Services

Employee Benefits and Executive Compensation

Fiduciary Duties and Governance

Qualified Retirement Plans

Taft-Hartley Plans

Health and Welfare Plans

Government Plans

Higher Education

Employee Stock Ownership Programs (ESOPs)

Executive Compensation and Nonqualified Plans

ERISA Fiduciary and Benefits Litigation

College Savings and ABLE Plans

Mandatory Paid and Unpaid Leave

Audits and Investigations

KUTAKROCK

February 3, 2025

Was the Johnson & Johnson Win a Win for Other Health and Welfare Plan Fiduciaries? Maybe Not.

In our February 2024 Client Alert, we broke down the class action lawsuit against Johnson & Johnson ("JNJ") and their plan fiduciaries alleging that JNJ's fiduciaries breached their fiduciary duty by entering into unreasonable contract arrangements with their pharmacy benefit manager ("PBM") that allowed the PBM to charge the plan extraordinary costs for drugs that could be obtained by plan participants elsewhere at a fraction of the cost.

Motion to Dismiss Granted

On January 24, 2025 the JNJ Court granted JNJ's motion to dismiss Ms. Lewandowski's complaint for breach of fiduciary duty. The Court held that Ms. Lewandowski's argument that she would have paid lower premiums if the plan did not pay such extraordinary costs to the PBM was speculative and hypothetical.

Interestingly, the Court found that Ms. Lewandowski did (potentially) suffer an injury-in-fact by paying higher prices for drugs under the plan due to JNJ's alleged fiduciary breach. Nonetheless, because Ms. Lewandowski met her prescription drug cap each year, even if she won on her claim she would not be awarded any damages because that money would be owed to the plan to reimburse expenditures on other prescription drugs. Because the Court cannot redress Ms. Lewandowski's injury, the Court ruled she lacked standing to bring the claim in the first place.

This finding by the Court is important because it found an injury-in-fact where "a Plaintiff spent more money on drugs at the pharmacy, which was allegedly the result of Defendants' breach of fiduciary duties." With another plaintiff who may not have met their prescription drug cap, it seems this Court would have let this breach of fiduciary duty claim survive a motion to dismiss.

Wells Fargo Case Pending

In fact, in a nearly identical case brought against Wells Fargo and their plan fiduciaries alleging a fiduciary breach for overpaying for prescription drugs, as detailed in our August 2024 Client Alert, the plaintiffs submitted supplemental briefs on January 28, 2025 distinguishing themselves by saying that none of the Wells Fargo plaintiffs had exceeded their cost-sharing limits. All eyes are now on the Wells Fargo Court to see how they will decide these similar claims. If the Wells Fargo Court follows the reasoning of the JNJ Court, the Wells Fargo plaintiffs may survive a motion to dismiss, moving the litigation into the costly and burdensome discovery phase.

Contacts

John E. Schembari
Omaha
402.231.8886
john.schembari@kutakrock.com

Michelle M. Ueding
Omaha
402.661.8613
michelle.ueding@kutakrock.com

William C. McCartney
Omaha
949.852.5052
william.mccartney@kutakrock.com

P. Brian Bartels
Omaha
402.231.8897
brian.bartels@kutakrock.com

Ruth S. Marcott
Minneapolis
612.334.5044
ruth.marcott@kutakrock.com

Sevawn Foster Holt
Little Rock
501.975.3120
sevawn.holt@kutakrock.com

John J. Westerhaus
Omaha
402.231.8830
john.westerhaus@kutakrock.com

Marcus P. Zelzer
Minneapolis
612.334.5037
marcus.zelzer@kutakrock.com

Emma L. Franklin
Omaha
402.231.8842
emma.franklin@kutakrock.com

Aaron D. Schuster
Kansas City
816.960.0090
aaron.schuster@kutakrock.com

Jacob S. Gray
Minneapolis
612.334.5053
jacob.gray@kutakrock.com

Jason Kotlyarov
Kansas City
816.502.4622
jason.kotlyarov@kutakrock.com

Important Action Items

Despite the JNJ dismissal, these action items remain urgent and important. Health plan fiduciaries should strongly consider these steps to reduce their litigation exposure:

- Establish a fiduciary committee for health and welfare benefits, adopt a committee charter, and delegate fiduciary responsibility to the committee.
- Engage qualified prescription drug plan consultants to assist in comparing PBMs and prescription drug arrangements. Fiduciaries should ensure consultants do not have conflicts of interest.
- Request and review PBM agreements, fee and rebate arrangements, and formularies, and negotiate reasonable terms. Avoid simply signing the PBM's standard form agreement.
- Collect and review benchmark information from other plans and pharmacies and compare to current and prospective vendor agreements or proposals.
- Consider whether any direct or indirect compensation arrangements are reasonable or whether there are any conflicts of interest.
- Periodically subject PBMs and other vendors to requests for proposals.
- Document the policies and procedures used to obtain, review, and monitor vendors, agreements, and benchmarking information. It is critical that health plan fiduciaries document their procedural prudence.

If you have questions about fiduciary matters or these action items, please contact a member of Kutak Rock's Employee Benefits Practice Group, including the ERISA Fiduciary and Benefits Litigation team.