Changes to the Terms of BCBSM’s Administrative Services Contracts in the Wake of Hidden Fees Suits

BCBSM Litigation Updates
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Effective January 1, 2016, Blue Cross Blue Shield of Michigan ("BCBSM") will implement significant changes to the Administrative Services Contracts ("ASCs") issued to its self-funded customers. Notably, BCBSM has attempted to regulate how it is viewed for purposes of the Employee Retirement Income Security Act ("ERISA"), the federal statute that governs benefits plans.

Under the new ASCs, for example, BCBSM's relationship to a health care plan is defined as that of a "Service Provider," as opposed to a "Plan Fiduciary." Any other fiduciary responsibilities or duties on the part of BCBSM are expressly disclaimed. The contract also makes clear that BCBSM does not retain "as compensation" any portion of health care claims made by health care providers. Finally, the contract places all liability on the customer for any breaches of fiduciary duty with regard to the plan. Again, all of these duties are renounced by BCBSM—including the duty to disclose information about the plan.

Nevertheless, BCBSM's attempts to limit or remove its liability under ERISA are legally ineffective. ERISA is not governed by the labels used by parties in their contracts or otherwise. See, e.g., Rafferty v. N.Y. Mercantile Exch. Long Term Disability Plan, 133 F. Supp. 2d 158, 162 (E.D.N.Y. 2000) (noting that the status of an entity "for the purposes of ERISA is not determined solely by the label used in the contract between the parties"). Thus, because BCBSM's role will remain constant under the new and old ASCs, the disclaimers will likely have little impact on BCBSM's actual duties (and potential liability) under ERISA.

While the changes to the ASCs are ineffectual, there is no mystery as to why the changes occurred: all follow in the wake of a host of lawsuits lodged against BCBSM by its current and former self-insured customers. The initial case, Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan, was spearheaded by Varnum attorneys, who exposed BCBSM's approximately 20-year practice of actively hiding the amount of fees charged to its self-insured customers. According to an internal BCBSM memo, for example, BCBSM had become "its own worst enemy" because the surcharges and subsidies it assessed were "highlighted for all to see."
Thus, the memo provided a solution—BCBSM would change its fee structure so that the fees were “no longer visible to the customer.”

U.S. District Court Judge Victoria A. Roberts determined that these actions were in violation of BCBSM’s fiduciary duties under ERISA, and entered a $6.1 million judgment in favor of Hi-Lex. The judgment was subsequently affirmed by the Sixth Circuit and the United States Supreme Court.

To date, Varnum has represented over 90 current or former BCBSM self-insured customers in hidden fees cases. For more information about the changes to the ASCs, or to determine if your company has a claim, please contact Aaron Phelps, Perrin Rynders, or your Varnum attorney.

In 2013, Varnum successfully represented a client against Blue Cross Blue Shield of Michigan in a matter that involved millions of dollars in illegal hidden access fees. The practice was widespread and Varnum has now represented more than 90 clients in similar litigation against BCBSM. These case updates serve as a record of Varnum’s activity on behalf of our clients in these matters.