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Stakeholder collaboration: conflicts of interest and self-dealing

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Setting the stage: why this matters now

1

A structural triple role

Health systems are also ERISA plan sponsors, employers, and, through their own hospitals and physician groups, frequently a related party the benefit plan pays for care.

Prohibited transactions under ERISA are a common concern for health systems – referred to as “steering” or “self-dealing”

2

A litigation wave moving in

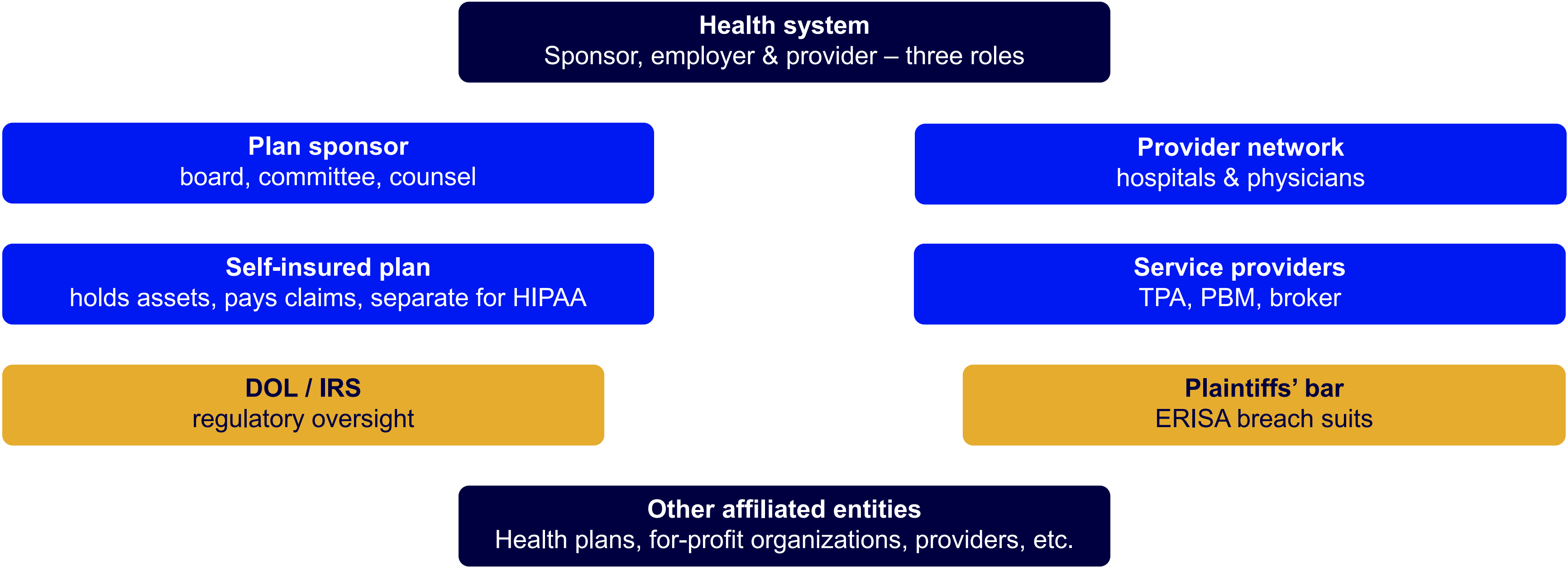
PBM and excessive-fee fiduciary breach theories that reshaped 401(k) litigation are now being tested against health and welfare plans.

3

Nowhere left to hide the arrangement

CAA compensation disclosure, gag-clause prohibitions, and health care price transparency rules put vendor and network arrangements that used to stay opaque into plain view.

Cast of characters



Legal framework: the fiduciary duty framework, fast

Duties of loyalty & prudence

- §404 — act solely in the interest of participants; prudent expert standard
- §406(a) — prohibited transactions between the plan and a party in interest (sale, exchange, furnishing of goods)
- §406(b) — fiduciary self-dealing: acting on both sides, or profiting from a transaction with the plan

Takeaways

- Health system is both ERISA fiduciary and party in interest with respect to its group health plan
- ERISA limits activities entered into with an ERISA plan — i.e., “prohibited transactions”

Tax code overlay & relief

- Code §4975 — parallel excise-tax regime for “disqualified persons”
- §408(b)(2) exemption — compensation must be reasonable and disclosed

A line that matters: settlor vs. fiduciary decisions

Settlor — business decisions

- Establish, amend, or terminate the plan
- Decide self-insured vs. fully insured
- Set benefit design and eligibility classes

Fiduciary — administration decisions

- Administer and interpret claims
- Select and monitor TPAs, PBMs, brokers
- Negotiate provider network rates on the plan's behalf

The health system wrinkle: the people making settlor decisions often supervise the fiduciary side — and the plan may be paying the system's own network.

Where self-dealing hides in a health system

■ Domestic claims

Plan pays system hospitals and physicians at non-arm's-length rates

■ PBM rebate retention

Spread pricing and rebates flowing back to system-tied entities

■ Broker & consultant comp

Override commissions and undisclosed data-sharing fees

■ Plan Assets

Earnings on plan assets held by an affiliated TPA, bank, retirement plan, life insurance

■ Internal Business Units

Cross-selling between the system's insurance/TPA/UM arm and its own plan

■ Where else?

You fill in the blank: _____

Steering and the Emory prohibited transaction exemption

When a plan's financial incentives steer participants to domestic hospitals or physicians, DOL treats that as §406(b) self-dealing — but has granted individual relief before.

In PTE 93-62, DOL exempted Emory University's affiliated-network arrangement on six conditions:

1

At least 50% of network physicians and 50% of network hospitals unaffiliated with the plan sponsor

2

An independent fiduciary negotiates all provider fees, affiliated or not

3

That independent fiduciary — not the sponsor — selects the network's providers

4

An independent auditor reviews claims processing after year one, then at least every two years

5

Affiliated providers get terms no less favorable to the plan than unaffiliated providers do

6

Participants remain free to use any provider, in-network or out, affiliated or not

The litigation and enforcement backdrop



Governance and risk mitigation

- 1 Committee structure with a documented decision-making process**
- 2 Regular RFP and benchmarking cadence for vendors and PBMs**
- 3 Independent fiduciary appointed where the system can't act at arm's length from itself**
- 4 Conflict-of-interest policy with clear recusal protocols**
- 5 Fiduciary liability insurance sized to the actual exposure**

Case study: based in truth

- 1 Health system provides medical services to its own employees who participate in the system's group health plan**
- 2 Affiliated entity applied to the DOL for a prohibited transaction exemption**
- 3 Entity engaged independent third-party to act as independent fiduciary with authority to select TPA and provider network**
- 4 DOL was not convinced this factor alone would be sufficient to resolve prohibited transaction**
- 5 Outcome?**

If you do nothing else: practical takeaways

- ✓ Map who sits on both sides of every claim, PBM, and network arrangement
- ✓ Consider putting an independent fiduciary between the system and any transaction it can't negotiate at arm's length
- ✓ Benchmark vendor and provider compensation on a regular, documented cycle, audit regularly
- ✓ Keep settlor and fiduciary decisions on separate, documented tracks
- ✓ Consider complying with Emory PTE, applying for individual PTE, or structuring to receive no profit



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Thank you

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