Case Study – How Current Market Assumptions Are Harmful for Our Industry.
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If a Tree Falls…

On June 23, 2015 a very interesting case was allowed to proceed in the United States District Court in New Jersey entitled *Johnson & Towers, Inc. v. Corporate Synergies Group, LLC.* Although my mind was blown away by this case, I saw very little discussion across the industry. It was almost as if a large tree had fallen in an empty forest. It's been two months and there have been no bulletins, no strategies in place to deal with this case and the potential outcomes, no warnings to association members…nothing! I almost feel like I must be crazy to think that this case is meaningful but today, I will share with you why this pending case truly epitomizes what is happening across the country in the self insured world and why I expect it to continue to grow as more and more employers self fund for the first time.

This important case underscores the ever increasing standard to which brokers (and the rest of us) are held with respect to self funded plans and what the expectations are within our industry. In this suit brought by a health plan sponsor against its broker, the plan alleged that the broker failed to properly protect the plan.

Don't Blame Stop Loss on This One

While the broker chose to work with a reputable stop loss carrier in the industry, the broker did not ensure that the coverage rules set forth in the summary plan subscription were properly shared with the stop loss carrier. Specifically, the plan document had an amendment for unique widowed spouse coverage that was not shared with the stop loss carrier at the time the policy was finalized. The carrier agreed to offer stop loss coverage to the underlying plan document but was not advised of this amendment and thus did not have coverage in that specific claim situation. As a result, the plan incurred major expenses due to the widowed spouse coverage that the stop loss carrier was not required to reimburse.

This is not the case of a stop loss carrier finding unique ways to deny a claim based on broad language in its policies that allow for stop loss discretion. I have seen plenty of those in my lifetime. The stop loss carrier in this case agreed to reimburse claims based on the employer's plan document. They were not advised that there was this unique amendment for widowed spouses that clearly would have made a major difference as to whether they would offer coverage to the plan in the first place or at least increase the annual premium that the plan would have to pay. I am no actuary but I would assume that covering widowed spouses are potentially expensive claims since most of these individuals aren't 25 years old!

This is just the case of a broker not disclosing all of the required and reasonable requests that a stop loss carrier must have before accepting liability on its end. Any well regarded carrier would have done the same in this situation as they cannot be blindsided with amendments that tremendously increase their risk and be expected to cover the claims.

Tread Lightly

Safeguarding plan assets is not just for plans anymore; TPAs, brokers, and other vendors are tasked with protecting the plan and its money, and even the smallest neglected detail can have dire consequences, and this case is a great example of that. My advice to TPAs and brokers alike is to be careful. You can never have too much protection; although in this case the broker did not follow the proper steps in securing stop loss coverage, the majority of fiduciary claims we see have to do with improper plan payments or denials, and this is another reminder to watch for gaps in coverage.

This stop loss policy did not have gaps with the underlying plan document; the carrier just didn't know that this amendment existed when coverage was put in place. This is a direct consequence of the broker not ensuring that all language was shared and properly accounted for. Regardless, every plan

and broker must perform a gap free analysis to compare your current plan document and any proposed or in force stop loss policy.
In addition, be sure to take whatever steps possible to rid yourself of troublesome fiduciary duties. In the current industry and legal climate, plan administrators, brokers, and TPAs are always looking for ways to minimize their fiduciary liability…and for good reason.
Case Details
The plaintiff Johnson & Towers is a family business that sells and services diesel engines, transmissions and related components. The company provided health insurance to its eligible employees and their dependents through the Johnson & Towers, Inc. Employee Healthcare Plan, a self-funded insurance plan.
This case arose out of the responsibility to pay medical bills for Patricia Johnson, the widowed spouse of Walter Johnson Jr., who had been a shareholder of the company that provided health insurance to eligible employees and their dependents. The plan had a stop loss deductible whereby the plan was responsible for up to $125,000, and any additional amounts were to be paid through stop loss insurance policies. In 2013, Ms. Johnson incurred medical bills in the amount of $387,710.82. After the plan paid the $125,000 deductible, the amount still due was $262,710.82.
The plan believed that the remaining balance should have been paid through its stop loss insurance policies, but the stop loss carrier, Standard Security Life Insurance Company of New York, correctly refused payment on the ground that Ms. Johnson was no longer eligible for benefits after her husband, the covered employee, died in 2005.
The plan argued that Ms. Johnson should have been covered under the widowed spouse amendment to the plan document. Pursuant to the amendment, the plan would cover the widowed spouses of the company's shareholders until age 65 or whenever the spouse remarried, whichever came first. However, when the plan switched stop loss carriers to Standard in 2008, the new insurance policy did not include the widowed spouse amendment.
The plaintiffs brought the action against their insurance brokers and an agent who had been employed by the broker and was the primary point of contact between the brokers and the company. The plaintiffs alleged that when they changed stop loss carriers to Standard in 2008, they instructed their brokers and agent to ensure that the substantive provisions of the stop loss policy and the plan document with Standard matched the prior policy and plan, including the widowed spouse amendment. Since Standard correctly had taken the position that the stop loss policy did not include coverage for widowed spouses, the plaintiff contended that their brokers and agent failed in their duty to procure and maintain stop loss insurance that provided the coverage requested by the plan.
Therefore, they asserted a claim against their brokers and agent on the basis that these defendants breached the fiduciary duties they owed to the plan under Section 409(a) of the Employee Retirement Income Security Act (hereafter, "ERISA"), 29 U.S.C. § 1109(a). The court has yet to make a decision on this very important case but the fact that these brokers and agents may be found to be fiduciaries would change how TPAs and brokers act in the future.

The Definition of a Fiduciary – Seems Pretty Broad
Plaintiffs argued that because they are "fiduciaries" under the plan, they have standing to bring a claim for the losses to the plan that resulted from the insurance brokers' failure to comply with their fiduciary duties. In Section 409(a), Congress provided a cause of action for breach of fiduciary duties by a fiduciary to an employee benefit plan.

This section states:
Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make

good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Under ERISA, a person is a fiduciary if "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).
In addition, a named fiduciary under ERISA is a "fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly." 29 U.S.C. § 1102(a).
Plaintiffs stated that J & T and Johnson are named fiduciaries under § 1102(a) and that Johnson is also a "fiduciary" under § 1002(21)(A).

The Case that Makes Us All Fiduciaries
Another court in this same district already considered whether an employee benefit plan suffered damages as a result of a broker's breach of fiduciary duty under ERISA Section 409(a). *Feigenbaum v.. Summit Health Adm's,* No. Civ. A. 01–805, 2008 WL 2386168 (D.N.J. June 9, 2008). The plaintiffs were the employer, the employee benefit plan, and the plan's trustee, and they brought suit against a health insurance agency and an insurance broker. The defendants assisted the plaintiffs in obtaining stop loss insurance, and when the term of the policy expired they obtained insurance from a new carrier. However, for unknown reasons, the employee benefit plan was without stop loss insurance for a period of several months before the new plan began. The plaintiffs brought a claim under ERISA Section 409(a) against the insurance agency and broker for breach of fiduciary duty based on the alleged failure to secure continuous stop loss insurance.
In *Feigenbaum,* the court indicated that "many courts have found insurance providers or brokers to be fiduciaries under ERISA" where the insurers or brokers "play central roles in determining what benefits the plans will provide or where a plan de facto delegates its administration to an insurance agent or broker. However, where insurance providers or brokers "merely provide insurance or brokerage services to the plan," courts have found brokers not to be fiduciaries.
The court found that the plaintiffs sufficiently demonstrated that they had damages resulting from the gap in stop loss insurance, because the plan received medical claims that were not covered by either the plan's initial stop loss insurance or its replacement stop loss insurance. The court cited evidence that the gap in stop loss insurance resulted in the plan being liable for claims that the initial stop loss insurance would have covered had the defendants ensured that it remained in place.
This is huge as there is a fine line regarding the duties that create a fiduciary role. In the self funded space with TPAs, when do brokers and TPAs merely provide insurance services? Key in on the word merely. In almost 20 years in this industry I have yet to see this occur. Self funded employers depend on their TPAs and brokers to help make key decisions from coverage issues to plan design to finding the right stop loss partners. In fact, one of the biggest advantages of working with a TPA rather than an ASO carrier is that the plan can custom build their self funded plan based on the numerous offerings and hand holding set forth by TPAs and their broker partners. Thus, based on this court's definition, we are all potential fiduciaries regardless what our contracts with self funded employers may state. Maybe in

the ASO world brokers merely offer standard plan options but that doesn't happen in the TPA space..Ever.

The Spectrum

The court's inquiry will be to locate where on the spectrum between mere provision of insurance and de facto total control of plan decisions and assets the alleged fiduciary's actions lie. There is a lot of space in between these two extremes. Most self funded plans I work with expect their TPA, broker, and attorney to help them make key claim and plan language decisions. I can argue that most plans expect it regardless of the fact that they signed plenty of documents stating that they are the fiduciary and not the TPA.

I was once brought into a case as an expert for a dispute between a TPA and its long time self funded plan. The plan was a university that had been self funded for over 20 years. During the depositions the plan stated that they had never made a claim decision and that they always believed that the TPA was making the decisions on issues for them. This wasn't some ignorant employer making widgets; it was a well known university with plan trustees who had attorneys review every administrative agreement between the plan and the TPA. Yet, under oath, they continued to state that they always expected the TPA to make the call on claim issues.

In fact, they stated that the TPA had never even asked them whether to pay a claim or not. The problem for the plan, however, was that the summary plan document is their words telling the TPA whether a claim was covered or not. If the plan document is well written one could argue that the TPA never actually has to contact the plan on a claim issue since the answer should lie within the four corners of the plan document. The problem in our industry, however, is that most plan documents aren't well written and require a TPA to make an educated decision that too often isn't run by the plan first since that would slow down the claim payment process and be inefficient. Instead of updating and making the plan document actually match the intentions of the employer, TPAs just rely on their own internal staff to make the decisions, which in my mind makes the TPA a fiduciary on those claims.

In Conclusion

The bottom line is that it is pretty clear based on all of the details in this case that the plan relied on its broker to assist them with ensuring they had adequate protection from large claim liability through the purchase of stop loss coverage that would take on the risk for all plan eligible claims above the stop loss deductible. In our self funded world, this is pretty much what every employer plan expects.

We should all move forward with the assumption that we are all potential fiduciaries in the current state of self funding. Every employer that is either self funded or looking to enter our world for the first time is expecting us to be the experts and to guide them down the path of lowering their claims costs. It is unimaginable that in the post ACA world any broker or administrator is not looked to for guidance. Heck, we look to the DOL and HHS for guidance because the rules are vague and new. How can any reasonable person (or judge) believe that employers are not looking to all of us for our expect opinion and guidance. It's the current way things are done and as long as the ACA and state regulatory bodies continue to bombard our industry with additional requirements and obligations, we will have to be the experts. Who else can be? The employers' human resource departments? While the case law from the past may have viewed brokers, administrators, and agents are merely conduits for employers to purchase insurance, the new rules and obligations for health insurance require us to take on additional responsibilities and the fiduciary spectrum currently in place adds a whole lot of liability to us all. Let's see how this case ends up – will the court be looking at the past experiences between employers and brokers or what currently takes place in a post ACA world.