

Having a Health Plan Fiduciary Duty Mindset



Emerging Risks for Health Plan Fiduciaries

Health plan fiduciaries need to prudently manage health plan assets (dollars) with the same level of care as pension plan fiduciaries. Recently, there has been an uptick in cases that have focused on health plan fiduciaries' obligations to their respective health plans.

Recent Case Law

(1) *Peterson v. UnitedHealth Group, Inc.*, 2019 U.S. App. LEXIS 1270 (8th Cir. Jan. 18, 2019), where the court held that UnitedHealth's ("UHC") longstanding practice of cross-plan offsetting was in violation of the terms of the several ERISA health plans at issue in that case. Cross-plan offsetting is the practice of UHC (and other claims administrators) of withholding all or a portion of a payment owed to a medical provider for one claimant covered by one health plan because UHC deems the provider was overpaid as it relates to another claimant of a different health plan. What seems clear to most observers is that the health plan administrators at issue in the Peterson case had not sufficiently investigated and monitored UHC's claims paying practices and therefore had not identified UHC's fiduciary breach, which was itself a fiduciary breach by the plan administrators.

(2) *Acosta v. Dorel Juvenile Group, Inc. and the Juvenile Group, Inc. Welfare Benefit Plan*, No. 1:18-cv-02993-JRS-MJD (S.D. Ind. Nov. 11, 2018) in which the defendant plan sponsor entered into an agreed order with the DOL accepting that it breached its fiduciary duties by not making a full contribution for certain employees based on their smoking status. The plan sponsor/fiduciary had to reimburse the plan nearly \$150,000 for the improperly withheld contributions.

(3) *Shore v. The Charlotte-Mecklenburg Hospital Authority (Atrium)*, No. 1:18-cv-00961 (M.D. N.C. Nov. 19, 2018) where a noted plaintiffs' benefits class action law firm filed a class action on behalf of the members of the Charlotte-Mecklenburg Hospital Authority benefits plans so that the plan sponsor and plan fiduciaries fulfill their obligations to the 401(k) and health plan.

The clear message from these cases is that: (1) the DOL is looking for health plan fiduciary failings; (2) plaintiffs' class action firms are looking for health plan breach of fiduciary duty cases; and (3) poor vendor oversight leads to vendor and plan sponsor breaches of fiduciary duties. And that can lead to personal liability.

Questions to Answer

To protect against fiduciary duty liability with respect to your health plan's subrogation program, can you answer the following questions?

- Are recovered subrogation dollars correctly applied back to your plan's account versus another plan's account?
- What is the cost of recovery and is that clearly accounted for whether it is through a claims administrator's internal unit or through an outside vendor?
- Does tying subrogation to a bundled administrative services agreement somehow eliminate the need for a deeper analysis of a claims administrator's subrogation performance? Or does it actually increase the fiduciary burden to make certain subrogation isn't a nominal-effort activity by your claims administrator?
- Does an exclusive or near exclusive arrangement between a claims administrator and an outside subrogation vendor raise potential concerns about a financial tie-in that benefits the claims administrator and its subrogation vendor versus your plan and its members? Or would a direct versus indirect relationship with a subrogation vendor better fulfill your fiduciary obligations?

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