

WELFARE PLAN FIDUCIARIES SUED DUE TO EXCESSIVE PHARMACY COSTS

Hodgson Russ Employee Benefits Alert
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A plan participant, individually, and on behalf of other participants, recently filed a class action complaint against Johnson and Johnson (“J&J”) and the individual members of the Pension & Benefits Committee (“Committee”). The complaint alleges that J&J and the Committee breached their ERISA fiduciary duties by mismanaging the J&J prescription-drug benefit program.

Under ERISA, fiduciaries are required to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” The complaint alleges that J&J and the Committee failed this duty of prudence by not making diligent efforts to: (i) negotiate favorable contract pricing terms with prescription drug vendors; (ii) regularly conduct requests for proposals to compare pharmacy service providers; and (iii) ensure the plan’s prescription drug program does not funnel participants towards higher cost prescription drug options. As a result, the complaint alleges plan participants were harmed by paying higher premiums and cost sharing from the impact of inflated prescription drug costs on the plan. One example cited in the complaint is that Express Scripts, the plan’s pharmacy benefit manager, charged the plan over \$10,000 for a 90-pill prescription that could have been purchased *without insurance* for approximately \$28.

This complaint is a reminder to welfare benefit plan sponsors and committee members that they must be diligent in discharging their fiduciary duties. Plan sponsors should review their welfare benefit committee charter to confirm that it appropriately delegates responsibility. The committee will want to conduct regular RFPs to ensure they are getting the best value for the plan participants. Although many plan fiduciaries utilize a third-party service provider or consultant for this process, as the complaint points out, fiduciaries cannot simply rely on the advice of third-party service providers, consultants, or experts. Instead, they must exercise independent, prudent, and impartial fiduciary judgment. Fiduciaries must also do their due diligence to identify any conflicts of interest that a third-party service provider or consultant may have that would prevent them from providing advice solely for the benefit of the plan participants. For example, the complaint alleges that the method the J&J plan used to compensate its pharmacy benefit manager incentivized it to direct participants towards more expensive prescription drugs.

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Finally, recent laws such as the Consolidated Appropriations Act and No Surprises Act have allowed welfare benefit plan fiduciaries to gain greater access to plan expense information. As this complaint shows, however, that greater access to information may increase the scrutiny that plan fiduciaries are under to responsibly manage their plans. (Lewandowski v. Johnson and Johnson, (D. New Jersey)).

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