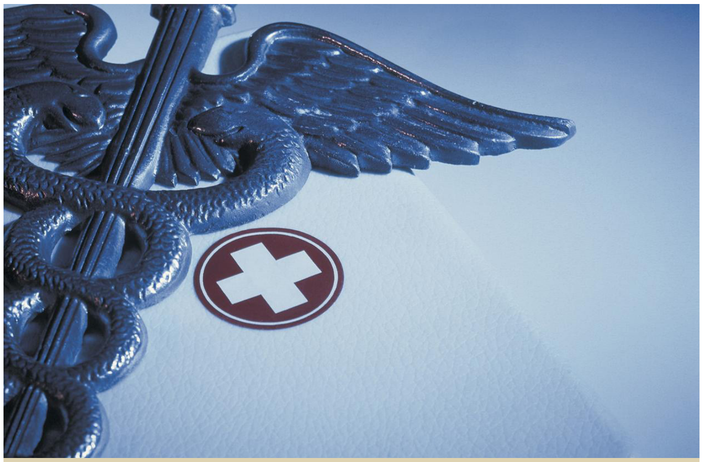

DICKINSON WRIGHT'S

HEALTHCARE LEGALNEWS

July 2016 • Volume 6, Number 1

IN THIS ISSUE

DW HEALTHCARE BLOG
http://www.dwhealthlawblog.com/

RECENT DEVELOPMENTS IN MENTAL HEALTH BENEFIT DENIALS

by Alexandra Hall, Associate
Troy Office
248.433.7576
ahall@dickinsonwright.com
and

Jessica Russell, Associate
Troy Office
248.433.7503
jrussell@dickinsonwright.com

The Mental Health Parity and Addiction Equity Act (Parity Act) requires health plans to provide the same coverage for mental health conditions as they provide for physical conditions, and that financial requirements and treatment limitations applicable to mental health and substance use disorder benefits be no more restrictive than those that apply to medical and surgical benefits.

But can a mental health provider directly challenge an insurer's benefit denial of coverage for a patient's mental health treatment under the Parity Act or ERISA? The 2nd U.S. Circuit Court of Appeals recently said "no."

In *American Psychiatric Association v Anthem Health Plans*, the 2nd Circuit ruled that individual physicians and physician associations lacked standing to sue health plans under the Parity Act and ERISA. Ultimately, this ruling could affect the future legal avenues available to providers who desire to advocate on behalf of their mental health patients and challenge allegedly unfair or illegal benefit denials.

In the case, two Connecticut psychiatrists, together with the American Psychiatric Association (APA), the Connecticut Psychiatric Society, Inc. and the Connecticut Council of Child and Adolescent Psychiatry, alleged that four insurers failed to provide mental health and substance use benefits owed under beneficiaries' plan documents, the Parity Act, ERISA, and Connecticut common law. The plaintiffs argued that the insurers imposed unnecessary administrative burdens on the psychiatrists, and reimbursed them at a lower rate than non-psychiatric physicians who provided comparable medical services, which ultimately prevented them from accepting health insurance. The trial court dismissed the case, holding that both the physicians and associations lacked legal standing to sue under ERISA, and the Parity Act did not create a statutory cause of action. On appeal, the 2nd Circuit acknowledged that policy reasons might support allowing physicians to bring suit on behalf of patients with mental health and substance use disorders in the absence of statutory authorization for such action, but agreed with the trial court that the psychiatrists lacked standing to sue under ERISA. The court also rejected the argument of one psychiatrist, who asserted standing from an assignment of two patients' claims for violations of the Parity Act. The court held that for purposes of conferring an ERISA cause of action upon a provider, an assignment of claims to a provider must be made in exchange for consideration in the form of healthcare services, which was not present in this case.

While the issues involved in this case are something to watch, the decision doesn't mean the end of benefit denial lawsuits across the country. It's important to note that the *American Psychiatric Association* decision is binding only as to cases in 2nd Circuit states (New York, Connecticut and Vermont) until other circuits or the U.S. Supreme Court decide to opine on the issue. Dickinson Wright's Healthcare Team will continue to monitor these developments.

NEW IRS AUDIT RULES: IS YOUR HEALTHCARE LLC READY?

by Ralph Levy, Jr., Of Counsel
Nashville Office
615.620.1733
rlevy@dickinsonwright.com
and

Peter Domas, Of Counsel
Troy Office
248.433.7595
pdomas@dickinsonwright.com

The Bipartisan Budget Act of 2015 (the BBA), which was signed into law in November 2015, significantly changes how the IRS will audit partnerships beginning in 2018. These changes will also have far-reaching effects on how members of many limited liability companies must prepare for potential tax liability resulting from an IRS audit. Under the BBA, the Tax Equity and Fiscal Responsibility Act (TEFRA) audit rules that have been in place for more than 30 years were repealed and replaced with new "streamlined" entity-level audit rules. These new rules will almost certainly affect the healthcare industry, because many healthcare limited liability companies and professional limited liability companies are relatively small entities (fewer than ten members) and taxed as partnerships.

Summary of Prior Provisions

Under TEFRA rules, a "small partnership" was automatically exempt from an entity-level audit by the IRS. To be a "small partnership," an LLC must generally have had fewer than ten members, none of which were an LLC or corporation. The small partnership qualification was determined annually, and it was possible for a partnership to be covered by the TEFRA entity-level audit rules in one year and not in a subsequent year.

Tax liability resulting from an IRS audit under TEFRA also passed through to the ultimate individual member's tax returns. This requirement often caused significant difficulty for the IRS in determining each partner's share of the tax liability adjustment and in collecting the tax owed from each member. The difficulty in collecting outstanding amounts owed was further complicated by the IRS being unable to apply any tax liability to the entity, even though members of an LLC could change multiple times during the period being audited.

Summary of New Rules

Although the new audit rules under the BBA were designed to make the IRS's collection of tax liabilities simpler, this simplification will require a significant redesign of the way members must look at their relationship with their company, and with the company's current and former members. The key features of the new audit rules are as follows:

- Rather than assessing a tax to individual partners, the IRS will assess the partnership an "imputed underpayment," which will be subject to the individual or corporate tax rate regardless of the actual tax rate applicable to individual members.

- Any tax liability from an audit will be assessed at the company level in the year of the adjustment (when the audit occurs) rather than in the tax year under audit. As a result, subject to two exceptions, current members may be liable for tax errors that benefited the company's prior members.

- The new law requires an LLC to appoint a "Partnership Representative." It is not yet known whether the IRS will treat this person the same as the Tax Matters Member.

Small Partnership Exception

LLCs with fewer than 100 members may opt out of the new audit rule if they do not have any members that are a separate LLC or C-Corporation. A member can be an S-Corporation. To opt out, an LLC must:

- Elect the opt-out each year on its 1065;

- Inform each partner of the election;

- Submit to the IRS the names and TINs of each of the members, including the names of each of the shareholders of an S-Corp member.

Implications for Healthcare LLCs

As a result of the BBA, each healthcare LLC will need to update its operating agreement to remain in compliance with the law, protect its members, and ensure that any tax liability is allocated equitably. These changes should include:

- Requiring managers of companies that meet the small partnership exception to elect out of the audit rules on an annual basis and comply with the member notification requirements;

- Creating rules limiting who can be a member for those companies wishing to remain eligible to opt-out as a small partnership;

- Establishing rules for electing a Partnership Representative, as well as defining actions the Partnership Representative may take;

- Allocating any assessed tax liabilities in accordance with agreed upon measures; and

- Providing procedures that members must follow to allow the company to qualify for one of the two exceptions to the entity level tax assessment.

Even though the new rules will not take effect until January 1, 2018, the BBA will have a substantive impact on tax planning for healthcare limited liability companies being taxed as partnerships, regardless of whether or not they meet the small partnership exception. As a result, companies need to take proactive steps to prepare for the new IRS audit requirements by reviewing their operating agreements to determine what changes are needed.

Please contact Peter Domas at 248-433-7595, Ralph Levy, at 615-972-0608 or any member of Dickinson Wright's Healthcare Practice Group, for assistance with preparing your LLC for the new audit rules.

FTC MOBILE HEALTH GUIDANCE

On April 5, 2016, the Federal Trade Commission (FTC) released new guidance for mobile apps directed towards providing health-related services and information. This guidance was developed with numerous other agencies, including the Office for Civil Rights (OCR), to assist app developers in complying with federal healthcare law.

One of the paramount concerns with mobile apps is the protection of patient protected health information (PHI) under the Health Insurance Portability and Accountability Act (HIPAA).

The guidance is provided in the form of a web-based interactive tool. For more information, see https://www.ftc.gov/tips-advice/business-center/guidance/mobile-health-apps-interactive-tool.

Please contact one of our healthcare attorneys for assistance in creating a compliant mobile app.

DICKINSON WRIGHT OFFICES

Detroit
500 Woodward Ave.
Suite 4000
Detroit, MI 48226
Phone: 313.223.3500

Austin
300 Colorado Street, Suite 2050
Colorado Tower
Austin TX 78701
Phone: 737.484.5500

Columbus
150 E. Gay St.
Suite 2400
Columbus, OH 43215
Phone: 614.744.2570

Ft. Lauderdale
450 East Las Olas Boulevard
Ft. Lauderdale, FL 33301
Phone: 954.991.5420

Las Vegas
8363 West Sunset Rd.
Suite 200
Las Vegas, NV 89113
Phone: 702.382.4002

Lexington
300 W. Vine St.
Suite 1700
Lexington, KY
Phone: 859.899.8700

Nashville
424 Church St.
Suite 1401
Nashville, TN 37219
Phone: 615.244.6538

Phoenix
1850 North Central Ave.
Suite 1400
Phoenix, AZ 85004
Phone: 602.285.5000

Reno
100 West Liberty
Suite 940
Reno NV 89501
Phone: 775.343.7500

Toronto
199 Bay St., Suite 2200
Commerce Court West
Toronto ON M5L 1G4
Phone: 416.777.0101

Washington, D.C.
1875 Eye St., NW
Suite 900
Washington, DC 20006
Phone: 202.457.0160

Ann Arbor
350 S. Main St.
Suite 300
Ann Arbor, MI 48104
Phone: 734.623.7075

Grand Rapids
200 Ottawa Ave., NW
Suite 1000
Grand Rapids, MI 49503
Phone: 616.458.1300

Lansing
215 S. Washington Square
Suite 200
Lansing, MI 48933
Phone: 517.371.1730

Music Row
54 Music Square East
Suite 300
Nashville TN 37203
Phone: 615.577.9600

Saginaw
4800 Fashion Square Blvd.
Suite 300
Saginaw, MI 48604
Phone: 989.791.4646

Troy
2600 W. Big Beaver Rd.
Suite 300
Troy, MI 48084
Phone: 248.433.7200