



## Today's Speakers



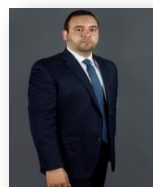
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## Our Webinars Are Awesome!



We are honored to announce that The Phia Group's free monthly webinar has recently been named one of the top-ranked healthcare webinars of 2017!



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## Today's Agenda



- Political Update
- Phia Group Consulting FAQ
- Why We're Here
- Who is a Fiduciary?
- What Fiduciary Duties are Owed?
- What Can You Do to Protect Yourself?

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## A Big, Beautiful Christmas Present



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## GOP Tax Plan Eliminates the Individual Mandate



- Late last week, the House and Senate ironed out differences in the final \$1.5 trillion tax bill.
- Last few Republican holdouts came onboard: Rubio (R-FL), Corker (R-TN).
- Despite razor thin margins, it could pass this week and be signed before Christmas.
- The bill is over 1,000 pages long...how does it affect our industry?
- It **eliminates** the Affordable Care Act's individual mandate.
  - It also brings back deduction for medical expenses (but lowers to 7.5%).



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## The Glue Holding Obamacare Together



- Why is the mandate so important?
  - ACA addressed unaffordability for sick people through “guaranteed issue” and “community-rating” provisions.
  - This does not address “adverse selection”
- The “Death Spiral”
  - Goal of the mandate was to solve this problem.
  - CBO → ending mandate = 13 million fewer insured by 2027.
  - CBO → premiums in marketplaces will rise by at least 10% in 2019.



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## Impact on Employer-Sponsored Insurance



- Just like in the individual market, the employer market should expect premiums to rise. Insurers may raise prices across the board.
- The truth is...no one knows for sure how many will drop out.
  - Young, healthy workers may keep coverage...or,
  - They may drop coverage if they believe they do not need it.
- Providers → expect more uncompensated E.R. care.



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## Will States Fill the Gap?



- One state would have an individual mandate if Congress repeals the federal mandate:
  - Massachusetts (it was never cancelled).
- Other states are considering mandates: e.g. California, Connecticut, New Jersey, and Maryland.
  - But this is risky, it's very unpopular.
- Federal judge blocked HHS rollback of contraceptive mandate.
  - It is a **nationwide** injunction while the case proceeds in a Pennsylvania federal court.



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## PGC: October's Most FAQ



- What terms should be present in an ASA to address ERISA's fiduciary duties?
- What incentives can we provide for wellness other than tobacco cessation?
- Does the law require a plan to cover detox if the plan covers mental health and substance abuse claims?

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## Why We're Here: The *Macy's* Case



- Plan Document did not have supporting language, but the Plan paid providers based on Medicare rates
- There's a reason that RBP vendors provide their required SPD language...
- If the SPD doesn't *allow* it, the Plan can't *do* it.
- If your SPD still defines U&C as the prevailing charge in the area, **it's time to update it.**

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## Why We're Here: The *Nordstrom* Case



- Allegation: Nordstrom “failed to ensure that annual operating fees of the holdings in the plan were reasonable for a plan of its size and failed to take advantage of cost-cutting alternatives that would have been dramatically cheaper.”
- Nordstrom “allowed unreasonable fees to be incurred by participants”
- Nordstrom “did not act prudently to lower costs.”

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## Why We're Here: The Writing on the Wall



- Fiduciary concerns have historically been more relevant to 401k administrators than health plans (ex. *Nordstrom*)
  - Imprudent investments or improper disclosures
  - Financial consultants have also been in the spotlight
- Lately, health plan administrators have come under fire as well, for the same fiduciary duties in different contexts
  - Any time someone else's money is being managed, there's the potential for fiduciary breaches
  - Liability is sought wherever it can even potentially be found

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## Why We're Here: The Writing on the Wall



**Adam Russo's LinkedIn Post – December 6, 2017**

*I would love to get some commentary on the vast fiduciary breaches I see daily when it comes to health care claims being overpaid for no other reason than auto adjudication. If a tenth of what goes on in health care occurred in the 401k world it would be front page news but in our industry there isn't a peep. Why? What is the difference?*

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## Why We're Here: The Writing on the Wall



### Adam Russo's LinkedIn Post – December 6, 2017

#### Commentary:

- “It seems like this is an issue with the administration of the plan...whether claims are paid by a carrier or TPA.”
- “The TPA should give good advice and counsel to the client and trustee but is unable to make decisions in the world we live.”
- “As an employer don't sign any agreement that doesn't allow you to look, audit, or manage your claims. “
- “I'd say the biggest contributing factor is that the employer “doesn't know what they don't know” because their brokers (in most cases) don't know. That's why it's crucial to have the right advisor...not just a broker.”

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## Why We're Here: The Writing on the Wall



### Ron Peck's LinkedIn Post – December 13, 2017

*Unlike Adam's short post, Ron is very verbose. Here's a summary.*

- Group signs up with an international medical tourism vendor.
- A member uses the program, and a claim is received above spec (but still less expensive than a domestic procedure)
- Stop-loss denies the claim, citing the SPD provision excluding all non-domestic claims
- The Plan is left without stop-loss reimbursement, despite paying vendor fees and valid medical claims.

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## Why We're Here: The Writing on the Wall



### Ron Peck's LinkedIn Post – December 13, 2017

#### Commentary:

- "Ouch."
- "The TPA is at fault for not contacting the stop loss provider and amending the plan document to allow for the off shore procedure."
- "Whoever brokered the stop loss is directly accountable..."
- "Appalling that a TPA or broker could drop the ball in ensuring that the PD and reinsurance contract are not in sync. It's the fundamental principle of self-funding."
- "Not to worry, even though Stop Loss is 100% not at fault they will be asked to reimburse the entire amount. If they refuse, they will be told that they must do it or risk losing their entire block with said TPA or Broker."

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## Who is a Fiduciary?



### Can you be a fiduciary without being named in the SPD?

- Supreme Court: "not only the persons named as fiduciaries by a benefit plan, but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets is an ERISA 'fiduciary.'"
- If it walks like a duck...

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## Who is a Fiduciary?



### Can you decide your own fiduciary status?

- Federal law: “...any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.”
- Not an all-or-nothing concept

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## Who is a Fiduciary?



### Who is *not* a fiduciary?

- Federal regulation: “a person without the power to make plan policies or interpretations but who performs purely ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits, is not a fiduciary under ERISA.”
- What about drafting authority over plan assets?

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## Who is a Fiduciary?



### Is a TPA a fiduciary?

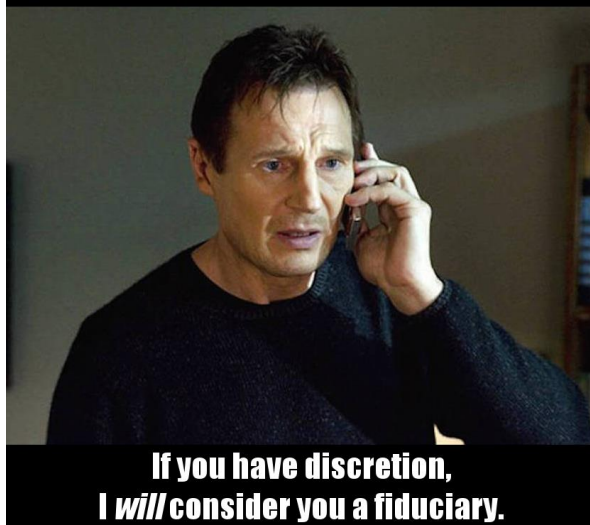
- Claims and appeals: **it depends on your role!**
- Plan assets: **usually!**
- Balance-billing: **irrelevant!**

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**I don't know who you are.  
I don't know what you want.**



**If you have discretion,  
I will consider you a fiduciary.**

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## What Fiduciary Duties are Owed?



- Acting solely in the **interest of plan participants** and their beneficiaries and with the **exclusive purpose of providing benefits** to them
- **Following the plan documents** (unless inconsistent with ERISA)
- Prudently managing **plan assets**
- Paying only **reasonable plan expenses**.

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## What Fiduciary Duties are Owed?



**Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them.**

- The employer is a business; the Plan isn't
- Embezzlement, falsifying documents, and interference with rights can potentially subject a fiduciary to *criminal* penalties

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## What Fiduciary Duties are Owed?



### Following the plan documents (unless inconsistent with ERISA)

- Only apply benefit limitations if stated within SPD
- Avoid limiting benefits due to suspected impropriety
- **It doesn't matter what is "reasonable." All that matters is what's in the SPD.**

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## What Fiduciary Duties are Owed?



### Prudently managing plan assets

- Plan assets cannot be commingled with employer assets; they belong to different entities
- Subrogation and overpayment recoveries?
- Maintain separation of admin fees and claims spend

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## What Fiduciary Duties are Owed?



### Prudently managing plan assets: Stop-Loss Example

- Health plans need stop-loss to ensure viability & prudent management of assets
- Stop-loss policies are sometimes recommended or placed by a broker or TPA
- Who is responsible in the event of a stop-loss denial?
  - What if the TPA *introduced* the carrier and plan?

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## What Fiduciary Duties are Owed?



### Paying only reasonable plan expenses

- Networks, direct contracts, RBP, etc.
- Make sure vendors are vetted!
- No affirmative duty to perform all actions in the most efficient and cost-effective way possible

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## What Can You Do to Protect Yourself?



### Engage a neutral third party whenever possible

- Courts look favorably upon efforts to comply
- Objectivity is crucial; having claims or appeals reviewed is the best way to prove good faith

### Outsource final-level appeals

- Ensure that the plan has done what it has promised

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## What Can You Do to Protect Yourself?



### Don't deviate from the terms of the SPD!

- This is by far the easiest way to violate fiduciary duties!
- Courts and IROs focus on this when reviewing matters

### Have your SPD reviewed, and keep it current!

- Review definitions, exclusions, eligibility, etc.
- Limited-scope reviews can drill down into the issues that concern you most

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## What Can You Do to Protect Yourself?



**Share those fiduciary duties! You don't have to shoulder them alone. (*But is it always cost-effective?*)**

- Adjudication of *all* claims...
  - ...Or only disputed or particularly complex claims
  - ...Or only certain claims, such as OON claims
- Adjudication of *all* appeals...
  - ...Or only a subset of appeals (such as by claim type)
  - ...Or only final-level appeals (the ones that matter)

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