BENEFIT CLAIMS: ALTERNATIVES TO LITIGATION

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Overview

- Pre-Suit Settlement Negotiations
- Media Coverage
- External Review
- Request for Review Strategies
Pre-Suit Settlement Negotiations
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Do:
- Cultivate relationships with in-house and outside counsel
- Be selective in the cases you try to settle
- Put a tolling agreement in place
- Make a demand that demonstrates you are serious about settlement
Pre-Suit Settlement Negotiations

- Don’t:
  - Try to settle every case pre-suit
  - Assume you know who the outside counsel will be
  - Allow negotiations to drag on indefinitely
Pre-Suit Settlement Negotiations

- When all else fails...
Media Coverage

- **Sarkisyan v. CIGNA Healthcare of California, Inc.,** 613 F. Supp. 2d 1199, 1201 (C.D. Cal. 2009) (After widespread media coverage of CIGNA’s denial of a liver transplant as experimental, CIGNA reversed its denial, but the insured died before she could receive the transplant. The family brought a wrongful death lawsuit against CIGNA.)

- **Deadly Spin: An Insurance Company Insider Speaks Out on How Corporate PR Is Killing Health Care and Deceiving Americans,** by Wendell Potter.

- **Her only chance at life is a new liver, but her insurer said no. Then she wrote a powerful plea to the CEO,** CNN Article by Wayne Drash (5/13/18) (UnitedHealthcare reversed decision to deny liver transplant as experimental after media coverage of the denial.) [https://www.cnn.com/2018/05/13/health/liver-transplant-mom-erika-zak/index.html](https://www.cnn.com/2018/05/13/health/liver-transplant-mom-erika-zak/index.html)

Media Coverage

- Do:
  - Be selective: consider in high stakes cases, especially health cases, where coverage is a matter of life and death
  - Think creatively (i.e., pen a letter to the CEO)
  - Be strategic about timing
  - Consider adverse effects (i.e. a company may not want to publicly change its decision)
Media Coverage

Don’t:

- Make bald threats of media attention that only slow down the process
- Assume the public will care
External Review
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Do:
- Consider whether the health plan is self-funded or insured
- Ask the provider about past IRO outcomes
- Request that review be expedited
- Weigh the damage of an adverse decision
External Review

- Don’t:
  - Pursue unless litigation is unfeasible or cost-prohibitive
Request for Review Strategies

- Regulation: 29 C.F.R. § 2560.503-1 (claims and appeals)
- Regulation: 29 C.F.R.§ 2590.715-2519 (Affordable Care Act)
- Case law:
  - Aetna Health Inc. v Davila, 542 U.S. 200, 220 (2004) (citing DOL regulation that claim determinations are ordinarily fiduciary acts under ERISA)
  - Saffon v. Wells Fargo & Co. Long Term Disability Plan, 522 F.3d 863, 872 (9th Cir. 2008) (finding that if required information is omitted, claimants can’t adequately present their arguments and are denied fair and full review)
  - Booton v. Lockheed Martin Benefit Plan, 110 F.3d 1461, 1463 (9th Cir. 1997) (DOL claims regulation calls for a meaningful dialogue between plan administrators and their beneficiaries)
Request for Review Strategies

- Do:
  - Submit expert reports and make sure your experts are ready to respond on the dime
  - Paper the file
  - Consider requesting an IME
  - Address any deficiencies
  - Engage in meaningful dialogue
  - Communicate via attorneys when counsel is involved
  - Ensure decision follows applicable guidelines and is the result of a neutral process
Request for Review Strategies

- Don’t:
  - Send generic, boilerplate arguments
  - Use the same experts repeatedly
  - Ignore unfavorable facts
Questions?