

## **Lewandowski v. Johnson & Johnson**

*Chapter Two: The Judge Letters, Memorandum on Dismissal – We’ve only just begun...*

### **On Your Mark, Get Set, Go!**

In Chapter 1, we introduced this lawsuit as a game changer. Considering the extensive writings and continuous chatter in the group health plan industry, regardless of the outcome, this case has impact. It is a proverbial wake-up call to those in the industry who offer, consult on and provide group health plans with structures that separate self-funded medical benefits from prescription drug delivery.

To be helpful to those in the industry who really need to follow this litigation and assess its impact, this Chapter addresses not just the substance of the claims, but also its procedural status. Both have impact on the industry, as the parties and the federal district court, sort out the claims.

### **Procedural Status and the Motion to Dismiss**

In general, once the lawsuit, or “Complaint” is filed, the defendant must respond. That response may be in the form of an Answer, in which the defending party responds line-by-line to the Complaint. Or, when a defendant believes that all or part of the lawsuit is legally deficient in some way, like in this case, the defendant may file a motion to dismiss it. A motion to dismiss is subject to a number of rules and standards that we will address, as they may be necessary. If a defendant fails to respond at all to the lawsuit, the court can enter a default judgment. Of course, that would be very bad, but it does not apply here.

On March 1, 2024, the parties jointly filed a stipulation regarding preliminary matters in the case, which was approved by the court. This stipulation involved the submission of a letter to request a pre-motion conference, and it called for the movement of the deadlines for the Defendants to file a motion to dismiss the lawsuit.

On March 21, 2024, Defendants, through counsel, sent a letter to Judge Quraishi, the federal judge assigned to the case. The Local Rules of this court, require a pre-motion conference in regard to the type of motion that Defendants wished to file. As such, they sent the letter to the Judge. In that letter, Defendants provide a substantive preview of Defendants’ position that the Complaint is fully dismissible on motion. Sensibly, Plaintiff responded on April 4, 2024, to explain her view that the Defendants were completely wrong.

On April 5, 2024, Judge Quraishi waived the requirement for the pre-motion conference and directed the Defendants to file their motion. On April 19, 2024, Defendants filed a Notice that it would file its Motion to Dismiss on May 20, 2024 and submitted its Memorandum in support of that motion. Defendants also moved to strike the jury demand. Defendants’ Memorandum is a lengthy, detailed analysis and presentation of the Defendants’ position that the lawsuit should be dismissed (and that the jury demand be denied).

On April 30, 2024, the parties again filed a joint stipulation on procedures. The parties agreed that the Plaintiff would be permitted to file an Amended Complaint, as of right, under the rules. In addition, the parties agreed to remove the individual defendants listed in the lawsuit. Johnson & Johnson (“J&J”) has stipulated that it would be responsible for any judgment entered, and as such, Plaintiff agreed to remove the individual Defendants from the Amended Complaint.

Also, the Defendants’ pending motion to dismiss, was agreed to be moot – meaning that it is no longer relevant. But of course, Defendants can (and will) refile a motion to dismiss after the Amended Complaint is filed.

## **Defendants’ Substantive Points and What’s Likely Going on Here**

With a new Complaint to be filed, in some sense, the case is starting all over again. But, there is some learning from the Defendants’ letter and their Memorandum on dismissal that are worth a review, and that Plaintiff is no doubt taking into account for purposes of a First Amended Complaint.

Of note, is that Defendants provide with the Motion to Dismiss, a copy of the purported J&J Rx Plan prescription drug Plan Document/Summary Plan Description. We will focus on this documentation in Chapter 3. Preliminarily, we will have a great deal to say about what J&J has submitted for its supposed plan documentation for the prescription drug plan.

Turning to the Defendants’ position on dismissal, there are two main categories of defenses to this lawsuit, that in J&J’s view, warrants a dismissal of the lawsuit. The first is the concept of “standing.” This refers to the right of the Plaintiff party to bring the lawsuit at all. Standing in this regard is actually a concept from Article III, of the U.S. Constitution, that requires a Plaintiff to have an injury in fact. The second is the requirement that Plaintiffs assert a “plausible” claim. We commented in Chapter 1, that in a lawsuit filing, the Plaintiff must meet certain minimal pleading rules to establish their claims. This second defense addresses whether the Plaintiff has actually met those minimum pleading rules, in substance.

## **The Asserted Standing Defense and the Response**

In Chapter 1, we commented that the Lewandowski lawsuit is a game changer. We noted that it employs concepts that are similar to lawsuits successfully filed in the retirement plan industry that started decades ago and continue to this day. The retirement plan fee, cost and expense cases filed, proved to be successful in many cases for Plaintiffs.

Defendants first assert a standing argument that is directly borrowed from the retirement plan lawsuits. Citing to the case of *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615 (2020), a U.S. Supreme Court case, Defendants similarly assert that there is no ERISA cause of action here, because the benefits under the J&J Rx Plan would not change as a result of the assertions in this case. The *Thole* case dealt with alleged improprieties in the investments in a U.S. Bank sponsored defined benefit pension plan. Defined benefit pension plans provide for a fixed monthly benefit, rather than the accumulated funds in a 401(k) or other defined contribution plan. In sum, the Supreme Court held that as long as a plan continues to pay the required fixed monthly pension

benefit, as promised, it doesn't really matter if the fiduciary handled investments improperly. Since the plaintiff in *Thole* had no evidence that their monthly pension benefit would change, despite any improper fiduciary conduct, there was no injury. Thus, there was no claim.

In this case, Defendants similarly assert that Lewandowski's J&J Rx Plan benefits were delivered, notwithstanding any asserted mismanagement. Since Plaintiff was going to receive her benefits regardless of any mismanagement, like in *Thole*, Defendants assert that Lewandowski has no standing, because she has no injury.

Not surprisingly, in response, Plaintiff asserts that this position is specious. Plaintiff argues that Lewandowski's claim is not that she did not get her benefits. Her claim is that Defendants failed to monitor the cost to ensure that the costs under the J&J Rx Plan were reasonable. Plaintiff has an asserted personal stake, because she pays monthly employee contribution amounts, and she pays co-pays, coinsurance, and deductibles for all of her prescriptions. As a result, as her counsel describes it, her drug benefit is "no free lunch." To contrast Defendants' assertions, Plaintiff further argues that Lewandowski does in fact allege monetary injury, because Lewandowski is directly responsible for a portion of her prescription drug costs and her monthly employee contribution amounts. Adding to this, Plaintiff alleges that the increased plan expense requirements, reduce her wages – adding to the asserted monetary injury.

In a similar vein, Defendants also compare Plaintiff's claims to those in *Knudson v. MetLife Grp., Inc.* 2023 WL 4580406 (D.N.J. July 18, 2023)(appeal pending). *Knudson* is a plan rebate case in which the plaintiff was denied the ability to assert entitlement to a share the rebates paid back to the plan from the insurer. Plaintiff responded by distinguishing these cases from Lewandowski's claims and asserted the other monetary losses noted above.

Also on the subject of injury, Defendants assert that Plaintiff lacks standing because she never paid for any of the 42 generic specialty drugs cited in the Complaint, that were allegedly too expensive. In other words, she wasn't harmed by these pricing errors and or pricing differentials. Plaintiff counters by asserting that Lewandowski's claims are not limited to these drugs and that she is not required by law to limit her claims in such a manner. She asserts direct monetary injury as a result of Defendants' mismanagement of the plan.

### **Plausible Claims and Plaintiff's Assertions**

Turning to the Defendants' plausibility argument, as noted above, the concept of plausibility is a pleading standard designed to ensure that a lawsuit has minimum factual substance in order to demonstrate a valid claim at law. Defendants list a number of reasons why the lawsuit fails to meet the plausibility standard. Defendants assert that since J&J bears the lion's share of the J&J Rx Plan cost, it cannot be inferred that the selection of Express Scripts as the PBM was defective. They argue that J&J has every incentive to negotiate the overall deal for plan price and services, because it pays most of the Rx costs. Defendants further assert that cost disparities, like those alleged in the Complaint, are not sufficient to state a claim in this instance. Defendants argue that Plaintiff must be able to show that the costs were excessive through some type of an apples-to-apples type of comparison, that is not present.

In response, Plaintiff asserts that while the fiduciary inquiry focuses on process, black-letter ERISA law at the pleading stage, permits the court to infer that the process was flawed, based upon the allegations. Further, Plaintiff asserts that she is not required to allege, directly, every way in which the process was deficient. For proof, Plaintiff highlights that some Plan participants have to pay excessive drug cost of over 10,000% above a reasonable amount. Plaintiff asserts that the alleged extreme overpayments “strain the credulity” of the position that J&J got the best overall deal.

Again, Plaintiff seems to borrow from the retirement plan industry 401(k) plan excessive fee cases. Plaintiff asserts the notion that Defendants failed to monitor and control fees and costs, which resulted in unreasonably high cost to participants. (This should sound familiar to those who know of the 401(k) plan excessive fee cases). Predictably, Plaintiff also asserts that the Complaint does present apples-to-apples comparisons by using examples with the same equivalent drugs, and demonstrates the improper differentials in cost for the exact same drug, to show facts in support of mismanagement of the J&J Rx Plan.

### **Where, Oh Where, Are the J&J Plan Document and Summary Plan Description?**

The failure to produce to Lewandowski, the required Plan document and Summary Plan Description remains a constant assertion in this continued battle. Defendants’ position is that there was no written request. As such, there is no liability for the failure to produce these documents on request under ERISA §104(b)(4)(enforceable with penalties under ERISA §502(c).

Once again, Plaintiffs assert that an electronic mail request was made and that electronic mail is a valid method of requesting the Plan document and Summary Plan Description, as a written request under ERISA §104(b)(4). She asserts that the failure to produce the documents upon request, warrant the claims and related statutory penalties.

Importantly, the purported Plan Document and Summary Plan Description was included in Defendants’ Memorandum in Support of its Motion to Dismiss. ***Stay tuned for Chapter 3, in which we will provide a comprehensive review of that documentation!***

### **What Next?**

As we write, the First Amended Complaint was just filed and we will scour it for new assertions and new statements of claims.

In Chapter 3, we give the J&J Plan Document/Summary Plan Description an examination with our Prescription Drug Plan Document/SPD Compliance Checklist. Stay tuned for what will be a very interesting and possibly unanticipated result!

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