
THE GOOD, THE BAD, AND THE NAUGHTY – ETHICS: SIMPLE MISTAKES VS. BREACH

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HEALTH CARE ADMINISTRATORS ASSOCIATION
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ETHICS IN OUR INDUSTRY: INNOVATION vs. VIOLATION

ETHICS IN OUR INDUSTRY: INNOVATION vs. VIOLATION

- Questionable Ethics: Exclusion Issues
 - Causation Issues (lack of helmet in motorcycle crash – but injury is broken foot) and Causal vs. Temporal Link (“while” vs. “as a result of”)
 - Medical Necessity, Experimental, or Usual and Customary Determinations Without Proper Plan Language – (or the “black box” approach)
 - Perhaps done in good faith, but unethical if not supported by SPD
 - TPA Awareness of “Gaps” Between SPD and PPO Contract – But Failure to Inform The Plan
- VIP Exceptions

ETHICS IN OUR INDUSTRY: INNOVATION vs. VIOLATION

- Questionable Ethics: Carve-Out Issues
 - Immediate Effect May be Discriminatory, Depending on Member Need
 - Retroactive Effect?
 - Conflict with Network Agreements – Unethical Breach of Contract

ETHICS IN OUR INDUSTRY: INNOVATION vs. VIOLATION

- Questionable Ethics: TPA & Plan Administration Issues
 - Processing Claims Without SPD for the Group
 - Applying Uniform Clinical Standards Regardless of SPD Language
 - TPA Receiving and Keeping PBM Rebates – Whose Property is It?
 - TPA's Claims and Appeals Staff Operate Without “Separation”

ETHICS IN OUR INDUSTRY: INNOVATION vs. VIOLATION

- Questionable Ethics: TPA & Plan Administration Issues
 - TPA Failing to Recover an Overpayment to Avoid Highlighting its Mistake
 - TPA Failure to Disclose Fees
 - Leaving Money on the Table!
 - Ignoring an Overpayment may be Unethical – Forget “Fault”
 - Subrogation (& Converse – Spending \$2 to Get \$1)
 - Inadequate or “Lazy” Discounts

ETHICS IN OUR INDUSTRY: INNOVATION vs. VIOLATION

- Questionable Ethics: Compliance Issues
 - Plan Designs Marketed as ACA-Compliant, and Yet...
 - Reference-based Pricing Without Support (FAQ Part 31, Question 7)
 - Imposing Benefit Limitations not Otherwise Found in SPD
 - Ex. Plan or TPA Imposing Non-SPD Provider Limitations for “Drug-seeking Behavior”
 - Imposing Employment Limitations Based on Health Data
 - Ex. Employer Contacts PBM, Discovers Employee’s Narcotics Rx, and Fires Employee



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FIDUCIARY DUTIES & ETHICS IN THE NEWS

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CURRENT EVENTS

- Quick Introduction to Fiduciary Duties:
 - According to the best dictionary in the world (Wikipedia):
 - “A fiduciary is a person who holds a legal or ethical relationship of trust with one or more other parties”
 - If there is any way you could act *unethically* with respect to the Plan, chances are you are a fiduciary.
 - Fiduciary duties were created to assign a more official title than just “person who is responsible.”

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CURRENT EVENTS

- Question: If an entity is not the “named fiduciary” in the SPD, can that entity still be a fiduciary?
 - Answer: **Absolutely! If it walks like a duck, and talks like a duck...**
 - Acting unethically is never OK – but when done in a fiduciary capacity, there are bigger problems than usual.

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CURRENT EVENTS

- Question: I am a TPA that performs purely ministerial claims payment operations for my clients. Can I be a fiduciary?
 - Answer: **Yes.** Anyone with authority over Plan assets has potential to act unethically and is therefore potentially a fiduciary – which includes even such things as accidental overpayments or underpayments. Ordinary good faith negligence can still be unethical.
- Question: My ASA specifically says that the Plan may not hold me as a fiduciary. Can --
 - Answer: Stop right there. **Any such language is unenforceable and meaningless.**

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CURRENT EVENTS

- Courts and regulatory bodies are constantly restating the ethical duties involved in plan administration:
 - Acting **solely in the interest of plan participants** and their beneficiaries and with the exclusive purpose of providing benefits to them;
 - Carrying out their duties **prudently**;
 - **Following** the plan documents (unless inconsistent with ERISA);
 - Holding plan assets (if the plan has any) in **trust**; and
 - Paying only **reasonable plan expenses**.

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CURRENT EVENTS

- Parties in interest are prohibited from engaging in prohibited transactions with the Plan.
- Prohibited transactions include:
 - A sale, exchange, or lease between the plan and party in interest, lending money or other extension of credit between the plan and party in interest; and furnishing goods, services, or facilities between the plan and party in interest.

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CURRENT EVENTS

- Parties in interest include the employer, the union, plan fiduciaries, service providers, and statutorily-defined owners, officers, and relatives of parties in interest.
- Oh, and never, ever act for personal gain.



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FIDUCIARY DUTIES AND ETHICS IN THE NEWS:

CASES INVOLVING FIDUCIARY BREACHES FROM UNETHICAL BEHAVIOR

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CASES INVOLVING FIDUCIARY BREACHES FROM UNETHICAL BEHAVIOR

- Cigna v. Humble Surgical Hospital
 - Cigna alleged that Humble engaged in fraudulent billing practices (such as fee waiving and referral kickbacks)
 - Cigna withheld certain payments to Humble to account for the alleged improprieties
 - Humble countersued and was ultimately awarded \$13MM in damages for Cigna's unethical behavior
 - Including \$2.3MM for bad faith and fiduciary breach
 - Moral of the story? DO NOT STRAY FROM THE SPD! Beneficiaries not informed, payment not defined...

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CASES INVOLVING FIDUCIARY BREACHES FROM UNETHICAL BEHAVIOR

- Little River Band of Ottawa Indians v. BCBSMI
 - Health plan: BCBSMI had duty to administer payment for "Medicare-Like Rates" as defined in the SPD
 - BCBSMI used its own proprietary pricing and paid providers more than "Medicare-Like Rates," despite the vague nature of the term
 - BCBSMI held to have acted unethically in breaching its fiduciary duty to the Plan

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CASES INVOLVING FIDUCIARY BREACHES FROM UNETHICAL BEHAVIOR

- **Mason v. FedEx**
 - Aetna (as claims administrator) denied a short-term disability claim
 - Member appealed and submitted additional information; appeal denied
 - Member sued, arguing that Aetna had a financial incentive to deny claims and reduce the Plan's exposure
 - Court: Agreed that there was a conflict of interest!
 - FedEx "has an obvious incentive to hire a Claims Administrator that minimizes benefits awards."

Yikes.

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CASES INVOLVING FIDUCIARY BREACHES FROM UNETHICAL BEHAVIOR

- **Pac. Shores Hosp. v. United Behavioral Health**
 - Plan Administrator relied on patient's medical history and condition to deny inpatient stay after three weeks; provider sued
 - Record showed that the Plan relied on telephone conversations rather than hospital records
 - Court: Plan acted unethically – violated fiduciary duty!

FIDUCIARY DUTIES & ETHICS IN THE NEWS: CASES INVOLVING FIDUCIARY BREACHES FROM UNETHICAL BEHAVIOR

- Guyan Int'l v. Professional Benefits Adm'rs, Inc.
 - TPA commingled Plan assets with its own assets, violating the “trust” requirement
 - TPA: “but our ASA says we’re not a fiduciary, so case closed!”
 - Court: What? No, that’s not how this works.
 - If it walks like a fiduciary and talks like a fiduciary...



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BEST PRACTICES AND IDEAL ETHICS

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OBJECTIVE FINAL APPEAL REVIEW

BEST PRACTICES AND IDEAL ETHICS

PROPERLY ASSIGNED SPD INTERPRETIVE DUTIES

BEST PRACTICES AND IDEAL ETHICS

TPA FIDUCIARY ROLE DEFINED AND ACCEPTED

BEST PRACTICES AND IDEAL ETHICS

ELIMINATION OF UNNECESSARILY VAGUE SPD PROVISIONS

BEST PRACTICES AND IDEAL ETHICS

**ALL ACTIONS SUPPORTED BY
SPD VERBIAGE**

BEST PRACTICES AND IDEAL ETHICS

**AVOIDANCE OF CONTRACTS THAT
CONFLICT WITH SPD**

BEST PRACTICES AND IDEAL ETHICS

PUT THE WELFARE OF THE PLAN FIRST,
SECOND, AND THIRD!

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