Case No. 19-15192

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALIFORNIA SPINE AND NEUROSURGERY INSTITUTE,

Plaintiff – Appellant,

v.

BLUE CROSS OF CALIFORNIA,

Defendant – Appellee.

On Appeal from the U.S. District Court, Northern District of California
Case No. 4:18-cv-04777-PJH, Hon. Phyllis J. Hamilton, Presiding

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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PLAINTIFF-APPELLANT, AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Association of American Physicians & Surgeons is a nonprofit Indiana corporation having its principal place of business in Arizona. It is not a wholly owned subsidiary of any corporation. It does not have any stock and thus no corporate or publicly held entity owns more than 10% of its stock.

TABLE OF CONTENTS

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Identity, Interest and Authority to File 1

Summary of Argument 2

Argument...4

I. Assertion of a "Litigation Defense" Cannot Negate a Prior Waiver of an Anti-Assignment Provision 4

A. The United States Waives a Statutory Anti-Assignment Provision by its Conduct, and Insurance Companies Should Not Have Greater Rights 5

B. Silence and Conduct Constitute Waiver by an ERISA Plan Administrator of an Anti-Assignment Provision..10

II. Expecting Consistent Conduct by an ERISA Plan Administrator Would Enhance Efficiency, a Public Policy Objective 13

Conclusion 18

Certificate of Compliance 19

Certificate of Service 19

TABLE OF AUTHORITIES

Cases **Pages**

Cal. Spine & Neurosurgery Inst. v. Blue Cross of Cal.,
358 F. Supp. 3d 949 (N.D. Cal. 2019) 3, 14

Dillingham Tug & Barge Corp. v. Collier Carbon & Chem. Corp.,
707 F.2d 1086 (9th Cir. 1983) 13-14

District of Columbia v. Heller, 554 U.S. 570 (2008) 1

Eden Surgical Ctr. v. Cognizant Tech. Sols. Corp.,
720 F. App'x 862 (9th Cir. 2018) 14

Georgia v. South Carolina, 497 U.S. 376 (1990) 11

Girolametti v. Michael Horton Assocs., 332 Conn. 67, 208 A.3d 1223 (2019)......15

G. L. Christian & Assoc. v. United States, 312 F.2d 418, 160 Ct. Cl. 1, *cert. denied,* 375 U.S. 954 (1963)..7, 8

Maffia v. United States, 163 F. Supp. 859, 143 Ct. Cl. 198 (Ct. Cl. 1958)...............7

Maryland Small Business Dev. Financing Authority v. United States,
4 Cl. Ct. 76 (1983) 9

Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554 (2002) 12

Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251 (2004)......................................12

Springer v. Henry, 435 F.3d 268 (3d Cir. 2006)...1

Tuftco Corp. v. United States, 614 F.2d 740, 222 Ct. Cl. 277 (Ct. Cl. 1980) ...5, 6, 7

United States v. Cook, 48 M.J. 236 (C.A.A.F. 1998) 10

United States v. Irvine, 511 U.S. 224 (1994)...12

United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 17

United States v. Midwest Oil Co., 236 U.S. 459 (1915) 11, 13

Valfer v. Evanston Nw. Healthcare, 2016 IL 119220, 402 Ill. Dec. 398,
52 N.E.3d 319 (2016) 1

W.A.. v. Patterson Joint Unified Sch. Dist.,
No. CV F 10-1317 LJO SMS, 2011 U.S. Dist. LEXIS 77695
(E.D. Cal. July 15, 2011) 12

Statutes and Rule

41 U.S.C. § 15 ....5, 7, 8

Employee Retirement Income Security Act of 1974 (“ERISA”),
29 U.S.C. § 1001, *et seq*. 1

FED. R. APP. P. 29(a)(4)(E) 1

Other Authorities

5 Pope Boniface VIII, Book of Decretals (c. 1300)..10

Robert P. Merges, “To Waive and Waive Not: Property and Flexibility in the
Digital Era,” 23rd Annual Horace S. Manges Lecture, April 6, 2010,
34 Colum. J.L. & Arts 113 (Winter 2011) 16

E. Zamir, “The Inverted Hierarchy of Contract Interpretation and
Supplementation,” 97 Colum. L. Rev. 1710 (1997)............................... 15-16

IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians & Surgeons ("AAPS") is a non-profit corporation founded in 1943. AAPS defends the practice of private and ethical medicine. The U.S. Supreme Court has made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The U.S. Court of Appeals for the Third Circuit cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). The Illinois Supreme Court also addressed an AAPS *amicus* brief. *See Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (2016) (discussing an *amicus* brief which was filed by AAPS).

AAPS has members who practice medicine within the jurisdiction of this Court, and who are affected by denial of full payments by plans under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. The decision in this case will likely affect how AAPS members continue to practice with respect to patients covered by ERISA plans.

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[1] All parties have consented to the filing of this brief by *Amicus* AAPS. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: no counsel for a party authored this brief in any respect; and no party, party's counsel, person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

In addition, *Amicus* AAPS has filed a lawsuit challenging the constitutionality of California AB 72 with respect to out-of-network physicians. *Association of American Physicians & Surgeons, et al. v. Shelley Rouillard, in her official capacity as the Director of the California Department of Managed Health Care*, 2:16-cv-02441-MCE (E.D. Cal.). In that lawsuit AAPS has argued for the rights of out-of-network physicians, and the importance of their role in the vitality of the delivery of medical care. Charity care, and medical care to underserved communities, depend in part on protecting the rights of out-of-network physicians and their patients.

Amicus AAPS thereby has direct and vital interests in the issues presented here by Plaintiff-Appellant California Spine and Neurosurgery Institute, doing business as San Jose Neurospine (the "Neurosurgery Institute").

SUMMARY OF ARGUMENT

ERISA plans should not be able to have their cake and eat it too. An ERISA plan administrator who waives an anti-assignment provision, by directly paying a physician to perform surgery on an assignment, should not later be able to reverse its position by invoking the anti-assignment provision to deny payment in full. Defendant Blue Cross of California ("Blue Cross") waived the anti-assignment provision by its silence and partial payment, but then in litigation demanded dismissal under the same anti-assignment provision that it had previously waived.

It was an error of law for the court below to allow Defendant Blue Cross first to waive the anti-assignment provision for its purposes, and then assert it as a "litigation defense" to avoid liability. *Cal. Spine & Neurosurgery Inst. v. Blue Cross of Cal.*, 358 F. Supp. 3d 949, 953 (N.D. Cal. 2019).

Multiple precedents deny even the United States government the right to do what the insurance company Blue Cross got away with below. Federal statutes prohibit the assignment of certain contracts with the federal government, but when conduct by the government waives that protection then it is not allowed later to reassert the anti-assignment statute to dismiss a lawsuit. Stated another way, even the United States may not assert a defense in court which is contrary to its prior conduct of waiving its protection against assignment. It was an error of law for the lower court to hold that an insurance company can do what the United States itself cannot do with respect to the issue of anti-assignment protection.

"He who is silent seems to consent" – *qui tacet consentire videtur* – was long a maxim of English law as famously invoked by Sir Thomas More in 1535, albeit unsuccessful in light of his execution. This doctrine dates back to 1300 and survives to this day in many contexts. It is essential to apply this doctrine to reduce inefficiencies in dealing with third-party payors for medical treatment. In this case, there was even an action (the partial payment) which confirmed the silent

consent by the ERISA plan administrator that its anti-assignment provision would not be enforced.

Allowing ERISA plan administrators to take one position in dealing with a physician, and then an opposite position in court, has the effect of increasing inefficient costs. A legal rule to allow ERISA plan administrators to play "gotcha" with physicians about coverage issues increases transaction costs and thereby exacerbates wasteful administrative expenses in the medical system, without improving the quality of care for anyone. To advance public policy objectives and avoid inconsistencies in the law depending on who the parties are, the decision below should be reversed.

For the foregoing reasons and as expounded further below, the decision below dismissing the complaint was erroneous as a matter of law.

ARGUMENT

I. Assertion of a "Litigation Defense" Cannot Negate a Prior Waiver of an Anti-Assignment Provision.

Conduct by even the United States can implicitly waive a statutory anti-assignment provision, and it was an error of law for the district court to rule against the possibility of such waiver with respect to an ERISA plan. Well-established authority precludes the United States itself from invoking the protection of a statute prohibiting assignment of claims when governmental conduct had

previously implied waiver. It is fanciful for an insurance company to be allowed to assert in court a "litigation defense" contrary to its prior conduct, when the United States itself is denied the right to do likewise. In these circumstances silence (and conduct) implies consent, and it was a reversible error of law for the court below to hold otherwise.

A. The United States Waives a Statutory Anti-Assignment Provision by its Conduct, and Insurance Companies Should Not Have Greater Rights.

Not even the United States, backed by a federal anti-assignment statute, is allowed to use "litigation defense" as a basis for objecting to an assignment of a claim, when its prior conduct implied a waiver. It is difficult to see why an insurance company should have some kind of special right, greater than what the United States enjoys, in order to take a position in litigation which contradicts its prior waiver with respect to an anti-assignment provision.

Clear authority establishes that conduct even by the United States constitutes waiver of a prohibition in federal law against assignment of claims. In *Tuftco Corp. v. United States,* the Court of Claims (the predecessor to the Federal Circuit) held that governmental conduct constituted waiver of a statutory prohibition against the assignment of government contracts. *Tuftco*, 614 F.2d 740, 222 Ct. Cl. 277 (Ct. Cl. 1980) (citing 41 U.S.C. § 15). Likewise, it is at least an issue of fact

as to whether Defendant Blue Cross waived the contractual provision below against the assignment of a claim to Neurosurgery Institute.

In *Tuftco,* entities which had contracted with the federal government then assigned the contracts to Tuftco, in order for the assignee to perform on the contracts. There, as here, the payor was informed about the assignments, and did not object to them. Subsequently the assignee performed on the contracts. The United States then mistakenly paid a portion of the contract price to the original contractor rather than to the assignee. The assignee sued the United States for the unpaid amount, just as Neurosurgery Institute sued below for its unpaid amount. The United States invoked as a litigation defense the Anti-Assignment Act, by arguing that the federal prohibition on assignment barred the lawsuit.

The Court of Claims implicitly rejected the litigation defense theory, as the court below should have done here. The Court of Claims explained that:

> the contracting officer was fully aware of the assignments, recognized them, and communicated such recognition to plaintiff. In this case the action of defendant constituted a waiver of the Act's provisions, including the notice provision applicable to banks and financial institutions. Having chosen to recognize the assignments, defendant was bound to act in accordance with their terms.

Tuftco, 614 F.2d at 743-44. The Court further held that:

> It is unnecessary to identify any one particular act as constituting recognition of the assignments by the Government. It is enough to say that the totality of the circumstances presented to the court establishes the Government's

> recognition of the assignments by its knowledge, assent, and action consistent with the terms of the assignments.

Tuftco, 614 F.2d at 746.

The holding below is the diametric opposite of the *Tuftco* decision, on weaker grounds below than the United States had. Here, there is no statute prohibiting the assignment of the ERISA claim. The court below held that an ERISA plan administrator may recognize an assignment, through silence and conduct, but then later its counsel can take the opposite position as a "litigation defense" in court. The Court of Claims rejected the similar argument by the United States that it should be able to assert a litigation defense which differs from its conduct concerning the assignment. Given that the United States cannot do this when backed by a federal statute, an ERISA plan administrator should not be able to do this without even a federal statute to back it up.

The Court of Claims emphasized "the long-recognized principle that '[d]espite the bar of the Anti-Assignment statute (41 U.S.C. § 15), the Government, if it chooses to do so, may recognize an assignment.'" *Tuftco*, 614 F.2d at 745 (citations omitted). *See also Maffia v. United States,* 163 F. Supp. 859, 862, 143 Ct. Cl. 198, 203 (Ct. Cl. 1958) (same); *G. L. Christian & Assoc. v. United States,* 312 F.2d 418, 423, 160 Ct. Cl. 1, 10, *cert. denied,* 375 U.S. 954 (1963)

(same); *Thompson v. Commissioner,* 205 F.2d 73 (3d Cir. 1953) (rejecting a litigation position inconsistent with conduct).

In *G. L. Christian & Assoc.,* the federal court explained that the federal anti-assignment statute (41 U.S.C. § 15):

> speaks imperatively of annulling any Government contract which is transferred, but it has nevertheless been interpreted as being solely for the Government's own benefit and therefore as permitting the Government to assent to and recognize an assignment where it seems appropriate. That was certainly done here. Before and during performance of the contract and after its termination, the Government recognized Centex-Zachry as the prime contractor and consented to its full participation in that capacity. It would be unreasonable for us to hold otherwise at this late stage.

G. L. Christian & Assocs., 312 F.2d at 423, 160 Ct. Cl. at 10 (omitting numerous cited precedents). Likewise, the anti-assignment provision in ERISA plans is solely for the benefit of the administrator. It can waive the provision by conduct, just as the United States can waive a statutory prohibition on assignment. Such a waiver cannot be properly rescinded later through use of a contrary “litigation defense” strategy.

Here, Defendant Blue Cross acknowledged the assignment by acting on it in its dealings with Neurosurgery Institute, which included recognizing Neurosurgery Institute as the entity to pay on the claim. The conduct by Blue Cross suffices to constitute waiver under the numerous precedents on this issue in which the United

States waived and then invoked the anti-assignment statute. As explained by another precedent:

> In the case at bar, the plaintiff has asserted, and the defendant has admitted, that the notice of assignment was received, acknowledged and acted on by a responsible official. We therefore conclude that the Government was obligated to comply with the assignment that it had acknowledged ….

Maryland Small Business Dev. Financing Authority v. United States, 4 Cl. Ct. 76, 80 (1983).

In *Thompson v. Commissioner*, the Third Circuit rejected an argument similar to that of Defendant Blue Cross and the court below, by calling the argument against waiver "anomalous" and concluding that "[n]o more need be said on that score":

> The position of the Commissioner (subscribed to by the Tax Court) is certainly an anomalous one.
>
> It amounts to this: the government, qua contracting party, by the supplemental agreement waived the provisions of Section 3737 (assuming they were applicable in this situation); the government, qua tax collector, despite such waiver, seeks to invoke the provisions of Section 3737 after the contract has been completed and the entire contract transaction is history.
>
> No more need be said on that score.

Thompson v. Commissioner, 205 F.2d 73, 78 (3d Cir. 1953). The Third Circuit thereby reversed the Tax Court on this issue. Yet by allowing Defendant Blue Cross to adopt a "litigation defense" position inconsistent with its prior conduct,

the lower court contravenes the compelling logic of all the foregoing holdings which ruled against attempts by the United States to do likewise.

An ERISA plan administrator has the right to recognize an assignment, as Defendant Blue Cross did first by not objecting to it and then by even paying the assignee, Plaintiff Neurosurgery Institute. It was an error of law for the district court to rule that there was not at least a disputed issue of material fact on this point, which should have precluded dismissal of the case below.

B. Silence and Conduct Constitute Waiver by an ERISA Plan Administrator of an Anti-Assignment Provision.

There was not merely silence by the ERISA plan administrator, but there was also the act of its partial payment to Neurosurgery Institute based on the assignment. The combination of silence and action constitute waiver of an anti-assignment provision in an ERISA plan. Under these circumstances, the longstanding doctrine of *qui tacet consentire videtur* (one who is silent may be seen to have given consent) should apply.[2]

Numerous decisions by the Supreme Court and other federal appellate courts continue to apply this centuries-old doctrine in a variety of circumstances. For example, it is presumed that one will speak out or otherwise respond to a possible

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[2] *See United States v. Cook*, 48 M.J. 236, 241 n.1 (C.A.A.F. 1998) (attributing an early statement of this doctrine to Pope Boniface VIII more than 700 years ago: "Qui tacet, consentire videtur," or "He who is silent shows agreement." 5 Pope Boniface VIII, Book of Decretals, ch. 12 § 43 (c. 1300)).

infringement of a right or privilege. *See Georgia v. South Carolina,* 497 U.S. 376, 389 (1990) (holding that in a jurisdictional dispute over the Barnwell Islands, South Carolina established sovereignty over the islands by prescription and acquiescence due to inaction of Georgia in objecting to South Carolina's exercise of taxation and other incidents of sovereignty). By not speaking out, and by making partial payment to the assignee under the ERISA plan, the administrator indicated his waiver of the anti-assignment provision. Blue Cross should not be able later to take the opposite position in court. *See also United States v. Midwest Oil Co.,* 236 U.S. 459, 472-73 (1915) (applying this same principle of acquiescence by silence to the practice of withdrawals by the Executive of lands opened by Congress for occupation).

Another example of this can be found in federal taxation, where the doctrine of silence implying consent is considered justification for imposing a gift tax on a bequest for which the beneficiary is initially silent but later disclaims it. If the disclaimer is not within reasonable time, then the gift tax will apply to the later transfer caused by the untimely disclaimer. Justice Scalia, fond of Latin phrases, cited this principle as part of his textualism:

> The justification for the "reasonable time" limitation must, as always, be a textual one. It consists, in my view, of the fact that the failure to make a reasonably prompt disclaimer of a known bequest is an implicit acceptance. *Qui tacet, consentire videtur*. Thus, a later disclaimer, which causes the property to go to someone else by operation of law, is effectively

a transfer to that someone else.

United States v. Irvine, 511 U.S. 224, 242 (1994) (Scalia, J., concurring). It is unjustified to allow an insurance company to get away with an untimely switch in position when the tax code considers silence to imply consent and thereby justify imposing a tax based on a change in position.

In administrative law, it is a familiar rule that issues must be raised before an agency or an internal review process in order to preserve those issues for litigation later. "It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (2004). *See also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (2002) ("[T]here is a near absolute bar against raising new issues--factual or legal--on appeal in the administrative context."); *cf. W.A.. v. Patterson Joint Unified Sch. Dist.*, No. CV F 10-1317 LJO SMS, 2011 U.S. Dist. LEXIS 77695, at *28 n.5 (E.D. Cal. July 15, 2011) (in the context of education litigation pursuant to a federal statute, "this Court refuses to consider issues not raised or resolved at the administrative level") (citation omitted). If Neurosurgery Institute had remained silent about an issue or otherwise misled Blue Cross during an internal review or other type of administrative process, then that could easily preclude Neurosurgery Institute from asserting it later in court. The result should be no different when such conduct is

by Blue Cross: its failure to timely raise the anti-assignment issue, and indeed its conduct in accepting the assignment by making payment on it, should bar it from asserting the defense later in court. While this dispute over the anti-assignment provision does not involve an administrative proceeding before an agency, the reasoning of the decision below could extend in error to allowing switches in court of positions taken before agencies.

"Government is a practical affair intended for practical men," the Supreme Court observed in finding that silence implies consent. *Midwest Oil*, 236 U.S. at 466. Insurance companies should be also bound by such practicality, and should not be allowed to mislead physicians into thinking the payors have waived an anti-assignment provision only to reassert it later as a surprise "litigation defense" contrary to their prior conduct. Once Blue Cross waived the anti-assignment provision by its conduct, it should not be allowed to resort to it later for its own benefit under the guise of a litigation defense strategy. The lower court erred as a matter of law in ruling otherwise.

II. Expecting Consistent Conduct by an ERISA Plan Administrator Would Enhance Efficiency, a Public Policy Objective.

Economic efficiency is an important consideration in deciding whether to enforce an anti-assignment provision despite apparent waiver of it by an ERISA plan administrator. *See, e.g.*, *Dillingham Tug & Barge Corp. v. Collier Carbon &*

Chem. Corp., 707 F.2d 1086, 1090 (9th Cir. 1983) (deciding the enforcement of a contractual provision based in part on whether it would be "economically efficient" to do so). It was, in fact, an inefficient approach for the trial court to place the burden on a physician to know the intricacies of an ERISA plan upon taking an assignment of a claim under it. A surgeon's time is better spent mastering the art of surgery, while plan administrators should be candid and consistent about what they know best: the often-complex details of the plans they administer.

Despite the fact that the surgeon had no right to see a copy of the ERISA plan, the lower court took the inefficient approach of expecting the surgeon to know the details of the ERISA plan anyway, including the legal answers to whether its provisions would be enforceable:

> If plaintiff were in fact an assignee as it alleges, it would have had the Plan documents available to it. It would have known about the anti-assignment provision. *Eden Surgical Ctr.*, 720 F. App'x at 863 ("Eden could have – and should have – attempted to obtain the plan documents from the purported assignor to verify whether the plan contained an anti-assignment provision, if knowledge of that fact was indeed critical to its decision").

Cal. Spine & Neurosurgery Inst., 358 F. Supp. 3d at 955 (quoting *Eden Surgical Ctr. v. Cognizant Tech. Sols. Corp.*, 720 F. App'x 862 (9th Cir. 2018)).

Significant, wasteful transaction costs would result from placing the burden on a physician to know the details of a health plan when he takes an assignment. The physician would have to somehow obtain a copy of the document from a

patient, to which a patient rarely has immediate access, and then the physician would need to review the provisions in the document to make legal assessments about them, despite the fact that this is outside of the physician's expertise. Or the physician could hire an attorney to review the document and give legal advice as to the existence and enforceability of certain provisions. The costs of the legal advice could easily exceed the payment for the surgery under the plan.

The plan administrator, in contrast, knows the details of the policy and is obviously in the best position to candidly disclose them, without incurring any transaction costs. Expecting the plan administrator to be honest about what is in the plan, or least not change his positions, is a far more efficient approach. Public policy militates in favor of this more efficient approach of requiring candor, or at least consistency, from plan administrators. It was inefficient for the lower court to place the burden of knowledge about fine print in ERISA plans on surgeons, whose time is better spent focusing on what they are trained to do. Having surgeons interpret ERISA plans is not helpful to patients or to the efficient delivery of medical care.

Legal scholars and courts alike seek adoption of rules for contracts which "help to reduce transaction costs, increase efficiencies, and resolve contractual ambiguities." *Girolametti v. Michael Horton Assocs.*, 332 Conn. 67, 78, 208 A.3d 1223, 1229 (2019) (citing E. Zamir, "The Inverted Hierarchy of Contract

Interpretation and Supplementation," 97 Colum. L. Rev. 1710, 1755-56, 1756 n.175 (1997)). The inefficient approach adopted by the lower court does the opposite and drives up medical expenses by increasing transaction costs. A better approach from an economic perspective would be to allow administrators to waive rights by their conduct, and not allow them to act inconsistently later in court.

"[O]ur legal system permits individuals to selectively enforce their property rights. A voluntary, conscious decision to eschew enforcement - i.e., waiver - is thus the flip side of the freedom that property provides. It is another dimension of freedom." Robert P. Merges, "To Waive and Waive Not: Property and Flexibility in the Digital Era," 23rd Annual Horace S. Manges Lecture, April 6, 2010, 34 Colum. J.L. & Arts 113, 117 (Winter 2011). Professor Merges continued:

> So for example, waiver is a built-in feature of the Coase Theorem; without waiver, it is impossible to structure a payment to someone to get them not to enforce their right, and payments of this type are integral to the workings of the theorem. Waiver is also but one species of the larger genus of alienability, which has been thought of as a foundational aspect of property since its earliest history. But waiver as a special case of alienability, as a feature of property whose contours are worth spelling out in detail, has largely escaped detailed scrutiny by legal scholars.

Id. at 119.

Allowing an ERISA plan administrator to take a position (or be silent about it) at one stage of the process, but then take the opposite position (or assert for the first time a position) at another stage of the process is contrary in spirit to the body

of law holding that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) (collecting authorities). Allowing a party such as an ERISA plan administrator to spring new arguments in court for the first time both burdens the court system and has the effect of misleading the hospital or physician into reliance on the prior silence or conduct. This approach taken by the court below is inconsistent with norms of administrative law and the goals of judicial efficiency.

By rejecting the doctrine of waiver in the administration of ERISA plans, the district court adds costs and inefficiencies to an already bloated medical system. Public policy, in addition to the legal reasons cited above and in Appellant's opening brief, weighs heavily against allowing ERISA plan administrators to take a position contrary to their prior silence or conduct.

CONCLUSION

For the foregoing reasons and those cited in the Appellant's brief, the decision below dismissing the complaint should be reversed.

Respectfully submitted,

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Dated: August 18, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a total of 4,158 words, excluding material not counted under Rule 32(f).

Dated: August 18, 2019

/s/ Andrew L. Schlafly
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CERTIFICATE OF SERVICE

I hereby certify that, on August 18, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Andrew L. Schlafly
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