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# Johnson & Johnson Litigation Highlights Significant Risks for Health and Welfare Plan Fiduciaries

In our June 2023 Client Alert, we predicted a heightened risk of litigation following passage of the Consolidated Appropriations Act, 2021 ("CAA"), and the implementation of the Transparency in Coverage Rule. Specifically, we discussed how health plan fiduciaries could be at risk for failing to determine that a prescription drug plan's negotiated network discounts reflect market pricing comparable to other plans. Unfortunately, that risk has materialized, as a federal lawsuit was filed last week against Johnson & Johnson ("JNJ") and its plan fiduciaries alleging its prescription drug plan overpaid for prescription drugs.

### The JNJ Litigation

The class action complaint alleges that the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), requires JNJ's plan fiduciaries to make a diligent effort to compare alternative service providers for its prescription drug plan, seek the *lowest* level of costs for the services provided, and monitor plan expenses to ensure they remain reasonable. The complaint alleges that JNJ's fiduciaries failed to act prudently by entering into an agreement with a pharmacy benefit manager ("PBM") that allowed the PBM to charge the plan "extraordinary" costs for dozens of drugs as compared to other market options, thereby unnecessarily costing the plan millions of dollars. The plaintiffs seek various remedies for the alleged breaches. In essence, the plaintiffs are seeking to hold the fiduciaries ***personally*** liable for not paying the lowest possible cost for every drug offered by the plan.

*Cost Transparency Facilitates Comparisons*

As discussed in our November 2021 and June 2022 Client Alerts, group health plans must publicly post machine-readable files of prescription drug prices. Because this information is publicly available, individuals (e.g., class action plaintiff attorneys) can review the amount a plan pays for various prescription drugs and compare that information to other plans or pharmacies. The JNJ lawsuit highlights that plan participants (or more likely their lawyers) not only scrutinize the reasonability of their own out-of-pocket costs, but how much the plan is paying for a drug as compared to other plans or pharmacies in the market.

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*Plaintiffs Ignore Differences Between Retirement and Health Plans*

Plaintiffs lawyers are trying to replicate and expand upon their success with excess fee litigation against retirement plan fiduciaries. In those successful cases, plan sponsors have been found liable for breaching fiduciary duties by paying excessive fees to service providers. While the JNJ plaintiffs are asserting claims similar to those in the retirement plan excess fee litigation, there are important differences between retirement and health plans. Unlike 401(k) plans, where individual account balances determine the participant's benefits, group health plans are typically more like defined benefit plans. That is, the participant pays a premium each pay period, along with co pays/coinsurance and deductibles, in exchange for medical and prescription drug benefits that are generally not subject to annual or lifetime limits. As such, unlike a 401(k) plan, the plan sponsor (for a self-insured group health plan) bears the financial risk—and responsibility—if the PBM's fees and drug prices are excessive. For example, if an employer sponsors a self-insured plan and the PBM charges excessive amounts for covered drugs, the claims for those excessively priced drugs are paid by the plan sponsor. The participant pays only the appliable cost-sharing amounts, which are subject to annual limits. Even though the claims are paid by the plan sponsor, plaintiffs will allege that a participant's premiums, co pays, and deductible will all be higher if the fiduciary is not ensuring the lowest cost drugs possible. If the plaintiffs are successful, this will turn the health and welfare plan industry upside down. There are thousands of drugs and health care services. It would be seemingly impossible for employers to ensure the amount the plan pays for every item is the lowest possible cost.

### Important Action Items

The action items laid out in our June 2023 Client Alert are more urgent now than ever before. 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.
- 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.