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No Cure in Sight: Group Health Plans and Prescription Drug Benefits Infected by Excessive Fee Lawsuits

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The future of excessive fee litigation is here – and it is aiming right for employer-sponsored prescription drug benefit plans.

The Employee Retirement Income Security Act (ERISA) lays out a number of principles that retirement plan fiduciaries must uphold. Primarily, these responsibilities include acting solely and exclusively in the interest of plan participants and beneficiaries, carrying out duties in a prudent fashion, minimizing losses of the plan, and acting within the scope of the plan's documents and instruments insofar as those directives are in accordance with ERISA.¹ These standards of conduct are exacting and strict, meant to protect plan participants and beneficiaries who rely upon fiduciaries for their well-being into retirement.

For nearly 20 years, plaintiffs have been suing large 401(k) plans for claimed fiduciary breaches in lawsuits colloquially referred to as “excessive fee” cases. These claims allege that plan fiduciaries breached their duties by failing to:

- (1) Ensure reasonable fee structures, including by allowing excessive service provider fees;

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- (2) Adequately monitor investment performance; or
- (3) Offer lowest-cost share classes and prudent investment options.

THE BEGINNINGS OF “EXCESSIVE FEE” LITIGATION

Beginning around 2006, law firms filed the initial batch of excessive fee class action lawsuits, suing large companies alleging they allowed their 401(k) plans to pay excess fees and include overpriced and underperforming investments.² These lawsuits – and many of the cases that followed – generally used the same template: plaintiffs alleged that plan fiduciaries breached duties of loyalty and prudence by improperly managing and investing participants’ retirement savings in funds that charged excessively high fees and offered diminishing returns, amongst a variety of other alleged breaches. At the beginning stages of this influx of litigation, plans with over \$1 billion in plan assets were targeted, including at least 18 of the United States’ largest employer-sponsored 401(k) plans.³

Between 2015 and 2020, hundreds more excessive fee litigations were filed – with 2020 alone seeing over 200 cases filed – and with over one third of those targeting plans with less than \$1 billion in plan assets.⁴ According to Chubb, a global insurance provider, just under \$1 billion in total settlement funds were paid to plan participants and beneficiaries between 2016 and 2020, with settlements ranging from less than \$1 million to over \$55 million.⁵

THE TEMPLATE CHANGES: RECENT DEVELOPMENTS IN EXCESSIVE FEE CLAIMS

As several of these cases found success through multi-million-dollar settlements, new renditions of excessive fee claims began to emerge. In 2016, for example, over a dozen 403(b) retirement plans offered by universities were targeted with allegations of fiduciary breaches.⁶ In these cases, plaintiffs alleged similar fiduciary breaches, including improper inclusion of high-cost investment options in plans and improper fees for recordkeeping, administrative, and investment services.⁷ Most of these cases settled for several million dollars each.

But these university-focused lawsuits are not the only deviations from traditional excessive fee claims seen in the last decade. Beginning in 2018, a series of class actions was filed alleging that actuarial assumptions used to calculate certain forms of annuities were unreasonable and violated ERISA. Specifically, plaintiffs alleged that plans used outdated, and thus “unreasonable,” mortality assumptions to calculate benefits in violation of ERISA.⁸ Plaintiffs alleged, amongst other claims, that the plans’ use of these outdated assumptions led to lower payouts.⁹ One

such case resulted in a \$59 million settlement, prompting the filing of nine new such class actions in 2023.¹⁰

IT IS CONTAGIOUS: THE NEWEST WAVE OF EXCESSIVE FEE LITIGATION OVER GROUP HEALTH PLANS

Recently, such claims have taken on another new focus: group health plans. In what may become the newest wave of excessive fee litigation, plaintiffs allege that health plan fiduciaries have breached their duties under ERISA. These claims have promulgated due, in large part, to the passage of the Consolidated Appropriations Act of 2021 and the issuance of the Department of Health and Human Service's Transparency in Coverage Rule.

The Consolidated Appropriations Act of 2021 (CAA) amended ERISA § 408(b)(2) to require certain service providers to group health plans to disclose information to plan fiduciaries about direct and indirect compensation received in connection with their services to that plan, as long as that compensation is expected to amount to \$1,000 or more.¹¹ These new disclosures were intended to provide plan fiduciaries “with sufficient information to assess the reasonableness of the compensation to be received and potential conflicts of interest that may exist” as a result of these compensatory arrangements.¹²

Similarly, the Transparency in Coverage Rule requires group health plans to disclose cost-sharing information, including in-network provider negotiated rates, historical out-of-network allowed amounts, and prescription drug pricing information.¹³ This Rule aims to enable plan participants and beneficiaries to evaluate healthcare options in a more cost-conscious manner, “strengthen[] the support consumers receive from stakeholders that help protect and engage consumers,” and “lower[] overall health care costs.”¹⁴

A recently filed lawsuit, *Lewandowski v. Johnson and Johnson*, shows just how these newly required disclosures may impact future waves of excessive fee litigation.

ALLEGING EXCESSIVE PRESCRIPTION DRUG FEES

In *Lewandowski v. Johnson and Johnson*, a Johnson and Johnson (J&J) healthcare policy and advocacy director alleges that J&J, its Pension & Benefits Committee, and individual members of the Committee (collectively, “Defendants” or the “Company”) breached their fiduciary duties under ERISA related to the management and administration of prescription drug benefits offered through the Company's group health plans.¹⁵ The complaint contends that the Company mismanaged J&J's prescription drug benefits program, costing the plan and its participants and beneficiaries “millions of dollars in the form of higher payments for

prescription drugs, higher premiums, higher deductibles, higher coinsurance, higher copays, and lower wages or limited wage growth.”¹⁶

The complaint alleges that Defendants breached their fiduciary duty of prudence in several ways:

Defendants failed to exercise prudence before selecting a [pharmacy benefits manager], failed to exercise prudence in agreeing to make its ERISA plans and beneficiaries pay unreasonable prices for prescription drugs, failed to exercise prudence in agreeing to contract terms with its [pharmacy benefits manager] that needlessly allows the [pharmacy benefits manager] to enrich itself at the expense of the company’s ERISA plans and their beneficiaries, failed to actively manage and oversee key aspects of the company’s prescription-drug program, and failed to take available steps to rein in its [pharmacy benefits manager’s] profiteering and protect plan assets and beneficiaries’ interests.¹⁷

This failure of prudence, Lewandowski contends, forced “benefits plans and employees to acquire drugs via some of the most expensive methods conceivable.”¹⁸

The complaint, for instance, alleges that the Company mismanaged the plan’s specialty-drug program by failing to adequately consider available options for its contracted pharmacy benefits manager.¹⁹ Plan fiduciaries routinely contract with pharmacy benefits managers to help manage and administer plan prescription drug benefits. Pharmacy benefits managers may, among other things, negotiate with pharmacies to establish networks where plan beneficiaries may obtain prescription drugs and contract with drug manufacturers to secure price reductions for certain prescriptions. Here, the complaint alleges that the Company “did not consider the full range” of available pharmacy benefits managers.²⁰ Further, the Company’s employee benefits consultant, used to guide the pharmacy benefits manager selection process, may have had a financial stake in connection with the selection of certain pharmacy benefits managers by its clients.²¹

Further, the complaint contends, the Company agreed to make the plan and the plan’s participants and beneficiaries pay “staggering” mark-ups for prescription drugs.²² For instance, the complaint alleges, the Company paid roughly \$10,000 more per-prescription for a drug used to treat multiple sclerosis than pharmacies pay to acquire that same drug – a markup two hundred and fifty times higher than an individual paying out-of-pocket for that same prescription might pay.²³ Lewandowski argues that the Company’s failure to use its “significant bargaining power

as a Fortune 50 company with over 50,000 U.S. employees” to secure lower prescription drug prices shows a breach of the fiduciary duty of prudence.²⁴

The complaint also lists numerous other allegations of mismanagement, including agreeing to steer beneficiaries towards pharmacies with prices “routinely higher” than others for identical drugs²⁵ and failing to appropriately incentivize lower-cost but chemically-identical generic prescription drugs over name-brand drugs.²⁶

To remedy these alleged fiduciary breaches, Lewandowski seeks actual damages in the amount of the plan’s losses; any losses related to amounts paid by plan participants and beneficiaries as premiums, claim payments, co-insurance, deductibles, and lost wages; and statutory penalties.²⁷ Given previous amounts demanded in excessive fee cases, as well as this complaint’s contention that Defendants’ breach of fiduciary duty cost plan participants millions of dollars over the proposed class period, the claimed damages could be calculated at millions of dollars.²⁸

While the status of this case is uncertain, it is likely that – just like in previous iterations of excessive fee suits – similar suits will be filed shortly.

CONCLUSION

Given the filing of *Lewandowski*, as well as past trends in excessive fee litigation, it is essential that group health plan fiduciaries evaluate their current fiduciary processes and governance models. In particular, fiduciaries should closely review the selection and monitoring of plan providers as well as the reasonableness of group health plan costs and fees.

Plan fiduciaries may also consider establishing a group health plan fiduciary committee to monitor necessary duties and responsibilities, creating or reaffirming review processes for group health plan costs and fees, or implementing consistent and ongoing trainings for group health plan fiduciaries. Companies should also explore the acquisition of fiduciary liability insurance in preparation for potential allegations for fiduciary breaches.

Group health plan fiduciaries should prepare now for this new wave of excessive fee litigation. This preparation will not only ensure that plan participants and beneficiaries reap the benefits of these plans, but also may prevent costly and time-consuming litigation over these fiduciary responsibilities.

Notes

1. 29 U.S.C.A. § 1104(a)(1).
2. See, e.g., José M. Jara, ERISA: Thou Shall Not Pay Excessive Fees!, *Am. Bar. Ass'n*, Mar. 1, 2019 (https://www.americanbar.org/groups/real_property_trust_estate/resources/ereport/2018-2022/erisa-thou-shall-not-pay-excessive-fees/); Mark Bieter, Is Excessive Fee Litigation Headed for its Dudenhoeffer?, *Groom L. Grp.*, Apr. 2, 2018 (<https://www.groom.com/resources/is-excessive-fee-litigation-headed-for-its-dudenhoeffer/>).
3. AIG, *Understanding the Rapid Rise in Excessive Fee Claims* (2021) (hereinafter, AIG White Paper).
4. AIG White Paper, *supra* note 3; William Delany et al., ERISA Litigation Faces New Frontiers in 2024, *Law360* (Jan. 17, 2024, 5:35 PM), <https://www.law360.com/articles/1785655/erisa-litigation-faces-new-frontiers-in-2024>.
5. Chubb Ltd., *Excessive Litigation Over Excessive Plan Fees* (Sept. 15, 2021).
6. Nevin E. Adams, Another 403(b) Plan Slapped with Excessive Fee Suit, *Nat'l Ass'n Plan Advisors* (May 12, 2023), <https://www.napa-net.org/news-info/daily-news/another-403b-plan-slapped-excessive-fee-suit>.
7. Maria O'Brien & Calvin Utter, *Understanding University Fee Litigation: A Few Lessons about the Perils of Imprudence for Higher ED Plan Sponsors*, 90 *Miss. L.J.* 441, 444-446 (2021).
8. See, e.g., Jay Desjardins, *Fiduciary Liability – Class Action Litigation Risks and the Continuing Firming of the Market*, *AON Fin. Servs. Grp.* (Jan. 2023), https://www.aon.com/risk-services/financial-services-group/insight_38_fiduciary-liability-class-action-litigation-risks-and-the-continuing-firming-of-the-market; Suzanne E. Meeker, *Pension Plan Mortality Table Litigation – What's Next*, *Verill Dana LLP* (Apr. 29, 2021), <https://www.verrill-law.com/benefits-law-update/pension-plan-mortality-table-litigation-whats-next>.
9. Meeker, *supra* note 8.
10. Order Granting Preliminary Approval of Settlement, *Cruz v. Raytheon Co.*, et al., No. 1:19-cv-11425 (D. Mass. Feb. 23, 2021); Settlement Agreement at 3, *Cruz v. Raytheon Co.*, et al., No. 1:19-cv-11425 (D. Mass. Feb. 12, 2021).
11. Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182, Title II, Division BB § 202.
12. Field Assistance Bulletin No. 2021-03, Memorandum from John J. Canary, Dir. of Reg. and Interpretations, Emp. Benefits Sec. Admin., to Mabel Capolongo, Dir. of Enf't, Emp. Benefits Sec. Admin., & Amy J. Turner, Dir. of Field Admin., Emp. Benefits Sec. Admin. (Dec. 30, 2021) (<https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2021-03#:~:text=Section%20202%20of%20Title%20II,about%20the%20direct%20and%20indirect>).
13. 29 C.F.R. § 2590.715–2715A2.
14. Ctr. for Medicare & Medicaid Servs., *Transparency in Coverage Final Rule Fact Sheet* (CMS-9915-F) (Oct. 29, 2020).
15. Complaint, *Lewandowski v. Johnson and Johnson*, Case 1:24-cv-00671 (D.N.J. February 2, 2024).
16. *Id.* at 2.

17. Id. at 5.
18. Id.
19. Id. at 31–32.
20. Id. at 32.
21. Id.
22. Id.
23. Id. at 3.
24. Id. at 33.
25. Id. at 46.
26. Id. at 48.
27. Id. at 73.
28. Id. at 6.

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