

August 6, 2024

## 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](#)

## Lawsuit Against Wells Fargo Highlights Increasing Focus on Health and Welfare Plan Fiduciaries

In our [February 2024](#) Client Alert, we highlighted new litigation involving Johnson & Johnson (“JNJ”) alleging breaches of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) fiduciary duty rules in JNJ’s administration of its prescription drug program. We observed that the JNJ litigation is likely the first in a new trend of health and welfare fiduciary litigation and urged plan sponsors to take various actions to mitigate their litigation risks and exposure to potential liability.

### *JNJ Litigation Update*

JNJ filed a motion to dismiss plaintiffs’ first complaint on April 19, 2024. In its motion, JNJ challenged the plaintiffs’ standing to bring the claims, given that they were not denied any benefits and failed to show they were prescribed any of the drugs they complained were overpriced. Further, JNJ argued the plaintiffs failed to sufficiently plead any allegations that JNJ’s process for choosing a pharmaceutical benefit manager (“PBM”) was imprudent. As of the date of this article, the court has not decided the motion to dismiss.

### *Navarro v. Wells Fargo*

On July 30, 2024, a [complaint](#) was filed in a Minnesota federal court accusing Wells Fargo and its plan fiduciaries of engaging in prohibited transactions and breaching their fiduciary duty to the Wells Fargo & Co. Health Plan (the “Plan”) and its participants under ERISA. The Wells Fargo complaint echoes many of the same claims as in the JNJ suit—in fact, some portions were directly copied from it. The complaint states that Wells Fargo mismanaged the Plan’s prescription drug benefit program, costing the Plan and its participants millions of dollars in higher premiums and out-of-pocket costs, as well as lower wages. However, perhaps learning from the JNJ motion to dismiss, this complaint lists specific drugs (although redacted) the plaintiffs were prescribed, purchased, and were presumably included in the complaint’s list of allegedly overpriced drugs.

Also new in the Wells Fargo complaint is an allegation the plan fiduciaries engaged in prohibited transactions under ERISA by causing the Plan to pay excessive and unreasonable administrative fees to its PBM. In general, ERISA prohibits transactions between a health plan and its service providers unless the arrangement is reasonable and necessary for the operation of the plan and only reasonable compensation is paid for the services. The complaint alleges the \$25 million in

## Contacts

### John E. Schembari

Omaha  
402.231.8886  
[john.schembari@kutakrock.com](mailto:john.schembari@kutakrock.com)

### Michelle M. Ueding

Omaha  
402.661.8613  
[michelle.ueding@kutakrock.com](mailto:michelle.ueding@kutakrock.com)

### William C. McCartney

Omaha  
949.852.5052  
[william.mccartney@kutakrock.com](mailto:william.mccartney@kutakrock.com)

### P. Brian Bartels

Omaha  
402.231.8897  
[brian.bartels@kutakrock.com](mailto:brian.bartels@kutakrock.com)

### Ruth S. Marcott

Minneapolis  
612.334.5044  
[ruth.marcott@kutakrock.com](mailto:ruth.marcott@kutakrock.com)

### Sevawn Foster Holt

Little Rock  
501.975.3120  
[sevawn.holt@kutakrock.com](mailto:sevawn.holt@kutakrock.com)

### John J. Westerhaus

Omaha  
402.231.8830  
[john.westerhaus@kutakrock.com](mailto:john.westerhaus@kutakrock.com)

### Robert J. Hannah

Omaha  
402.661.8667  
[robert.hannah@kutakrock.com](mailto:robert.hannah@kutakrock.com)

### Marcus P. Zelzer

Minneapolis  
612.334.5037  
[marcus.zelzer@kutakrock.com](mailto:marcus.zelzer@kutakrock.com)

### Emma L. Franklin

Omaha  
402.231.8842  
[emma.franklin@kutakrock.com](mailto:emma.franklin@kutakrock.com)

### Aaron D. Schuster

Kansas City  
816.960.0090  
[aaron.schuster@kutakrock.com](mailto:aaron.schuster@kutakrock.com)

### Jacob S. Gray

Minneapolis  
612.334.5053  
[jacob.gray@kutakrock.com](mailto:jacob.gray@kutakrock.com)

### Jason Kotlyarov

Kansas City  
816.502.4622  
[jason.kotlyarov@kutakrock.com](mailto:jason.kotlyarov@kutakrock.com)

administrative fees the Plan agreed to pay Express Scripts in 2022 greatly exceeds what comparable plans paid for similar services and is thus unreasonable and a prohibited transaction. Again, likely garnering insight from JNJ's motion to dismiss, the complaint lists similarly situated plans and cites what those plans paid for administrative fees per participant as compared to the Plan.

Plaintiffs seek recovery from Wells Fargo and its Plan fiduciaries, personally, for losses to the Plan, the removal of Plan fiduciaries and appointment of an independent fiduciary, replacement of Express Scripts as the Plan PBM, and any other equitable relief available.

### Action Items

The action items laid out in our prior [Client Alert](#) remain imperative for fiduciaries. Health plan fiduciaries should strongly consider these steps to help 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 proposals, agreements, benchmarking information, and vendor performance. 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 and Executive Compensation practice group](#), including the [ERISA Fiduciary and Benefits Litigation team](#).

