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Publications

Plaintiffs Double Down on Challenges to PBM Arrangements in Class Action Lawsuits Involving Johnson & Johnson and JPMorganChase

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On March 10, 2024, the plaintiffs filed an amended complaint in a much-followed putative class action lawsuit against Johnson & Johnson ("J&J") alleging that the plan fiduciaries for J&J's group health plan violated ERISA by mismanaging its self-funded health plan's prescription drug benefit. See our prior alerts on the J&J litigation here and here.

Several days after the plaintiffs filed an amended complaint in the *J&J* litigation, the same plaintiffs' counsel team filed a substantially similar complaint against another large employer, JPMorganChase & Co. ("JPMorgan").

Groom's key takeaways regarding the *J&J* amended complaint and the trajectory of health plan fee litigation are as follows:

- The amended complaint in the *J&J* litigation attempts to remedy the deficiencies underlying the district court's prior decision dismissing the case due to lack of Article III standing.
- To the extent the district court finds that one or both plaintiffs in the *J&J* case have sufficiently alleged Article III standing, the district court will need to turn to the substance of the allegations and address whether the amended complaint at least plausibly alleges an ERISA fiduciary breach.
- With the recent filing of the complaint against JPMorgan (see below for further information), the *J&J* case is now one of three putative class actions—filed by the same team of plaintiffs' counsel—where current or former plan participants have alleged that employers mismanaged their self-funded health plans' prescription drug benefit.
- The *J&J* case may be a test case for a potential wave of additional putative class actions by health plan participants against employers based on alleged mismanagement of health plan fees and expenses. It seems likely that additional cases may be filed—especially if one or more of these filed cases survive a motion to dismiss.

A detailed discussion of these developments follows.

The J&J Amended Complaint

As we previously described in detail, last year plaintiff Anne Lewandowski filed a lawsuit against J&J alleging that the plan fiduciaries mismanaged the prescription drug benefit of the company's employer-sponsored health plan, resulting in economic harm in the form of higher premiums and out-of-pocket costs.

The district court dismissed the case because none of the plaintiff's alleged injuries satisfied the requirements of Article III standing, *i.e.*, (i) an injury-in-fact, (ii) that was caused by the employer's alleged ERISA violation, and (iii) is redressable by the court.

Ms. Lewandowski, along with a second plaintiff, filed an amended complaint which attempts to address the deficiencies identified in the district court's opinion.

Higher Premiums

The district court previously held that plaintiff's alleged injury due to the payment of higher premiums, higher deductibles, higher coinsurance, and higher copays, and lower wages or limited wage growth for employees was "at best" speculative and hypothetical because (i) the plaintiff failed to allege that the employer's conduct resulted in the payment of higher premiums and (ii) the plaintiff failed to assert allegations comparing the premiums charged by the J&J plan to those charged by other plans.

The amended complaint attempts to cure this deficiency by trying to tie higher prescription drug costs to higher premium contributions for plan participants. Specifically, the amended complaint alleges:

- J&J aimed to maintain a "consistent ratio" of employer and employee contributions to the plan. The amended complaint cites data showing that the employee contribution rate, as a percentage of total plan spending, remained relatively consistent over a nine-year time period. The plaintiffs use this alleged fact to claim that the amount employees pay in premiums is therefore "tied directly" to the plan's actual and projected costs, including prescription drug costs.
- Numerous government and independent studies support the conclusion that employees pay higher premiums as a result of inflated prescription drug costs. The amended complaint specifically highlights a recent Federal Trade Commission report finding that over time "inflated drug costs" "result in higher premiums."
- 85% of premium costs for large plans such as the J&J plan is "attributable to prescription drug outlays and other healthcare expenditures."

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- The amended complaint attempts to link higher premium costs to J&J's alleged mismanagement of the plan's prescription drug benefit by pointing out that participants generally paid the same percentage of the plan's total costs each year. However, the amended complaint does not allege that J&J used, or the terms of the plan required it to use, a rigid formula of employer versus employee contributions when calculating the amount of premiums charged to employees – *i.e.*, there is no allegation J&J was required to charge participants premiums that amounted to fixed percentage of plan costs.
- The amended complaint cites secondary sources that generally link higher prescription drug costs to higher employee premiums. Those sources are not specific to the expenses incurred by the J&J plan.
- Whether the court is swayed by this argument remains to be seen. Nonetheless, employers may be able to guard against such an assertion by ensuring that the employee contribution is set, and communicated, as a fixed dollar amount rather than as a percentage or ratio of the plan costs.
- The amended complaint does not address the district court's observation that the complaint failed to compare the premiums charged by the J&J plan to those charged by other plans.

Higher Out-of-Pocket Costs

The district court previously held that Ms. Lewandowski's alleged injury due to higher out-of-pocket costs was not redressable. This was due in large part to J&J's demonstration that Ms. Lewandowski would have hit the plan's maximum limit on out-of-pocket expenses based on her medical expenses alone (aside from prescription drug costs). As a result, Ms. Lewandowski's out-of-pocket costs would have been the same even if she paid less for the drugs identified in the complaint.

The amended complaint alleges that in 2023, Ms. Lewandowski paid higher out-of-pocket amounts for certain prescription drugs *before* she hit the plan's out-of-pocket maximum. Further, the amended complaint alleges that Ms. Lewandowski suffered a reduction in her cash position when she paid more out-of-pocket for those prescription drugs. The amended complaint also added a new plaintiff to the lawsuit. The new plaintiff alleges to have paid a higher copay amount for a generic drug in comparison to various benchmarks. Further, unlike Ms. Lewandowski, the new plaintiff alleges that he *did not* hit the plan's out-of-pocket maximum for the years at issue.

GROOM INSIGHT:

- Ms. Lewandowski's allegation that she suffered a reduction in her cash position when paying out-of-pocket for prescription drugs is a new theory of injury that has yet to be addressed by the district court. To the extent the plaintiff is successful in establishing standing based on this theory, this would be unwelcome news for employers and plan fiduciaries as the class of affected participants that could seek redress via these types of claims would be materially increased.
- The addition of the second plaintiff appears to be a direct response to the district court's concerns regarding the redressability of Ms. Lewandowski's alleged out-of-pocket injury given that she hit the plan's out-of-pocket maximum based on her medical expenses alone and in this respect appears to be a hedge on the likelihood that the district court will agree with the plaintiffs' cash position theory.
- The differences in the claims experience of the plaintiffs underscores the individualized nature of the alleged injuries at issue. These differences may make it challenging for plaintiffs to obtain class certification in this case and other health plan fee cases.

What's Next?

We anticipate the defendants in the *J&J* case will again file a motion to dismiss – this time seeking to dismiss the amended complaint. As before, we expect J&J to challenge whether the amended allegations adequately allege Article III standing, as well as whether the amended complaint plausibly alleges a claim for relief. To the extent the district court finds that one or both plaintiffs have alleged Article III standing, the district court will need to address whether the employer was acting as an ERISA fiduciary when setting premiums and selecting and managing the plan's pharmacy benefit manager and/or the pleading standard applicable to excessive fee claims in the context of a health plan.

The resolution of the anticipated motion to dismiss will likely have an impact on the trajectory of health plan fee litigation, *i.e.*, whether we see a wave of similar putative class actions filed by health plan participants against employers or whether the plaintiffs' bar pivots in how it approaches excessive fee cases in the health plan context.

Indeed, just days after the plaintiffs in the *J&J* case filed the amended complaint, the same team of plaintiffs' counsel filed a new complaint against another large employer, JPMorgan, asserting substantially similar allegations related to the employer's purported mismanagement of its self-funded health plan's prescription drug benefit. This case was filed on March 13, 2025 in the United States District Court for the Southern District of New York.

Like the amended complaint filed in the *J&J* case, the plaintiffs in this new complaint against JPMorgan allege:

- The plan overpaid for specific prescription drugs. Like the *J&J* plaintiffs, the complaint challenges the plan's use of a traditional PBM pricing arrangement. The plaintiffs in this new complaint similarly target the prices of generic specialty and generic non-specialty drugs. Some of the same drugs are used as examples in both complaints.
- The employer maintained a "consistent ratio" of employer and employee contributions to the plan such if total plan costs were lower, employee contributions would have been lower.
- JPMorgan failed to implement several cost-saving recommendations from two organizations in which it is a member.

- Like the second plaintiff recently added to the *J&J* case, the plaintiffs in this new complaint allege that they did not reach the plan's cap on out-of-pocket expenses.
- The plan's expenses were paid using funds from an employer-sponsored trust and are therefore plan assets, which must be used for the exclusive benefit of the plan's participants and their beneficiaries.

This is an area of litigation that is continuing to develop. We are monitoring plaintiffs' evolving theories of liability in these cases.