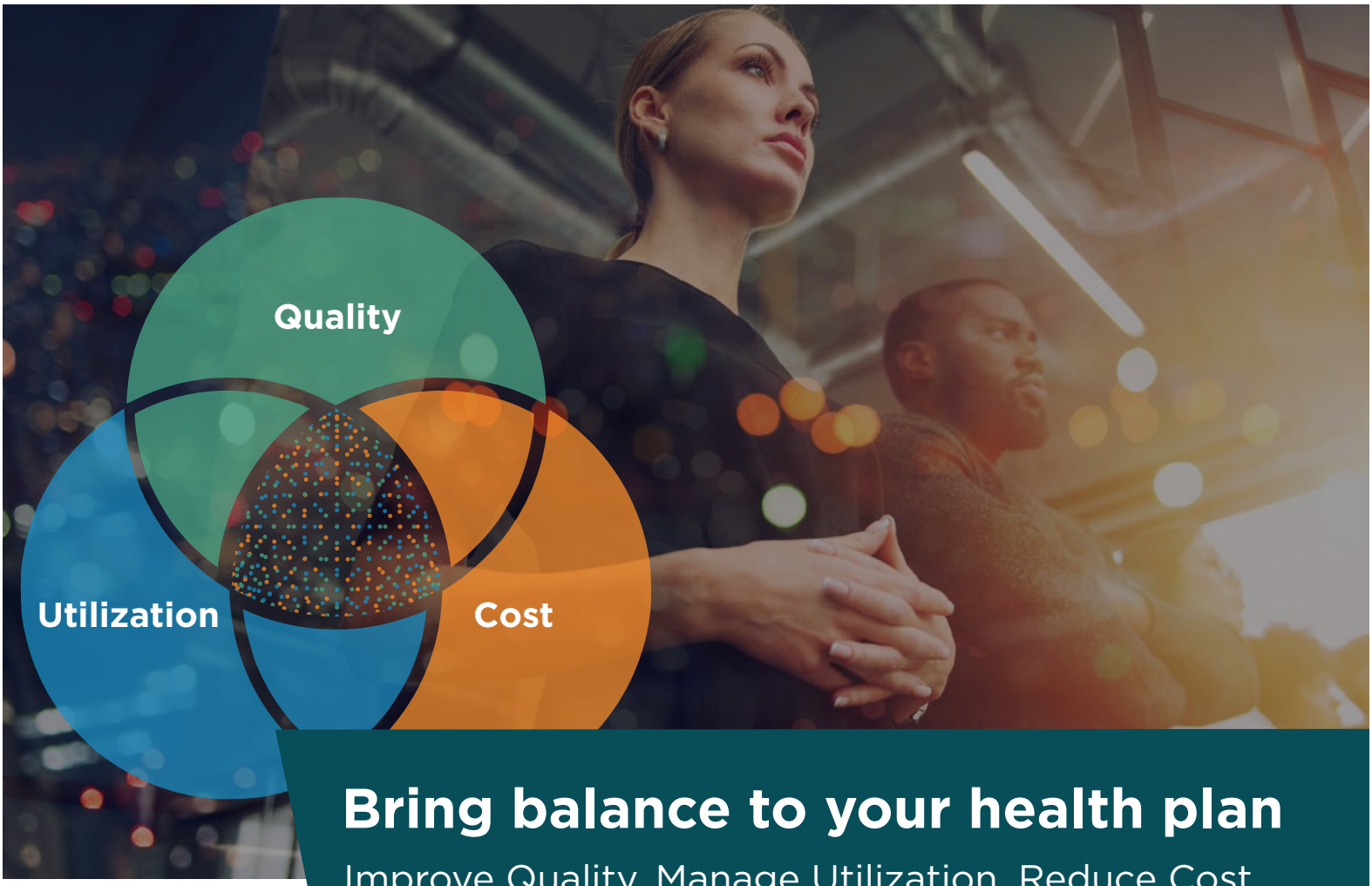
# THE LIABILITY LANDMINE: THE SURPRISING DECISION IN DOE V. UBH

Written By Jon Jablon

The industry is buzzing. Congress and the Department of Labor are shaking things up with the Consolidated Appropriations Act – including, of course, the No Surprises Act and new requirements for compliance with the Mental Health Parity and Addiction Equity Act.

Even though the fiduciary liability standards we have all come to understand have been relatively static for a long time, a recent Mental Health Parity-related federal court decision has sent a shockwave across the self-funded industry, potentially changing the way TPAs and other entities will need to view fiduciary liability.

The decision in question is in response to a motion in *Jane Doe v. United Behavioral Health*, in the U.S. District Court for the Northern District of California (Case No. 4:19-cv-07316-YGR), decided March 5, 2021. The dispute in this case centered around the health plan's blanket exclusion of Applied Behavioral Analysis and Intensive Behavioral Therapy – two of the primary treatments for Autism Spectrum Disorders.

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The facts of the case demonstrate that the SPD excluded these two services, and the claims administrator – United Behavioral Health, or UBH – administered the exclusion that was written in the SPD, and denied a medical claim pursuant to that SPD language as written. UBH moved to dismiss the suit under the theory that even assuming the truth of all facts alleged, applicable law would not classify UBH as a fiduciary.

The relevant case law generally indicates that if *the Plan* makes the rules via the Plan Document, and if the TPA is just following the literal written terms without exercising discretion, the TPA has not rendered itself a fiduciary.

Based on case law and regulatory guidance, that's the prevailing sense of the fiduciary rules. The court's decision started out very much as we tend to expect from cases like this: the court recited the facts of the case, iterated the general rules of fiduciary duties, and cited to lots of cases that have indicated that rule, apparently using those cases to guide its decision.

Then, though, the court's decision changed course, and things got a little strange.


## WHO'S A FIDUCIARY?

Department of Labor (DOL) guidance has made it clear that the intended interpretation of ERISA's fiduciary duty designation is fairly broad, but still well-established through an explicit set of exceptions to the "general" rule that an entity that makes decisions for a health plan is a fiduciary.

According to the DOL, there is an eleven-item list of actions that explicitly do *not* render an individual or company a TPA, including applying established rules (as opposed to *making* the rules), processing claims pursuant to established rules (as opposed to adjudicating claims), and calculating benefits (as opposed to *determining* benefits).

With respect to this list, the DOL has stated that "a person who performs purely ministerial functions such as [these] for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is *not* a fiduciary." (Emphasis added).

The distinctions may seem small, but the regulators and courts have been clear that if an entity performs *only* those broad functions listed in the exceptions, that entity is not a fiduciary. Of course, a TPA or other entity can become a fiduciary if it performs any of these eleven items in *addition* to other actions – but limiting its actions to solely these eleven items does not cause the TPA to assume a fiduciary designation.


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The court appeared to agree, making the point multiple times: *a purely ministerial act does not in itself rise to the level of a fiduciary act.* This court did not show any evidence of a desire to change that well-established law; in fact, its language tends to indicate that the court agreed and embraced these principles.

## SO, WAS UBH A FIDUCIARY?

According to UBH, when acting as the TPA, they did exactly what the SPD said, and they didn't exercise discretion in doing it. The Plan Document excluded ABA and IBT services, and the TPA read the SPD and applied it as written.

To an onlooker, UBH's conduct seems like a textbook definition of a purely ministerial decision; denial of the ABA or IBT claim is indisputable. All indications are that UBH performed "purely ministerial functions…for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons…" and therefore "is not a fiduciary."

Interestingly enough, the court apparently didn't disagree with that premise, but still concluded nonetheless that UBH *did* act as a fiduciary. The logic employed is unexpected, given all the precedent cited: the court reasoned that even though UBH did exactly what the Plan Document provided, UBH still *made a decision*, and the simple act of making a coverage decision is enough to render UBH a fiduciary.

Recall, however, that the eleven explicit exceptions to the general fiduciary rule include applying established rules and processing claims pursuant to those established rules; the facts suggest that UBH meets those exceptions and is therefore not a fiduciary. For a reason the court did not quite explain, however, it disagreed.

## THE SUPREME COURT'S GENERAL RULE

In reaching its conclusion, the court placed a great deal of reliance on the United States Supreme Court's decision in *Aetna Health Inc. v. Davila*. According to the Supreme Court, "A benefit determination under ERISA . . . is *generally* a fiduciary act". *Aetna Health Inc. v. Davila*, 542 U.S. 200, 218-19 (2004) (Emphasis added; internal quotations omitted).

Despite all the iterations of the "purely ministerial" standard that the court cited in reviewing UBH's conduct, the court nonetheless relied on the Supreme Court's quotation above, and concluded that the TPA was necessarily a fiduciary, since *all benefit determinations are fiduciary in nature*.

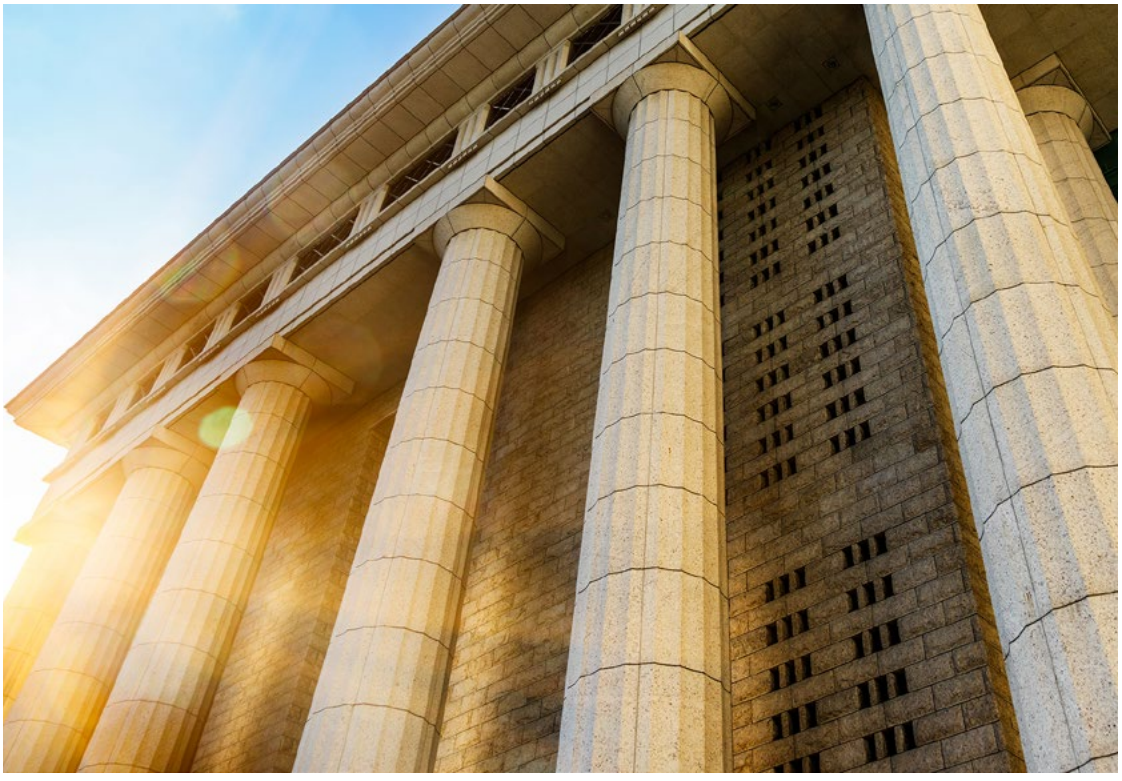
Hang on a minute, though: are *all* benefit determinations fiduciary in nature? Is that really what the Supreme Court wrote? A plain reading of the quote casts some doubt on this court's interpretation.

Despite quoting the Supreme Court's *general* rule, including the very telling word "generally", this court interpreted the Supreme Court's rule as an absolute one. The difference is that a general rule is subject to exceptions (recall that case precedent and regulatory guidance suggests that UBH is subject to an exception) while, to contrast, an absolute rule has *no* exceptions (and this is what the court ultimately concluded).

The Supreme Court's rule can be read as: *benefit determinations are generally fiduciary acts, unless they are purely ministerial in nature and the decision-maker exercised no discretion in making the determination*. Instead, the court in *Doe v. UBH* read the Supreme Court's rule as *benefit determinations are fiduciary acts, period*. That doesn't seem right, though – especially based on *everything else* the court in *Doe v. UBH* wrote.

In other words, the text of this decision shows that the court added 2 and 2 and got 5.

Sometimes a court will reimagine or reinterpret existing law, but this court showed no evidence of doing that. Instead, the court went through all the premises, but then disregarded those premises and reached a different conclusion entirely.



An analogy would be to say that if oranges are *generally* round, then *all* oranges must be round.

## THE LITERAL FIDUCIARY DUTY

On the topic of general versus absolute rules, the fiduciary duty within ERISA to strictly abide by the terms of the SPD is a *general* rule, an important exception to which being if the terms of the SPD do not comply with applicable law.

It is therefore possible to *violate* a fiduciary duty by choosing to enforce noncompliant plan language over contradictory law, but in order to violate a fiduciary duty, the entity must first be determined to *be* a fiduciary.

As it happens, the court did go on to determine that the plan language in this case did violate federal law and was therefore unenforceable – but again, the question isn't whether UBH violated a fiduciary duty, but whether UBH owed one in the first place. An act performed by a non-fiduciary wouldn't give rise to fiduciary liability, after all.

## BEGGING THE QUESTION

At one point, after it had already analyzed the expected premises and reached the unexpected conclusion, the court iterated the fiduciary duty to apply plan terms as written except to the extent inconsistent with ERISA.

The court wrote that UBH "cannot hide behind plan terms" since applicable law conflicts with those terms, which is unquestionably accurate – but this statement or the single paragraph explaining, which appears to be an afterthought, it still does not explain why UBH should be deemed a fiduciary to begin with.

It's possible that the court's intended logic was that UBH exercised discretion by choosing to follow the SPD over the conflicting law, thereby rendering it a fiduciary on that basis. The court did not iterate that connection, but giving the court the benefit of the doubt, perhaps that was the intended meaning.

In any event, the court performed this ancillary one-paragraph analysis of whether UBH violated a fiduciary duty only because it had already decided that the TPA is a fiduciary; in other words, this single paragraph discussing how UBH can't "hide behind plan terms" already assumes that the TPA is a fiduciary, which means that this discussion can't be relevant to the analysis of whether the TPA is a fiduciary to begin with.

In a logical fallacy known as "begging the question", the court used its conclusion (that UBH is a fiduciary) to form one of its premises (that UBH's conduct violated a fiduciary duty) – the only premise that even comes close to explaining why UBH might be a fiduciary (which, again, is the conclusion).

Put more simply, the court apparently used its conclusion to justify its conclusion. From a logic perspective, this doesn't track.

At one point in this decision, the court indicated that UBH was a fiduciary because UBH did not sufficiently prove it was *not* a fiduciary. Interestingly, the old adage "innocent until proven guilty" does not always apply in the civil court setting.

Without getting too far down the rabbit hole on this particular point, it is worth noting that any allegation that a TPA has acted as a fiduciary could prompt the need for the TPA to defend itself – and as a good portion of the self-funded industry has experienced first-hand, plan participants and their attorneys often opt for a "kitchen sink" approach, suing everyone possible, sometimes resulting in an apparently baseless suit against a TPA, broker, consultant, or other entity.

As this case makes clear, though, court is sometimes like the wild west, where anything can happen.

As discussed, the court's logic is not quite clear, and hopefully an appeals court will shed some light on this so we can at least get some closure one way or the other – but one thing is for sure: if this case doesn't get reversed, or even if other courts start to rely on this case prior to appeal, TPAs across the country may be in for a paradigm shift when it comes to their ability to strictly follow the clear, literal terms of an SPD without fear of reprisal.

Strengthening plan language is always a good idea, but health plans (and their TPAs!) need to ensure that strong language isn't stronger than the law permits, since there could be liability landmines even where we least expect them. ■

Formerly Director of The Phia Group's Provider Relations department, Jon Jablon currently serves as Director of Consulting Services, as well as assisting with in-house legal needs. In his eight years with The Phia Group, Jon has helped numerous entities in the self-funded industry navigate and overcome issues related to claims negotiation, balance-billing, compliance, cost-containment, and more. Jon and the rest of The Phia Group's legal team stay up-to-date on the issues that most effect our client base, in order to help health plans and their TPAs prepare for the future.