

# PHIA CASE STUDIES - WHEN SILENCE IS LOUD AND ASSUMPTIONS MEAN DISASTER



THE  
PHIA  
GROUP

EMPOWERING PLANS

September 17, 2015

[www.phiagroup.com](http://www.phiagroup.com)

[PgcReferral@phiagroup.com](mailto:PgcReferral@phiagroup.com)

Presented By:

Adam V. Russo, Esq.  
CEO

Ron E. Peck, Esq.  
Sr. Vice President & General  
Counsel

Christopher M. Aguiar, Esq.  
Legal Counsel

Jon A. Jablon, Esq.  
Legal Counsel



EMPOWERING PLANS

# OVERVIEW

- Costs: What Do You Care About?
- Emerging Law: What Went Wrong, and How to be Proactive
  - *Obergefell v. Hodges*
  - *Johnson & Towers v. Corporate Synergies Group*
  - *TrueView v. OneSubsea*
  - *Aetna v. Methodist and NYS Psychiatric Assn vs. UnitedHealth Group*
  - *Schrempf, Kelly, Napp & Darr, Ltd. vs. Carpenters' Health and Welfare Trust Fund*
- Stop the Losses!



EMPOWERING PLANS

# COSTS: WHAT DO YOU CARE ABOUT?

What Do Members Care About?

*Co-Pays & Deductibles*

What Do Plans Care About?

*Dollar Exposure (Claims Paid up to Spec)*

What Does Stop-Loss Care About?

*The Entire Bill*

What Do Brokers Care About?

*Keeping the Plan Happy*

...But What Do Providers Care About?

*Not Having to Justify Their Charges*



EMPOWERING PLANS

# COSTS: WHAT DO YOU CARE ABOUT?

Providers will continue to take advantage as long as the players don't agree that the **overall costs of medical care** are the real problem.

How do we change this dynamic?

**Transparency.**



EMPOWERING PLANS

# COSTS: WHAT DO YOU CARE ABOUT?

## Transparent Pricing: Current Barriers

- Transparent pricing: survival or altruism?
- Networks'/Carriers' aversion to free market approach
  - Quote: *Participating Provider agrees to keep and hold its Fee Schedule (irrespective of the Network Rate Percentage) confidential. Participating Provider shall not disclose such Fee Schedule except in standard billing to Patients or [TPA], or as otherwise necessary to ensure payment.*



EMPOWERING PLANS

# COSTS: WHAT DO YOU CARE ABOUT?

## Transparent Pricing: Current Barriers

From *Unaccountable*, by Marty Makary, MD:

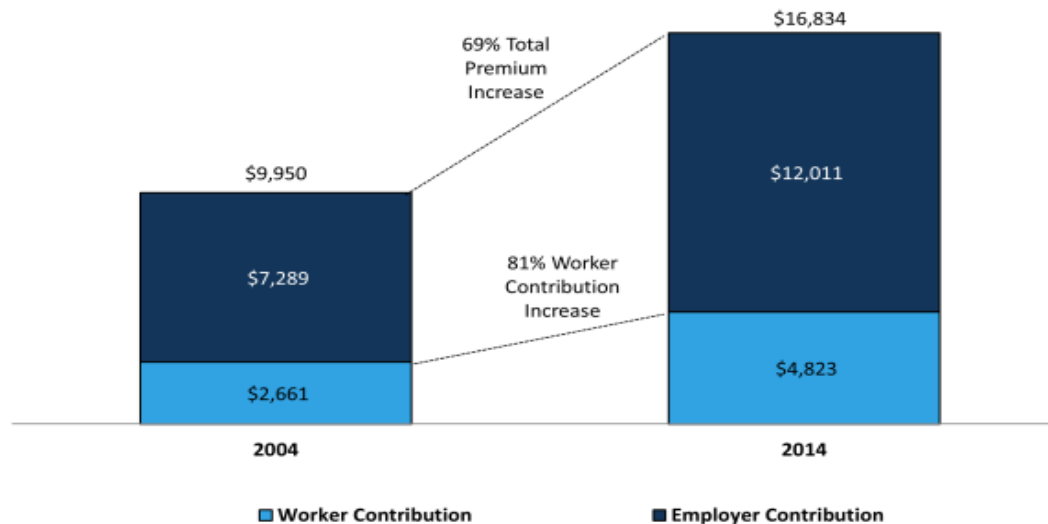
- Salaries of three CEOs of Children's Hospitals range from \$5.1MM to \$5.9MM
- One study “estimated that a hospital gets paid \$10,000 extra per surgical complication”
- In 2009, “Texas Children's Hospital recorded a \$275 million profit and Children's Hospital of Philadelphia (CHOP) \$359 million”

# COSTS: WHAT DO YOU CARE ABOUT?

As medical costs increase, it's no surprise that health insurance costs increase as well – for employers and employees alike

## Exhibit A:

Average Annual Health Insurance Premiums and Worker Contributions for Family Coverage, 2004-2014



SOURCE: Kaiser/HRET Survey of Employer-Sponsored Health Benefits, 2004-2014.



# EMERGING LAW: WHAT WENT WRONG, AND HOW TO BE PROACTIVE





# *OBERGEFELL V. HODGES*

- 14th Amendment: States must license marriages between same-sex couples and recognize all legal same-sex marriages
- If the eligibility rules are clear within the SPD, they are enforceable... however...
- Employer could face litigation alleging sex discrimination under Title VII of the Civil Rights Act of 1964
- Treat spouses the same! All in, or all out...

# *OBERGEFELL V. HODGES*

- *Employers generally treat the TPA as the entity responsible for informing the employer about changes to the SPD*
- **How to be proactive?**
- Review the definition of “spouse” and “marriage” in the SPD



# *JOHNSON & TOWERS V. CORPORATE SYNERGIES GROUP*

- SPD had amendment for widowed spouses of the group's shareholders
- Broker procured stop-loss for a group without the "widowed spouse" amendment
- One widowed spouse incurred \$387,000 in claims
- Stop-loss denied amounts over spec (\$125k); said the widowed spouse wasn't eligible



EMPOWERING PLANS

# JOHNSON & TOWERS V. CORPORATE SYNERGIES GROUP

- **Safeguarding plan assets is not just for plans anymore**
  - Even the smallest neglected detail can have dire consequences
  - Third parties can be considered fiduciaries
  - Remember the test: *if it walks, talks, and smells like a fiduciary...*
- This case has implications not just for brokers but for health plans themselves and anyone potentially in a position to protect or harm the plan
  - Who might harm the plan? There's no way to know until afterwards.
- Is this counterintuitive?
  - The group should have known what stop-loss contract it was signing!
    - ...but that's why groups hire brokers and other vendors
      - Can the group - an auto transmission distributor – be expected to know?
- **How to be proactive?**



EMPOWERING PLANS

# *TRUEVIEW V. ONESUBSEA*

- Plan had broad anti-assignment clause but did not specifically enumerate providers as prohibited from receiving assignments
  - Clause read “any action by a Participant to anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge [any benefit payable under the Plan] shall be void and of no effect....”
- Not unexpectedly, Participant executed an assignment to provider
- Provider submitted claims; Plan denied based on the prohibition of assignments in the SPD
  - Provider appealed; Plan denied appeal; provider sued



EMPOWERING PLANS

# TRUEVIEW V. ONESUBSEA

- Texas district court: the SPD needs to be much more specific
  - Can't be silent on which entities can't get assignments
  - Court indicated that it would have a different opinion if the Plan had mentioned "providers of medical care, treatment or services" in the prohibition on assignments
- Since the plan didn't specifically say the *provider* wasn't entitled to assignment, the court upheld the assignment
- Is this counterintuitive?
  - The SPD broadly prohibited *all* assignments – but in Texas, somehow that wasn't enough
  - Court opined that it only applied to unrelated third parties such as creditors – but why?
- **How to be proactive?**



EMPOWERING PLANS

# *AETNA V. METHODIST AND NYS PSYCHIATRIC ASSN V. UNITEDHEALTH GROUP*

## **Aetna Life Ins. Co. vs. Methodist Hospitals of Dallas**

- Texas Prompt Pay Act: Electronic claims must be paid within 30 days
- Hospital system demanded over **\$10,000,000** in late fees from Aetna, the ASO
- Aetna argued Prompt Pay Act did not apply to it, since it is a claims *administrator* rather than a claims *payer*



EMPOWERING PLANS

# *AETNA V. METHODIST AND NYS PSYCHIATRIC ASSN V. UNITEDHEALTH GROUP*

## **Aetna Life Ins. Co. vs. Methodist Hospitals of Dallas**

- Court: ERISA does not preempt the Texas Prompt Pay Act
- Court: TPA can be held liable for breaching state prompt pay act
  - TPA, after all, is responsible for the actual ministerial payment obligations
    - Regardless of who funds claims, TPA is responsible for actually sending payment
- **How to be proactive?**



EMPOWERING PLANS



# *AETNA V. METHODIST AND NYS PSYCHIATRIC ASSN V. UNITEDHEALTH GROUP*

## **NYS Psychiatric Assn. vs. UnitedHealth Group**

- ASO processed mental health claims based on its own standard, other than what the SPD provided
  - Applied concurrent medical necessity review based on visit limits (not supported by SPD) and applied more restrictive limits than medical and surgical benefits
- ASO alleged to have violated the Mental Health Parity and Addiction Equity Act
- ASO exercised “‘sole and absolute discretion’ to deny benefits and makes ‘final and binding decisions’”



EMPOWERING PLANS

# *AETNA V. METHODIST AND NYS PSYCHIATRIC ASSN V. UNITEDHEALTH GROUP*

## **NYS Psychiatric Assn. vs. UnitedHealth Group**

- Court: ASO's control over plan made it a fiduciary
  - That's old news!
  - What is interesting here is that the claims administrator can be held liable via ERISA's broad equity provisions for violations of the mental health parity law rather than just ERISA violations
- Implication: not just mental health parity...
  - COBRA, ACA, MSPA, state prompt pay laws, and tons more
- Traditional notion of ERISA's enforcement mechanism applying *only to ERISA* is no longer accurate
- **How to be proactive?**



EMPOWERING PLANS

# *SCHREMPF, KELLY, NAPP & DARR, LTD. V. CARPENTERS' HEALTH AND WELFARE TRUST FUND*

Illinois: Applicability of common fund depends on who brings claim

- If member, McCutchen governs
- If attorney...well...

State court interpreting ~~SPD ERISA~~ state law?

**“We recognize that the *dicta* of *McCutchen* may foreshadow a different result than our supreme court has pronounced in the past.** Given the strong and clear pronouncements of our supreme court, however, we are unwilling to adopt such an interpretation of McCutchen that could lead to the demise of a deeply rooted equitable remedy in Illinois, the common fund doctrine, with respect to self-funded employee benefit plans.”



EMPOWERING PLANS

# STOP THE LOSSES

- **Advanced Funding Issue**

- Plan had \$650,000 claim
- Repriced by network to \$600,000
- Plan sought advanced funding
- Additional information requested by carrier
- Plan failed to pay before network discount expired
- Who's job is it to pay providers on time?
- Discuss at policy's execution!

- **CT Bulletin HC-103**

- Eradicates lasers
- Claims to close “hard gaps”
- Possibly even limits “soft gaps”
- Facially seems to help plans
- Practically, may eliminate stop-loss in CT
- Transform plan with stop-loss into “sham self-funding”?



EMPOWERING PLANS

# THANK YOU

*The Phia Group announces Joe Montalto  
as Chief Operating Officer*

[JMontalto@phiagroup.com](mailto:JMontalto@phiagroup.com)

# THANK YOU

**Text “PHIA” to 22828 & Join our Mailing List &  
Get All the Latest News and Free Webinar Announcements**

**[arusso@phiagroup.com](mailto:arusso@phiagroup.com)** ♦ **[rpeck@phiagroup.com](mailto:rpeck@phiagroup.com)**

**[caguiar@phiagroup.com](mailto:caguiar@phiagroup.com)** ♦ **[jjablon@phiagroup.com](mailto:jjablon@phiagroup.com)**

**Join Us for Our Next *Free* Webinar: Wednesday, October 14<sup>th</sup> at 1PM EST:**  
*“A Call to Action! Proposed state and federal regulations, bulletins,  
litigation, industry developments & troubling trends.”*

**Feel Free to Send Consulting Requests to**  
**[PgcReferral@phiagroup.com](mailto:PgcReferral@phiagroup.com)**