On Monday, a first-of-its-kind lawsuit was filed in a federal district court in New Jersey, alleging that an employer (Johnson & Johnson) had violated its fiduciary duty by allowing a PBM to overcharge the plan and its members for drugs. Like the famous first shot at the Battle of Lexington, this single legal volley could be the precursor to a barrage of similar lawsuits and challenges across the industry.

It's a lawsuit that many experts saw coming, especially following the enactment of the Consolidated Appropriations Act, which expanded fiduciary responsibilities for employers and focused everyone's attention on PBM finance as an area of potential concern. And like the CAA, the lawsuit also takes a critical look at the role of the employee benefit consultant in PBM contracting and procurement.

The entire lawsuit is worth a read -- the first half serves as an excellent crash course on the PBM industry in general. The second half details the allegations of the plaintiff:

- To make the case that the employer mismanaged the program, the lawsuit focuses on Generic Specialty medications as an area of rampant spread price manipulation by the PBM.

- Numerous examples are provided, comparing the drug cost under the employer plan (presumably gleaned from the PBM's drug price lookup tool) against the published NADAC for the product. They also include several retail "cash price" comparisons (which appear to be screenshots from GoodRx or a similar site).

- Some of the examples show a PBM spread markup of over 10,000% vs. NADAC. Two highlighted examples are teriflunomide (NADAC of $82 vs. PBM Cost of $16,822 for 90-day supply) and imatinib mesylate (NADAC of $160 vs. PBM Cost of $16,398 for 90-day supply). A summary table of Generic Specialty drugs and their comparative costs is shown on page 43 of the document.

- The lawsuit also argues that the plan mismanaged assets by steering patients to the PBM-owned specialty pharmacy when a drug was available at a lower cost via retail. To demonstrate this, they provide side-by-side screenshots from the PBM's drug price lookup tool, showing a lower member copay at the PBM's specialty pharmacy despite a higher gross cost.

- After spelling out the alleged fiduciary violations, the lawsuit takes us through a highlight reel of articles, reports, and white papers from the past decade related to PBM business practices, suggesting that a "prudent person" (in the parlance of ERISA) should be aware of the spread pricing issues raised by the plaintiff.

- The lawsuit provides examples of large plan sponsors that have taken steps to counteract traditional PBM tactics (moving to pass-through models, taking more control of formulary, etc.). Capital Rx gets an unsolicited shout-out on page 64 of the lawsuit, excerpted from a recent client interview from the WSJ.

Key considerations for benefit plan sponsors:

- The price manipulation tactics described in the lawsuit are extremely commonplace in the industry. Plan sponsors should review their current PBM contracts to determine whether the issues raised in this lawsuit might also apply to their own PBM arrangement.

- There is a near-term potential for copycat lawsuits to emerge, so plan sponsors may want to share the summary table of Generic Specialty drugs from page 43 of the lawsuit with their PBM or consultant to have them explain the current contracted pricing logic for these products.

Johnson & Johnson has already indicated that they will submit a motion to dismiss the lawsuit. All eyes will be on the court's assessment of that motion, as it will be a good leading indicator of the traction that other similar lawsuits may receive in the future.

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