brought with or without ERISA claims
  - We must evaluate whether to remove a case from state court based on the *Davila* test.
  - A state claim is completely preempted if
    - (1) an individual, at some point in time, could have brought the claim under ERISA Sec. 1132(a)(1)(B); and
    - (2) where there is no other independent legal duty that is implicated by a defendant's actions. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004)

## Strategies for Responding

### What to do now?

- ERISA Preemption
  - As to Prong 1, provider plaintiffs often argue they lack statutory standing, as they are not enumerated parties under ERISA's civil enforcement provisions.
    - submission of bills possible only with assignment
  - Prong 2 – provider plaintiffs often claim their state law claims implicate independent legal duties
  - Often worth risking removal/remand to argue application of ERISA preemption to Federal not State judges

# Preemption

## Bristol SL Preempts Third-Party Claims

- *Bristol SL Holdings, Inc. v. Cigna Health and Life Ins. Co.*, 103 F.4th 597 (9th Cir. May 31, 2024)
  - Bristol SL state law claims are preempted because they have both a “reference to” and an “impermissible connection with” the ERISA plan that Cigna administers.
  - Bristol SL expressly distinguished *The Meadows v. Employers Health Ins.*, 47 F.3d 1006 (9th Cir. 1995). The Plaintiff relied on *The Meadows* claiming there could be no preemption because Bristol was suing ‘not as an assignee of a purported ERISA beneficiary, but as an independent entity claiming damages.’
  - The Ninth held that *The Meadows* stands for the proposition that ERISA preemption does not apply when state law claims are triggered by the complete lack of any ERISA plan.

# Preemption

## Bristol SL Preempts Third-Party Claims

- Courts have followed *Bristol SL* to find provider's state law claims are preempted
  - *Healthcare Ally Mgmt. of California, LLC v. United Healthcare Servs., Inc.*, 2024 WL 3915364, \*1 (C.D. Cal. July 15, 2024)
  - *Dedicato Treatment Center, Inc. v. Aetna Life Ins. Co.*, 2024 WL 3346241, \*5 (C.D. Cal. July 15, 2024)

## Anti-Assignment Provisions

### Anti-Assignment Provisions

- Courts have long recognized that ERISA allows for the assignment of welfare benefits such as healthcare reimbursements.
- But Courts have also recognized that anti-assignment clauses in ERISA plans are valid and enforceable.
  - These provisions seek to (1) permit the payment of benefits directly to providers (for the convenience of all parties),
  - While (2) simultaneously restricting a participant's right to assign the right to appeal an adverse benefit determination or to otherwise pursue legal remedies.
- Providers have responded by bringing state law causes of action, etc.

# Erosion of the Anti-Assignment Provision

**HEALTH INSURANCE CLAIM FORM**  
 APPROVED BY NATIONAL UNIFORM CLAIM COMMITTEE (NUCC) 02/22

1. MEDICARE (Medicare)  MEDICAID (Medicaid)  TRICARE (TRICARE)  CHAMPVA (Champion)  GROUP HEALTH PLAN (Group Health Plan)  SECA (SECA)  OTHER (Other)

2. PATIENT'S NAME (Last Name, First Name, Middle Initial) \_\_\_\_\_

3. PATIENT'S BIRTH DATE (MM/DD/YY) \_\_\_\_\_ SEX (M/F) \_\_\_\_\_

4. INSURED'S NAME (Last Name, First Name, Middle Initial) \_\_\_\_\_

5. PATIENT'S ADDRESS (No. Street) \_\_\_\_\_

6. PATIENT RELATIONSHIP TO INSURED (Self/Spouse/Child/Other) \_\_\_\_\_

7. INSURED'S ADDRESS (No. Street) \_\_\_\_\_

8. RESERVED FOR NUCC USE \_\_\_\_\_

9. CITY \_\_\_\_\_ STATE \_\_\_\_\_

10. RESERVED FOR NUCC USE \_\_\_\_\_

11. CITY \_\_\_\_\_ STATE \_\_\_\_\_

12. ZIP CODE \_\_\_\_\_ TELEPHONE (Include Area Code) \_\_\_\_\_

13. ZIP CODE \_\_\_\_\_ TELEPHONE (Include Area Code) \_\_\_\_\_

9. OTHER INSURED'S NAME (Last Name, First Name, Middle Initial) \_\_\_\_\_

10. IS PATIENT'S CONDITION RELATED TO \_\_\_\_\_

11. INSURED'S POLICY OR FECA NUMBER \_\_\_\_\_

1. OTHER INSURED'S POLICY OR GROUP NUMBER \_\_\_\_\_

2. EMPLOYMENT? (Current or Previous) \_\_\_\_\_

3. PERIOD'S DATE OF BIRTH (MM/DD/YY) \_\_\_\_\_ SEX (M/F) \_\_\_\_\_

4. RESERVED FOR NUCC USE \_\_\_\_\_

5. AUTO ACCIDENT? \_\_\_\_\_ PLACE (State) \_\_\_\_\_

6. OTHER CLAIM ID (Designated by NUCC) \_\_\_\_\_

7. OTHER ACCIDENT? \_\_\_\_\_

8. CLAIM CODES (Designated by NUCC) \_\_\_\_\_

8. INURANCE PLAN NAME OR PROGRAM NAME \_\_\_\_\_

10. CLAIM CODES (Designated by NUCC) \_\_\_\_\_

12. PATIENT'S OR AUTHORIZED REPRESENTATIVE'S SIGNATURE (I authorize the release of any medical or other information necessary to process this claim. I also request payment of government benefits either to myself or to the party who accepts assignment to me.) \_\_\_\_\_

SIGNED: \_\_\_\_\_ DATE: \_\_\_\_\_

14. DATE OF CURRENT ILLNESS, INJURY, OR PREGNANCY (MM/DD/YY) \_\_\_\_\_ QUAL: \_\_\_\_\_

15. OTHER DATE (MM/DD/YY) \_\_\_\_\_ QUAL: \_\_\_\_\_

17. NAME OF REFERRING PROVIDER OR OTHER SOURCE (MD/DO/PA/NP) \_\_\_\_\_

19. ADDITIONAL CLAIM INFORMATION (Designated by NUCC) \_\_\_\_\_

21. DIAGNOSIS OR NATURE OF ILLNESS OR INJURY (Table A-1 to enter in the below box) \_\_\_\_\_ ICD ICD \_\_\_\_\_

22. RESUBMISSION CODE \_\_\_\_\_ ORIGINAL REF. NO. \_\_\_\_\_

23. PRIOR AUTHORIZATION NUMBER \_\_\_\_\_

24. A. DATES OF SERVICE (From MM/DD/YY To MM/DD/YY) B. PLACE (Type) C. PROCEDURE, SERVICE, OR SUPPLY (Enter Unusual Characteristics) D. PROVIDER (Type) E. DIAGNOSIS CENTER F. CHARGES G. ICD ICD H. ICD ICD I. ICD ICD J. RENDERING PROVIDER (Type)

25. FEDERAL TAX ID NUMBER (SSN/EIN) \_\_\_\_\_

26. PATIENT'S ACCOUNT NO. \_\_\_\_\_

27. ACCEPT ASSIGNMENT? (For gov't claims, see back) YES  NO

28. TOTAL CHARGE \$ \_\_\_\_\_

29. AMOUNT PAID \$ \_\_\_\_\_

30. Read for NUCC Use \_\_\_\_\_

31. SIGNATURE OF PHYSICIAN OR SUPPLIER (Include Degrees or Credentials) (Verify that the statements on the reverse apply to the DR and are made a part thereof) \_\_\_\_\_

32. SERVICE FACILITY LOCATION INFORMATION \_\_\_\_\_

33. BILLING PROVIDER (FIC & PIA) \_\_\_\_\_

SIGNED: \_\_\_\_\_ DATE: \_\_\_\_\_

NUCC Instruction Manual available at: www.nucc.org PLEASE PRINT OR TYPE APPROVED OMB-0938-1197 FORM 10/01/02 (2)

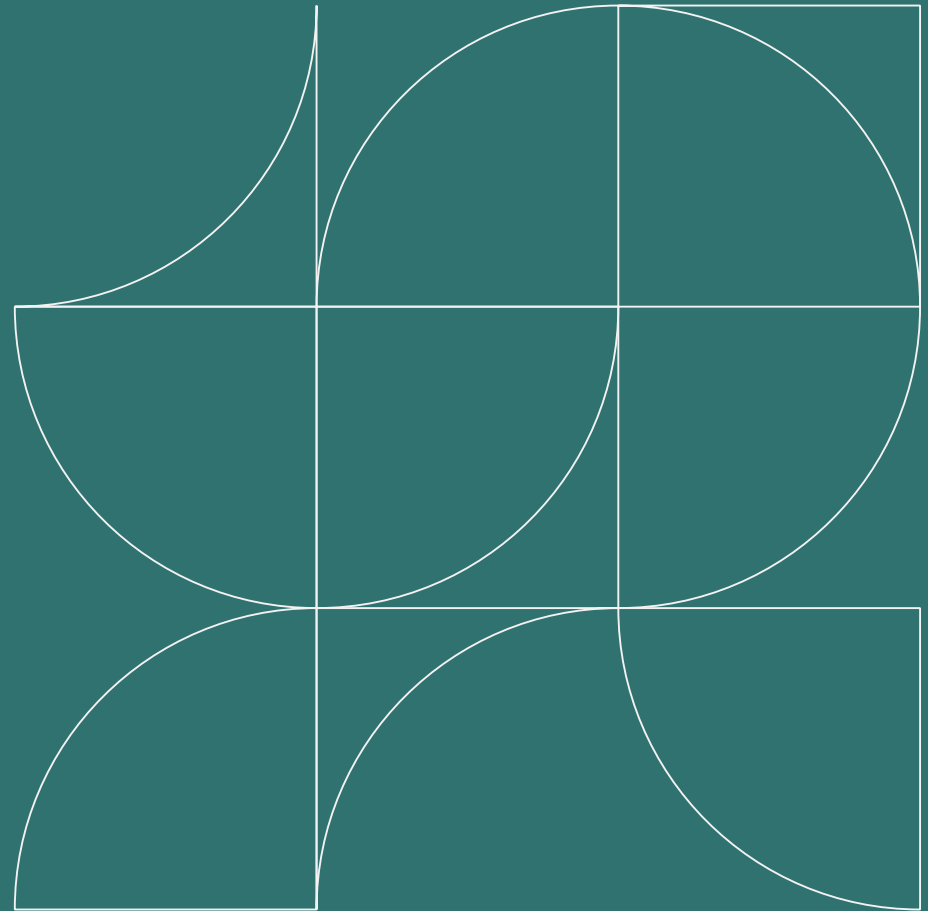
**27. ACCEPT ASSIGNMENT?**  
(For gov't claims, see back)  
 YES  NO

## Erosion of Anti-Assignment Provisions

### Courts Have Held That Plans Are Prohibited From Raising Anti-Assignment Provision as Defense if Not Raised During Administrative Process

- *Spindex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1296 (9<sup>th</sup> Cir. 2014).
  - Anti-Assignment Provisions are Enforceable
  - But can be waived through conduct that is inconsistent with the intent to enforce the provision
- *Beverly Oaks Physicians Surgical Center, LLC v. Blue Cross and Blue Shield of Illinois*, 983 F.3d 435 (2020).
  - Held that provider adequately pleaded facts supporting waiver because Plan administrator did not raise anti-assignment provision during the administrative claims process even though the provider had “marked the appropriate box on the claim form.”

# Welfare and Pension Issues





## Trends in Welfare Plan ERISA Litigation

### Fiduciary Litigation involving Prescription Drug Benefits

- *Lewandowski v. Johnson & Johnson, et al.*, No. 3:24cv00671 (D.N.J. Feb. 5, 2024).
- *Navarro et al. v. Wells Fargo & Company, et al.*, No. 0:24CV03043 (D. Minn. July 30, 2024).
  - ERISA breach of fiduciary duty claims based on alleged mismanagement of prescription drug program.
- *Knudsen v. MetLife Group, Inc.*, No. 23-2420, 2024 WL 4282967 (3d Cir. Sept. 25, 2024).
  - Allegations that plan administrator misappropriated plan assets by pocketing rebates from drug manufacturers.
  - Held: allegations that participants' out-of-pocket costs increased not concrete for standing purposes.

## Forfeitures

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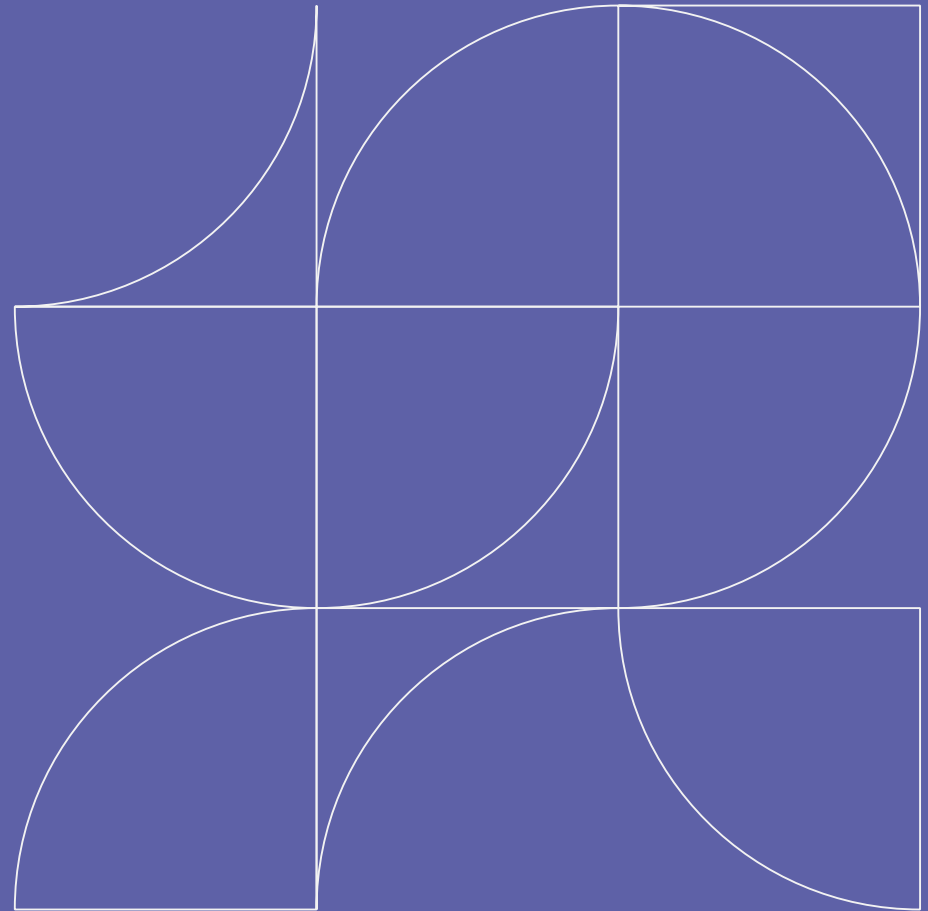
- Nearly a dozen cases have been filed alleging a novel theory of liability against ERISA plan sponsors for their use of forfeited employer matching retirement-plan contributions
- These theories put plan sponsors in particularly bad positions because Treasury Department regulations have expressly authorized applying forfeitures toward ongoing employer contribution.
  - 26 C.F.R. Section 1.401-1(a) requires that the “amounts so forfeited must be used as soon as possible to reduce the employer’s contributions under the plan.”
- In *Hutchins v. HP, Inc.*, and *Perez-Cruet v. Qualcomm Inc.*, the courts considered whether a plan violated ERISA by using forfeited plan contributions to fund the employer match for other participants’ accounts rather than defraying administrative expenses of the plan.

## Forfeitures

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- in *Liao v. Fisher Asset Mgmt, LLC*, 2024 WL 4351869 (N.D. Cal. Sept. 30, 2024), the Plaintiff, a former employee of Fisher, alleged a claim for benefits under ERISA, a claim for breach of fiduciary duty, as well as a prohibited transactions claim.
- Judge Tigar of the Northern District of California agreed with our position, relying on the analysis of *Hutchins v. HP*, as well as established Supreme Court precedent.

# Discovery and Trial Issues



# Trial Strategies



- Always have a Powerpoint that tells your story
  - Meeting Minutes that Discuss Claims
  - Know your screen shots
- Be wary of witnesses showing up for trial
- Consider Objections or Motions in Limine to prevent backdooring records
- Be prepared to argue all issues, even those already ruled upon
- Have ERISA citations/regulations memorized
- Make all arguments just in case you have an appeal

## Discovery Issues

### Perfecting the Record Before the Court

- At the motion to dismiss/demurrer stage, Courts often consider the at-issue Plan document and publicly available information
  - Can consider ERISA plan document
  - publicly available websites
  - licensing information
  - public information from regulatory agencies (DMHC letter)
  - RJN at state court vs. federal court level
- Bench trial
  - consider all information that was before the administrator
  - helpful reference guides (CMS coding policies)
    - National Correct Coding Initiative Policy Manual
    - Assistant surgery policies (16% of billed rates)
  - Manuals
    - MCG Guidelines
    - CALOCUS Guidelines
  - Objection to discovery requests



SCAN ME

## CLE: NEW PROCESS

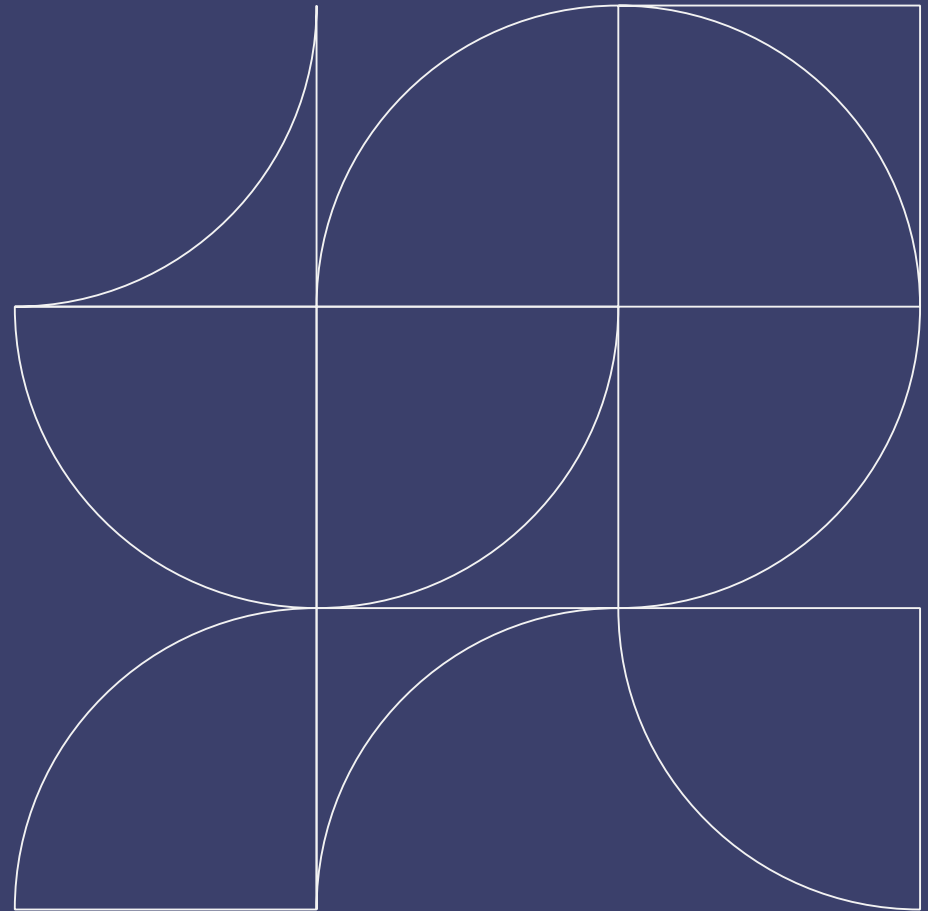
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1. Title: ERISA Litigation Updates: California Leads the Way
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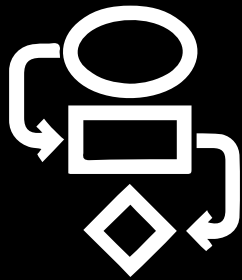
# Lessons Learned





## Lessons Learned

- Venue Shopping
- \$75,000 limit
- Small Claims - \$2,500
- Make sure to include reference to anti-assignment provisions on your Explanations of Benefits regardless of the reason for denying or partially paying a claim submitted by a provider.
- Ask questions of your PBMs and Plan Consultants
  - Understand the fees and other sources of revenue.
  - Examine total plan costs and costs for participants.



## Questions of Venue

- Small Claims/Limited Civil Actions
  - Small claims trials of underpaid emergent services
- State Court vs. Federal Court
  - In Federal Court, you risk remand because Courts often find no complete preemption of state law claims.
  - State court judges can have difficulty fully understanding complex healthcare regulatory schemes and ERISA preemption

**thank  
you**

**contact information**

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