

Excessive Fee Cases: Not Just for Retirement Plans Anymore

A Practical Guidance® Article by Chelsea Ashbrook McCarthy, Stacy Hooper, Sara Benson, and Tahany M. Alsabahi, Holland & Knight LLP



Chelsea Ashbrook McCarthy
Holland & Knight LLP



Stacy Hooper
Holland & Knight LLP



Sara Benson
Holland & Knight LLP



Tahany M. Alsabahi
Holland & Knight LLP

This article describes a recent wave of cases that has attempted to apply the theory of liability for retirement plan excessive fee cases to health plans.

Highlights

- A recent wave of cases has attempted to apply the theory of liability for retirement plan excessive fee cases to health plans – specifically, arrangements with pharmacy benefit managers.
- Though the cases thus far have been dismissed for lack of standing, health plan sponsors should consider reviewing their prescription drug arrangements (particularly the associated costs) and documenting a prudent fiduciary process in selecting and monitoring the health plan's service providers.
- This Holland & Knight alert examines how the application of such fees is playing out in various court cases.

As discussed by Holland & Knight attorneys in the [Winter 2024 Benefits Law Journal](#) and in alerts on [July 20, 2020](#), and [Sept. 22, 2022](#), plan sponsors and fiduciaries have seen lawsuits filed alleging that they paid excessive administrative and recordkeeping fees and, in turn, violated their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA).

In a recent trend, plan sponsors have seen this theory of liability applied to health and welfare plans, specifically in regard to the cost of prescription drug benefits and fees paid to pharmacy benefit managers (PBMs). Although those lawsuits have not made it past the pleadings stage, the claims serve as reminders to plan sponsors to scrutinize their fee arrangements with their health and welfare plan service providers, including PBMs.

Background on Excessive Fee Cases

For many years, retirement plan participants have raised claims against plan sponsors and plan administrators claiming that the administrative and recordkeeping fees paid by the plan were excessive. Plan participants typically claim the plan fiduciaries breached their fiduciary duties by allowing the plan to pay excessive fees in violation of ERISA Section 404.

In a group of recent cases, participants have taken this theory and turned their attention to fees paid to PBMs under health and welfare plans. The decisions issued to date have dismissed the cases for lack of standing, but the courts' decisions do leave open the possibility that the trend will continue.

Third Circuit

In *Knudsen v. MetLife Group*, the U.S. Court of Appeals for the Third Circuit addressed one of the first challenges to allegedly excessive fees associated with a health plan's prescription drug benefits. The court upheld the trial court's determination that the plaintiffs lacked standing.

MetLife Group served as the plan sponsor and administrator of an employee benefit plan that provided medical and prescription drug coverage. The plan was self-funded, meaning the plan sponsor was responsible for paying the claims and bearing the financial risk associated with making those payments. The plan sponsor's PBM negotiated volume discounts and rebates with drug manufacturers, and the plan sponsor applied those rebates toward plan expenses.

The named plaintiffs – participants in the plan – alleged that the plan sponsor violated ERISA by diverting the drug rebates from the plan to itself, causing participants to pay higher out-of-pocket costs, mainly in the form of premiums. The plaintiffs claimed that had the sponsor not taken the rebates for itself, the plan sponsor may have reduced ongoing contributions, copays and co-insurance for pharmaceutical benefits and may have distributed rebates to participants in proportion to their contributions to the plan.

The U.S. District Court for the District of New Jersey dismissed the plaintiffs' complaint for lack of standing, concluding that the plaintiffs had not pled facts that demonstrated individualized injury. The court concluded that the plan participants had no legal right to the general pool of plan assets and any asserted injury to the plan was not an injury to plaintiffs themselves.

The Third Circuit affirmed on appeal. The appellate court concluded that the plaintiffs' allegations were insufficient to show that the purported violative conduct was the but-for cause of their injury – namely, an increase in their out of pocket costs.

New Jersey District

In *Lewandowski v. Johnson and Johnson*, No. 3:24-cv-00671, the U.S. District Court for the District of New Jersey, which sits in the Third Circuit where *Knudsen* was pending, had another opportunity to address a claim for allegedly excessive fees in connection with a plan's PBM arrangement. The district court again dismissed for lack of standing.

Lewandowski had a nearly identical factual premise to *Knudsen*. The plaintiff, a participant in Johnson & Johnson's sponsored medical plans, brought suit against the plans' sponsor and administrator, alleging that the defendants mismanaged the prescription drug benefits program, causing the ERISA plans and participants to pay higher prescription drug prices, premiums, deductibles, coinsurance and copays.

The plaintiff cited specific examples of the higher payments for certain prescription drugs, including a detailed chart illustrating how much the plans paid for a selection of certain drugs, compared to a pharmacy acquisition cost. The plaintiff alleged that no prudent fiduciary would agree to make its plan and participants pay a price that is significantly higher than the price available to an individual who walks into a pharmacy and pays out of pocket. The plaintiff alleged two distinct injuries – one in the form of paying higher premiums and another in the form of higher out-of-pocket costs for medication.

The defendants moved to dismiss, asserting that the plaintiff did not allege a concrete harm or injury-in-fact because she did not allege that she was improperly denied benefits under the plan. The defendants argued that the plaintiff did not suffer any injury because she would have paid the exact same amount in total out-of-pocket costs each year she has participated in the plan, regardless of the cost of the drugs.

The district court agreed and found that the plaintiff's alleged injury – that she paid more in premiums due to the defendants' purported breach of fiduciary duty during the negotiation process of the plans – did not support standing because the outcome of the suit would not affect the plaintiff's future benefit payments.

The district court also addressed the plaintiff's claimed injury from allegedly paying more out of pocket for medications that were available at a lower cost. Though the court concluded that the plaintiff had alleged an injury traceable to the defendants' alleged ERISA violations, the plaintiff's purported injury was not redressable. The plaintiff had reached her prescription drug cap for each year she asserted in the complaint. Thus, even if the defendants were to reimburse the plaintiff for her out-of-pocket costs on a given drug, that money would be owed to her insurance carrier (technically, the employer) to reimburse it for its expenditures on *other* drugs that same year, not to the plaintiff.

Based on these findings, the court dismissed for lack of standing but allowed the plaintiff the ability to try and replead. The plaintiff filed an amended complaint on March 10, 2025.

District of Minnesota

Following the reasoning from the Third Circuit cases, the U.S. District Court for the District of Minnesota recently dismissed another challenge to PBM fees on standing grounds in *Navarro v. Wells Fargo & Company*.

The facts in the *Navarro* case are similar to the other cases that were filed. The plan sponsor moved to dismiss for lack of standing and failure to state a claim. The court dismissed for lack of standing (and did not address the alternative grounds for dismissal).

In reaching its conclusion, the court stated that, “in theory,” it agreed with plaintiffs’ theory of standing: that they were each individually harmed in the form of high out-of-pocket costs and increased monthly premiums for coverage. But, the court countered based on the actual facts alleged that the plaintiffs’ alleged harm was too speculative and not redressable. The court decision addressed the plaintiffs’ claim under both 29 U.S.C. § 1132(a)(2) and (a)(3).

The court reasoned that the plaintiffs lacked standing for their claims under 29 U.S.C. § 1132(a)(2) because “the connection between what Plan participants were required to pay in contributions and out-of-pocket costs, and the administrative fees the Plan was required to pay the PBM, is tenuous at best.” The plan sponsor was vested with sole discretion to set participant contribution rates. The court also rejected the plaintiffs’ proposition that the court could alter the terms of the plan to require the plan sponsor to alter participants’ contributions amounts, stating that it is “unaware of any mechanism by which it could force Wells Fargo to reduce participant contribution rates,” nor did the plaintiffs identify one.

The court concluded that the plaintiffs lacked standing under Section 1132(a)(3) because they were no longer participants in the plan and had no stake in the prospective injunctive relief they requested. The court did not give the plaintiffs the chance to file an amended complaint and closed the case after issuing its opinion.

Key Takeaways

Though the current challenges to PBM fees have not been successful to date, attacks on the fees and expenses paid by health and welfare plans are likely to continue. Lawsuits challenging fees paid by retirement plans gained significant traction in the courts and often resulted in settlements in

the millions. As the wave of those suits recedes, health and welfare plans are becoming the next target. The recent challenges to PBM fees act as a reminder to plan sponsors to scrutinize the fees paid to all plan service providers.

Best practices may include:

- reviewing fiduciary governance of the health plan and considering a committee structure with periodic meetings and documentation of activities
- documenting the selection process and ongoing oversight of all health plan vendors, particularly PBMs and other third-party administrators
- conducting a fulsome review of the services provided to the health plan and associated costs, including indirect costs, for prescription drug services

PBM arrangements can be complex – knowledgeable consultants and legal counsel may be of assistance to help understand the cost structure (including rebates, performance guarantees, etc.) and how costs, both direct and indirect, are passed through to the health plan.

If you would like assistance in evaluating your plan’s governance practices, ensuring that your plan complies with ERISA or determining how these lawsuits might impact your plan, contact the authors or another member of Holland & Knight’s [Executive Compensation and Benefits Team](#) or [ERISA Litigation Team](#).

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Related Content

Cases

- *Navarro v. Wells Fargo & Co.*, No. 24-cv-3043 (LMP/DTS), 2025 U.S. Dist. LEXIS 53444 (D. Minn. 2025)
- *Lewandowski v. Johnson & Johnson*, Civil Action No. 24-671 (ZNQ) (RLS), 2025 U.S. Dist. LEXIS 12732 (D.N.J. 2025)
- *Knudsen v. MetLife Grp., Inc.*, 117 F.4th 570 (3d Cir. 2024)

Chelsea Ashbrook McCarthy, Partner, Holland & Knight LLP

Chelsea Ashbrook McCarthy is an attorney in Holland & Knight's Chicago office. Ms. McCarthy routinely handles highly complex financial-based litigation matters under the Employee Retirement Income Security Act of 1974 (ERISA) and in the areas of real estate and class action defense.

As a partner in the firm's Litigation and Dispute Resolution Practice and member of the ERISA Litigation team, Ms. McCarthy blends nearly two decades of experience in complex litigation matters with a keen interest in each client's business objectives to create a tailored approach to achieve them. Her experience advocating through all phases of litigation helps ensure that she advises on the best strategy – be it the means for obtaining a quick resolution or driving trial-focused litigation.

With a particular focus on ERISA litigation, Ms. McCarthy defends plan sponsors, company boards of directors, selling shareholders and fiduciaries in ERISA putative class actions involving employee stock ownership plans (ESOPs) and 401(k) plans alleging claims of breach of fiduciary duty and engaging in prohibited transactions. She also represents clients in regulatory investigations by the U.S. Department of Labor (DOL) for alleged violations of ERISA. Ms. McCarthy is a member of the ESOP Association's Legal and Regulatory Committee, the American Bar Association's (ABA) Labor and Employment Section Employee Benefits Committee and a frequent speaker and publisher on ERISA issues. She is a chapter editor of the Bloomberg ABA Treatise: Employee Benefits Law.

Ms. McCarthy's class action experience extends beyond the ERISA space. She has defended clients in putative class actions involving claims under the Illinois Consumer Fraud Act (ICFA), Illinois' Biometric Information Privacy Act (BIPA) and other state comparable statutes, as well as federal Truth-in-Leasing Regulations governing motor carriers.

Ms. McCarthy also has significant experience handling claims for breach of contract, fraud, breach of fiduciary duty and other business torts across a variety of industries. She represents companies and individuals in the prosecution and defense of restrictive covenant and trade secret claims, frequently representing clients in expedited injunction proceedings. She routinely advises clients in financial services disputes, with a particular focus on distressed real estate and commercial foreclosures. Her real estate experience extends to commercial lease disputes. And, as the client development leader for Holland & Knight's Real Estate and Hospitality Industry Sector Group, Ms. McCarthy utilizes her years of experience with real estate disputes to collaborate with attorneys across practice areas to support clients in the real estate and hospitality industries.

Ms. McCarthy advocates for clients through all phases of litigation, from pre-suit counseling through appeals. She has successfully prevailed on and defended claims for preliminary injunctive relief and has tried cases to verdict in state and federal court. She is a member of the trial bar of the U.S. District Court for the Northern District of Illinois and has argued before the U.S. Court of Appeals for the Seventh Circuit.

In addition to her legal practice, Ms. McCarthy is an active community volunteer and serves as a member of the board of directors of the YWCA of Metropolitan Chicago.

Prior to joining Holland & Knight, Ms. McCarthy clerked for the Honorable Richard L. Young in the U.S. District Court for the Southern District of Indiana.

Stacy Hooper, Partner, Holland & Knight LLP

Stacy Hooper is an attorney in Holland & Knight's Nashville office. She focuses her practice on executive compensation and employee benefits.

Executive Compensation and Employee Benefits. Ms. Hooper represents employers in a range of employee benefit plan matters, including health plans, retirement plans, employee stock ownership plans (ESOPs), equity and deferred compensation plans, and executive compensation arrangements. She has particular experience with health and welfare benefit plan compliance and frequently assists clients in resolving issues related to the Affordable Care Act.

Ms. Hooper brings a practical approach to solving complex issues. Her practice includes advising on a broad range of employee benefits compliance matters (including structuring and drafting employee benefit plans); negotiating service provider agreements on behalf of plan sponsors; and navigating U.S. Department of Labor and Internal Revenue Service (IRS) audits and investigations. Additionally, she regularly advises on the employee benefits aspects of corporate transactions for clients ranging from small employers to public companies.

Industry Focus. Ms. Hooper has experience representing clients in a broad range of industries, but is particularly well versed in matters related to the healthcare and retail industries.

Representative Experience

- Successfully resolved several multi-million dollar Affordable Care Act 'employer shared responsibility' penalties, including an approximately \$70 million penalty for a Fortune 500 Global manufacturing company and an approximately \$32 million penalty for an international facilities management company
 - Reduced or eliminated IRS penalties on behalf of multiple clients with respect to Affordable Care Act filing issues
 - Advised regarding the Employee Retirement Income Security Act (ERISA) fiduciary implications of restructuring a complex group health care purchasing arrangement
 - Successfully guided an employee stock ownership plan (ESOP)-owned client through an on-site IRS audit
 - Assisted with the successful defense of mental health parity litigation for a Fortune 500 client
 - Negotiate and advise on complex employee benefits diligence and integration matters for mergers, acquisitions, spinoffs and divestitures
 - Frequently conduct controlled group and affiliated service group analyses to determine appropriate benefit plan structure, with particular experience structuring arrangements for physician groups and management services organizations (MSOs)
 - Regularly counsel with respect to the compliance obligations of fully insured multiple employer welfare arrangements (MEWAs)
 - Counsel client human resources and benefits teams regarding ERISA fiduciary and Health Insurance Portability and Accountability Act (HIPAA) compliance responsibilities
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Sara Benson, Associate, Holland & Knight LLP

Sara Benson is a litigation attorney in Holland & Knight's Washington, D.C., office. Ms. Benson focuses her practice on commercial litigation and dispute resolution matters. Ms. Benson has assisted clients in complex commercial disputes, purported class actions, Employee Retirement Income Security Act (ERISA) and Employee Stock Ownership Plans (ESOPs) and transactions, Fair Housing Act (FHA) investigations, commercial landlord tenant matters and D.C. real estate disputes, among others.

Ms. Benson's recent representative matters include:

- participating in a team representing a privatized military housing operator defending against purported class actions alleging mold exposure to residents on U.S. military bases
- defending multifamily housing developers in actions involving compliance with the FHA and Americans with Disabilities Act (ADA)
- advising clients on accessing records via the federal Freedom of Information Act (FOIA) and appealing adverse FOIA decisions
- navigating fiduciary duty claims and excessive fee claims under ERISA
- litigating commercial landlord tenant matters
- assisting clients in domestic trademark registration and prosecution

Prior to joining Holland & Knight, Ms. Benson served as a judicial law clerk with the Honorable Michael J. Newman of the U.S. District Court for the Southern District of Ohio.

During law school, Ms. Benson gained experience advocating for community groups at the school's First Amendment Clinic. She also served as a notes editor of the Washington University Jurisprudence Review. In addition, she served as a teaching fellow for the Marshall-Brennan Constitutional Literacy Project.

Tahany M. Alsabahi, Associate, Holland & Knight LLP

Tahany M. Alsabahi is an attorney in Holland & Knight's Chicago office and a member of the firm's Litigation and Dispute Resolution Practice. Ms. Alsabahi focuses her practice on complex commercial disputes in state and federal courts, including representations and warranties insurance (RWI), Employee Retirement Income Security Act (ERISA), employee stock ownership plan (ESOP) transactions and purported class actions. Ms. Alsabahi has extensive experience representing clients in RWI claims investigations, breach of fiduciary duty actions, including ERISA- and ESOP-related litigation, and breach of contract claims.

In addition to her litigation practice, Ms. Alsabahi serves as the vice chair of the firm's Middle Eastern/North African (MENA) Affinity Group, as well as a member of the associates committee and diversity, equity and inclusion (DEI) committee for the Chicago office.

Before joining Holland & Knight as an attorney, Ms. Alsabahi was a summer associate with the firm and gained experience in bankruptcy, shareholder disputes, professional responsibility and antitrust matters.

During law school, Ms. Alsabahi mediated employment and housing discrimination cases before the U.S. Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH). Ms. Alsabahi also served as the senior articles editor of the Southern California Interdisciplinary Law Journal, co-president of the Womxn of Color Collective and professional development chair of the Barbara F. Bice Public Interest Law Foundation. In addition, she was a founding member and inaugural vice president of the Middle Eastern and North African Law Student Association (MENALSA).

Prior to joining the legal profession, Ms. Alsabahi worked in higher education, specializing in inter- and intra-group dialogue and conflict resolution.

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