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New Trend of Health and Welfare Fiduciary Litigation

As discussed in our prior [publication](#), because individuals can now review the amount a plan pays for various services and compare that information to other plans, health plan fiduciaries could be at risk if they fail to determine whether their plans' vendor arrangements reflect market pricing. A recent litigation trend underscores this risk.

Lewandowski v. Johnson & Johnson

The plaintiffs, participants of Johnson & Johnson's ("J&J") health plan, allege that J&J and plan fiduciaries breached their fiduciary duties in selecting and failing to monitor J&J's agreement with a pharmacy benefit manager ("PBM") and consultants. The agreement allegedly allowed the PBM to charge the plan "extraordinary" costs for numerous drugs as compared to other market options and unnecessarily cost the plan millions of dollars. Plaintiffs seek to hold J&J's fiduciaries *personally* liable for not paying the lowest possible cost for every drug offered by the plan.

Navarro v. Wells Fargo

The plaintiffs filed a class action complaint in July 2024, alleging Wells Fargo and its plan fiduciaries engaged in prohibited transactions by agreeing to pay their PBM excessive administrative fees relative to market rates, a breach of their ERISA fiduciary duties. Plaintiffs seek to hold Wells Fargo and its fiduciaries responsible for the plan's losses, to have the fiduciaries removed, and to have the PBM replaced by another vendor.

Status of Litigation

It is unclear whether these cases will proceed beyond the initial stages. A similar case, *Knudsen v. MetLife*, was recently dismissed because the court concluded that the plaintiffs failed to demonstrate they were personally harmed by the plan's losses. Regardless of the result in *Lewandowski*, *Navarro*, and other similar lawsuits, this litigation trend will likely continue and evolve. Employers and plan fiduciaries should take steps to help reduce their litigation exposure.

Action Items for Plan Sponsors

Plan sponsors should consider establishing fiduciary committees to oversee their health and welfare benefits. Such fiduciary committees should:

- Create policies and procedures for selecting vendors, negotiating service agreements, and monitoring vendor performance.

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- Collect and review benchmarking data from other plans and compare those to proposed vendor arrangements for market reasonability.
- Periodically subject vendors to requests for proposals.
- Engage qualified plan consultants to assist in comparing vendors and ensure consultants and vendors do not have conflicts of interest.
- Consider whether any direct or indirect compensation arrangements are reasonable or whether there are any conflicts of interest.
- Request and review agreements, fee arrangements, and prescription drug formularies and actively negotiate favorable terms.
- Document the policies and procedures used to obtain, review, and monitor proposals, agreements, benchmarking information, vendor performance, and steps taken to demonstrate procedural prudence in administering health and welfare benefits.

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

