TPA's Beware of Fiduciary Liability by Jim Kinder

I read with interest Steve Polino's "From the Bench" column in the February 2013 issue of The Self-Insurer and agree that the court finally got it right. Hopefully all TPAs will take note of this Fifth Circuit Court decision and adjust their administrative practices accordingly. While some may argue this was a narrow decision, I have contended that ever since ERISA was passed in 1974 this type of finding of TPA fiduciary liability by the courts may become the new norm.

For years TPAs and their attorneys have tried their best to reduce or eliminate their TPA fiduciary duty, claiming that as TPAs they simply do "ministerial" work. However this Texas case Mr. Polino cited clearly disputes this view since in the course of their "administrative" work, TPAs clearly exercise "discretionary" decisions every day and with virtually every claim. Trying to escape this responsibility and function through administrative agreements with sometimes confusing language does little to remove the fact TPAs usually share fiduciary responsibility under an ERISA plan. In this case, the court clearly agrees.

While I am not an attorney, I have none the less consistently argued this point with some of the nation's top legal experts in this area and have always taken the position that a TPA (regardless of how their administrative agreement is written) cannot escape the fact that they most always perform ERISA fiduciary duties. In other words, if it looks like a duck, quacks like a duck, it must be a duck!

Perhaps a little history about ERISA may be in order. How many folks really know how ERISA came into existence? It was a law that took 10 years to pass following the collapse of a retirement plan sponsored by automaker Studebaker. The mere name of the act should provide TPAs, Plan Sponsors, Providers, Claim Adjudicators, Subrogation Specialists and virtually anyone affiliated directly or indirectly with the administration and management of an ERISA plan a clear message: Employee Retirement Income Security Act (ERISA) means any benefit plan established under ERISA must provide "Security" to the plan participants!

There is repeated reference throughout the law that all dealings with an ERISA plan must inure to the benefit of plan participants. So, basic logic (are you smarter than a 5th grader) needs to apply this principle anytime a decision or interpretation of a plan provision, investment decisions (such as in case of retirement plans) is made. Why? Because ERISA also provides that persons who have ANY discretionary authority either directly or indirectly with the administration of the plan have a fiduciary duty to the plan participants.

Fiduciaries under ERISA as mentioned above are defined as "any person having any discretionary authority" under the plan. TPAs and other service providers have spent tens of millions of dollars over the years trying to craft language within administrative service agreements in an effort to "escape" being defined as a fiduciary, but as this case illustrates, that just is not going to work. It is practically – if not totally – impossible for a TPA to escape having discretionary authority to some degree. Once that is established the only question is, are they acting as a co-fiduciary under the direction of the Plan Administrator or as a party in interest? Either way, the fact remains the TPA's work includes discretionary authority – when they exercise this authority they become a fiduciary. Period. OK, bring on the lawyers, I love a good debate/fight.

So, how can a TPA lower their risk of being classified as a fiduciary? Perhaps they really cannot. However they can mitigate it to some degree by, as Steve Polino pointed out, avoiding making discretionary decisions and reserve those decisions solely to the designated Plan Administrator.

TPAs would be wise in processing claims on behalf of a plan to put in place procedures for any and all claims that could be subject to denial or benefit reductions to present the facts to the Plan Administrator/Plan Fiduciary for "decision". TPAs should not try to play attorney/judge on plan interpretation; that is the responsibility of the Plan Administrator, who might also be wise to seek legal counsel before making a claim determination. Of course, as ERISA states, a process of appeal (plan document) should also be provided so that every step is taken to make sure the plan inures to the benefit of plan participants. And by that I mean, assume for a moment a decision is made to pay a claim that is clearly not covered by the plan (oh this happens all the time, bosses daughter, son, key employee etc.). Doing so, while it may be to the benefit of the individual plan participant, it would not be to the benefit to all plan participants, thus, such action begs the question:

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Could there be a potential breach of fiduciary duty in making an exception?

Bottom line… you can't escape what you are! So, might as well fess up and admit you make discretionary decisions day in and day out and rather than try to be all things to all people, recognize this responsibility can be transferred to the proper party (i.e. plan administrator) to make final decisions on behalf of the plan – and the TPA merely implements/administrates those decisions. A bit more time consuming but a lot less costly should something like this case goes astray. ■

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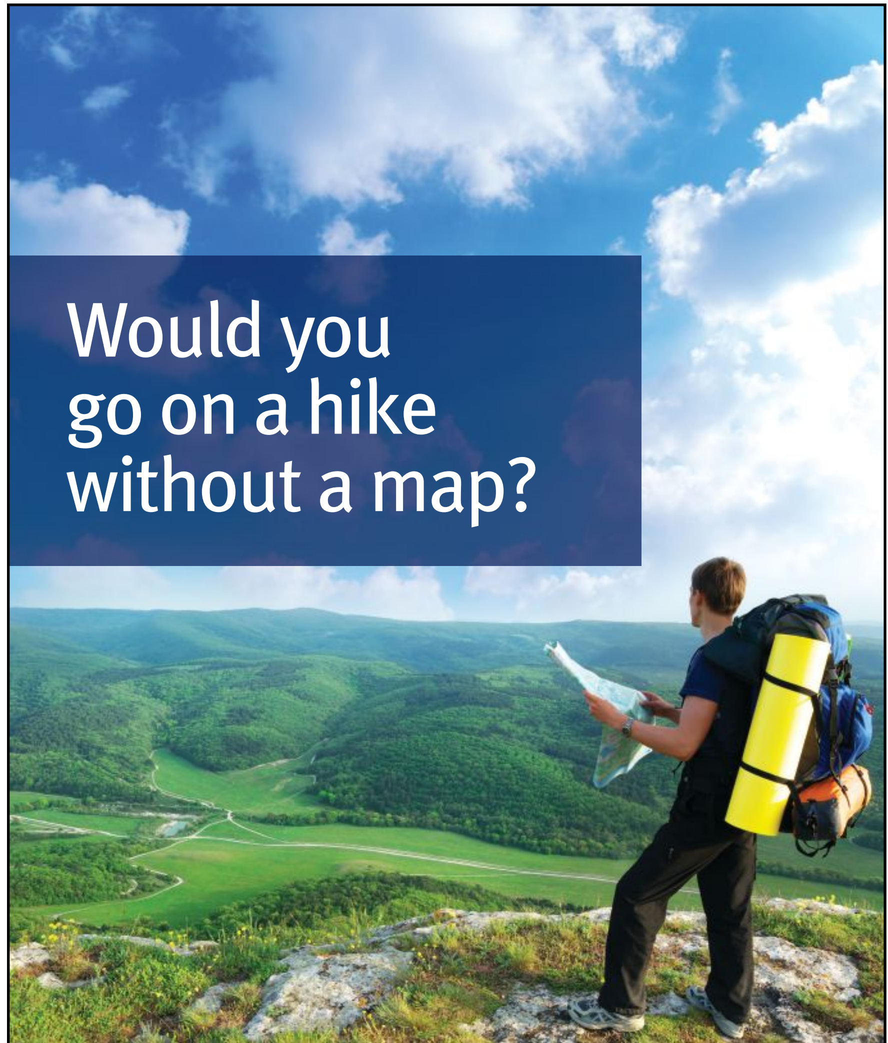

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