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# ERISA Group Health Plan Fees and Expenses: New Challenges

New Disclosure Obligations, Recent Class Actions Challenging Indirect Compensation, and Challenges for 401(k) and 403(b) Plans

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THURSDAY, DECEMBER 14, 2023

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Today's faculty features:

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# ***ERISA Group Health Plan: New Litigation Challenges***

**Andrew Holly & Nick Bullard**

**December 14, 2023**

# Dorsey Presenters



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**“Occasionally, a statute comes along that is so poorly contemplated by the draftspersons that it cannot be saved by judicial interpretation, innovation, or manipulation. It becomes a litigant's plaything and a judge's nightmare. ERISA falls into this category.”**

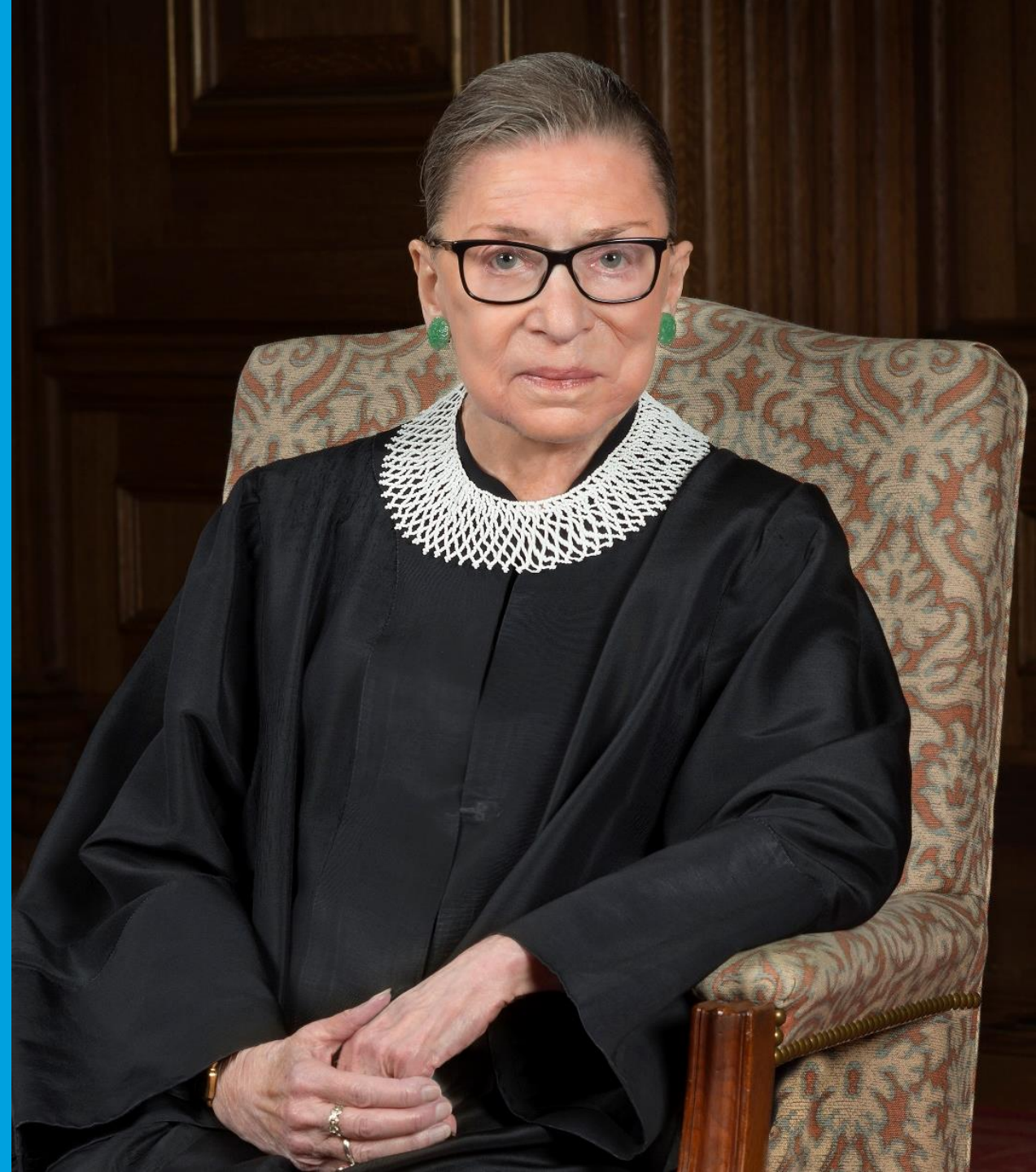
~ The Honorable William Acker, U.S. District Court Judge, N.D. Ala.

# ERISA



Federal law governing nearly all employee benefit plans in the United States, including group health plans, pension, disability, severance, etc.

- ✓ A “comprehensive and reticulated” statute.
- ✓ Preempts all state laws that “relate to” an employee benefit plan.
- ✓ ERISA is a “candidate for the most inscrutable legislation Congress ever passed.”



# ERISA Group Health Plan Structure and Regulation

- **Plan fiduciaries**
- **TPAs and other service providers**
- **Fiduciary duties:**
  - **Prudence**
  - **Loyalty**
  - **Prohibited transactions & plan assets**
- **Preemption of state laws**
- **ACA and state regulations**



# New Challenges to ERISA Health Plan Administration

- **“Out of Network Wars”**
- **New disputes between plan sponsors and TPAs**
- **Potential new wave of class actions mirroring 401(k) fee disputes**
- **Increased antitrust scrutiny**
- **Increasing scrutiny from state AGs and the DOL**

# “Out of Network Wars”

- **Hundreds of lawsuit brought by “out-of-network” providers seeking payment of plan benefits**
- **Often involve hundreds or thousands of individual claims**
- **Target TPAs, which often have no idea that they are financially responsible**
- **Plans can be liable via indemnification**

# “Out of Network Wars”: Common Problems

## Billing Disputes

Disputes over the amount paid for OON services under plan terms

## Copay Waivers

Induces patients to receive services by promising to waive patient responsibility amounts

## “Upcoding”

Characterizes services as more complicated or expensive to receive a higher payment

## Services Never Provided

Never provides the services in question

## “Kickback” Schemes

Provides tests services in return for kickback from test provider (e.g., urinalysis)

## Medically Unnecessary Service

Provides medical services that are not necessary or are excessive

## Claim Filing Issues

Does a poor job filing out claims forms or understanding procedure

# Disputes Between TPAs and Sponsors

- **Health plans are showing greater willingness to sue providers like TPAs**
- ***Kraft Heinz Co. Employee Benefits Administration Board v. Aetna Life Ins. Co.***
  - Filed in September, Kraft Heinz alleges that Aetna mismanaged the Kraft Heinz group health plan in various ways:
    - Overpaying claims;
    - Poor overpayment recovery system;
    - Cross Plan offsetting processes that benefits Aetna; and
    - Duplicative fees and charges.
  - Alleges that Aetna refused to provide data to Kraft Heinz, making it impossible to verify Aetna's compliance with contractual and ERISA duties.

# Disputes between TPAs and Sponsors

- ***Henkel of Am., Inc. v. ReliaStar Life Ins. Co. (D. Conn. 2023)***
  - ESI approved \$50 million in drugs to treat two participants' blood disorders.
  - The plan sponsor sued ESI for ERISA breach of fiduciary duty.
  - ESI allegedly failed to enforce prior auth. rules, didn't reconsider approvals, and failed to perform utilization review.
  - Notably, ESI agreed in its contract "that it shall be the appropriate named fiduciary in accordance with" ERISA's claim regulations.
  - The court denied summary judgment; trial is set for January 2024.

# Disputes between TPAs and Sponsors

- **New theories that drug rebates are “plan assets” and therefore must be handled under ERISA fiduciary standards.**
- **Example: *Knudsen v. MetLife* (D.N.J. 2023)**
  - MetLife’s self-funded plan hired ESI to negotiate rebates.
  - ESI allegedly paid the rebates directly to MetLife, which kept them.
  - The plaintiffs claim MetLife breached its ERISA fiduciary duties “by diverting tens of millions in drug rebates from the Plan to itself.”
  - “\$65 million in drug rebates . . . should have been retained by the Plan and allocated to Plan participants in proportion to their contributions.”

# Disputes between TPAs and Sponsors

- ***Trustees of International Union of Bricklayers and Allied Craftworkers Local 1 Connecticut Health Fund et. al. vs. Elevance et al.***
  - Putative class action lawsuit brought by union group health plan trustees alleging that Elevance (formerly Anthem) mismanaged the group health plan by:
    - Failing to provide requested data
    - Overpaying for claims
    - Overcharging fees and expenses

# Disputes between TPAs and Sponsors: Things to Consider

- **Plan sponsors lose money/could face liability for failing to monitor TPAs**
  - Understand direct and indirect compensation
  - Review TPA compliance with contract
  - Ensure contracts allow for access to plan data as needed
  - Understand network arrangements
  - Evaluate overpayment recovery process
  - Establish fiduciary process
- **TPAs**
  - Understand contracts and ensure no liability for sponsor obligations
  - Understand obligations under new disclosure regulations and work on compliance
  - Parity Act compliance



# Background on 401(k) Fee Cases

- **Starting in 2006, hundreds of cases have been filed challenging ERISA pension plan investments and recordkeeping arrangements.**
- **Over \$6 billion in settlements thus far.**
- **Not slowing down: Over 200 new cases filed since 2020, often focusing on smaller plans with less than \$1 billion in assets.**

# New Rules Provide Ammunition for Potential Class Action Fee Litigation

- **New ERISA rules require “covered service providers” (i.e., “brokers” and “consultants”) to health plans to disclose indirect compensation.**
- **Certain “gag clauses” are now barred.**
- **“Transparency in Coverage” rules require plans to disclose information about “provider rates for covered items and services, out-of-network allowed amounts and billed charges for covered items and services, and negotiated rates and historical net prices for covered prescription drugs.”**
- **Fee disclosures played a major role in the explosion of litigation alleging excessive service provider fees in the retirement plan context.**

# Health Plan Excessive Fee Cases: A New Frontier?

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# Legal Issues in New Health Plan Litigation

- **Does the plaintiff have standing after *Thole v. U.S. Bank*, 140 S. Ct. 1615 (2020)?**
- **ERISA issues:**
  - Was a defendant acting an ERISA fiduciary?
  - Are “plan assets” involved?
  - Any prohibited transactions or fiduciary violations?
  - Did the defendants have a duty to provide information to sponsor/participants?
- **Did the defendant comply with contractual obligations?**

# Increased Antitrust Scrutiny

- **Increased antitrust scrutiny due to current administration and regulatory environment**
- **Healthcare industry remains a top priority**
  - Legislative and antitrust regulator focus on PBM practices, including rebates and pharmacy networks
- **Traditional focus on drug manufacturer pricing practices but expanding theories include PBMs**
- **Generic Drug Litigation/“Pay to Delay”**
- **Other areas of focus and expanded theories**
  - Labor markets
  - Benchmarking / information exchanges
  - Mergers

## July 9, 2021 Biden Executive Order

### “Promoting Competition in the American Economy”

“Americans are paying too much for prescription drugs and healthcare services — far more than the prices paid in other countries. Hospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options. And too often, patent and other laws have been misused to inhibit or delay — for years and even decades — competition from generic drugs and biosimilars, denying Americans access to lower-cost drugs.”

# Increasing Scrutiny from State AG/DOL

- **Rebate/price gouging cases**
  - Example: *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices, and Antitrust Litigation*
  - Example: *In re Insulin Pricing Litigation (D.N.J.)*
- **Opioid litigation**
- **Generic drug price manipulation**
- **ACA/Parity Act enforcement**
- **Group health plans have the ability to take action**

# Other Issues

- **Active DOL monitoring of Group Health Plans**
- **Increasing federal and state regulation, particularly of PBMs**
- **Increasing relevance of Mental Health Parity issues**
- **Data privacy and security**
- **“No surprises Act”**

# Questions?



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