The new 'F-Word' – Fiduciary Responsibility Looms Large for Plan Sponsors in Landmark Case

As ERISA celebrates its 50th birthday this year, one of its core concepts remains firmly in place: health plans must be prudently managed by a "fiduciary" of the plan. Although that general concept may sound simple, it has many layers of complexity, especially when it comes to monitoring prescription drug plans and the pharmacy benefit managers ("PBMs") who administer those plans.

Why are prescription drug plans and PBMs particularly challenging from an ERISA fiduciary duty perspective? Historically, many PBMs used a "spread pricing" approach to their fees. Under this approach, a PBM would reimburse a pharmacy a certain amount (e.g., $10) for a particular drug, but would charge the health plan a larger amount (e.g., $11). The PBM would then keep the difference (e.g., $11 - $10 = $1) as revenue. Sometimes PBMs also kept prescription drug manufacturer rebates and other amounts as additional revenue. Many times, these dollar amounts were not disclosed in the contract between the PBM and the employer or other plan sponsor. That is, the dollar amounts were essentially "hidden" and not transparent.

This type of pricing is still very prevalent. However, over time, more and more information about prescription drug pricing has become available. Thanks to consumer shopping tools and technology, plan enrollees are more empowered than ever with knowledge of their employee benefits and the cost of prescription drugs. Plan sponsors are also generally pleased that this additional pricing information has become available.

However, there is a downside to this additional pricing information becoming available. Plan enrollees now have a greater ability to use that pricing information and assert that plan sponsors have not prudently managed prescription drug costs. In other words, it opens the possibility that plaintiffs' lawyers will "second guess" the decisions of plan fiduciaries and claim that plan fiduciaries failed to control the costs charged by PBMs, or that plan sponsors otherwise mismanaged the prescription drug plan. Below, we discuss an important new class action lawsuit, "Lewandowski vs. Johnson and Johnson" (available at. https://s3.documentcloud.org/documents/24408435/lewandowski-v-johnson-and-johnson.pdf), which makes these types of arguments.

How have plan sponsors managed this type of risk in the past? Many plan sponsors elect to utilize external brokers or consultants to help navigate and negotiate benefit plans with medical, dental, and pharmacy carriers. These arrangements can vary in terms of scope of services provided, the means in which negotiations take place, and even how the broker/consultant receives compensation for their respective services. Transparency is key to understanding who is getting paid, how they're getting paid and if there are concerns with a broker's/consultant's incentives.

The Johnson and Johnson lawsuit highlights a concern with this approach. According to the complaint, many employee benefit consultants ("EBCs") receive additional, undisclosed compensation. That compensation can come directly from the PBM – i.e., the entity whose costs the EBC is supposed to help monitor. According to the complaint, some EBCs insist that they receive additional compensation – perhaps $1 per prescription, perhaps over $5 per prescription – merely for allowing the PBM the chance to bid on the plan sponsor's PBM work. This type of arrangement raises significant conflict of interest concerns. We believe it's critical for all plan sponsors to align with a broker/consultant who is independent from third-party incentives and can provide an unbiased viewpoint.

Another interesting piece of the Johnson and Johnson lawsuit is the aspect of plan sponsors having to navigate and explore an open RFP process. One of the allegations in the lawsuit is that "the process by which Defendants chose Express Scripts as the Plans' PBM was not an open RFP process and did not consider the full range of available options for PBM services". It's not clear if this (or any other allegation in the complaint) is true. However, Prism believes it is imperative that plans – and the fiduciaries of plans – explore potential PBM partners in a fair and thorough RFP process. This should include partnering with an independent broker/consultant who properly evaluates a potential PBM partner based on both financial value and qualitative scoring.

This due diligence process should also be reflected in the contract between the PBM and the plan sponsor. PBM contracts should include the right to conduct annual market checks to ensure the pricing remains market-competitive throughout the term of the contract and provides the greatest value to your members. Without the ability to conduct annual market checks, plan sponsors are at greater risk for increasing cost and less favorable terms and conditions. And, if lawsuits like the Johnson and Johnson lawsuit become more common, this risk will increase dramatically.

Another allegation in the lawsuit was that Johnson and Johnson did not consider the main alternative to "spread pricing" PBMs: PBMs who use "pass-through" pricing. These PBMs "pass through" many or all of the rebates they receive. Their compensation structure is, in general, more-fully-disclosed than the compensation structure of spread pricing PBMs.

While we agree that pass-through arrangements may offer the best opportunity for aligned incentives, not all PBMs administer pass-through pricing in the same manner. Some PBMs may state they're pass-through but then simply manage to the proposed discount guarantees without the opportunity for over-performance ever being provided to the plan and its members. To protect against this risk, a plan sponsor needs strong, clear language in its PBM contract allowing the plan sponsor (or its vendor) the ability to review all pricing, discount, and fee data, along with clear guarantees related to those items.

Once a good contract is in place, the plan sponsor then should verify that the PBM is actually satisfying the terms of the contract. While some large plan sponsors with sophisticated in-house audit personnel might be able to do that analysis themselves, most plan sponsors will use an experienced consultant, such as Prism Health Group, for this work.

With strong contractual language that provides price and performance transparency, and robust auditing and monitoring, a plan sponsor should feel comfortable with either a pass-through or spread pricing PBM model.

While specialty vendors continue to emerge as a carve-out solution, it's not necessarily the best option for plan sponsors or their members. Prism Health Group has witnessed situations where a client carved-out its specialty drug services to a third-party vendor and the client's costs went up dramatically, as the third-party wasn't able to provide the same level of competitive pricing nor member services as the prior PBM. From a member perspective, carving-out specialty can also bring risk to members as it creates another vendor for members to engage and interact with, in an already complex healthcare environment. While acting as a prudent fiduciary and exploring all relevant options (even specialty carve-out) is wise, it doesn't mean the fiduciary must choose the lowest-cost option. This is where a plan sponsor needs an independent consultant to help validate ALL bidder proposals and aid the plan sponsor in making an informed decision that's best for their specific circumstance.

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PRISM HEALTH GROUP

Call to Action & Recommended Best Practices

Thoroughly Evaluate Market Options

Effectuating a thorough buying exercise by way of Request for Proposal (RFP) or similar Procurement effort will ensure you're aware of all possible options, their respective capabilities, and overall fit for your organization.

Document Your Process

Given the heightened degree of scrutiny on Plan Sponsors' procurement practices, methods, and outcomes, diligent documentation efforts will aid in validating a fiduciary's genuine intent to establish an independent and thoughtful outcome.

Contract is King

When you've identified your desired PBM partner, place added emphasis to secure aligned terms and definitions, transparency of fees and how pricing is applied, as well as verifiable service guarantees.

Trust, Yet Verify

Once you've secured a solid contract with your PBM, it's equally important that you consistently audit the PBM's performance as compared to their contractual commitments.

Watch the Market

Monitor market conditions (e.g., when drug prices change significantly, or a new drug enters the market) to verify that your plan continues to receive competitive pricing – (i.e., perform a "market check" on prices periodically).

If you're seeking a trusted advisor or consultant, consider the following criteria:

- Align with an Independent Pharmacy Consultant.
- Confirm whether or not your broker/consultant owns or operates a Consortium, Coalition, or Cooperative.
- Demand by attestation that any/all compensations, commissions, fees, etc., be fully disclosed.
- Ensure your broker/consultant understands and is aligned with your organizational goals and objectives.
- Never hesitate to ask questions and perform your own due diligence prior to making final plan decisions.

Conclusion & Final Thoughts

It will be interesting to watch the "Lewandowski vs Johnson & Johnson" lawsuit play out. The complaint is interesting and has sparked a number of (probably overdue) questions from plan sponsors about the costs of their prescription drug plans. We also suspect that Johnson and Johnson will have a number of defenses available to it (e.g., the actual utilization of some of the high-cost drugs may have been negligible or non-existent – so, plan participants may not have been harmed by the high costs).

In any event, the lawsuit properly sparks a number of questions about a plan fiduciary's responsibility for benefits management, who a plan partners with to administer benefits and what type of broker/consultant partner provides unbiased opinions and recommendations.

*The insights and guidance provided herein is not legal guidance or counsel.

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