



Rights and Responsibilities of Plan Sponsors as Fiduciaries



National Alliance
of Healthcare Purchaser Coalitions
Driving Innovation, Health and Value

Speakers



Michael Thompson
President & CEO
National Alliance of Healthcare
Purchaser Coalitions



Anthony J. Sorrentino, JD
CPA



James Gelfand, JD
Senior Vice President
The ERISA Industry Committee (ERIC)

About



Tony Sorrentino

President

Health Plan Fiduciary Compliance, LLC

Tony@HPFID.com

- ERISA attorney in Group Health and Welfare Plan Compliance (30 years)
- Adjunct Professor
Creighton University School of Law
Health Plan Compliance
- JD, CPA, CEBS, CLU, ChFC

Education leads to Awareness
Awareness leads to Discovery
Discovery leads to Action

Protect your C-Suite!

Plan Sponsor Fiduciary Responsibilities

Who is a fiduciary?

- Anyone who exercises discretion over plan assets
 - Almost *always* the **Plan Sponsor**
 - **Claims Administrator**
(BUCAH or TPA)
- CEOs, CFOs, COOs
 - Board Members
 - Benefits Committees
 - VPs of HR
 - Benefits Administrators
 - Benefits Consultants
 - The Benefit Trust

What does it mean to be a fiduciary?

ERISA requires fiduciaries to discharge their duties:

- For the **EXCLUSIVE BENEFIT** of plan & participants
- Using the skills of a prudent person
- In accordance with the plan's documents

What are the consequences of a breach of fiduciary duty?

Personal liability to restore any losses to the plan resulting from their actions, or inaction:

- 20% penalty assessed by the DOL
- Removal from fiduciary status
- Possible criminal penalties

What steps can be taken to limit your fiduciary liability?

- Documented process
- Understand what you've agreed to in your existing plan documents
- Establish program to reconcile your health plan expenditures

Be aware how Healthcare is connected

AGREEMENT TYPES:

JAA

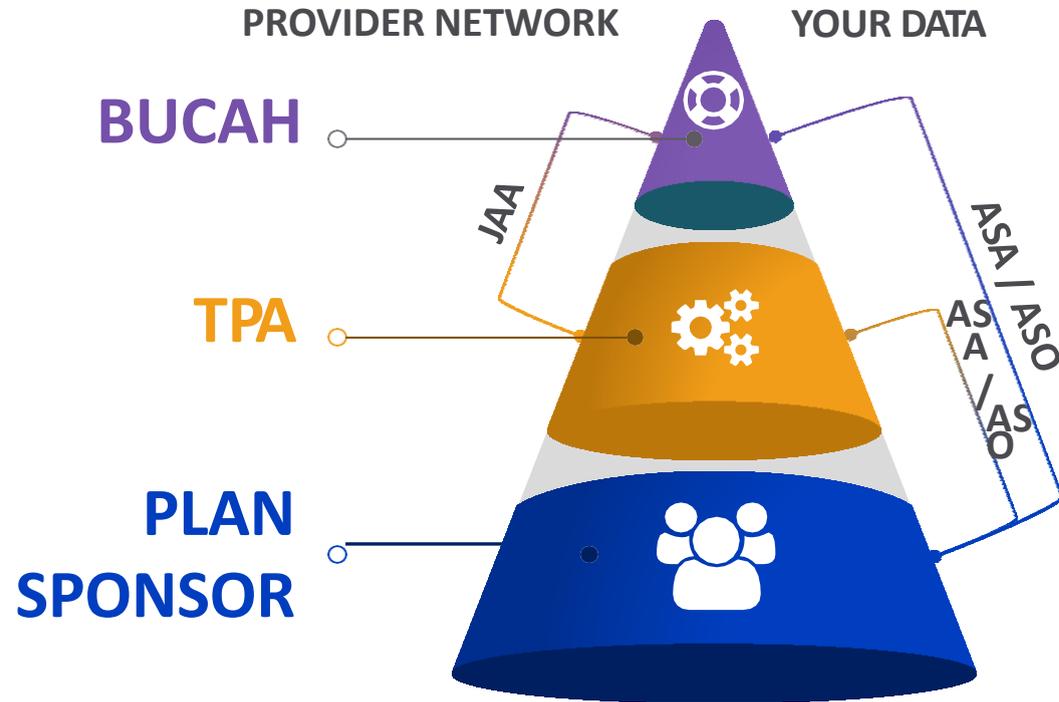
Joint Administrative Agreement

ASA

Administrative Services Agreement

ASO

Administrative Services Only



What to look for

- Violations of the **EXCLUSIVE BENEFIT RULE**
- Fraud Waste & Abuse
- Negligent claim adjudication
- Sub-agreements that the Plan Sponsor is not aware of between **BUCAH-TPA & Provider Networks**

Why don't we know if this is happening on my plan?

BUCAH: Restrictive DUAs, confidential contracts, HIPAA, etc.

Providers: Non-transparent network agreements.

Consultants: They partner. They don't disrupt.

Understand potential conflicts of interest

- Resistance to change until mandated or public perception demands change
- Transparency of claim adjudication vs transparency of compensation arrangements
- Consultants can be invaluable partners with plan sponsors in the mission for claim transparency & fulfillment of fiduciary obligations because of their strong relationships with carriers/TPAs

Healthcare transparency is coming. Is your plan ready for it?

- Consider your investment in safe harbor compliance for your retirement plans...
- Consider the **liability of fiduciary compliance** for your health plan...
- Are you fulfilling your health plan **fiduciary responsibility?**

Next steps...

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Awareness leads to Discovery

Discovery Leads to Action

Quick Summary

- Plan sponsors have a mountain of ERISA compliance. Keep managing that with your current advisors.
- You have significant risk related to emerging transparency in healthcare billing, data and hidden fees in your contracts, impacting how plan assets are spent (in violation of EBR).
- **Recommend:** Investigate this risk to understand your exposure and establish a process to protect your fiduciaries.

ERIC

*Shaping benefit policies
before they shape you.*

December 10, 2020



James Gelfand, Senior Vice President, Health Policy

The ERISA Industry Committee



Fiduciary responsibilities for health plan sponsors



So far, consequences mostly speculative

However, plan sponsors have been flooded with lawsuits on the retirement side

Examples:

Fees in the plan were “too high”

Value of plan investments fell (“stock drop”)

Potential self-interests of plan sponsor (employer stock options)

Failure to vigilantly monitor plan investments

Too many choices, too few, not the “right” ones

Important to know: Who is responsible?

- **Service providers:** For a self-insured plan, these are generally **NOT a fiduciary**. Carrier, TPA, PBM – usually contract stipulates not. Would need to be exercising “*discretionary authority or control*”
- **Plan sponsor:** Same standard. **CANNOT DELEGATE AWAY**. Responsible for delegees

Conclusion

YOU are responsible not only for your vendor choices, but for their behavior and performance



DOL has issued plenty of guidance on what is expected



***Every one of these responsibilities
can become a liability!***

- Hiring a service provider is a fiduciary function
- Employee “contributions” must be handled in timely and efficient manner
- Medical Loss Ratio considerations
- Minimizing fees
- Monitoring service providers
- Maintaining plan’s benefit claims procedures
- Meeting disclosure and information requirements
- Preventing prohibited transactions

Could the transparency rule increase plan sponsor exposure?

Less guess work – The price each individual plan pays, for each individual product and service, will be posted on the internet for all to see

Much easier to benchmark against other similarly situated plans

Third parties may work to reverse-engineer costs

With the goal of ferreting out “spreads”, “rebates”, “claw backs”, etc.

Especially vulnerable - File with historic payments to out-of-network providers

Payments/settlements to protect employees from surprise medical bills?

Particular concern: Hospital cross-subsidization, regional variations, drug price differentials

Issue is already being discussed on Capitol Hill and agencies

- PhRMA and PBMs have told the Hill that employers take drug rebate money and do whatever they want with it. **Obviously, this is a violation**
- Previous Administration considered affirmatively making PBMs a fiduciary. They are adamantly opposed
- Legislation like *LHCCA* includes expansion of responsibilities, disclosures, which could lead to more exposure



Can you demonstrate chain of custody for funds, prove no diversion?

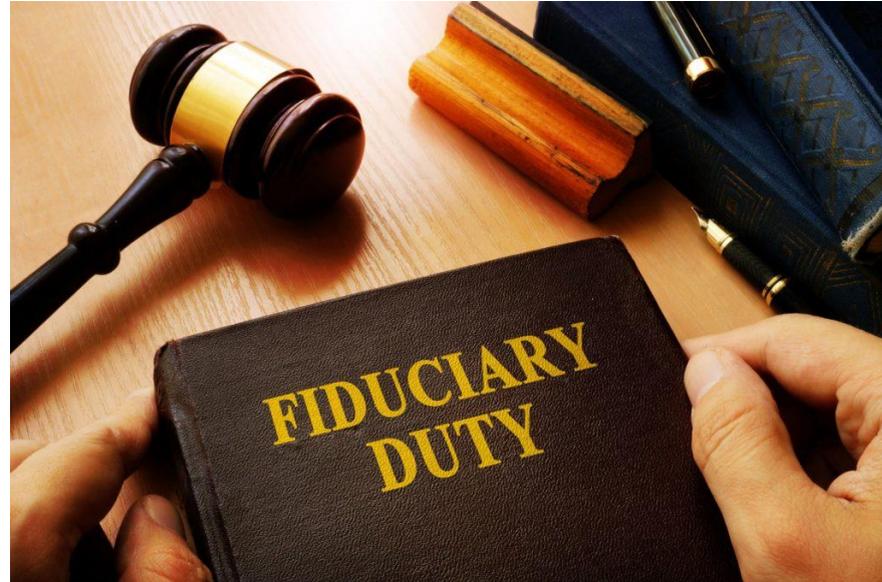
Has the litigation already begun?

Interesting recent attempt: *John Doe I, et al v. Express Scripts, Inc., Anthem, Inc.* (18-346, 2nd Circuit)

Asked courts to decide whether the companies violated ERISA by allowing ESI to charge Anthem plans a higher rate for drugs than other plans

(part of a larger deal to sell certain business assets)

"The decision to sell a corporate asset is **not a fiduciary decision** — even if the sale affects an ERISA plan," the Second Circuit wrote.



Litigation will continue

Asner v. Bd. of Trs. of Screen Actors Guild-Producers Health Plan, (No. 20-cv-10914, Central District of California [Western Division – Los Angeles])

Plaintiff accuses the trustees of breaching fiduciary duties when they approved a merger between SAG and AFTRA plans in 2017

Changes to the union's health plan in August eliminated senior coverage, changed eligibility criteria for older members, and increased premiums



Complaint filed December 1,
2020

Litigation will continue (Cont.)



Scott v. UnitedHealth Grp., (20-cv-01570, Central District of Minnesota)
Plaintiff challenges United’s alleged practice of cross-plan offsetting saying the practice violates ERISA by causing ERISA plan assets to be used for purposes other than providing benefits or defraying reasonable administrative expenses

Peterson ex rel. E v. UnitedHealth Grp. (No. 17-1744, 8th cir. 2019)
U.S. Court of Appeals for the Eighth Circuit said in 2019 that nothing in United’s health plans “even comes close” to authorizing cross-plan offsetting
“At the very least it approaches the line of what is permissible,” said the 8th circuit
United appealed the decision to the Supreme Court, but dropped the case before the court decided whether to hear the dispute

Questions?



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