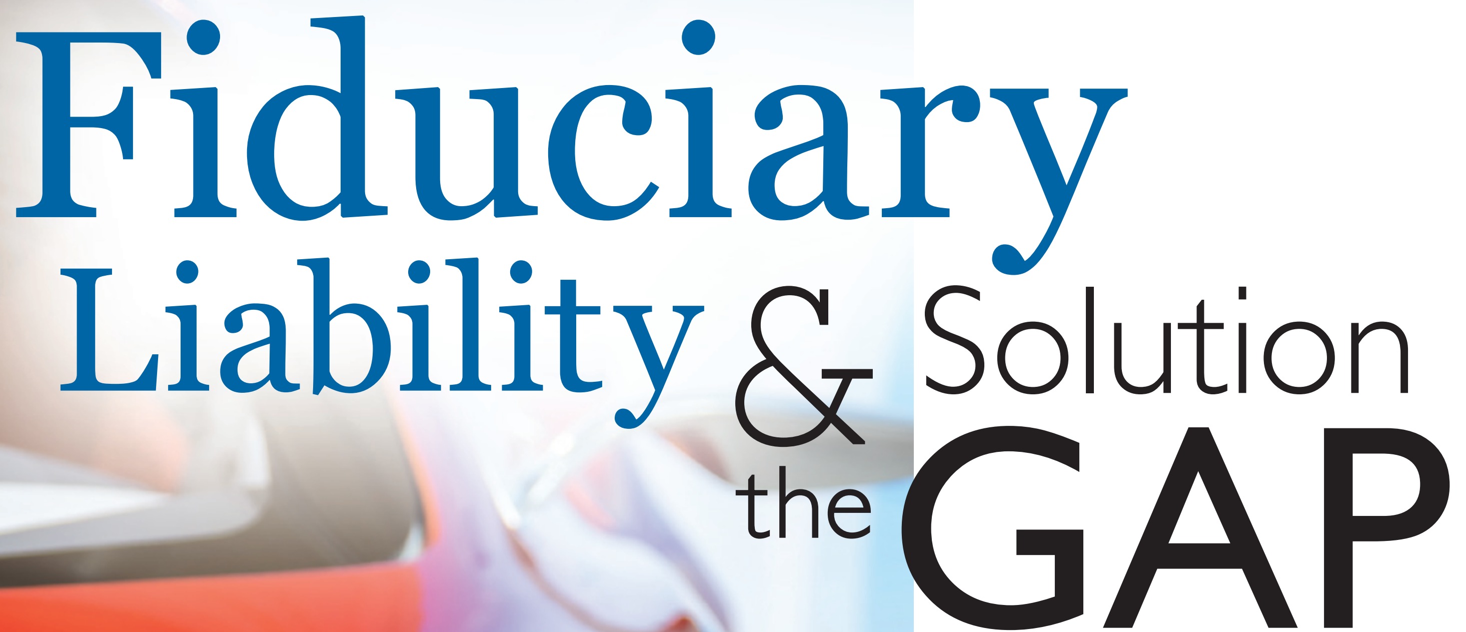

Fiduciary Liability & the GAP Solution

Written by Tim Callender, Esq.

As is the case in most American neighborhoods, a new neighbor might move in every few years. Place yourself in this familiar scenario: A new neighbor has moved in right across the street from your home. You spy through your front window and see kids, dogs, an assortment of nice furniture exiting the moving van and most importantly a really, really nice car parked in the driveway. Now you are interested. Protocol dictates that you immediately schedule a barbeque so that you might meet your new neighbor. If the stars align, you will somehow compel a conversation about that new, beautiful car parked in the driveway across the street.

Luckily for you, all goes according to plan. The kids play, the spouses compare vacation stories and the dogs romp through the green grass chasing butterflies. It really is a picturesque scene. You manage to force an awkward conversational segway and suddenly find yourself learning about "the car." The gas mileage is unheard of, the safety features are top of the line, it vacuums itself, the wiper blades never need to be changed, it can parallel park for you, the paint simply *does not* show dirt, ever and its purchase price is insanely cheaper than any car you have ever owned. You do not understand how this can be – you figure there must be a catch – and then your neighbor mentions "The Downside." "Well," he says, "you do need to know that all maintenance for this car must be done by you. There are no mechanics or shops around that work on these cars, period. If you buy one, you better make sure you know what you're doing. It's a lot of responsibility. I hope you're ready for that." Sound familiar... ?

With Self-Funding Comes Great Responsibility

The advantages to self-funding are many and tend to revolve around two primary ingredients: customization and cost-savings. Custom processes tacked on to practices such as subrogation, claim negotiation, medical tourism, unique plan design and reference based pricing can all lead to cost-savings and significant financial performance for a health plan. As is routinely the case, though, all roses do come with thorns. In this case the "rose" of customization and cost-savings comes with the "thorn" of fiduciary responsibility. This thorn can be especially shocking for the self-funding rookie who has grown used to an insulated health insurance experience where fiduciary liability concerns for the plan-sponsor are extremely limited and oftentimes nonexistent.

Like our neighbor's new car and its maintenance needs, self-funding comes with a unique set of responsibilities that a plan-sponsor may not be equipped to handle. The fiduciary is solely responsible for the health plan's administration, it will be expected to exercise discretion regarding claims decisions and the fiduciary is accountable for the handling of plan assets. Not to mention that ERISA §404 mandates that all of this must be done in the sole interests of plan participants and beneficiaries, commonly known as the "duty of undivided loyalty." §404 further obligates that this undivided loyalty must be executed with the care, skill, prudence and diligence that a person acting in a similar capacity and familiar with such matters, would employ in a similar situation. Part of the problem, of course, is that a fiduciary that is new to the self-funding game may not be familiar with what a person acting in a similar capacity would do in a similar situation. The key phrase is "familiar with such matters," and some fiduciaries are, in fact, not familiar with such matters.

The most daunting and serious of fiduciary liabilities comes when a plan administrator is faced with analyzing a final, internal appeal of a denied medical claim. The fiduciary absolutely must understand the claim and ultimately must decide how the plan's governing plan document should be applied to that claim appeal – and of course ERISA §404(a)(1)(D) requires a plan fiduciary to strictly follow the terms of that plan document. It is fair to say that the vast majority of self-funded plan administrators lack the qualifications necessary to understand a medical claim let alone properly apply language from a complicated plan document to that same claim. Plan sponsors (and/or administrators) make widgets – they do not adjudicate health claims, nor should they have to handle such a task. Consider a final appeal of a health claim hinging on a medical necessity determination. Is it fair, or right, or even ethical to expect the widget maker to exercise fiduciary discretion based on medical expertise? Consider the final appeal of a health claim that hinges on the interpretation of a plan document's uniquely worded and complicated "Illegal Acts Exclusion." Is it reasonable to expect the plan administrator to play the role of lawyerly wordsmith while dealing with the stress of a contentious final claim appeal? Obviously not.

In addition, the unqualified plan administrator must not only juggle its duty to handle the responsibilities enumerated above, it must also sweat and worry about numerous penalties and consequences that may be realized, should the plan administrator fail to comply with any one of its vast array of fiduciary responsibilities.

The Thorny Realities

ERISA §409 tells us that a plan fiduciary is liable for losses caused to the plan. Further, it mandates that a plan fiduciary can be held liable for equitable or remedial relief, as a court may find appropriate, should a breach of fiduciary duty occur, such as the wrong decision on the final appeal of a medical claim.

ERISA §502(a)(3) authorizes equitable relief for a breach of fiduciary duty. The United States Supreme Court has held that plan participants and beneficiaries are able to seek individual equitable relief under this section of the law.[1] Recently, the Supreme Court has expanded the meaning of "equitable relief."[2] This recent holding broadened ERISA §502(a)(3) by specifically identifying possible, equitable remedies that could be levied against a fiduciary, including, reformation of the

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plan's terms, estoppel and surcharge. Although traditional equitable remedies might not include "money damages," this holding seems to suggest that the surcharge remedy would absolutely allow for a monetary payment, akin to money damages. This very well could lead to monetary payments by plan fiduciaries, for varieties of alleged fiduciary breach.

Further, ERISA allows for an award of attorney fees, to the prevailing party, in actions that involve the very scenarios we have discussed herein: a plan fiduciary denies a medical claim at the final level of appeal, yet the claim proves payable upon legal review and now interest and the participant's attorney's fees must be paid. As we all know, attorneys ain't cheap.

In addition to the above, plan fiduciaries involved in a fiduciary breach are likely to face a U.S. Department of Labor penalty, pursuant to ERISA §502(l). By law, this civil penalty is set at 20% of the applicable recovery amount. ERISA 502(l) tells us that "applicable recovery amount" means "any amount which is recovered from a fiduciary or other person with respect to a breach or violation... pursuant to any settlement agreement with the Secretary, or ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary... ."

Most frightening in all of this is the fact that a plan fiduciary may end up being an *individual*, thus triggering personal liability for fiduciary breaches, pursuant to ERISA. Oftentimes family-owned companies, closely-held enterprises, or even large, privately-held organizations will either intentionally or inadvertently name an owner, or a handful of high-level individuals, as plan fiduciaries.

The risks to a plan fiduciary are numerous and the potential financial fallout is high. Here, then, is where our industry is faced with a unique and significant service gap regarding the transfer of fiduciary liability to a qualified entity. Multiply instances of this service gap by the growth of our industry and you can see the growing need that must be met.

The Fiduciary Service Gap and Industry Growth

Using a typical Request for Production as the benchmark indicator for rookie, self-funder concerns, it becomes readily apparent that every plan administrator (likely on the advice of its broker) is gravely concerned about fiduciary liability. In a survey orchestrated by The Phia Group, we learned that 88% of broker RFPs submitted to third-party administrators include a question

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focused on shifting fiduciary liability, whether in general, or for specific, final appeal functions. Like the Roadrunner fleeing from Wylie Coyote, the average TPA will run from this liability shift as quickly as its TPA legs will allow often losing business in the process. But, can any liability-conscious business person fault a TPA for answering "no" to this new and frightening RFP question? Absolutely not – the TPA's hesitance is valid and understood.

As if it was not difficult enough for TPAs to field this fiduciary transfer question on 88% of the RFPs coming through the door, the rapid growth of self-funding is now necessitating even more RFPs, thus dramatically increasing the demand for this transfer of fiduciary liability. From the end of 2013 through the first six months of 2014, the number of lives covered by a self-funded health plan grew by approximately 4 million while the fully-insured platform saw a decline of approximately 5 million lives. It goes without saying that new self-insured lives equal new health plans which equal new plan-sponsors submitting RFPs, which RFPs, very likely, ask, "will you, pretty, pretty please, assume fiduciary liability for my health plan?" As noted above, this question will routinely be answered in the negative. A gap exists.

When a consumer becomes aware of a gap in service, the consumer will routinely shy away from those service providers unable to cure the gap. This results in lost business and another study performed by The Phia Group reveals that lost business is not good. In other fields, examples of a service gap leading to lost business can tend to seem ridiculous with so many solutions readily apparent to all involved. If a house painter refuses to include clean up in his painting services, the savvy home owner will choose a different house painter. A landscaper is not willing to include lawn fertilizing in her service offering – so the reasonably selective consumer will go with a different landscaping contractor. An auto mechanic does not offer a courtesy shuttle to drive his customers to/from his garage while he works on their cars – and the average consumer will look elsewhere for better service.

No business owner should allow business to walk away when the reason behind the customer's departure is so easily fixed.

Fiduciary Service Gap Solutions and the Move Forward

The plan administrator has a handful of options when considering the fiduciary service gap.

Perhaps they flee. Some plan administrators are so frightened by the lack of fiduciary assistance that they simply pack up and return to the fully-insured world. In essence, these plan administrators – if also the plan-sponsors – choose to give up the rose to avoid the thorns.

Perhaps they go in-house. Should widget makers look to hire medical experts and legal wordsmiths, in-house, specifically to handle those complicated, final, internal appeals? This would most certainly assure that the widget-making plan administrator could meet its fiduciary responsibility when making complex appeals decisions. As nice as this might sound, it is completely unrealistic and an unfair expectation.

Perhaps they move forward, naked into the wilderness. Should plan administrators simply accept a "no" answer to the fiduciary RFP question and do nothing to prepare for their fiduciary demands? While clearly ill-advised, it seems that this tends to be happening more and more. Unfortunately, this option tends to result in a plan administrator being forced into the unappetizing position of a final appeal reviewer, bringing the entire "C-suite" and a handful of attorneys into the room to sit and make a medical, or legal determination, on a complex final appeal. Not surprisingly, a few of these experiences over a plan year and you tend to see the typical plan administrator and/or plan-sponsor pack up and walk away from the self-funded platform.

Perhaps TPAs address the need. Should TPAs begin to adjust their response to this frightening RFP question and accept a transfer of the plan's fiduciary liability? Should TPAs begin to explicitly name themselves as "fiduciaries" in the hundreds of plan documents they service? Although this is, arguably, a question for TPAs to determine individually, based on their unique business models, it is clear that this was never the role of a TPA and probably should not be the role of a TPA, *especially if the TPA is handling first-level appeals*. In this first-level scenario, how is the TPA to meet its newly acquired fiduciary duty of objectivity, at the final level of appeal, when it already handled the first level? Further and by its very nature and modeling, a third-party administrator is not meant to be a risk-bearing entity. TPAs are service providers that are not insured or financially arranged to handle the financial fallout that might occur with the assumption of fiduciary liability. Lastly, a TPA's assumption of fiduciary liability opens the TPA up to fiduciary claims and lawsuits, as brought by the plans or members it serves.

As a frightening side note, it should be mentioned that many TPAs are likely assuming fiduciary liability unbeknownst to them. Courts have held that a service provider's exercise of control over a health claim decision may result in fiduciary liability regardless of whether an express agreement to that effect exists, or

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not. Further, a TPA's "exercise of control" may be as simple as the routine review of a health claim appeal, by a staff member, when an automated adjudication process would not suffice.[3]

What then, is the Solution?

Perhaps a vendor solution addresses the need. When weighing the pros and cons of the various options explored above, it becomes apparent that a well-oiled fiduciary transfer service clearly serves the needs of the fiduciary service gap explored herein. By shifting fiduciary burdens to a reputable, third-party vendor, a plan-sponsor, plan administrator and/or a TPA can rest easy knowing that the legal, medical and analytical expertise necessary to meet fiduciary obligations will be satisfied, most especially in the complicated scenario of a final, internal appeal of a medical claim. With a vendor solution in place, a plan administrator/sponsor can return to making widgets, with the confidence that complicated, final claims decisions will be made accurately and within the strict purview of the governing plan document. All the while, the plan's servicing TPA can rest easy, knowing that it has retained good business and helped to provide a solution to that very troublesome RFP question, while also avoiding the assumption of fiduciary liability itself. ■

Tim is a Staff Attorney with The Phia Group. Prior to coming to The Phia Group, Tim gained a great deal of industry knowledge and experience functioning as in-house legal counsel for a third party administrator. Tim is well-versed in complex appeals, plan document interpretations, direct provider negotiations, keeping abreast of regulatory demands, vendor and network contract disputes, stop-loss conflict resolution and many other issues unique to the industry.

Tim has spoken on a variety of industry topics at respected venues such as the Society of Professional Benefit Administrators ("SPBA") and the Health Care Administrator's Association ("HCAA"). Tim currently sits on the Board of Directors for HCAA as well. Prior to his time as a TPA's in-house counsel, Tim spent many years as an attorney in private practice, successfully litigating many cases.

References

[1] *Varity Corp. v. Howe, 516 U.S. 489 (1996)*

[2] *CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011)*

[3] *More information on this topic can be found in the cases of LifeCare Mgmt. Servs. LLC v. Ins. Mgmt. Adm'rs Inc., 703 F.3d 835 (5th Cir. 2013), and Cyr v. Reliance Standard Life Ins. Co., 642 F.3d 1202 (9th Cir. 2011)*

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