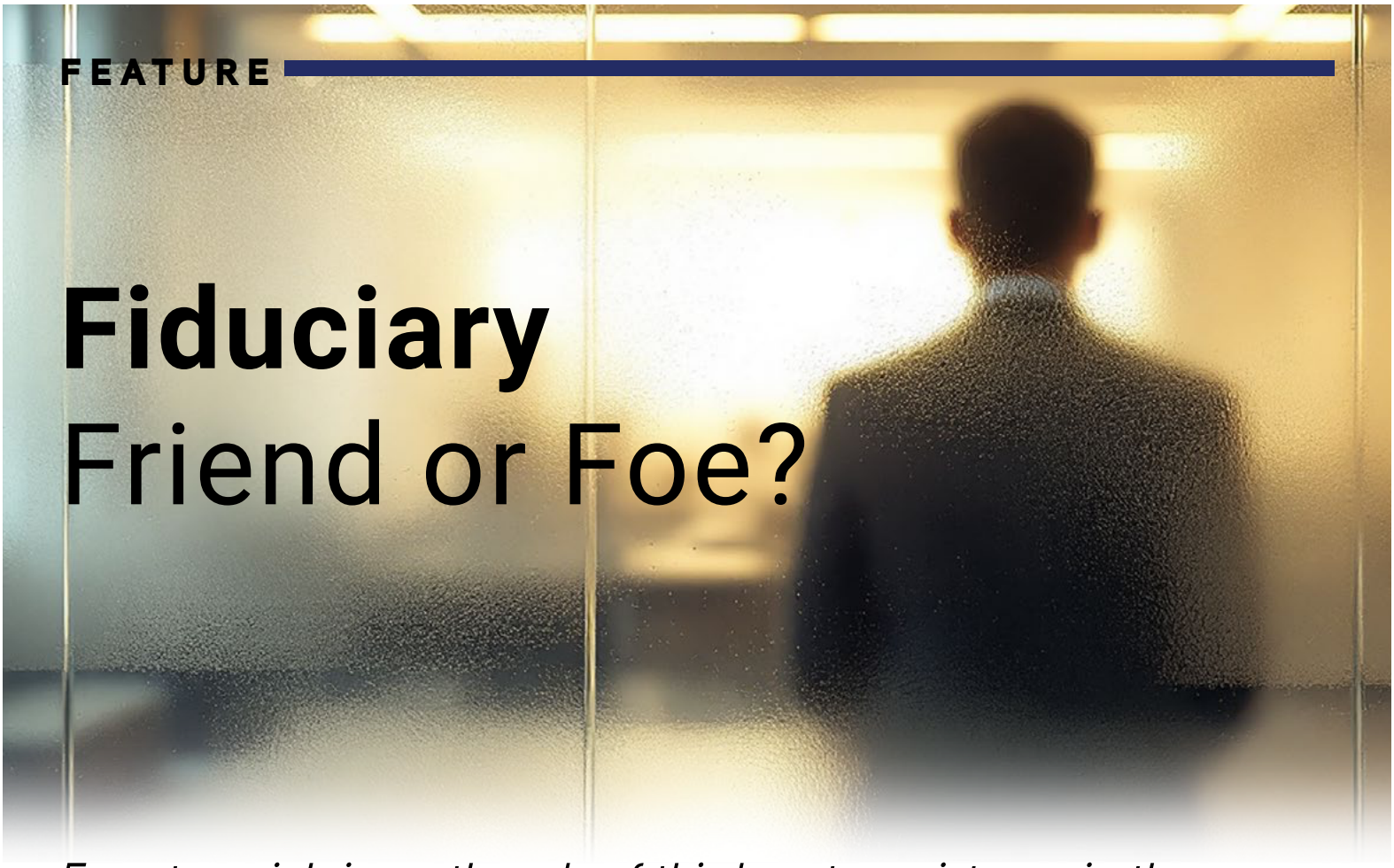

Fiduciary Friend or Foe?

Experts weigh in on the role of third-party assistance in the operation of self-insured health plans.

Written By Bruce Shutan

Benefit brokers, third-party administrators (TPAs), pharmacy benefit managers (PBMs) and industry carriers have faced mounting pressure in recent years to be better stewards of self-insured health plans. It has intensified since the passage of the Consolidated Appropriations Act of 2021 (CAA) and the filing of several high-profile class-action lawsuits alleging breaches in fiduciary responsibility.

But experts caution that these service providers usually are not actually considered fiduciaries unless they have explicitly accepted that status in writing. Most contracts disclaim discretionary authority, limiting their role to routine tasks.

Some industry players toss around the word "fiduciary" a bit too loosely to gain a competitive leg up, causing confusion when perception doesn't square with reality. Just ask Jamie Greenleaf, co-founder of Fiduciary in a Box, who recalls a recent conversation with a PBM executive who claimed they were a fiduciary on behalf of an employer client.

Jamie Greenleaf

Upon further investigation, the contractual language revealed that the PBM merely committed to abiding by fiduciary standards – that it wasn't an explicitly named fiduciary, which would be the employer or plan sponsor. While service providers can agree in writing to be named a fiduciary, employers still must monitor their performance and ensure that decisions are being made in the best interest of the plan sponsor and participants.

DISCRETION OVER PLAN ASSETS

To be considered a fiduciary, Greenleaf says a service provider needs to have discretion over plan assets. In other words, it's duty-related, not title-related. "That's where some of these TPAs are getting into trouble because they're writing in their contracts that they are not a fiduciary, but their actions are making them a functional fiduciary because they have discretion over those assets," she explains.

That's what happened when the U.S. Court of Appeals for the Sixth Circuit last year reversed a lower court decision in Tiara Yachts, LLC v. Blue Cross Blue Shield of Michigan, which reinstated ERISA fiduciary breach claims by the plan's TPA. The decision noted that service providers and administrators can be functional fiduciaries whose actions must be in the best interests of a plan sponsor and participants.

Stephen Carrabba

"A TPA is without question a fiduciary," says Stephen Carrabba, co-founder and president of ClaimInformatic. "They have discretion as to how any claim is paid, not paid, adjudicated, not adjudicated, whether it goes through a payment integrity engine or not, etc., when that claim is going to be paid and at what kind of discount."

He has clients whose savings fee is more expensive than doctor or hospital payments. "It's insane," he explains. "That is not fee reasonableness; that is a blatant violation of fiduciary responsibility under ERISA. A lot of these ASOs [administrative-services-only] explicitly state they are not a fiduciary. That, in my opinion, needs to be eliminated."

He recalls finding about $22 million in overpayments made by a client, Massachusetts Laborers' Benefit Funds (MLBF), which later sued Blue Cross Blue Shield of Massachusetts for breach of fiduciary obligations. MLBF later learned that it gave the Blues discretion to settle any claims under the terms of its ASO contract but did not prevail in court.

One example of how a TPA may be unwittingly exercising discretion over plan assets is in negotiating the cost of out-of-network care, notes Christine Cooper, CEO of aequum and immediate past-chair of SIIA's Price Transparency Committee. "If I have authority on behalf of a plan to negotiate up to 200% and I settle at 175%, well, that's me exercising discretion over plan assets," she says.

Greenleaf observes the emergence of a new type of environment for health plan sponsors that she describes as "a rinse-and-repeat of what we saw in the retirement space."

For retirement-savings plans, 3(16), 3(21) and 3(38) under ERISA define fiduciary capacity for administering, advising on and managing benefit plan assets. However, the federal government has not yet codified a fiduciary role for health and welfare benefits. It's also anyone's guess as to how federal courts eventually will rule in three high-profile cases expected to

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be re-filed against Fortune 500 companies that stand accused of breaching their fiduciary duties.

In the event that a lawsuit is filed, a service provider is always going to take the position that they are not a fiduciary, whereas the plan sponsor is going to argue that they are, in fact, a fiduciary, explains SIIA's Legals and Policy Counsel Chris Condeluci. Irrespective of those perceptions and what the ERISA statute says, what matters is whether the facts and circumstances support an argument that the service provider exercised discretionary authority over the plan's assets.

What service providers need to do is understand the fiduciary obligations that the plan sponsor has to meet and do everything in their power to help them satisfy those obligations, make prudent decisions and be legally compliant, he suggests. Doing so isn't just an ERISA duty, he says, it's also an ethical business duty.

Jake Velie

AN UPHILL CLIMB

Jake Velie, chairman and CEO of National Integrative Health, can't get over just how difficult it still is to price medical procedures and medicines, despite having a large analytics and actuarial practice.

He appears to be in good company. Most of the time, he says, even stop-loss carriers that are supposed to be underwriting the risk in a plan don't know what the plan paid for something. What's more, he adds that so-called transparent PBMs aren't really providing the "true" cost and are still operating on rebate guarantees.

His firm ends up doing quite a bit of estimating and building rebate databases to get as close as possible to the correct price based on the PBM contract. If there's a rebate guarantee in place, for example, they'll factor in those numbers against the ingredient cost.

"It's really just making sure that the contracts don't have exclusionary language that would keep you from getting rebate information you need and understanding what you actually paid," he adds.

Christine Cooper

Although PBMs have been the focus of fiduciary lawsuits alleging excessive Rx fees, Greenleaf says it's important to remember that in most cases, prescription drugs represent only 30% of an employer's overall healthcare spend.

"The reality is that they were led to that PBM by a consultant and didn't have a fiduciary process in place to determine if that PBM was appropriate for them," she explains, noting the need to unpack excessive fees involving medical claims and conflicts of interest with respect to the other 70% of spending.

A COMPETITIVE ADVANTAGE

A growing number of partners across the self-insurance community are seeking to exploit this shortcoming. But to gain a true competitive advantage, Cooper says a service provider would have to outline what fiduciary responsibilities they're taking on and then make sure that their actions match how those commitments are written.

"If the service provider wants to take on fiduciary status, that typically is not done," Condeluci adds, "but if the service provider is willing to be a fiduciary in the context of spending plan assets or operating and

Chris Condeluci

administering the plan on behalf of the plan sponsor, they could do that by taking on that fiduciary status."

In a recent report, Mercer suggested five critical areas where vendor oversight should be strengthened to avoid litigation over breaches in fiduciary responsibilities. They include demanding to know how service providers use AI in claims adjudication, pre-authorization and medical necessity determinations; scrutinizing all fees; eliminating gag clauses; building in audit rights; and documenting all fiduciary actions for at least six years under ERISA.

Velie has seen only a few benefits administrators who have been willing to take on the reporting requirements as a paid service and actually sign off, saying that they did the work as the fiduciary, but not directly as the plan sponsor themselves. That could change, however, once the few high-profile class-action lawsuits are re-filed or others proceed and courts rule that fiduciary breaches occurred, he says.

Even as someone with deep knowledge of fiduciary responsibility who also teaches a continuing-education course on the CAA, Velie would need to see more legal precedents before he's comfortable putting his firm in that position. "We're already operating with the [fiduciary] mindset, but we won't officially call ourselves that because with all the gray areas and lack of regulatory guidance, the risk is just too high," he explains.

He's starting to see a groundswell among benefits consultants who have a hunger to learn more and are committed to pursuing daily excellence with the fiduciary goal in mind. "One of the reasons why I publish the Daily Industry Report newsletter is because it forces me to read a couple of hours a day about what's going on in our industry," he says.

About five or six years ago, Carrabba recalls meeting with representatives from Risk Strategies whose mantra was pinned to explicitly accepting fiduciary status in writing. The insurance brokerage and consulting firm charged clients a fixed fee and did not accept commissions from any plan whatsoever.

"That's how they operate, and we are lock, stock and barrel with them," he says, also citing Justin Leader, CEO of BenefitsDNA, as another adviser who embraces this approach.

Jim Wachtel, founder and CEO of FITT Health, lauds the work of Steve Ditto, a healthcare executive, compliance adviser and patient advocate who's also a board adviser for the Nautilus Health Institute. "He runs a consulting company based solely on the fiduciary responsibilities of a plan," he says. "I think there's a lot of runway for brokers who are certified fiduciaries or take the approach of bringing up more of a strategic framework to cost and risk management within a plan and help the employers manage their fiduciary risk."

The key to fiduciary compliance is through payment integrity, observes Carrabba, emphasizing his firm's prepayment claim editing capability as unique in the self-insurance market.

He identifies eight characteristics that every plan fiduciary has an obligation to adopt. They include embracing loyalty and prudence; following a plan document; avoiding conflicts; monitoring service providers; securing reasonable fees; protecting assets and data; and diversifying investments. Each of these steps is interconnected. For example, in order to ensure fees reasonableness, he says employers must monitor their service providers.

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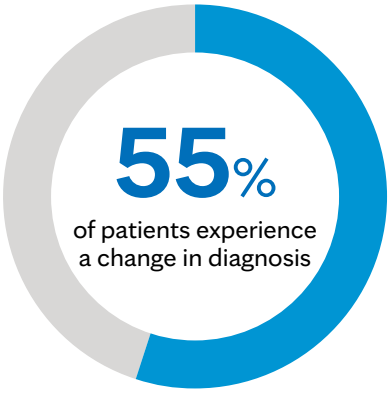

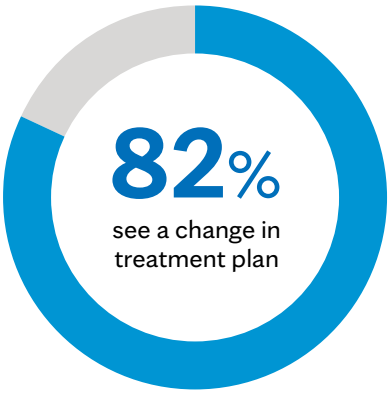

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The spotlight on fiduciary responsibility is going to compress service-provider margins, cautions Wachtel, citing as examples revenue sharing from PBM rebates and cost savings for claims reduction. He says gaining full access to medical claims data, especially on the pharmacy benefits side, will be a ripe opportunity for employers to cement strategic partnerships with various vendors that serve the self-insurance market.

LOOKING AHEAD

Greenleaf predicts that at some point, there's going to be a payout from all the litigation, "and I would then make sure as a plan sponsor that whatever that person got sued for, that I wasn't doing it. But I think what will happen is that plan sponsors will demand that their providers become fiduciaries on their plan, whether it's their broker, TPA or PBM that needs to move into a co-fiduciary status. That's the direction that the market will move in because employers will insist upon it, just like they did in the retirement space."

Given that this issue has become much more front and center, driven largely by lawsuits filed against plan sponsors claiming fiduciary breaches, Condeluci believes service providers are starting to realize they need to be better educated on this topic.

"These lawsuits aren't going to end anytime soon, and no one wants to be sued between now and whenever this may end, which is an unknown at this point," he opines.

There are now efforts in Congress among some employer groups to deem certain service providers an ERISA fiduciary, singling out PBMs in particular. For example, there could be legislation that amends ERISA to reflect that PBMs are a fiduciary if they establish a drug formulary, develop a prescription drug provider network, adjudicate claims or negotiate with drug manufacturers the prices of drugs

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Condeluci thinks TPAs would be next in the crosshairs over failing to share health claims data or properly disclose negotiated pricing information, followed by brokers – though it would be a stretch and more difficult to pull them into being an ERISA fiduciary.

Cooper predicts that fiduciary responsibilities will be codified on the health and welfare benefits side at some point, as it was years ago for qualified retirement plans. "Essentially, we're asking for a list of the duties and what the penalties are for not meeting them, and I don't think that's unrealistic to expect," she says.

Wachtel believes SIIA is well-positioned to take on a leadership role as the fiduciary issue evolves, noting how non-governmental entities like FINRA devised a best-interest standard for broker-dealers in the financial services industry. "The writing is clearly on the wall," he observes of the need to step up group health plan stewardship. ■

Bruce Shutan is a Portland, Oregon-based freelance writer who has closely covered the employee benefits industry for nearly 40 years.