Engaging and Health Plan TPAs:

Understanding Your Fiduciary Obligations

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benefits MAGAZINE

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Monitoring

The Department of Labor has begun showing more interest in investigating ERISA health plans, including the fees third-party administrators charge to self-funded health plans. Recent litigation provides some guidance for plan fiduciaries.

Since the passage of the Employee Retirement Income Security Act of 1974 (ERISA), the Department of Labor (DOL) and private litigants have focused mainly on pension plans and more recently, 401(k) plans. But ERISA was enacted to protect the interests of employees and their beneficiaries in all employee benefit plans,[1] including health plans.

Recently, DOL has shown a heightened interest in investigating health plans governed by ERISA for compliance. ERISA fee litigation is also shifting into the health plan arena, and litigation accusing health plan fiduciaries of paying or charging excessive or hidden fees is becoming more common. Investigation of self-funded health benefit plans and the fees charged by the third-party administrators (TPAs) that serve them is an important area of focus.

Recent DOL enforcement actions have focused on the conduct of the TPAs, but fiduciaries have an obligation to understand the fees paid to the TPAs they hire and to ensure that such fees are reasonable. One case discussed in this article, *Acosta v. Chimes,* should serve as a warning to ERISA plan fiduciaries, because in that case DOL pursued litigation against the plan fiduciaries for paying too much in fees to the TPA engaged to administer claims under the plan.

For these reasons, although some of the cases discussed in this article are actions against the TPAs for charging excessive and/or hidden fees, such cases could just as easily be brought against plan fiduciaries. Therefore, it is critical for ERISA fiduciaries, particularly Taft-Hartley plan trustees and those responsible for implementing employer-sponsored plans, to understand their obligations under ERISA when it comes to retaining and monitoring TPAs.

The Changing Health Plan Paradigm

Self-Funded Health Benefit Plans

Enthusiasm for fully insured health plans has waned as premium costs have skyrocketed over the years, and self-insured health plans have become more popular. According to DOL, by the end of 2015, 83% of ERISA health plan participants were covered by self-insured or mixed-funded plans.[2]

The choice to self-fund a health plan exposes employers that run such plans and Taft-Hartley trustees (collectively, plan fiduciaries) to heightened risk in two broad areas: (1) the risk of higher-than-expected claims costs and (2) the risk that a TPA retained to administer some part of the health benefit plan will charge excessive fees or benefit from so-called hidden fees for which the plan fiduciaries may be legally liable. The first risk is frequently addressed by the purchase of stop-loss or excess insurance policies, which are triggered to reimburse the health plan at a certain dollar amount.

The second risk is not as easily addressed and is the focus of this article: the risks of legal liability to plan fiduciaries resulting from the actions of a TPA.

When a plan fiduciary fails to understand or monitor the fees being collected by TPAs retained to provide plan administration services, that plan fiduciary is also in violation of its obligations under ERISA; specifically, the duty to pay only reasonable plan expenses. As the cases discussed in this article show, some plan fiduciaries have not successfully monitored the TPAs hired for self-funded health plans. While the litigation and enforcement focus has been on the TPAs and their own fiduciary breaches in this area, recent actions show signs of shifting to the plan fiduciaries. As such, plan fiduciaries need to know what they must do in this ever-changing arena to comply with their fiduciary duties.

TPAs and Self-Funded Health Benefit Plans

Plan fiduciaries often look to TPAs to design and/or administer their health plans, delegating such tasks as creating and managing a network

takeaways

- The Department of Labor (DOL) has recently shown a heightened interest in investigating health plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) for compliance.
- ERISA fee litigation is also shifting into the health plan arena, and the investigation of self-funded health benefit plans and the fees charged by the TPAs servicing them is one of the focus areas.
- Plan fiduciaries have a duty to understand and monitor the fees collected by TPAs.
- TPAs that assume fiduciary functions through administrative services agreements (ASAs) with self-funded health plans have an obligation to be transparent about the fees they collect from the plan.

of health care providers and handling claims and/or appeals. The TPAs are necessary because entities offering self-insured plans often lack the in-house expertise to design or administer employee health benefit plans in accordance with ERISA. For this reason, plan fiduciaries often enter into administrative services agreements (ASAs) with TPAs. However, upon entering into these ASAs, plan fiduciaries frequently give up much of their ability to control costs under the plan to the TPAs, as well as the ability to effectively monitor the fees collected by the TPAs.

This increases the risk to plan fiduciaries of a DOL enforcement action or of civil litigation, because no matter what a TPA is hired to do, plan fiduciaries remain obligated to understand the fees and payments going to the TPA and to understand that once an ASA is entered into, the TPA becomes a party in interest to the plan, making the payment of any fees to the TPA prohibited unless such fees meet the statutory exemption of reasonableness. Importantly, the reasonable compensation exemption contained in 29 USC §1108(c)(2) does not apply to fiduciary self-dealing, another potentially relevant issue that arises in connection with fees collected by TPAs.

The Current Legal Landscape Regarding TPAs and Their Fees

The following cases provide some guidance to plan fiduciaries wondering how to fulfill their fiduciary obligations when engaging a TPA.

Perez v. MagnaCare Administrative Services, LLC, et al.

In this 2016 case, the DOL alleged that the health plan TPA, MagnaCare, charged 100 or so ERISA plans "network management fees" that were undisclosed and hidden in overall charges for ancillary medical services. The participating plans paid MagnaCare the full amount requested, and MagnaCare allegedly gave only a portion of that amount to the ancillary providers, pocketing the markup, so there were allegations of self-dealing in addition to hidden fees, as well as allegations regarding MagnaCare's claims procedures.

The case was settled in July 2017, and the consent order[3] required MagnaCare to rework its claims procedures to comply with ERISA and to pay $16 million to DOL—$1.5 million as a civil penalty and $14.5 million to compensate MagnaCare health plan clients for the network management fees. The consent order also included a road map detailing how MagnaCare should structure its ASA agreements going forward so that its fee structures comply with ERISA fiduciary requirements.

The DOL's position in this litigation and the settlement leave no doubt that TPAs have a fiduciary duty to provide transparent fee arrangements, and the failure to do so exposes them to significant financial risk. This case should also serve as a warning to plan fiduciaries engaging TPAs that their fiduciary obligations to avoid prohibited transactions and pay only reasonable fees charged to the health plan requires them to monitor *all* fees that a TPA collects. Plan fiduciaries would be wise to proactively negotiate or renegotiate the terms of the ASAs to ensure compliance.

Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan

In this seminal case, the U.S. Court of Appeals for the Sixth Circuit in 2014 affirmed a district court ruling that a TPA functions as an ERISA fiduciary and breaches its fiduciary duties under ERISA by charging undisclosed fees to a plan.[4] The argument by Blue Cross that the employer Hi-Lex agreed to the fees and failed to exercise due diligence was rejected, since there was detailed evidence of attempts by Hi-Lex officials to obtain information and vague and "misleading" responses from Blue Cross.

While the focus of *MagnaCare, Hi-Lex* and their progeny was on the TPA, if the TPA is performing only ministerial tasks without exercising discretion or judgment, it is not a fiduciary. This is a fact-intensive determination. Plan fiduciaries, on the other hand, always have the same

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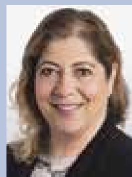

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fiduciary obligations, including the duty to pay only reasonable fees, so there is always a fiduciary obligation involved in selecting and monitoring the TPA. Two recent cases suggest the focus of TPA excessive/hidden fee cases is shifting or expanding to plan fiduciaries.

Acosta v. Chimes District of Columbia, Inc.

Fiduciaries also must determine whether the TPA will receive commissions and/or finder's fees from any other third parties if they are engaged to provide services to the health plan or if they will be allowed to collect any other hidden fees by operation of the ASA. In *Acosta v. Chimes District of Columbia, Inc.,* DOL filed suit in 2015 against the plan alleging, among other things, that the fees and expenses being paid to the TPA were not properly monitored by Chimes and that Chimes engaged in prohibited transactions.

This is the first (or one of the first) ERISA cases addressing claims against fiduciaries for failing to monitor and for paying excessive health plan fees to TPAs. The court ultimately ruled in favor of the defendant fiduciaries, rejecting the stringent requirements suggested by DOL. The *Chimes* decision illustrates that the duty to monitor TPAs begins with the duty to make a prudent selection.

While the court held that ERISA does not require fiduciaries to "scour the market"[5] to find the cheapest option for participants, or to engage in a formal written request-for-proposal process, the duty to pay only reasonable plan expenses should be considered when comparing estimates provided by the TPAs under consideration. Plan fiduciaries must understand fully which services are covered under the estimated fees; some TPAs charge separately for each service while others bundle several services for one price.

The *Chimes* decision reiterates the plan fiduciaries' responsibility to ensure that fees collected by the TPA are reasonable and necessary and that such fees are not prohibited transactions. This duty to monitor fees is ongoing, and any fees that are collected by the TPA must be specifically set forth in the ASA. *Chimes* suggests that the obligations of plan fiduciaries to health plans are similar to the fiduciary obligations related to the monitoring of TPAs hired to assist with defined contribution plans, adding to the likelihood that monitoring the performance of TPAs engaged through ASAs to provide services to self-insured health plans will be an increased focus of ERISA enforcement and litigation.

Shore et al. v. The Charlotte-Mecklenburg Hospital Authority et al.

The complaint in this case accuses the defendant The Charlotte-Mecklenburg Hospital Authority, aka Atrium Health, of failing to enforce the ERISA obligations it owed to the health plan, resulting in excessive copayments and deductibles for plan participants, "which would have been less with the selection of an alternate network provider."[6] The facts are unique in this case, because MedCost, the TPA hired to administer claims under Atrium's self-funded health plan, is partially owned by Atrium, so there is a self-dealing

allegation against Atrium that may not exist in all similar health plan fee cases. That said, the TPA is always a party in interest to the plan, so any payment of fees to a TPA is a prohibited transaction unless the fees are reasonable, and plan fiduciaries are liable for prohibited transactions along with the service provider. As such, plan fiduciaries must continually monitor the TPA fees to ensure that they continue to be reasonable and are not prohibited transactions.

The *Shore* complaint alleged that Atrium was paid "far greater amounts . . . for medical services rendered through the MedCost network than the plan would pay under other managed care networks, such as Blue Cross Blue Shield of North Carolina."[7] The complaint alleges several ERISA violations against Atrium and Medcost, including self-dealing and breach of the duty to monitor and to pay only reasonable fees. Win or lose, the fact that litigants are seeking to unwind and disgorge all payments made to the TPAs and all copayments and deductibles paid by participant and beneficiaries is indicative of the high cost plan fiduciaries could face if they are found to have improperly monitored health plan TPAs. This case was recently dismissed on unrelated grounds and is currently on appeal to the Fourth Circuit.

Conclusion

Recent litigation illustrates two important principles:

1. TPAs that assume fiduciary functions regarding self-funded health plans and their participants and beneficiaries have an obligation to be transparent about the fees they collect from the plan.
2. Plan fiduciaries are not absolved of their fiduciary obligations when they hire a TPA. They must enter into a reasonable contract, and there is an ongoing duty to monitor TPA fees and ensure the absence of prohibited transactions.

As more excessive fee cases are filed against self-insured health plans, plan fiduciaries need to figure out how to control TPA costs and find more effective ways to monitor the performance of the TPAs under the ASAs.

Endnotes

1. There are some narrow categories of exempt benefit plans, but none are relevant to this article.
2. See www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2018-appendix-b.pdf.
3. The consent order can be reviewed at www.dol.gov/sites/dolgov/files/legacy-files/newsroom/newsreleases/EBSA20170552.pdf.
4. *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan,* 751 F.3d 740 (6th Cir. 2014).
5. *Acosta v. Chimes D.C., Inc.,* No. CV RDB-15-3315, 2019 WL 931710, at *19 (D. Md. February. 26, 2019) (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); Department of Labor EBSA Tips (internal citation omitted)).
6. *Shore et al. v. The Charlotte-Mecklenburg Hospital Authority et al.*, 2018 WL 6586825 (M.D.N.C.).
7. Like *MagnaCare,* this was not the first time a lawsuit was filed over the fees charged by MedCost. In 2009, some North Carolina Baptist Hospital employees sued Atrium over its contract with MedCost, saying it paid inflated amounts for the medical treatment that Baptist provided to its own employees.

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