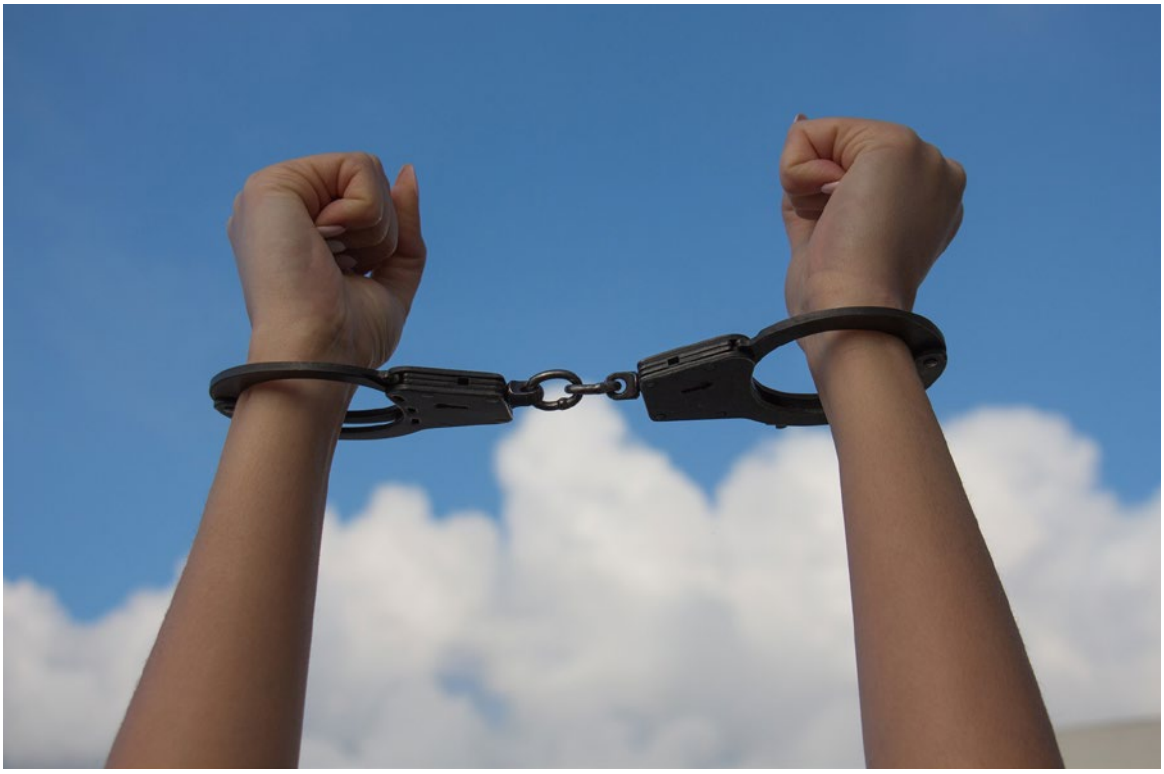


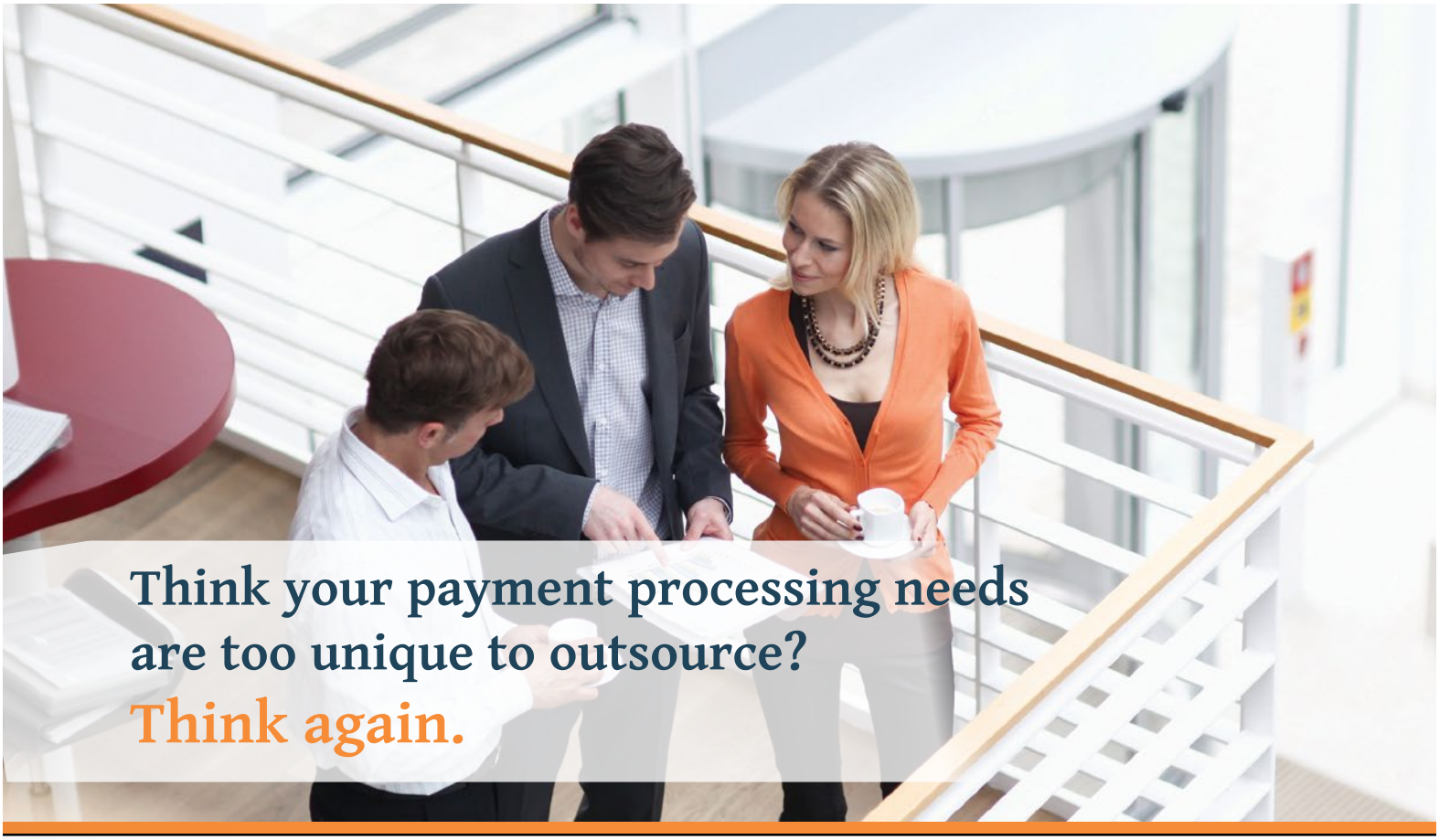
Held Captive by Appeals

By: Tim Callender, Esq.

Prior to the passage of the Affordable Care Act, self-funding was already healthy and growing. Since the passage of the Affordable Care Act (and predominantly due to the ironic increase in healthcare insurance costs through the fully-insured, carrier model) we have seen self-funding grow even more.

Although this growth has been significant, there are some employer groups – primarily small and mid-sized groups – that have struggled to find a sustainable path into self-funding nonetheless. For purposes of this article I will refer to these employers as "Small-Mids." Obviously, opinions differ as to what a "small" or "mid-sized" employer group is, but for today's discussion, we are looking at employer groups ranging from 50 employees up to approximately 200 employees.

One of the primary barriers to entry for Small-Mids is the financial risk inherent to the self-funded model. Even with a stop-loss policy in place (assuming the employer is domiciled in a state that has not regulated stop-loss to the point of making it prohibitive to gain a policy for a small to mid-sized employer), many Small-Mids do not have the cash reserves necessary to make it through a high health spend year before stop-loss reimbursement might kick in.



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There are programs in the market such as "level-funding" whereby an employer's risk is effectively capped at a certain figure in exchange for a set monthly expense, but such programs are still in their infancy and not very widely-used.

In the traditional market, however, figure in a handful of dialysis claims, one or two air ambulance claims, and one plan member on a growth hormone prescription, and the Small-Mid is running for the hills.

Lest we forget that Small-Mids are often terrified of financial ruin on many fronts to begin with, let alone bearing the risk of high claims exposure. For them, it is unquestionably easier to sign up for that prototypical fully-insured option and trade financial risk for predictable premiums. The problem, though, is that predictable premiums are generally high premiums.

Another barrier to entry for the Small-Mids is the appeals experience. "What do you mean, 'appeals experience,' Tim?" you might ask. In short, as those of us working in the self-funded health plan space know, a health claim's denial triggers appeals rights. These appeals may be pursued by the plan member, a plan beneficiary, or even the medical provider through an assignment of benefits or appeals authorization. The typical claims and appeals cycle tends to look something like this:

- (1) A claim for health benefits is submitted to the plan-sponsor's third-party administrator by the Claimant (the Claimant might be the plan member, a plan beneficiary, or a medical provider);
- (2) The claim is adjudicated, by the TPA, pursuant to the terms of the governing plan document, as created and adopted by the plan-sponsor;
- (3) The claim is denied pursuant to the terms of the plan document;
- (4) The Claimant files a first-level appeal.
- (5) The first-level appeal is handled by the TPA. Sometimes input from the plan-sponsor is solicited, sometimes not. Every TPA / plan-sponsor relationship is different.
- (6) The denial of benefits is upheld by the TPA / plan-sponsor at the conclusion of the first-level appeal process.
- (7) The Claimant files a second-level appeal.
- (8) The TPA will handle the second-level appeal in one of two ways: (i) it will review the second-level appeal, provide a recommendation to the plan-sponsor regarding the determination, and ask the plan-sponsor to make a final determination based on the TPA's recommendation; or (ii) the TPA will submit the second-level appeal to the plan-sponsor, in its entirety, for the plan-sponsor to review and determine, on its own, whether the denial should be upheld or overturned.

As featured in the September 2016 issue of Self-Insurer

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It is step (8) where the wheels typically come off for an existing self-funded plan and it is step (8) that is a significant barrier for Small-Mids to get past when they analyze and consider self-funding. Imagine a Small-Mid that is privately held and made up of hard-working, blue-collar employees and blue-collar leaders who have risen to positions such as Vice President of H.R., or Chief Operations Officer.

Suddenly, it is these leaders who are faced with a second-level appeal based on the medical necessity of cortisone injections for the treatment of migraines; suddenly it is these leaders who are faced with a second-level appeal based on the interpretation of a complex plan exclusion, such as the "hazardous activities exclusion" or the "illegal acts exclusion." We have all heard these stories and we are all familiar with the fallout that might occur when a Small-Mid is faced with this daunting task.

Additionally, how many stories exist of the closely held Small-Mid's leadership team suddenly faced with a second-level appeal that directly concerns their highest performing sales person? Or, more generally, consider the heartache involved for any Small-Mid's leadership team when they must decide an appeal on a health claim for a well-known and well-loved employee, regardless of his or her title! Many Small-Mids have close-knit employee populations, many of whom have been coworkers and friends for years.

How many times have we heard, *"we make motorcycle clutches and just wanted to provide our employees with good health benefits! We never signed up to make these types of decisions!"*

Another group leaves self-funding and then the horror stories trickle downstream, preventing other Small-Mids from moving toward self-funding.

Or, if the Small-Mid stays in the self-funded space, there is a very real chance that they unknowingly breach their fiduciary duty as a plan-sponsor, time and again, when they throw their hands in the air and pay claims that should not be paid pursuant to the governing plan document, simply because of the emotion, heartache, and the difficulty of handling complex appeals.

Solutions to the problems discussed above do exist, and these solutions are exploding across the industry and across the country. The captive model is one such solution, primarily focused as a remedy to the Small-Mid's concern over self-funding and financial devastation. Captive risk-sharing is not a new idea – yet it is not as common in the self-funded health space as we all might think.

Time and again, my colleagues and I are surprised as we travel and speak on self-funding topics, all around the country, to learn that many employers, not to mention their brokers, have either never heard of captive risk sharing or have simply never invested the time to learn much beyond the basics.

The proof is in the pudding. The numbers show that properly-run captive programs, filled with Small-Mids, are breaking down doors and bringing Small-Mids into self-funding through the assurance of responsible, managed risk-sharing.

Whether heterogeneous (made up of groups spanning multiple industries) or homogeneous (groups within the same industry) in makeup, a captive provides a common goal amongst its members to keep costs down and prop one another up through the safety net of a pool of funds that many might view as a "rainy day fund."

Regarding the second barrier to entry for Small-Mids, directly handling health claim appeals, there are solutions covering that problem as well. Third-party, second-level appeals outsourcing is becoming more prominent in the self-funded industry.

Historically, the only option that might exist for a plan sponsor was to hope it landed with a TPA that might be willing to handle second-level appeals, usually for a fee. But, most TPAs steer away from this administrative add-on for two reasons. (1) it drastically blurs the line between who is acting as a fiduciary for the plan and (2) it can create a potential conflict of interest and call objectivity into question when the same entity has adjudicated the initial claim, handled the first appeal, and then went on to handle the second appeal.

Figure in a solution that can handle the appeals concerns discussed above and we are looking at the pinnacle method to eliminate the two most prominent barriers to self-funding faced by Small-Mids: financial concerns over claims exposure, and managing appeals.

Tim Callender serves as the Vice President of Sales and Marketing for The Phia Group, LLC, headquartered out of Braintree, Massachusetts. Prior to his current role, Tim served as a Staff Attorney and Lead PACE Counsel for The Phia Group. Before joining The Phia Group in 2015, Tim spent years functioning as in-house legal counsel for a third party administrator. Tim is well-versed in complex appeals, direct provider negotiations, plan document interpretation, stop-loss conflict resolution, keeping abreast of regulatory demands, vendor contract disputes, and many other issues unique to the self-funded industry. Tim works out of The Phia Group's newest office, in Boise, Idaho.