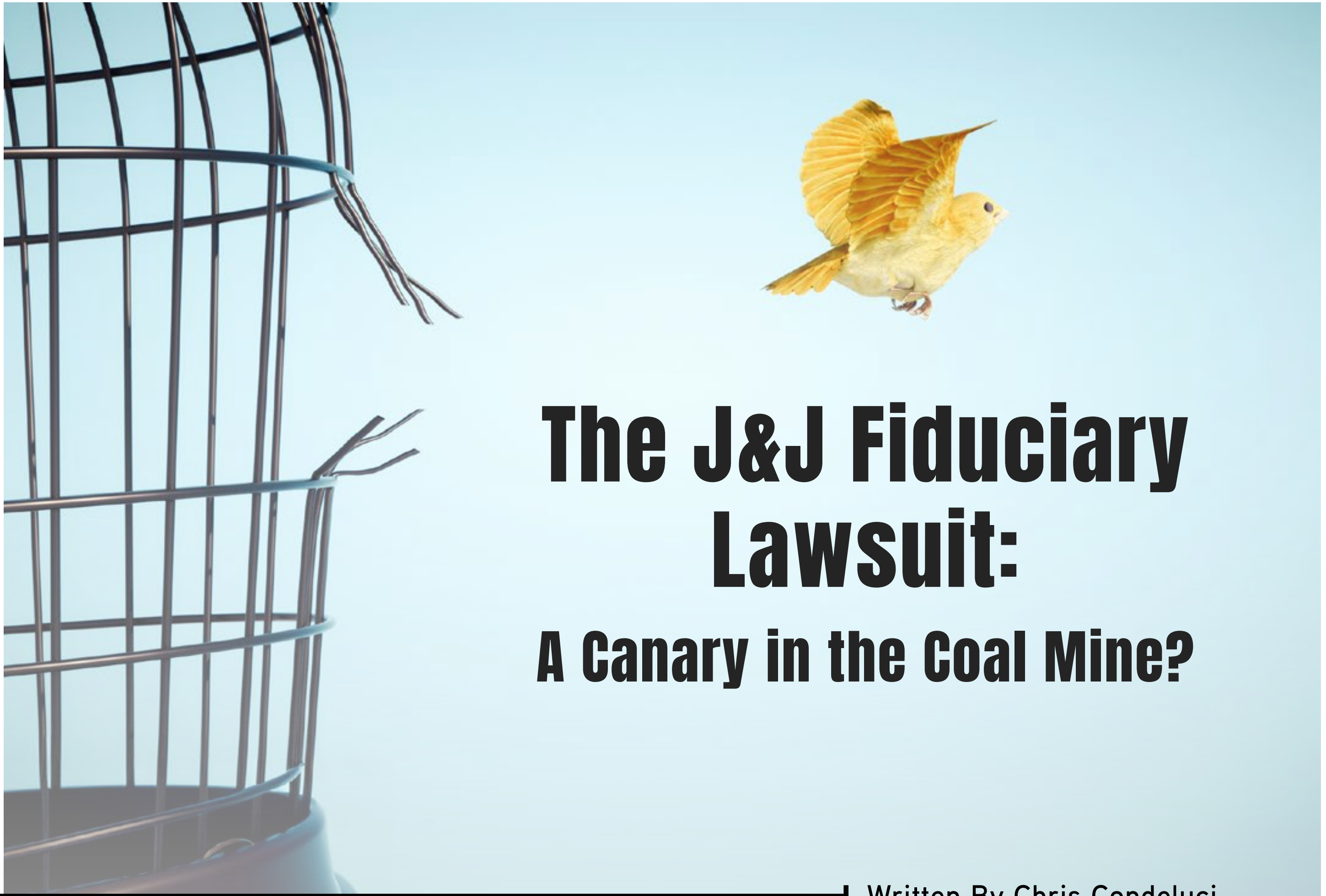

The J&J Fiduciary Lawsuit:

A Canary in the Coal Mine?

Written By Chris Condeluci

In a potentially industry-changing lawsuit, an employee-participant of a health plan filed a complaint against the plan sponsor and the plan's fiduciaries in their individual capacity for breach of their fiduciary duties for failing to prevent the plan from overpaying for covered benefits. In this particular case, an employee of Johnson & Johnson (J&J) claimed that over a period of years, J&J's health plan paid the plan's Pharmacy Benefit Manager (PBM) service provider for covered prescription drugs in excess of 200% – and in some cases 500% – times the cash-price for the covered drugs.

The employee-participant's complaint alleges that J&J and the plan's fiduciaries:

- Failed to exercise prudence before selecting its PBM (Express Scripts).
- Failed to exercise prudence in agreeing to contract terms with Express Scripts, which allowed the PBM to enrich itself at the expense of J&J's plan.
- Failed to exercise prudence in agreeing to make J&J's plan and the plan's participants pay unreasonable prices for prescription drugs.
- Failed to actively manage and oversee key aspects of the plan's prescription drug program.
- Failed to take available steps to rein in Express Scripts' profiteering and to protect plan assets and participants' interests.

The breadth of these complaints against a plan sponsor and the plan's fiduciaries is sending shockwaves through the employer-sponsored health plan and service provider communities. Consensus is growing that this J&J lawsuit is just the beginning of a series of lawsuits that will be filed against the plan sponsor and the plan's fiduciaries for fiduciary breaches, but also lawsuits filed directly against plan service providers (e.g., PBMs, TPAs, brokers/consultants) by the plan sponsor and/or plan participants.

HISTORY IN RETIREMENT PLANS

Beginning in the early 2000s and continuing to this day, hundreds of lawsuits have been filed by retirement plan participants against employer plan sponsors and the retirement plan's fiduciaries, claiming fiduciary breach due to excessive fees paid to the retirement plan's investment managers and for investment losses on account of investment decisions made by the plan's fiduciaries.

In the wake of court rulings and settlements over the past two decades, most ERISA practitioners expected similar types of lawsuits to be filed against the sponsor of a health benefits plan by health plan participants. However, no employee-participant-driven lawsuits against health plan sponsors claiming fiduciary breach were filed…until recently.

With this J&J lawsuit, as well as similar lawsuits filed against MetLife and a union-sponsored health plan, it appears that this void is finally being filled by a Plaintiffs Bar that sees an opportunity to repeat the legal challenges that have been advanced in the retirement space.

ERISA'S FIDUCIARY DUTIES

ERISA imposes specific fiduciary duties on sponsors of an ERISA-covered health plan, as well as individuals and entities that have discretionary authority to manage the plan and the plan's assets (collectively referred to as "ERISA fiduciaries").

For one, ERISA fiduciaries must act for the exclusive purpose of providing benefits to plan participants, which means, among other things, the fiduciaries must protect plan assets from being misused either intentionally or mistakenly. ERISA fiduciaries must also undertake actions to defray the reasonable expense of administering the plan, which includes, among other things, ensuring that the plan does not pay excessive fees to service providers. In addition, fiduciaries must also act prudently when making decisions relating to the management and operation of the plan, and within each of these fiduciary duties is the duty to monitor the plan's service providers to ensure that they are properly performing their administrative responsibilities and not wasting plan assets.

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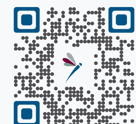
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J&J CLAIMS OF FIDUCIARY BREACH

Prudence

The J&J employee-participant's complaint argues that the duty to act prudently was breached because no prudent fiduciary would agree to make the plan and its participants pay a price for a covered prescription drug that is 200% to 500% higher than the price available to any individual who walks into a pharmacy and pays out-of-pocket.

The complaint also asserts that prudent fiduciaries must select among different PBM providers with different PBM payment models (e.g., Traditional vs. Pass Through PBM Models) carefully analyzing which PBM offering and payment model will be most beneficial and cost-effective for the plan and its participants.

The complaint further contends that prudent fiduciaries must negotiate favorable terms with PBMs and continually monitor their PBM's actions to ensure that the plan is minimizing costs and maximizing outcomes for plan participants. And prudent fiduciaries must periodically attempt to renegotiate their PBM contracts and/or conduct an open RFP process to solicit proposals from other PBMs and ensure that they have the best possible deal for the plan and its participants.

Failure to Act in the Best Interest of Plan Participants and Failure to Monitor the Service Provider

The lawsuit goes on to contend that J&J and the plan's fiduciaries failed to act in the best interest of plan participants when they failed to recognize that the prices charged by Express Scripts were much higher than prices charged by other PBMs operating in the market, and in many cases, higher than the cash price of the drug.

In addition, J&J and the plan's fiduciaries failed to actively manage and oversee key

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aspects of the prescription drug program and failed to properly monitor Express Scripts by allowing Express Scripts to steer participants to the PBM's own mail-order pharmacy, forcing participants to pay higher prices for drugs than other reasonable and accessible alternatives that charge lower prices for the same drugs.

The complaint further argues that if J&J and the plan's fiduciaries had engaged in a prudent and reasoned decision-making process, J&J and the plan's fiduciaries would have known – or should have known – of the availability of other reasonable and accessible alternatives that charge lower prices, which would have saved millions of dollars for the plan and its participants.

FORESHADOWING THE EXAMINATION OF BROKER AND CONSULTANT COMPENSATION DISCLOSURES

Teeing Up the Issue

Although this J&J lawsuit focused primarily on ERISA's fiduciary duties, the complaint did raise another issue that could show up in future litigation. And that issue is the failure to receive the proper disclosure of compensation paid to a broker or consultant providing services to the plan, along with the plan fiduciaries' failure to properly consider this disclosure before entering into or renewing any contract with the broker or consultant.

This new compensation disclosure requirement was added to the law at the end of 2020 through the Consolidated Appropriations Act, 2021 ("CAA 2021"). Modeled after requirements for compensation disclosures for retirement plans (a theme already discussed above), compliance with this new health plan disclosure requirement has yet to be tested in a court of law (or actively enforced by the DOL).

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Prudence and Conflicts of Interest

While the J&J employee-participant's lawsuit does not specifically allege non-compliance with this new compensation disclosure requirement, the specter of non-compliance is implied. And such implication is tied back into the fiduciary duty to act prudently.

More specifically, the complaint devotes eight paragraphs asserting that plan fiduciaries must act prudently when hiring brokers and consultants to, for example, assist the plan in selecting and negotiating contract terms with a PBM. These paragraphs go on to explain that in many cases, brokers and consultants have a conflict of interest when recommending a particular PBM due to indirect compensation and "kick-backs" (as the complaint puts it) paid to the brokers/consultants by the PBM.

Based on these points, the complaint asserts that plan fiduciaries must ensure that any broker/consultant they hire to help them select and negotiate with a PBM does not have a conflict of interest that would prevent the broker/consultant from offering objective advice. The exclamation point to these assertions is that a plan fiduciary's failure to obtain the required disclosures from a broker/consultant makes the contract with the broker/consultant a prohibited transaction under ERISA.

FUTURE LITIGATION

Fiduciary Breach Based on Broker/Consultant Compensation Disclosures

Following on the points raised above, the Plaintiffs Bar may very well pursue a claim of fiduciary breach if and when they uncover that the required compensation disclosures were never furnished to the plan's fiduciaries and/or that the plan's fiduciaries did not give due consideration to the compensation disclosures prior to entering or renewing a contract with a broker/consultant.

Lawsuits Involving Other Plan Service Providers

Any future lawsuits involving employee-participants' claims of fiduciary breach may also involve other plan service providers beyond PBMs. Why? Because the J&J lawsuit focused exclusively on prescription drugs, thereby bringing PBMs into the picture. But future lawsuits will likely focus on overpayments made to medical providers for medical and surgical benefits covered under the plan, and quite possibly underpayments to mental and behavioral health providers for covered mental health and substance use disorder benefits. Claims of fiduciary breach advanced by employees can go both ways.

Participant-Driven Excessive Fee Lawsuits

Excessive fees charged by TPAs – including both independent TPAs and insurance carrier-owned TPAs – have been and will continue to be a major focus. To date, lawsuits claiming the payment of excessive fees have been advanced by plan sponsors and even the Department of Labor, not plan participants. But this J&J employee-participant lawsuit will likely open the door to participants going directly after their plan sponsor for the payment of excessive fees, consistent with what we see here.

Plan Sponsors Suing Plan Service Providers

This J&J lawsuit begs the following questions: Isn't the plan sponsor the ultimate victim here, and not necessarily the plan participants? Stated differently, is it not the plan's service providers who are the bad actors here, not necessarily the plan sponsor? After all, what appears evident in this J&J case is that Express Scripts engaged in practices that resulted in the overpayments for the covered prescription drugs, with arguably the most egregious practice of steering plan participants to Express Scripts' own mail-order pharmacy so the pharmacy (and ultimately Express Scripts) could

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charge prices that are routinely higher than retail pharmacies charge for the same prescription drugs.

This point leads to a logical conclusion that future litigation stemming from this J&J employee-participant's complaint will likely involve the plan sponsor filing lawsuits against the plan's service providers through a proactive lawsuit in advance of any employee-driven class-action filed against the plan sponsor or through a reactive cross-claim motion against the plan's service provider to reimburse the plan sponsor for any monetary damages that may be awarded through the class-action suit.

POSSIBLE LEGISLATIVE AND REGULATORY ACTIONS

Access to Pricing and Claims Information Is Needed to Monitor Plan Service Providers

For decades, plan sponsors have been clamoring for access to negotiated prices and the plan's health claims data to no avail. Only recently has the Federal government promulgated regulations requiring the public disclosure of pricing information, and Congress passed legislation intended to allow plan sponsors to access the plan's claims data. However, plan sponsors still cannot get accurate pricing data and owners of the provider networks continue to refuse to share the plan's claims data.

Access to pricing and claims information is needed if plan sponsors and plan fiduciaries are expected to adequately monitor the plan's service provider to ensure, for example, excessive fees are not being paid and/or overpayments are not being made. Put more plainly, if a plan sponsor and plan fiduciaries do not have access to meaningful and accurate pricing and claims data, the plan sponsor and plan fiduciaries are exposed to potential fiduciary liability and claims of fiduciary breach due to the inability to adequately monitor the prices charged by, and any overpayments made to, the plan's service providers.

Will this J&J lawsuit convince Congress and the Administration to improve and strengthen the existing requirements to publicly disclose pricing information? Will Congress and the Administration finally require owners of the provider networks to share a complete and accurate set of claims data with plan sponsors or face monetary penalties? Only time will tell.

PBMs Considered Fiduciaries?

Because plan service providers – such as PBMs – typically do not have discretionary authority over plan assets, a PBM is not considered an ERISA fiduciary. However, if a PBM is subject to the same fiduciary duties applicable to, for example, a plan sponsor, arguments can be made that many of the practices highlighted in this J&J lawsuit would be mitigated if not eliminated entirely.

For example, as an ERISA fiduciary, a PBM would be subject to liability if the PBM took steps to steer plan participants to pharmacies owned by the PBM and ultimately force the plan to pay higher prices to the PBM-owned pharmacies than pharmacies not owned by the PBM.

In addition, as an ERISA fiduciary, the PBM could not charge unreasonable or excessive fees. And, as an ERISA fiduciary, a PBM would not be considered to be acting in the best interest of plan participants if the fiduciary (here, the PBM) is profiting off of the plan by, for example, charging hidden fees or retaining savings for prescription drugs paid for with plan assets that should otherwise be returned to the plan and/or plan participants.

Congress is currently considering PBM reforms. Will this J&J lawsuit convince Congress that ERISA should be amended to specifically make PBMs an ERISA fiduciary? Again, only time will tell. ■

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