

## Blog Post

# Second Circuit Sends PBM “Clawback” Litigation Plaintiffs Back to the Drawing Board

December 22, 2020

Anthem, Inc., (Anthem) and Express Scripts, Inc., (Express Scripts) had a big win this week, creating another setback for plaintiffs filing ERISA lawsuits against pharmacy benefits managers (PBMs). On December 7, 2020, the Second Circuit Court of Appeals upheld U.S. District Judge Edgardo Ramos’s decision that Anthem and Express Scripts did not violate fiduciary obligations under the Employer Retirement Income Security Act (ERISA) because neither party acted as an ERISA fiduciary with regard to decisions that allegedly led to higher prescription drug prices for patients and plans. (See Doe v. Express Scripts, Inc., 2020 WL 7133860, (C.A.2 (N.Y.), 2020)).

Traditionally, employers and health insurers like Anthem partner with PBMs like Express Scripts to manage health plan prescription medication programs. In turn, PBMs leverage their pharmacy networks to bring down the costs of prescription drugs for patients and insurers. However, in recent years, PBMs have come under increased scrutiny as prescription drug pricing has become a hot button issue. PBM critics assert that PBMs often (1) set drug copayment amounts at prices that exceed the actual cost of the prescription, and (2) subsequently “claw back” the excess amount from the pharmacies while keeping the difference. The Second Circuit’s most recent decision adds to the growing body of case law

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addressing the question of whether PBMs owe a fiduciary duty to ERISA plan participants when entering into arrangements that may result in PBMs receiving clawback payments.

The original lawsuit, filed in 2016, relates to a 10-year PBM agreement signed between Anthem and Express Scripts in December 2009. As part of the agreement, Express Scripts acquired three PBM companies owned by Anthem (the NextRx Companies). Plaintiffs asserted that the multi-billion-dollar deal between Anthem and Express Scripts led to plans and plan participants overpaying for prescription drugs. The plaintiffs argued that by agreeing to the 2009 arrangement, Anthem consented to allow Express Scripts “to charge far more for prescription drugs than the industry standard.” Plaintiffs argued that the defendants were ERISA fiduciaries and that accepting clawback payments amounted to a breach of their fiduciary duties.

In 2018, the district court granted Express Scripts and Anthem’s motions to dismiss for failure to state a claim upon which relief could be granted. In the 2018 dismissal, the court determined that Express Scripts was not acting as a fiduciary when it operated as a service provider following the terms of its PBM agreement. The district court also noted that Anthem made a business decision, not a fiduciary decision, to sell the NextRx Companies.

The Second Circuit agreed with the district court that Anthem was not acting as a fiduciary when it sold the NextRx Companies to Express Scripts. “This Court previously found that the decision to sell a corporate asset is not a fiduciary decision – even if the sale affects an ERISA plan.” In addition, the Second Circuit also determined that the district court correctly held that Express Scripts was not a fiduciary. It held that “when a PBM sets prices for prescription drugs pursuant to the terms of a contract, it is not exercising discretionary authority and therefore not acting as an ERISA fiduciary.”

Plaintiffs' counsel has signaled that they may pursue another appeal. However, this case has weakened theories regarding PBMs breaching fiduciary duties under ERISA. In the meantime, there will also be ramifications for plan sponsors moving forward. Plan sponsors should continue to (1) review the terms of PBM agreements to remain informed about pricing arrangements and (2) emphasize plan participant education regarding prescription drug cost options.

In a separate, but related court ruling from the U.S. Supreme Court, the Justices appear to have provided a way forward for states to assert their regulatory power over PBMs. (See Rutledge v. Pharmaceutical Care Management Association, 2020 WL 7250098 (U.S., 2020)). We will follow up with a separate informational blog on that topic soon.

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